CRIMINAL LAW EXAMINATION

Mr. Fleissner Fall 1996

Instructions

1. Time. You have three and one half hours (210 minutes) to complete this examination. You will be alerted to the time every 30 minutes and when 15 minutes and 5 minutes remain. A suggested allocation of time is set forth for each part of the exam. Of course, the allocation of your time is up to you.

2. Marking Your Blue Books. Do not put your name on your blue books. Before you begin the exam, put your examination number on the cover of each blue book. Number your blue books on the cover. After time expires, you will be given time to indicate the total number of blue books you used.

3. Writing Your Answers. Please double space your answers and use a separate bluebook for each section of the exam. You may write on both sides of a page or one side.

4. If You Are Typing Your Exam. If you elect to type your exam, you should proceed to the typing room (Room D).

5. Scoring Of The Exam. The examination has three sections:

Section	Description	Grade %	Suggested Time
I	Fact Pattern Problem	35%	75 minutes
II	Fact Pattern Problem	35%	75 minutes
III	Three Questions	30%	60 minutes

6. Reminders. This is an open book exam. You should have the course text with you (LaFave, Modern Criminal Law); you may also use other materials that you assisted in preparing. Read the questions with care. Follow instructions found in the questions. Plan your answers before you begin writing. Do not merely state conclusions; set forth your reasoning, make arguments, and give examples. Do not merely recite legal rules; remember that your answers will be evaluated on your application and analysis of the law. Relax! Good luck.

Section I: Fact Pattern Problem

Reminders and Instructions: This section is 35% of the grade; suggested time is 75 minutes (1 hour and 15 minutes). Please label your blue book "Section I".

In this section, your role is that of an assistant prosecutor. You are assigned to prepare a memo for your boss, the District Attorney. In the memo, your task is to recommend appropriate criminal charges and evaluate defenses in the four cases described below. You must address each of the four cases. You may identify code provisions by number ("2.02(1)"). You may assume that there is evidence to prove the factual scenarios set forth.

Your jurisdiction has adopted the Model Penal Code. Only the Model Penal Code provisions on the list provided need to be considered. Your answers should explain how the relevant code provisions apply to the facts.

Case A

Amy and Alan Adams are the proud parents of Andrea Adams, who is in the ninth grade. When Marcy Friday, the cheerleading coach at Andrea's school, failed to select Andrea as member of the cheerleading squad, Amy and Alan decided to have Friday killed.

Alan Adams contacted an old friend, Andy Ax. Alan recruited Andy to help carry out the killing of Marcy Friday. Alan told Andy why he and his wife wanted to kill Friday.

Andy, in turn, recruited a friend of his, Albert Anderson, who had committed murders for money in the past. Andy did not reveal to Albert the identities of Amy and Alan Adams or their reason for wanting Marcy Friday to be killed. Instead, Andy told Albert that the killing was being carried out for Ricky Rico, a person with mob connections. Albert was happy to take the "contract" for $5,000.

By coincidence, a police officer happened to interview Andy Ax about another matter. Because the police officer contacted Andy so soon after his conversations with Alan and Albert, Andy became very nervous. Andy was afraid that the plan to kill Friday was under investigation. Andy decided to "spill his guts." Andy told the police officer about how Alan had contacted him and about his deal with Albert. After Andy gave this information to the police, Amy, Alan, and Albert were arrested.

In another coincidence, Marcy Friday died of natural causes the day before Amy and Alan first discussed having her killed.

Case B

Bert Bean is the father of murder victim Ron Bean. Bert Bean became very upset when Ron's accused murderer, Tom Jones, was acquitted after a jury trial. Bert Bean firmly believes that Jones committed the crime.

A year after the verdict, Bert Bean set out to kill Tom Jones. Bert Bean purchased a handgun. One day Bean followed Jones to a health club and waited for Jones to emerge. After a while, Bean thought he saw Jones coming out of the health club. Bean took aim and shot the man be believed to be Jones, killing him. However, the man killed was not Jones, but another man who looked like him, Vince Victim.

After hearing the shot, three people came out of the health club to see what was happening. In order to scare those people off while he made his escape, Bean sprayed the front of the building with gun fire, aiming over the heads of the people coming out of the club. One bullet ricocheted and struck one of the people who had come out of the club to investigate. The person struck by the bullet died at the scene. That person was Tom Jones.

Bert Bean jumped into his car and fled the scene. Several persons recorded his license plate number. As he drove off, Bert decided that he would not allow himself to be taken alive. He went to a store and purchased some more ammunition and then went home and waited for the police to arrive. When a sqaud car pulled up in front of his house, Bert decided he would shoot any policeman who approached. Bert opened a window slightly and crouched down so the two approaching policemen could not see him. As the two policemen got close to the front door, Bert took aim and pulled the trigger repeatedly. The policemen saw Bert trying to fire, but it was their lucky day. Bert had forgotten to reload his gun. At that point, Bert was overcome with regret and surrendered to the uninjured policemen.

Case C

Carl Coats is suspected by the police of committing a "date rape." Here are the facts: Carl Coats asked an acquaintance, Mary Smith, to go on a date. Carl and Mary went to a local bar featuring live music. Carl and Mary, who are both legal drinking age, each drank a number of beers. Both became intoxicated. Carl suggested that they both have a shot of tequila, but Mary declined, saying that strong liquor "really knocks me out." Carl bought a shot for himself and asked the bartender to mix a very sweet and very strong "tequila sunrise." Carl gave Mary the "tequila sunrise" to drink, telling her that it contained no alcohol. After Mary drank the tequila drink, she became very drunk. Carl was also very drunk.

After finishing the tequila drinks, Carl quite openly asked Mary to have sex. Several witnesses saw Carl and Mary kiss and embrace. Carl and Mary left the bar together. There is no dispute that Carl and Mary subsequently had sexual intercourse. Carl Coats says there was consent. Mary Smith reported the incident to authorities the next day.

Case D

Dan Davis, an armed security guard, was walking home from work when he saw a robbery being committed. Davis saw Peter Punk pointing a gun at Jane Brown and heard Punk say to Brown, "Give me your purse, or I'll blow your head off! Just give it to me and you'll be OK." Davis, who has poor eyesight and is a poor marksman, acted immediately: He pulled out his handgun and fired four times. The shots fired by Davis killed both Peter Punk and Jane Brown.

[End of Section I]

SECTION II: Fact Pattern Problem

Reminders and Instructions: This section is 35% of the grade; suggested time is 75 minutes (1 hour and 15 minutes). Please begin a new blue book and label "Section II".

In this section, your role is defense counsel. In the two cases set forth below, you are to make the best arguments you can on behalf of your client. You are a zealous advocate for your client. Both cases are set in a hypothetical jurisdiction, the State of Mercer. The relevant law is summarized for each case. You must address each of the two cases.

Case A

You represent Kyle Kurtz, who has been charged by the State of Mercer with the crime of "reckless endangerment." The statute under which Kurtz is charged, Mercer Penal Code Section 2, states:

> Any person who recklessly engages in conduct that places or may place another person in danger of death or serious bodily injury shall be guilty of a felony and may be punished by up to 5 years' imprisonment and a fine of up to $10,000. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.

The State of Mercer has adopted Section 2.02(2) of the Model Penal Code.

The basis for the one count indictment was an incident this past Thanksgiving. Kurtz, a law student, was busy studying at his apartment. Jack Taylor, who lived in the apartment next door, was playing music loudly on a stereo system. The noise was making it difficult for Kurtz to concentrate. When Kurtz telephoned his neighbor to ask that the stereo be turned down, Taylor refused. Kurtz took his handgun, which he kept unloaded, went to Taylor's door, and knocked. When Taylor answered the door, Kurtz pointed the gun at Taylor and told him turn down the music. Taylor politely agreed and Kurtz returned to his apartment. Taylor then called the police. Five friends of Taylor were in the apartment and saw the incident. When Kurtz was arrested a short time later, the gun was unloaded and no ammunition was found in Kurtz's apartment. **[continued next p.]**

The case is set for trial. The prosecutor has submitted proposed jury instructions. Among the instructions that the prosecutor wants the judge to give the jury are these:

> 1. "Reckless conduct is a gross deviation from the standard of care that an ordinarily prudent person would exercise under the circumstances."
>
> 2. "Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded."
>
> 3. "It is not necessary to find that the defendant's gun was loaded in order to find the defendant guilty of the crime charged."
>
> 4. "The issue is not whether the gun was loaded but whether it reasonably appeared to Taylor that he was placed in danger."

The court has asked for your response to these proposed instructions. What objections do you have? How should the jury be instructed on the points covered by the prosecutor's proposed instructions? Why?

Case B

You are representing a client in what may be a landmark appellate case before the Mercer Supreme Court.

Your client, Walter Wayne, was convicted of felony murder in the State of Mercer. Following the Mercer Bears victory in the 1995 NCAA men's basketball championship, Walter Wayne was part of a big crowd celebrating in a downtown area. Wayne, who had consumed a few beers during the celebration, took out a handgun and started shooting into the air. One of the bullets fired by Wayne struck and killed a person watching the celebration from an open window on the 25th floor of a nearby building. Because Wayne had a prior felony conviction, he was charged with the felony of being a felon in possession of a firearm. That Mercer criminal statute provides:

> Any person. . .who has been convicted of a felony. . .who receives, possesses, or transports any firearm commits a felony. . . [punishable by up to five years imprisonment].

[continued next p.]

Wayne was charged in a second count with felony murder. Mercer's felony murder rule states:

> A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice.

The predicate, or underlying, felony for the felony murder count was the crime of possession of a firearm by a convicted felon. Wayne was convicted by a jury of both counts. The court sentenced Wayne to life imprisonment on the felony murder count. If Wayne did not have the previous criminal conviction, which made him eligible for the felony murder charge based on gun possession, it appears that the most serious charge would have been involuntary manslaughter, which has a maximum sentence of 10 years imprisonment.

Mercer has one of the most expansive felony murder statutes in the nation. The Mercer Supreme Court has held that any felony connected to a homicide may serve as the underlying felony for a felony murder conviction. While the case was in the trial court, you filed challenges to Mercer's version of the felony murder rule, thus preserving the issues for appeal.

The case is now on appeal. The Mercer Court of Appeals affirmed Wayne's conviction and rejected all your arguments. However, the Mercer Supreme Court has agreed to consider your arguments challenging Mercer's felony murder rule.

What legal and policy arguments will you make to the Mercer Supreme Court? You may argue for a different version of the rule, and in the alternative, you may argue to abandon the felony murder rule completely.

[End of Section II]

Section III: Three Questions

Reminders and Instructions: This section is 30% of the grade; each question is worth 10%. Suggested time for each of the three questions is 20 minutes (Total of 1 hour). You must answer each of the three questions. Please begin a new blue book and label it "Section III". Each question asks for an analysis of a legal issue drawn from the course materials. Your "role" is to give and defend what you think is the best resolution of the issues presented.

Question A

In connection with your study of the concept of criminal intent, you read the 1974 decision of the Supreme Court of Washington in State v. Odom [Text at pp. 113-116]. Address the question posed in the first note following the Odom case:

> The question not reached in Leary and Turner was finally resolved in County Court of Allen [in 1979], p.210 [of the Text], where the Supreme Court held that a "rational connection" between the proved and presumed facts exists whenever the latter is more likely than not to flow from the former. **Had the Odom court correctly anticipated this development, would the case have come out differently?**

Question B

In Liparota v. United States [Text at pp. 175-180], the Supreme Court held that in a prosecution for violating a federal statute prohibiting food stamp fraud, that the government must prove that the defendant knew that his conduct was unauthorized by statute or regulations. In reaching this result, the Supreme Court rejected the government's argument that the crime in question was a "public welfare offense" under United States v. Morissette, and that, therefore, no mens rea of any kind was required for conviction. [See Text at p.178; Morissette also is discussed in the course materials at pp. 152-153 and p. 157, note 1.] **Was the Supreme Court right to reject the government's argument that the food stamp fraud statute in question created a "public welfare offense" requiring no mens rea?**

Question C

One of the self defense cases considered in the course was State v. Hodges [Text at pp. 474-478]. In Hodges, the defendant was convicted of voluntary manslaughter for fatally shooting her abusive husband. The defendant argued that the killing was self defense, and offered evidence of a long history of abuse by her husband, including on the night of the killing. One issue addressed by the Supreme Court of Kansas was whether the defendant's claim of self defense would be judged by an "objective" or "subjective" standard. [See Text at pp. 477-478] The court held that "the proper standard to determine whether the accused's belief in asserting self defense was reasonable is a subjective one. The jury must determine, from the viewpoint of the defendant's mental state, whether the defendant's belief in the need to defend herself was reasonable." **How does the Kansas "subjective" standard for judging the defendant's belief in asserting self defense compare to the standard under which Hodges' belief would be judged if Hodges was prosecuted for criminal homicide under the Model Penal Code?**

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Bonus Question:

What position does the Model Penal Code take concerning the "misdemeanor-manslaughter" doctrine? [place answer here]

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[End of Section III]
[End of Exam]
[End of Criminal Law course]

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Dear Section 2:

I very much enjoyed the opportunity to work with you and get to know you this semester. I hope you have a happy and restful holiday break.

Jim Fleissner