



California Bar Examination

**Performance Test
and
Selected Answers**

July 2017



The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

PERFORMANCE TEST AND SELECTED ANSWERS

July 2017

CALIFORNIA BAR EXAMINATION

This publication contains the performance test from the July 2017 California Bar Examination and two selected answers.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

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July 2017

**California
Bar
Examination**

**Performance Test
INSTRUCTIONS AND FILE**

UNITED STATES v. BLAKE C. DAVIS

Instructions

FILE

Memorandum to Applicant from Timothy Alfaro

Interview Transcript.....

Department of Homeland Security Incident – Arrest Report

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



July 2017

**California
Bar
Examination**

**PERFORMANCE TEST
LIBRARY**

UNITED STATES v. BLAKE C. DAVIS

LIBRARY

United States v. Clark

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

United States v. Clark
U.S. Court of Appeals, 15th Circuit (2014)

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.

PT: SELECTED ANSWER 1

Dear Ms. Castille,

Our firm, Alfaro, Blevin & Cohn, represents Blake C. Davis in the matter of the United States v. Davis. As you may recall, Mr. Davis has been 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. We are writing to you today to inform you that it is our contention that the search of Mr. Davis' cabin aboard the cruise ship was unreasonable under the Fourth Amendment to the United States Constitution because the CBP officers did not have the requisite reasonable suspicion necessary to conduct the search of Mr. Davis' cabin. As a result, the possession charge should not be brought against Mr. Davis because the drugs were illegally seized, and will be suppressed in a trial against Mr. Davis. However, Mr. Davis will agree to accept a guilty plea to misdemeanor arresting if the felony charge is dropped.

A. *The Fourth Amendment Required the CBP Officers to Have Reasonable Suspicion Prior to Searching Mr. Davis' Cabin*

The Fourth Amendment of the US Constitution protects people against unreasonable searches and seizures. Generally, the court will find that warrantless searches are unreasonable, however the court will look to the nature and all of the surrounding circumstances before making that determination. One exception to this rule is when those searched are made at the nation's borders, which includes the functional equivalent of a border such as the first port where a ship docks after arriving from a foreign country. Generally, a search at a border or functional equivalent of a border may be conducted without a warrant, probable cause, reasonable suspicion, or in fact any suspicion of a wrong doing. United States v. Clark. This is due to the fact that the expectation of privacy is

less at a border crossing, and the interest of the government is much greater. However, this does not mean that the government's right to search is absolute at the border. Any search that is non-routine still requires that the government has reasonable suspicion of wrongdoing prior to the conducting of such a search.

1. *The Search of Mr. Davis' Room was a Non-Routine Search and Reasonable Suspicion Was Required*

A person has the right to be free from unreasonable searches and seizures in their home because any search of the home is considered to be highly intrusive. Under 15th Circuit law, any border search that implicates the dignity and privacy interests of a person requires reasonable suspicion. Id. This includes the cabin of a passenger on a cruise ship because the cabin is merely a temporary abode for the passenger, and therefore should be afforded similar protections as the person's home. In Clark, the court there found that the search of the defendant's room was a non-routine search because it was his temporary home while on the ship. Entering the cabin, searching an individual's private belongings, and subjecting their private space to a search by a drug-sniffing dog was beyond the level of routine. Id. Contrast this with United States v. Braun, where the court there found that a routine search occurred. However, the search was routine because the officers used trained canines to detect narcotic odors in the hallway. After the dog alerted the police to the presence of drugs, the officers then searched the room. However, the court there found that the search in the hallway by the dogs was routine, and not the search of the cabin.

Furthermore, when a search of a cruise ship cabin is conducted at the border, the officers must have reasonable suspicion to search the cabin. Id. Reasonable suspicion is required to provide some protection to an individual on a cruise ship because it best strikes the proper balance between the government interests and the privacy rights of an individual. Id.

Here, Mr. and Mrs. Davis were traveling aboard the ship as passengers, and the cruise ship had just returned from Mexico, making their first stop back in the

United State. Accordingly, this was a border search and Mr. Davis does not deny that there is a lower expectation of privacy. However, the cabin still constituted the Davis' temporary abode, any completely warrantless and suspicionless search of the cabin violated their Fourth Amendment rights. The cabin was their de facto home, it held all their belongings while they were on this trip, and therefore, the search by the CBP officers was a non-routine search. Additionally, the officers brought in a drug-sniffing dog, searched all of the Davis' belongings, and entered their de facto home, just as the officers did in Clark. This also corresponds with the holding in Braun, as the search of the room would still be non-routine. As such, the officers were required to have reasonable suspicion before entering the room and searching the Davis' belonging.

2. The CBP Officers Did Not Have Reasonable Suspicion to Enter the Davis' Cabin

As the room constituted the Davis' temporary abode, the officers needed reasonable suspicion to enter into the cabin. Reasonable suspicion requires that the officers have specific, articulable facts that the suspect committed, is committing, or is about to commit a crime before conducting a search. Id. In Clark, the officers were found to have had reasonable suspicion based upon the information known to the officers, including a tip from a reliable informant, as well as the officer's own observations, and the arrest and seizure of drugs from an acquaintance of the defendant. In Braun, the officers failed to have reasonable suspicion prior to entering the room because the dog did not alert them to the presence of drugs there, it was only after the dog entered the room did the dog alert. Furthermore, the court in Clark stated in dicta that suspicion based upon an unreasonable mistake would not be a reasonable suspicion supporting a non-routine search.

Here, for the following reasons, the CBP officers did not have the reasonable suspicion required. First, the officers made an unreasonable mistake in coming to the Davis' room in the first place. The officers were acting based

upon information obtained from an informant who was an undercover officer. However, the information that the officers obtained was to be on a lookout for a white male named Blaine C. Daviss. Mr. Daviss was in room 8086, on the same floor but the opposite side of the ship from the Mr. and Mrs. Davis. Certainly officers who conducted routine searches of ships for drugs would know how to find the correct room. Officer Oliphant acknowledged his mistake in his report, but blamed it on a harmless error due to the names being next to each other on the manifest. We acknowledge that this alone might be a reasonable mistake, however when looked at in the totality of the circumstances here, the officers failed to have reasonable suspicion.

Second, Officer Oliphant then states in his report that upon arriving at the incorrect state room, the dog alerted in the hallway as to the presence of cocaine. However, Office Oliphant acknowledges there that cocaine could have been deposited at that site at any time in the past year. This is not enough to establish reasonable suspicion as there was no indication there was presently cocaine, or that the cocaine was in the room, but only that at some point cocaine had been there. The court in Braun did find that an alert to the presence of drugs while in the hallway could be enough to establish reasonable suspicion because the search of the hallway was a routine search. However, in that situation, the officers were conducting a routine search of the hallways that they always conducted for ships arriving at Key West. In our present situation, the officers were only on the ship and in that hallway because they were planning to go to Mr. Davis' room, which as established above, was a mistake. However, even the situation at this point could still be a reasonable mistake as there had been some alert, but the court will most likely find that the facts here were different because it was not a routine search, and reasonable suspicion was still required, which when looked at in the totality of the circumstances, the officers failed to meet.

Third, when the officers knocked on the door, Mrs. Davis opened the door, who as Officer Oliphant stated, was a middle aged white female. They had been told that Mr. Daviss was 21 years old and traveling by himself. This fact should have indicated to them that they had the wrong room. Instead, the officers told

her they were looking for contraband and she had to step into the hallway. They did not ask, and so never obtained her consent to enter.

Fourth, Mr. Davis showed up at this point and the officers began to talk to him. He signaled to them that he was in fact the Mr. Davis. The officers had been told by their informant that the Mr. Daviss they were looking for was 6'4, 260 pounds, and 21 years old. Mr. Davis is also a white male, but the similarities stop there. Mr. Davis is 5'7, 140 pounds, and 61 years old. When he told them he was Mr. Davis, neither officer realized at that point their mistake and instead informed Mr. Davis he had to stay out of the room. This was an unreasonable mistake at that point. They knew what their suspect looked like, and knew Mr. Davis could not be him. Yet they proceeded to enter the room, all because of the fact that cocaine might have been at that location within the past year. This one fact is not enough to rise to the level of reasonable suspicion, yet still the officers proceeded.

Fifth, when entering the room, the canine ignored all the belongings and most of the room, and went over and sat by the window. However, the officers now ignored this and began pressing on the luggage, and then had the dog specifically sniff the luggage, but the dog again ignored the luggage. The officers ignored this lack of an alert, and proceeded to search through every piece of luggage, invading Mr. and Mrs. Davis' privacy. They had no reasonable suspicion at that time to search the luggage, or to even be in the room.

Sixth, they finally paid attention to the "alert" and went over to where the dog was sitting and looked in the surrounding area, and it was only then they found the cocaine. The dog was enough to provide reasonable suspicion due to the alert. However, as the court in Clark said when interpreting Braun, the alert of the canine inside of the room was not enough to establish reasonable suspicion to be within that room. Accordingly, the invasion of the Davis' privacy was not justified at this point by the alert because the officers were not allowed to be in their cabin. It was then that the officers forcibly removed the briefcase from Mr. Davis, which he prevented them from doing so because of the confidential information contained within. The officers then looked at Mr. Davis' passport,

and stated that it was only then they realized their mistake and that they had searched the wrong room. However, they should have realized that mistake when Mr. Davis returned to the room and identified himself. Accordingly, the officers here made a very unreasonable mistake, and did not have reasonable suspicion to search the room. Therefore, the search will be found to be unreasonable, and the seized cocaine will be suppressed at the trial.

B. Conclusion

As stated above, it is our proposal that the government drops their felony charge against Mr. Davis because it has no chance of success due to the fact that the seized cocaine will be suppressed and without it, the government has no case against Mr. Davis. The officers did not have the required level of reasonable suspicion prior to conducting the non-routine search of Mr. Davis' cruise cabin, and therefore the search violated his Fourth Amendment rights against unreasonable searches and seizures. Mr. Davis will in turn plead guilty to his misdemeanor offense for resisting arrest.

Sincerely,

Applicant

PT: SELECTED ANSWER 2

FROM: Applicant
TO: Ms. Maria Castile
DATE: July 25, 2017
RE: United States v. Blake C. Davis

Dear Ms. Castile,

I, along with Timothy Alfaro, represent Mr. Blake C. Davis in his charges of (1) misdemeanor of resisting agents from the U.S. Customs and Border Protection Service (CBP) and (2) felony possession of cocaine. After a discussion with Mr. Davis regarding the charges, we are amendable to a plea bargain regarding the charges as well. Mr. Davis is willing to plead guilty to a misdemeanor of resisting CBP agents. Mr. Davis does not want to have a felony conviction on his record, but is willing to plead guilty to a misdemeanor for an efficient resolution of this matter.

The charges against Mr. Davis regarding felony possession of cocaine should be dropped because the search of Mr. Davis' cabin aboard the cruise ship was unreasonable under the 4th 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.

First, the border search at issue was non-routine, and thus CBP agents needed reasonable suspicion to conduct search. Second, the CBP agents did not have reasonable suspicion to search the cabin and made unreasonable mistakes that did not justify their suspicion.

Therefore, our offer of Mr. Davis' pleading guilty to the misdemeanor charge should be accepted because the felony charge of possession of cocaine would be suppressed at trial because of the illegal search.

The Search of Mr. Davis' Cabin is Non-Routine and Requires Reasonable Suspicion for CBP Agents to Search and Enter the Cabin

"The 4th 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." *United States v. Clark*, U.S. Court of Appeals, 15th Circuit (2014).

The court in *Clark* states that as long as the border search is routine, it may be conducted without a warrant, probable cause, reasonable exception, or any suspicion of wrongdoing. No suspicion is required in order for a Customs officer to board and search a cruise ship as part of a routine border search. However, even at the border, an individual is entitled to reasonable searches only and their privacy interests must be balanced against the government's interests. Therefore, searches that are classified as "non-routine" require reasonable suspicion of wrongdoing to pass constitutional muster.

To determine whether the border search is routine, the degree to which it intrudes on a person's privacy must be determined. Any search that implicates the dignity and privacy interest of the person being searched is highly intrusive and requires reasonable suspicion.

The court in *Clark* concluded that a 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 court held in *United States v. Braun*, that the routine aspect of a search is the use of trained drug-dogs in a "search" of the public hallways of the cruise ship. A search of the public areas of cruise ship is routine and does not require any reasonable suspicion, however, a search of the cruise ship cabin is non-routine and requires reasonable suspicion.

In Mr. Davis' case, the CBP agents actually searched the Davis' cabin with their drug dog. According to the court in *Clark*, a 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. While the CBP agents may have been following procedures and conducting routine enforcement actions by searching the cruise ship when it entered port, their search of Mr. Davis' cabin is not routine.

The CBP agent's search of the Mr. Davis' property was highly intrusive, the agents not only searched throughout the entire cabin but also opened and probed every item that the Davis' owned. Such an intrusive and detailed search is not routine and the invasion into the sanctity of privacy must be supported with reasonable suspicion to be valid under the 4th Amendment.

Thus, the search conducted by the CBP was non-routine and must be supported with reasonable suspicion.

The Search of Mr. Davis' Cabin is Unreasonable and any Evidence should be Suppressed because the Search was not Supported with Reasonable Suspicion and the Agents made Unreasonable Mistakes to lead to the Search

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. *Clark*. The court held that the search of the defendant's cabin was reasonable because the agents had reasonable suspicion of a crime and the defendant was unable to point to any evidence of unreasonable mistakes by the agents.

However, in Mr. Davis' case, the CBP made several unreasonable mistakes that led to a search of Mr. Davis' cabin and the agents did not have any actual information that Davis is guilty of a crime.

First, Agent Oliphant made an unreasonable mistake when he took down the wrong cabin number in the TECS database due to his inability to notice a difference between the two last names. The mistake is clearly unreasonable because the names, although similar, are not identical and an agent conducting a warrantless search of a living quarter should have been more careful. The difference between Blaine versus Blake and Daviss versus Davis is clear, and it is unreasonable for the agent to make such a mistake.

Agent Oliphant may argue that the dog "alerted" in the hallway next to Mr. Davis' cabin and that is enough reasonable suspicion to enter the cabin to conduct a search. In *United States v. Braun*, a dog's alert to drugs outside the hallway of the cabin during a routine search is enough to create reasonable suspicion for a non-routine search of the defendant's cabin. However, if not for the unreasonable mistake by Agent Oliphant when taking down the room number, the CBP agents would not have been conducting a search on that side of the cruise ship. If the Agent had taken down the correct number and did not make an unreasonable mistake, the CBP agents and the drug dog would be searching the opposite side of the ship because Daviss resides on the port side and David on the state side. Thus, the drug dog's alert only arose because of Agent Oliphant's unreasonable mistake in taking down the room number.

Second, the CBP agents may also argue that the drug dog's action once inside the room also gave rise to reasonable suspicion because the dog alerted to the existence of drugs near the outer wall. However, the court in *Clark* also held that a drug dog's alert to drugs after entering the cabin is not reasonable suspicion, and the search is unreasonable. The dog's alert that arose after the agents made an unreasonable search does not establish reasonable suspicion for the search.

Lastly, Agent Oliphant also made an unreasonable mistake regarding the identity of Mr. Davis. The TECS report clearly indicated that Daviss was a white male that was 6'4", 260 lbs and aged 21 years. Mr. Davis by comparison is aged 61 years, weighing 140 lbs and only 5'7". Once Mr. Davis entered into the cabin, the CBP agents should have realized that they have the wrong cabin and the wrong suspect.

Even if the CBP's mistake regarding the cabin number and the identity of Mr. Davis is reasonable, their inability to recognize that they have the wrong suspect the moment that Mr. Davis entered into the cabin is clearly unreasonable. The CBP agents should have stopped the search of the cabin the moment they recognized that Mr. Davis is not the suspect that they are looking for. However, the CBP continued their illegal search of the cabin and managed to find a bag of cocaine that the Davis' had no knowledge of.

The CBP agents did not have reasonable suspicion to search Mr. Davis' cabin because their conduct was not based on specific and articulable facts that the Mr. Davis is committing a crime. With the known information by the agents and in light of the unreasonable mistakes the agents made throughout their conduct, the search and seizure of the cocaine from Mr. Davis' cabin is clearly not justified by reasonable suspicion.

Conclusion

The search of Mr. Davis' cabin by the CBP agents was highly invasive and non-routine, and under the 4th Amendment it must be supported with reasonable suspicion for it not to be illegal. However, the CBP agents did not have reasonable suspicion to search the cabin and made unreasonable mistakes in their process of looking up information and conducting the search. Thus, the felony possession of cocaine should be dropped because the search of Mr. Davis' cabin aboard the cruise ship was unreasonable under the 4th Amendment and any possession charge should not be brought because the drugs were illegally seized and will be suppressed.

We hope you consider our offer of Mr. Davis' accepting a guilty plea for the misdemeanor of resisting arrest and drop the charges against Mr. Davis for felony possession.

Thank you,

Applicant