**CRIMINAL PROCEDURE**
Fall 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 [Phone Calls from Police]**

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

A. ***Domestic Violence Call.*** The officer asks what she is "allowed to do" and then lists a few specific things she wishes to do if permitted—(1) "to go in" to the apartment, (2) to "chat with the complainant," and (3) to "get the evidence" mentioned by the complainant, along with other evidence.

To begin at the beginning, yes, the officer may enter the apartment because the complainant has consented to the entry. While the boyfriend was present, his denial of consent trumped the girlfriend's consent. *Randolph* (208).[2] Once the boyfriend departed with the paramedics, however, his absence prevents him from objecting, and the single consenting occupant may welcome police inside.[3] *Fernandez* (Supp. p. 46). (Note that police did not do anything improper to secure the boyfriend's absence.)[4]

Once inside, the officer is free to chat with the complainant. The complainant is a friendly witness and is not in custody. No warnings of any kind are needed.

---

[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, *Criminal Procedure: Investigation* (2d ed. 2013). "Supp." refers to the 2015 supplement by C&L. Citations were generally not needed even in excellent answers. I include them as shorthand.
[3] Because the officer's call came after the boyfriend's departure, exigent circumstances no longer present a plausible argument for warrantless entry.
[4] No warning concerning the right to refuse entry is needed. *Schneckloth v. Bustamonte* (201).

The TASER in the boyfriend's bedroom is likely beyond the lawful reach of the officer. Each resident of the apartment rents his own bedroom, meaning that the boyfriend's room is his own, and he can exclude others. He evidenced no desire to consent to police searching his room; indeed, he said the opposite. The girlfriend may consent to searches and seizures only of places and things over which she has sole or shared dominion. Absent some evidence that the girlfriend shares the bedroom (*e.g.*, his room is the couple's shared sleeping room, and her room is their shared study), the officer cannot reasonably believe that the girlfriend has authority to consent to a search of the boyfriend's room. *See United States v. Matlock* (U.S. 1974) (discussed in *Randolph* and *Fernandez*). It does not matter if the bedroom door is open and the TASER is in "plain view" from the living room. The officer may not enter the bedroom without valid consent.

The backpack (which allegedly contains drugs, which as contraband are subject to seizure) is more complicated. If the bag is still on loan to the girlfriend, then she may consent to a search of the bag (he assumed the risk of such consent by lending it), and if the marijuana were then discovered, it could lawfully be seized under the "plain view" exception. *Coolidge* (160). If the bag was loaned earlier (for the girlfriend to transport her laptop) and has since been returned, then the girlfriend no longer has authority to consent. It looks like the bag is no longer on loan, but the answer is not certain.

Note that the girlfriend's statements about the TASER and "what she believes (but is not sure) to be" marijuana likely constitute probable cause that would justify the issuance of a search warrant for the bedroom and backpack. The TASER is subject to seizure as evidence of crime even if possessing it is not itself unlawful. Threatening persons with a TASER is almost surely criminal conduct.

As for "whatever else" the officer may find, she can seize whatever she sees (and can reach) while remaining in places she lawfully may be, such as the common living room, kitchen, and bathroom, so long as the items are clearly subject to seizure (*i.e.*, either contraband or evidence, fruits, or instrumentalities of crime). Also, she may pick up and examine any objects over which the girlfriend has authority to consent, and such examinations may help clarify what may be seized.

B. ***Robbery Investigation.*** The second officer asks four questions. Here are four answers.

First, the officer likely did not "mess up" by not Mirandizing Laertes at home. Most interviews at home are not "custodial" for purposes of *Miranda* doctrine. *Orozco* (500); *Mathiason* (501). Unless Laertes was not free to leave (or, to be precise, unless someone is his situation reasonably would not have felt free to leave), he was not "in custody,"

meaning *Miranda* did not apply.[5] That said, after he was arrested, the officers should have Mirandized him. It is unclear from the facts if that occurred.

Second, if the officer sees Claudius waiting for the bus, he almost certainly cannot take his backpack and search it for stolen whiskey. Chances are, the statements by Laertes concerning the booze are not sufficient to establish probable cause. Laertes is "pretty sure" that Claudius brings the whiskey bottle to school daily. How does he know? Maybe the whiskey has been consumed. Anyhow, even with probable cause, an officer cannot search the bag without a warrant.[6] The *Terry* doctrine is no help here because there is no reason to expect Claudius is armed and dangerous at the bus stop (possessing whiskey as a child is not the sort of danger that allows frisks under *Terry*).

Third, the principal probably can search Claudius's bag at school, if she does so in her capacity as a public school administrator. School officials may search students and their belongings at school if the officials have "reasonable suspicion" that the search will yield evidence of lawbreaking or a violation of school rules. Underage alcohol possession violates the law of every state and the rules of most schools. Laertes's tip, if relayed by police to the school, probably satisfies the "reasonable suspicion" standard, and a backpack examination is the sort of moderately invasive search that the Court has upheld. *T.L.O.* (240); *Redding* (241). Note, however, that if the principal is acting as the agent of the police, then the principal will be held to the standards that apply to police investigations, not the more lax standards usually applied to school searches.[7]

**Question 2 [Senate Shakedown]**

Below are brief answers about the proposed investigatory tactics.

A. ***Recording Device.*** The recording is likely permissible. The senator is not in custody, so *Miranda* does not apply. (And an undercover agent is not an interrogator for *Miranda* purposes regardless.) No formal process has begun, so the Sixth Amendment has not attached. This sort of recording does not implicate the Fourth Amendment; the Senator assumes the risk that his conversation partners will betray him. *White* (84). Note, however, that in some states, it is unlawful to record a conversation without the consent of all participants. In such a "two-party consent" state, police would need a warrant to secretly record the senator.

B. ***Senate Mobile Phone.*** This tactic presents issues more complicated than many students realized. Two primary issues deserve attention. First, it is a Fourth Amendment "search" to examine the texts sent from the senator's senate-supplied

[5] If Laertes was in custody, then the officer indeed messed up, and the statements are likely not admissible in the prosecution's case-in-chief.
[6] With probable cause, the officer could seize the bag temporarily and attempt to obtain a warrant.
[7] The resolution of this question in the case of a search of Claudius is complicated and would require facts not provided. *See, e.g.*, *In re D.E.M.*, 727 A.2d 570 (Penn. Super. Ct. 1999).

mobile phone (and the numbers to which they were sent)? Second, if it is a "search," is it reasonable? The key case, *City of Ontario v. Quon* (250), explicitly reserved the question of whether searching a government employee's state-supplied phone is a "search" (253-54), choosing instead to decide that *if it were a search*, the search was reasonable in that case. Accordingly, students who wrote something like "Not a search; *see Quon*" missed the mark somewhat.

So, is it a "search" in the senator's case? Hard to say. On the one hand, it's a state-supplied phone provided for work purposes, so perhaps the senator has no reasonable expectation of privacy. On the other hand, he may well use it in part for personal matters (perhaps with the permission of the senate), and even certain work communications may be private—not all communications with constituents and colleagues are necessarily public documents. I didn't expect students to resolve an issue the Court has ducked, just to identify the question and raise appropriate arguments. A lawyer confronting this situation in real life would want additional information (*e.g.*, what if any notice did the senator receive concerning the phone, did he sign it, etc.).

If it is a search, *Quon* might suggest that the search is reasonable, but one can argue both sides. As in *Quon*, this case concerns job-related misconduct. Unlike in *Quon*, however, in this case the police seek to examine the phone to gain evidence in a criminal investigation. This is not simply an employer worried about excess mobile charges. *See Quon* (254-55). Good answers could find the search reasonable or unreasonable, so long as the most important factors were addressed.

C. ***Window-Peeping Drone.*** Using a drone to peep into Hermes's window is probably prohibited.[8] The key question is whether the tactic would be a "search." If so, police almost certainly need a warrant, and once officers get a warrant, they might as well search the house in a less convoluted manner. If it's not a search, then the tactic is likely permissible, assuming it doesn't violate any local laws concerning drone use, window peeping, etc. (more on that issue in a moment).

It was tempting simply to conclude "no search" and to cite to *Ciraolo* (59) and, even better, *Riley* (63). In Riley, an examination of greenhouse in someone's curtilage by a helicopter flying 400 feet off the ground was deemed not to be a search. (64-65) Here, however, the remote-controlled device would be "a few feet" from the "second-floor window" of a home, sent for the purpose of examining someone's "papers." This flight may well constitute a trespass, in which case it would be a search. *See Jones* (38); *Jardines* (Supp. 6). Further, even under a *Katz* "reasonable expectation of privacy" analysis, Hermes might prevail. Are drones so common today that we cannot reasonably object to strangers flying them mere feet from our upstairs windows to spy on us? I am not so

[8] Many students referred to the senator's house and desk, not to those of Hermes. While the analysis is the same, repeated confusion of the players betrays inattention to detail.

sure such behavior counts as "general public use." *See Kyllo* (70). In sum, while I can imagine the Court declaring such a tactic permissible, I would bet against it. Police would be foolish to go ahead without a warrant.

D. **Miranda *Invocation.*** Hermes—after being arrested, receiving *Miranda* warnings, and answering "a few questions"—tells police, "I want to talk to my dad." Absent highly unlikely circumstances, police may go ahead with the interrogation. First, note that by answering questions, Hermes has probably performed a "course of conduct indicating waiver," *see Butler* (551); *Berghuis* (553), meaning *Miranda* has been satisfied for the time being. Next, his statement concerning his father is almost certainly not an unequivocal invocation of his rights (either to silence or to counsel). *See Davis* (580). Hermes is a college graduate, so he likely does not have a right to the presence of parents during an interrogation (as a child often would). Unless the senator is a lawyer, and police *know* that Hermes is represented by his father in connection with the investigation, saying "I want to talk to my dad" will not satisfy the standard set forth in *Davis*.

E. ***Recording Device, Part 2.*** This is not the same as Tactic A, despite its similarity. Because the senator has been arraigned, his Sixth Amendment right to counsel has attached. Under *Massiah* (597), secret recording to the senator by police is generally prohibited. If, however, the undercover business person does not "intentionally elicit" information, *see Henry* (623); *Kuhlmann* (627), but instead acts like a "listening post," then the recording does not offend the Sixth Amendment. (The Fourth Amendment and Fifth Amendment analyses are identical to those of Tactic A.) Be careful, however. It seems like it would be quite difficult for the business person to meet the listening post standard. Police will want to give precise instructions.

F. ***Visiting the Senator.*** This analysis differs from Tactic E for two reasons: (1) the police are not asking about the identical matter for which the senator has already been charged, and (2) the police are acting openly, rather than through an undercover cooperator. Because police wish to question the senator about the "phony expenses," they likely are not asking about the "same offense" for which the senator's Sixth Amendment rights have attached. *See Cobb* (609). If the offenses are not the same under the "*Blockburger* test" (discussed in *Cobb*, at 611-13), then the Sixth Amendment presents no obstacle to questions about the expenses. Chances are, each offense has an element that the other does not, making them distinct offenses under Sixth Amendment double jeopardy jurisprudence.[9]

Even if somehow the Sixth Amendment applies, police likely may seek a waiver of the senator's rights. *See Montejo* (613). Unless police act to put the senator in "custody," *Miranda* would not apply. *See Orozco* (500); *Mathiason* (501).

[9] I did not expect students to perform the *Blockburger* analysis in any detail; the statutes were not provided. Raising the issue was sufficient, particularly if one noted the likely result.

**Question 3 [Kyllo Returns]**

This question presented facts extremely similar to *Kyllo v. United States* (70) and asked if a prosecutor would have a "non-frivolous argument" against suppression of evidence obtained via a warrantless "infrared camera" examination of a suspect's attic. Good answers stated the holding of *Kyllo* (*i.e.*, that thermal imaging was deemed a Fourth Amendment "search," meaning imaging of a home normally requires a warrant) and then answered the question presented.

Students who concluded that no non-frivolous argument existed missed an opportunity to earn points. If nothing else, *Kyllo* was decided 5-4, and the dissent is excerpted in the casebook (74). A basic colorable argument would be, "*Kyllo* was wrongly decided, and the Court should overrule it for the reasons stated in the thoughtful dissent."

Better answers examined whether even under the reasoning of the *Kyllo* majority, the prosecution might prevail. (After all, asking the Court to overrule a case decided 15 years ago is usually not a winning strategy.) Solid arguments noted that the *Kyllo* Court held as follows:

> "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." (74)

Further, the Court decided *Kyllo* in 2001, and the case concerned a thermal imager used in 1992.

Thermal imagers (*a.k.a.* infrared cameras) are substantially more common than they were in 1992, or even 2001. Contractors use them, as do home inspectors. Hunters use them to spot game. They are far less expensive than they were a decade ago. Students did not need to know the details of prices and uses; a good answer could note the advance of technology and state that the prosecution's brief would include examples of common current uses.[10]

In sum, a decent (although probably unlikely to prove successful) argument can be made that under the legal principles set forth in *Kyllo*, the police officer in your case did not conduct a "search" for purposes of the Fourth Amendment.

**Some General Comments**

Many students would have benefited from taking time to edit their answers. I realize there is time pressure, and I do not expect copy editing perfection. That said, errors of the "counsel/council" variety, as well as odd choices concerning capitalization, abbreviations, and similar matters can distract from an otherwise well-constructed examination answer.

[10] For the curious: FLIR Systems, Inc. (who made the thermal camera advertisement I showed in class) and Seek Thermal, Inc. both sell infrared cameras attachments for common mobile phones. Prices start around $250. Less expensive (albeit presumably less powerful and effective) options are also available from other vendors.

In addition, several students wasted time and words with opening paragraphs that resembled preambles, in which they presented general recitations of potentially applicable law. For example, in the question about the domestic violence call, a needless preamble might discuss the Fourth Amendment in a general manner and would list a variety of exceptions to the warrant requirement that don't apply to the facts presented, only then turning to the consent issue. Such exercises did not cost students points directly but did have what economists would call "opportunity costs."

*Final Comment:* This document contains 2993 words, including footnotes.