

Criminal Procedure

Mary M. Cheh

THIRD EDITION

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CRIMINAL PROCEDURE

Third Edition

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Criminal Procedure

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- *Exam Pro* Criminal Procedure was written by Mary M. Cheh, a highly respected law professor at George Washington University Law School. Professor Cheh has taught Criminal Procedure for over 20 years, has prior experience as a prosecutor and consultant to the Presidents' Commission on Organized Crime and the National Institute of Justice, and is a recognized expert and media commentator on legal affairs.

CRIMINAL PROCEDURE

Preface

To the student:

Objective examinations are now common in American law schools. As a result, more students are seeking opportunities to practice and prepare for objective testing. This volume, and indeed the entire Exam-Pro Series, answers that need. But that's not all. These books give students a new and enjoyable way to pull together what they have studied, to test themselves on their understanding, and to prepare for any kind of examination, whether essay, short-answer, or objective.

Exam-Pro: Criminal Procedure consists of three examinations of forty two questions each. These questions can be used as practice essay questions, hypothetical problems to consider while studying the particular subject in class, or as actual objective questions to be answered under exam-like conditions.

After answering the questions, the innovation (and the fun) lies in assessing how well you did and why. The book contains answers that fully explain why one choice is correct and, as importantly, why the alternatives are wrong. Every answer is a compact consolidation of relevant principles, and these can easily be used as study summaries. If a question is based on an actual case, that is noted and a citation is provided. In addition, each answer includes references to additional sources, namely LAFAVE, ISRAEL, KING & KERR, *CRIMINAL PROCEDURE* (5th ed. 2009 & Supp. 2010) and WHITEBREAD AND SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* (5th ed. 2008 & Supp. 2010), to permit you to pursue topics in greater detail.

Basic courses in criminal procedure do vary, but the subjects covered here are typical of the vast majority. The bulk of the questions address interrogation and confessions, search and seizure, right to counsel, eyewitness identification, and the exclusionary rule. You will also encounter an occasional question in other areas such as entrapment and outrageous police conduct, bail, the grand jury, and harmless error. There is no particular order to the questions, and each exam is meant to include a full cross-section of all of the topics. If you do choose to take any of the tests under exam-like conditions (and that is an excellent idea), allow two hours to complete all forty two questions.

For this, the third edition of EXAM PRO, my thanks go to Laura D. Mazor, class of 2012, who provided invaluable research assistance. Needless to say, all errors are my own. Thanks also to my faculty support assistant, Mary Wells, for her help in facilitating this project.

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CRIMINAL PROCEDURE

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EXAM I

CRIMINAL PROCEDURE

MULTIPLE CHOICE

OBJECTIVE QUESTIONS

EXAM I

Raphael Trice was charged with assault with intent to commit robbery and illegal possession of a firearm. The government's evidence at trial showed that, just before 2pm on a Sunday afternoon, Earl Green was shot while walking near his residence. Green testified that Trice approached him and demanded that Green "give it up." Trice then shot Green with a shotgun and ran away. Green, who was only grazed by the shot, immediately called 911 and, within minutes after the incident, identified Trice as the shooter. Green explained that he knew Trice from the neighborhood. He even gave the police the address where he was "pretty sure" Trice lived. Green accompanied the police down to the station to provide further information and, while there, an officer showed him a photograph of Trice and said, "Is this the guy who robbed you?" Green said, "Yes, that's him." A short time later, Detective Truman obtained an arrest warrant for Trice and arrested him in his home. While in the home, Detective Truman saw Trice's mother and several small children who apparently also lived in the home. Detective Truman escorted Trice to his police car where he read Trice the Miranda warnings and asked, "Do you want to answer any questions at this time?" and Trice replied emphatically, "No." Detective Truman then asked Trice for his full name, social security number, and whether he had any serious medical conditions. Truman then asked Trice, "I'd like to know where the shotgun is. There are little kids in your house. I don't want anyone to get hurt." Trice responded, "It's okay, I gave it back to the person I borrowed it from." Truman did not ask any more questions.

QUESTIONS:

1. **At a suppression hearing prior to trial, Trice moved to exclude his answer to the question about the gun, arguing that**

Detective Truman did not honor his right to remain silent; the trial court should:

- (a) Deny the motion because the question was part of the routine inquiries that are made of suspects, and Miranda was never meant to apply to such an inquiry.
 - (b) deny the motion because Detective Truman scrupulously honored Trice's invocation of his right to silence and immediately turned from investigative matters to administrative ones.
 - (c) deny the motion because Truman's question was reasonably prompted by concern for public safety and was, therefore, within the "public safety exception" to the Miranda rules.
 - (d) grant the motion because, by asking about the gun, Truman failed to honor Trice's right to remain silent, and the public safety exception cannot apply once a suspect is removed from his home.
 - (e) grant the motion because no questions may be asked of a suspect if he insists, as Trice did, on his right to keep silent.
- 2. Prior to trial, Trice moved to suppress any testimony related to Mr. Green's identification of his photograph at the police station and any in-court identification of Trice by Mr. Green. The trial court should:**
- (a) disallow both the photo identification and the in-court identification because the photo identification was unnecessarily suggestive, and any in-court identification would be impermissibly influenced by the photo identification.
 - (b) disallow both the photo identification and the in-court identification because Trice's Sixth Amendment right to counsel was not honored.
 - (c) permit Mr. Green to testify as to the photo identification because it was arguably reliable, but disallow any in-court identification because there is some risk of error, and jurors attach too much significance to such identifications.
 - (d) permit Mr. Green to testify about the photo identification and to make an in-court identification
 - (e) permit Mr. Green to make an in-court identification but not to testify about the photo identification

Clifford Bogel's brother was murdered in the District of Columbia one day in early June. That very day, Bogel flew from California to the District to make funeral arrangements. Three days later undercover officers saw a man, later identified as Clifford Bogel, run up and shoot a man on the street. Marty, the victim, was shot multiple times and collapsed and died on the sidewalk. The police chased after Bogel, he eluded them briefly, but they eventually captured him and placed him under arrest. At the station house, Detective Gonzalez wanted to question Bogel about Marty's murder and read Bogel the Miranda warnings. Bogel said he did not want to talk "right then." Gonzalez then left the room and did not speak to Bogel again. About one hour later, Detective Parker asked Detective Gonzalez if he could speak to Bogel about the murder of his brother. Gonzalez told Parker that he had read Bogel his Miranda warnings and that Bogel had invoked his right to silence and did not want to talk about the murder case against him. Neither detective had any reason to believe there was a connection between the two murders. Gonzalez then introduced Parker to Bogel, telling Bogel that Parker only wanted to talk to him about the murder of his brother. Gonzalez then left Parker alone with Bogel. Parker told Bogel that he was investigating the murder of his brother and that he wanted to talk to him only about that murder and not the murder that Bogel was charged with. Parker asked Bogel if he had any information about who might have shot his brother. Bogel asked about what others had told the police, and when Parker said no one seemed to know what happened, Bogel then said, "Let me tell you what happened." Bogel then explained his view of who killed his brother, and he went on to make incriminating statements about his involvement in the murder case against him.

QUESTION:

3. **In the murder case against him, Bogel now seeks to suppress the incriminating statements he made to Detective Parker. Bogel claims the statements were obtained in violation of his Miranda rights. The district court should:**
- (a) suppress the statements because Bogel invoked his right to silence and questioning him again within one hour did not scrupulously honor his rights.
 - (b) suppress the statements because Detective Parker did not rewarn Bogel before he asked him the questions about his brother's murder.
 - (c) suppress the statements because, once Bogel invoked his Miranda rights, further questioning could only take place with Bogel's lawyer present.

- (d) admit the statements because Bogel evinced a willingness and desire to engage in a discussion with Detective Parker.
- (e) admit the statements because the questions Detective Parker asked were not interrogation within the meaning of Miranda.

* * *

Sally Johnson was arrested and indicted for the murder of her husband. Counsel was appointed, and she was held in the county jail. Norma Holloway, also awaiting trial for murder, was housed in the same cell block as Johnson. Holloway asked the jail guards if she could talk to Detective Jenner of the homicide squad, whom she knew from some prior brush with the law. Holloway told Detective Jenner that she was on the same cell block as Johnson and offered to report any incriminating statements she might make, "if it could help me with a lighter sentence." Detective Jenner said, "Well, if you bring us something, I'll see what I can do. See what you can find out, but don't get into any interrogation type thing with her. Just listen and pay attention." Over the next two days, Holloway engaged Johnson in conversation. She asked her, "What are you in for?" and "What's your story?" Johnson said she was going to use an alibi, but Holloway suggested that she come up with something better because "if they find the body, they can always get some evidence, like hair or something, linking you to the crime." At that, Johnson laughed and said, "Don't worry about that. I put the body where the Lord himself couldn't find it."

QUESTION:

4. **At Johnson's trial for murder, the prosecutor plans to introduce Johnson's incriminating statements. Johnson argues that introduction of the statements will violate her Sixth Amendment right to counsel. The evidence is:**
- (a) inadmissible because Johnson did not know she was speaking to an informant and was, therefore, unaware of her right to keep silent.
 - (b) inadmissible because Holloway was acting as an agent of the state and affirmatively induced Johnson to make incriminating statements.
 - (c) admissible because Holloway initiated contact with the police, was acting for her own benefit, and was not an agent of the state.
 - (d) admissible because Johnson did not know she was speaking to an informant and, therefore, was not under any pressure to make the statements.

- (e) admissible because Holloway was told not to interrogate Johnson, and her failure to follow instructions means the state was not responsible for her behavior, and there was no state action.

Assume that the statements from the previous question are inadmissible and that Johnson's husband's body has not been found. At trial Johnson takes the stand and, during her direct examination, testifies that she is innocent and therefore does not know where her husband's body is located. During the State's rebuttal, the prosecutor called Holloway to the stand and asked Holloway to divulge what Johnson had revealed about the whereabouts of the body.

QUESTION:

5. Assume that Johnson's counsel objects to the question asked of Holloway. What is the judge's likely ruling on the admissibility of the evidence?

- (a) The testimony is admissible because it is being used to impeach Johnson's credibility.
- (b) The testimony is admissible because the police acted in good faith when they told Holloway not to ask about the crimes and the fact that she did not listen is not the kind of mistake that furthers the purpose of the exclusionary rule.
- (c) The testimony is inadmissible because it is the fruit of the poisonous tree.
- (d) The testimony is inadmissible because the statements did not lead to the body and therefore, the inevitable discovery doctrine does not apply.
- (e) The testimony is inadmissible because the Sixth Amendment violation here, unlike Fourth Amendment violations, occurs when the evidence is admitted at trial.

* * *

Wisconsin police had probable cause to search a car parked on a public street. They did not have a warrant, although there was no exigency preventing them from getting one. A search of the car netted cocaine and illegal guns and the owner of the vehicle, Miss Muggle, was charged with drug and gun possession. The Supreme Court of Wisconsin ruled that the search was illegal because there was no warrant. In reaching this conclusion, the Wisconsin high court relied on its interpretation of the Fourth Amendment of the U.S. Constitution and on an

analogous provision of the state constitution. The state prosecutor appealed to the United States Supreme Court, arguing that Wisconsin was not free to disregard Supreme Court precedents establishing the “automobile exception” to the warrant requirement, that is, that police, with probable cause may search a car without a warrant.

QUESTION:

6. Assuming the Wisconsin prosecutor is correct about the “automobile exception,” which of the following statements is the most accurate and appropriate?

- (a) Wisconsin is free to apply its own interpretation of Fourth Amendment requirements so long as it provides greater protections for the criminally accused, not fewer.
- (b) Wisconsin is free to apply its own interpretation of Fourth Amendment requirements unless the Supreme Court chooses to exercise its supervisory power to assure uniformity among the various state court judgments.
- (c) Wisconsin is free to interpret its own state constitution in any way it sees fit so long as the case involves only a local or state prosecution.
- (d) Wisconsin is free to interpret its own state constitution to give greater protections to the criminally accused than those provided by the federal constitution, but Wisconsin must provide a clear statement that that is what it is doing.
- (e) Wisconsin is not free to provide greater or lesser protections than those of the Fourth Amendment. If the Fourth Amendment is applicable to the facts, the State’s constitutional provision is preempted.

* * *

In November seven members of the Del Ray Police Narcotics Squad arrested Steven Matt in his grocery store, Matt’s Market. The officers had a valid arrest warrant, but although they had probable cause to search and were in the process of securing a search warrant, they did not yet have a warrant to search the premises. Because they received credible information that Matt might be armed, the officers entered the store with weapons drawn. The few customers in the store were escorted out, and Matt, who was behind the counter, was seized, handcuffed, and informed of his Miranda rights. With matters in hand, the officers holstered their weapons. The officers then told Matt they would like to search his store and asked for his consent. At first Matt said nothing, and one of the

officers said, "Look, you do what you want. We have sufficient information to get a search warrant and will secure one by this afternoon or tomorrow." Matt then said, "I want to talk to my lawyer." He went to a telephone and tried twice, unsuccessfully, to reach his lawyer. After hanging up, Matt said to the officers, "Look I know what you are here for," and led the officers to a stash of marijuana behind the counter. The officers seized the drugs and said, "well, that's nice, but we still want to search the whole store." Matt then agreed to let them search, and they uncovered cocaine in some boxes at the back of the store. Later, while in custody at the police station, Matt was approached for the first time by two officers from the Vice Squad who wanted to question him about a gambling operation they believed he was running out of his store. They administered Miranda warnings, and Matt agreed to talk and made incriminating statements.

QUESTIONS:

7. **Matt was charged with gambling offenses and, prior to trial, moved to exclude his statements at the station house. He contends that, because the police initiated questioning after he had invoked his right to counsel, none of his statements may be used in the case against him. The district court should:**
- (a) deny the motion because Matt's reference to a lawyer while in the grocery store was an anticipatory invocation of counsel which does not trigger Miranda's right to counsel rules.
 - (b) deny the motion because the officers who questioned Matt about the gambling offenses did not know he had invoked his right to counsel in the grocery store.
 - (c) deny the motion because the officers who questioned Matt about the gambling offenses reread him his Miranda rights and secured a proper waiver.
 - (d) grant the motion because Matt had invoked his right to counsel, and, as a result, the police were not permitted to reinstate questioning unless counsel was present.
 - (e) grant the motion because police had an affirmative duty to clarify whether Matt was seeking a lawyer in connection with the search of his store or whether he was seeking a lawyer for all of his dealings with the police.
8. **Matt also faces drug charges in connection with the cocaine found in his store. He has moved to exclude the admission of the drugs, arguing that he never voluntarily gave consent for a search. The district court should:**