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627 CRIMINAL PROCEDURE II
Semester II, 1999-2000

Final Examination
UNM School of Law
Three Credits

Professor Barbara Bergman
Friday, May 5, 2000
Friday, May 12, 2000
9:00 a.m. to 12:00 noon

INSTRUCTIONS

This examination consists of three questions with subparts. Questions One and Three will be worth one-fourth (1/4) of the examination grade. Question Two will be worth one-half (1/2) of the examination grade. I suggest you allocate your time accordingly. Please apply the Federal Rules of Criminal Procedure unless the question directs you otherwise. Please answer the entire examination in your bluebooks. Please be sure to:

- (a) Put your examination number on each page of the your exam and on each bluebook.
- (b) **Please write on only one side of the page and skip every other line.** (I find that much easier to read.) And please try to write legibly. (I realize I do not have standing to make that request, but I would really appreciate it.)
- (c) Turn in everything at the end.

This is a MODIFIED OPEN BOOK EXAMINATION. You are permitted to use your notes, any outlines which you and/or your classmates prepared, any required texts, and any materials distributed in class. You may **not** use any commercial outlines.

End of Instructions

GOOD LUCK!

[THE QUESTIONS BEGIN ON PAGE 2]

QUESTION I
(1/4 of the exam grade)

George Eaton is seventeen years old and a junior at Lomas High School. He was arrested on Monday afternoon for bringing a loaded gun to school. When the principal searched George's locker, he found explosives and paramilitary literature. According to George's teachers, he had always been a quiet student, not a troublemaker like some. His grades had been excellent and he had been on the honor roll every semester except the last one, when his grades plummeted. No one could figure out exactly what was going on in George's life, but he had seemed depressed and no one could get him to talk about it. Everyone was shocked with his arrest.

Part A

You are the Assistant District Attorney handling the Eaton case. In your jurisdiction, anyone over twelve charged with unlawful possession of this amount of explosives must be tried as an adult. If you do not charge Eaton with that count, but limit your charge to the possession of a gun, the case would then be handled in Children's Court. If you choose to process the case in Children's Court, the maximum sentence George could receive if convicted is two years in the juvenile justice system. If prosecuted as an adult, George would be facing a maximum of fifteen years incarceration for the various possible charges. What additional information would be helpful to you in making your decision? What decision would you make if you have no further information available to you at this time and why?

Part B

Assume for this portion of the question that you decide to charge George as an adult. At the initial hearing, George's parents are present. His mother is crying and his father seems equally upset. Defense counsel explains that George's parents are willing to accept third party custody of George. They promise to monitor his behavior and restrict him to the house. The defense attorney explains that George's older brother had recently died of AIDS and George has been very depressed and suicidal as a result. His parents want to try to get him into psychotherapy and assure the court that they will make those arrangements immediately upon his release. They have insurance that will cover some of the cost and they will do whatever they have to do to secure the therapy. They are concerned about his safety and well-being if held at the local adult jail. The court then asks for your recommendation on release/bail. What do you ask the court to do and why?

Part C

Assume for this portion of the question that the court refuses to release George and orders him held on \$150,000 bond at the adult jail. You learn from the jail officials that George is not

doing well in the jail. They are worried that he is suicidal and may be the target of sexual assaults if not placed in administrative segregation. To protect George from himself and the adult detainees, the jail officials place George on suicide watch and in isolation. George's parents and defense counsel come to your office asking for your help in getting George out of the jail. They offer to have him plead to whatever you want, if you will just recommend to the judge that he get probation and psychiatric help. What do you do at that point and why?

QUESTION II
(1/2 of the exam grade)

Robert Miller was arrested and charged with the rape/murder of a ninety-two year old woman named Selma Elliott. She was found dead in her bed. Apparently, she had been suffocated by the weight of the man who raped her. Four months earlier, in the house across the street, Ms. Elliott's eighty-three year old neighbor, Dorothy Cedar, had been similarly murdered. No property had been taken, and there was no sign of ransacking. Telephone lines were wrenched from the ground in both yards. The circuit boxes at both houses were switched off.

The police interrogated Miller after his arrest. (Assume for purposes of this question that the police had probable cause to justify the arrest.) The police switched on the videotape when Miller said, "I was dreaming about it one night and, you know, probably almost the same night it happened. You know I have dreams like that, you know, come to me all the time." The next twelve hours were a numbing drone of hallucination, interrogation, exorcism, revival and nonsense. The detectives held a Bible. They prayed. They cast out demons. They coaxed Miller, accused him, walked out on him, begged him to peer deeper into his visions. Miller spoke of enemies who stole his hair from garbage cans, pilfered his clothes, poisoned his days. An ancestor had predicted that he would be a great federal lawman, perhaps another Marshall Dillon, perhaps the Lone Ranger, he told the police. At times, he invoked the memory of his hero, Bruce Lee. He concentrated ferociously when asked to envision the killings, and what the murderer was doing. Like a TV set with a weak antenna, Miller's details were fuzzy, and sometimes he changed channels without warning. The detectives played with his mind-set and even prayed with him to get him back in tune. By the end, the detective decided that they had the killer.

Miller went to trial for the murders of the two women. His trial attorney, Scott Howell, was an inexperienced public defender, and this was his first death penalty case. The attorney did virtually no investigation of the case except to read the police reports and listen to the videotape of Miller's statement to the police – all twelve hours worth. He filed no pretrial motions. Howell did request any exculpatory information in the prosecutor's possession and was told that everything they had proved his client was guilty. Despite the fact that Miller was black and both victims were white, defense counsel made no objection when the prosecutor exercised peremptory challenges against all seven black members of the venire. All twelve jurors who ultimately

decided Miller's fate were white. Howell put on no evidence in mitigation at the penalty phase. Not surprisingly, Miller was convicted of both murders and sentenced to death.

Mike Jackson, an appellate attorney in the public defender's office, handled Miller's direct appeal to the state supreme court. He quickly reviewed the trial transcript and could not find any issues that he thought were not frivolous. He filed an *Anders* brief in the state supreme court. When Miller heard what Jackson had done, he filed a pro se motion with the supreme court asking for permission to proceed pro se and to file his own appellate brief. The state supreme court denied that request and affirmed Miller's conviction and death sentence.

Part A

A few weeks after Miller's conviction was upheld by the state supreme court, Miller's sister comes to your office. You are in private practice specializing in criminal defense, and she convinces you to investigate her brother's case to see if there is anything that can be done. She tells you that she knows her brother is innocent. He could never have done what the state has accused him of doing. She explains that Miller has been mentally ill for years and also has mental retardation, something his previous attorneys never investigated although she tried to tell them both. Despite his mental problems, he is a gentle man who would never hurt anyone. She has managed to bring you a copy of the trial transcript she obtained from the state appellate defender. You review the transcript and then contact both Howell and Jackson to discuss what they know about the case. They grudgingly allow you to review their files. As a result, you learn the facts as set forth in the introductory section. What do you tell Miller's sister about the options that remain available to Miller at this point? What might you be able to do to help Miller and what issues might you raise.

Part B

Assume for the rest of this question that you decide to file a state habeas petition on Miller's behalf. Before doing so, you examine the serologist's report that you find in the discovery packet turned over to Howell before trial. You realize from that report that during the police investigation of the murders, the state serologist had provided the names of twenty-three black men whose blood had been tested as part of the investigation. Then the serologist gave the names of all the men whose hair had been microscopically examined. There had been twenty-three blood tests and twenty-four hair checks. The extra man, whose hair had been examined but not his blood, was Ronald Lott.

You then hire a private investigator who learns that the crime spree in Mrs. Elliott's neighborhood had not stopped with the arrest of Robert Miller. After he was taken into custody, after he had made the twelve-hour videotape, after the District Attorney had announced that "the danger has been removed" from the community, identical crimes were continuing. Two other

elderly women who lived in corner houses were attacked by a man who broke in their back doors. The electricity and phone lines were disabled – just as they had been in the two murders. Both women were raped but survived. One woman actually pulled a gun on the attacker and bopped him on the head. He then wrested the gun away from her. A few days after the second of these rapes, Ronald Lott was stopped on the street and found with that very gun, registered to the victim. His fingerprints were found at the other victim's house. Lott is charged with those two rapes.

You then learn that the same prosecutor, Carl Pope, had been assigned to prosecute both Miller and Lott. Pope had failed to inform Howell of the information about Lott. That prosecutor then withdrew from the Miller trial and another attorney in his office proceeded with Miller's prosecution. As a result, the jurors in Miller's trial never learned that Lott had admitted to doing identical crimes in the same neighborhood. They never learned that Lott had a record of felonies in Kansas, unlike Miller, whose biggest crime was not paying parking tickets. The jurors also never knew that Lott had the same blood type as the rapist and Miller. (Assume that DNA was not available at the time of Miller's trial.)

What can you do at this point? What arguments can you make based on this new information? Are you likely to be successful? Why or why not?

Part C

Assume that your state habeas petition is denied and the state supreme court denies certiorari, refusing to review the district court's denial of the petition. What can you do now? What issues can you raise? Are you likely to be successful? Why or why not?

QUESTION III **(1/4 of the exam grade)**

Part A

Susan Dexter was charged in New Mexico state court with possession of cocaine with the intent to distribute. She was indicted along with thirty-three (33) other co-defendants, including the alleged drug kingpin who was supposedly involved in a wide ranging conspiracy to import and to distribute over \$45 million dollars worth of cocaine and heroin. He is named in one hundred and sixty-three counts in the indictment. Two others, like Dexter, are charged only with a single count of possession with intent to distribute cocaine. While the government acknowledges that Dexter has been accused of only a single criminal act, they allege that the act was part of the overall conspiracy. Dexter's attorney argues first that Dexter was improperly joined with the other co-defendants in the indictment. In the alternative, she argues that her case should be

severed from all the others. She also alleges that two other co-defendants (who were in mid-level management in the conspiracy according to the state) would testify in her defense if they were not being tried together and if they are tried first. She insists that she did not know anything about any drug conspiracy and that she had simply made the mistake of getting involved with her boyfriend (also an indicted co-defendant). He may have been distributing drugs but she never knew about it.

You are the judge assigned to try this case. Assume for purposes of this Part of the Question that the Federal Rules of Criminal Procedure apply. How would you rule on Dexter's misjoinder and severance motions and why?

Part B

Dexter's attorney has filed a motion to dismiss the indictment. The count pertaining to Dexter alleges that on January 5, 2000, an informant, Joe Uri, saw Dexter helping package cocaine for distribution. Uri had gone to high school with Dexter and had even dated her at one time so he had no trouble recognizing her. Dexter had been the one to terminate the relationship. It also turns out that Uri had gotten a sweetheart deal with the government. In exchange for his testimony against all the co-defendants, no felony charges that could have been brought against Uri would ever be filed. Before the deal, Uri was facing charges with a possible maximum of life in prison. When the case was being presented to the grand jury, Dexter's attorney informed the District Attorney of this information (some of which she assumed the District Attorney already knew) and asked that it be presented to the grand jury. The District Attorney refused to do so. Dexter's attorney argues that because the grand jury must have based its indictment of Dexter solely on Uri's testimony and the grand jury was not informed of his bias against Dexter and was not informed of his plea agreement, the indictment must be dismissed without prejudice. Assume for purposes of this Part of the Question that the New Mexico criminal procedure rules apply. As the judge, how do you rule and why?