

MASSACHUSETTS SCHOOL OF LAW
Trial Court Practice & Procedure
Spring, 2006 Semester – Criminal
Hon. Peter Agnes, Jr. – Hon. Robert A. Cornetta

FINAL EXAMINATION

Instructions: This final examination consists of four (4) questions. Question one (1) is a ten (10) part true/false exercise.

Questions two (2), three (3) and four (4) are all essay questions. This is a **closed book** examination. Please be sure to **number** each question in your blue books.

Please also keep the following in mind:

1. Write legibly. If your examination cannot be read, you will not receive a grade.
2. Please consider outlining your answers on the back of this examination sheet before you write in your blue books. It will help you with organization and issue spotting. However, anything you outline **MUST** be written in your blue book. No credit will be given for outline materials not written in your blue books.
3. Please **DO NOT** repeat the question in your answer. Do get right to the point and be both precise and concise in your answers. Identify each issue you find in the fact pattern. If you are going to cite case law or statutory law, be sure your citation is correct. Remember, it is quality not quantity that counts.
4. In the event you write in more than one blue book, please be sure to number each blue book and be sure your SSN is on each for identification purposes.

Good Luck!

Question One:

- A. Under Massachusetts law, a defendant if an indigent defendant is before the court for arraignment on a felony charge and there is no attorney available to represent him or her, the defendant must be released on personal recognizance. True or false?
- B. The standards and procedures for setting bail in criminal cases are the same in all departments of the Massachusetts Trial Court (Superior, District, BMC, and Juvenile). True or false?
- C. Misconduct in the form of a prosecutor's failure to observe her constitutional obligation to turn over exculpatory evidence prior to trial entitles the defendant to the dismissal of the charges without the need to establish prejudice. True or false?
- D. Under Rule 14 of the Massachusetts Rules of Criminal Procedure, the Commonwealth is required to disclose the names of all persons (civilian and police) to whom the victim has made statements about the subject matter of the case whether before or after the date of the offense. True or false?
- E. A private party may initiate a criminal prosecution against another person by filing an application for process with the Clerk-Magistrate of the District Court in both misdemeanor and felony cases. True or false?
- F. A defendant has a right to an independent medical examination under G.L. c. 263, § 5A in any case in which a crime involving alcohol or drugs is charged in connection with the operation of a motor vehicle. True or false?
- G. There is no constitutional right in Massachusetts to a "show-cause hearing" or "clerk's hearing" in misdemeanor cases before a person may be required to appear in court and answer to criminal charges in misdemeanor cases. True or false?
- H. An indictment that is based entirely on hearsay evidence presented to the grand jury is subject to be dismissed as lacking in probable cause under *Commonwealth v. St. Pierre*, 377 Mass. 650 (1979).
- I. Under the so-called "Bishop-Fuller protocol," a party seeking access to any information revealed by a person alleged to be the victim of a crime to another person who is providing counseling or therapeutic services must first obtain a court order based upon a showing that the information sought is exculpatory and material to guilt or innocence. True or False?
- J. In Massachusetts, when the issue of whether the defendant validly waived his Miranda rights or gave a voluntary confession to the police is raised by the evidence the Commonwealth has the burden of proving a waiver or voluntariness by a standard of proof beyond a reasonable doubt. True or false?

Question Two:

Based on your distinguished law school record, you have been appointed as Chief Law Clerk for Justice Miriam Wisdom of the Andover-Essex Supreme Judicial Court. In the jurisdiction of Andover-Essex, Massachusetts law is controlling.

Based on the record and the appellate briefs submitted in the case of Commonwealth v. Jones, the following summary of the facts has been prepared by another law clerk which you may accept for purposes of this assignment.

“The defendant appeals from four armed robbery convictions. He claims error in the denial of his pretrial motion to dismiss the robbery indictments or to suppress photograph and fingerprint evidence as a remedy for an allegedly illegal detention.

“At approximately 11:00 A.M. on Tuesday, February 21, 2004, following an automobile chase which terminated when the defendant's vehicle struck a guard rail, the defendant was arrested for receiving a stolen motor vehicle, receiving a stolen credit card, driving to endanger, failing to stop for a police officer, and attaching plates. The defendant was not at that time a suspect in any armed robbery investigation. The injured defendant was taken to a hospital, and bail in the amount of \$250,00.000 surety or \$25,000.00 cash was set later that day by a judge at the Wareham District Court while the defendant, who was unrepresented at the bail hearing, was in the hospital. The defendant's case was continued until March 3, and the judge issued a mittimus ordering that the defendant be committed to the Plymouth County house of correction pending his postponed appearance.

“At approximately 12:00 P.M. the following day, February 22, the sheriff's department transported the defendant from the hospital to the house of correction where he was fingerprinted and photographed pursuant to the facility's standard admissions procedure. Later that day, the staff psychologist at the house of correction examined the defendant, found the defendant to be suicidal, and recommended that he be committed to Bridgewater State Hospital. The following morning, after he set fire to his own cell, the defendant was examined by a second doctor who concurred in the first doctor's recommendation and filed a request for commitment with the court. Pursuant to G.L. c. 123, § 18(a), a District Court judge adopted the recommendation and ordered that the defendant be committed to Bridgewater for a period of observation not to exceed thirty days

“The defendant was first brought to court on March 27, after being released from Bridgewater, and was arraigned at that time on the charges arising out of the February 21 incident. The defendant was also arraigned, following his release from Bridgewater, on charges for various armed robberies to which the police had connected him using the photographs and fingerprints taken at the house of correction. The charges arising out of the February 21 incident were subsequently dismissed.

“The defendant contends that his detention from February 21 to March 27 was illegal because bail was set in his absence and because he was not brought to court for an initial appearance. In response, the Commonwealth argues that the delay in bringing the defendant to court was reasonable under the totality of the circumstances, and therefore

lawful, since the defendant's own behavior in attempting to flee the arresting officer caused his hospitalization and therefore his absence from court when bail was set. According to the Commonwealth, whenever a defendant is unable to be present at arraignment for medical reasons, the standard practice in the Wareham District Court is to set bail in his absence and continue the case ten days. The delay beyond ten days in this case was reasonable, says the Commonwealth, because of the subsequent necessity of committing the defendant to Bridgewater for observation."

Justice Wisdom has provided you with a copy of the applicable Massachusetts bail statute, G.L. c. 276, § 58, which reads in pertinent part:

"A justice or a clerk or assistant clerk of the district court, a bail commissioner or master in chancery ... shall ... hold a hearing in which the defendant and his counsel, if any, may participate and inquire into the case and shall admit such person to bail on his personal recognizance without surety unless said justice, clerk or assistant clerk, bail commissioner or master in chancery determines ... that such a release will not reasonably assure the appearance of the prisoner before the court"

Justice Wisdom also indicates that she believes there are several precedents of the Supreme Judicial Court that may have a bearing on the outcome of this case.

First, Justice Wisdom explains there is a case that states that "[o]ur Legislature intended § 58 to protect the rights of a defendant by establishing a presumption that he or she will be admitted to bail on personal recognizance without surety and by delineating carefully the circumstances under which bail may be denied..

Second, Justice Wisdom explains that G.L. c.. 276, § 61 provides that "[a] person authorized to take bail out of court shall take such bail in the presence of the person to be bailed."

Third, Justice Wisdom indicates that Rule 7(a)(1) of the Rules of Criminal Procedure provides in pertinent part that "[a] defendant who has been arrested shall be brought before a court if then in session, and if not, at its next session.... At that time the defendant shall be interviewed by the probation department: the probation department shall make a report to the court of the pertinent information reasonably necessary to determination of the issues of bail and indigency. If the judge or special magistrate finds that the defendant is indigent or indigent but able to contribute and has not knowingly waived his right to counsel under the procedures established in Supreme Judicial Court Rule 3:10, the Committee for Public Counsel Services shall be assigned to provide representation for the defendant. The judge or special magistrate shall then arraign the defendant or shall set a time for arraignment. The judge or special magistrate shall determine the conditions of the defendant's release, if any."

Justice Wisdom explains that the defendant has argued that his rights were violated and that the pending armed robbery charges must be dismissed as a remedy for the violation. She further indicates that she has not made up her mind about what to do and want you to prepare a draft decision based on your understanding of the appropriate way to apply the above legal principles (and any others you believe should be controlling) to the facts.

Question Three:

On Friday, January 13, 2006, Lewis Holmes was arrested by the Salem Police Department and charged with breaking and entering in the night time with intent to commit a felony, malicious destruction of private property, threats, assault and battery, resisting arrest and possession of class B controlled substance with intent to distribute, to wit: cocaine. The facts are stated briefly in the police report as follows:

Police received a 911 hang up call from 15 Main Street in Salem at about 8:30 p.m. Upon arriving at the scene they found the front door window of the one family house broken and the door open. Upon entering the premises, they found Maria Reyes inside the house crying. She had a red welt on the left side of her face. She told police that she had an argument over the telephone with her live in boyfriend Lewis Holmes and told him she was throwing him out of the apartment. She locked all the doors and called her sister to come over for protection. Before her sister arrived, Lewis drove up and began pounding on the door and windows on the first floor.

When Maria refused to let Lewis in, he broke the front door window and entered the apartment. A confrontation then occurred and Maria ran to get the phone. She dialed 911 and at that point, Lewis ripped the phone out of the wall, struck Maria in the face, knocked her down, took some of his belongings and left.

An ambulance was called for Maria and police began searching the neighborhood for Lewis. He was found about fifteen minutes later hiding under the back stairs of his parents' house at 29 Granger Avenue, a short distance from Maria's apartment. When police tried to arrest Lewis, he put up a struggle and had to be sprayed with pepper spray to be subdued enough to be handcuffed and put into a police cruiser. While being booked at the police station, Lewis was found to have fifteen (15) ten dollar (\$10.00) 'twists' of cocaine on his person, a cell phone, beeper and \$985.00 in small bills on his person.

Lewis was held by Salem Police over the long weekend and was transported to Salem District Court for arraignment on Tuesday morning. While in the lock up at Court, he had trembles, looked pale and sweaty, began to scratch himself all over, said he had nausea and was hearing voices, refused to further communicate with his court appointed lawyer and continually looked down at the cell floor while sitting in a corner. When he was brought upstairs into Court, the judge appointed an attorney for him and after a brief hearing immediately announced he was placing seventy five thousand dollars (\$75,000) cash bail on Lewis because the facts alleged by the prosecutor were so egregious. When defense counsel requested funds for an investigator in this case, the judge said he wanted to hear if the Commonwealth had any objection to the request since the case seemed so "cut and dried".

What issues might you wish to consider presenting to the Court on the next date since Lewis's parents has now hired you and dismissed the court appointed lawyer that had been given to their son?

Question Four:

Jorge Gonzalez is on trial in Essex Superior Court charged with drug trafficking (Class A – heroin), assault with intent to murder and conspiracy.

The District Attorney has announced the Commonwealth's intention to proceed with all three indictments at this time for reasons of judicial economy.

During the jury selection process, the District Attorney has exercised four preemptory challenges to potential jurors, each whose surname ends in a vowel.

Upon the defense's questioning of this, the trial judge has advised defense counsel that each side is entitled to four preemptory challenges for no cause and an unlimited number of challenges for cause.

Upon the seating of the jury, the judge has selected as jury foreperson, William Putnam, a white, iron worker from Saugus, Massachusetts. The defense has requested a sidebar conference in this matter and the judge has denied that request.

The defense has prepared and presented to both the trial judge and prosecutor a series of proposed voir dire questions to be presented to the jury during the selection process. The trial judge has indicated on the record that he has now reviewed and ruled upon each proposed question. Of the fifteen proposed questions, the judge has allowed three of them. The judge has indicated from the bench that the remaining questions are denied and has instructed the sessions clerk to proceed with the empanelment process.

During final arguments, the prosecutor has told the jury that they have more than enough evidence that has been presented to them to convict Jorge and that it is now their duty to remove him from the streets of the Commonwealth for the protection of society. The defense has objected to these statements and at sidebar has requested that the judge give an instruction to the jury to address this issue. In his final instruction, the judge has told the jury that final arguments presented by attorneys are not evidence, they only are presented by the parties to seek to explain what all the evidence means

After an hour of deliberations, the jury has come back with a finding of guilty as to each indictment. The defense immediately has moved for a stay in sentencing and for an aid in sentencing report. The defendant has been in custody since his indictment six (6) months ago. The defense notes that pursuant to Ch. 123, s. 18A, the defendant has been hospitalized at Bridgewater State Hospital three times for mental breakdowns and that this should be considered in any sentencing arguments the Court will hear.

The Commonwealth objects and moves for sentencing immediately. The judge grants that motion and after hearing, sentences the defendant to fifteen (15) to thirty (30) years consecutively on each indictment.

You have now been retained by the defendant's family to seek an appeal in this case. What issues do you plan to raise on appeal?