

Cases and Problems in Criminal Procedure: The Police

Cases and Problems in Criminal Procedure: The Police

SEVENTH EDITION

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Contents

Table of Cases	xi
Preface to the First Edition	xxv
Preface to the Seventh Edition	xxvii
Introduction	xxix
Part I • Searches and Seizures	1
Chapter 1 • Probable Cause	3
Problem 1	3
<i>United States v. Draper</i>	5
Notes from Latimer	9
<i>Aguilar v. Texas</i>	11
Notes from Latimer	14
<i>Illinois v. Gates</i>	17
Notes from Latimer	32
<i>Florida v. Harris</i>	33
Chapter 2 • The Exclusionary Rule	41
Problem 2	42
<i>Mapp v. Ohio</i>	44
Notes from Latimer	51
<i>People v. McMurtry</i>	52
<i>United States v. Leon</i>	56
Notes from Latimer	76
<i>United States v. Savoca</i>	87
Notes from Latimer	90
<i>United States v. Savoca</i>	93
Notes from Latimer	99
<i>Herring v. United States</i>	106
Note from Latimer	115
<i>Byrd v. United States</i>	118
Chapter 3 • What Is a “Search”?	127
Problem 3	128
<i>Katz v. United States</i>	129

Notes from Judge Jones	133
<i>Oliver v. United States</i>	143
Notes from Judge Jones	150
<i>California v. Greenwood</i>	157
Notes from Judge Jones	162
<i>Kyllo v. United States</i>	166
<i>United States v. Jones</i>	174
<i>Florida v. Jardines</i>	188
Note from Judge Jones	200
<i>Carpenter v. United States</i>	204
Chapter 4 • Search Incident to Valid Arrest	225
Problem 4	225
<i>Schmerber v. California</i>	226
Notes from Potts	229
<i>Chimel v. California</i>	234
Notes from Potts	238
<i>United States v. Robinson</i>	239
Notes from Potts	251
<i>United States v. Chadwick</i>	252
Notes from Potts	255
<i>New York v. Belton</i>	256
Notes from Potts	264
<i>Arizona v. Gant</i>	266
Notes from Potts	281
<i>Riley v. California</i>	292
Chapter 5 • Stop and Frisk	309
Problem 5	310
<i>Terry v. Ohio</i>	311
Notes from Potts	323
<i>United States v. Mendenhall</i>	337
Notes from Potts	342
<i>Minnesota v. Dickerson</i>	348
Notes from Potts	353
<i>Navarette v. California</i>	357
<i>Heien v. North Carolina</i>	367
<i>Rodriguez v. United States</i>	374
Chapter 6 • Search of the Home	383
Problem 6	383
<i>Warden v. Hayden</i>	384
Notes from Judge Jones	386
<i>Vale v. Louisiana</i>	386
Notes from Judge Jones	389
<i>United States v. Santana</i>	396

Notes from Judge Jones	399
<i>Stackhouse v. State</i>	407
Notes from Judge Jones	415
<i>State v. Menz</i>	418
Notes from Judge Jones	420
<i>Hudson v. Michigan</i>	427
Note from Judge Jones	444
<i>Kentucky v. King</i>	444
Chapter 7 • Searches and Seizures of Cars, Containers, and Objects	455
Problem 7	455
<i>United States v. Chadwick</i>	456
Note from Latimer	458
<i>California v. Carney</i>	458
Notes from Latimer	465
<i>Arizona v. Hicks</i>	467
Notes from Latimer	474
<i>California v. Acevedo</i>	478
Notes from Latimer	490
<i>United States v. Bond</i>	495
Notes from Latimer	499
<i>Collins v. Virginia</i>	499
Problem A	506
Chapter 8 • Consent Searches	509
Problem 8	509
<i>Stoner v. California</i>	510
Note from Potts	513
<i>Bumper v. North Carolina</i>	513
Notes from Potts	516
<i>Schneckloth v. Bustamonte</i>	527
Notes from Potts	538
<i>Illinois v. Rodriguez</i>	539
Notes from Potts	547
<i>Florida v. Jimeno</i>	551
Notes from Potts	555
<i>Davis v. State</i>	564
Notes from Potts	567
<i>Georgia v. Randolph</i>	571
Note from Potts	586
Chapter 9 • Regulatory Searches	589
Problem 9	590
<i>Delaware v. Prouse</i>	592
Notes from Latimer	600
<i>Vernonia School District 47J v. Acton</i>	614

Notes from Latimer	627
Common Regulatory Searches	635
Searches when Entering Government Facilities	635
Border Searches	637
Searches of Probationers and Parolees	638
Part II • Interrogation	649
Chapter 10 • <i>Miranda</i>	651
<i>Miranda v. Arizona</i>	655
Some Questions about the Privilege against Self-Incrimination	682
<i>Dickerson v. United States</i>	691
Note	704
Chapter 11 • <i>Miranda</i>—The Warnings	705
Problem 11	705
<i>Rhode Island v. Innis</i>	706
Notes from Judge Jones	713
<i>New York v. Quarles</i>	716
Notes from Judge Jones	725
<i>Berkemer v. McCarty</i>	726
Notes from Judge Jones	731
<i>Pennsylvania v. Muniz</i>	739
Notes from Judge Jones	753
<i>People v. Elmarr</i>	765
Notes from Judge Jones	772
<i>Florida v. Powell</i>	777
Notes from Judge Jones	783
Chapter 12 • <i>Miranda</i>—The Waiver	791
Problem 12	791
<i>Michigan v. Mosley</i>	792
Notes from Latimer	797
<i>North Carolina v. Butler</i>	799
Notes from Latimer	803
<i>Arizona v. Roberson</i>	807
Notes from Latimer	814
<i>Davis v. United States</i>	820
Notes from Latimer	828
<i>Maryland v. Shatzer</i>	841
Note from Latimer	856
<i>Berghuis v. Thompkins</i>	856
Notes from Latimer	872
Chapter 13 • “Due Process” Limits on Interrogation	875
Problem 13	877
<i>In re Roger G.</i>	880

Notes from Judge Jones	885
<i>United States v. Tingle</i>	891
Notes from Judge Jones	896
<i>Colorado v. Connelly</i>	900
Notes from Judge Jones	909
<i>Miller v. Fenton</i>	913
Notes from Judge Jones	941
<i>Arizona v. Fulminante</i>	959
Notes from Judge Jones	964
Part III • Line-Ups	975
Chapter 14 • Line-Ups	977
Problem 14	977
<i>Wade v. United States</i>	979
Notes from Latimer	992
<i>Foster v. California</i>	1003
Notes from Latimer	1005
<i>Kirby v. Illinois</i>	1009
Notes from Latimer	1014
<i>Neil v. Biggers</i>	1017
Notes from Latimer	1021
<i>United States v. Ash</i>	1065
Notes from Latimer	1074
<i>Perry v. New Hampshire</i>	1079
Part IV • Standing and Fruits of the Poisonous Tree	1091
Chapter 15 • Standing	1093
Problem 15	1094
<i>Mancusi v. DeForte</i>	1095
Notes from Potts	1098
<i>Rakas v. Illinois</i>	1105
Notes from Potts	1119
<i>Rawlings v. Kentucky</i>	1121
Notes from Potts	1126
<i>Minnesota v. Carter</i>	1130
Notes from Potts	1142
<i>Brendlin v. California</i>	1148
Note from Potts	1153
Chapter 16 • Fruit of the Poisonous Tree	1155
Problem 16	1155
<i>Wong Sun v. United States</i>	1156
Notes from Latimer	1161
<i>Brown v. Illinois</i>	1162
Notes from Latimer	1169

<i>Nix v. Williams</i>	1177
Notes from Latimer	1188
<i>Oregon v. Elstad</i>	1191
Notes from Latimer	1206
<i>Utah v. Strieff</i>	1211
Problem B	1216
Problem A: Outline of Issues	1217
Problem A: Sample Answer	1218
Problem B: Outline of Issues	1220
Problem B: Sample Answer	1221
Index	1225

Table of Cases

[References are to pages.]

A

Abdul-Saboor, United States v. . . . 279
Acosta, United States v. . . . 12, 13, 151
Adams v. Williams 19
Agnello v. United States. . . . 132, 388
Aguilar v. Texas 9, 15, 17, 22, 62,
97, 228
Alabama v. White. 358
Albers, United States v. 466
Albritton, State v. 538
Alcantar, United States v. 563
Alderman v. United States . . . 56, 60, 79
Alejandro (Also Known As Green
Eyes), United States v. 405
Alexander, People v. 1055
Allen, People v. 467
Allred v. State 754
Almeida-Sanchez v. United States . .
1153
Alvarez v. Gomez 833
American Postal Workers Union v.
United States Postal Serv. . . . 1099
Andersen, People v. 909
Anderson v. Terhune 837
Anderson, United States v. . . . 555, 557
Arizona v. Evans. 104, 108, 109,
428, 437
Arizona v. Fulminante. 883, 959
Arizona v. Gant. 121, 266, 306
Arizona v. Hicks. . . 170, 288, 351, 352,
467, 625
Arizona v. Roberson. . . . 694, 695, 807,
823, 844
Arizona v. Youngblood 1053
Arkansas v. Sanders 480, 482, 483
Ash, United States v. 1065

Ashcraft v. Tennessee. . . . 651, 675, 919
Ashcroft v. al-Kidd 192
Atkins v. State 565
Atwater v. Lago Vista 270
Augenblick, United States v. . . . 1005
Aukai, United States v. 519, 636

B

Bacon, People v. 818
Bae v. Peters. 909
Bailey, People v., 24 A.D.3d 788
Bailey, United States v. . . . 95, 97, 1176
Baldwin, People v. 55
Ballard, United States v. 895
Baltazar, People v. 558
Banks, United States v. 427, 443
Barber, State v. 334
Bartlett, State v. 1120
Bass v. Commonwealth 609
Baxter, United States v. 416
Bayer, United States v. 1192
Beck v. Ohio 132, 318
Beck, United States v. 417
Beckwith v. United States . . . 894, 919
Beecher v. Alabama 1197
Bennett, United States v. 1068
Berg, Commonwealth v. 896
Berger v. United States 1070
Berghuis v. Thompkins 856
Berkemer v. McCarty. 376, 726,
731, 732, 733, 736, 739, 768, 772,
774, 808, 848
Berkowitz, United States v. 402
Best, United States v. 1147
Billings, Commonwealth v. 476
Biswell, United States v. 597

Bivens v. Six Unknown Fed. Narcotics Agents	78, 431, 695		
Blackburn v. Alabama	530, 658, 884, 893, 902, 906, 916, 919, 961		
Blake, United States v.	409, 411, 522		
Blasi v. State.	761		
Blount, United States v.	30		
Board of Education v. Earls	627		
Bond, United States v.	495		
Botero, United States v.	399		
Boyd v. United States	45, 146, 162, 167, 434, 441, 663		
Bradford, People v.	785		
Brady v. United States	922, 940		
Bram v. United States.	920, 940		
Breard v. Alexandria	191		
Breithaupt v. Abram.	229		
Brendlin v. California	369, 1148		
Brendlin, People v.	1153		
Bresolin, State v.	1110		
Brethauer, People v.	20		
Brewer v. Williams	1179, 1185		
Bridger v. State	20		
Brigham City, Utah v. Stuart.	426		
Brignoni-Ponce, United States v.	330, 593, 594, 729		
Brinegar v. United States	5, 6, 19, 20, 543		
Brooks v. East Chambers Consol. Indep. Sch. Dist.	613		
Brower v. County of Inyo.	1150		
Brown v. Illinois.	61, 1162, 1175, 1194		
Brown v. Mississippi.	529, 651, 674, 692, 702, 902, 907		
Brown, United States v.	1191		
Broxton, United States v.	560		
Brugal, United States v.	609		
Bulacan, United States v.	635		
Bumper v. North Carolina	513, 532, 536, 537		
Burbage, United States v.	1102		
Burket v. Angelone	833		
Burkhart, United States v.	91		
Bush v. United States	54		
Bushyhead, United States v.	798		
			C
Cabassa, United States v.	1189		
Cady v. Dombrowski	456, 457, 460, 501		
Cagle v. State	1204		
Cahan, People v.	47		
Calandra, United States v.	51, 58, 59, 68, 93, 428, 437		
California Attorneys for Criminal Justice v. Butts	876		
California v. Acevedo.	121, 478, 491		
California v. Beheler.	730, 732, 769		
California v. Carney.	458, 466, 467, 492, 501		
California v. Ciraolo.	158, 159, 165, 167, 496 497, 498, 499, 502, 1138		
California v. Greenwood	157, 173, 498, 499		
California v. Hodari D.	347, 1150		
California v. Rooney	160		
Camacho, People v.	152		
Camara v. Municipal Court	318, 591, 593, 597		
Cannady v. Dugger.	833		
Capers, United States v.	1211		
Card, United States v.	1057		
Cardwell v. Lewis	210, 457, 460, 491, 1116		
Carkhuff, Commonwealth v.	606		
Carley v. State	947, 949		
Carlson, People v.	762		
Carnley v. Cochran	668, 802		
Carr v. State.	818		
Carriger, United States v.	1100		
Carrillo, United States v.	725		
Carroll v. United States	6, 456, 459, 501		
Carty, People v.	610		
Cassell, State v.	873		
Castleberry v. Alford	949		
Cayward, State v.	942		
Ceccolini, United States v.	61, 1169, 1183		
Cerezo, People v.	830		

Davis, Commonwealth v.	513	Ducharme, State v.	1148
Davis, People v.	725	Duckworth v. Eagan.	697, 779, 784
Davis, United States v.	136	Dunaway v. New York	61, 258, 1198
Deal, State v.	731	Dunbar, People v.	787
Defore, People v. 42, 47, 49, 50, 68, 112, 1186		Duncan v. Louisiana	1005
Delaware v Prouse 121, 592, 728, 1150		Duran, United States v.	567
Delaware v. Van Arsdall.	904	Durbin, State v.	466
DeLuca, United States v.	1172	Dyke v. Taylor Implement Mfg. Co. . 262	
DeMaria, Commonwealth v.	1055		
Demesme, State v.	818	E	
Dennis v. Secretary, PA Dep't. of Corrections.	1001	Edrozo, State v.	735
Dennis v. State	1177	Edwards v. Arizona 694, 807, 808, 811, 820, 827, 835, 841, 851	
Denny, United States v.	1101	Edwards, United States v.	251
DeSantis, United States v.	816	Elizalde, People v.	759
Dey, People v.	491	Elkins v. United States 47, 48, 49, 74, 314	
Di Re, United States v.	7, 31	Ellison, United States v.	139
Dias-Castaneda, United States v.	138	Entick v. Carrington.	176, 191
Diaz v. Senkowski.	833	Escobedo v. Illinois	529
Diaz, People v.	293	Escobedo v. Illinois 654, 674, 692, 806, 982, 1011	
Dickerson v. United States. 273, 277, 436, 691, 837, 862, 1206		Evans, State v.	567
DiGiambattista, Commonwealth v. 888, 950, 954, 969		Ex parte Jackson	159
Dionisio, United States v.	201, 743	Ex parte Warren	353
Disla, United States v.	757		
Dixon, State v.	1119	F	
Doe v. United States 741, 744, 745		F.B., Interest of	627
Doe, United States v.	833	Falso, United States v.	92, 116
Donovan v. Lone Steer, Inc.	219	Fare v. Michael C.	809, 823
Doody v. Schiro	911	Fazio, United States v.	1173
Dorado, People v.	667	Feldman v. United States.	49
Dorsey, United States v.	270	Fellers, United States v.	1211
Douglas v. California	667	Ferro, People v.	714
Douglas v. City of Jeannette	678	Ferro, People v.	716
Dow Chemical Co. v. United States 153, 169		Fikes v. Alabama.	918, 919
Downs, United States v.	1021	Fisher v. United States	718
Doyle v. Ohio	695, 798	Fixel v. Wainwright	1100
Drake, People v.	1053	Flores, United States v.	95, 98
Draper v. United States	259, 300	Florida v. Bostick 331, 345, 523, 1150, 1172	
Draper, United States v. 3, 23, 28, 29		Florida v. Harris	31, 194
Drayton, United States v.	347	Florida v. J.L.	327
DuBose, State v.	1014	Florida v. Jardines.	121, 188, 501, 502

Florida v. Jimeno 551, 560
 Florida v. Powell 777, 866
 Florida v. Riley 496, 1138
 Florida v. Rodriguez 329
 Florida v. Royer 331, 345
 Florida v. White 494
 Floyd, People v. 1008
 Ford v. State 568
 Ford, United States v. 356
 Forrester, United States v. 140
 Foster v. California 1003, 1007,
 1011, 1012, 1019
 Foster v. State 410
 Fowler, People v. 1013
 Frank v. Maryland 591
 Franks v. Delaware 62, 66
 Franks v. State 754
 Frazier v. Cupp . . . 534, 545, 947, 1116
 Free, State v. 956
 Freeman v. State 890
 Frierson, State v. 1176
 Funches, United States v. 1006

G

G.M. Leasing Corp. v. United States.
 503
 Gallo-Moreno, United States v. . 1079
 Garcia v. N.Y. State Police
 Investigator Aguiar 356
 Garcia, People v. 798
 Garner v. Mitchell 911
 Garner, State v. 1190
 Garza-Fuentes v. United States . . 1110
 Garzon, United States v. . . 1101, 1102
 Gega, People v. 1009
 Georgia v. Randolph 441, 571
 Gerstein v. Pugh 846
 Gideon v. Wainwright 654, 667
 Gilbert v. California . . 743, 750, 1066,
 1069
 Gilliard, People v. 818
 Giordenello v. United States 9
 Gissendaner v. State 832
 Glasgow, United States v. 895
 Go-Bart Co. v. United States 245

Gobert, State v. 841
 Godinez v. Moran 805
 Goldman v. United States . . 127, 130,
 183, 184, 1110
 Golotta, State v. 360
 Gomez, People v. 563, 610
 Gompf v. State 538
 Gonzalez, United States v. 940
 Gouveia, United States v. 822
 Gramlich, United States v. 95, 97
 Grant, State v. 715
 Green, People v. 1008
 Green, United States v. . . . 95, 97, 1173
 Griffin v. Wisconsin . . . 617, 618, 638
 Grigg, United States v. 329
 Griscavage, Commonwealth v. . . 743
 Grubbs, United States v. 391
 Grunewald, United States v. 664
 Guerrero v. State 1003
 Guidry v. State 519
 Guilbert, State v. 1030
 Guiney v. Roache 613
 Guzman, State v. 1026
 Guzman, United States v. 856

H

Hackley, United States v. 715
 Hall, Commonwealth v. 408
 Hall, United States v. 956, 965,
 1024
 Halsema v. State 548
 Hamilton v. Alabama 982
 Hamilton, People v. 521
 Hamilton, United States v. 465
 Hardaway v. Young 806
 Harmon v. Thornburgh 613
 Harris v. New York 695, 819, 876,
 1195
 Harris v. United States 278
 Harris, People v. 830, 1008
 Harrison, United States v. 898
 Hatcher, United States v. 87, 97
 Hauser, State v. 163
 Havens, United States v. 60
 Hawkins v. Lynaugh 886

Jones, United States v. . . 174, 189, 209,
210, 212, 223

K

Kaiser Aetna v. United States . . .1125
Karathanos, United States v. 73
Karo, United States v. . . 169, 177, 184,
187, 1139, 1140
Kastigar v. United States 1203
Katz v. United States. . . 121, 122, 129,
138, 144, 147, 158, 161, 172, 176,
179, 184, 193, 196, 209, 268, 307,
317, 339, 388, 419, 484, 498, 527,
552, 553, 565, 581, 1096, 1110, 1111,
1113, 1116, 1124, 1132, 1135, 1136,
1141, 1147
Kaupp v. Texas516
Kendricks, People v. 827
Kent v. Claiborne County Hosp.. 613
Kentucky v. King191, 197, 444
Ker v. California10, 411
Kinard, State v.1057
Kincade, United States v. 643
Kirby v. Illinois. 1009
Kirschenblatt, United States v. . . 237,
302
Knights, United States v. 641
Knotts, United States v.182, 187
Knowles v. Iowa 270
Kowalski, People v. 966
Krause v. Commonwealth. 406
Kremen v. United States.316
Kuhlmann v. Wilson 963
Kyllo v. United States . . 166, 179, 193,
194, 199, 203, 211

L

Ladd, State v. 759
Larson, United States v.1121
Laughton, United States v. 100
Lawrence v. Texas. 272
LeBrun, United States v. 886
Ledbetter v. Edwards 941
Ledbetter, State v. 1060
Lee v. State. 806

Lee v. United States521
Lefkowitz, United States v. . . 10, 245
Lego v. Twomey 894, 903
Lemus, United States v. 286
Leon, People v.1146
Leon, United States v. . . . 56, 93, 102,
111, 428, 430, 437, 903
Leonard, People v.1119
Letsinger, United States v. 347
Lewis v. United States 406, 521
Lewis, United States v.1147
Leyra v. Denno . . . 659, 918, 919, 921,
922
Leyva, State v. 838, 839
Licari, State v. 547
Linkletter v. Walker533
Lisenba v. California 678, 904
Liss, United States v.1172
Little v. Barreme 486
Locke v. United States 20
Lockett, United States v. 95, 97
Lockhart, State v. 873
Locklear, State v. 759
Lo-Ji Sales, Inc. v. New York . . 62, 66,
85
Londo, State v. 726
Longoria, United States v. 137
Lopez, State v.819
Lowery v. State 526
Loy, United States v. 392
Lucarz, United States v. 95
Lucas v. State. 832
Luc-Thirion, United States v. . . 638
Ludlow v. State 408
Lynumn v. Illinois674, 679, 894

M

Machupa, People v. 76
Mack, State v. 608
Madrid, People v.1161
Maestas, United States v. 95, 97
Magluta, United States v.416
Mallory v. United States. . . 654, 664
Malloy v. Hogan . .654, 664, 692, 843,
893, 894, 899, 902, 907, 1201, 1207

Mancusi v. DeForte .1095, 1107, 1110, 1116	McVeigh, United States v. 992
Manson v. Brathwaite1053	Meehan, Commonwealth v. 889
Mapp v. Ohio . . . 44, 53, 58, 110, 113, 314, 428, 434, 533, 1213	Melucci, United States v.1146
Marbury v. Madison 697	Melvin, Commonwealth v.1057
Margaret v. State 550	Mendenhall, United States v.. . . . 337, 345, 1150
Marini, Commonwealth v. 1056	Menz, State v.418
Marshall v. Barlow’s, Inc.. . . .145, 597	Merrill, State v.163
Martinez-Fuerte, United States v. 213, 340, 594, 601, 617	Michael, People v.531
Maryland v. Buie 272, 286, 289	Michigan Department of State Police v. Sitz. 600, 617
Maryland v. Garrison. 542	Michigan v. DeFillippo61, 369
Maryland v. King 646	Michigan v. Jackson815
Maryland v. Pringle 30	Michigan v. Long . .265, 272, 274, 352
Maryland v. Shatzer 841	Michigan v. Mosley . . . 792, 809, 810, 823, 835, 851, 857, 860, 872
Maryland v. Wilson265, 1151	Michigan v. Payne1165
Massachusetts v. Sheppard 109	Michigan v. Summers 303
Massiah v. United States1186	Michigan v. Tucker. . . . 437, 694, 699, 700, 718, 820, 822, 1195, 1196, 1201
Mathis v. United States 729	Middleton v. State. 396
Matlock, United States v. . . . 539, 541, 545, 565, 571, 572, 573, 585, 1182	Miller v. Fenton902, 913, 961
May, People v.910	Miller v. State 877
McArthur, United States v. 92	Miller, United States v. 208, 212, 214, 215, 646, 1116
McCarty, People v. 281	Mincey v. Arizona263, 273, 408, 425, 468, 546, 718
McClain, United States v. 76	Minnesota v. Carter1130, 1145
McClendon, United States v. 347	Minnesota v. Dickerson. 348
McCord, State v.521	Minnesota v. Murphy 643
McCraw, United States v. 403	Minnesota v. Olson . . . 122, 569, 574, 1126, 1127, 1129, 1131, 1132, 1133, 1135, 1136
McDaniel v. Commonwealth . . . 830	Minnick v. Mississippi . 694, 815, 844, 854
McDaniel, United States v. 803	Miranda v. Arizona .21, 257, 277 655, 691, 694, 695, 702, 706, 708, 709, 710, 717, 726, 728, 733, 740, 741, 742, 745, 747, 750, 751, 777, 785, 786, 793, 795, 796, 802, 808, 822, 823, 825, 826, 839, 840, 841, 843, 844, 852, 856, 861, 862, 865, 866, 867, 884, 900, 904, 905, 971, 982, 1010, 1012, 1013, 1162, 1165, 1166, 1191, 1194, 1195, 1196, 1200, 1201
McDonald v. United States . 257, 385, 1116	
McDonald, United States v. 497	
McIntyre v. Ohio Elections Comm’n 1147	
McMorris, State v. 995	
McMurtry, People v. 52	
McNabb v. United States 664	
McNeil v. Wisconsin819	
McNeil, People v. 999	
McPhearson, United States v. . . . 102	
Mcrae, United States v. 557	
McShane, United States v. 895	
McSween, United States v. 557	

Miravalles, United States v.1100
 Missouri v. McNeely 229
 Missouri v. Seibert 1207
 Mitchell v. United States 696
 Mitchell, United States v.1104
 Mobley, United States v.816
 Monroe v. Pape.431
 Montejo v. Louisiana 855
 Montoya de Hernandez, United States v. 637
 Mooney, State v. 150
 Moore v. State 832
 Moore, State v.14
 Morales, Commonwealth v.251
 Moran v. Burbine803, 806, 807, 861, 866, 905, 906
 Moreno, People v.1128
 Morrissey v. Brewer80, 81, 638
 Morton v. United States.1142
 Murphy v. Waterfront Comm. of New York Harbor. 664, 1203
 Murphy, United States v. 270
 Murray v. United States.439, 1188

N

Nardone v. United States . 1160, 1161, 1167, 1201, 1204
 Nasiriddin v. State 758
 Nathanson v. United States 22
 National Fed'n of Fed. Employees v. Cheney613
 National Treasury Employees Union v. Von Raab. 611, 613, 617, 621, 622
 Navarette v. California. 357
 Neil v. Biggers . 1001, 1017, 1051, 1081, 1082
 Nerber, United States v. 136
 New Jersey v. T.L.O. 329, 617, 618
 New York v. Belton 146, 256, 265, 266, 273, 283, 482, 1173
 New York v. Burger.1133
 New York v. Class 139
 New York v. Harris 401
 New York v. Quarles.695, 697, 700, 716, 847, 1194, 1195, 1201

Newton, United States v.731
 Nguyen, People v.819
 Nichols, United States v.819
 Nitschmann, People v. 783
 Nix v. State 520
 Nix v. Williams, 467 U.S.439, 700, 1177
 Nobles, United States v.745
 North Carolina v. Butler799, 861, 867, 868, 904
 Northwest Airlines, Inc. v. Minnesota213
 Nottoli, People v. 282
 Novo, Commonwealth v. 956

O

O'Connor v. Ortega485, 1133
 Ogberaha, United States v. 638
 Oglesby, United States v.918
 Oliver v. United States 139, 143, 153, 165, 170, 178, 183, 184, 190
 Olivera, People v.814
 Olmstead v. United States 49, 75, 150, 176, 183, 215, 1110
 One 1986 Mercedes Benz, United States v.1120
 Oregon v. Bradshaw810, 812, 827
 Oregon v. Elstad695, 697, 700, 702, 819, 820, 904, 1191, 1210, 1211
 Oregon v. Hass 700, 820, 876
 Oregon v. Mathiason718, 769
 Orozco v. Texas. 729, 1202
 Ortiz, United States v.601, 1115
 Osage, United States v. 563
 Osborne, People v. 281
 Oscar-Torres, United States v.51
 Osife, United States v. 270

P

Padilla, United States v.1119
 Palanza, People v. 20
 Pascu v. State. 520
 Patane, United States v. 820
 Payne v. Arkansas.674, 883, 961
 Payner, United States v. 59

Rothgery v. Gillespie County . . .	1014	Shaver v. Commonwealth	474
Rowe v. State	653	Shears, United States v.	921
Rubin, United States v.	408, 409, 411, 413, 414	Sheler v. Commonwealth.	140
Rushing, State v.	353	Sherman, State v.	251
Rutledge, United States v.	889	Shields v. State.	716
S			
Sabbath v. United States.	405	Shipley v. California.	261, 388
Safford Unified School District No. 1 v. Redding.	627	Sibron v. New York.	245, , 25
Salamasina, United States v.	283	Sierra-Hernandez, United States v.	557
Salinas v. Texas	874	Silverman v. United States.	127, 131, 183
Salvucci, United States v.	1093, 1139	Silverthorne Lumber Co. v. United States.	46, 434, 1159, 1160, 1181, 1203, 1205
Samson v. California	647	Simac, People v.	1003
Samson, United States v.	95, 98	Simmons v. United States	1011, 1019, 1071, 1072, 1093, 1108
Sanchez, United States v.	1074	Simmons, State v.	1174
Sanders, State v.	419	Simons, United States v.	1098
Sanders, United States v.	638	Simpson v. United States	1109
Santana, United States v.	396, 401, 404, 447	Simpson, People v.	817
Santiago, People v.	827	Sitz v. Department of State Police .	604
Santiago, State v.	786	Skinner v. Railway Labor Executives’ Assn.	617, 619, 620, 621, 762
Santiago, United States v.	610	Smith v. Maryland 141, 158, 172, 208, 212, 215, 219, 304	
Sargent, State v.	559	Smith v. State	160
Satz, People v.	1120	Smith v. United States	1170
Saucedo, United States v.	563	Smith, United States v.	134, 1147
Savoca, United States v.	87, 93, 103	Snyder, People v.	1008
Scales, State v.	874, 971	Soffar v. Cockrell	871
Schaill by Kross v. Tippecanoe County School Corp.	619	Soldal v. Cook County.	503, 1104
Scher v. United States.	504	Soliz, United States v.	872
Schmerber v. California.	226, 388, 741, 742, 743, 744, 745, 748, 750, 762, 1194, 1203	South Dakota v. Neville.	748, 749
Schneckloth v. Bustamonte.	340, 343, 521, 527, 541, 552, 553, 917	South Dakota v. Opperman	457, 459, 460, 491, 553
Scott, United States v.	164, 837	Spano v. New York	652, 919
SDI Future Health, Inc., United States v.	1099	Sparks, United States v.	1103
See v. City of Seattle	1096	Spearman, United States v.	95, 98
Segura v. United States.	390	Spinelli v. United States	15, 17, 20, 25, 97, 359
Semayne’s Case.	578	Stacey, People v.	567
Shabazz, People v.	1075	Stadfeld, United States v.	910
Shakir, United States v.	283	Stanley v. State	18
		Stansbury v. California	694, 739

State v. (see name of defendant)

States v. Smith.	1057
Stein v. New York	917, 918, 923
Stephan v. State.	874
Stone v. Powell	58, 65, 71, 437
Stoner v. California	510, 543, 545, 546, 573
Stout v. State	1144
Stovall v. Denno	1004, 1011, 1015, 1019, 1066
Strain, State v.	891
Strickland v. Washington	856, 857
Strickland, United States v.	562
Sumrall, United States v.	270
Swoboda, People v.	726

T

Taketa, United States v.	155
Talkington, State v.	1130
Tavolacci, United States v.	343
Taylor v. O'Grady	613
Teas v. State	890
Tejada, United States v.	279
Telfaire, United States v.	1029
Terry v. Ohio.	75, 241, 265, 311, 326, 338, 339, 349, 352, 356, 358, 360, 372, 473, 561, 562, 597, 609, 643, 729, 1115, 1150
Terry, State v.	316
Thierman, United States v.	715
Thierry, People v.	1170
Thomas v. Parett.	408
Thompson-Bey, United States v.	282
Thomson v. Marsh	613
Tingle, United States v.	891, 898, 899
Topanotes, State v.	1188
Townsend v. Sain	893, 901, 902, 903
Traubert, People v.	830
Tremblay, Commonwealth v.	887
Troxell, State v.	555

U

Ullmann v. United States.	745
United States v. (see name of defendant)	

University of Colorado v. Derdeyn.	612
--	-----

V

Va Lerie, United States v.	477
Vale v. Louisiana.	262, 386, 398, 408
Vaneaton, United States v.	399
Vankesteren, United States v.	153
Varner v. United States.	1119
Vasila, People v.	891
Vega, United States v.	1144
Veney v. United States	54
Ventresca, United States v.	21, 61
Vera, United States v.	917
Vernonia School Dist. 47J v. Acton.	294, 614

Villa-Gonzalez, United States v.	1211
Villamonte-Marquez, United States v.	466
Virgin Islands v. John.	115
Vizcarra, United States v.	1120

W

Wacker, United States v.	557
Wade v. United States.	979, 998, 1004, 1066, 1070, 1072, 1073, 1084
Wade, United States v.	743, 750, 1181
Wai-Keung, United States v.	1121
Walder v. United States	60, 437
Walker, Commonwealth v.	1063
Walshire, State v.	361
Walton, State v.	716
Walton, United States v.	886, 889
Warden v. Hayden	130, 298, 317, 384, 388, 398, 717
Warren, State v.	977
Washington v. Unified Government of Wyandotte County, Kansas	614
Washington, United States v.	699, 718, 1194
Watkins v. Sowders.	977, 1035
Watson, United States v.	396, 397, 399, 400, 486, 494

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 Moskowitz 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 Moskowitz, *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.

Statutes 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.

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 law³ 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.

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.

