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529 Criminal Procedure I (4th, 5th 6th Amendments)
Fall Semester 2005

UNM School of Law
Final Examination
Three Credits

Professor Rapaport
Thursday, December 7, 2006
9:00-12:30 p.m. (3 1/2 hours)

Examination Format
Essay Answers

1. **Laptop** computer users: Start the Securexam program entering your examination number, course name, professor's name, & date of examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam.

2. **Bluebooks** for writing: write on every-other line and only on the front page of each sheet. On the front of bluebook record the class name, professor's name, date of exam, and your examination number. Make sure to number each bluebook in order. DO NOT WRITE YOUR NAME ON BLUEBOOKS.

A five-minute warning will be given prior to the conclusion of the examination. When time is called, stop immediately. If you are handwriting, lay down your pen & close bluebook immediately. If using a laptop, save & exit the program.

Go to the exam check-in table at the conclusion of the exam & fill out an examination receipt.

Professor's Instructions

This is a 3 ½ hour in-class examination. The questions are designed to be answered in 3 hours. There is an additional one-half hour for reading the question carefully, and for organizing and preparing your answers.

In preparing your answers, you may consult your casebook, any class handouts, your class notes, and any outlines you have prepared yourself or in collaboration with your classmates. You may not consult commercial outlines or stale outlines, or treatises or hornbooks.

If you hand write, please write in ink, legibly, on every other line of the blue book, and on one side of each page only. If you type, please double space.

GOOD LUCK!

QUESTION

On the morning of June 25, 2006 Brian Little and Saul Ruiz, both members of the El Dorado New Mexico Police Department (EDPD) Narcotics Interdiction Unit, were working at the El Dorado City Bus Station. Adjacent to the Bus Station was the Flying J Truck Stop, which also had their full attention that morning.

Ruiz began the morning by conducting routine searches of carry-on luggage on buses entering New Mexico at El Dorado City Bus Station. Bus driver Vern Countryman arriving nonstop from Flagstaff gave Ruiz permission to question his passengers during their 8 A.M. stop. Ruiz boarded the bus, stood at the front, blocking the only exit, and identified himself as an EDPD officer from the Narcotics Interdiction Unit. He said he was going to proceed from the rear of the bus, and making his way forward, ask each passenger about his or her itinerary and to identify his or her carry-on luggage. He later testified that he asked every fourth passenger if he could search their luggage. In due course he asked Joe Hill, a 20 year old with a fifth grade education, to identify his luggage, and Hill identified a blue soft-sided duffel in the overhead rack. He asked Hill, whom he noted was visibly shaking, if he could search his bag, specifically telling Hill that he did not have to permit him to search his bag. Hill responded, "yes." When Ruiz opened the bag, he smelled a strong chemical odor that he identified as that of PCP. There were 40 small brown bottles of chemicals in the bag. He placed Hill under arrest, read him his Miranda warnings, and had him transported to the police station. On the way to the station, Hill told the transporting officers, "Uh, I think I want to see a lawyer, my lawyer said I shouldn't, you know, I think I should." The transport officer told Hill he was going to be booked for narcotics trafficking when they got to the station. At the station, Hill was asked his name and address. The contents of his pockets and of his luggage – other than the already confiscated bottles – were examined and stored away. He was taken to a holding cell.

Hill's sister Ginger arrived in the lobby of the police station three hours later and asked about her brother. The Sergeant told her that her brother had been arrested for possession with intent to sell PCP. Ginger asked to see him. She told the Sergeant that her brother had attention deficit disorder. She was brought to her brother and found Ruiz with him. Ruiz was asking him whether his lawyer had told him to ask for a lawyer, to which her brother replied, "yes." Then Ruiz asked him whether this was the lawyer he had had when he had been previously arrested, to which Hill again replied in the affirmative. Ginger told her brother that he should tell the police exactly what happened, the whole story. Ruiz told Ginger that he was unable to talk to her brother because he had asked for a lawyer. Ruiz recited Miranda warnings to Hill again: "You have a right to remain silent. You have a right to an attorney. If you cannot afford an attorney, one will be provided to you when you go to court." At this point Hill signed a waiver and confessed that he was transporting the drugs to be delivered to someone unknown to him at a Santa Rosa address.

Later that morning, after Hill's arrest, Ruiz and Little saw a man leave the truck stop in a maroon Cadillac Escalade. An hour later, the Escalade returned to the truck stop. A man later identified as James Street approached the vehicle; the vehicle door opened and the driver handed Street a white object the size of a billiard ball. Immediately thereafter, a green pickup with two men inside pulled up next to the Escalade, whereupon the drivers of the two vehicles had a heated argument, after which both vehicles departed in different directions. Street went into the Bus Station, bought a coke, and exited, whereupon Little and Ruiz approached him and Little asked him if they could do a patdown search, to which Street consented. Ruiz, who conducted the patdown, felt a round object the size of a billiard ball in Street's jacket pocket. Ruiz asked, "Can I remove this round thing?" Street replied, "Go ahead." The ball turned out to be five grams of cocaine. Street was placed under arrest, mirandized, and told the officers that he got the cocaine from the driver of the Escalade, whose name was Fabian. He further told them that the passenger in the Green pickup was a white man named Mosley who was also in the drug trade. He told them further that one of the men in the green pickup had shot another dealer earlier that week, but he didn't know whether it was Mosley or the driver. Street said that he had been told that the shooter was known as "Idaho" by two people who had witnessed the shooting.

The EDPD dispatcher broadcast an "attempt to locate" (ATL) with a description supplied by Ruiz and Little of the Escalade and the green pickup, including the make, model, color and license plate number of the Escalade. The ATL described the driver of the Escalade as a "Spanish male adult" with a shaved head and a small ponytail. The ATL linked the vehicles to a possible homicide, although Officer Ruiz later testified that he did not link the alleged homicide to either vehicle.

Hoping the ATL would be productive, Little and Ruiz went into the bus station and surveyed the waiting room. They walked up to a young black man who was eating a fast food barbecue lunch. Little asked if they could talk to him. Ruiz assumed a position on the man's left and Little was on his right. There was no way the man could walk away unless he asked the officers to move and allow him to pass. Defendant gave a small strangled laugh and said, as Little later testified, "yes, or sure, or something along those lines." Little asked him for his identification. The man said he had lost it. Little asked him his name, but the man said, "I don't have to tell you my name." Little explained that he was a Drug Enforcement Agent trying to find smuggled narcotics. He then asked if he could have the man's permission to search his luggage. The man gave an affirmative answer. Ruiz moved so that the man had room to pass him, although he stayed quite close by to protect Little in case of trouble. The man handed Little an athletic bag and told Little that he had a "joint," but Little found no drugs in the bag. The man handed Little the marijuana cigarette, which Little gave to Ruiz to discard. Little found no drugs in the man's suitcase, which the man also handed to him. Little waited to see what would happen next. The man handed him a plate of leftover barbecue, which Little handed back. Then the man handed Little a rolled up paper MacDonald's sack. Little asked him if it contained trash and the man nodded yes. Little looked in the sack and saw what

looked like crack cocaine. Little and Ruiz arrested the man, later identified as James Brown. They placed Brown under arrest and mirandized him.

That night at 11PM, EDPD Officer Harvey spotted an Escalade that matched the ATL's description of the Escalade observed at the truck stop that morning, except that it had no license plate. Harvey called for back up, and when three other police cars converged on the scene, ordered the driver of the Escalade to stop. All cars trained their headlights on the Escalade; all the officers pointed their guns at the driver. Harvey ordered the driver to throw out his keys and exit the vehicle with his hands in the air. Harvey ordered the driver to drop to his knees and keep his hands in the air. Officer Harvey approached and realized that the man, the sole occupant of the Escalade, did not match the description of the man from the Fying J Truck Stop. He was black, not Hispanic. Harvey asked the man to get up and told him, he was sorry for the inconvenience, explaining that his vehicle resembled one belonging to a homicide suspect. He asked for permission to search the vehicle. Wilson Pickett, the driver of the Escalade, said, "yes." He found a small quantity of crack cocaine and arrested the driver and then mirandized him.

Later that week, Ruiz learned from a confidential informant that Mosley was dealing drugs out of a house at 1234 Central Ave. in El Dorado. The informant went to 1234 Central and made a drug buy through the window from Mosley that was observed by Ruiz and Little watching from an unmarked car parked across the street. Ruiz and Little knocked and the door was answered by Mosley's 16 year old daughter, who told them her father had gone upstairs for a nap. They called up to Mosley to come down; receiving no answer, they went upstairs and placed him under arrest, cuffed him, mirandized him, and placed him in the back of their unmarked car.

A neighbor who lived at 1232 Central was passing in the street and asked Ruiz what was up with "Idaho." When the neighbor identified his prisoner as Idaho, Ruiz realized that they might well have arrested the man who had shot and killed another drug dealer earlier that week in front of two witnesses. Later that evening the police showed a photo array including Mosley's photo to both witnesses to the shooting. They both identified Mosley as the shooter. The next day Mosley was again read his Miranda warnings and declined an attorney. The police questioned him about the homicide. He told them that he wanted some time alone to think. They withdraw, but returned 3 hours later and asked if he was ready to talk. They reread him his Miranda warnings. Mosley confessed and signed a written confession.

Three days later the police got a lead to the identity and whereabouts of "Fabian," the driver of the Escalade observed at the truck stop. A man answering the description of Fabian, named Jorge Burciaga, lived in an upscale suburb of El Dorado. He drove a Lexus; no Escalade was registered under his name. But a confidential informant told Ruiz that Burciaga was rumored to be the shadowy drug dealer, Fabian. Ruiz and Little went to his address on Easy St, rang the bell and asked to talk to him and to search his house, to clear up suspicion of trafficking. He smiled demurely, refused, and said, "Sorry fellas, I had a very good upbringing," excused himself, and shut the door. The next day

Ruiz and Little waited until Burciaga drove off in his Lexus and then approached the house from the rear. There was a closed gate and a fenced area through which they could see a swimming pool and a covered patio. A boy of about 10 was playing with a video game at a table on the patio. They called to him to open the gate, and he came and opened the gate. They stepped inside. Buster, Burciaga's dog, then ran out of the house and dropped a bag labeled "Fabian's Famous Outrageously Good DOPE" at their feet. They looked at each other, and asked the boy if they could go inside. The child led them through the backdoor of the house into the kitchen. In the kitchen they encountered Burciaga's girlfriend, Rita Foster. Foster asked them who they were, and when told, ordered them out of the house.

Little asked Foster to step outside and talk to them and she agreed. They asked if she lived there. She said, no, although she sometimes stayed there because she was Jorge Burciaga's girlfriend. They asked her about the child. "Mine," she said, "not Jorge's." In response to persistent questioning she said she had been staying there for three weeks and that her son went to a school in Jorge's district because it was better than the school in her district. She admitted that she had full access to every part of the house, but when asked to allow them to search, she said that she didn't think she had that authority and would not agree unless Jorge gave his permission. The officers repeatedly refused to allow her to call Jorge. She repeatedly declined to give consent to search. Little told her that she would be charged with whatever contraband they found in the house when they searched, and that they would take her downtown and place her child with Child Protective Services. At this point, Little read her the consent form in its entirety and asked again for her consent. She agreed and signed the form. Ruiz began searching the kitchen while Foster and Little went to the master bedroom. There were two matching nightstands on either side of the bed. Little asked Foster which side she slept on. She indicated the right. He asked her if she had access to the nightstand on the left. She said, "yes." Little opened the nightstand and found a ledger recording sales transactions and several dozen bags of Fabian's Famous brand drugs. He arrested Foster, subsequently making arrangements to place her son in protective care. At that point, Jorge drove up in his Lexus and Ruiz arrested him in the street as he got out of his car. Both were read their Miranda warnings and transported downtown.

Jorge Burciaga was eventually convicted for trafficking, although he never stopped protesting his innocence. In prison, his cellmate was Joe Hill. At his sister's instigation, Joe kept his ears open around Jorge, hoping he would reveal something the authorities would want to know about that he could trade for reduced time in prison. Jorge kept his guard up but because he regarded Joe as harmless, he eventually slipped and spoke to Joe about persons known to both in Santa Rosa, implicated himself in trafficking in Santa Rosa. Jorge was subsequently charged with additional trafficking offenses. After that, he stopped talking to fellow inmates altogether.

But Jorge did look forward to his conversations with a corrections officer named Toby, who, like him, had been a high school athlete and understood the finer points of basketball and football. The two men became friends, the relationship as genuine on Toby's part as on Jorge's. He made admissions to Toby implicating himself for the

crimes for which he had been imprisoned. Specifically, he admitted, while bemoaning the foolishness of women, that the drugs found in the nightstand when Rita Foster admitted the police to his bedroom were there because he had to make a large delivery to subsidiary dealers the following day. Low and behold, three years later, Jorge's smart and well paid lawyers – recent graduates of UNM – won him a new trial on these very charges. But the DA, another heads up UNM grad, insisted on a thorough investigation, which uncovered Jorge's conversations with Toby. Reluctantly, Toby agreed to testify against Jorge.

Discuss fully all issues arising under the Fourth, Fifth and Six Amendments to the federal Constitution in the above account.