

CONSTITUTIONAL CRIMINAL PROCEDURE LW6751  
EXAMINATION

FINAL

Professor Schmolesky

Spring 2006

PART II. Essay Question

You have 90 minutes to answer this portion of the exam, which consists of a five-part essay question worth 50 points (10 points per question based on a single fact pattern). Please write your answer in the bluebook(s) that will be provided to you with the exam question (unless you are typing your exam on a laptop). Please write your answer with a blue or black ink pen or type your answer. You may use your textbook, notes, or any other material that you have prepared, borrowed, or purchased. Good luck!

Part Two. Essay Question. 50 Points

Two men, Phillip Frick and Fred Flack were in a public park in San Antonio Texas drinking beer from cans that were pulled out of twelve-pack package that was on the ground behind a car, a late model Ford that belonged to Phillip in which Fred recently had been a passenger. San Antonio Police Officer Herman Heath observed the two men and approached them to tell them that the consumption of alcoholic beverages in the park violated a San Antonio ordinance. Officer Heath gave both men tickets for the Class C misdemeanor ordinance violations of drinking alcoholic beverages in the park and asked both men for identification. Officer Heath learned from the police dispatcher that there were several outstanding warrants for Phillip Frick's arrest for traffic offenses. Officer Heath called for back-up assistance from other officers before placing Phillip in handcuffs and putting him in his patrol car.

Another officer, John Jackson, arrived and approached Fred Flack. Officer Jackson patted Fred's outer garments and detected a spongy substance inside of Fred's jacket. Officer Jackson reached inside Fred's inside coat pocket and removed a plastic baggie containing a leafy substance that Jackson believed was marijuana. Fred was then handcuffed and placed in Jackson's patrol car.

Meanwhile, after securing Phillip in his patrol car, Officer Heath approached Phillip's car and observed a film canister in the front driver's seat. Heath later said that, based upon his experience as an officer, including five years as a narcotics officer, that film canisters are frequently used to hold narcotics. Officer Heath opened the unlocked front driver's side door and removed the canister. Heath opened it and discovered a white powdery substance that field tested positive as cocaine. Heath confronted Phillip with his discovery and, after giving Phillip a full set of the warnings required by 38.22 of the Texas Code of Criminal Procedure, asked him if he wanted to make a statement. Phillip stated: "I want to talk to a lawyer." Heath stopped his effort to interrogate Phillip. There was no writing or tape recording of this attempt to interrogate and Phillip's request for counsel.

When Phillip was taken to the police station, he was asked his name and Phillip provided both the name of Phillip Frick and Phillip Stein, an alias that Phillip sometimes used. When it was discovered that Phillip had another name, officers from Fredricksburg, Texas were contacted because an individual by the name of Phillip Stein was a fugitive from justice from an indictment for the robbery of a convenience store in that community. In fact, Phillip Frick, aka Phillip Stein, had appeared at an initial appearance following his grand jury indictment for aggravated robbery. At the hearing, the magistrate had advised Phillip of the offense, found probable cause to believe that he had committed it, set bail, and determined that Phillip was indigent and that Phillip had requested the appointment of counsel at state expense for his trial.

Four hours after Phillip's arrest officers from Fredricksburg came to the Bexar County Jail where Phillip had been taken. The officers introduced themselves, gave Phillip a complete set of the warnings required by 38.22 of the Texas Code of Criminal Procedure and asked Phillip if he would like to make a statement concerning the robbery that Phillip had committed in Fredricksburg. Phillip stated that he understood his rights and that he would make a statement. Phillip then admitted that he had been at the convenience store but stated that he was a peaceful person and that he had only taken money from the cash drawer because he feared for his life because Olin Oaf had threatened him with a gun unless he

helped him commit the robbery. Phillip described the gun that Oaf owned and the address where he lived. The officers did not reduce Phillip's statement to writing and they did not record it.

Based upon this information, the Fredricksburg officers went to the home of Olin Oaf. Without knocking on the door, the police pushed open the door and ordered Olin to get on the floor. Olin was handcuffed and the officers seized a gun and currency that was later traced to the convenience store that had been the location of the robbery from a chest of drawers found in a upstairs bedroom as the officers searched the house after arresting Olin.

After Olin was arrested but before he was indicted, he was placed in a line-up with Phillip and four other individuals, two of whom were the approximate height and weight of Olin and two of whom were the approximate height and weight of Phillip. The convenience store clerk who had been working on the night of the robbery identified Olin as the man who held the gun and Phillip as the one who had taken money. The store clerk testified that he was able to get a good look at both men during the several minutes of the robbery in the brightly lit convenience store. The store clerk expressed no hesitation in identifying both men and he said that he was certain of his identifications, which occurred less than a month after the robbery. The description of the robbers given by the store clerk immediately after the crime, although extremely general ("white males of average height and weight") is consistent with the physical appearance of Olin and Phillip. The prosecution also intends to have the store clerk identify Phillip and Olin as the perpetrators of the aggravated robbery at their criminal trial.

Defense attorneys for Philip Frick, Fred Flack, and Olin Oaf have filed the following pretrial suppression motions:

- (1) Fred Flack's attorney has filed a motion to suppress the marijuana taken from Fred's coat pocket.
- (2) Phillip Frick's attorney has filed a motion to suppress the cocaine found in the film canister in the front seat of Phillip's car.
- (3) Phillip Frick's attorney has filed a motion to suppress Phillip's statement concerning the convenience store robbery.
- (4) Phillip Frick's attorney and Olin Oaf's attorney have filed motions to suppress the evidence of the gun and money found in Olin's home.
- (5) Phillip Frick's attorney and Olin Oaf's attorney have filed motions to suppress the out-of-court and in-court identifications by the store clerk.

Assume that you are a law clerk for the judge who must rule on these suppression motions. Write a brief memo discussing the legal issues raised by these motions and your conclusion concerning whether the motions should be granted or denied.

CONSTITUTIONAL CRIMINAL PROCEDURE LW6751

FINAL EXAMINATION

Professor Schmolesky Fall 2009

PART II. Essay Question

You have 90 minutes to answer this portion of the exam, which consists of a five-part essay question worth 50 points (10 points per question based on a single fact pattern). Please write your answer in the bluebook(s) that will be provided to you with the exam question (unless you are typing your exam on a laptop). Please write your answer with a blue or black ink pen or type your answer. You may use your textbook, notes, or any other hard copy material that you have prepared, borrowed, or purchased. Good luck!

San Antonio police officer Adam Adams was driving his police squad car on loop 410 in the city at about 10 P.M. when he observed a car repeatedly weave across several lanes and then pull over to the side of the road. Adams thought the driver might be intoxicated or ill and in need of assistance. Adams parked his squad car behind the vehicle that had stopped on the shoulder of the road and approached the vehicle. As Adams approached the car, he observed the driver, a man, and a woman in the front passenger seat. When Adams tapped on the closed driver's-side front window, he observed that the driver was apparently startled and that he had not observed Adams or his police car prior to this point. Adams motioned for the driver to lower the window and he did so. Adams asked the driver if he was all right. The driver, Bernard Bates, said that he was and that he had pulled over because he was having trouble finding a street where a party was being held. Adams told Bates that he had failed to maintain his lane prior to pulling over. Bates said that he may have been distracted because he was trying to follow the map and instructions provided by his GPS device.

Although Adams did not observe that Bates had any of the classic signs of intoxication, he asked Bates to get out of the car and to bring his driver's license and proof of insurance. Adams also asked the woman in the front passenger seat to get out of the car. Adams escorted Bates to his squad car, leaving the passenger standing by the car while he examined the driver's license and insurance form. Bates' name was on the driver's license but the insurance form was in the name of Carrie Crane. Adams had placed Bates in the back seat of the squad car and was talking to him through the open door of the car. Adams gave information from the license and the insurance form to the police dispatcher to see if there were any outstanding warrants for either name. Adams asked Bates who owned the car, and Bates said that the owner was his passenger, Carrie Crane. Adams then closed the squad car door, which locked Bates in the back seat although Bates was not handcuffed.

Officer Adams then walked back to the car that Bates had been driving and asked the woman passenger her name. The woman replied that she was Carrie Crane and she later nodded affirmatively when Adams said, "I understand that this is your car." Adams asked Crane for identification and she took her purse off her shoulder and found her license inside and handed it to Adams who examined the license as he took the purse from Crane, who offered no objection. Adams placed the purse on top of the car and then began patting down the outer garments that Crane was wearing while he asked if she had been aware that Bates had been "weaving all over the road." Crane said that she hadn't noticed and that she had been preoccupied with finding a street that they had been looking for on a map. Adams did not discover anything that appeared to be a weapon during his pat-down search.

Adams asked Crane to stay where she was standing for a moment while he went back to his squad car, taking her license and the purse from the top of the car with him. The dispatcher informed Adams over the radio that there were no outstanding warrants for either Bates or Crane. Adams left Crane's purse on the front-seat of the squad car and returned to car owned by Crane. Without speaking again to Crane, Adams entered the car and began looking around, shining a flashlight to illuminate many areas. In the door pocket on the driver's side of the car, underneath a map, Adams found a clear plastic baggie containing a white powdery substance that Adams believed was cocaine. He showed the bag to Crane and asked her if the baggie was hers. Crane said that she had never seen it before. Bates escorted Crane to his squad car and placed her in the back seat next to Bates. Adams called the dispatcher again, asking for back-up officers and for a tow truck to take the car to the impound lot.

Officer Bates sat in the front seat until other officers arrived and looked through the purse that he had taken from Carrie Crane. Inside the purse, Bates found a glass pipe that he thought from his training was probably used to smoke crack cocaine. Bates observed a residue on the pipe that he believed was crack cocaine.

Both Bates and Crane were taken to a new squad car when the back-up officers arrived on the scene and Bates and Crane were transported to the police station. Officer Adams remained behind and searched the car, noting the items inside it on an inventory form until the tow truck arrived. In the trunk of the car, Adams found a cardboard box that was kept securely closed by a tightly knotted string. Adams cut the string, opened the box and found a large quantity of what appeared to be marijuana. Adams confiscated the box and its content and then directed the tow trucker driver who had arrived to take the car to the police impoundment lot.

Adams tagged the box with marijuana and placed it in a room where evidence is kept securely locked before going to an interrogation room where Bernard Bates had been placed. Adams was informed that Crane had refused to give a statement and had asked for an attorney after officers gave her warnings that fully complied with those set out in Article 38.22 of the Texas Code of Criminal Procedure. Adams told the officer: "Let's not make the same mistake with Bates. I won't give him any warnings until I get a statement from him."

Adams entered the interrogation room and told Bates that he had found cocaine and marijuana in the car that he had been driving and that Carrie Crane had told him that the drugs belonged to him. Bates protested that Crane was also involved in importing cocaine and marijuana for the purpose of selling it for a profit along with David Dial. Bates asked a number of follow-up questions and Bates provided detailed statements concerning their drug conspiracy. Bates did not record the statement of Bates nor did he reduce it to writing.

After the interview, Bates wrote an application for an arrest warrant for David Dial, citing the information provided by Bates in the affidavit in support of the application for an arrest warrant. Early the next morning, Adams and other officers executed the warrant at Dial's home. Dial was taken before a magistrate later that same morning shortly after Bates had his initial appearance. Bates had appeared with an attorney that he had called from the jail. The attorney arranged for a bond and Bates was released from custody on bail a short time after this first appearance.

David Dial did not have an attorney to represent him at his initial appearance, but he requested that the court appoint counsel to represent him. The magistrate set bail for Dial and told him that counsel would be appointed for him.

Later that same day, Officer Adams called Bates on the phone and suggested that he meet him at a local diner so that they could talk about his case. Adams agreed and went to the diner. As soon as Bates sat down at the table where Adams was waiting, Adams told Bates that he had a right to remain silent and the other warnings provided for in 38.22 of the Texas Code of Criminal Procedure. Adams did not tell Bates that he had a concealed microphone on his person that would allow him to record the conversation. After the warnings, Bates began to repeat many of the things that he had told Adams the night before. At no time did Adams make any reference to the prior statement that Bates had given and he offered no advice concerning the possible admissibility of the prior statement.

Later that day, Adams went to the jail to interview David Dial, who had been unable to obtain a bond to secure his release from custody. Bates gave Dial a full set of the warnings set out in Article 38.22 of the Texas Code of Criminal Procedure. Dial immediately said that he wanted to talk to counsel. Dial terminated the interview and left the jail.

The next day, Carrie Crane came to the police station and asked to speak with Officer Adams. Although Crane had been released from custody and had not yet been charged with a crime, she stated that she knew that an indictment was imminent and she wanted to make a deal. Crane offered to help get evidence against Bates and Dial if Adams would promise that she would not go to jail. In fact, indictments for drug conspiracy were returned by the grand jury against Bates, Crane, and Dial within hours of Crane's meeting with Adams. Adams told Crane that he couldn't guarantee that she would not be sentenced to imprisonment but he would recommend probation for her to the prosecutor if she would cooperate in obtaining evidence against the other conspirators.

Crane accepted Adam's offer and agreed to wear a microphone while conversing with David Dial. Adams admonished Crane not to initiate any discussion about the drug conspiracy but just to listen in the hope that Dial would say something incriminating. Dial had succeeded in getting his bail reduced and was able to post bond. Crane went to Dial's home and was ushered into the house by an agitated David Dial. Dial immediately began to talk about his legal problems. Dial said that he was short of funds and that he was going to have to rely on whatever attorney the court would appoint and that he had not been contacted yet by an attorney. Dial then said that he was nervous because he had just received a shipment of methamphetamines that he had hidden inside a desk that had a secret drawer that was being stored at a storage facility. Dial expressed concern that he would be in worse trouble if this later drug shipment were to be discovered. Crane said that she didn't remember ever discussing dealing with amphetamines with him or with Bates. Dial said that he had set up the amphetamine deal on his own because he was so short of money.

Based on the conversation that Officer Adams overheard and recorded electronically, he obtained a warrant for the storage facility that Dial had named while talking to Crane. Dial executed the warrant and found the contraband in the secret drawer that Dial had described.

Assume that defense attorneys for Bates, Crane, and Dial, file motions to suppress the following evidence. Assume that you have been hired as a law clerk for the judge in whose court the motions have been filed. Write a brief memo discussing whether the following evidence should be suppressed:

- 1) The cocaine found in the door pocket and in the trunk of the car.
- 2) The crack pipe found in Crane's purse.
- 3) The statements made by Bates to Officer Adams including the recording of the second statement.
- 4) The tape recording of the statements and the statements themselves made by Dial to Crane and overheard by Adams.
- 5) The amphetamines found in the drawer of the desk in the storage facility.

Good luck.

Part Two. Essay Question. 50 Points

San Antonio police officer Brian Bedders was on routine patrol when he received a dispatch to go to a private residence because of a report of “man down.” Officer Bedders had no other information as he arrived at the scene and observed a man lying on the driveway of a home, apparently unconscious. The officer examined the man, determined that he was still breathing and called for an ambulance. Bedders noticed a jacket on the ground, two feet from where the man was lying. The officer found a wallet in a pocket of the jacket and found a driver’s license with a picture that appeared to be the man lying on the ground. The name on the driver’s license was Alvin Adams. Officer Bedders called this name in to the dispatcher and asked for a computer check to determine if the police had any outstanding warrants or information about Alvin Adams. Officer Bedders reached into another pocket of the jacket and found a small opaque paper bag. Bedders reached inside and found a transparent baggie that contained a white powdery substance that Bedders believed to be heroin. A quick field test showed that the substance was heroin, a fact later confirmed by more thorough scientific testing.

Officer Bedders went up to the front door of the house and knocked. A moment later, Cory Cotton, opened the door about a foot and peered out cautiously. Officer Bedders immediately detected the odor of marijuana emanating from the house and observed a “waterpipe,” a device that Bedders associated with the use of marijuana on top of a bookcase that Bedders could see from the doorway. Officer Bedders asked Cotton if he knew anything about the man in the driveway. After Cory Cotton looked out at Alvin Adams, he exclaimed, “I told him to stay off the heavy stuff—is he O.K.?” Bedders responded that it would soon be known because Cotton would be on his way to the hospital. At that moment, an ambulance and a back-up squad car arrived. When the police officers emerged, Bedders told Cotton that he was under arrest “for controlled substances” and told him he would be in the custody of the arriving officers. Officer Bedders told the officers who had just arrived to put Cotton in handcuffs in the back of the squad car while he went into the house, “to have a look.”

Bedders entered the home and saw a burning hand-rolled cigarette that Bedders concluded must be the source of the marijuana odor. Bedders searched through several rooms of the house without finding any other person or item of interest. In the kitchen, Bedders opened a cylindrical container that said “Pringle’s Potato Chips.” Inside, Bedders found more of what appeared to be marijuana in a baggie. Later testing confirmed that the “joint” in the ashtray and the baggie in the potato chip canister were marijuana.

Cory Cotton was placed inside the squad car and handcuffed by the second group of officers to arrive at the scene. One of the officers gave Cotton a complete set of the warnings required by 38.22 of the Texas Code of Criminal Procedure. When Cotton said, “I think I would like an attorney.” The officers stopped talking to Cotton and drove him to the police station for booking. Three days later, after Cory Cotton was indicted for the felony of possession of marijuana with intent to deliver, a police officer who had not been present at the arrest of Cotton, went to the jail to talk to Cotton, who had been unable to raise enough money to make bail. The officer told Cotton that he saw a ring that had been taken from Cotton when he entered the jail



matched a ring that had been taken in a burglary that the officer had investigated. The officer gave Cotton a complete set of the warnings required by 38.22 of the Texas Code of Criminal Procedure and asked him if he understood his rights and wished to make a statement. Cotton said that he understood his rights and that he would talk to the officer. Cotton then admitted that he had committed the burglary and informed the officer where the other jewelry taken in the burglary was hidden in his home. The officer used Cotton's statement, which was not recorded or reduced to writing, to obtain a search warrant for Cotton's home. The officer executed the warrant and found stolen jewelry in a false book in Cotton's home office exactly in the location that Cotton had described.

After Alvin Adams was taken unconscious from the driveway in front of Cory Cotton's home, he was taken to the hospital. Blood tests conducted by medical personnel at the hospital revealed the presence of heroin in Adam's bloodstream. Adams remained in a coma for two days but he eventually recovered but remained in the hospital. Police officers moved an ailing police officer into Adam's hospital room. Two days after Adams was indicted, the officer, who did not identify himself as a police officer, asked Adams why he had conferred with an attorney earlier that day. Adams told the officer that he had been involved in heroin after he had become addicted. Adams said that he didn't like being a drug dealer but that he had been compelled to participate in order to obtain heroin for his own use. Adams told the undercover officer that Douglas Dempsey had been the person who supplied him with heroin for helping to sell it to others.

When police officers learned of Dempsey through Adam's statements in the hospital, they kept Dempsey under surveillance. When police officers observed Dempsey leave the hotel room where he was staying and get into a large limousine, officers followed the vehicle. About two miles from the hotel, officers observed the limousine turn a stop light with a prior signal. The vehicle had been traveling on a direct line to the airport and was about two miles from the airport when the police stopped the vehicle. While one officer gave the driver a traffic ticket another officer asked Dempsey to get out of the car. A narcotics dog that was with the officer circled the limo without any indication until the dog sniffed Dempsey and alerted. A police officer thoroughly searched Dempsey and found heroin taped to his body underneath his shirt. Dempsey was arrested and charged with possession of heroin with intent to deliver.

Assume that the following motions to suppress have been filed on behalf of the defendants Cotton, Adams, and Dempsey:

Question One (20 Points): Alvin Adams challenges the admissibility of the heroin taken from his jacket and the statement made to his roommate at the hospital, who he later learned was a police officer.

Question Two (20 Points): Cory Cotton challenges the admissibility of the marijuana taken from the ashtray on the coffee table at his home and the marijuana taken from the potato chip container. Cotton also challenges the admissibility of his statement admitting his commission of the burglary and the jewelry discovered in Cotton's house following his statement.

Question Three (10 Points) Dempsey challenges the heroin found in the search of his person after the stop of the vehicle in which he was a passenger.

Assume that you are the law clerk of the Texas judge who must decide these motions. Discuss the merits of the claims in a memo that addresses the overlapping issues involved in these three cases. Be sure to explain your answer.

## PART II. Essay Question

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### Part Two. Essay Question. 50 Points

Police officer Alvin Adams was driving his marked police squad car on Interstate Highway 10 in San Antonio, Texas at 1:15 A.M. when he observed a late model car on the side of the shoulder of the highway on the opposite side of the highway from Adam's patrol car. Adams observed the driver of the car leaning out of the vehicle through the open driver's side door. After Adams saw the apparently ill driver vomit, he turned his car around at the next highway exit and drove back to investigate. By the time Adams arrived at the location where Adams had seen the parked car, the car had pulled away from the shoulder of the road and was back in the flow of traffic. Adams followed the car for nearly a mile. Although Adams did not observe any traffic violations or signs that the driver was suffering any further distress, Adams activated his lights and siren to pull the car over. Adams later testified that he was concerned that the driver might be intoxicated or ill and in need of help. The car pulled over immediately after Adams put on his lights and siren.

The driver and owner of the car, Barry Brown, was alert and exhibited no signs of intoxication. Brown said that he had eaten something that apparently did not agree with him but that he felt better and that he was on his way home where he would take an Alka Seltzer. In response to Adam's request, Brown produced a driver's license and proof of insurance. Adams called the driver's license of Brown into the police dispatcher to conduct a computer check, as a matter of routine procedure, and then continued to talk to Brown. Brown had a passenger in the front seat of the car, Donald Davis, who also provided identification, but Adams did not run a computer check for Davis. Less than three minutes after stopping the car, the police dispatcher contacted Officer Brown with the information that Brown's driver's license had been revoked and was no longer valid. Officer Brown then asked both Brown and Davis to exit the car. At this point another officer who had been patrolling in the area pulled up to assist Officer Brown. The back-up officer, Carl Canine, had a drug-detecting dog in his squad car. Officer Brown called a tow truck to remove the car and the two officers conducted outer garment pat-down searches of both Brown and Davis. The officer patting down Davis detected a soft item around Davis's back. In response to the officer's inquiry about this item, Davis said that he had back problems and wore a small brace. Nothing else of interest was discovered in the pat-down searches.

Before the tow truck arrived, Officer Canine let the dog out of his squad car and escorted the dog around Brown's vehicle. The dog did not alert while walking around the vehicle but as Canine led the dog back to the squad car, the dog passed nearby to Donald Davis and the dog sniffed Davis and alerted. When Officer Adams observed this, he reached into Davis's shirt and

removed the "back brace" that the officer discovered was taped to Davis's body. Inside a small package, Adams observed a baggie with a white powdery substance that Adams believed, and later testing confirmed, was cocaine.

Prior to the arrival of the tow truck, Officer Adams took the car keys from the ignition and opened the trunk. Two large cardboard boxes were in the trunk that Adams opened. Several illegal machine guns were inside that Adams confiscated.

The tow truck arrived and towed Brown's car to the police impoundment lot. Both Brown and Davis were handcuffed and placed in separate squad cars. When Davis was placed in Adam's car, Officer Adams said to him: "You and your friend are in a lot of trouble." Davis responded by saying: "The guns belong to both of us but the cocaine is mine alone. Barry won't have anything to do with that stuff." Adams made no reply but drove Davis to the police station and took him to an interrogation room where he gave Davis a complete set of warnings that fully complied with the warnings required by 38.22 of the Texas Code of Criminal Procedure. Davis said that he "didn't know what to do" but that he "wished he could talk to his Uncle Bill." Officer Adams said, "Well, the decision is up to you, you're not required to talk to me." Davis then said that he would make a statement. Davis confessed to his involvement in selling cocaine and in selling illegal weapons for a profit and admitted that he had more guns and cocaine at his home at 2346 Main street. Davis's statement was neither recorded nor reduced to writing. Davis's uncle is a lawyer who had previously represented Davis in a divorce proceeding although Officer Adams had never met Uncle Bill and did not know his profession.

Officer Adams prepared an affidavit summarizing Davis's admission concerning the presence of guns and drugs at his home and attached it to an application for a search warrant for "the home of Donald Davis at 2346 Main Street." A magistrate issued the warrant and Officer Adams and others executed the same day it was issued. The officers found nothing in Davis's home, but in the trunk of Davis's car parked in the driveway, they found more illegal machine guns.

The next day both Davis and Brown were charged by indictment with a series of weapons offenses and Davis was charged with possession with intent to deliver cocaine. An information charging Brown with driving after revocation was also filed. Law enforcement officers made an agreement with Barry Brown under which he would be convicted only of driving after revocation, would receive probation, and the weapon's offense against him would be dismissed if Brown would plead guilty, testify against Davis, and attempt to get Davis to make an incriminating statement about his drug transactions, a subject about which Brown knew a great deal less because of his lack of involvement with Davis's drug dealing. Brown agreed to wear a microphone during a conversation in a restaurant so that Officer Adams could overhear it. After discussing their legal strategy with regard to the pending weapon's charges, Brown turned the subject of the conversation to Davis's drug dealings. After making several admissions concerning the cocaine Davis had taped to his person on the day that Adams had stopped Brown's car, Davis told Brown that he also had a shipment of amphetamines coming to town that evening. Based on this information overheard by Officer Adams, a combination search and arrest warrant was obtained leading to the another arrest of Davis and the discovery of amphetamines on his person. Additional charges against Davis for possession of amphetamines with intent to deliver were then filed.

Prior to Davis's trial, Davis's attorney files motions to suppress the following evidence:

- (1) The cocaine found on Davis's person following the stop of Brown's car.
- (2) The weapons found in trunk of Brown's car.
- (3) The admissions made by Davis to Officer Adams in the squad car and at the police station.
- (4) The weapons found in a search of Davis's car when the search warrant was executed at his home.
- (5) The statements overheard by Officer Adams concerning Davis's possession of cocaine on the day of the stop of Brown's car and the evidence of the amphetamines found in the execution of the search and arrest warrants obtained based upon Davis's statements to Brown, overheard by Davis.

Assume that you are a clerk for the judge who must decide the defense suppression motions. Write a brief memo discussing whether the defense motions should be granted and why or why not. [The total value of the essay is 50 points or 10 points per question].

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FINAL

Professor Schmolesky

Summer 2001

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Part Two. Essay Question. 50 Points

Police officer Walter Williams was on routine patrol in San Antonio, Texas when he heard a report of burglary of home that just occurred in which a neighbor next door to the burglarized house had observed a man that the neighbor did not recognize emerging from the backdoor of the home carrying a television and VCR that were placed in a red Ford Mustang automobile with a San Antonio Spurs bumper sticker. The man was described as tall (at least 6'4"); thin, wearing a blue running suit; long, shoulder-length brown hair; with a CD player at his waist and wearing attached headphones. Officer Williams was driving only three blocks from where the reported burglary had occurred when he saw a man putting gas into a red Ford Mustang automobile that had a San Antonio Spurs bumper sticker. The man filling the tank, John Jackson, was tall and thin and was wearing a blue running suit and he had earphones on his head.

By the time Williams turned his car around the man had re-entered the car and was driving away. Officer Williams followed the car for about three miles. He observed nothing further that was unusual about the car or Jackson who was the sole occupant of the vehicle. Officer Williams did not observe the driver commit any traffic law infractions. However, because of the similarity of the man's appearance and the car to that described in the recent burglary, Williams asked the dispatcher to send another squad car to his location. When the car he was following entered the parking lot of an apartment complex, Officer Williams drove into the parking lot and parked the squad car without ever activating his emergency lights or siren. When the man in the blue running suit emerged from the car, he walked briskly towards the front door of one of the apartments, snapping his fingers as he walked, and apparently swinging his hips rhythmically, which suggested that the man was listening to music on his CD player. Officer Williams called out for the man to stop and he waived his arms as he shouted. The man had his back to the officer and he either did not hear Williams or did not obey the officers commands if he did hear him.

Officer Williams saw the man open the door of an apartment with a key and enter. The man had nothing in his hands and he removed a key ring from a front pant's pocket to open the door. Officer Williams was now hurrying after the man, but he was unable to reach him until after he had opened the door and gone inside. The man entered the ground-floor apartment and let the door swing closed but he did not push the door tightly closed or lock the door. Williams

was able to pull the door open he went inside. The man inside, John Jackson, seemed startled when he saw Officer Williams enter the apartment and he removed his headphones and asked Williams what he wanted. Officer Williams said that he was a police officer and that he wanted to talk to him. In response to questions from Williams, Jackson identified himself and showed his driver's license to Williams. The license showed that Jackson resided in the apartment that he had just entered. When asked if anyone else lived in the apartment, Jackson said that he shared the apartment with his girlfriend, Carrie Cox, who Jackson said was out of town on a business trip. Williams conducted a pat-down exploration of Jackson but detected nothing of interest after running his hands over the running suit.

Two other police officers had arrived at the apartment complex and Officer Williams opened the front door and summoned the other officers to Jackson's apartment. One of the two new officers entered the apartment and asked Williams what was happening. Williams looked at Jackson and said: "This is the man who just committed the burglary on Oak Street, isn't it?" Williams admitted that he had taken some electronic equipment from a house on Oak Street earlier that evening. Williams put handcuffs on Jackson and gave him a full set of warnings found in 38.22 of the Texas Code of Criminal Procedure. However, none of the officers asked Williams any other questions at this time, except to ask him for permission to search the apartment, which Jackson granted.

One of the officers took Jackson's keys and went outside to Jackson's car. After unlocking the trunk with the key, the officer found a television and a VCR matching the description of the items taken in the recent burglary on Oak street. The car was impounded and towed to the police impound lot where an officer looked inside the unlocked glove compartment and found a small film canister containing what appeared to be marijuana. (Later testing confirmed that it was). Inside the apartment, Officer Williams entered the only bedroom and looked in the closet. Williams saw two of three purses hanging from a hook inside the closet and he opened one of them. Williams found a baggie containing a white, powdery substance that appeared to be cocaine. (Later testing confirmed that it was). Also inside the bag was a library card in the name of Carrie Cox.

John Jackson was taken to jail and again given a full set of the warnings set out in 38.22 of the Texas Code of Criminal procedure and asked if he wished to make a statement. Jackson again admitted taking the television and the VCR from the home on Oak street and putting them in the trunk of his car. Jackson also admitted owning the marijuana that had been discovered in his glove compartment. Jackson said that he didn't know about any cocaine in his closet but he stated that it probably belonged to Carrie Cox. At no time was any statement of Jackson's reduced to writing or recorded.

Within the week, Jackson was indicted for burglary and possession of Marijuana. Two weeks later, the neighbor who had someone placing the electronic items in the trunk of a red Ford came to the police station to observe a line-up that included Jackson and five other men all of whom were tall, thin, and had brown hair. The witness selected Jackson and one other man as resembling the person he had seen at dusk from the second story window of his house, which was about 60 feet away from the red Ford. The witness said that he had looked at the man for about thirty seconds before deciding that he might be witnessing a burglary and calling the



police. A videotape was made of the lineup and one month after the original line-up, the witness identified only Jackson as the person who resembled the person that he had seen committing the burglary.

Carrie Cox was indicted for cocaine possession while she was still out of town. Her friend, Felicity Fink, called Cox to warn her of her legal difficulties. Cox called a San Antonio attorney, who arranged to appear with Cox at her preliminary initial appearance in county court when Cox returned to San Antonio. Bail was set and Cox was able to post bond and return to her apartment. The next day Cox arranged to have dinner with Felicity Fink. Unbeknownst to Cox, Fink had her own legal difficulties but had been promised probation for her pending charges if she would help provide evidence against Cox. Fink agreed to wear a microphone so that police officers could overhear her conversation with Cox about her involvement with cocaine. During dinner, Cox admitted that the cocaine that the officers had found in her purse was hers and she also made several incriminating statements concerning burglaries that she had helped John Jackson commit.

Assume that you are a member of the defense firm that has been appointed to represent John Jackson and Carrie Cox. Your firm is contemplating filing motions to suppress several items of evidence that you anticipate the prosecution will attempt to introduce against your clients. Write a brief memo describing the possible arguments that you could make and anticipate prosecution counter-arguments regarding the following evidence:

- 1) The statements made by John Jackson at his home and at the police station.
- 2) The television, VCR, and marijuana found in John Jackson's car.
- 3) The cocaine found in Carrie Cox' purse.
- 4) The out-of-court identifications by the neighbor of John Jackson and your analysis of the likelihood that the neighbor would be allowed to identify Jackson during the neighbor's testimony in court.
- 5) The statements made by Carrie Cox to Felicity Fink and overheard electronically by police officers.

Be sure to evaluate the strengths and weaknesses of your potential arguments and to explain your answers. Each of the above issues is worth 10 points for a total of 50. Good luck.

ST. MARY'S UNIVERSITY SCHOOL OF LAW

CONSTITUTIONAL CRIMINAL PROCEDURE LW6751

FINAL

EXAMINATION

Professor Schmolesky

Fall 2000

PART II. Essay Question

You have 90 minutes to answer this portion of the exam, which consists of a three-part essay question worth 50 points (one 10-point and two 20-point questions). Please write your answer in the bluebook(s) that will be provided to you with the exam question. Please write your answer with a blue or black ink pen or type your answer. You may use your textbook, notes, or any other material that you have prepared, borrowed, or purchased. Good luck!

Part Two. Essay Question. 50 Points

Arnold Anderson, a police officer with the White Valley, Texas Police Department observed two men enter their automobile near the only tavern in White Valley about 12:30 A.M. on Saturday, October 7, 2000. The two men were laughing and talking boisterously as they entered the car. The loud manner of their speech and the appearance of the two men attracted Anderson's attention. Officer Anderson described the two men as young, either in their late teens or early twenties, wearing clothing that Anderson described as "sloppy hip-hop style" clothes that looked out of place in the small staid community of White Valley, a town of mostly established professional families, located between San Antonio and Austin, Texas. Officer Anderson stated that one of the two men was black and that he knew that no black people lived in the small community of White Valley. Anderson watched as the black man got into the driver's side of the vehicle and drove away with the other young man in the front passenger seat. After following the car for more than a mile, Anderson observed that the car began to weave, although Anderson admitted that the car never left its lane of traffic. Anderson stated that the car was "weaving within its lane," and Anderson stated that he saw the tires of the car twice touch the white line on the shoulder of the road before swerving back to the center of the lane. Anderson admitted that he did not see the tires of the car cross over the white line. Arnold Anderson testified that because of what he described as the "erratic driving," he thought that the driver might be too intoxicated, ill or tired to operate the vehicle safely and he stopped the car for "safety reasons" to check the condition of the driver.

Boyd Bates, the driver of the car, pulled over immediately when he saw the lights of Arnold Anderson's squad car behind him. Bates produced a valid driver's license upon request. Anderson asked Bates and his passenger, Cory Cates, to step out of the car while he checked the car and Boyd Bates's driver's license for outstanding warrants through the police dispatcher. While waiting for a response from the dispatcher, Anderson conducted an outer garment pat-down search of Boyd but did not detect anything that prompted further investigation. However, when he patted down the long coat pocket of Cory Cates, he detected a hard cylindrical item that Anderson stated he thought might be a knife or club or other weapon. Anderson reached into the

coat pocket and took out a large glass "bong-style" pipe that Anderson stated, in his experience, is frequently used in smoking marijuana and other substances. Attached to the pipe with rubber bands was a clear plastic baggie containing a small quantity of a green leafy substance that Anderson stated appeared to be marijuana. (Later testing in fact showed that the substance was marijuana. Anderson told Cory Cates that he was under arrest and he took Cates to his squad car after allowing Boyd Bates to leave. While driving Cates to the police station where he was booked and taken to jail until his initial appearance before a magistrate, Anderson asked Cates where he obtained the marijuana. Cates stated that he had given money to Donald Dill for the purchase of marijuana. According to Cates, Donald Dill later informed him that he had purchased one ounce of marijuana for each of them from an unnamed source earlier that same evening. (Possession of less than four ounces of marijuana is a misdemeanor under Texas law).

After Cory Cates was placed in jail, Arnold Anderson drove to Donald Dill's home without a warrant and knocked on the door. A tired Donald Dill woke up and answered the door in his pajamas. Arnold Anderson asked if he was Donald Dill and when Dill replied in the affirmative, Anderson said that Dill was under arrest and he demanded to be allowed inside. Anderson then told Dill about Cory Cates's allegations concerning the purchase of marijuana from Ernie Evers. Anderson gave Dill a complete set of the warnings required by 38.22 of the Texas Code of Criminal Procedure. Dill stated: "It would probably be best for me to talk to an attorney." Officer Anderson responded: "If you help us to get your supplier, you won't need an attorney." Dill then agreed to make a statement and informed Anderson that he had purchased an ounce of the marijuana for Cory Cates and ounce for himself less than eight hours earlier from Ernie Evers, whose address Dill provided. While talking to Dill, Officer Anderson observed a clear plastic baggie containing a green leafy substance, like the one he had taken from Cory Cates, on the kitchen table about 15 feet from where Anderson and Dill were standing. Officer Anderson seized the baggie before leaving the apartment with Donald Dill.

The next day an information was filed charging Cory Cates and Donald Dill with misdemeanor possession of marijuana. After the information was filed, but while Donald Dill was still in jail, Officer Anderson went to his jail cell and again gave Dill a full set of the warnings required by 38.22 of the Texas Code of Criminal Procedure. This time, Dill said that he understood the rights but that he would agree to make a statement. Dill again admitted purchasing marijuana for himself and for Cory Cates with money that Cates had given to him for the purchase. Donald Dill again named Ernie Evers as the seller and provided his address. Dill stated that he personally observed that Evers had more than a kilo of marijuana at his home. Donald Dill's statement was neither recorded nor reduced to writing. Later, that day, Dill hired an attorney who appeared with Dill at his initial appearance.

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Officer Anderson obtained a search warrant for Ernie Evers's home based upon Donald Dill's statements. The warrant authorized the search of Ernie Evers's apartment for "marijuana, other controlled substances, and any paraphernalia used in the possession, sale, or distribution of controlled substances." The warrant was issued on October 8, 2000 but was not executed until October 15, 2000. Officers searching Ernie Evers's apartment found baggies and scales that officers testified are often used in the sale of controlled substances. However, a search of Ernie Evers's car parked outside his apartment in the space numbered to correspond to Ernie Evers's apartment led to the discovery of several grams of cocaine in the trunk of the car.

Assume that Cory Cates, Donald Dill, and Ernie Evers all file motions to suppress evidence obtained by Officer Arnold Anderson. Assume that you are the trial judge who must rule upon these motions. Discuss the potential defense and prosecution arguments and how you would rule concerning:

- (1) Cory Cates's motion to suppress the baggie of marijuana found in his pocket and his oral statement to Arnold Anderson admitting that he had purchased marijuana through Donald Dill. (20 points).
- (2) Donald Dill's motion to suppress his two oral statements to Arnold Anderson and the seizure of the baggie of marijuana from Donald Dill's apartment. (20 points).
- (3) Ernie Evers's motion to suppress the cocaine found in the trunk of his car. (10 points).

## Part Two. Essay Question. 50 Points

Following the armed robbery of a convenience store, police officers in San Antonio, Texas interviewed the store clerk and a customer who was in the store at the time of the robbery. The customer said that he was a neighbor of the robber, whom he identified as Donald Trumpless, stating that he recognized Donald by his appearance and by his voice that he had often heard through the thin walls at the cheap apartment complex. A computer check revealed that Donald had a long criminal record including convictions for several burglaries and a prior armed robbery. The day after the robbery, Donald's parole officer supplied police officers with a current address. San Antonio police officers went to Donald's apartment to arrest him at 2:00 A.M., although the officers did not have a warrant. The officers observed a car registered to Donald in the parking lot of the apartment. Without knocking on the door of his apartment, they broke open the door and found Donald asleep in his bed. On the kitchen table about twenty feet from the bed the officers observed a gun similar to the one that the store clerk had described as the gun used by the robber. Officers seized the gun and arrested and handcuffed Donald and took him to the police station.

At the station, officers gave Donald warnings that fully complied with Article 38.22 of the Texas Code of Criminal Procedure. When Donald said that he did not want to speak to the officers, interrogation ceased and Donald was returned to his jail cell where he stayed until his preliminary initial appearance before a magistrate the next day. After determining that Donald was indigent, the magistrate appointed an attorney for Donald at his request. Three days later, Donald was indicted for armed robbery and he met his attorney for the first time, who interviewed Donald at the jail for nearly an hour. Bail was set at an amount that was higher than Donald could meet, and he remained in jail.

Donald's stay in the Bexar County Jail was brief, however. Donald and his cell-mate, Tommy Thomas, escaped from the jail, after overpowering a guard and taking him hostage. Although no gun shots were fired during the jail break, several employees at the jail were threatened by Tommy, who had obtained the guard's gun. A county-wide manhunt ensued that involved roadblocks that were set up to stop cars to search for the escaped inmates and their hostage. A witness saw the two inmates steal a car that had been parked in the jail parking lot, a green late model Buick sedan.

Within an hour after the jail break, Donald was arrested, alone and on foot, about a mile from the jail. Donald was immediately put in handcuffs and leg restraints. In the squad car, officers demanded to know where Tommy and the hostage were located. Although no warnings were given by the officers, Donald said that he wanted to talk to his attorney. The officers ignored Donald's request and continued to press for information concerning the location of Tommy and the hostage. Donald then admitted that he had left the jail with Tommie and the hostage but declined to say anything else about it. Donald also admitted that he had committed the convenience store robbery that had put him in jail in the first place.

When Donald arrived at the police station, he was taken to an interrogation room and, for the first time on this evening, was given warnings that complied with the requirements of Article 38.22 of the Texas Code of Criminal Procedure. However, neither these warnings or Donald's subsequent statement, repeating what he had said in the squad car, was reduced to writing or recorded.

Two hours after Donald was apprehended again following the jail break, witnesses to the events at the jail as well as the convenience store clerk and the customer who had been in the store at the time of the robbery were shown photographs of men who had a physical appearance generally similar to Donald. Also included in the photographic array was the photograph of Donald that had been taken following his arrest at his home on suspicion of the convenience store robbery. A physical line-up including men who generally resemble Donald was then conducted on the same evening. Both the witnesses at the jail and the two people who had been present at the convenience store selected Donald and his photograph in these proceedings. These same witnesses also testified at trial and identified him. The next day, a grand jury indicted Donald on charges of escape and kidnapping and another attorney was appointed to represent Donald on these charges at Donald's initial appearance.

At Donald's trial on the escape and kidnapping charge, Donald took the stand and testified that he only participated in the escape and the taking of a hostage because he was coerced by Tommy Thomas, who threatened him with the gun that Tommy had taken from the guard. According to Donald, he was dumped on the side of the road by Tommy a short distance from the jail. On cross-examination, the Prosecutor asked Donald: "If your

testimony is true why didn't you turn yourself in to the police after Tommy Thomas pushed you out of the car? Why didn't you tell this story to the police after you were arrested or when the police questioned you at the police station? The defense objected to these questions.

On the night of the jail-break, San Antonio police officers set up several roadblocks on major streets near the jail. Under the guidelines that were quickly developed by the leadership of the San Antonio Police Department, all cars were to be detained briefly to examine the passenger compartment of all vehicles from the outside. The drivers and passengers in the vehicle were to be asked for identification and briefly questioned to determine whether the occupants had any knowledge of the jail-break. Permission was to be sought to obtain the car keys in order to look in the trunk. If the brief inquiry and view into the passenger compartment and trunk, yielded no suspicion, the vehicle was to be allowed to proceed. However, there was a secondary referral post that would allow for further inspection. The guidelines for the roadblocks that were e-mailed to the officers executing them stated that any green Buicks containing multiple male occupants should be sent to the secondary referral area as well as any other car that "raises the officer's suspicion."

Because Bobby Brown drove a green Buick and there was another male in the car, Charles Cooper, the vehicle and its occupants were sent to the secondary referral point where officers asked both men to exit the vehicle. Both men complied and were subjected to outer garment pat-down frisks. The frisks and the search of the passenger compartment and the trunk did not lead to the discovery of anything unusual. However, when one of the officer's observed a portion of a baggie sticking out of the gas tank area, he requested that a drug and bomb-detecting canine be brought to the scene. Brown and Cooper were placed in a squad car for 15 minutes until the dog arrived on the scene. When the dog alerted at the gas tank area, the officers popped the release button from the car's interior and discovered a baggie containing a white powdery substance in the recessed gas tank opening area.

After the police arrested both men, they searched the car and the two defendants again but did not find anything of interest. However, officers obtained a search warrant for Bobby Brown's home and found more white powder, which later testing showed was cocaine (as was the case for the substance found in the gas tank area). Another group of officers went to the home of Charles Cooper, although these officers did not have a search warrant. However, the officers knocked on the door and spoke to Cooper's girlfriend who told the officers that she did not live with Cooper but that she was planning on spending the night with him and that Cooper had given her a key and told her to "make herself at home" while he conducted a little "business" before he could join her at home. The police officers asked for and received permission to search the premises from Cooper's girlfriend. In a drawer in the bedroom of the one-bedroom condominium, police officers found a white powdery substance that later tested positive as cocaine.

Making sure to explain your conclusions, in a brief essay, address the admissibility of the following evidence:

- 1) The gun found in Donald Trumpless's home at the time of his arrest for the armed robbery;
- 2) Donald's admission in the police squad car after the jail-break that he had left the jail with Tommy Thomas and a hostage and that he had committed the prior robbery of the convenience store;
- 3) Donald's statement in the police station repeating his admissions made in the squad car concerning the jail-break.
- 4) Donald's statement in the police station repeating his admissions made in the squad car concerning the prior robbery.
- 5) The out-of-court identifications of Donald by photograph and in a physical line-up by witnesses to the robbery and the jail-break;
- 6) The in-court identifications of Donald by witnesses to the robbery and the jail-break;
- 7) The prosecutor's questions concerning Donald's failure to turn himself in or tell officers that he acted under duress in the jail-break because of Tommy Thomas's threat with a gun;

- 8) The discovery of the cocaine found in the car and used against Bobby Brown and Charles Cooper;
- 9) The discovery of the cocaine found in the home of Bobby Brown pursuant to a search warrant;
- 10) The discovery of the cocaine found in the home of Charles Cooper based upon the consent given by his girlfriend.