

KERN COUNTY COLLEGE OF LAW
FINAL EXAMINATION
SPRING 2020

CRIMINAL PROCEDURE

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Instructions

1. This examination consists of three sections of equal value. There is a four our time limit to complete the exam.
2. There are three essay questions. Make sure that you read each essay question carefully before answering. Attempt to organize your answer before you start writing.

Question 1

On January 5, 2020, Bakersfield police lawfully arrested Karen outside her apartment for burglary of a local doctor's house. They had probable cause for the arrest but no arrest warrant. Officer Beretta advised Karen of her Miranda rights. Karen lawfully waived but during the interrogation, Karen stated, "It would be better if I had an attorney." Beretta responded, "It would be better for your boyfriend Ken if you talk to me." Karen knew that Ken was a suspect in a large-scale illegal marijuana grow near Delano. Beretta then said, "Ken's marijuana beef could go away." Karen then confessed to the burglary and told Beretta he could find a diamond ring she stole during the burglary at a pawn shop she identified.

Two days later, Karen was arraigned on the Bakersfield burglary. A public defender was appointed to represent her. She entered a not guilty plea and was released from custody on her own recognizance.

Detective Jones from the Delano Police Department was investigating a burglary in Delano in which Karen was a suspect. On January 10, 2020, Jones contacted Karen at her apartment and asked to speak with her. Karen invited the detective in, and they sat down in her living room. Jones told Karen he knew she had committed a burglary in Delano. Karen admitted she had committed a Delano burglary. Jones told Karen he knew she had more stolen jewelry from the doctor's house in Bakersfield. Karen admitted she did and handed Jones a diamond pendant.

Beretta recovered the diamond ring from the pawn shop. The victim in the Bakersfield burglary identified the diamond ring and pendant as her stolen property.

Subsequently, the district attorney charged Karen with the Delano burglary. The information that was filed after the preliminary hearings, charged Karen with both burglaries. Before Karen's trial, her attorney moved to suppress the following items of evidence:

1. Karen's confession to Beretta.
2. The diamond ring.
3. Karen's confession to Jones that she had more stolen jewelry from the Bakersfield burglary.
4. The diamond pendant.

What arguments should defense counsel make? How should the prosecutor respond? How should the court rule? Please discuss both the rules of law and the facts in your analysis of the issues.

Question 2

Detective Jones, a knowledgeable and experienced narcotics law enforcement officer with the Bakersfield Police Department, received information from a proven and reliable informant that Addict, Sherry Smith, was both using and selling heroin from her apartment at a specific address. Detective Jones had arrested Addict Smith for possession of heroin on two previous occasions. Both had led to convictions. Addict Smith was not currently on probation or parole. Detective Jones conducted surveillance of Addict Smith's apartment from the building's lobby/ mailbox area.

When Addict Smith stepped into the lobby area, detective Jones briefly observed Smith's physical appearance and immediately concluded that she was under the influence of a narcotic. Detective Jones arrested Addict Smith and searched her pockets and purse, finding a key to her apartment in her pocket. Detective entered the apartment wherein he found and seized a large quantity of heroin, some packaged for sale. Detective Jones had neither a search nor arrest warrant.

At the county jail, over Addict Smith's violent objections, a nurse removed a sample of blood from Addict Smith's finger for the purposes of testing for narcotics. Addict Smith was charged with "possession of heroin for sale" and with being "addicted to the use of a narcotic" in violation of the State's Criminal Code.

State's criminal procedure provides for a preliminary hearing for the sole purpose of testing the sufficiency of the prosecutor's evidence for holding an accused to answer criminal charges. Addict Smith, claiming that she was indigent, requested the appointment of counsel to represent her. The motion was denied. Addict Smith appeared unrepresented at the preliminary hearing, where she renewed her motion for counsel. The motion was denied with the court stating she had had enough time to hire an attorney. She was held to answer on all charges by the magistrate.

At the arraignment on the Information, Addict again requested appointment of an attorney as she claimed indigency. Counsel was appointed. No motions were filed on behalf of Addict Smith. The narcotics and the narcotic content of the blood sample were introduced as evidence at the trial. Addict Smith was convicted on both counts. On appeal to the State Appellate Court, appointed appellate counsel stated in her brief only that she had made a thorough examination of the record and, in her considered opinion, there were no meritorious contentions that could be raised on appeal.

Assume that Addict Smith has preserved all objections and claims she might have made at trial or on appeal, and that all such objections and claims are now before the State's Supreme Court for decision. What arguments would be made by Addict Smith's new counsel and what would be the likely result of each? Discuss.

Question 3

With lawful probable cause, two Kern County Sheriff deputies arrested Tom for bank robbery in front of his house. Hearing a disturbance, Tom's wife Sara came outside. Deputy Ross asked Tom if he would consent to a search of his house. Tom refused consent to search and yelled at his wife to keep the cops out of the house. Deputy Ross took Tom to the Kern County jail and Mirandized him before conducting his interrogation. Tom demanded an attorney and Deputy Ross terminated the interrogation. The deputies returned to Tom and Sara's house and asked for Sara's consent to search the house. Sara asked what would happen if she refused. The deputies truthfully replied they would hold her outside while they obtained a search warrant, for which they had probable cause. Sara then consented, signed the consent form, and allowed the deputies into the house. During the search, the deputies located a mask and a gun that matched the description given by the witnesses to the robbery.

The DA charged Tom with armed bank robbery. Tom was arraigned two days later in Superior Court and a Public Defender was appointed to represent him. Later that day Tom bailed out of jail and returned home.

A week after Tom's release from custody on the bank robbery charges, Officer Phillips of the Taft Police Department arrested Tom on a valid arrest warrant for possession of child pornography. At the police station, Office Phillips Mirandized Tom, who said he understood his rights. Tom voluntarily waived his rights and admitted to photographing neighborhood children.

The next day, Tom was placed in a fair, non-suggestive line-up with 5 other jail inmates. Tom's Public Defender was not notified. Witnesses to the bank robbery identified Tom as the robber. Each witness positively recognized Tom as the man who robbed the bank. Their description of Tom at the time of the robbery matched Tom.

The DA charged Tom with possession and production of child pornography. He was arraigned and the public defender's office was again appointed to represent him.

Tom's attorney moved to suppress the following items of evidence: 1. The mask and gun. 2. Tom's admission that he photographed neighborhood children. 3. The lineup with the robbery witnesses. 4. Any testimony of these witnesses at trial identifying Tom as the bank robber.

For each item of evidence, what issue(s) should defense counsel raise? What law/rule(s) apply to each issue? For each issue, what argument(s) should defense counsel and the prosecutor make applying the facts to the law (analysis)? How should the court rule as to each issue?

1)

State v Karen

The confession and ring may or may not get excluded, However, the ring will likely be admitted into evidence. The confession to Jones had more stolen jewelry and the diamond pendant will not get suppressed.

Arrest

Occurs when police take a person into custody against her will for criminal prosecution or interrogation.

Here, Karen was lawfully arrested outside her apt. In other words, it was a restraint on freedom of movement.

Thus, the arrest was lawful

Probable Cause (PC)

Every arrest must be based on PC. PC is present when the officer has reasonable trustworthy facts that the suspect has committed a crime or is committing a crime.

Here, the police had PC, but no arrest warrant. Police need not obtain a warrant before arresting a person in a public place, even if they have time to get a warrant. *U.S. v Watson*.

Thus, the arrest was valid.

Miranda

A person shall not be compelled to give self-incriminating testimony.

Here, Karen was lawfully Mirandized, but she waived the right.

Thus, because Karen was Mirandized and she waived the right, any statement made will be admissible.

Custody

Freedom of movement test, requires the court to determine whether a reasonable person under the circumstances would feel that he was free to terminate the interrogation.

Here, Karen was in custody because she did not feel she free to decline or terminate the encounter *Florida v Bostick*.

Thus, Karen was in custody.

Interrogation

Any words or actions on part of the police that they know is reasonably likely to elicit an incriminating response from the suspect.

Here, interrogation was about to take place, but Karen waived her rights.

Waive Rights

To be valid, the government must show by a preponderance of the evidence that the waiver was knowing and voluntary. The courts will look to the totality of the circumstances in determining whether this standard is met *Gates*.

Here, it appears Karen waived her right knowing and voluntary, but Karen could argue that she did not know she could remain silent *Berghuis*.

Thus, the waiver appears valid.

5A or 6A Right to Counsel Must be Expressed Invoked

A D has a right to counsel under the 5th and 6th. The 5A right applies to all custodial interrogation. Whereas, the 6A right applies to all critical stages of a prosecution after formal proceedings have begun.

Here, Karen asked for counsel, but it was not stated unambiguously *Davis v U.S*. Because Karen was not direct, Beretta was free to continue to question Karen.

Thus, Beretta did not need to stop questioning Karen, unless she actually requested an attorney.

Involuntary Confession

14thA requires that a confession be voluntary. Voluntariness is assessed by looking at the totality of the circumstances *Spano v N.Y*.

Here, Beretta claimed that her boyfriend's marijuana beef would go away, if she would confess to the burglary. However, a confession is involuntary if obtained under coercion. Because Beretta claimed he could make her boyfriend's drug beef go away, this will be deemed involuntary because he is using his power to elicit an incriminating response.

Thus, because Beretta attempted Karen with immunity to gain a confession using an untrue promise to benefit himself, any confession should be excluded.

Independent Source

Evidence is admissible if the prosecution can show that it was obtained from a source independent of the original illegality. *Murray v U.S.*

Here, while it is true Beretta may have stepped over the line to elicit an incriminating confession, the independent source rule would kick in because the ring was recovered at a pawn shop that Karen said it would be.

Thus, the ring will likely be admitted.

Attenuation

Applies when an officer unlawfully obtains a confession or property without a warrant, and discovers an intervening act or circumstance.

Here, the ring will likely be admitted because at worst Beretta acted negligently.

Thus, the ring should be admitted.

6A right to Counsel Plea

The 6A requires effective counsel at all critical stages of a prosecution. *Strickland*.

Here, a public defender was appointed to represent Karen, she entered a not guilty plea and was released from custody.

Thus, Karen had the necessary people to help navigate her through this process.

Consent

Police may seize unspecified property while executing a search warrant. For consent to be valid, it must be voluntary.

Here, when detective Jones contacted Karen at her apt and asked to speak with her, Karen invited Jones in. Because Karen let her in the home, Jones had a right to be present and ask questions in their conversation.

Thus, Karen's consent to let Jones did not violate her rights.

Confession not Mirandized

For a confession to be admissible, the Due Process Clause of the 14A requires that they be voluntary.

Here, Jones told Karen he knew she had committed a burglary in Delano and Karen admitted she had committed a Delano burglary. However, the defense will argue she was confessing to the first burglary charge that she plead not guilty to just two days earlier. The prosecution will argue that she was confessing to both burglaries and absent Miranda warning, she just blurted it out. It is true that Karen was not Mirandized, but under *Innis*, the conversation was not an interrogation and Karens rights under the 5A were not violated.

Thus, her statement about the ring and the pendant will be admissible.

5A Right To Counsel

A D has a right to counsel under the 5th and 6th. The 5A right applies to all custodial interrogation. Whereas, the 6A right applies to all critical stages of a prosecution after formal proceedings have begun.

Here, when Karen ambiguously asked for counsel in her first encounter, she waived her right by coercion from Beretta. When Karen spoke to Beretta at her house about the other crime, this did not violate a break in miranda custody lasting longer than 2 weeks between the first and second attempts at interrogation, *Shatzer*. One is 5A, while the other has to do with the 6A.

Thus, Karen's right to counsel was not violated.

6A Specific Offense

If a D makes a 6A request for counsel for one charge, he must make another request for counsel if he is charged with a separate, unrelated crime *Texas v Cobb*.

Here, Karen never asked for counsel when Beretta for counsel when he came over to speak with her at her house. Because these are two different charges, Karen did not have to be Mirandized and Beretta could question her.

Thus, Beretta did not violate Karen's rights when he spoke to her about a separate crime.

Double Jeopardy

5A attaches to be free of double Jeopardy for the same offense has been incorporated into the 14A. Once Jeopardy attaches, D may not be tried for the same offense.

Here, the defense may argue that Karen believed she was confessing to her first burglary. The prosecution will argue that she confessed to the second burglary because it produced two different items. However, when the victim identified the diamond ring and pendant, they both belonged to the same person.

Thus, Karen may have been wrongfully charged for the same burglary.

Conclusion:

Karen's confession to Beretta was an involuntary coerced confession because Beretta claimed he could make her boyfriend's drug beef go away, this will be deemed involuntary because he is using his power to elicit an incriminating response. Therefore, her confession about the diamond ring should be excluded. However, because of the independent source rule, evidence is admissible if the prosecution can show that it was obtained from a source independent of the original illegality. *Murray v U.S.* Because the ring was recovered at a pawn shop that Karen said it would be and it was identified as the victims stolen property, the ring will likely be admitted. Further, because Karen consented and let Jones her in the home, Jones had a right to be present and ask questions. When Karen admitted to the Delano burglary, she blurted out she had more jewelry, this statement will be admissible because she did not ask for counsel, or asked for the conversation to cease. Instead she volunteered the information. It follows, then that the diamond pendant will be admissible as well because she volunteered the information.

END OF EXAM

2)

Smith v. United States

4th Amendment

1. Lawful Arrest & Reasonable Expectation of Privacy

The fourth amendment protects people against unreasonable arrests. Generally, an arrest warrant is not required for an arrest, unless the person is arrested in her home. An arrest warrant must be issued based on probable cause, which is the reasonable belief that the person violated the law.

The fourth Amendment also protects people and places from unreasonable searches and seizures. A search by the government of a place where a person has a reasonable expectation of privacy is what triggers a 4th amendment violation. According to *Katz*, a person's reasonable expectation of privacy is based on the totality of the circumstances and must satisfy a two pronged test. First there is the subjective expectation the person has by taking some action to keep the area private from public observations. Second, the area searched must be objectively reasonable in that society would respect it as private. A person does not have a reasonable expectation of privacy in public areas or objects held out to the public.

Under the fourth amendment, the police may search an individual incident to a lawful arrest, but only the area within the immediate control of the arrestee. If an arrest warrant is not issued and the police make an arrest, the court must look at the totality of the circumstances, according to *Illinois v. Gates*.

Starting with Smith's arrest, the factors we must look at are (1) the reliability of the informant, (2) officer Jones' experience and knowledge, and (3) Addict Smith's prior offenses.

The defense will likely argue that Jones did not have an arrest warrant and that Smith was arrested in the lobby area of her apartment.

The prosecution will likely argue that the lobby is an open area and not Smith's actual home. They will also argue that the factors mentioned above (reliable informant, experienced officer, and suspect's priors) would lead to probable cause allowing officer Jones to make the arrest.

It is likely that Smith was arrested lawfully based on the totality of the circumstances.

2. Warrant Requirement & Exceptions

To be reasonable under the fourth Amendment, a search must be subject to a warrant based on probable cause, issued by a neutral magistrate, that describes the place to be searched with particularity.

The exceptions to the warrant requirement are (1) search incident to a lawful arrest (2) automobile exception (3) plain view doctrine (4) consent (5) stop & frisk (6) hot pursuit, exigent circumstances, evanescent evidence, and other emergencies.

Here, Jones did not have a search warrant and conducted a search of Smith's pockets and purse and of her apartment. However, the arrest of Smith falls under the exception of search incident to a lawful arrest. Jones was permitted to searching the area under the immediate control of Smith. However, the area within the Smith's immediate control does not extend to a place where Smith had a reasonable expectation of privacy. Under *Chimel*, the police may not extend the search to the entire home without a search warrant.

The defense will likely argue that it was both subjective and objective that Smith had a reasonable expectation of privacy in her apartment. The apartment was locked and they were not already in the apartment when the arrest occurred, therefore none of the exceptions to the warrant requirement apply.

The prosecution will likely argue that the key was in her possession and Jones had probable cause to believe there were drugs in her apartment based on her being under the influence.

Had Jones found the drugs on Smith's person, there would be an exception to the warrant requirement. Since there is no warrant requirement to the search of Smith's apartment and the search was unconstitutional under the Fourth Amendment, the court should grant the motion to suppress the evidence found in Smith's apartment.

For the blood sample, according to *Schmerber v. California*, there is an exigent circumstances exception that allows officers to withdraw a suspect's blood for testing without a warrant if the officers reasonably believe that delaying the test to obtain a warrant could lead to the destruction of evidence.

The prosecution will likely argue that even though the police lacked a warrant, an exigent circumstance existed in order to preserve the evidence in Smith's blood.

3. Exclusionary Rule

The exclusionary rule prohibits the introduction of evidence obtained in violation of a person's Fourth, Fifth, or Sixth Amendment rights. The "fruit of the poisonous tree" doctrine states that all illegally obtained evidence and all evidence obtained from exploitation from that evidence must be excluded.

Here, the blood sample was taken after the lawful arrest.

The defense will argue that it should fall under the fruit of the poisonous tree doctrine because it was obtained in conjunction with the illegal search of the narcotics. They will argue that had the police not found the evidence in her apartment, the police's suspicion that Smith was under the influence would not have been corroborated.

The prosecution will likely argue that the blood sample was not taken in relation to the search but under an experienced and knowledgeable police officer who had received information from a reliable informant that she was using.

Under the totality of the circumstances, the blood sample will likely be admissible and not be considered fruit of the poisonous tree, but an exigent circumstance to preserve evidence.

6th Amendment

1. Right to Counsel

The 6th Amendment provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to effective counsel. The 6th Amendment right to counsel includes having counsel present during all critical stages of prosecution - including, interrogations, physical lineups, preliminary hearings, and sentencing. Under *Gideon v. Wainwright*, The Fourteenth Amendment incorporates the 6th

Amendment right to counsel to the states. Defendants have the constitutional right to a fair trial, and this requires having an advocate present who knows the intricacies of the legal system.

In this case, Smith requested the appointment of counsel at her preliminary hearing twice and was denied. She was held to answer all questions by the magistrate.

Again, Smith requested appointment of counsel during the arraignment, another critical stage. Counsel was then appointed to Smith.

The defense will likely argue that this was a violation of the 6th Amendment as the preliminary hearing is a critical stage in the prosecution and she expressly requested counsel and claimed she was indigent.

The prosecution will likely argue that she was appointed counsel during the arraignment.

The defense will likely prevail in this argument.

2. Right to effective counsel

Under the 6th Amendment, a suspect has a right to effective assistance of counsel. The defendant must prove that counsel's performance was deficient in that counsel did not act as a reasonably competent attorney would have acted, and that this deficiency was prejudicial such that, but for the deficiency, the result would have been different.

Here, the appointed counsel did not file any motions on behalf of Smith and the narcotics and narcotic content of the blood sample were introduced as evidence at trial. Smith was convicted on both accounts. The appointed counsel stated that in her opinion there were no meritorious contentions that could be raised on appeal.

Smith's new defense counsel should argue that her counsel was ineffective and if she had filed motions to suppress the evidence it is likely that the result would have been different. The narcotics found in Smith's apartment were in violation of the Fourth Amendment, as concluded earlier. Smith's right to counsel under the 6th Amendment was also violated.

The prosecution will likely argue that under the totality of the circumstances, Smith was rightfully convicted. They will likely argue that she had prior offenses and that she was appointed counsel for trial and appeal.

CONCLUSION

1. The court will likely find the evidence found in Smith's apartment inadmissible because it violated the 4th Amendment.
2. The court will likely find the blood sample admissible because it fell under the exigent circumstances excuse of waiver.
3. The court will likely find that Smith's 6th Amendment rights were violated when she was not appointed counsel during her preliminary hearing.
4. The court will likely find that Smith's 6th Amendment rights were also violated when she was appointed ineffective counsel.

END OF EXAM

3)

Issue 1: Was searching Tom's house and finding the mask and the gun in violation of Tom's Rights?

In order to search a person's home without a search warrant, the deputies need voluntary consent to do so by someone living in the home, or someone who has standing. The deputies must reasonably believe that the person who is consenting to their search has the privilege and authority to do so. This case deals with a husband who did not consent and told the wife not to consent. If the defendant declines and expresses their decline to the search and instructs a third party (like their wife) to not allow the deputies in, then the deputies must honor this and know that they are declined entrance into the house until the defendant is off of the property and a reasonable time has passed. In *Georgia v. Randolph*, the court held that without a search warrant, the deputies did not have a right to search the house where one of the occupants consented to the search while the other occupant didn't. However, *Randolph* doesn't exactly apply if the police remove the suspect (defendant) off of the property by arresting him after he declines the entry according to *Fernandez v ?*.

One can infer that Sara lived in the same house as Tom since Tom is the husband and Sara is the wife. Thus, Sara has authority to consent or not consent to the search of the house since she is presumably a resident of the house and lives there. Since Tom refused the search of his home and then was arrested and taken away by the police, and then the police came back to re-ask Sara, there seemed to be enough time in between the taking away of Tom and the re-asking of Sara. The prosecution will argue that Sara's consent after the deputies took Tom away and returned is valid since Sara has authority and Tom is gone, according to the rule of *Fernandez*. The defense will argue that Sara was coerced or duressed into consenting since the deputies answered her question saying that they would hold her outside while they obtained a search warrant since they had probable cause. However, this argument would lose because Sara knew she they had probable cause and it was inevitable that the police would discover the mask and the gun.

Thus, the mask and the gun will be admissible evidence in court.

Was Tom's admission that he photographed neighborhood children in violation of his Miranda Rights?

The Fifth Amendment

After being read Miranda Warnings, a suspect may remain silent, waive their rights, or assert their right to counsel (5th amendment). Once a suspect asserts this right, all questioning must cease. Also, this assertion means that no future waiver of the Miranda warning is voluntary, as discussed in *Edwards v. Arizona*, since the suspect has already asserted their right to an attorney and assistance of counsel at their trial. The 5th Amendment right to counsel is not case specific and it lasts for fourteen days after the suspect is released from the custody.

In regards to the bank robbery, Tom was mirandized in front of his house and arrested. He responded saying that he would like his right to counsel and then all questions ceased from the police. A week after Tom's release, an officer of a different department arrested Tom for a valid arrest warrant for possession of child porn. Tom was mirandized again and he waived this rights admitting to the child porn. Tom's best argument is that his 5th A right to counsel was violated because his right to counsel was supposed to last 14 days and the second interrogation took place within that time span. The prosecutor will argue that this is a different officer and different police department and different crime. However, the 5th amendment isnt crime specific so this argument wont uphold. Tom's argument will probably win and the confession as to the child porn will be suppressed.

Was the lineup with the robbery witnesses in violation of Tom's rights?

The 6th Amendment

The 6th Amendment right to counsel allows a suspect to have the presence of an attorney at all critical stages. The suspect has a right to the presence of an attorney at any post-charge lineup or showup, as shown in *United States v. Wade*. A lineup is a critical stage of the criminal proceedings. The purpose of having counsel present during this lineup is so the attorney can observe any suggestive aspect of the lineup and use as cross-examination of the witness. If the defense counsel is not present then the lineup cannot be used. If this occurs, then the prosecution may try to use an independent source for the identification in court. The court weighs certain factors in determining an independent source. These factors include: the opportunity of the witness to observe said criminal at the time of the crime occurrence, their level of certainty, the time between the crime and confrontation, etc. If the identification was initially highly suggestive and could easily be misidentified, then the court will exclude it.

Here, the defense would argue that the excluding Tom's lawyer at the lineup is a violation of his 6th Amendment right to counsel at all critical stages of the criminal proceedings. The prosecution would argue that he did not assert the right to his attorney for the child porn case. The defense would rebuttle saying that the interrogation of that case was a violation of Tom's rights as addressed above. Tom's argument here could be strong since he did assert his 6th amendment right to counsel, he should be able to have counsel present here and the lineup thrown out unless the prosecution uses an independent source.

The testimony of the witnesses at trial identifying Tom as the bank robber

See directly above for the rules.

Here, the lineup was not suggestive. The facts state that it was fair, non-suggestive, and with 5 other jail inmates. Since there were multiple witnesses and each had the opportunity to observe the criminal at the time of the crime and positively identified Tom as the bank robber. This can be seen as an indication from an independent source. Further, the fact that each of the witnesses positively identified him and none of the witnesses identified anyone else helps the presumption of independent source. Tom may try to argue that there was a little over a week and that this was a lot of time in between the crime and the identification of an independent source. However, this argument is not strong enough. Thus, the identification testimony of the witnesses at trial will probably not be suppressed.

END OF EXAM