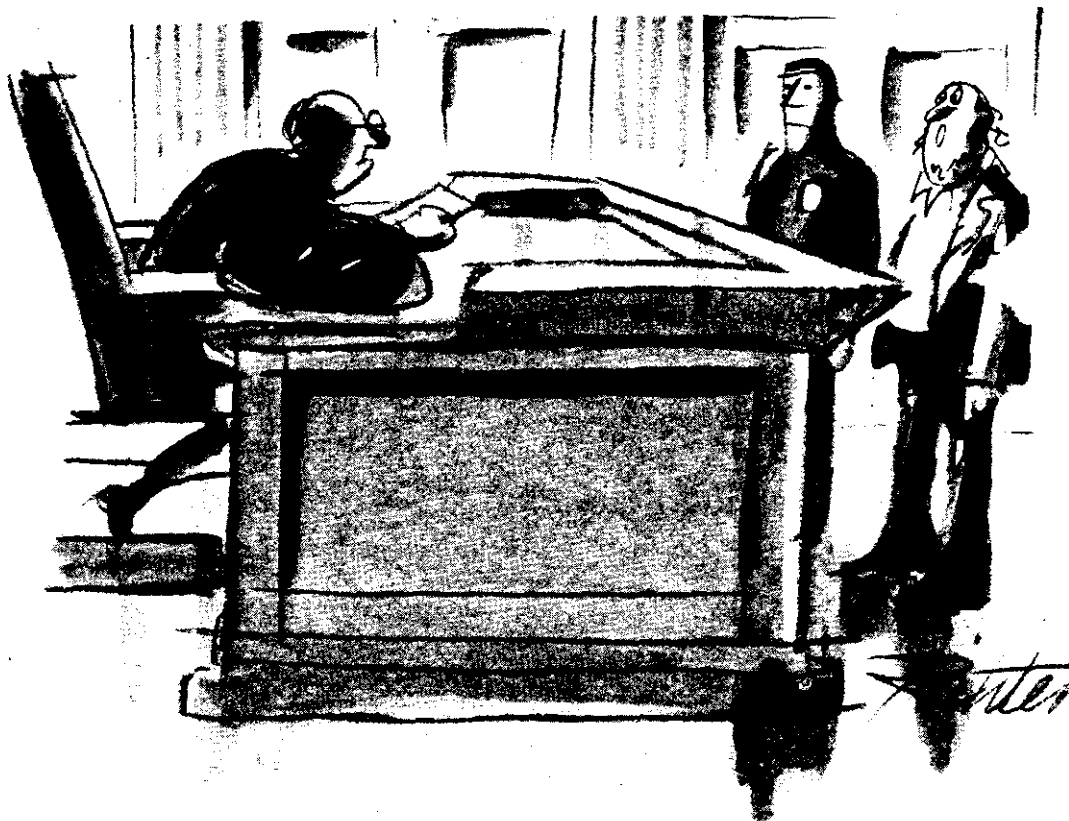


CRIMINAL LAW AND PROCEDURE

SECTION B3

Final Examination  
April 30, 1980

Three Hours  
12:30-3:30



*"Being innocent in this day and age, Your Honor, is no easy matter."*

OPEN BOOK

Instructions

The four problems are of unequal weight. Each is worth an amount in grading proportionate to the suggested time limits. Budget your time accordingly.

Answer all the questions reasonably raised in each problem even though your resolution of a prior issue in the same problem may technically make decision of other issues immaterial. If you believe that you need more facts than are presented to adequately resolve an issue, indicate specifically what facts you believe you need and why.

Specific citations to cases are welcome but not as a substitute for thinking, i.e. do not use citations instead of clearly stating the relevant point of law.

I. [Suggested Time: 60 minutes]

Officers Abbott and Costello, members of the Vice Squad of the Comic City Police Department, located in the State of Hilarity, decided on September 3, 1979 to make a personal investigation of Tomlin's Tavern for suspected public homosexual activity which was alleged by "a usually reliable informant" to take place regularly on the premises. The Comic Vice Squad doesn't usually check out all allegations of public homosexual activity but as Officer Abbott later commented in the press: "We've been trying to get something on Tomlin for quite a while. She has never cooperated with the police in any of our investigations of local underworld activity."

On September 5, 1979, Abbott and Costello entered Tomlin's Tavern with a warrant and headed straight for the Men's Room. As they entered the Men's Room, they immediately saw Tomlin and one Richard Pryor sitting on the floor smoking what looked and smelled like marijuana. Abbott and Costello immediately placed Tomlin and Pryor under arrest and fully searched them. They also "searched" George Carlin who was standing in the Men's Room immediately next to Tomlin and Pryor when the police officers entered. The "search" of Carlin was a cursory check of his outer clothing which culminated in Officer Abbott reaching his hand into Carlin's jacket pocket, producing a metal cigarette case which contained two rolled marijuana cigarettes inside. The search of Tomlin and Pryor also produced two marijuana cigarettes on each of them. The search of Tomlin also included a search of a knapsack that she was sitting next to at the time of her arrest. In that knapsack, the police found a volume entitled "My Personal Diary: Lily Tomlin." Inside this volume, the police later found the statement: "We are going to have to do something about Bob Newhart who knows all about the marijuana distribution plan I set up with Pryor, Carlin and Steve Martin." Officer Costello later contacted Newhart who stated that he was willing to testify against all four of those individuals, the defendants in the instant action.

Officer Costello gave Tomlin, Pryor and Carlin full Miranda warnings and then, when they said nothing in response, he asked them if they wanted to say anything about where they got the marijuana. Carlin responded: "I'll talk. I know what you did to my friends Cheech and Chong when they wouldn't talk to you three weeks ago. They still can't see straight since that beating you guys gave them. Of course, they never saw too straight before that." At that point, Officers Abbott and Costello said nothing but Carlin made a statement which implicated Martin in procuring the marijuana all three individuals were carrying.

You have the pleasure of representing Tomlin, Pryor, Carlin and Martin on charges of conspiring to distribute marijuana. What constitutional challenges do you have relating to the potential introduction of any evidence discussed as a result of the police conduct against each of these defendants? What chance of success do you have with each of those challenges on behalf of each defendant? Why?

II. [Suggested Time: 45 minutes]

Defendant Mathew Gandhi was arrested on October 5, 1979, in the State of Tranquility, and charged with the offense of indecent exposure under Tranquility Crimes Code § 5601(a)(1). The maximum penalty for violation of § 5601(a)(1) is 1 year imprisonment and/or a fine up to \$5,000.

At arraignment, Gandhi asked to be provided with appointed counsel to represent him in these proceedings. He claimed to have no assets other than his car, in which he lived. Judge Deliberate rejected this request, ruling: "I see on this record that you own and live in a 1979 Corvette Stingray. I see no basis to appoint counsel for you as you are not indigent given the value of that asset. Moreover, even if you were indigent, the Supreme Court has held that you have no constitutional right to counsel in minor cases like this one." Likewise, when Gandhi timely requested a jury trial in this matter, Judge Deliberate responded: "The Supreme Court gives you no jury trial right in minor cases like this since I have absolutely no intention of imposing a sentence of imprisonment."

The trial was supposed to have been held on January 8, 1980. However, when defendant Gandhi appeared in court that morning wearing only an opaque loincloth and when he told the judge that he had decided to represent himself non-violently, that is, by letting all the State's witnesses say whatever they wanted without the violence of cross-examination, Judge Deliberate thought better of his decision not to appoint counsel. Signalling to Chester Shodd (an attorney who supports himself by taking criminal appointments only), who was dozing off in a corner of the courtroom, Judge Deliberate indicated that the trial would be continued for one day while Shodd assumed control of defendant's case.

The next morning, Shodd met with Gandhi 30 minutes before trial and told him, based on his reading of the file that morning that Gandhi should plead guilty because "you committed the act and the judge isn't likely to send you to prison anyway--he told you as much already." Gandhi rejected this advice, the State put two eyewitnesses on the stand, no defense witnesses were proffered, Gandhi was quickly convicted and received a \$5,000 fine.

After receiving such a stiff fine, Gandhi wants to appeal. Does he have any reasonably appealable issues? What are they? What chance of success does he have with them? Why?

## III. [Suggested Time: 45 minutes]

The following excerpt is taken from a recent decision of the Oregon Court of Appeals:

"The defendant was convicted of being an ex-convict in possession of a firearm. On appeal, he argues that his motion to suppress the firearm was improperly denied.

"Officer Coleman received word that shots had been fired during what appeared to be a chase between two cars. When he arrived on the scene, he observed a 1963 Plymouth in a driveway at the dead end of a street. Two men nearby told Coleman that, upon approaching a friend's house in the area, they had seen the Plymouth back out of the driveway and slowly drive away. When they discovered that the friend's house had been broken into and ransacked, the men pursued the Plymouth, catching up with it at a stop light. One of the pursuers got out of his vehicle, engaged the driver of the Plymouth in conversation, and noticed in the car some of his friend's property. When the light turned green, the Plymouth took off. As the chase resumed, some property was thrown from the Plymouth. When the Plymouth approached a dead end, the two occupants bailed out.

"Officer Coleman looked into the car's interior, but not into the glove compartment or trunk. He then had it towed and, at the towing company, wrote down serial numbers and characteristics of the property in the car's interior. He had no indication that the car contained any inherently dangerous items or items of perishable evidence.

"Officer Winegar took possession of the car at the towing company. Acting on information from the police dispatcher, and not from Officer Coleman, Winegar 'inventoried' property in both the interior and the closed trunk and processed it for fingerprints. In the trunk, he found a paper sack, which he opened, discovering inside a pistol. The defendant's fingerprints were found on the gun. The defendant was also the registered owner of the car."

What constitutional claims should Defendant have made challenging police conduct in this case? How should the Oregon Court of Appeals have resolved these claims? Why?

[State v. Green, 27 Crim. Law Rptr. 2005 (Ore.Ct.App., decided 1/28/80).]

IV. [Suggested Time: 30 minutes]

Professor Elson of Northwestern University Law School has recently commented:

"[T]he [Burger] Court is now in transition between polar principled positions. On the one hand, it is unwilling to accept the expansive protection of individual constitutional rights that the Warren Court derived from an evolutionary purposive approach to constitutional construction. On the other hand, it is also unprepared to embrace the negation of the Warren Court approach which, as advocated by Mr. Justice Rehnquist, would accord all state action that allegedly violates individual constitutional rights a presumption of constitutionality that can be overcome only by an unequivocal textual or historical showing that the Framers' intent was to the contrary. It gives the Court the freedom to choose the outcome that seems appropriate for each case without having to devise substantive constitutional principles that might lead to consequences the Court is now unwilling to accept."

J. Elson, "Balancing Costs in Constitutional Construction: The Burger Court's Expansive New Approach," 17 Am. Crim.L.Rev. 160, 200 (1979).

Do you agree or disagree with Professor Elson's comments? Explain why or why not with specific reference to cases or substantive areas covered in this course.

Professor Burkoff