



July 2017

**California
Bar
Examination**

**Performance Test INSTRUCTIONS
AND FILE**

UNITED STATES v. BLAKE C. DAVIS

Instructions.....

FILE

Memorandum to Applicant from Timothy Alfaro

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UNITED STATES v. BLAKE C. DAVIS

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. This performance test is designed to be completed in 90 minutes. Although there are no parameters on how to apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response. Since the time allotted for this session of the examination includes two (2) essay questions in addition to this performance test, time management is essential.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Alfaro, Blevin & Cohn, LLP

MEMORANDUM

TO: Applicant

FROM: Timothy Alfaro

DATE: July 25, 2017

RE: United States v. Blake C. Davis

We represent Blake Davis who may be charged with: (1) the misdemeanor of resisting agents from the U.S. Customs and Border Protection Service ("CBP"), and (2) the felony of possession of cocaine. Mr. Davis views the incident, which took place aboard a cruise ship after it docked at Port Columbia, as an unfortunate incident prompted by a significant investigative error made by the Customs officers who made the arrest.

Maria Castile, the Assistant U.S. Attorney who is reviewing the case, seems inclined to seek an indictment against Mr. Davis. Ms. Castile, however, is willing to consider a plea bargain. Following a lengthy counseling session yesterday, Mr. Davis wants to try to get a plea agreement but does not want a felony conviction on his record.

What I want to do is convince Ms. Castile to accept a guilty plea to misdemeanor resisting.

To support this offer, please draft a letter to Ms. Castile that argues that: the search of Mr. Davis' cabin aboard the cruise ship was unreasonable under the Fourth Amendment to the United States Constitution and hence a possession charge should not be brought because the drugs were illegally seized and will be suppressed. Do not prepare a statement of facts, but use the facts in making your legal arguments.

INTERVIEW TRANSCRIPT

July 18, 2017

Blake Davis (BLAKE): Thanks for seeing us.

Tim Alfaro (TIM): I'm glad both of you could come in. It should simplify getting all the information we'll need.

Ann Davis (ANN): We are so upset about this situation. We really appreciate your help.

TIM: We'll do our best. Now, I know that you were arrested, Blake, for assaulting a U.S. Customs agent and for possession of cocaine as you were about to get off of a cruise ship.

BLAKE: That's right, but it was a huge mistake. We had no idea there were drugs hidden in the wall. The Customs folks got the wrong cabin, they busted in with a drug dog and tossed all of our belongings, and then tried to grab my briefcase from me.

TIM: Why don't you start at the beginning and tell me what happened?

BLAKE: Alright. Well, we had booked this cruise on the *Esprit* months ago to celebrate our 40th wedding anniversary. I didn't realize at the time that I would be buried in work that would force me to bring along stuff that had to get done by the time we returned to Columbia City. It only was because of the need to protect the work product that I got in any trouble.

TIM: Where do you work and what type of work product are you talking about?

BLAKE: I'm an engineer with Allied Industries and I've been working with corporate counsel and others to put together a patent application for breakthrough technology that will revolutionize our business. I had to submit the final paper work right after we got off the ship. I was told by the lawyers, the chief engineer, and the CEO to make sure no one got a look at any of the papers.

TIM: How does this tie in with your encounter with the Customs agents?

ANN: It all happened the morning we were to disembark. We got up early to finish packing; we planned to wheel our luggage off the ship. I got room service, just a light continental breakfast. Blake went up to the buffet area because he wanted a full breakfast.

BLAKE: I took my briefcase with me because I wanted to recheck some final details.

ANN: Right. Well, I was on the balcony sipping coffee when I heard a knock on the door. I thought it was our cabin steward checking to see if we needed anything before disembarking. So I opened the door and there were a man and a woman. She had a dog on a leash – a black Labrador, I think.

TIM: Did they ask you your name?

ANN: Yes, the gentleman said, "Who are you?" and I said, "Ann Davis. What's all this about?" He told me he was from U.S. Customs and they were there to search our cabin for contraband.

TIM: Were they in uniform and did they state their names?

ANN: Sure. I told them we didn't know anything about contraband but he – Oliphant, now I remember – told me to step into the corridor and remain there while they conducted the search. I told him it was some kind of mistake but I did what he asked.

BLAKE: That's when I showed up. I told them who I was and asked them what they were doing. They asked me to step aside and I did. Then they went in.

TIM: From your position could you see what the two agents were doing?

ANN: They propped the door open so I was able to see most of the cabin, except the corner where it was blocked by the bathroom.

TIM: What did you see?

ANN: First, they poked into everything, looking under the bed, opening drawers. I couldn't figure out what they were after. Then they put our three pieces of luggage on the bed and pressed down on them; our bags are soft-sided. Then the dog was brought over to the luggage. It sniffed at each one and then the dog went over to the balcony door and just sat down. After that, the two agents opened each bag and dumped everything on the bed; after we had spent all that time packing them neatly! Then they pawed through every darn thing we owned, every piece of clothing, our toiletries, rifling through the pages of our books, probing into each suitcase – everything. They didn't find anything they were interested in, just like I had told them. When they finished with the luggage, leaving all of our stuff strewn across the bed in piles and some on the floor, they turned their attention to where the dog was sitting. I saw them squat down and poke around with something, maybe a pencil. The guy pulled a panel off the wall and took out a small plastic bag. I had no idea what they found.

TIM: Okay, what did the Customs agents say or do?

BLAKE: At some point, the lead guy, Oliphant, said that they had "reliable information" that we had illegal drugs. I told him that was nonsense, we knew nothing about drugs, and I was outraged they had ransacked our private stateroom. That's when he demanded that I turn over my briefcase.

TIM: What happened then?

BLAKE: I told him “no way,” that the briefcase contained confidential business materials and no one could look through it. Period. He told me I was required to give it to him, that they already found narcotics, and he suspected there was more in my briefcase. I told him he was nuts and to go away. That’s when he tried to grab the case from me. I wouldn’t let go. He and the woman officer threw me to the floor and put the cuffs on me. Then Oliphant took the key to the briefcase from my pocket and tossed everything in it on the bed with our other stuff. That’s when he found my passport and, gosh, was he surprised! He and the woman agent conferred and then he asked me if I was Blake C. Davis. I said, “Of course; that’s what I told you!” He said there had been a mistake. They were looking for *Blaine C. Daviss* with an extra “s” -- spelled D-A-V-I-S-S; some other guy. They had been informed that this other Daviss had a cabin on the same deck, but on the other side of the ship. They took the cuffs off of me and apologized, but said that I would have to accompany them and that I’d be charged with resisting a legal search and possession of cocaine.

TIM: Okay. Thanks so much. Let me get in touch with the U.S. Attorney’s Office and see where this situation stands and what we have to do to try to quash it. That seems like the first thing we have to address.

ANN and BLAKE: Okay. Thanks.

DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
INCIDENT – ARREST REPORT

1. PORT WHERE INCIDENT-ARREST OCCURRED: Port Columbia
2. CBP OFFICER IN CHARGE: Ralph Oliphant #06254
3. NAME OF VESSEL: Sun Cruise Line - *Esprit*
4. DATE: July 16, 2017
5. SUBJECT: Davis, Blake C.
6. SEX: Male
7. HEIGHT: 5' 7"
8. WEIGHT: 140 lbs.
9. AGE: 61
10. RACE/ETHNICITY: White

The undersigned CBP Officer, assisted by Canine Enforcement Officer Veronica Brown, conducted a scheduled vessel search of Sun Cruise Line's *Esprit* when it docked in Port Columbia, in Columbia, following a seven-day cruise that included day-long visits to Acapulco, Mexico and three other foreign ports. As standard procedure before boarding the ship to conduct routine enforcement actions, I accessed the Treasury Enforcement Communications System's ("TECS") computerized database to determine if it contained

any enforcement information about passengers or crew members traveling on the *Esprit*.

Included in the TECS report on the *Esprit* was a "lookout" for a white male, Blaine C. Daviss, 6' 4", 260 lbs., 21 years old. The information was filed by an undercover CBP officer stationed in Acapulco who had observed Daviss during the period when the ship was docked at that port. The TECS report revealed that Daviss had traveled to other drug source countries in the Caribbean and South America on other occasions, had a criminal record (two arrests, one conviction for heroin possession and sale), had purchased his ticket at the last minute and in cash, and was traveling alone. The TECS report also indicated Daviss was observed in Acapulco in the company of three suspected drug dealers for a period of about 30 minutes.

Based on all of the data available in the TECS system for the *Esprit*, I identified Daviss to investigate when our CBP team boarded the ship. I accessed the passenger/crew manifest from the TECS database, but in doing so I erroneously listed Daviss' stateroom as 8132 instead of 8086. Cabin 8132 was assigned to *Blake C. Davis*, the subject of this report, who was listed on the manifest on the line immediately above Daviss. Both had staterooms on Deck 8 but on opposite sides of the ship, Daviss on the port side and Davis on the starboard side.

After boarding the ship, Canine Enforcement Officer Brown, her drug-sniffing dog, and I approached cabin 8132, at which point the dog "alerted" in the hallway. The "alert" indicated that cocaine had been deposited at the site within a year. I knocked on the door of the cabin and it was opened by a middle-aged white female. I identified myself as a CBP Officer and introduced Officer Brown. Upon my request, the woman told us she was Ann Davis(s). I instructed Ms. Davis(s) to step into the hallway while we conducted a search for narcotics. She complied. At that point, the subject arrived and identified himself. I instructed him to comply. He complied. When the dog entered the stateroom, he moved to the corner of the cabin by the glass door that opened onto the balcony and alerted by sitting down. I opened each piece of luggage, removed the

contents and conducted a thorough search of the items and the bags. I found nothing suspicious. I then moved to the area where the dog alerted and, with the assistance of Officer Brown and the dog, pulled a panel off the wall and found a white substance in a large plastic bag that later tested positive for cocaine.

While I was conducting a search of the rest of the cabin, the subject started protesting loudly. I explained we had evidence he was in possession of drugs, that a suspicious substance had been found, and asked him to turn over his briefcase. He refused to do so, claiming it contained confidential business documents. Officer Brown and I wrestled Davis(s) to the floor and forcibly took possession of the briefcase and handcuffed him. A search of the briefcase revealed no contraband. However, when I examined the passport in the case, I learned that the subject's name was *Blake C. Davis*. It was only then I realized we had made an error. We took Davis into custody. Subsequently, we searched stateroom 8086, found a large quantity of cocaine, and arrested *Blaine C. Daviss* for felony possession of cocaine with intent to distribute.

SIGNATURE:

_____ *Ralph Oliphant* _____

RALPH OLIPHANT #06254



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UNITED STATES v. BLAKE C. DAVIS

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United States v. Clark

U.S. Court of Appeals, 15th Circuit (2014)

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Daniel Clark was convicted in the U.S. District Court for the Eastern District of Columbia of violating *21 U.S.C. § 846* (possession with intent to distribute a controlled substance) following the denial of a motion to suppress evidence. On appeal, Clark asserts the United States Custom Service failed to procure a warrant to search his cabin aboard the *M/V Enchanted Isle* where he was employed as a seaman. The judgment of the District Court is affirmed.

I. Facts

On September 7, 2010, the *Enchanted Isle* returned to her home port, Sealand, at approximately 4:30 a.m. after visiting Cozumel, Mexico, the Grand Cayman Islands and Jamaica. The ship was to depart again at about 4:00 p.m. U.S. Customs agents, with the cooperation of the vessel owner, routinely boarded and searched the ship upon reentry at Sealand.

Robert Sedge, a Customs Service agent, had received information from a reliable informant that two crew members, Alan Arch and Daniel Clark, would be transporting illegal narcotics. At approximately 2:30 p.m., Alan Arch, was seen by Sedge passing a package to Larry Bates. Although Clark was with Arch, there was no evidence Clark gave anything to Bates. Bates later was arrested by other Customs agents and a package containing shoes with cocaine hydrochloride innersoles was seized from him. This information was relayed to Sedge who, without a warrant, boarded the *Enchanted Isle* with a drug-trained dog.

Sedge went directly to the cabin assigned to Clark and, after knocking and being admitted by Clark's roommate, entered the cabin, whereupon the dog alerted to the presence of drugs. Sedge did not have Clark's permission to enter the room; the

roommate admitted Sedge based solely on the latter's claimed authority to do so. Clark's roommate informed Sedge that his was the top bunk and pointed out his belongings, with the inference that the remainder belonged to Clark. Upon searching the cabin and Clark's belongings, Sedge found two pairs of shoes with innersoles made of cocaine hydrochloride, one on the lower bunk and another between the bulkhead and the bed. These were the materials that were the subject of Clark's motion to suppress and are the basis of his appeal.

II. Discussion

The *Fourth Amendment* protects "against unreasonable searches and seizures." Whether a search is reasonable will depend upon its nature and all of the circumstances surrounding it but, as a general matter, warrantless searches are unreasonable. Searches conducted at the nation's borders, however, represent a well-established exception to the warrant requirement. The exception applies not only at the physical boundaries of the United States, but also at "the functional equivalent" of a border, including the first port where a ship docks after arriving from a foreign country. The search here, conducted as the *Enchanted Isle* arrived in Sealand, was therefore a border search.

Provided a border search is routine, it may be conducted, not just without a warrant, but without probable cause, reasonable suspicion, or any suspicion of wrongdoing. The expectation of privacy is less at the border than in the interior and the *Fourth Amendment* balance between the interests of the Government and the privacy right of the individual is much more in favor of the Government. Even at the border, however, an individual is entitled to be free from an unreasonable search and privacy interests must be balanced against the sovereign's interests. Consequently, certain searches, classified as "non-routine," require reasonable suspicion of wrongdoing to pass constitutional muster.

The question here, therefore, is not whether the Customs officers were required to have a warrant or probable cause in order to search Clark's private cabin, but,

rather, whether reasonable suspicion was necessary. The parties agree that no suspicion is required in order for a Customs officer to board and search a cruise ship as part of a routine border search. They disagree, however, as to whether any *Fourth Amendment* protection applies to a search of a private sleeping cabin aboard a cruise ship.

To answer this question, we must first decide whether the border search at issue was routine or non-routine and, so doing, set forth the correct standard required under the *Fourth Amendment*. We turn to a determination of whether this search was conducted in accordance with it.

To ascertain whether a border search can be classified as routine, we must examine the degree to which it intrudes on a person's privacy. Highly intrusive border searches that implicate the dignity and privacy interests of the person being searched require reasonable suspicion. In the present case, Clark argues that the search of a cruise ship cabin is not a routine border search because the *Fourth Amendment's* primary purpose is the protection of privacy in one's home and the search of a home, by its nature, is highly intrusive. He makes a compelling argument that an individual's expectation of privacy in a cabin of a ship is no different from any other temporary place of abode. Because the search of his living quarters aboard the cruise ship intruded upon that most private of places – his home – he says it should be considered non-routine. In response to Clark's arguments, the Government contends that the search of the cabin was a routine border search and should be analyzed in the same way as that of a vehicle.

It is an open question whether the search of a cabin of a cruise ship sufficiently intrudes upon an individual's privacy to render it non-routine, so that reasonable suspicion of criminal activity is required. Indeed, there is a surprising dearth of authority on the matter.

The authority the Government cites for the proposition that a search of a crew member's cabin amounts to a routine border search is readily distinguishable from the present case. In *United States v. Braun* (S.D. Fla. 2004), the "routine" aspect of the search was

the use of trained canines to detect narcotic odor from the hallways of newly-arrived cruise ships in Key West. The search of Braun's cabin occurred only after the drug-sniffing dog had alerted to the presence of drugs in the cabin while still in the hallway. While the court stated the search was a routine border search, clearly it was referring to the use of the dogs to "search" the ship's hallways, not the search of the cabin once there was reasonable suspicion based on the alert and all of the other circumstances. Here, by contrast, the dog did not alert until after the cabin was opened and the animal entered the room. The dog's alerting, therefore, cannot establish reasonable suspicion for the search. The routine search in *Braun*, done without reasonable suspicion, was of the ship's hallways -- public space; the search of Braun's cabin was done only after there was reasonable suspicion (or even probable cause) to search.

The relatively few decisions in this area counsel in favor of the approach urged by Clark. Other courts correctly recognize that the search of private living quarters aboard a ship at the functional equivalent of a border is a non-routine search and must be supported by reasonable suspicion of criminal conduct. The cruise ship cabin is both living quarters and located at the national border. As a result, one principle underlying the case law on border searches -- namely, that a port of entry is not a traveler's home -- runs headlong into the overriding respect for the sanctity of the home embedded in our traditions since the origins of the Republic, foremost in our nation's *Fourth Amendment* jurisprudence. We find that requiring reasonable suspicion strikes the proper balance between the interests of the government and the privacy rights of the individual. It also best comports with the case law, which treats border searches permissively but gives special protection to an individual's dwelling place, however temporary. We, therefore, join those courts that require reasonable suspicion to search a cabin of a passenger or crew member aboard a ship.

Here, the search was highly intrusive on Clark's privacy. Uninvited and in Clark's absence, the officers entered his *de facto* home, searched through his belongings, and subjected his private space to inspection by a drug-sniffing dog. Because of the high

expectation of privacy and level of intrusiveness, the search cannot be considered "routine" and must therefore be supported by reasonable suspicion of illegal activity.

Under the reasonable suspicion standard, law enforcement officers, including Customs officers, must have reasonable suspicion, based on specific and articulable facts, that the suspect committed, is committing, or is about to commit, a crime in order to conduct a search. In our view, the information known to the agent, including the informant's tip, his own observations, and the arrest and seizure of cocaine from Bates justified reasonable suspicion that Clark (and Arch) had contraband aboard the *Enchanted Isle*.

Clark argues that any suspicion the agent might have had *about him* was unreasonable because it supposedly arose from various mistakes the agent had made about his relationship with Arch. To be sure, suspicion is unreasonable if it arises from mistakes that are themselves unreasonable. But quibbles aside, Clark points to no evidence revealing *any* mistake by the agent, lest still any *unreasonable* one.

III. Disposition

For the foregoing reasons, we AFFIRM the denial of the motion to suppress and uphold Clark's conviction.