Cases and Problems in Criminal Procedure: The Police

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SEVENTH EDITION

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Carolina Academic Press
Durham, North Carolina

ISBN 978-1-5310-1313-4
e-ISBN 978-1-5310-1314-1
LCCN 2019943137

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Contents

Table of Cases

[References are to pages.]

D

E

F

I

J

Q

R

Y

Z

Preface to the First Edition

This book is designed to help law professors teach students to do what lawyers do: analyze problems.

A client comes to a lawyer with a difficult legal problem, involving a complex set of facts. The lawyer then researches the legal issues, finding a cluster of authorities. In order to advise the client (and—if necessary—to litigate the case), the lawyer must analyze, distinguish, reconcile, and interrelate the authorities in the cluster, seeing them as a group indicating the direction of the law as well as seeing them separately.

This book is an attempt to recreate that experience for the law student, and to help the student learn how to handle it. To learn to do something practical, one needs 3 things: a task, some tools, and a teacher. This book supplies the task and the tools. The task is the Problem at the outset of each chapter. The tools are the statutes and cases that follow. Following many cases are notes giving the student hints as to how the cases might be used to help analyze the Problems. (The notes also contain summaries of recent cases, which may give students a broader perspective on how courts are handling the issues raised by the main cases.)

Analyzing problems is useful in itself—as this is what lawyers must do. But equally important, problem analysis can encourage the student to understand each case on a deeper level. One cannot apply a principle to a new set of facts unless one truly understands the principle and its underlying rationale.

The book focuses on how the United States Constitution affects criminal procedure in this country. Statutes and common law doctrines appear only incidentally. Because of this constitutional focus, most of the cases in this book are from the United States Supreme Court. I also included a few lower court cases that cover issues which arise in practice with some frequency, but which have thus far escaped the attention of the U.S. Supreme Court.

Keeping reading assignments for students to a reasonable length forced me to restrict the number of issues and cases I was able to include. I tried, however, to select cases that address fundamental issues in each area, which are well-written, and which are fairly recent. (My editing of the cases often omits the usual asterisks, brackets, and the like. I tried to make the cases as readable as possible for weary law students, and I hope the authors of those opinions will forgive the minor liberties I have taken.)

When I attended Boalt Hall in the early 1960's, I took a one-semester, 3-unit course called "Criminal Law & Procedure." This short course gave us ample time to cover all the major issues in both fields. Within a few years thereafter, however, the Warren Court — and the reactive opinions of the Burger and Rehnquist courts — expanded the law of criminal procedure exponentially. The size of this book reflects that explosion.

This book covers most of the important 4th and 5th Amendment issues in some depth. Some are covered more briefly, just enough to give the student a basic familiarity with the subject. The price of teaching the student how to apply the law — by using the Problems, which takes time — is breadth of coverage. I think it is well worth it. The student can learn legal rules while practicing law, but the guiding hand of a teacher is needed to learn application. A good treatise or hornbook might be used to supplement this book.

While I believe that the approach taken by this book is pedagogically sound, I have another, more selfish reason for using this approach in my teaching: it is fun to play lawyer. My students usually agree, and I think this in itself enhances their learning. This approach does demand more work from them. They must not only read the cases, but also apply them to the Problem. I also ask them to prepare an outline of an analysis of the Problem, based on the authorities in the chapter. All this takes more time and effort, but they do it and seem to enjoy doing it. They know that they are reading the cases as a lawyer would, for a specific purpose: to answer the Problem.

I hope you enjoy it too.

M.M.

Preface to the Seventh Edition

Problems remain the essence of this textbook. Students will read each case in the context of the hypothetical problem at the beginning of each chapter. Professor Boals and I joined Professor Moskovitz in updating the Seventh Edition after a combined two decades of teaching Constitutional Criminal Procedure with this textbook. As first-career criminal defense attorneys, Professor Boals and I were drawn to a textbook that pushes students to consider complex constitutional law in real case setting. The approach helps foster an engaged learning environment in the classroom, and it prepares students to address the bar exam and to practice law.

The Supreme Court of the United States has been busy developing its constitutional criminal procedure jurisprudence since the publication of the Sixth Edition, particularly in areas dealing with technology and in refining its exclusionary rule. As we have added new cases, we have thoughtfully trimmed note cases and materials to keep the textbook at a manageable length for students.

We hope this textbook provides a guide for your students to read the cases and materials with a specific purpose: to resolve the Problem.

J.A.G.D.

Introduction

I.
An Overview Of The Criminal Courtroom Process

This book is primarily about what happens to a criminal case *before* it gets to court. Nevertheless, the cases in the book do discuss what happened *in* court. To help you understand the courtroom process, here is a brief overview of the whole process in felony cases, as it usually operates in federal courts and most state courts.[1]

Suppose the police believe that Dan has committed a series of four bank robberies. They arrest Dan and "book" him (write the charges and biographical data about Dan in a book), and they send a report of the case to the prosecutor's office ("United States Attorney" in the federal system, "District Attorney" in most states). The prosecutor considers the strength of the evidence against Dan and other factors in determining what charges to file, and then files a complaint against Dan in court. The complaint is similar to a complaint in a civil case. Each count (i.e., each separate charge) in the complaint states that on a certain date, Dan committed certain acts which violated a specified penal statute, at a location within the jurisdiction of the court.

Within a few days, Dan will be arraigned before a magistrate of the court (who does not have as much authority as the judge who will later preside at the trial of the case). At the arraignment, the magistrate will read the charges to Dan and ask him to enter a plea of guilty, not guilty, not guilty by reason of insanity, or "nolo contendere" (i.e., a default), to each charge. If Dan does not have a lawyer with him to advise him on what plea to enter, the magistrate will usually give Dan some time to hire one, or, if Dan is indigent, time to arrange for the services of a public defender. If Dan pleads guilty to any charge, the magistrate will sentence him or refer him to a judge for sentencing.

Suppose that, after consulting with counsel, Dan pleads not guilty to all charges. The magistrate will then set a date for a preliminary hearing (sometimes called a preliminary examination), to be held before the magistrate, unless Dan waives his right

1. This process is examined more thoroughly in Moskovitz, Cases & Problems in Criminal Procedure: The Courtroom (Carolina Academic Press).

to a preliminary hearing. The magistrate will also consider whether Dan should be released on bail (or on his "own recognizance"), pending the preliminary hearing.

The preliminary hearing is intended to permit the magistrate to decide whether there is "probable cause" to hold Dan for trial on each count. This is a screening device, meant to save Dan the expense and anxiety of a trial on a weak case, and meant to save the courts the expense of a trial which is unlikely to lead to a conviction. At the preliminary hearing, the prosecutor will put on a somewhat skeletal case, with a minimum of witnesses — enough to show probable cause but not enough to let defense counsel see the whole prosecution case. The defense will seldom put on witnesses of its own, but will cross-examine prosecution witnesses in an effort to undermine probable cause and to try to "discover" as much of the prosecutor's case as possible, in preparation for trial.

The magistrate's decision may take several forms. She may dismiss some or all charges against Dan. She may also reduce some or all charges to "lesser-included" crimes. (For example, she may find probable cause to believe that Dan stole the money, but no probable cause to believe that he used force or threats — so a robbery charge should be reduced to larceny.) If the magistrate finds probable cause as to any charge which is a felony, she will "hold the defendant to answer" the charges at trial, and she will order the defendant "bound over" to the court for trial on these charges. The prosecutor will then file an information in the trial court. The information is similar to the complaint, setting out the remaining charges.

In federal court and in a few states, the prosecutor must obtain an indictment from a grand jury (unless Dan waives indictment, in which case an information may be filed). The grand jury may indict only if it finds probable cause to believe that Dan committed the crimes, based on evidence presented in secret by the prosecutor to the grand jury. (Defense counsel is not present before the grand jury, and no cross-examination of witnesses occurs.) Usually, if the prosecutor obtains the indictment before the date set for the preliminary hearing, the preliminary hearing will not be held, as the purpose of the preliminary hearing — to determine "probable cause" — will already have been served.

After the indictment or information is filed, Dan will be arraigned before a trial court judge, and Dan will enter a plea of guilty or not guilty to the remaining charges. If Dan pleads not guilty, the judge will set a date for the trial. The judge may also decide whether Dan should be released on bail pending trial. Before trial, both the prosecutor and defense counsel may be given certain rights to discover each other's case — although these rights are much more limited than discovery rights in civil cases.

Before trial, defense counsel may file certain pretrial motions, such as motions for discovery and motions to suppress evidence which is the result of an illegal search or interrogation.

At any point in this process, but usually before the trial begins, the parties may engage in plea bargaining. Each defendant has a right to a speedy trial (i.e., a trial

which begins fairly soon after the arrest or indictment), but the prosecutor and the court do not have the resources to give a speedy trial to every defendant. So the prosecutor must induce most defendants to plead guilty. This is done by offering to dismiss or reduce some charges or to recommend certain sentences. Before accepting a guilty plea, the judge will make sure that the defendant knows what he has been promised and not promised, and that he is giving up the right to trial by jury on the charges.

At trial, if both parties agree, the case may be tried by the judge. Usually, however, the defendant demands a jury trial, as it is generally assumed that a group of lay people is less likely to convict than a "case-hardened" judge. In most cases, the jury's verdict must be unanimous, which makes it less likely that the prosecutor will obtain a guilty verdict from a jury.

The case begins with voir dire, the questioning of prospective jurors by the two lawyers and/or the judge. If any prospective juror displays improper bias, a lawyer may challenge that person "for cause," and if the judge finds improper bias, that person will be dismissed. Each lawyer also has a limited number of peremptory challenges, allowing the dismissal of several prospective jurors for any (almost) or no reason.

After the jury is selected and sworn, each lawyer may make an opening statement to the jury, summarizing the evidence to be presented. Then the prosecution puts on its witnesses, who are subject to cross-examination by the defense. When the prosecution rests its case, defense counsel may move for a directed verdict of acquittal, on the ground that the prosecution evidence, even if believed by the jury, does not show all of the elements of the crime(s) charged in the information or indictment. If such a motion is denied or not made, the defense then puts on its case, and its witnesses are subject to cross-examination by the prosecutor. The defendant has a constitutional right not to testify, but if he does testify, he too is subject to cross-examination by the prosecutor. When the defense rests, the prosecutor may introduce rebuttal evidence, and sometimes the defense may introduce surrebuttal evidence.

After each side rests its case, each attorney submits to the judge proposed jury instructions, containing the rules of law which apply to the case. Some of these instructions will be standard instructions taken from appellate court opinions and form books, and others will be devised by the lawyers. After hearing and ruling on any objections to proposed instructions, the judge will inform the lawyers as to which instructions will be given. Each lawyer then delivers a summation (sometimes called closing argument) to the jury. Because the prosecutor has the burden of proof (beyond a reasonable doubt), she will go first, then the defense lawyer will argue, and then the prosecutor is allowed a final rebuttal. Since each lawyer then knows what instructions the judge will give the jury, the lawyers will usually argue that the law contained in the instructions, when applied to the evidence heard by the jury, dictates a result favorable to that side.

After the summations, the judge reads the jury instructions to the jury. The jury then deliberates and returns with its verdict. If the jury is unable to decide any of the charges by the required majority (usually unanimity), the judge will declare a mistrial as to those charges and, if the prosecutor so requests, set the case for re-trial before a new jury. If the jury acquits the defendant, the defendant will be released and case is over — the prosecutor has no right to appeal an acquittal. If the jury convicts the defendant on any charge, the jury is then discharged, in most cases. Usually, the jury plays no role in the next phase — sentencing — unless the jury convicted the defendant of a capital crime and the prosecutor is seeking the death penalty.

Statues control what the judge may consider in sentencing the defendant. Some statutes set low and high limits on the sentence, but allow the judge wide discretion as to any sentence within these limits (e.g., "2 to 10 years"). Such statutes often allow the judge to consider just about any factor in choosing the sentence. Other statutes confer the authority to select the actual sentence on some other board or agency. Some statutes set the sentence at specific terms of years, depending on certain factors the judge must find (e.g., 2 years for a robber with no criminal record and who injured no one, 6 years for a robber with a record who injured someone, and 4 years for an in-between robber). Before sentencing the defendant, the judge will usually request a pre-sentence report from the court's probation department or similar agency. These officials will investigate the defendant's background and recommend a sentence to the judge. At the sentencing hearing, defense counsel may object to all or parts of the presentence report, and may present evidence on the appropriate sentence. The sentence may also include a fine. In some cases, the judge may grant probation to the defendant, perhaps on condition that the defendant serve a few months in a local jail.

After selecting the appropriate sentence for the defendant, the judge will enter a judgment, which states both the conviction and the sentence. From this judgment, defendant may file a notice of appeal to the appellate court which oversees the trial court. Filing this notice does not stay the sentence, and the defendant will have to seek a stay of the sentence and bail on appeal in order to avoid incarceration during the appeal.

A defendant will often obtain a new attorney on appeal, one who specializes in appellate work. The prosecutor often does the same. Copies of the pleadings and other documents are compiled (usually into a volume called the "clerk's transcript"). A court reporter's transcript of all of the oral testimony and argument is also prepared. Using these transcripts and any exhibits submitted as evidence at trial, the defendant's lawyer writes and files an "Appellant's Opening Brief," the prosecutor's attorney writes and files a "Respondent's Brief," and the defendant's lawyer then writes and files an "Appellant's Reply Brief." The appellate court then sets the case for oral argument, the case is argued, and it is submitted for decision. The appellate court then decides the case, usually issuing a writing opinion, which may or may not be published in the official reports. The court may affirm the trial court judgment, reverse it (usually for retrial, but sometimes with instructions

to dismiss certain charges), or modify it (e.g., by reducing the sentence). If either side is unhappy with the appellate court's ruling, that party may seek review from the next highest court (usually the state supreme court or United States Supreme Court), but that court usually has discretion to grant or deny a hearing in the case.

An appeal must be based on the record—the transcripts and exhibits from the trial court—and no other evidence will be considered by the appellate court. If a defendant claims that evidence outside of these transcripts and exhibits warrants relief, he must file a petition for a writ of habeas corpus. For example, if Dan claims that one of the jurors who convicted him was threatened during jury deliberations, evidence of this claim is unlikely to appear in the trial transcripts, and Dan must prove it by submitting affidavits attached to his petition for writ of habeas corpus. If Dan claims that a state court denied him his constitutional rights, he may sometimes seek habeas corpus relief in federal court.

If all else fails, Dan must pay his debt to society.

II.

On Problem Analysis

Each chapter of this book begins with a Problem, which simulates a case a lawyer might be called on to analyze, in order to advise a client or to prepare some litigation document.

Analyzing these Problems is not easy, even if you think you know "the law" in the chapter. Just as cases in real life are seldom simple, one-issue cases, each Problem raises several issues. The key to analyzing these Problems is good *organization* of the issues. Once you arrange the issues into a proper framework for analysis, the rest is—well, not easy, but manageable.

Organization of the issues is done by preparation of an outline. A typical outline will break down something like this:

I.
- A.
  - 1.
  - 2.
- B.

II.
- A.
  - 1.
    - a.
    - b.
  - 2.
- B.

What goes into these blank spaces? The following principles usually work pretty well:

* The issues in the "first level" of the outline (i.e., the roman numerals I, II, etc.) come from *the question* raised by the Problem. You do not have to know any law to write in these issues — just read the Problem, find the question, and read it carefully.[2]

* The issues in the lower levels of the outline (the A's and B's, 1's and 2's, etc.) come from the rules of law that appear in the cases in the chapter. To write in these issues properly, you will have to learn the *rules of law* — in some detail.

Let's apply these principles to a sample Problem.

Problem X

To: My law clerk

From: Clarence Barrow, Esq.

Re: *State v. Pott*

My client, Paul Pott, has been charged with sale of marijuana and possession of cocaine. At trial, the prosecutor plans to introduce into evidence some marijuana and cocaine seized by the police from Pott's home. To keep these items out, I filed a motion to suppress this evidence. At the hearing on the motion to suppress, Police Officer Nick Nark testified as follows:

Q. State your name and occupation, please.

A. Nick Nark, City Police Officer.

Q. Officer Nark, why did you go to Pott's home on April 1?

A. One of our undercover officers told me that he had just bought some marijuana from Pott on the street. Pott had told him that he was going home to get some more, and that he keeps his stash in his bathroom, next to the toilet. I wanted to arrest Pott, search his home, and confiscate any marijuana I found there.

Q. What happened when you got there?

A. I knocked on the door and said, "Police officer. Open up." I then heard some scurrying-around noises inside, so I smashed open the door. I found Pott in the bathroom putting some leafy substance in the toilet. I arrested him and took the leaves, which looked to me like marijuana. On the bathroom sink, I saw a small plastic bottle with some white powder in it. I thought this might be cocaine or heroin, so I took that too.

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2. You might try this out by turning to any Problem in the book — now, before you have even read any of the chapters. Knowing no law, you should nevertheless be able to write out the major issues for an outline of a memo on the Problem — simply by finding the *question* in the Problem.

My brief in support of my motion to suppress is due tomorrow. Please read the attached authorities and write a memo advising me of what reasonable arguments I can make and how the judge is likely to rule on them.

Penal Code § 321

"Before forcibly entering any home in order to make an arrest or conduct a search, a police officer must first knock and announce his authority and purpose."

State v. Grass

[This case holds that where a defendant moves to suppress evidence seized in a warrantless search, the prosecution has the burden of proving all facts which would convince the judge that it was more probable than not that the search was valid.]

State v. Weed

[This case holds that police officers are excused from complying with Penal Code § 321 where the police reasonably believe that "exigent circumstances" are present. Such exigent circumstances include the impending destruction of evidence to be seized, or the impending escape of persons to be arrested.]

United States v. Joint

[This case holds that, under the Fourth Amendment to the U.S. Constitution, assuming that the police are lawfully in a place where they *see* an object, they may then *seize* that object only if they have probable cause to believe that the object is evidence of a crime or is illegal to possess.]

State v. Roach

[This case holds that, where the police commit any illegal act in the course of a search, any evidence thereafter obtained by the police must be excluded from evidence, and a motion to suppress this evidence should be granted. There are exceptions to this holding, which do not apply to our case.]

After reading the above material, you have probably spotted a few issues that should be discussed in your draft brief. Did the white powder really look like cocaine or heroin? Did Nark reasonably believe that Pott would flush the marijuana down the toilet? Did Nark's announcement comply with § 321?

Good issues, but how do you present them? As they occur to you? In the order they appear in the testimony? Unless you find some coherent way to organize your issues, your presentation will be less effective and persuasive than it should be, and it might even descend into an incoherent mess.

Preparing an outline pursuant to the two principles mentioned above may help you write a good memo. Also, it should help you to find all of the relevant issues.

Let's begin our outline. First, specify the major issues—the roman numerals. These come directly from the question, which appears somewhere in the Problem.

You'll find it in the first and last paragraphs, where lawyer Barrow directs you to write a memo advising him of reasonable arguments supporting a motion to suppress two items — the marijuana and the cocaine — and your prediction of how the court will rule on these. Our major issues, then, should reflect this direction:

I. Motion to suppress *marijuana*

II. Motion to suppress *cocaine*

Usually, the major issues should appear in the same *order* that they arose in the facts, chronologically. This will minimize the need for repetition and allow you to refer back (rather than ahead) to facts or issues discussed elsewhere, producing a more readable memo. In Problem X, the marijuana was seized before the cocaine, so it is probably better to address the marijuana issues first.

Next, fill in the "submajor" issues, where they belong. This requires you to learn the correct *rules of law*, and then fit these rules into the outline in their proper places. Usually, a rule of law consists of several *elements* that must be satisfied. By carefully reading Penal Code § 321, for example, you will see that it contains the following elements: (1) forcible entry, (2) of a home, (3) in order to arrest or search, (4) by a police officer, (4) who must knock, (5) and announce (a) his authority (b) and his purpose. The rules from the cases can be broken down in a similar way. By doing this, our outline now becomes:

I. Motion to suppress *marijuana* (As both *entry* and *seizure* led to marijuana, if either was illegal, marijuana should be suppressed. *See State v. Roach*.)

  A. *Entry* into home was illegal, because N violated § 321, without excuse.

    1. Compliance with § 321

      a. Forcible entry

      b. Of a home

      c. In order to arrest or search

      d. By a police officer

      e. Who must knock

      f. And Announce

        i) His Authority

        ii) His Purpose

    2. Excuse. (*See State v. Weed*.) Did N have reasonable belief that:

      a. Pott would escape?

      b. Marijuana would be destroyed?

  B. *Seizure* of the marijuana was illegal, because N did not show facts supporting probable cause to believe "leafy substance" was marijuana. *See U.S. v. Joint*.

II. Motion to suppress *cocaine* (As both entry and seizure led to cocaine, if either was illegal, cocaine should be suppressed. *See State v. Roach*.)

A. *Entry* violated § 321, without excuse.

[Same subissues as under IA, above.]

B. *Seizure* of the cocaine was illegal, because N did not show facts supporting probable cause to believe white powder was cocaine. *See U.S. v. Joint*.

Now the outline is almost complete. In fact, it is *too* complete. Some of these "issues" are not *live* issues, because you have no reasonable argument that these elements are not present here. For example, you would look pretty silly if you advised your employer to argue to the judge that the evidence failed to show that Nark was a police officer, or that the evidence failed to show that he forcibly entered a home. So we must now *cull out* "issues" which turn out to be "nonissues"—because of our facts. This results in the following outline:

I. Motion to suppress *marijuana* (As both entry and seizure led to marijuana, if either was illegal, marijuana should be suppressed. *See State v. Roach*.)

A. *Entry* into home was illegal, because N failed to comply with § 321, without excuse.

1. Compliance with § 321—Did N properly announce his authority and purpose in entering?

a. Authority

b. Purpose

2. Excuse. (*See State v. Weed*.) Did N have reasonable belief that:

a. Pott would escape?

b. Marijuana would be destroyed?

B. *Seizure* of the marijuana was illegal, because N did not show facts supporting probable cause to believe "leafy substance" was marijuana. *See U.S. v. Joint*.

II. Motion to suppress *cocaine* (As both entry and seizure led to cocaine, if either was illegal, cocaine should be suppressed. *See State v. Roach*.)

A. Because N failed to comply with § 321, without excuse.

[Same subissues as under IA, above.]

B. *Seizure* of the cocaine was illegal, because N did not show facts supporting probable cause to believe bottle of white powder was cocaine. *See U.S. v. Joint*.

We have one more job to do. At the lowest level of the outline, we should briefly note the *facts* that are relevant to each legal issue. Thus, our final outline might look like this:

I. Motion to suppress *marijuana* (As both entry and seizure led to marijuana, if either was illegal, marijuana should be suppressed. *See State v. Roach*.)

A. *Entry* into home was illegal, because N failed to comply with § 321, without excuse.

1. Compliance with § 321 — Did N properly announce his authority and purpose in entering?

a. Authority

i) N said "Police Officer."

b. Purpose

i) N said "Open up."

2. Excuse. (*See State v. Weed*.) Did N have reasonable belief that:

a. Pott would escape?

i) No evidence re P's statements or means of escape.

b. Marijuana would be destroyed?

i) P kept drugs next to toilet.

ii) N heard "scurrying around noises."

B. *Seizure* of the marijuana was illegal, because N did not show facts supporting probable cause to believe "leafy substance" was marijuana. *See U.S. v. Joint*.

1. Informant said P kept marijuana next to toilet.

2. N found "leafy substance" there.

3. But no evidence that N was trained to identify marijuana.

II. Motion to suppress *cocaine* (As both entry and seizure led to cocaine, if either was illegal, cocaine should be suppressed. *See State v. Roach*.)

A. Because N failed to comply with § 321, without excuse.

[Same subissues as under IA, above.]

B. *Seizure* of the cocaine was illegal, because N did not show facts supporting probable cause to believe bottle of white powder was cocaine. *See U.S. v. Joint*.

1. No evidence N was trained to identify cocaine.

2. No evidence informant said P would have cocaine in home.

3. P did not try to dispose of cocaine.

4. Fact that P sells one drug might indicate he sells others.

Now our outline is about as good as we can make it. Our *assignment* is not done yet — we still have to write the memo. Our memo will carefully *apply* each of the above issues to the *facts*. But we have laid the groundwork for a well-organized memo that covers all of the relevant issues.

When you come to each new chapter of this book, try to write an outline for the Problem in that chapter. This might seem difficult at first, but it should become easier as you gain some experience with it. The skills you learn from doing this may prove useful to you when taking exams—and when practicing law.

After writing the outline, you might wish to finish the job and write the memo. In writing the memo, try to follow the following principles: (1) focus on the *question* posed by the Problem, (2) stay organized, following your outline, (3) for each issue, briefly state the correct rule of law[3] and then *apply* that rule to the *facts*, discussing the facts in some depth, (4) spend more time on issues on which reasonable people might disagree, presenting the best arguments on *both* sides before reaching a *conclusion*, and (5) end the discussion of each issue with a conclusion—a prediction of what the court will rule and why—before moving on to the next issue.

For Problem X, the final memo might look something like this:

To: Clarence Barrow, Esq.

From: Your faithful law clerk

Re: *State v. Pott*

I. Motion to suppress the ***marijuana***

There are two reasonable arguments we can make to suppress the marijuana.

First, we should argue that the marijuana was obtained as a result of an illegal entry into Pott's home. Where evidence is obtained after an illegal entry, a motion to suppress that evidence should be granted. *State v. Roach*.

Here, the entry might have violated Penal Code § 321, which required Nark to knock and "announce his authority and purpose" before entering in order to search for the marijuana or to arrest Pott. It appears that Nark did announce his "authority," as he stated that he was a "police officer" to anyone inside. But I see no evidence that he announced his "purpose," which, as he testified, was to arrest Pott and search his home for marijuana. His statement "Open up" says that he wanted the door opened, but it does not say *why* he wants the door opened, so cannot reasonably be construed as announcing his purpose. *State v. Grass* requires the prosecution to prove all facts showing a search to be valid, and the prosecution here has failed to show that Nark complied with § 321 by announcing his "purpose" for entering. For this reason, I predict that the judge will find that Nark failed to comply with the terms of § 321.

State v. Weed, however, holds that the police are excused from complying with § 321 when the police reasonably believe that "exigent circumstances" are present. This includes the impending escape of the person to be arrested or the impending destruction of evidence.

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3. For some Problems in this book, your explanation of the correct rule of law will have to be more lengthy, because the holdings of some of the cases in these chapters might be a bit murky.

I see no evidence that Pott was about to escape when Nark knocked on the door. He made no statements to this effect, and there is not even evidence that there was a back door or window from which he could quickly escape.

There may be, however, evidence that would permit Nark to reasonably believe that Pott was about to destroy evidence. Nark had reliable information from another police officer that Pott kept his marijuana by the toilet. Also, after Nark knocked and said "police officer," he heard "scurrying-around noises," which might have been due to efforts to dispose of the marijuana. The judge might well find that this gave Nark a reasonable inference that, if Nark were to take the extra time to announce his purpose, Pott would flush the evidence away before Nark could get inside. On the other hand, Nark did announce "police officer," which tends to show that he did not believe that there was a significant danger that Pott would flush the marijuana. I conclude that the judge will find for the prosecution on this issue, because the inference described above is so reasonable, and maybe Nark announced "police officer" just to avoid being attacked when he entered. The issue is close, however, and the argument that Nark violated § 321 should definitely be made.

Second, we should argue that, even if the *entry* was legal, the *seizure* of the marijuana was illegal. Nark could seize the marijuana only if he had probable cause to believe that the "leafy substance" was marijuana. *U.S. v. Joint*. The record fails to show any evidence that Nark had any training or experience in identifying marijuana. As the prosecution had the burden of proof, we must assume that Nark had no such training or experience. On the other hand, Nark had reliable information that Pott had marijuana in his home, near the toilet, and this is where he found the "leafy substance," which Pott was trying to flush away. For this reason, I conclude that the judge will probably find that Nark had probable cause to believe the substance was marijuana, and that the seizure was legal. But the argument is reasonable enough for us to make.

For the above reasons, I conclude that the judge will probably *deny* our motion to suppress the marijuana.

II. Motion to suppress ***cocaine***

The same two arguments should be made for suppression of the cocaine.

First, if Nark's entry into Pott's home violated § 321, and this violation was not excused by exigent circumstances — as discussed above — then the motion to suppress the cocaine will be granted, because the cocaine was discovered after the entry.

Second, we should argue that the *seizure* of the cocaine was illegal, on the ground that the evidence fails to show that Nark had probable cause to believe that the white powder in the bottle was cocaine or heroin. The prosecution failed to present any evidence that Nark had any experience or training in identifying cocaine or heroin, so we must assume that he had none. The record also fails to show any information that Nark received indicating that Pott might possess such a drug. In addition, while Nark saw Pott trying to flush the marijuana, he did not see Pott trying to hide or

dispose of the cocaine. The prosecutor might argue that the fact that Pott sold one drug suggests that he might possess other drugs, but I conclude that the judge will find this suggestion too weak to outweigh the other factors I mentioned. Therefore, I conclude that the judge will probably *grant* our motion to suppress the cocaine.

In reading over this memo, note that "easy" issues are dealt with only briefly, while "hard" issues take more care. An *easy* issue is one on which reasonable people cannot really disagree—there is only one reasonable answer. A "hard" issue has two reasonable sides. Your job as a law student taking an exam, a law clerk working for a lawyer, or a lawyer working for a client, is pretty much the same: distinguish the easy issues from the hard issues, and construct arguments *on both sides* of the hard issues ("on the other hand …") before coming to a conclusion.

Note also that this memo spends a lot of time *carefully* examining *the facts* of the case, and explains how the rules of law apply to them. This too is one of the main jobs of a good law student taking an exam and a good lawyer representing a client.

One final suggestion: when you work on these Problems, try not to get emotionally involved with the characters, the events, or the charges. If you were working on Problem X, for example, and have strong feelings against (or for) drug dealers, you should look to see if your concerns are reflected some way in the policies underlying the applicable rules of law (as explained in the cases). If they are, you might mention these concerns as a way of strengthening your legal arguments. But do *not* let your concerns dictate the *result* you *want* to reach *before* you do your legal analysis. Such "result-oriented prejudging" usually leads to a weak analysis and poor representation for your client.

When you begin practicing law, you might decide not to take such cases. Many clients in criminal cases (and some civil cases) have done things that are not very nice. But once you take a case, you have an ethical duty to do your best for your client—no matter how you feel about him or her.

While you are doing these Problems, pretend that you have taken the case, and do your best for the client. This will help you to develop the skills you will need to help the clients you *want* to represent. (It might help to remind yourself that none of these characters, events, or ridiculous names are real. They are all figments of the author's rather bizarre imagination.)

THE BILL OF RIGHTS
The First Ten Amendments to the United States Constitution

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

SECOND AMENDMENT

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

THIRD AMENDMENT

No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in the manner to be prescribed by law.

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.

SEVENTH AMENDMENT

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

NINTH AMENDMENT

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

TENTH AMENDMENT

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.