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627 CRIMINAL PROCEDURE II
Semester II, 2001-2002

Final Examination
UNM School of Law
Three Credits

Professor Barbara Bergman
Saturday, May 4, 2002
Thursday, May 9, 2002
9:00 a.m. to 12:00 noon

INSTRUCTIONS

This examination consists of three questions with subparts. Each question is equally weighted and is worth one-third of the final exam 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 that 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 1
(1/3 of the exam grade)

You are an Assistant United States Attorney in New Mexico. You have been heading an investigation into allegations of fraud, bribery, conspiracy, and obstruction of justice arising out of certain business activities by officers of Defendus Enterprises, Inc. During the course of your investigation, you have interviewed Wiley Witness ("W"), a disgruntled employee, who tells a convincing story about illegal activities at Defendus – although much of it is based on circumstantial evidence and information that W has been told by other employees.

Defendus manufactures circuit boards that are installed in military aircraft. These circuit boards are critical to the proper functioning of the aircraft. According to W, if the boards are shoddily made or do not meet proper specifications, the aircraft potentially may explode in mid-air. Your independent investigation confirms the accuracy of that information. Although the Air Force has quality inspectors at the Defendus plant, according to W, those inspectors have been handsomely "paid off" to look the other way. Meanwhile, the Defendus officers have been pocketing huge sums of money that they have saved by substantially cutting the quality of the circuit boards being produced.

You issued a grand jury subpoena duces tecum for the financial records of the top five officers at Defendus, including Mr. Anthony Axam ("A"), the company president. [The other officers are Barry Black ("B"), the vice-president for product control; Carol Corey ("C"), the vice-president for financial affairs; David Dorsey ("D"), the vice-president for product development; and Evan Elliott ("E"), the secretary.] You learn that each of them has deposited over \$5,000,000 in various accounts during the past year. Their annual salaries at the company normally range from \$150,000 to \$500,000. The \$5,000,000 payments have been listed as "bonuses" on their tax returns and they have paid the required taxes on them.

After it became known that the FBI and the U.S. Attorney's Office had been asking questions about what was going on at Defendus, W also claims to have seen A shredding documents late one night with the assistance of his personal secretary, Joseph Zeldin ("Z"). When you ask A about his shredding activities, he laughs and says that they shred documents all the time at Defendus. With all the top-secret work they do, they are expected to take all necessary precautions to destroy classified documents that are no longer needed. Every office has a shredder and his is no exception. He also often works late at night since he can get more work done when the office is quiet and the phones are not ringing. In addition, it is not unusual for his personal secretary to work late with him as well.

You have asked the Air Force to track down and test circuit boards that have been manufactured by Defendus to determine if they are, indeed, defective. The Air Force has not seemed particularly convinced by W's story and have not yet gotten back to you about the circuit boards.

Part A

Based on the information you have so far, at this point, would you seek indictments against A, B, C, D, E, and/or Z? Why or why not? What factors would influence your decision?

Part B

You decide to go ahead and present this case to the grand jury. W is your star witness. During the course of his testimony, W describes the hearsay statements made to him by other employees at Defendus. He also brings in portions of shredded documents that he stole from A's shredding machine at the request of the FBI agent in charge of the investigation. W claims these were some of the documents he had seen A shredding the night after A learned of the FBI investigation. When you try to piece together the shredded documents W has produced, you find that one of them appears to be a memo from A to the other four Defendus officers (B, C, D, and E) in which A refers to their next "pay out" to the Air Force inspectors. [You know from your law school days that, technically, these shreds have been illegally seized at the direction of the government and are likely to be suppressed as evidence before trial.]

Shortly before his grand jury testimony you learn that W has a history of mental instability. He has apparently been diagnosed as being paranoid schizophrenic but the condition has been in remission for almost a year. You do not present that information to the grand jury.

An FBI agent testifies about the large sums deposited in the officers' bank accounts but neglects to mention that the officers had declared the amounts on their income tax and listed them as "bonuses."

Do you expect to get an indictment against A, B, C, D, E, and/or Z? Assuming that you do get indictments, do you anticipate any legal challenges to them? If so, what would they be and what is their likelihood of success?

Part C

Assume for purposes of this Part that you have obtained indictments for fraud, bribery, conspiracy, and obstruction of justice against A, B, C, D, and E. You obtained an indictment charging Z with obstruction of justice.

Z's defense counsel has filed a motion claiming first that Z has been improperly joined with the other defendants. In the alternative, Z's attorney asks the court to sever Z's trial from that of the other defendants, claiming that (1) he will be unfairly prejudiced by being tried with them, (2) they have antagonistic defenses, and (3) if he is tried separately after A's trial, then A would be willing to testify on his behalf, otherwise A will invoke this Fifth Amendment privilege

against self-incrimination and refuse to testify at a joint trial. What arguments would you make opposing this motion? How do you expect the court to rule and why?

QUESTION 2
(1/3 of the exam grade)

Your client, Linda Jones, a criminal defense attorney in town, was indicted in federal court for (1) providing material support for a terrorist group; (2) providing material support for terrorism; (3) conspiring to defraud; and (4) making false statements. She faces up to 40 years in prison if convicted of these charges. She is 62 years old.

Over the years, Ms. Jones has defended a great many high profile cases often involving less than popular defendants. She has a reputation for being an aggressive litigator, who is zealous in the representation of her clients. One of her clients is Sheikh Abdel Ramdan, who was convicted of seditious conspiracy to wage a war of urban terrorism against the United States. He is now serving a life sentence in federal prison. The charges against Ms. Jones are based on allegations that she violated prison regulations and assisted Sheikh Ramdan in communicating with his followers around the world. The government alleges that she took affirmative steps to conceal discussions between an interpreter and her client concerning matters that violated the prison regulations and that as a result of these communications, the Sheikh's supporters were instructed to take action against the United States.

Part A

You have requested all discovery to which you are entitled under the Federal Rules of Criminal Procedure and the U.S. Constitution. The prosecutors have taken the position that certain information cannot be disclosed without risking national security and that they will not disclose it even if it might technically fall within the requirements of *Brady v. Maryland* and *Giglio v. United States*. [Assume for purposes of this question that there is no federal statute that applies in these circumstances.]

What do you do in response to that position? What arguments do you make? And what ruling do you expect from the court?

Part B

Needless to say, your client's indictment has been the subject of both national and local news media stories. In light of the events of September 11, 2001, the public outcry throughout the country against your client has been strident and uniformly condemning of her alleged behavior. The press reports in this federal district have been particularly scathing and vitriolic against your client. The federal court is anxious to assure your client her right to a speedy trial.

You are not quite as anxious for an immediate trial date. The court seems determined to proceed to trial as soon as possible.

What motions would you file to address this situation? What arguments would you make? And what is your likelihood of success?

Part C

When the trial date arrives, the court permits fairly extensive individual voir dire of the members of the jury panel. At the end of that process, the prosecution uses five of its six peremptory strikes to remove individuals with Arabic names. What do you do at that point? What arguments do you make? What analysis should the court implement in evaluating your claim?

QUESTION 3

(1/3 of the exam grade)

You are a newly appointed federal district judge. One of the cases assigned to you is a habeas corpus petition filed by a Texas state prisoner. The facts alleged in the petition are as follows:

The defendant, Daniel DeSoto ("D"), had been convicted of murder and sentenced to death. He was eighteen at the time of his conviction and had no prior criminal record. At his trial, D had been represented by Jim Atkins, an experienced criminal defense attorney. Unfortunately, during the trial Atkins was going through a bitter divorce and seemed distracted most of the time.

Before the police arrested D, they had searched his home without a warrant or consent and recovered the murder weapon and bloody clothing. They then arrested D and took him down to the police station for questioning. He was grilled nonstop for eighteen hours. He claims he was beaten by one of the detectives until he signed a confession. The most damaging pieces of evidence admitted at trial were the murder weapon, bloody clothing, and D's confession.

Atkins did not file any pretrial motions to suppress either the evidence found during the search or D's confession. When Atkins tried to raise those issues the morning of trial, the state court judge refused to hear any argument on those issues because Atkins had not complied with the court rules requiring all such suppression motions to be filed no later than twenty days after arraignment. When the trial judge asked why Atkins had not filed such motions in a timely manner, Atkins admitted that he had been so busy dealing with personal problems that he had forgotten to do so. The court said that was too bad but "rules are rules."

At the penalty phase of the trial, Atkins did not put on any evidence in mitigation and in closing briefly argued that D did not deserve to die because he was only eighteen and had no prior record. Not surprisingly, the jury was not persuaded and imposed the death penalty.

Atkins handled the appeal. When the time came to file his brief, Atkins filed an *Anders* brief advising the court that this appeal was “wholly frivolous” and seeking permission to withdraw. Although Atkins gave D a copy of that brief, and the appellate court gave D time to file his own brief, D did not file anything. Affidavits in support of the habeas petition state that D has mental retardation and an overall I.Q. of 69. The state appellate court affirmed D’s conviction and sentence.

New counsel, Rodney Gallegos, who was retained by D’s family, filed a state habeas corpus petition, alleging, inter alia, ineffective assistance of trial and appellate counsel. At the evidentiary hearing on that petition, Gallegos called Atkins as a witness. Atkins admitted on the stand that he had previously represented the murder victim in the case. He had not seen any reason to tell D of that previous representation since it had nothing to do with his work on D’s case, and, as far as Atkins was concerned, it did not impact his representation of D in any way. Atkins denied that he had had anything but a professional relationship with the victim. Gallegos then called five witnesses who testified that Atkins had told them all that he had had an affair with the victim, continuing until her death, and that Atkins thought D “got what he deserved.”

The state court denied D’s habeas petition and the state supreme court refused to grant certiorari. Gallegos has now filed this federal habeas petition. He has raised three primary issues: (1) the murder weapon and blood clothing should have been suppressed because of the illegal search; (2) D’s confession should have been excluded on due process, voluntariness grounds; and (3) D’s trial and appellate counsel had a conflict and provided ineffective assistance of counsel. [Assume for purposes of this problem that the search violated the Fourth Amendment and that the confession was involuntary.]

How would you rule in this case and why?