

Final Examination

Professor Ritter
Criminal Procedure II
Fall 2004

General Instructions

This exam consists of four parts. Part 1 contains 15 multiple choice questions. Each question is worth 2 points for a total of 30 points for part 1. Part 2 is worth 30 points. Part 3 is worth 15 points. Part 4 is worth 25 points. The entire exam contains 100 possible points.

You have three hours to complete this exam. Except for the multiple choice questions in part 1, all answers should be written in your bluebooks. Please write on one side of the bluebook page only and please write legibly. Including this page, there are 17 pages in this exam. Please make sure that you have all 17 pages. Good luck.

Part 1 - Multiple Choice (30 points)

Please answer each question on the computer answer sheet provided using a #2 pencil. There are 15 questions in this part and each question is worth 2 points.

(*2010 Note: the answers to the multiple choice questions appear at the end of the exam)

Questions 1-2: You are a criminal defense attorney. Last year one of your clients (client #1) pled guilty to a criminal indictment in exchange for a lenient sentence. She was sentenced to 1 year in jail which was the sentence agreed upon by the parties. You have just learned that at the time of the plea agreement, the arresting police officer had in his file, a statement from an eye-witness in which the witness retracted her identification of your client as the perpetrator of the crime. This was not disclosed to the defense prior to the entry of the plea.

1. If you file a post-conviction motion to vacate the plea and conviction you will probably:

A. Be unsuccessful if you didn't file a pre-trial motion for *Brady* material.

B. Be successful if the witness' retraction is deemed material.

C. Be unsuccessful because the police and not the prosecutor failed to disclose the existence of the statement.

D. Be successful because defendants can take back their guilty pleas at any time.

2. After filing the post-conviction motion for client #1, you find yourself negotiating a plea on behalf of another client (client #2) with the prosecutor from client #1's case. This prosecutor is offering an attractive plea agreement, however, as a condition of the plea, he wants client #2 to agree to waive his rights to all *Brady* material relating to grounds for impeachment of a prosecution witness. Is this a proper request?

A. Yes, because *Brady* doesn't apply to guilty pleas anyway.

B. No, because a defendant's right to exculpatory evidence is non-waivable.

C. No, because it would make the plea involuntary.

D. Yes, because such waivers have been upheld by the United States Supreme Court.

Questions 3-4: A client, (#3) has been accused of violating the federal narcotics laws. The charge is a felony. You have been retained and thus far he has not been indicted and has not had a preliminary hearing. The Assistant United States Attorney (AUSA) has asked the court for an order of detention without bail. The case is scheduled for a detention hearing later this week.

3. To win an order for pre-trial detention, the AUSA must
 - A. Prove that client #3 is either a flight risk or a danger to the community and there are no release conditions that could adequately prevent his flight or protect the safety of the community as the case may be.
 - B. Prove that client #3 is both a flight risk and a danger to the community and there are no release conditions that could adequately prevent his flight and protect the safety of the community.
 - C. Prove that client #3 has waived his constitutional right to bail.
 - D. Prove that pre-trial detention is regulatory and not punitive.

4. The client has asked for an explanation about his rights pertaining to the grand jury. Which of the following would be *incorrect* information:

A. If the AUSA obtains an indictment first, client #3 will no longer have a right to a preliminary hearing.

B. Client #3 does not have a constitutional right to a grand jury indictment and the AUSA may choose to file a prosecutor's information.

C. The AUSA may choose to present evidence to the grand jury that was obtained pursuant to an illegal search and seizure.

D. The grand jurors may request to hear from witnesses that the AUSA had not planned on presenting.

Questions 5-6: Assume that you are a prosecutor and you are about to start jury selection in a death penalty case in state court. You are worried that your case might not be given a fair hearing by a jury panel. The defendant is African-American and the victim was white. Given your experience you expect at least half of the prospective jurors to be African-American. In addition, you are trying the case in a county that has a good number of citizens who are against capital punishment.

5. You anticipate that defense counsel will want to question all prospective jurors, especially those that are white, about racial biases. You are planning to object and hope to limit this line of questioning. Your objections will probably be:

A. Overruled, because there are no limitations to *voir dire* in capital cases.

B. Sustained, if race is not relevant to the case beyond the fact that the victim and defendant are of different races.

C. Sustained, because the court has almost total discretion with regard to what to allow during the *voir dire*.

D. Overruled, because in capital cases where the victim and defendants are of different races, the defendant has a constitutional right to ask prospective jurors about possible racial biases.

6. You are hoping to challenge for cause, all prospective jurors that are against capital punishment. In order to accomplish this you should try to elicit which of the following statements from the jurors?

A. That they are against the death penalty and have voted against elected officials that support it.

B. That they are against the death penalty and their opposition would interfere with their willingness to vote for death no matter what.

C. That they are against the death penalty for religious reasons.

D. That they believe that everyone can turn their lives around and become rehabilitated.

Questions 7-8: A neighbor of yours who is of Pakistani descent, has a relative who had been held at the United States detention facility at Guantanamo Bay, Cuba and is now in a military prison in South Carolina. He has been in custody for the past two years. The relative in custody is a United States citizen. He was taken into custody by the United States Army in Afghanistan where, according to your neighbor, the relative was just visiting some old friends who happened to be fighting for the Taliban. Having heard that you are about to become a lawyer he has asked you for some information.

7. Will his relative have an opportunity to prove that he was and is not an enemy combatant?

A. Yes, because providing a forum for the relative to rebut the claim that he is an enemy combatant will not unduly interfere with military strategy.

B. Yes, because the due process clause requires proof of guilt beyond a reasonable doubt before detention can be imposed for a lengthy period of time.

C. No, because the war against terror has resulted in suspension of the *writ of habeas corpus*.

D. No, the defense department must focus all of its attentions on winning the wars in Iraq and Afghanistan and cannot afford the time it would take to provide hearings of this nature.

8. The 2001 Joint Resolution of Congress, passed in the wake of the September 11 attacks and authorizing the Use of Military Force against al Qaeda and its operatives,

A. Is not relevant to the legality of the detention because your neighbor's cousin is not a member of al Qaeda.

B. Is relevant to the legality of the detention because it provides a definition for "enemy combatant."

C. Is relevant to the legality of the detention because the detention of United States citizens is not permitted without Congressional authorization.

D. Is not relevant to the legality of the detention because the Resolution gives the President authorization to deploy troops, but, does not address the question of the rights of those taken prisoner by the troops.

Questions 9-10: Your client (#4) has been accused of mail fraud which is a federal offense. She was indicted on January 4, 2003. The case was first scheduled for trial on

June 1, 2004, but, the government requested and was granted a continuance until September 2004. This was because of the planned summer vacations of the prosecutor and investigating law enforcement agents. In September, the government was granted another continuance because one of the agents was in the hospital. As of today's date (December 14, 2004) the case has still not gone to trial. You are thinking of filing a motion to dismiss on constitutional speedy trial grounds.

9. If you file a speedy trial motion this week, you will likely:
- A. Lose, because the delay is still less than one year.
 - B. Lose, if you cannot show specific ways in which client #4 has been harmed by the delay.
 - C. Win, because the delay is the government's fault.
 - D. Lose because part of the delay was due to the hospitalization of a witness.
10. If you attempt to prove that the delay was prejudicial because a defense witness has died, which of the following will *not* be relevant?

- A. Whether or not the witness would have been willing to testify.
- B. What the witness would have testified about.
- C. That the witness had no criminal record.
- D. That the witness committed suicide.

Questions 11-12: Your next client, (#5) is 65 years old. He was tried and convicted along with his codefendant, of robbery. The defendants were tried together but each had his own attorney. The trial was in a state court. After they were convicted, they were both sentenced to 20-30 years in state prison.

11. Prior to trial you filed a motion to sever #5's case from his codefendant's case. You alleged that you were entitled to a severance pursuant to the United States Supreme Court case, *Bruton v. United States*. Your motion was denied. On appeal, the denial will probably be upheld if:

- A. The codefendant testified at the joint trial.
- B. The defendants were both charged with the same crimes.
- C. The trial judge gave the jury a limiting instruction.

D. Both defendants made confessions.

12. On appeal, client #5 would like you to argue that the length of his sentence violates his rights under the Eighth Amendment to the United States Constitution. You advise him that this might be:

A. Pointless because even death sentences are not necessarily considered cruel and unusual punishment.

B. Pointless because the Eighth Amendment does not apply to the length of prison sentences.

C. Worthwhile since he has no prior record and only stole 100 dollars.

D. Worthwhile because the judge relied on hearsay in deciding upon the sentence.

Questions 13-15: Client #6 has just hired you to represent him in his direct appeal. He is planning to raise the claim that he was denied both the effective assistance of counsel and the right to represent himself. He believes that these claims arise from the following facts: Just after the beginning of his trial, client #5 told the trial judge that he was dissatisfied with the way his trial counsel was planning to conduct his defense. He asked for another lawyer. The judge denied that request saying, “the trial has already started - it is too late to change lawyers.” Client #5 replied, “then maybe I should represent myself.”

The judge told client #5 that he was not qualified to conduct his own defense and continued the trial with the original defense counsel.

13. The issue regarding client #5's right to represent himself will be controlled by the precedent created in:

A. *Faretta v. California*

B. *Anders v. California*

C. *Stack v. Boyle*

D. *Illinois v. Sommerville*

14. The appellate court will likely decide that there was:

A. No violation of #5's right to self-representation because #5 could not competently represent himself.

B. No violation of #5's right to self-representation because #5's request was equivocal.

C. A violation of #5's right to self-representation because his knowledge of the rules of criminal procedure are entirely irrelevant.

D. A violation of #5's right to self-representation because his request was made in a timely manner.

15. You are reluctant to take this case on because you don't trust #5 and fear that if he loses his appeal he may decide to allege that you were ineffective. If #5 made such a claim it would likely be:

A. Unsuccessful because there is no right to the effective assistance of appellate counsel.

B. Successful if you don't raise the claims he asks you to raise.

C. Unsuccessful because it was #5's choice to hire you.

D. None of the above.

Part 2 (30 points)

Assume that you are a criminal defense attorney and have just been appointed to represent Client “A”. A has been charged in federal court with trespassing on federal land. A was protesting the war in Iraq and was inside the Liberty Bell pavilion urging tourists not to enter because the U.S. policy in Iraq was contrary to the framers’ ideas about liberty. When A started blocking the entrance he was asked by federal marshals to leave. He refused and was arrested.

According to the United States Code, trespassing on federal lands carries a maximum penalty of one year in jail. Under the Federal Sentencing Guidelines A would be sentenced to at least eight months in jail if it is found that he was trespassing with the purpose of interfering with a function of the federal government. The Government will argue that displaying and conducting tours of the Liberty Bell is a governmental function. A argues that it is not. If it is determined that A did not have the purpose of interfering with a governmental function, he will be sentenced to probation.

A thinks that a Philadelphia jury will be sympathetic towards him. (After all, Pennsylvania did go for John Kerry). A has the following questions for you: Please provide complete explanations for your answers.

1. Is he entitled to a jury trial for something as minor as trespass? **(6 points)**
2. If he is, will the jurors reside in the Philadelphia area? **(2 points)**

3. If he gets a jury, during jury selection will his lawyer (you) be able to ask the prospective jurors whether they support the war in Iraq? **(6 points)**

4. If he is entitled to a jury trial, will the jury get to decide whether or not displaying and conducting tours of the Liberty Bell is a governmental function? **(16 points)**

Part 3 (15 points)

The Fourteenth Amendment provides that United States citizens are entitled to equal protection under the law. Assume that you are working as a research assistant to a law professor who specializes in Constitutional Law. She has asked you to write a brief memo explaining how the Equal Protection Clause can be violated during certain stages of a criminal prosecution. Specifically, she would like you to explain its applicability to the *initial decision by the prosecutor to begin a case* and then to the *process of selecting a trial jury in a criminal case*. In each instance she wants to know how a criminal defendant would have to prove an equal protection violation in order to make a successful claim.

Part 4 (25 points)

Defendant, B, was charged with murder in the first degree. He was tried in a state trial court. In B's state, murder in the first degree is defined as, "causing the death of

another human being with intent and premeditation.” B was represented at trial by Attorney Z. Z was an experienced lawyer, but, in the family law field where he specializes in divorce law. B’s defense was that he learned that his wife was having a sexual relationship with C and when B saw C crossing the street on foot, B went into a rage and ran C over with his car. B also told Z that he was fearful that his wife and C were plotting to kill him in the future so that they could be together. Before the commencement of jury deliberations, Z considered asking the trial judge to instruct the jury on the elements of murder in the second degree as an alternative. Murder in the second degree is, “causing the death of another intentionally, but, without premeditation.” Z decided against making this request because he believed that murder in the second degree was not a lesser included offense of murder in the first degree and that, therefore, his request would be denied. Z also believed that he had a good chance of winning an acquittal based upon a claim of self-defense.

The jury convicted B after lengthy deliberations. B was sentenced to life in prison. B filed a direct appeal which was denied. His request for review by the state’s highest court was also denied as was his petition to the United States Supreme Court for a *writ of certiorari*. B’s family has hired an investigator who has just discovered that prior to B’s trial, Z, B’s trial lawyer had been retained by B’s wife to represent her in trying to obtain a divorce from B.

B has now turned to you for help.

A. Based upon the facts above, explain whether you think B has a legal claim or claims worth pursuing and why or why not. Include in your explanation what type of petition you would file on his behalf and in what court. Of course, your

explanation should also include how you anticipate the court will analyze the issues.

(18 points)

B. Should your petition on B's behalf be successful, will the double jeopardy clause of the 5th Amendment prevent a retrial? Why or why not? (7 points)

END OF EXAM.

HAPPY HOLIDAYS!

Multiple Choice Answers:

1-B; 2-D; 3-A; 4-B; 5-D; 6-B 7& 8- not applicable; 9-B; 10-D; 11-A; 12-C; 13-A; 14-B; 15-D