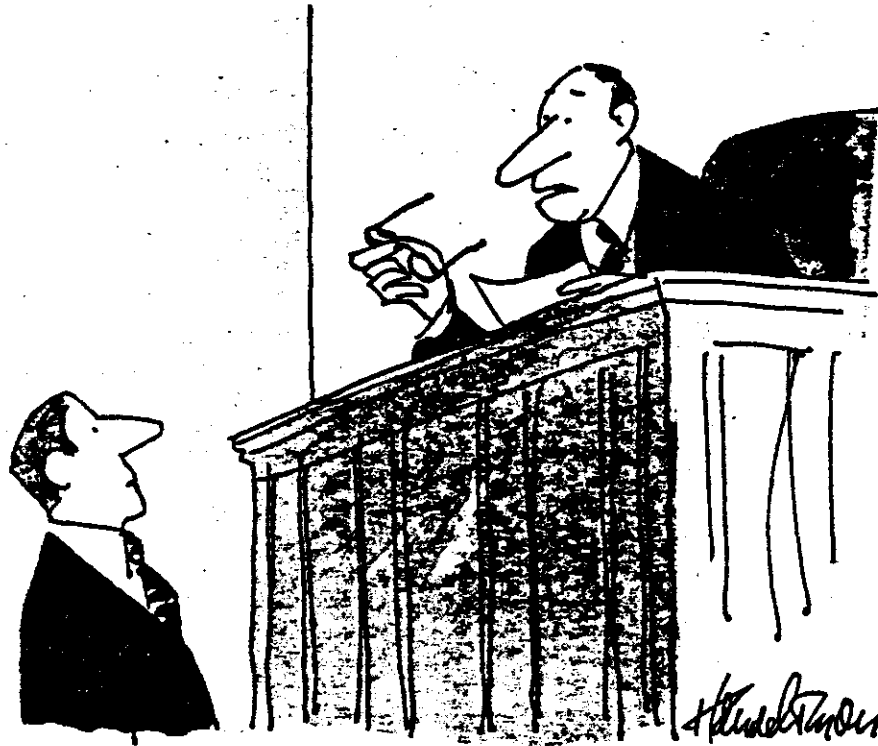


CRIMINAL LAW AND PROCEDURE

SECTION B3

Final Examination  
May 14, 1982

Three Hours  
9:00-12:00



*"By doing what you did, you brought disgrace on yourself, your family and friends, and everyone born under Aquarius."*

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. (One Hour)

In State v. Wolf, 640 P.2d 1190 (Idaho Ct. App. 1982), the Idaho Court of Appeals described the facts of that case as follows:

"The record . . . discloses that on July 19, 1978, a female employee of the Ada County Sheriff's Office met with the appellant [Wolf], ostensibly to seek employment with him as a prostitute. The meeting was recorded on tape. Statements made by the appellant during the meeting indicated that he was using his residence for a prostitution service and that evidence of prostitution, including a card file system, might be found there.

"On August 2, 1978, a Boise City Police Department detective and an Ada County deputy prosecuting attorney sought a warrant from a magistrate to search appellant's residence. The detective gave sworn testimony during which he presented the tape recordings and transcripts of the July 19 meeting and of a prior telephone conversation in which the time and place of the meeting had been arranged. The detective also testified that another person, an unnamed police informant, had furnished him similar information about a prostitution service at defendant's residence and the existence of a card file there. He further testified that this informant had provided reliable information in the past, although he gave no details of the nature of the past information.

"The magistrate issued a warrant authorizing a search of appellant's residence for 'a file card system containing the names of persons engaging in . . . prostitution, and any other evidence or instrumentality of . . . prostitution.' Pursuant to this warrant, on August 7, 1978, the detective and other officers searched appellant's residence and seized four boxes of index cards. The cards contained information about customers served, persons who provided the services, and payments received. The police, two hours later, sought and obtained a second warrant authorizing them to search the residence for items observed during the first search but not specifically listed on the first warrant. A second search was then conducted and additional items were seized, including some

letters ostensibly written to appellant requesting prostitutes' services. The detective subsequently testified at trial that after the first search was performed but before the second, the appellant, who was not being questioned at the time and had not been given Miranda warnings, and who was sitting in his home waiting for the second warrant to arrive, spoke to the detective and 'made a statement . . . that we should have found card files by now.'

"The appellant was charged with one count of inducing a woman for the purpose of prostitution, five counts of accepting the earnings of a prostitute, and one count of keeping a minor in a house of prostitution. [On the basis of appellant's statement and the other seized items, a] district court jury found appellant guilty on all counts."

Due to circumstances beyond your control, you now find that you are an Assistant Public Defender in Boise, Idaho, and have been assigned to represent appellant Wolf before the Idaho Court of Appeals. What, if any, arguments can you conceivably make with respect to the admissibility of the evidence, physical and testimonial, obtained as a result of these searches? What response will the prosecuting attorney likely make? Who is likely to win? Why?

## II. (30 minutes)

Winken and Blinken were convicted of burglary and theft of a motor vehicle. They were represented at trial, without a jury, by Nod, an experienced trial attorney they had privately retained. No evidence was presented at trial in Winken's behalf. When the judge asked Winken if he wanted to testify, Nod intervened and advised the court that Winken wished to "take the Fifth Amendment." After the trial, the judge quickly found Winken and Blinken guilty as charged and before he pronounced sentence, he asked either if they had anything to say. The following exchange then took place between Winken and the judge: Winken stated that, "Blinken, there, he didn't have nothing to do with that about the car that was taken, stolen. He didn't have nothing to do with it, which was--I went up to him and asked him--." The judge interrupted: "I've already found him guilty. When he was on trial, when it made some difference, you sat there and held your peace, and the court takes that as you were trying to hold your peace and refuse to testify in the case and not get on the stand so that you wouldn't have to give any explanation. I've already heard the evidence." When Winken then explained to the judge that his attorney had told him to remain silent, the judge responded, "Well, when Blinken was on trial, you could have got up and testified to that effect. Now, the court finds that the fact that

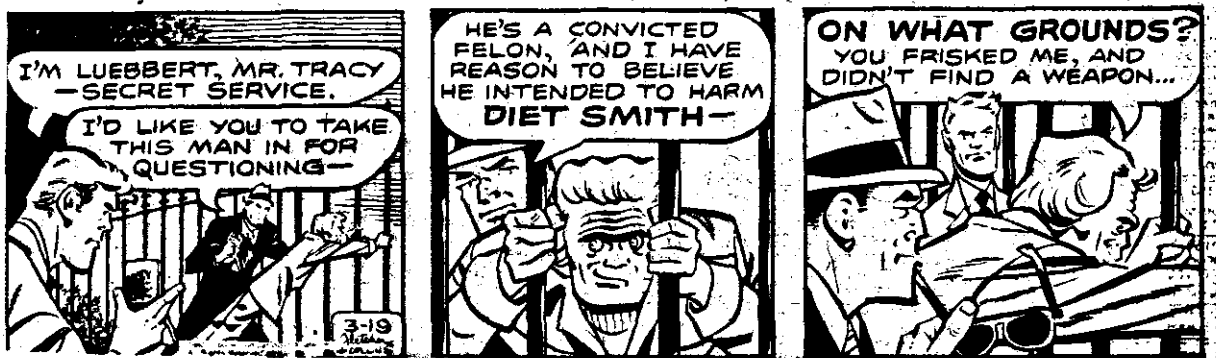
you refused to get up or you failed to get up and testify in his behalf or to let the court know what your position was on it was that you took your chances that the Court would find you not guilty or maybe him not guilty, or at any rate, at the worst, the Court would find you guilty and find him not guilty, and since you were serving time, it wouldn't make much difference. I've seen those angles before. You could have testified just as well earlier . . ." After several more statements in the same vein, the judge sentenced both Winken and Blinken.

You represent Winken and Blinken on appeal. Do the foregoing facts raise any colorably appealable issues? What are they? Are these issues likely to result in a reversal of the trial court judgment? Why or why not?

[Cf. Thomas v. State, 288 S.E.2d 112 (Ga. Ct. App. 1982)]

### III. (One Hour)

Dick Tracy



Jim was driving his car, with Barbara as a passenger, out of a University of Nittsburgh staff parking lot (in Nittsburgh, Nennsylvania, of course) when he was stopped by a uniformed University of Nittsburgh campus police officer, Joyce, who stopped the car because she believed that the parking sticker on Jim's car was counterfeit. (This turned out not to be true.) As Joyce approached the car, however, she immediately smelled the sweet, familiar odor of marijuana, an odor with which she was intimately familiar. After recognizing this smell, she ordered Jim and Barbara to get out of the car, and she detained them until, after her telephone call, two City of Nittsburgh police officers, Officers David and Amy, arrived at the scene. The Nittsburgh police officers also recognized the strong smell of marijuana coming from the car and thereupon frisked Jim and Barbara, discovering nothing on Barbara but discovering two marijuana seeds and a suspicious looking hand-rolled "cigarette" in Jim's vest pocket next to his pocket watch. The police then proceeded to search Jim's car. They found nothing of any consequence in the car except Barbara's purse which was lodged behind a back seat cushion stuffed down out of sight. Suspecting that something

might be hidden in the purse, the police opened it and searched it, ultimately discovering a small vial of white powder inside a small box wrapped in green, opaque plastic. Officers Amy and David suspected (correctly, as it turned out) that the white powder was cocaine.

Barbara was arrested and taken to the station house. At the station house, she was given Miranda warnings, in response to which, she immediately asked to talk to her attorney, Andy. Officers David and Amy placed Barbara in an interrogation room by herself and called Andy, who said he would come right over. Before he arrived, however, a janitor, Stanley, came into the interrogation room to mop the floor. After the floor was half-mopped, Barbara asked the janitor whether he knew if the police routinely "bugged" the interrogation rooms. Stanley replied: "I doubt it. Anyway, David and Amy are too busy looking through wanted posters to see if you have committed any other crimes to listen in on your conversations. They think you look real suspicious and may have been involved in a counterfeit NAT bus pass ring." (None of this was true, by the way. Officers David and Amy were both taking a nap elsewhere in the station house, waiting for Attorney Andy to arrive.) After hearing Stanley's comments, however, Barbara blurted out: "Why do they think I'm suspicious? Look, I'm just an ordinary, run of the mill drug user, not a criminal!"

Barbara has been charged with possession of narcotics. Her defense counsel, Andy, who finally arrived at the station house, has filed a motion to suppress the cocaine and Barbara's statement to Stanley. Since your father has significant political connections, you are an Assistant District Attorney in the City of Nittsburgh. What arguments can you anticipate Andy might conceivably make to support his suppression motion? What responses do you have? Who is likely to win? Why?

#### IV. (30 Minutes)

In his Mellon Lecture last fall, Professor Wayne LaFave commented:

"In Marshall v. Barlow's, Inc., holding unconstitutional the warrantless inspection of business premises by agents of the Occupational Safety and Health Administration (OSHA), the Court expressly rejected the government's claim that a businessman lacked any privacy expectation vis-a-vis the government when there was no such expectation as to others (in this instance, his employees). Rather, the Court concluded that an entry by OSHA inspectors would be a fourth amendment search even though the area entered was regularly used by the company's employees.

But a year later, in Smith v. Maryland, rejecting petitioner's claim that he had a 'legitimate expectation of privacy' as to the numbers he dialed on his telephone, the Court, though asserting that, 'our lodestar is Katz,' concluded there was no such privacy expectation because the telephone company's switching equipment had the capacity to record that information for certain limited business purposes.

"I find these cases irreconcilable and, by the way, do not think Barlow's can be dismissed on the theory that a government agency which tries to dictate the design of your toilet seat is bound to lose."

You agree or disagree with LaFave's comment that Barlow's and Smith are irreconcilable? Why or why not?

Professor Burkoff