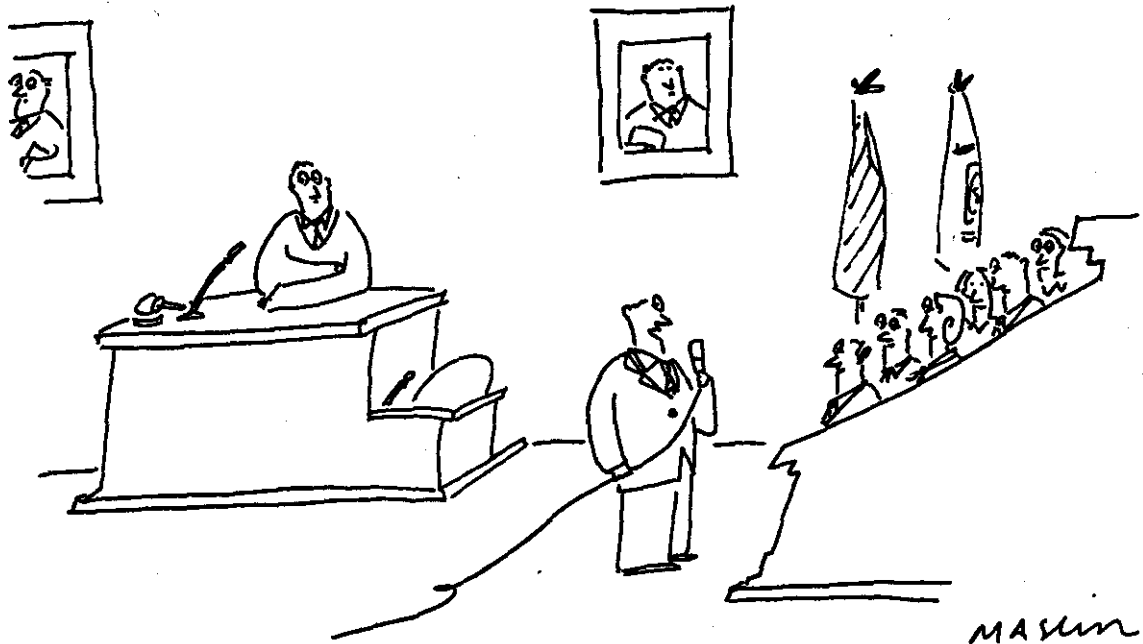


CRIMINAL LAW AND PROCEDURE

SECTION B3

Final Examination  
May 9, 1983

Three Hours  
9:00-12:00



*"And now I'd like to bring on a brand-new witness, with the brightest testimony you're likely to hear for quite some time. She's never been on the stand before, so let's give her a big, warm welcome."*

OPEN BOOK

Instructions

The three problems are of uneven weight in grading. Each is worth an amount equivalent to its suggested writing time. 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 the 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.  
(60 minutes)

The Supreme Court of Nebraska described the facts before it in a recent case as follows:

"At [a] suppression hearing, Gerard Ruiz, a Nebraska State Patrol officer, testified that on October 8, 1981, at about 3 a.m., he picked up the defendant [, Dennis Parsons] because he was walking on the Interstate. Defendant had been frantically waving to attract the officer's attention. Defendant told Ruiz that he had been riding in a car with Marvin Huntington, that he jumped out when Huntington said the car held four containers of marijuana, and that Huntington then tried to run over him. Defendant asked the officer to help him; Ruiz took him to the Lexington Police Department so he could sleep, and dispatched information on Huntington's car. The officer testified that, as a sleeper, defendant was locked in a cell so that he could not walk about the jail. He was not under arrest.

"About 6 a.m., Huntington was found and brought to the police station, where the defendant briefly confronted Huntington about the attempt to 'run him over.' The officer testified it appeared a fight might develop and the two were put in separate cells.

"Bruce Haney, an investigator for the Nebraska State Patrol, testified that at about 9:20 a.m., he spoke with the defendant and at that time viewed him as the assumed victim. The subject matter of the interview was defendant's accusations against Huntington. After the interview, Haney, unsure if defendant was the victim or a suspect, told the defendant he must stay for further questions and returned him to his cell. Haney next interviewed Huntington, who denied having any marijuana and asked to talk to the defendant. Defendant was brought into the room and Huntington asked the defendant if he had told Haney that there was marijuana in the car. Defendant said he had, and again accused Huntington of trying to run over him. When defendant had left, Huntington admitted he had marijuana in his car but said it belonged to the defendant. As Haney was returning Huntington to his cell, Huntington again told Haney that it was the defendant's fault the marijuana was in the car. Defendant called Haney to come over to his cell, and both Haney and Huntington went to the defendant's cell. Defendant, without being asked any questions, admitted he was responsible for the marijuana. At that point, Haney interrupted the defendant's discussion and read to him the Miranda warnings. Huntington, after defendant made the admission, said, 'See, I told you that he would talk.' The admission above described was received in evidence at the trial . . . .

"At trial, Huntington testified that defendant arranged for them to haul the marijuana north from Texas, that defendant helped load the car, and that defendant had ridden along from Texas. Officer Haney testified that defendant admitted responsibility for the marijuana and that a search of Huntington's car revealed four 5-gallon buckets holding more than 16 pounds of marijuana."

Defendant Parsons was convicted at trial of possession of marijuana with intent to distribute. His timely motions to suppress his incriminating statements and the marijuana found in the car were rejected by the trial court. Defendant now argues that the denial of his motions was error. You are a law clerk to Justice Louise Liverwurst of the Nebraska Supreme Court. Write a memorandum advising Justice Liverwurst of the constitutional issues presented by defendant's arguments and how these arguments should, in your humble opinion, be resolved.

State v. Parsons, 328 N.W.2d 795 (Neb. 1983).

II.  
(90 minutes)

On October 8, 1981, Officer Edward Kennedy of the Democratic City Police Department, located in the State of Partisanship, was walking his usual patrol beat when he heard a loud commotion coming from an apartment building on the opposite side of the street. Running across the street, he heard loud shrieks and strange yelps coming from a second story apartment window. Propping a garbage can against the apartment building on the public sidewalk, Officer Kennedy managed to peer directly into the apartment through the open window, and saw one Walter Mondale standing in the apartment, viciously kicking a bedraggled cocker spaniel. Kennedy immediately ran into the apartment building, banged on Mondale's door and, when Mondale answered, arrested him for assault on a spaniel. Kennedy then gave Mondale Miranda warnings and made a quick search of his person which produced a small quantity of marijuana [Item #1] and a sealed envelope marked on the outside "To Mondale" [Item #2]. The envelope was later opened by Desk Sergeant Ernest Hollings at the police station and held within a piece of white bond paper with the words: "PURCHASE ORDER FOR THREE (3) OUNCES MARIJUANA. (signed) Alan Cranston."

Mondale was given Miranda warnings once again by Sergeant Hollings and was then locked in a holding cell. He was also allowed to make a phone call and called his lawyer, Gary Hart, to come down and get him. After 6 hours in the cell, Hart arrived at the police station and convinced Hollings that Mondale must be released as he had been illegally arrested since there is no such crime as assault on a spaniel in the State of Partisanship Criminal Code. Mondale was released and as he was leaving the station, he saw Kennedy and taunted him: "Ha, Ha, Ha . . . But, listen, no hard feelings. Come see me if you or any of your cop friends want to cop some dope" [Item #3].

Two days later, on October 10, 1981, Kennedy was again walking his beat and again he heard a loud commotion, this time from behind a thick hedge abutting the sidewalk where he was walking. Making a peephole in the hedge with his hands by bending back some twigs, Kennedy looked through the hedge and saw Mondale and one John Glenn both busily kicking a small child who was dressed in a cocker spaniel suit. It was clear that Mondale and Glenn knew they were kicking a child not a dog as the "spaniel" kept calling out: "Stop! Stop! I'm a kid!" Kennedy immediately burst through the hedge upon viewing this sordid spectacle and arrested Mondale and Glenn for aggravated assault. (This is a crime in Partisanship).

Kennedy gave Mondale and Glenn Miranda warnings and took them to the station house and booked them. At the station house, Mondale was searched, again turning up a small quantity of marijuana [Item #4] and another "purchase order" [Item #5], again made out "To Mondale" on the outside of the envelope, this one signed on the inside by "Reubin Askew." Glenn was searched, turning up in Mondale's attache case (which Glenn was carrying when arrested) another "purchase order" [Item #6], this one also made out "To Mondale" on the envelope but signed on the inside by Alan Cranston.

Both defendants asked to speak to their counsel, Hart. Kennedy, meanwhile, went into the back room and called Cranston on the telephone. Explaining the circumstances of Mondale's and Glenn's arrests, he asked if Cranston would testify against them as to their intention to sell marijuana. Cranston said he probably would but he'd have to think about it. Kennedy then interjected that the police might need to talk to Cranston's employer about his personal drug habit, at which point Cranston blurted out: "I've thought about it now--why I'd love to testify, sir!"

Kennedy then went into the cellblock where Mondale and Glenn were being held and, talking only to the jail guard, with his back to the prisoners, said: "Take good care of these two miserable creatures. Now that I've talked to Cranston and Askew and know they will testify against them, we'll put these guys away for 4 more years." [Cranston testimony: Item #7; Askew testimony: Item #8]. Mondale immediately yelled out at Kennedy's back: "I may be a drug dealer, but you're a pig!" [Item #9].

Mondale and Glenn were both charged with possession with intent to sell marijuana, Glenn strictly as an accessory. The State of Partisanship put Officer Kennedy on the stand and witness Askew. Hart, representing both defendants, had timely moved to suppress admission of evidentiary Items #1 - 9, noted in brackets above. The trial court denied all but three of these motions; it suppressed use of Items ##1, 2, and 7 as "fruits" of an illegal arrest, noting, however, that Cranston's testimony [Item #7] could be used for impeachment purposes if either defendant took the stand in his own behalf. Mondale and Glenn were convicted as

charged, neither taking the stand. The marijuana [Item #1] and the "purchase order" [Item #2] seized by the police on October 8 were considered by the trial judge (Judge Reagan), over Hart's objections, in setting their sentence.

You are appellate counsel for appellant Walter Mondale only. What are your chances--and for what reasons--of getting the following matters to be declared reversible error as to your client by an appellate court:

- (1) admission of Mondale's statement after his first arrest on October 8 [Item #3]?;
- (2) admission of Items #4 & 5 seized from Mondale on October 10?;
- (3) admission of Item #6 seized from Glenn on October 10?;
- (4) admission of Mondale's October 10 statement [Item #9]?;
- (5) admission of Askew's testimony at trial [Item #8]?;
- (6) the trial court ruling that Cranston's testimony was available for use for impeachment purposes [Item #7]?;
- (7) use of the October 8 marijuana and purchase order seized from Mondale [Items ##1 & 2] at sentencing?;
- (8) the joint representation of both Mondale and Glenn by one attorney, Hart?

III.  
(30 minutes)

Professor Albert Alschuler, in his Mellon Lecture delivered at the School of Law this Spring, commented:

"What renders substantive fourth amendment law incomprehensible . . . is not the lack of categorical rules but too many of them. The application of different principles to seizures of persons than to seizures of things, the development of differing rules for arrests in restaurants than for arrests in houses, the attempt to articulate two tiers of justification for a thousand kinds of seizures, the proliferation of distinctions between and among containers--all these and more have rendered the fourth amendment a[n overly complex] system . . . . Abandoning the judging of categories, courts should resume the judging of cases. In that way, they might begin to make the law of search and seizure

comprehensible to the police and to the rest of us."

Other commentators have made similar points about fifth and sixth amendment rulings which adopt such "categorical rules" or "bright lines." Do you agree with Professor Alschuler's comments as applied in any of these areas? Why or why not? (Please include references in your answer to cases discussed this semester.)

Professor Burkoff

