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Constitutional Law III: Final Examination (May 1973)

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In April of 1972, Daniel Davis, 29, and his brother Donald, 23, had been living for the past two years in a Dodge motor home, a motorized structure which has a livingroom, two bedrooms, a kitchen, and a bathroom. During these two years they had rented a lot at a same trailer park where they could park the motor home and hook up to electricity and water supplies. On Wednesday, April 12, 1973, at 9:30 P.M., Daniel was driving the motor home with Daniel as a passenger when police officer Olney signaled him to stop. Since this occurred within thirty feet of the entrance to their trailer park and traffic was heavy, Daniel pulled into the camp and onto their lot which bordered on the street. Olney was with his partners Oliphant and a third officer, Oliver, to whom Olney and Oliphant were giving a ride home. Olney stopped on the street and asked Daniel to come to the police car, which he did. Olney explained that this was a routine spot check, and asked for Daniel's license and registration. He determined that Daniel owned the motor home and that Daniel was driving on a revoked license. Olney arrested Daniel on the charge of driving after his operator's permit had been revoked, a criminal offense punishable by imprisonment for not more than two years. State statutes require that persons arrested on this charge be taken to the station and booked; they may not simply be given traffic citations. Pursuant to departmental regulations, Olney then searched Daniel. Finding an object in Daniel's coat pocket, he removed it. The object was a wadded up cigarette package. Olney opened it and found a dozen capsules with white powder in them. Suspecting this powder to be heroin, he tasted a sample of the powder, decided it was heroin, and informed Daniel that he was now charged with illegal possession of heroin. (Later lab tests confirmed that the powder was heroin.) Olney also found a large number of high denominational bills in Daniel's wallet.

While Olney was with Daniel at the police car out of hearing of the motor home, Officer Oliphant had walked to the passenger side of the motor home. Shining his flashlight on Donald's face, Oliphant opened the passenger door and ordered Donald to get out of the motor home. He searched Don and found a small quantity of hashish. Oliphant then arrested Don on charge of illegal possession of hashish, and took him back to the police car.

Olney and Oliphant placed Daniel and Don in the police car and took them to the precinct station, where the brothers were booked. Before leaving the scene, Olney and Oliphant instructed the third officer, Oliver, to drive the motor home to the police station. Before driving the motor home to the precinct, Oliver opened the rear door and looked into the rear part of the motor home, which was paneled off from the front (driver and passenger) compartment. He found a sawed-off shotgun, possession of which is a felony, with the engraving "Donald Dynamite" on it, on a chair. He also saw a suitcase with the name "Daniel Davis" on it. Opening it, he discovered plastic bottles containing approximately 50,000 capsules. (These were later determined to be barbiturates and amphetamines.) On a shelf he found a notebook. As Oliver drove the motor home to the precinct house, he glanced through the notebook and read that Daniel and Don were to meet Elton Effretz at the "same place" the following evening (Thursday, April 13, 1972) "for the new shipment."

At the precinct station, Oliver turned the motor home over to the garage staff, who immediately inventoried and impounded the motor home according to police procedure. In the course of this procedure, the police found a stolen Apex color television, and in a jewelry box, which had Daniel's name on it, in a drawer in a chest, a diamond-studded watch which had been reported stolen in a burglary and valued at \$12,500. By this time, Daniel and Donald had been separated for questioning. Daniel was properly given his Miranda warnings and said nothing. Donald was given warnings which did not comply with Miranda. During their

questioning of Donald about the stolen television set, the police mentioned the time and date of the theft. Donald then told the police that a friend named Elton Effretz would confirm his alibi that Daniel and Don were with him at the time the television set was stolen. Donald made no other statements.

The following morning, in court, Daniel was charged with driving after revocation of license; illegal possession of heroin; illegal possession of dangerous drugs (the barbiturates and amphetamines); and two charges each of stolen property, burglary and larceny (regarding the television and the watch); all felonies. Donald was charged with illegal possession of hashish; illegal possession of a sawed-off shotgun; and possession of stolen property, burglary and larceny (regarding the television set); all felonies. Neither brother was able to post bond and thus were not released.

Meanwhile, on Thursday morning, Oliver relayed his information about the scheduled meeting to Lt. Narcy, head of the precinct's narcotics squad. Narcy checked his files and determined that two separate informants had recently reported seeing Effretz sell heroin to others. That afternoon, at 4:30 P.M., one of the informants in Narcy's file on Effretz told him that Effretz was to make a large transfer of heroin to the Davis brothers that evening at 10:00 P.M. in the third-to-last row of the Lotus-Eaters Drive-In Theater, that Effretz drove a 1972 purple-and-white Cadillac Eldorado, and that he was always stylishly dressed in three-piece, wide-lapel suits, flared pants, and wide-brimmed hats. That evening, on the basis of the information from the notebook and the informant, Narcy and several other narcotics squad members went to the Lotus Eaters Drive-In Theater. At 10:15 P.M., in the second-to-last row, Narcy and the other officers spotted a man sitting alone in a 1972 blue-and-white Lincoln Continental, wearing a sweater, flared pants, and a wide-brimmed hat. ~~The squad executed the warrant,~~ searched the car, found a large amount of heroin, and arrested the driver, who identified himself as Elton Effretz, on charges of illegal possession of heroin, illegal possession of heroin with intent to sell, and conspiring with the Davis brothers to illegally sell heroin.

The following morning, at 9:00 A.M., Effretz appeared in court and was formally charged with illegal possession of heroin and illegal possession of heroin with intent to sell. He and the Davis brothers were charged with conspiracy. Following this hearing, Donald was ordered by the police, over his objection, to participate in several line-ups completely unrelated to the present charges against him, his brother, and Effretz. In the fourth line-up at 1:00 P.M., he was identified by two witnesses as a participant in an armed robbery of a bank six months earlier. He was formerly charged in court with this offense later the same afternoon.

Meanwhile, Daniel Davis was again questioned, beginning at 10:00 A.M., by several officers regarding the stolen watch. He was properly given the Miranda warnings, stated he didn't want or need a lawyer, and was then questioned until 4:00 P.M. Breaking into tears he admitted that he had burglarized a home for the watch. At this point, Lawyer Lane arrived at the station from the Court, where he had entered his appearance in behalf of the Davis brothers on all of the charges and been retained by Effretz on all of the charges facing him. In Lane's presence and against his advice, Daniel signed a statement confessing the burglary and theft of the watch.

Friends of the three defendants posted bonds for the pre-trial release of all three later the same evening.

A preliminary hearing was held the following Monday, April 17, 1972. The magistrate found probable cause to bind the defendants over to the grand jury (In this state, felonies can be prosecuted only

upon grand jury indictments.) on all of the various charges except the armed robbery charge against Donald (due apparently to the recantation of his line-up identification by one of the witnesses and the hesitancy of the other witness who identified Donald at the line-up, facts which Lane elicited during the preliminary hearing).

Eleven months elapsed before the presentation of the charges, on March 10, 1973, to a grand jury, which returned subsequent indictments approximately one week later. The indictments were identical to the original charges including the armed robbery charge against Donald. None of the defendants had had any contact with the state except for three conferences (in April, June, and September of 1972) between the prosecutor and Effretz and Lane in which the prosecutor asked Effretz to testify against an individual whom the police suspected of being one of Effretz's suppliers in return for having all of the charges against him dismissed.

I. What pre-trial motions, on what grounds and arguments, should be made by Lawyer Lane on behalf of each of the defendants (omitting motions regarding allegedly improper joinder of parties or charges)? If additional information is required, indicate and make alternative assumptions.

How should each be decided? Why?

II. Prior to trial, Lawyer Lane moves for discovery of the criminal records of all prospective Government witnesses. The jurisdiction's statutes and the court's rules do not provide for discovery of the names of government witnesses prior to trial and to provide for impeachment on the basis of prior criminal records. How should the Court decide this motion?

III. Shortly before trial, Effretz and Lawyer Lane agree with the prosecutor that Effretz will plead guilty to the conspiracy charge in return for the prosecutor's recommendation of a two-year sentence and dismissal of the other charges which carry 5 to 15 and 5 to 30-year sentences. Effretz so pleads, the prosecutor recommends a two-year sentence and dismisses the possession charges. The Court sentences Effretz to a term of from 5 to 15 years of imprisonment. Effretz moves to withdraw his plea. How should the Court rule? Does it make any difference if the Court knew of the bargain between Effretz and the prosecutor?

IV. During the State's case on the burglary and larceny charges involving the television set, the State calls Elton Effretz to testify that Don and Dan were not with him at the time of the burglary and larceny and that they had visited him one hour later to ask if he would like to buy an Apex color television. Lawyer Lane moves to exclude this testimony. How should the Court rule, and why, with regard to Daniel and to Don?

V. During the course of its case on the conspiracy charge, the government introduces a witness to testify that Effretz, while selling him some narcotics on Monday, April 10, 1972, stated that "after this Thursday, the Davis boys will be your new main men." Upon Lawyer Lane's objection, the Court found this statement to be hearsay, but admissible as an exception to the hearsay rule, as reporting statements made in furtherance of a conspiracy. Lawyer Lane then moved to exclude on 6th Amendment grounds. How should the Court rule? Does it make any difference whether Effretz has already pleaded guilty, or is being tried with the Davis brothers?

[Question I represents 80% of the grade on this examination. Questions II, III, IV, and V each represent 5% of the grade on this examination.]