ESSAY QUESTION NO. 8

Answer this question in booklet No. 8

Judge John, a District Court Judge for the state of Alaska, is known as a stickler for court room decorum and professional dress.

Dieter, a criminal defense attorney, frequently appears professionally in front of Judge John. Dieter has an extensive tie collection. One of his ties is decorated with print of pigs in police uniforms and badges drinking and dancing. Dieter has previously worn this tie in Judge John's court and the Judge has issued an order informing Dieter that if he wears this tie in open court again Judge John will find Dieter in contempt.

Dieter wears the Pig tie during his closing argument in a criminal trial where the credibility of the investigating officers is the main contested issue.

- Judge John held Dieter in contempt. Under Alaska's constitution, identify and analyze the issues Dieter could raise in appealing this ruling.

GRADER'S GUIDE

***** QUESTION NO. 8 *****

SUBJECT: CONSTITUTIONAL LAW

I. INTRODUCTION

Under Alaska's constitution there are two constitutional provisions that Dieter might identify as the basis for asserting his right to wear the pig tie: freedom of speech; and liberty (personal liberty). The court would likely summarily reject a privacy argument.

II. FREE SPEECH (50 pts.)

Dieter's Pig tie is "speech" in that it communicates an idea more than just being an article of clothing. Clothing that expresses a point of view is considered a symbolic act that falls within the protections of the free speech provision of the state constitution. Article I, sec. 5 of Alaska's constitution provides: "Freedom of Speech. Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." The Alaska Supreme Court has found that Alaska's Constitution guarantees this right to be at least as broad as that of the First Amendment of the United States Constitution. *Mickens v. City of Kodiak*, 640 P.2d 818, 820 (Alaska 1982). Alaska recognizes items on clothing as symbolic speech. *Johnson v. Tait*, 774 P.2d 185 (Alaska 1989)(Hell's Angels symbol is protected symbolic speech).

The question is then whether the Alaska Constitution protects Dieter's right to free speech when it takes the form of a provocative tie worn by an officer of the court in a certain type of trial and in violation of a judicial order not to wear the tie.

The *Mickens* court held that the right to free speech is fundamental. *Id.* In determining the boundaries of individual rights guaranteed under the Alaska Constitution, the court balances the importance of the right at issue against the state's interest in imposing the disputed limitation. *Meyers v. A.P.I,* 138 P.3d 238, 245 (Alaska 2006).

As here, when a law or a judge places substantial burdens on the exercise of a fundamental right, the court requires the state to "articulate a compelling [state] interest" and to demonstrate "the absence of a less restrictive means to advance [that] interest." *Id.* At 245-246.

According to the Alaska Supreme Court, the state's interest in controlling the attire of an attorney in a courtroom is "proper administration of justice". *Friedman v. District Court*, 611 P.2d 77, 79 (internal citation omitted) (Alaska

1980). To further that interest the Alaska Supreme Court has empowered the court to have, at least, some minimum standards regarding a dress code for attorneys. Specifically, the *Friedman* majority (with Justice Rabinowitz dissenting) held:

> Attorneys occupy a different position in relation to the courts than do ordinary citizens. Attorneys are officers of the court. The privilege of practicing law is subject to certain conditions, among which is that an attorney must observe reasonable rules of courtroom behavior and decorum. Courts have long controlled the manner in which attorneys may appear before them. . . . . Thus we conclude that it is within the powers of the court to require at least the wearing of a coat and tie. *Id.* at 78-79.

Thus, *Friedman* establishes that Judge John had the power to sanction Dieter if he had not worn a tie to court and, strictly speaking, Dieter was in compliance with *Friedman* because he was wearing a tie.

The issue then becomes whether wearing a particularly provocative tie during a jury trial is protected speech or whether the compelling state interest is sufficient to allow a restriction to be placed on the right. It is probably not protected speech as the *Friedman* court positively cited to a New York case where the court barred a Roman Catholic priest who was also an attorney from wearing his "clerical garb" in front of a jury. *Id.* at 79.

Additionally, the fact that the activity is taking place in a courtroom means that an argument about protected speech in an unrestricted public forum would fail. It seems that, given the court's holding that "speech that affects the judicial process can be limited," see *Turney v. State*, 936 P.2d 533, 541 (Alaska 1997), the Alaska Supreme Court regards the courtroom itself as something less than a public forum.

Thus, given that the tie is communicating a symbolic disdain for police and given that the tie was being worn during a jury trial involving the issue of a police officer's credibility, it is likely that a court would find that the judge could place limits on Dieter's attire by requiring him to wear a different tie without violating Dieter's free speech right. The compelling state interest that the challenged clothing could have an impact on the judicial process could be found to outweigh Dieter's right to free speech.

On the other hand, the judge had issued a blanket order banning Dieter from wearing that tie to court at all. Dieter may be able to argue that the court's order is too broad and that he should be able to wear the tie to court during hearings other than jury trials or during jury trials other than ones such as the one he was in. He could argue that the impact of what is communicated by the

tie on the audience in those types of proceedings is not sufficient to outweigh his free speech interests.

III. LIBERTY (40 pts.)

Article I, Sec. I of Alaska's Constitution recognizes the right to "liberty". The Alaska Supreme Court in *Breese v. Smith*, 501 P.2d 159 (Alaska 1972) interpreted this liberty interest to include "personal liberty" in one's appearance and held that a male middle school student had the right to wear his hair to fit his personal taste and that this right is a fundamental right. The *Breese* court held: "there are few things more personal than one's body and its appearance." *Id.* at 169.

Arguably then, the regulation of an attorney's attire implicates the individual attorney's constitutional right to liberty. This was the rationale of Justice Rabinowitz's *Friedman* dissent where he found that an attorney--*sans* coat and tie-- would not disrupt the dignity of the court or interfere with judicial proceeding. Therefore, he concluded that the attorney's liberty right as recognized in *Breese* outweighed the interest of the court in decorum. *Friedman v. District Court*, 611 P.2d 77, 80 (Alaska 1980)(Rabinowitz, C.J., dissenting). However, again, this constitutional analysis was not mentioned by the *Friedman* majority and presumably implicitly rejected. *Id.* at 78.

But even Justice Rabinowitz recognized in his dissent in *Friedman* that this fundamental right to personal freedom may be limited where it interferes with a judicial proceeding. As previously discussed above in reference to freedom of speech, when a law, or a judge, places substantial burdens on the exercise of a fundamental right, the court requires the state to "articulate a compelling [state] interest" and to demonstrate "the absence of a less restrictive means to advance [that] interest." *Meyers v. A.P.I,* 138 P.3d 238, 245-46 (Alaska 2006).

This same balancing test was discussed in *Breese*. A fundamental right can have limitations placed on it when the compelling state interest is sufficient to warrant the restriction. In *Breese* the court found that the interests identified by the state (that students with longer hair might be more likely to be disruptive or do less well in school or might be distracting to other students) were not sufficiently "compelling" to warrant restrictions concerning student hair length.

But here the state could argue that the restriction that Dieter not wear the Pig tie in that trial is valid as to allow him to wear it would potentially interfere with the trial process. This rationale was recognized by Justice Rabinowitz in his *Friedman* dissent as being a viable argument.

Thus, Dieter's liberty argument would likely not prevail as to getting to wear the tie during this particular trial, but he may have a stronger argument that

the judge's blanket ban as to the Pig tie in court is overbroad. As previously mentioned, in the discussion of freedom of speech, even though the tie may be distasteful to the judge, if the state cannot show that the wearing of the tie would have an adverse impact on the judicial process, Dieter may have a much stronger argument, paralleling that of Chief Justice Rabinowitz's dissent in *Friedman* and consistent with the holding in the *Breese* case, that he has a constitutional right to wear the tie to other types of court proceedings.

IV. PRIVACY (10 pts.)

Some applicants will argue the explicit constitutional right to privacy found in Art. I, Sec. 22, of the Alaska Constitution, would support Dieter's position. This argument was implicitly rejected by the *Friedman* court.