

Exam No. \_\_\_\_\_

Criminal Procedure: Adjudication

Final Examination

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This is a 3-hour in-class CLOSED BOOK examination. Place your examination number at the top of this page. In addition, place your examination number on any bluebook (or computerized equivalent) you use to answer this examination. Do not include your name or personal information anywhere on the exam instructions or your answer. Also, if you are handwriting your exam, please write legibly.

This 12-page exam consists of three parts and is worth 90 points. Part One is an essay question worth 30 points and Part Two is 7 short answer questions worth 24 points and Part Three is 18 multiple choice questions worth 36 points.

Read the exam questions carefully and attempt to answer each directly. If there are ambiguities in the questions, discuss the ambiguity and how it impacts your answer. Your answers should be based on the assigned readings and the material covered in this class. Clear, well organized, and concise expression will be rewarded.

**Exam begins on the next page.**

## Long Essay Question (Smokey the Bear Bandits)

For some time now the city of Dayton has been plagued by the Smokey the Bear Bandits. These bandits illegally plaster buildings with images of Smokey the Bear. The city of Dayton like the state of Ohio and the federal government makes it illegal to reproduce the image of Smokey the Bear. The pertinent Dayton statute (Smokey the Bear Illegal Reproduction Act) reads as follows:

**Whoever, knowingly and for profit manufactures, reproduces, or uses the character "Smokey the Bear", originated by the Forest Service, United States Department of Agriculture, in cooperation with the Association of State Foresters and the Advertising Council for use in public information concerning the prevention of forest fires, or any facsimile thereof, or the name "Smokey Bear" shall be fined under this title or imprisoned not more than 6 months**

One day, the Dayton police receive a tip from an individual named Sideshow Bob. The police have previously received tips from Bob and they have always been 100% accurate. Bob told the police that recently he attended a party at the house of Bart and Lisa. While at the party, Bob accidentally got lost and entered Bart's room which was off-limits to the party goers. In Bart's room, Bob saw books on bears and hand-drawn images of bears. Bob thought this was odd since Bart had always expressed a strong dislike of all things related to bears.

Bart and Lisa are both well-known figures in the community of Dayton. Lisa has won numerous academic awards and is on her way to start college on a full-ride scholarship. Bart on the other hand is a well-known hooligan who has had numerous prior felony criminal convictions.

Following the tip, the police issue a subpoena to Bart that instructs him to appear before a city grand jury investigating bootleg images of Smokey the Bear. Bart's subpoena reads as follows:

"On 1 December 2012 you are ordered to appear before the City of Dayton Grand Jury. On this day bring to the grand jury any and all books and images of bears in your possession."

The rules and laws governing grand juries in Dayton follow those applied and used in federal grand juries. You represent Bart who has the following legal questions about this subpoena. Answer Bart's questions and state the reasons for your answers.

1. Must Bart testify and answer questions before the grand jury? (2 points)

2. Does your answer change if some of the answers Bart plans to give in the grand jury proceeding are incriminating? (2 points)
3. Must Bart turn over the books and images on bears that are sitting in his room? What if he gives the stuff to you his attorney will that keep it from going to the grand jury? (4 points)
4. If Bart decides to testify will you be present in the grand jury room with him? If you answer “yes” to this question, can you object to questions posed to him? (2 points)

Upon completing its investigation, the grand jury issues an indictment charging both Lisa and Bart with one count of violating Dayton’s Smokey the Bear Illegal Reproduction statute on 1 March 2012. Both Bart and Lisa accuse each other of owning the books and images and making illegal reprints of Smokey the Bear. Furthermore, Lisa claims that on March 1<sup>st</sup> she was enjoying Spring Break in Daytona, Florida not Dayton, Ohio.

To save city resources, the prosecutor’s office decides to try Lisa and Bart together. Since you can’t represent both Bart and Lisa simultaneously, Lisa hires Lionel Hutz. Hutz attempts to disassociate his client with yours by filing a motion for severance to have his client tried separately. This motion is denied by the trial judge. Hutz also files a jury demand which is also denied by the trial judge who hears the case without a jury.

During the bench trial, the government introduces overwhelming evidence of Bart and Lisa’s guilt. For example, the books and images found in Bart’s room were introduced into evidence and they had Lisa’s fingerprints on them. Furthermore, numerous witnesses testified that they saw both Lisa and Bart near Brown and Stewart streets right before and after the Smokey the Bear images appeared on a local building.

Despite overwhelmingly odds, Bart is acquitted. Unfortunately, Lisa was not as successful. Lisa’s case was not helped by the fact that Hutz occasionally took brief naps during the trial. Furthermore, the judge refused to allow Lisa’s mother, Marge to testify. If allowed to testify, Marge would have told the judge that Lisa was in Daytona, Florida on 1 March. Marge has no direct knowledge of Lisa’s whereabouts on 1 March but she believes that her “baby” is telling the truth. The judge disallowed Marge’s testimony because Hutz failed to provide the prosecution timely noticed of Lisa’s alibi defense.

The media had a field day with Bart’s acquittal which greatly upset city, state and federal officials. As a result, the city of Dayton appealed Bart’s acquittal. Furthermore, Bart was criminally charged at both the state and federal level for reproducing Smokey the Bear’s image. The state and federal charges have the same elements as the city statute.

1. What arguments, if any, can you make on behalf of Bart to prevent these state and federal charges from going forward? Will the city's appeal be successful? Why or why not? (5 points)
2. Does Lisa have any grounds on which to appeal her conviction? If so, discuss the grounds and her likelihood of success. (15 points)

## 7 Short Questions

1. Briefly define and describe the following plea agreements: (a) Open or Naked Plea; (b) Charge Bargaining; (c) Determined Sentencing; (d) Recommended Sentencing; and (e) Conditional Plea. (5 Points)
2. In *Batson v. Kentucky*, the Supreme Court established a three-part test to determine whether or not a peremptory challenge has been improperly exercised. Discuss each element of this test. Do you think this test works? Why or why not? (4 points)
3. In *Duren v. Missouri*, the Court held that a defendant must look at three factors to demonstrate a prima facie violation of the 6<sup>th</sup> Amendment cross-section requirement. Describe those three factors. (3 points)
4. Discuss the positives and negatives of the plea bargaining process. (3 points)
5. Discuss the positives and negatives of an "Open Discovery Process." (3 points)
6. Is detention pursuant to the Bail Reform Act of 1984 considered penal or regulatory? Explain the reasons for your answer. (3 points)
7. Is collateral estoppel applicable in criminal law? If "yes," how is it different from collateral estoppel in civil law? (3 points)

## 18 Multiple Choice Questions: Select the Best Answer

1. In which scenario has the defendant's 6<sup>th</sup> Amendment right to counsel been violated?

- A. Indigent defendant is denied a court-appointed attorney and convicted of a misdemeanor Assault charge which results in a \$100 fine and a suspended sentence of 30 days incarceration
- B. Indigent defendant is denied a court-appointed attorney and convicted of a misdemeanor Assault charge which results in a \$500 fine
- C. Indigent defendant is denied a court-appointed attorney and convicted of a misdemeanor "Peeping Tom" charge which results in a \$500 fine and registration as a Sex Offender
- D. None of the above
- E. All of the above

2. Pursuant to the Bail Reform Act of 1984, what standard of proof must the judge apply in deciding whether any release condition of the accused will reasonably assure the safety of another person and the community?

- A. Probable cause
- B. Preponderance of evidence
- C. Clear and convincing evidence
- D. None of the above

3. In *U.S. v. Salerno*, the defendant unsuccessfully challenged the Bail Reform Act of 1984, on which, if any, provisions of the Constitution did the defendant rely?

- A. 8<sup>th</sup> Amendment
- B. 5<sup>th</sup> Amendment
- C. Both A and B
- D. None of the above

4. Which group is not subject to a general obligation of secrecy in Federal Grand Jury proceedings?

- A. Grand jury witnesses
- B. Grand jurors
- C. Grand jury interpreters
- D. None of the above

5. Which statement about the Federal Grand Jury is incorrect?

- A. Grand juries have a high rate of indictment
- B. Grand juries can consider and indict strictly on hearsay evidence
- C. The target of the grand jury proceeding has a constitutional right to give testimony before the grand jury.
- D. None of the above
- E. All of the above

6. For the purposes of the 5<sup>th</sup> Amendment when does double jeopardy attach in a jury trial?

- A. After the indictment is issued
- B. After voir dire
- C. After opening statements
- D. After the jury is sworn in
- E. After conviction

7. Which of the following is most likely to help defense counsel find out more information about the criminal charges filed by the prosecutor?

- A. Bill of Particulars

- B. Notice of Alibi
- C. Notice of Insanity Defense
- D. All of the above
- E. None of the above

8. Marvin is charged with shoplifting a “snuggly” from a local store located in Fountain Square. The theft is caught on video by a street police camera located on Fountain Square. Marvin’s defense is that he did not commit the offense and maintains that someone by the name of AJ actually stole the snuggly.

Marvin’s lawyer filed a motion to review the surveillance video. However, the tape had already been taped over and erased. To save money, the police had a practice of erasing security videos to save storage space and reduce costs of purchasing blank ones.

At trial, the police investigator, who originally viewed the video before it was erased, plans to testify to what he saw. Marvin has asked that the case be dismissed because of police misconduct in destroying the tapes.

In applying constitutional principles to the aforementioned facts, this case will

- A. Be dismissed since the police were responsible for destroying the evidence that might have exonerated Marvin
- B. Be dismissed because the police have a duty to preserve all relevant evidence in a case
- C. Not be dismissed since it is unclear whether the destroyed evidence would have helped or harmed Marvin’s case
- D. Not be dismissed unless Marvin can demonstrate that the police acted in bad faith in destroying the evidence

9. The Allen charge has engendered a great deal of criticism. What is the primary argument against its use?

- A. It coerces the minority into agreeing with the majority



- B. It coerces the majority into agreeing with the minority
- C. It is unfair to the prosecution because it leads to more defense verdicts
- D. It produces too many hung juries
- E. All of the above

10. Which state statute is most likely in compliance with the Constitution?

- A. One that allows 6-1 jury verdicts in felony trials
- B. One that allows 5-0 jury verdicts in felony trials
- C. One that allows 9-3 jury verdicts in felony trials
- D. One that allows 8-4 verdicts in felony trials
- E. None of the above
- F. All of the above

11. Pursuant to the Blockburger rule, which of the following is the correct test to determine whether “transporting firearms across state lines” and “alien in possession of a firearm” are the same offense?

- A. Are there some common elements in the two crimes?
- B. Does each crime require proof of a fact that the other does not?
- C. Did the legislature intend for someone to be prosecuted for both crimes?
- D. Did the two offenses occur during the same transaction or set of acts?
- E. None of the above

12. What is one of the principle differences between a guilty plea and a no contest or nolo contendere plea?

- A. After the court has accepted a defendant's plea but before the sentencing, the defendant has a right to withdraw a nolo contendere plea without providing a reason but cannot withdraw a guilty plea without providing a fair and just reason.
- B. Before accepting a nolo contendere plea, the court is not required to determine voluntariness because it is presumed under the rule. However, the court must determine that a defendant who enters a guilty plea did so voluntarily and free of force.
- C. The court is provided discretion in informing the defendant the benefits of a nolo contendere plea during plea negotiations, provided that the defendant's attorney is present. However, the court cannot be involved in a guilty plea negotiation.
- D. A no contest plea is generally inadmissible in a subsequent criminal or civil trial where the defendant is involved. However, if the defendant accepts a plea of guilty that plea is generally admissible.
- E. None of the above

13. For the purposes of the 5<sup>th</sup> Amendment when does double jeopardy attach in a bench trial?

- A. After the prosecution rests her case
- B. After the first witness is sworn
- C. After the defense rests
- D. After the Indictment is issued
- E. After sentencing
- F. None of the above

14. In order for a plea agreement between the defendant and the prosecutor to be constitutionally valid, the prosecutor must provide the defendant with all impeachment evidence related to the defendant's case prior to the defendant accepting the plea deal.

- A. True
- B. False
- C. Only if the impeachment evidence is in the possession of the prosecutor

D. Only if the impeachment evidence is in the possession of the prosecutor or his/her agent (law enforcement officials)

15. Which of the following would be an unconstitutional use of a peremptory challenge?

- A. Prosecutor in a criminal case strikes a juror because of the juror's race
- B. Prosecutor in a criminal case strikes a juror because of the juror's gender
- C. Defense counsel in a criminal case strikes a juror because of the juror's race
- D. All of the above
- E. None of the above

16. Michael and Paul Brown are both charged as co-conspirators in a mail fraud scheme involving football tickets. Michael has confessed to the crime and implicated Paul. Michael's confession was as follows: *Paul and I defrauded the Tigers' fans with a ticket scheme*. Paul invoked his 5<sup>th</sup> Amendment Right to Silence and made no confession.

In order to save time and resources, the government decides to have a joint trial for Michael and Paul. Michael takes the stand and testifies. Before Michael's cross-examination, the prosecutor approaches the judge and tells him that she plans on introducing Michael's earlier confession. Paul's attorney objects and says that this confession violates his client's 6<sup>th</sup> Amendment Right to Confrontation. How should the judge rule on this objection?

- A. In favor of Paul's attorney
- B. In favor of the Government
- C. In favor of the Government only if the confession is redacted as follows: *I defrauded the Tigers' fans with a ticket scheme*
- D. In favor of the Government only if Paul ultimately takes the stand

17. Rule 16 of the Federal Rules of Criminal Procedure generally requires reciprocal discovery. The general pattern is that the defense requests certain information from the prosecution, which the prosecution is then obliged to give the defense. This triggers a reciprocal duty by the defense to turn over similar information to the prosecution. However, not all information is subject to this mutual requirement.

Which of the following is not subject to this reciprocity requirement?

- A. Written or recorded statements of the defendant
- B. Reports or examinations and tests
- C. Documents and tangible objects
- D. Summary of testimony of expert witness intended to be used at trial.

18. Which of the following serves as a justification for limiting post-verdict investigations into the jury's deliberative process?

- A. To maintain the finality of the verdict
- B. To prevent attorneys from hounding jurors
- C. To encourage jurors to freely express themselves during deliberations
- D. None of the above
- E. All of the above

**This is the end of the exam. Have an enjoyable summer. You earned it!!!**