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Examination No. _____

504 CRIMINAL LAW
Semester I, 1997-98

UNM School of Law
Final Exam
Three Credits

Professor Eliz. Rapaport
Monday, Dec 15, 1997
1:30 to 5:00 p.m.

INSTRUCTIONS

This is a 3 ½ hour in class examination. The questions are designed to be answered in 3 hours. There is an additional one-half hour for reading the questions carefully, and for organizing and preparing your answers.

In preparing your answers, you may consult your casebook, any treatises or hornbooks, class handouts, class notes, and any outlines you have prepared yourself or in collaboration with your classmates. You may not consult commercial outlines.

The exam contains two questions. Question 1 will count for 75% of the exam and Question 2 for 25%. You should budget your time accordingly. (25% of 3 hours is 37 ½ minutes.) Each question includes a statutory appendix. Be sure to use the correct statutes, citing to the relevant section where appropriate. Assume that the facts set forth in the questions are uncontested.

Check to see that there are 6 pages in your copy of the exam including this page.

Please write in ink, legibly, on every other line of the blue book, and only on one side of each page.

GOOD LUCK!

[All essay exams will be filed in the library]

QUESTION 1 (75%)

Mark Craig had a reputation as a skilled, if somewhat flamboyant and eccentric, investigator with the Eligius Bureau of Investigation (EBI). Mark's wife, Ellen, was a white collar crime specialist with the EBI. Their marriage began idyllically enough, but things proceeded to unravel, as the following facts may suggest.

Mark traces the difficulties back to the time when he became convinced that Ellen was involved in a lesbian relationship with Ginny Cavanero, the author of several best-selling crime novels. Cavanero had met Ellen while she was researching for her first best-seller, "The Postman Doesn't Ring At All, But We're Afraid to Complain." Ginny and Ellen consulted with some frequency about the nature of criminal investigations, and Ginny presented Ellen with a gift of an expensive pen and pencil set to celebrate the success of the novel. The heroine of "Postman" was a white collar crime specialist at the state bureau of investigation, and her description resembled Ellen both physically and in terms of background. In "Postman" and its sequel novels, the heroine solves baffling crimes, all the while carrying on steamy romantic liaisons with other women. Mark became convinced that the modeling of the character after his wife extended to her sex life. His conviction that this was true fuelled his already substantial homophobia and jealousy.

Mark hired a private detective, Ehrlich, who was a former EBI agent, to follow Ellen and report back on her activities. Ehrlich's early reports indicated only the meetings between Ellen and Ginny at Ginny's office, and the fact of the gift. Mark was dissatisfied with these reports and told Ehrlich, "I'm paying you big money, and I expect more substantive results." Since the detective knew of Mark's jealousy, his subsequent reports included accounts of "candlelight dinners" and "hugging and kissing in Cavanero's automobile." These latter accounts were fabricated by Ehrlich, but Mark believed them.

Mark confronted Ellen with these accusations, and her response was to laugh uncontrollably. Mark left the house in a rage, and filed for divorce the next day.

Ellen was startled to receive the divorce papers, and vowed to herself that she would take revenge. Ellen had known that Mark was involved in an undercover "sting" operation, and decided to do some investigating of her own. She discovered that Mark, in the course of his work for the EBI, was impersonating a "fence" who was purchasing stolen medical supplies from a local hospital. Ellen's investigation revealed that Mark had failed to turn in some of the supplies to his EBI superiors.

Ellen turned over the results of her investigation to the Director of the EBI, who was convinced that her accusations were

the product of revulsion at his crimes, rather than revenge in a domestic dispute. Mark was indicted, and Ellen was called to testify as a prosecution witness at his trial. To the astonishment of prosecutors, she testified that "Mark has done nothing wrong here. It is all a big misunderstanding." A mistrial was declared.

When prosecutors later confronted Ellen about her rather dramatic about-face, she told them that when Mark had learned that she was going to testify against him, he had shot her with a stun gun. Then he bound, gagged and blindfolded her, and put her in the back of their sports utility vehicle. Under EBI questioning, Ellen admitted that Mark let her out of the vehicle at night, and that on "at least one" of these nights, she and Mark had had sex in a motel under the following circumstances:

Mark unbound Ellen, removed the blindfold and gag, tucked the stun gun into his belt, grabbed the keys to the sports utility and escorted Ellen to a motel room; after they entered the motel room, Mark locked the door, and put the room key, along with the car keys, in his jacket pocket, which he buttoned and hung in the closet. Mark said, "Ellen, I love you now as I have always loved you," lightly fondling her throat; "I want us to reconcile. Let us renew our love tonight." Mark pointed to the bed and invited Ellen to join him. Mark then said, "our separation has been harmful to our young daughters (aged 4 and 6). If you testify against me, it would cause further harm to our children. Ellen told the EBI investigators that she looked in Mark's eyes as he said this scared her. Ellen then said, "I love you too, Mark," and allowed him to lead her to the bed.

Tensions escalated when both Mark and Ellen were fired from the EBI, in Ellen's case because her superiors were not persuaded that her false testimony was entirely attributable to her husband's threatening words and actions.

Two weeks later, Pastor Daniel Auschlander of the Prince of Peace Methodist Church received a rather vague phone call saying that a distraught parishioner wanted to meet him at the church. When Daniel arrived in the sanctuary, he found himself confronted by a man in a ski mask pointing a gun at him. The masked man blindfolded and tied the minister up and placed a bag around the cleric's waist that he claimed contained plastic explosives. (In actuality, the bag contained Play-Doh.)

The masked man told Pastor Auschlander that he would set off the explosives unless Auschlander called Ellen and persuaded her, under some pretense, to come down to the church. The pastor did what he was told, and Ellen came down to the church, but she found the call somewhat suspicious, so she decided to bring along her .38 revolver. When she entered the church and saw the pastor being held at gunpoint, she took a close look at the masked man and said, "Mark, you idiot, did you think I wouldn't recognize the ski mask I bought you last Christmas?" In the twinkling of an eye, she fired a shot at Mark, but unfortunately the bullet went astray, missing

Mark altogether, and killing Pastor Auschlander instead.

Both Mark and Ellen were arrested. In Mark's vehicle, police found evidence that made the case even stranger. It turns out that Mark had placed an ad in a local paper several weeks earlier, offering to train private investigators. A somewhat gullible and somewhat corruptible man named Fiscus had answered the ad. After some initial meetings and purported "training," Mark had told him that there was an opportunity to break up an insurance fraud and make some money at the same time. Fiscus was told that the fraud involved a woman named Ellen and her minister. Fiscus was instructed to insure his own life for one million dollars (with Mark providing the money for the premium) and was to name Ellen as the beneficiary. Fiscus and Mark agreed that when the insurance fraud was proven, that Fiscus and Mark would then blackmail Ellen and the minister and split the proceeds. But police also discovered Mark's diary in which he detailed his real plan: he would tie up Ellen, Auschlander, and Fiscus in the church and then blow up the church, killing his wife, the pastor and Fiscus. (A time bomb was found in Mark's vehicle.) Mark's plan was that the three bodies would be found in the ruins of the church, and Fiscus would be blamed for the bombing. Mark, as Ellen's heir, would collect on the Fiscus insurance policy, which provided for payment even in cases of suicide. The plan failed when Fiscus was unable to locate the church, and at the time of the shootout was five miles away. The police eventually found Fiscus and arrested him.

Prosecutors have charged Ellen with the murder of Pastor Auschlander. They have charged Mark with Auschlander's murder, attempted murder of Ellen and Fiscus, and rape of Ellen. Fiscus has been charged with attempted blackmail, conspiracy to commit blackmail, and the murder of Auschlander.

You are an assistant to District Attorney Brandon Falsey. He has asked you to prepare a memorandum analyzing the prospects for success in each prosecution. (Please limit your memorandum to the listed charges.) Relevant portions of the Eligius Criminal Code are included in Appendix I. In the past the courts of Eligius have sometimes found the approach of the Model Penal Code to be persuasive.

APPENDIX I

Eligius Criminal Code (portions)

Section 101. Murder. Murder is the unlawful killing of a human being with malice aforethought.

(a) Murder perpetrated by means of poison, lying in wait, or other willful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate arson, criminal sexual conduct, breaking and entering a dwelling, extortion, or kidnapping, is murder in the first degree. Murder in the first degree shall be punished by life imprisonment without the

possibility of parole.

(b) All other kinds of murder shall be murder in the second degree, and shall be punished by imprisonment for a term of twenty to thirty years.

Section 102. Manslaughter. Manslaughter is the unlawful killing of a human being without malice aforethought. It is of two kinds:

(a) Voluntary -- upon a sudden quarrel or heat of passion. Voluntary manslaughter shall be punished by imprisonment for a term of ten to fifteen years.

(b) Involuntary -- producing death, in an unlawful manner, without due caution and circumspection. Involuntary manslaughter shall be punished by imprisonment for a term of five to ten years.

Section 105. Rape. A person commits rape if he engages in sexual intercourse with another person by force or threat of force against the will and without the consent of the other person.

Section 121. Blackmail. Blackmail is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, including a threat to expose any disgrace or crime or to expose any secret affecting him. Blackmail is a felony punishable by imprisonment for a term of two to four years.

Section 200. Attempt. A person is guilty of attempt to commit a felony if, acting with the kind of culpability otherwise required for the commission of the felony, he or she purposely does or omits to do anything which is a substantial step in a course of conduct planned to culminate in the commission of the felony. An attempt is punishable by a term of years that is half the term prescribed for the completed felony.

Section 300. Complicity. An accomplice to a crime may be convicted and sentenced as if he were a principal.

Section 320. Conspiracy. Conspiracy is an agreement between two or more persons to commit a felony. A conspiracy is punishable by a term of years that is half the term for the completed felony.

QUESTION 2 (25%)

Recently there was a controversy in the state of Eligius concerning so-called mercy killings. The dispute surrounded the conviction of a defendant named Morrison for second degree murder in the killing of his twelve year old daughter. It is undisputed

that Morrison intentionally killed his daughter. His claim was that his motivation had been to spare her from suffering which could be anticipated from her advanced case of cerebral palsy. He made no claim that his daughter had been informed of his plans, or that she had asked him to take her life. The jurors who convicted Morrison stated that the facts were clear and left them no choice, under their instructions. But they said they had reached the verdict reluctantly, because "it didn't seem right." Following the jury's verdict, the judge sentenced Morrison to twenty years in prison.

In response to the resulting controversy, a state legislator has introduced a bill proposing an amendment to the state's criminal code. The amendment is printed in Appendix II to this examination. You are staff counsel to the state Senate Judiciary Committee. The chairperson of the committee has asked you to prepare an analysis of the draft bill, discussing the changes it makes to existing state law, and addressing the pros and cons of the proposal. Your analysis may also include discussion of alternatives or amendments to the bill that might be proposed.

APPENDIX II

Senate Bill 24

The Eligius Criminal Code shall be amended by adding the following paragraph to section 101:

"(c) Murder in the third degree. Unlawful killing with malice aforethought shall be murder in the third degree if the defendant acted from a belief that the victim was suffering substantial pain or would suffer such pain within the immediate future and that no medical prospect for cure was likely. Murder in the third degree shall be punished by probation or by a term of imprisonment not to exceed one year."

End of Exam