

MID-TERM EXAM

Criminal Procedure

Professor Scherr

Instructions

1. This is a take-home exam. You may pick it up no sooner than 2:30 PM on Friday, Oct. 7, 2005 at the Registrar's office. You must turn it in no later than 8:30 AM on Monday, Oct. 10, 2005 at the Registrar's office.
2. Please put your exam number on every page of the exam itself & on the cover of the blue book you use or on each page of your typed product.
3. As this is a take-home exam, you may consult with any written materials. You may not talk to or consult with **anyone** about the exam. You may not show **anyone** the exam. "**Anyone**" includes, but is not limited to, fellow students in the class, any other law student, any lawyer, any professor, any librarian or any past or present teaching assistant.
4. The correct answer to any question on this exam does not require research beyond the knowledge and information generated by class attendance, class notes and casebook assignments. You may, if you wish, do additional research that does not involve the prohibitions of #3 above.
5. **Multiple-choice Questions:** Each multiple-choice question is worth 10 points. There is only one correct answer to each multiple-choice question. Please do not write any explanations on the exam. You will receive points only for correct answers. You will not receive points for an explanation to a multiple-choice question.
6. **True/False Questions:** Each true/false question is worth 10 points. Please mark true or false. Do not provide any explanation for your answer. You will not receive any points for an explanation to a true/false question.
7. **Short-answer Essay:** The short-answer essay question is worth 140 points. You may use no more than six (6) blue book pages to answer the question. Alternatively, you may use no more than three (3) typewritten pages to answer the question. If you type your answer, it must be 8 1/2 x 11 paper; 3/4-inch margins; double-spaced and font no smaller than 12. If you use a blue book & write the answer in longhand, you may write on only one side of the page. I will not read anything written on the second side of a page. I will not read anything written beyond six (6) blue book or three (3) typewritten pages. **Please write in pen only** if you use a blue book.

The grading on the short-answer essay will be based on the quality of the analysis demonstrated in the written answer. **Tell** me what you think the "right answer(s)" to the essay question is. Do not simply write, "the answer could be this for this reason or it could be that for that reason." Commit to an answer. Also, **show** me the basis for the answer and the analytical sequence that led you to that answer.

8. All individuals mentioned in the exam are purely fictional characters. Any similarity to actual individuals is purely coincidental.

Multiple-choice Questions

1. Samuel Bullfinch is convicted in state court of first-degree murder. On appeal in the state Supreme Court, his appellate counsel argues that the trial judge should have excluded Bullfinch's confession from trial because it was obtained in violation of Bullfinch's state & federal constitutional rights. The state Supreme Court affirms Bullfinch's conviction, holding that the manner in which the confession was obtained did not violate Bullfinch's constitutional rights.

Bullfinch's appellate counsel then files a petition for a writ of Habeas Corpus in Federal District Court asking that Court to "correct" the state Supreme Court's decision.

The Federal District Court judge should:

___ **A.** Deny the petition for a writ of Habeas Corpus because it raised only state constitutional issues.

___ **B.** Grant the petition if she finds that there was not full & fair litigation of the confession issue.

___ **C.** Deny the petition but only because Bullfinch should have appealed first directly to the US Supreme Court.

___ **D.** Accept the case for hearing only if she finds that there is not an independent and adequate state basis for the decision.

2. Roger Corman has been charged with theft of \$40, a misdemeanor, in Marin District Court. At his arraignment, Corman tells the judge that he does not like lawyers; that he never has liked them and that he would much prefer to represent himself. The court asks the prosecution if they have any objection to Corman representing himself and, with a smile, the prosecutor, Cindy Mookinham, says that the government does not object to the defendant not having a lawyer. The Court then tells Mr. Corman that he may proceed as his own counsel.

At trial, Mookinham establishes that five witnesses saw Corman steal the money and that, twice, Corman confessed to his mother that he stole the money. In addition, one police officer testifies that he found \$40 hidden in the trunk of Corman's car.

After trial, Corman is convicted and sentenced to the maximum for the offense, a \$1,000 fine. On appeal, Corman thinks better of representing himself and hires an appellate lawyer, Bobo Simon. Simon argues that the Court incorrectly allowed him to represent himself. Assuming that the issue has been properly preserved the appellate Court should:

___A. Reverse the conviction because the trial court was incorrect in allowing Corman to exercise his constitutional right to self-representation in the fashion it did.

___B. Affirm the conviction because the denial of Corman's right to counsel was harmless error.

___C. Reverse the conviction.

___D. Affirm the conviction.

3. Prior to Jim Davenport's trial, the trial judge grants his counsel's motion to suppress Davenport's confession finding that it was involuntary. Davenport testifies at trial and denies committing the offense. The judge allows the prosecution to use Davenport's confession to impeach his credibility on cross-examination. Davenport is convicted of the charged offense. On appeal, the court may hold:

___A. The admission of the confession was not error because Davenport put his credibility in issue by electing to testify.

___B. An involuntary confession can be used for impeachment purposes.

___C. Admission of the confession was error but the error may have been harmless.

___D. Admission of the confession was error and the harmless error rule does not apply because the error was structural.

4. After his arrest, George Harrison is advised of his *Miranda* rights and he requests counsel. The police allow Harrison to telephone his lawyer. He does so & speaks with his lawyer for about 25 minutes on the phone. Afterwards, Harrison approaches John Lennon, one of the investigating detectives, and says, "Now that I think about it, let's talk." Lennon again advises Harrison of his *Miranda* rights; Harrison acknowledges understanding them and tells Lennon he waives his rights but refuses to sign a waiver of rights form. Harrison then confesses. Harrison's motion to suppress the confession should be:

___A. Denied for reasons other than B.

___B. Denied because Harrison had an opportunity to talk to his lawyer.

___C. Granted because the waiver was not express and in writing.

___D. Granted for a reason other than C above.

5. Harry Miers is arrested for 1st degree assault. Within two weeks he is indicted by a grand jury for that offense. After his arraignment, at which he and his lawyer Carlita Rove were present, Miers is released from custody without having to post any bail. That evening, Miers, a partner at a major corporate law firm in town, goes to a fundraiser for the local fire department's ambulance service. There, he runs into Dannie Rumsfeld, the police chief of an adjoining town who had not been involved in his case. Rumsfeld asks, "How've you been?" Miers, who by this point is very tired and quite intoxicated, breaks into tears and tells the chief that he can't keep up appearances any longer; that he's guilty of the assault and only wants an opportunity to explain what happened to the judge.

Carlita Rove hears of this confession the next day when he reads about it in the local newspaper. She immediately files a motion to suppress the confession. The trial judge should suppress the confession if she finds that:

___A. Rumsfeld's question to Miers was one he should have known was reasonably likely to elicit an incriminating response.

___ B. Rumsfeld's question to Miers was intended to elicit an incriminating response.

___ C. Miers recognized Rumsfeld as a police officer.

___ D. Rumsfeld knew about Miers' arrest, indictment and arraignment.

6. Cheryl Wheeler is serving a 20-year sentence for drug trafficking. She has completed 4 of those 20 years. The police put Dar Williams, an undercover officer, in the cell to pose as her cellmate. Williams engages Wheeler in conversation and asks her at one point whether she had killed Bill Morrissey. Wheeler admits having done so. Wheeler's statement to Williams should be:

___ A. Suppressed because a government agent deliberately elicited incriminating statements in violation of Wheeler's right to counsel.

___ B. Suppressed because Williams engaged Wheeler in custodial interrogation without proper safeguards.

___ C. Admitted because neither the 5th or 6th Amendments apply in this situation.

___ D. Admitted because Wheeler was unaware she was talking to a government agent so there are no constitutional restrictions on the agent's interrogation.

7. After John Huston was arrested for murder, he was advised of his *Miranda* rights. He refused to sign a waiver form but agreed to talk to the police. In deciding whether Huston waived his *Miranda* rights, the judge must rule:

___ A. The burden is on Huston to establish he did not waive his rights.

___ B. The federal prosecutor must prove waiver beyond a reasonable doubt.

___ C. The federal prosecutor must prove waiver by a preponderance of the evidence.

___ D. Once the defendant shows there is no express waiver, the burden shifts to the prosecutor to show there was a valid waiver.

True/False Questions

8. The police in Andover, MA stop W. G. Bush' car for speeding. Officer Kerry approaches the driver's side of the car and asks Bush for his license and registration. Bush responds, "Don't bother me, buddy. I may be really drunk but you're a loser." Kerry orders Bush out of the car and arrests him for driving while intoxicated.

Bush's lawyer, Anthony Scalia, files a motion to suppress Bush's statements to Officer Kerry. The trial court should grant the motion, as Bush was not free to leave when he made the statements.

___T___F

9. Beau Jacques is arrested for a conspiracy to commit a terrorist act. He is arraigned in state court and appointed counsel. While waiting for the police and prosecutors to complete the paperwork necessary for his transfer to a jail, Jacques is placed in a holding cell at the police station with Huey Long. Long says to Jacques, "Hey, I'm in for robbery; what 're you in for?" Jacques responds, "terrorist stuff." "Did you do it?" asks Long. Jacques snaps, "That's for me to know and not for you."

Long keeps asking Jacques about his crime and, after a while when Jacques refuses to even answer, Long who is 8 inches taller than Jacques and more than 80 pounds heavier, grabs Jacques by the arms; lifts him up off his feet and presses him up against the cell bars and says, "Look we can do this the hard way or the easy way; I'm going to beat the living s__(expletive deleted) out of you unless you tell me what you did." Jacques then confesses to committing the terrorist act for which he has been arrested. Unbeknownst to either Long or Jacques, a guard is walking towards the cell just as Jacques confesses and hears the entire confession before Jacques or Long see him.

Before trial on the terrorism charge, Jacques' counsel files a motion to suppress arguing the confession was obtained in violation of his Fifth Amendment right against self-incrimination, his Sixth Amendment right to counsel and Fourteenth Amendment ban against involuntary confessions. The trial should grant the motion to suppress on at least one of these grounds.

___T___F

10. The police have arrested Jennifer McDonald for fraud. They bring her to the police station and sit her in an interview room where she is cuffed to the chair. Officer Katie Leduc enters the room and reads McDonald her Miranda rights. When the Leduc asks McDonald whether she wishes to waive her rights, McDonald says, "I work at a law school; I'm no fool. I choose to remain silent."

Officer Leduc says nothing. She uncuffs McDonald; takes her to the cellblock and locks her in a cell. Five hours later, Leduc walks by and casually asks, "Do you want to answer any questions now?" McDonald thinks for a minute and then says, "Why not? It's not like this is any big deal." Leduc re-reads McDonald her Miranda rights. McDonald acknowledges understanding them and gives an oral and written waiver. She then provides the police with a full confession.

Defense counsel files a motion to suppress. The trial judge should grant the motion to suppress based on *Edwards v. Arizona*.

___T___F

11. As long as the police do not deliberately elicit an incriminating response through questioning, those questions will not count as "interrogation" under *Miranda*.

___T___F

12. Bill Frissell is taken into custody by the FBI regarding an unsolved theft of \$20,000 of old jazz recordings. The police intend to question him but before they do so, they read Frissell his *Miranda* rights. Frissell acknowledges that he understands the rights and agrees to waive them. The police then begin. After 45 minutes of questioning, Frissell say, "Maybe I should talk to a lawyer?" The FBI agent conducting the interview ignores Frissell's comment and keeps asking him questions. 30 minutes later, Frissell confesses to the theft and tells the police where the recordings he has yet to sell are located. Later, the police retrieve the recordings.

Frissell's defense counsel, Buzz Albert, a highly respected criminal defense lawyer & ex-law professor, files a motion to suppress Frissell's confession and the seized recordings. The trial court should suppress the confession and the seized recordings.

___T___F

13. Once a defendant, in custody and post-*Miranda*, invokes his right to counsel under *Edwards*, the police can only interrogate him after he waives his *Miranda* rights in the presence of counsel.

___T___F

14. The police suspect Jacques Pepin of robbing Thomas Keller of his wallet while wielding a kitchen knife. They take Pepin into custody and place him in a live lineup with five other gentlemen, all of whom are dressed if chef whites like Pepin. Keller views the lineup through a window that allows him to see those in the lineup but does not allow them to see him. At one point during the lineup procedure, the investigating detective, Todd English, asks each person in the lineup to say, "Your wallet or your life." Each does so. English also asks each person in the lineup where they were the night of the robbery. Each answers. Keller identifies Pepin as the one who robbed him.

Pepin's defense lawyer, Armand Cuisine, files a motion to suppress the statements Pepin made during the lineup. The Court should deny the motion to suppress.

___T___F

Short-Answer Essay

15. Greg Brown, a once-great folk musician, is suspected of felony theft. The police do not have enough information to charge him, however. They believe Brown stole several, quite valuable guitars from Bill Morrissey, a former friend, after a concert performance by Morrissey in Portsmouth, NH. They track Brown down at a Harvey Reid concert, also in Portsmouth at the Unitarian church.

At an intermission during the Reid concert, four police officers surround Brown in the foyer of the church. The foyer has three separate exits, one at one end and two on opposite walls in the middle. The police surround Brown at the exit-less end of the foyer during the concert. While several people walk through the foyer during Brown's encounter with the police, none can hear any of the conversation. The four officers encircle Brown in such a way that he must physically move at least one officer to get past the encirclement.

The lead officer of the four, Pat Donahue, strikes up a conversation with Brown, who is a childhood friend of his. They exchange pleasantries and talk about their respective families. At one point during the conversation, Brown takes a step as if to go between two of the officers; the two draw closer together

& Brown backs off. Occasionally, Brown sees someone he knows in the crowd towards the other end of the foyer and waves without saying anything.

As the Brown-Donahue conversation tails off, two of the other officers, Morris Evans and Jimmie Gilmore begin chatting about the Morrissey guitar thefts in loud, somewhat aggressive tones of voice. They chat continues for a period of time without either officer ever looking at Brown or directing any questions directly to him. Evans comments that Morrissey was considering retiring from the performance business because he could not afford to buy any new guitars & insurance would not pay him the \$6,000 they were worth.

During this time, Donahue notices that Brown is listening to the Evans/Gilmore conversation. When Evans mentions Morrissey's possible retirement and the insurance problem to Gilmore, Donahue says, "If only we could establish that they really were stolen, maybe the insurance company would pay. I'd be willing to give immunity to whoever it was who stole them just to be able to prove they were stolen."

Immediately, Brown speaks up and says, "Morrissey's crazy; those guitars I took from him aren't worth more than \$500. Hell, I'll give them back to him if he cares about'em so much!"

Upon hearing that statement, Donahue immediately arrest Brown. He is quickly transported to the Portsmouth police station, which is less than one mile away. There, he is read his *Miranda* rights. He acknowledges orally and in writing that he understands them. He agrees to waive them.

Detective John Hutson, who was not present at the Unitarian church when Brown made the statements about Morrissey's guitars, begins questioning of Brown by saying, "So, I hear you've admitted being the one who took those guitars that everyone's so worried about. Give me the details." Brown, still a bit startled from having been arrested, says nothing. Hutson follows up by saying, "Come on, you already told us you did it. We probably can't use what you said but at least tell us where the guitars are." Brown starts talking and eventually produces a full, signed confession.

You are Brown's defense lawyer. What arguments do you have to suppress Brown's statements in the foyer of the church & his confession at the police station? Identify the strengths and weaknesses of each of the arguments you articulate.
