

## Sample Essay Exam Questions and Answers

1. Officer Starbucks was patrolling one morning when he was approached by Joe, a homeless bum who lived in a make-shift shack under a highway overpass. Officer Starbucks had seen Joe wandering about the neighborhood on occasion. However, the officer had never talked to him before. Joe came up to him and the following conversation took place:

Joe: I saw a man steal some Krispy Cream donuts from an old lady.

Officer: Really? Where is he?

Joe: That's him over there sitting in that Mercedes."

Officer: Are you sure?

Joe: Yes I'm sure. I saw this elderly woman come out of the Donut Shop with a box of Krispy Cream donuts. She set the box down on a bench while she was using the pay phone, and this guy came along, while her back was turned and grabbed the box. I followed him for two blocks to his car. He's a thief.

Officer: Alright, I'll check it out, but you better not be lying to me, cause I know where you live.

Joe: I'll wait right here. You'll see I'm telling you the truth.

Officer Starbucks was in uniform and armed, but at all times kept his weapon strapped in his holster with the safety lock still on. He walked over to the Mercedes that Joe had pointed out. He observed nothing unusual. A rather obese man dressed in a business suit was sitting in the driver's seat talking on his cell phone. The officer did not see a brief case or a Crispy Cream donut box or any donuts. Officer Starbucks tapped on the driver's side window and said in a polite tone of voice: "Would you mind stepping out of the car?" The man rolled down the window and the following exchange took place:

Driver: Excuse me? What did you say?

Officer: Would you mind getting out of your car so I could talk with you?

Driver: Sure, OK.

When the man got out of his car Officer Starbucks noticed nothing unusual. However, it was his habit to always pat down anyone he talked to at close quarters. Without seeking the man's consent, or saying anything further, he patted down the man's outer clothing as he stood there. When he patted the outside of the man's front coat pocket he felt something soft and squishy. Having no idea what it might be, the officer reached in, putting his hand inside the pocket, and pulled out a half-eaten Crispy Cream donut.

Officer Starbucks arrested the man and upon checking his identification discovered that the man was none other than Jellyroll Chubbyman, the notorious Crispy Cream donut thief.

Assume Chubbyman is prosecuted for stealing the donuts and you are a legal intern working for the attorney that Chubbyman hired to defend him. The attorney, who has just started practice and does not have much experience in criminal cases, wants to exclude from evidence the half-eaten Crispy Cream donut found in the defendant's coat pocket. However, he is not sure whether a motion to suppress that evidence on Fourth Amendment grounds will be successful. Assume there is no other evidence in the case that can incriminate Chubbyman.

Assume that you have been given the police report and transcripts of interviews which contain all of the above information. The attorney has asked you to write a memo answering the following questions:

- A. ) Did the officer violate the Fourth Amendment when he asked the defendant to get out of his car? In answering this question consider:
- a) Was there a seizure?
  - b) Did the officer have reasonable suspicion that defendant might have stolen the donuts based on Joe's tip?
- B. ) Did the officer's conduct which discovered the half-eaten donut constitute an unreasonable search and therefore violate the Fourth Amendment?
- C. ) The Prosecutor has made a very attractive plea bargain offer which she says she will withdraw if defendant files the motion to suppress. Based on your answer to the above two questions do you think Chubbyman should take the plea bargain or file the motion to suppress?

Please take your first bluebook and write on the outside cover: Question #1. Use no more than a total of four (4) facing pages, answer all parts of question #1. Identify each part of your answer with the heading: 1A, 1B and 1C. Write only on the face of each page, not the back.

Tip:

Read the questions carefully and answer only the question that is asked. In other words don't start writing about whether his arrest was proper, or whether he had a right to counsel, etc.

Q1. Answer:

1A. Under recent Supreme Court precedent it would appear that the police officer's polite request to get out of his car so he could talk with him was not a seizure. The test for a seizure is whether, looking at the totality of the circumstances, a reasonable person, innocent of any wrongdoing, would feel free to go about his business and terminate the encounter by declining the officer's request. U.S. v Drayton. (at p. 217) Here the officer spoke in a polite tone of voice and said nothing that would indicate that the driver was required to exit his vehicle. The officer did not brandish a weapon, use intimidating language or block the car from leaving. Indeed the language used here ("Do you mind...?") is similar to the language used by the officer in Drayton where the Supreme Court found that no seizure had occurred when the officer displayed his badge to a seated bus passenger and asked if he could check his baggage and his person. Likewise here Officer Starbucks simply made a request, not a command. Because there was nothing coercive or confrontational about the encounter, Chubbyman's compliance with this request would therefore likely be found to be voluntary and not the result of a seizure.

Furthermore, even if the encounter was deemed to be a seizure, it was justified by reasonable suspicion based on Joe's tip. Under Adams v Williams, a tip by an informant made directly to the officer face-to-face, provides sufficient "indicia of reliability" to constitute reasonable suspicion because if the tip was bogus, the officer could arrest the

informant for giving a false report. ( p 163-64). Here the officer knew where Joe lived and could have arrested him if he lied. An officer who has reasonable suspicion can make a temporary seizure to investigate criminal activity. Terry v Ohio. Therefore even if Starbucks had ordered the defendant to get out of his car for the purpose of talking with him, that brief investigatory seizure, being minimally intrusive and not tantamount to an arrest, would be justified on the basis of Joe's tip.

1B. Even if there was no seizure, the officer had no right to search Chubbyman for either weapons or donuts. The officer clearly violated defendant's Fourth Amendment rights by subjecting him to a pat down search because the officer had no fear for his safety. Officer Starbucks had no information indicating the defendant was armed or dangerous. The crime he was suspected of (theft) was not one that involved the use of violence or weapons. The officer's failure to draw his weapon also shows that he did not subjectively fear any danger from the defendant, who appeared to be a businessman and who cooperated. Therefore the pat down search violated defendant's right to be free from unreasonable searches and the evidence should be suppressed.

Furthermore, even if he was justified in doing a pat down, Officer Starbucks exceeded the scope of what was necessary to ensure his safety by reaching inside the pocket. The only purpose of a Terry search is to discover weapons. Because the scope of the search must be reasonably related to its purpose, all that is allowed is a pat down. Sibron v New York An officer therefore is not justified in conducting a full search of a pocket unless he reasonably believes the object may be a weapon or otherwise had probable cause to believe it is evidence of a crime. When the officer felt something "soft and squishy" his right to search ended because it could not have been a weapon. Because the officer had "no idea" what the object might be, he also cannot claim he had probable cause to believe it was a donut. Even if he could, since he had no right to do the pat down in the first place this discovery was the fruit of an illegal search. See Ybarra v. Illinois ( at p 233).

1C. File the Motion to Suppress! The "no fear" argument is a sure winner!

2. Sam was a detective assigned to the State anti-pollution enforcement unit. Hoping to increase the number of polluters he could catch, Sam started a Hot Tips Anonymous web page on the internet. The web page was set up so that anyone could leave a confidential message about a suspected polluter in total anonymity. One day Sam received the following anonymous tip:

There is a fellow in La Jolla who is storing toxic chemicals in his house and using his backyard as a toxic dump. The house is near the university off Torrey Pines Road. I guarantee that if you investigate this you will catch a big time polluter.

It is of course illegal to store toxic chemicals in a residential area. Sam drove up and down Torrey Pines Road but could not see anything unusual. He then hired a helicopter and flew at 400 feet over the area near the university. Many of the homes had fenced in back yards with swimming pools and green yards. However, he observed that a large open yard area behind one home was mostly brown in color and appeared to have lots of leaking barrels piled into mounds. The area was not fenced in nor was there any wall or embankment linking it to the home. He circled over the area using a sophisticated gamma ray imager, known as the Star

Trek 2000, which had been developed just recently to detect toxic chemicals. The device gave a positive reading indicating the presence of toxic chemicals in the barrels.

Sam then checked on the ownership of the land and found that the home and the adjacent yard area behind it were owned by the president of the Acme Chemical Company. Sam has prepared an affidavit for a search warrant of the home which includes (1) the anonymous tip, (2) his observations from the helicopter and (2) a printout made by the Star Trek 2000 imager showing a high level of toxic chemicals present in the barrels.

2a. Did either the officer's observation of leaking barrels from the helicopter or the scan of the yard area by the Star Trek 2000 violate the Fourth Amendment? Explain why or why not.

2b. Would you grant the search warrant for the home if you were the judge? Explain

Please take your second bluebook and write on the outside cover: Question #2. Use no more than a total of three (3) facing pages to answer this question. Write only on the face of each page, not the back.

Q2. Answer:

2a. The officer's naked eye observation from the helicopter at 400 feet and the use of technology to scan the open field for toxic chemicals did not violate the Fourth Amendment.

The Fourth Amendment does not apply unless the government's conduct constitutes a search. A search occurs when the government invades a reasonable expectation of privacy (REP). The defendant must subjectively manifest an expectation of privacy and that expectation must be one that society accepts as reasonable. A person has REP in their home and the curtilage – the area immediately surrounding the home which is used for intimate activities associated with the everyday use of the home. However, under the PENS test ( Proximity, Enclosure, Nature of use and Steps taken to protect privacy) the yard area is not curtilage. While the area is close to the home, the defendant did not link the area to the home by enclosing it with a fence nor did he take any steps to even show that he subjectively expected privacy. Storing waste in barrels is also not something one typically thinks of as a activity associated with the home or “privacies of life.” The area is thus simply an open field and there is no REP in an open field (Oliver). Therefore, even though the tip was anonymous, it does not matter. The police do not need probable cause because the defendant has no threshold REP in the yard area and the observation was therefore not a search. The officers could have even trespassed onto the yard area and it would not be called a “search” for Fourth Amendment purposes.

It also follows that the scan by the Star Trek 2000 also did not constitute a search. Even if this technology was not generally available to the public, the area simply is not protected by the Fourth Amendment because the defendant does not have any reasonable expectation of privacy in an open field.

2.b. Yes, I would grant the search warrant because there is probable cause.

Probable cause is determined by looking at the “totality of the circumstances” to determine whether a person of reasonable caution would be justified in the belief that evidence of a crime is located in the place to be searched. The information upon which probable cause is based must be reasonably trustworthy. Where police use an informant's tip, trustworthiness is determined by looking at whether the informant is credible and whether or

not the informant had a reliable basis of knowledge. While these factors are important they are not rigid requirements and a deficit in one or both can be overcome by corroboration of the tip.

It is true that the anonymous tip, standing alone, did not provide probable cause. There is nothing in the tip itself to show the informant is truthful (credibility prong) nor does it tell us how the informant acquired his information (reliable basis of knowledge prong). However, both the officer's observation of the leaking barrels and the Star Trek 2000 scan detecting toxic chemicals in the open field adjacent to the home (neither of which was not an unlawful search) corroborated the tip's assertion that the yard was being used as a toxic dump. Verification of this detail corroborated the tip sufficiently to make it reasonable to believe that the informant's other assertion that toxic chemicals were being stored in the home was also true. (See Draper at p. 144) Under the totality of the circumstances, when the tip is added to the officer's observation of the leaking barrels and the scan which revealed the presence of toxic chemicals in those barrels, there is enough for probable cause.

3. Jennifer Sawlittle was the only eye-witness to a drive-by shooting of a police officer who had been working undercover in an attempt to infiltrate a suspected terrorist organization. The shooting occurred at 10:00 at night on a dark street. Jennifer had been on the balcony of her third story apartment looking at her cat that had climbed out on a ledge, when she heard several shots. She turned, looked down, saw someone leaning out of the passenger side of a speeding car with a gun in his hand, and watched a man fall on the sidewalk as the car sped away. The car was about 50 yards away at the time she first saw it. She could not describe the car, and described the shooter only as "a white, bearded male, wearing a turban." Jennifer said "Everything happened so fast, the car was gone in just a matter of seconds."

The police suspected that John Walker Taliban was the assassin because he was known to wear a turban, and had expressed anti-government views in the "letters to the editor" column of a local newspaper. The police obtained a photo from Taliban's high school year book, scanned it into a computer, and using a "Photo Shop" computer software program, touched it up by adding a turban. This single photo was then shown to Jennifer three days after the incident. Jennifer said, "I am not sure, but he could be the one." The detective in charge of the investigation told Jennifer: "Good, that's what we think too."

Several weeks later (based on additional information which you are to assume amounted to probable cause) J. W. Taliban was validly arrested and placed in a line-up. There were three other people in the line-up, including Taliban. He was the only person in the line-up wearing a turban. Jennifer, who had been called to come down to the police station, had been told by the detective: "We have a suspect and we want to see if you can identify him." At the line-up Jennifer immediately picked Taliban, stating: "I am 100% certain that he is the one." Taliban was then charged in state court with the murder of the undercover policeman.

Using the facts in the fact pattern, make the argument for Taliban that Jennifer's in-court identification testimony should be excluded.

Please take your third bluebook and write on the outside cover: Question #3.

Use no more than a total of three (3) facing pages to answer this question. Write only on the face of each page, not the back.

Q 3. Answer:

The defendant Taliban would argue that the identification procedures and conduct by the police violated his right to Due Process guaranteed by the Fourteenth Amendment because they were unnecessarily suggestive and created a substantial likelihood of irreparable misidentification (US+SILM). Therefore Jennifer's in-court identification of defendant should be excluded.

Showing Jennifer a single photo of Taliban was by itself suggestive and totally unnecessary as more photos could have been used. Touching up the photo by adding the turban was even more suggestive and, of course, unnecessary. Conducting a line-up with Taliban in it after showing the witness his single photo was also unnecessarily suggestive. A blank line-up should have been used. Moreover, there were only three people in the line-up (minimum should be six) and Taliban was the only one wearing a turban. This highly suggestive procedure was also totally unnecessary because there easily could have been more people in the line up. Also all people in the line-up could have worn turbans or none could have. The detective's conduct was also unnecessarily suggestive. He bolstered the witness's identification at the photo drop by saying "Good that's what we think too" after Jennifer only tentatively picked out Taliban's photo. The detective's comments just before the line-up ("We have a suspect and we want to see if you can identify him.") were also unnecessary and suggestive. Therefore defendant has established the first prong of the Due Process test: the identification procedures employed were unnecessarily suggestive.

Balancing the DCOAT factors, it is clear that these unnecessarily suggestive procedures created a "substantial likelihood of irreparable misidentification:"

Description: The general description "a white bearded male" lacked any details. This fact plus her inability to describe anything about the car indicated that Jennifer Sawlittle in fact saw little. Certainty: The fact she is now 100% certain means little because she was initially "not sure" at the photo drop. Moreover, her certainty at the line-up is undoubtedly due to the fact that her tentative identification of the photo was "bolstered" by the detective when he confirmed that Taliban was the one the police also suspected. Opportunity to Observe: Jennifer's opportunity to view Taliban's face was extremely limited. It was dark. The car in which the shooter was riding was half a football field away when she first saw it and she had only a momentary glance ("seconds") as the car passed by. Attention: Jennifer's attention had been actually focused on her cat (away from the street) until she heard the shots. Therefore this factor also indicates she did not get a good look at defendant's face. Time: Finally the time between the event and the suggestive procedures was significant. The suggestive photo drop was done three days after the event and the suggestive line-up was two weeks after the event. Conclusion: Weighing all of the above factors there is a substantial likelihood that Jennifer's incomplete and faded memory of the shooter's face was filled in by the suggestive photo of Taliban. She thus picked Taliban out at the line-up because the face in the photo is what she now believes is the face of the shooter. Because her memory was altered at an unconscious level, this misidentification is irreparable. The in-court identification should therefore be excluded.