

CRIMINAL PROCEDURE

Spring 2015

Professor Ben Trachtenberg

Comments on the Final Examination

Having read all the answers to the final examination, I have written a few comments about them. The text below is not intended to serve as a “model answer.” I spent more than six hours preparing this document, and I consulted whatever sources I pleased. Accordingly, there is no way that any exam taker could have addressed all of the issues that I discuss below.¹ Instead, this document exists to list some of the main points that students could have raised in response to the questions calling for narrative answers, and it also identifies a few common mistakes. The purpose is to enhance the exam’s utility as a teaching tool.

While not everything I discuss below applies to each student’s answer, I have focused on issues of broad relevance.

Question 1 [Mother’s Day]

The question has three parts, which I address in turn:

- A. **No-Knock Entry.** The officer was mistaken. Absent exigent circumstances, knocking and announcing is required when an officer executes a warrant, even to search for illegal drugs. *Wilson v. Arkansas* (126); *Richards v. Wisconsin* (129).² Accordingly, absent additional facts not provided (*e.g.*, the sounds of someone destroying evidence), the officer likely violated Mother’s Fourth Amendment rights when she “smashed in Mother’s front door with a single kick.”

Alas for Mother, the exclusionary rule is not available as a remedy for knock-and-announce rule violations. *Hudson v. Michigan* (132, 374). She cannot keep the piano out of evidence. Mother is limited to suing for monetary damages. Because the rule violated by the officer was clear (announced by the Supreme Court during the 1990s), Mother has good odds of winning a civil suit; she should be compensated for her broken door. As for Deliveryman, he has no standing to object to the smashing of Mother’s door. (For more on his standing problems, see the next subpart.)

- B. **Invalid Warrant.** Mother’s potential remedies depend on precisely why the search warrant was deemed invalid. Here are the two main scenarios worth reviewing:

¹ That said, these comments are by no means exhaustive; my failure to address an issue in this document does not necessarily mean that a student was erroneous in discussing it on the exam. These comments are too brief to acknowledge every good point I read while grading.

² Page numbers refer to Chemerinsky & Levenson (2d ed. 2013). Citations were generally not needed even in excellent answers. I include them as shorthand.

Good faith. If officers made a good faith effort to obtain a legitimate warrant (*i.e.*, they presented evidence to a magistrate, and they believed the evidence was sufficient to support a finding of probable cause), and the magistrate issued a warrant that appeared legitimate on its face, then the officers will likely be viewed as having reasonably relied upon the (invalid) warrant, despite a subsequent finding that the evidence presented to the magistrate in fact did not support a probable cause finding. *Leon* (438). This is an example of the “good faith exception” to the exclusionary rule. In this scenario, Mother could in theory sue for damages, but it is probable that she would recover nothing. The officer’s reasonable reliance on a bad warrant is not the sort of mistake that will support a successful suit.

No good faith. If instead the officer acted in a less reasonable manner (*e.g.*, intentionally or recklessly gave false information to the magistrate), *see Franks v. Delaware* (457), then the good faith exception would not apply. In that case, Mother might be able to exclude the piano evidence as the fruit of an unlawful seizure, which would probably prevent her from being prosecuted successfully for receipt of stolen property.³

Even if Mother successfully excludes the piano evidence, Deliveryman likely has no standing to object to the unlawful entry of Mother’s house by police. (Note that if after the officer entered the house, the officer did something to Deliveryman that was unlawful—such as an unjustified frisk— Deliveryman could object to that action and might well have a remedy. The question on the exam concerned what remedy (if any) Deliveryman has concerning the invalid warrant.⁴) The Supreme Court has held that neither mere commercial visitors nor briefly-present social guests can object to the introduction of evidence obtained while they happened to be at a residence, at least not on the basis of the unreasonable search of the residence. *Minnesota v. Carter* (409). Deliveryman was dropping off flowers and stayed to drink some water. He had the bad luck to still be around when police arrived. He did not have the lengthy presence that the Court has deemed necessary to obtain standing. *Compare Carter with Minnesota v. Olson*, which involved an overnight guest and was distinguished by the *Carter* Court.

- C. ***The Shotgun.*** This question asks students to “assume that Deliveryman was validly arrested.” Accordingly, there was no need to analyze whether the officer properly frisked Deliveryman or whether she properly seized the gun from his pocket. The issue presented concerns the *Miranda* rule. When asked about “any other illegal guns,” Deliveryman was in “custody” for purposes of *Miranda* because he was cuffed and in a squad car. *New York v. Quarles* (588). And the officer asked him directly about criminal

³ Other bad behavior that would likely activate the exclusionary rule includes reliance on an obviously defective warrant. *See Groh v. Ramirez* (116, 445 n.10) (civil case concerning warrant that failed to describe the “persons or things to be seized” as required by the Fourth Amendment).

⁴ It is possible that the frisk of Deliveryman was unlawful. *See Ybarra v. Illinois* (122). Absent the reasonable suspicion required under *Terry v. Ohio*, a person present when a search warrant is executed is not subject to a search simply because he is there. He is, however, subject to being detained during the search. *Michigan v. Summers* (122).

activity, which is “interrogation.” See generally *Rhode Island v. Innis* (514). Absent some exception to the usual *Miranda* rule, the prosecution cannot use Deliveryman’s words against him during its case in chief.⁵ If, however, Deliveryman takes the stand and testifies in a manner inconsistent with his statement to the officer (e.g., he says he had no knowledge of any shotgun in his vehicle and that the weapon did not belong to him), his un-Mirandized statement may be offered against him as impeachment. *Harris v. New York* (585). As for the gun itself, it’s coming in. Physical evidence obtained as a result of *Miranda* violations is not excluded. *United States v. Patane* (546).⁶

Question 2 [The Police Inquiries]

What follows are some potential replies to the officers. They are brief and get to the point pretty quickly.

- A. The answer depends on whether the suspect’s Sixth Amendment rights have “attached.” If the suspect has been formally charged (as in indicted, or brought in front of a judge), then you may send in an undercover informant, but that person must not “intentionally elicit” information from the suspect. The person should act like a listening post (or a hidden tape recorder), not like an interviewer. If the suspect happens to say something incriminating, you can use it. But if your agent cajoles the information from the suspect, it’s no good. *Henry* (623); *Kublmann v. Wilson* (627).

If, however, the suspect has simply been arrested but has not had any formal proceedings start at the court, then you can send in an undercover informant, and that person can ask questions. No need to act like a listening post. *Perkins* (521).

Of course, in no scenario can your informant coerce the information from the suspect. *Fulminante* (464).

- B. When seeking the grandmother’s consent, no warnings are needed at all. Unlike with interrogations, there is no *Miranda*-style warning requirement for waivers of Fourth Amendment search and seizure rights. *Schneckloth* (201). As long as you don’t obtain the consent by coercion, it’s legitimate.

As for the suspect, the “hot pursuit” exception to the warrant requirement applies only if you have the sort of probable cause that would ordinarily allow an arrest, and you say

⁵ To get the statement in during the case in chief, the prosecution would need to convince the court that the “emergency exception” to *Miranda* applies. See *Quarles*. This is not especially plausible because the facts do not suggest any particular reason for the officer to fear that a gun was at large in a dangerous place (even less reason than was presented by the facts of *Quarles* itself).

⁶ The statement provides probable cause to search the car pursuant to the automobile exception. Note that the “search incident to lawful arrest” exception does not apply here; this exception cannot justify the search of the vehicle’s trunk.

you don't have that. You cannot enter the grandmother's house simply because the suspect is running inside.

- C. No. You cannot question her now, and you cannot ask her if she wants to change her mind. Because she has invoked her right to counsel ("I want my lawyer!" is unambiguous), you cannot question without her lawyer being there unless she initiates the communication. *Edwards v. Arizona* (565). This stays true for as long as she remains in custody, even if her lawyer has visited her. *Minnick* (568).⁷
- D. For purposes of your interrogation, it doesn't much matter how your fellow officer got the information you want to use. You may use it when questioning your suspect. Information obtained from a totally different person will not be considered "tainted" by the possible *Miranda* violation. (Of course, the stuff he got may not be directly usable against Suspect A. But that's a problem for later.)

As for embellishment, deception of this sort is allowed. *Leyra v. Dennis* (471).⁸ Feel free to lie to Suspect B about a bogus confession by her confederate.

- E. You are probably out of luck, but you may be able to clean up the mess somewhat. The Supreme Court has said that cops may not intentionally get an un-Mirandized confession and then promptly Mirandize the suspect, get a new confession, and use the second confession against the suspect. *Missouri v. Seibert* (540). But in at least one case, the Court has allowed the admission of the "second" (Mirandized) confession against a suspect who initially confessed without being Mirandized. *Oregon v. Elstad* (534). I hate to tell you this, but the Supreme Court's opinions on this issue have not been especially clear. Here is what I suggest: Wait a couple of hours. Then send in a different officer (ideally one with no knowledge of the information you already got), and have that colleague Mirandize the suspect. The colleague should not mention the previous conversation (the one with you) at all. If your colleague gets the suspect to make incriminating statements, maybe the district attorney can use them. The key is that the second interrogation should be truly separate from the one you already conducted. The more it looks like it's all one big interrogation process, the less likely a court is to allow the second conversation to escape the *Miranda* problems of the first conversation.

Also, even if this plan doesn't work, the DA can use the suspect's words (whether said to you or to your colleague) against the suspect to "impeach" his testimony if he takes the

⁷ If she is released from custody (e.g., on bail), then *Miranda* will not apply during subsequent "non-custodial" interrogation. But if (as is likely) she was released after seeing a judge, her Sixth Amendment rights will have attached, and you will need a waiver of those rights before you may interrogate her. If after being released she is rearrested, then the rule of *Maryland v. Shatzer* (573) (concerning "breaks" in custody) will come into play. Note as well that the existence of Sixth Amendment rights, if those have attached, does not remove any protections provided by the *Miranda* doctrine.

⁸ See also "The Wire," Season 5, Episode 1 ("More With Less") (Bunk Moreland: "The bigger the lie, the more they believe.").

stand in his own defense. And if his statements lead you to physical evidence (like the murder weapon), you can use that too. So your information may be useful after all.

Question 3 [Those Who Flee When No One Pursues]

[Note: The “saying” quoted in this exam question appears in the Book of Proverbs, chapter 28, verse 1. The translation in the King James Version has been quoted repeatedly by the Supreme Court.⁹]

This question was worth only one-sixth of the narrative answer portion of the exam grade, and students sensibly devoted fairly little time (or, at least, fairly few words) to answering it. Because the question explicitly encouraged students to “offer arguments on both sides,” a good answer began by explaining why (1) who someone who flees from police might reasonably be deemed suspicious, or worse, by an unbiased observer as well as (2) why that suspicion might be unwarranted in at least some situations.

Arguments in support of the proverb’s accuracy relied on “proverbial common sense,” *see Hodari D.*, majority opinion, at n. 1, stating in essence that while perhaps not all who run are guilty, unprovoked flight is surely probative of a guilty conscience. After all, the guilty have more to fear from police than do the innocent. Indeed, evidence of flight is routinely admitted at trials to show consciousness of guilt, and if the evidence is good enough for a jury to consider, then law enforcement officers (and courts that review the behavior of such officers) would be foolish to ignore it.

Arguments against the proverb’s accuracy made points similar to those raised by Justice Stevens in his *Hodari D.* dissent.¹⁰ In short, some people run from police because they fear

⁹ I displayed the Court’s quotation of this verse during Class 14, as part of our discussion of *California v. Hodari D.* (306). Footnote 1 of the majority opinion, not reproduced in our casebook, reads:

California conceded below that Officer Pertoso did not have the “reasonable suspicion” required to justify stopping Hodari, *see Terry v. Ohio*, 392 U.S. 1 (1968). That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. *See Proverbs 28:1* (“The wicked flee when no man pursueth”). We do not decide that point here, but rely entirely upon the State’s concession.

¹⁰ Footnote 4 of his dissent, which was also displayed in class, reads:

The Court’s gratuitous quotation from Proverbs 28:1 ... mistakenly assumes that innocent residents have no reason to fear the sudden approach of strangers. We have previously considered, and rejected, this ivory-towered analysis of the real world for it fails to describe the experience of many residents, particularly if they are members of a minority. *See generally Johnson, Race and the Decision To Detain a Suspect*, 93 YALE L.J. 214 (1983). It has long been “a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that ‘the wicked flee when no man pursueth, but the righteous are as bold as a lion.’” *Alberty v. United States*, 162 U.S. 499, 511 (1896).

police misbehavior (in particular, in at least some communities, members of certain minority groups and residents of intensely policed areas may fear mistreatment), some happen to run when police arrive for unrelated reasons (*e.g.*, to catch a bus), and others simply wish to avoid whatever hassles might ensue should they interact with police (*e.g.*, involvement in a case as a witness, which could prove dangerous).

Good answers then turned to how the saying (and its accuracy or inaccuracy) is “relevant to the criminal procedure law we have studied together.” The most obvious example is the “reasonable suspicion” standard set forth in *Terry v. Ohio*. In *Illinois v. Wardlow* (348), the Court held that a suspect’s “unprovoked flight upon noticing the police” can contribute to a finding of reasonable suspicion that justifies a *Terry* stop. Indeed, such flight, if it occurs in a “high crime area,” likely is sufficient in itself to justify such a stop. *Id.* This holding makes more sense if the quoted proverb is accurate and less sense if the proverb is inaccurate. More generally, the cases concerning reasonable suspicion often turn on whether an officer may sensibly ascribe sinister motives to certain ambiguous conduct by suspects. See *Sokolow* (353); *Navarette v. California* (C&L 2014 Supplement, p. 56); *Arvizu* (338).

Other areas of criminal procedure law could have been addressed instead of (or in addition to, if time and space allowed¹¹) the relation of flight to *Terry* stops, assuming a plausible relationship between doctrine and the “saying” could be articulated.

General Remarks: Several students made the mistake of answering questions they wished had been asked instead of those actually printed on the exam. If a question asks, for example, what remedy two persons have for a knock-and-announce rule violation, it is important to answer that precise inquiry. Information about the doctrine concerning the frisking of persons present during the execution of search warrants, while perhaps interesting, is not really responsive to the question.

That said, it was a mistake to needlessly foreclose one’s opportunity to demonstrate knowledge. For example, if you are told a warrant has been deemed invalid, it makes sense to consider what would happen if the officer executing the warrant acted in good faith, as well as the consequences of bad faith. Simply assuming good faith removes the chance to discuss how the exclusionary rule might apply (*e.g.*, to discuss who has standing to raise it).

Final Comment: This document contains 2,995 words, including footnotes.

¹¹ A decent discussion of the issue presented by *Wardlow* was sufficient to earn full credit for this part of the question.