Texas Criminal Procedure LW8259
Professor Reamey

FINAL EXAMINATION

1. This examination consists of a total of 6 pages, inclusive of this cover page. There are 7 numbered questions, and an indication, as a guide only, of the approximate time that should be used on each question. Grades will be weighted approximately in accordance with the amount of time required to answer the question.

2. All questions are to be answered (i.e., you should answer a total of 7 questions). Watch your time carefully and reserve sufficient time to deal with all required questions. No additional time will be given, and the time limit will be strictly observed. The examination period will last two hours.

3. No questions may be asked during the examination period unless the question deals exclusively with administrative matters and is asked of the person administering the examination.

4. No examination may be removed from the testing room for any reason without prior permission of the professor. Typists may take examinations directly to and from the typing rooms only.

5. Students may use Blue Books or other normal writing paper for their answers. Social Security numbers will be placed on each answer page. No names should appear anywhere on the examination answer. Students using Blue Books may place their Social Security number on the cover of the front page only.

6. Students may use notes, outlines, casebooks, statutory or other resource material brought to the examination, but may not obtain any assistance from any other student. Students may leave as soon as they complete the examination.

7. Students wishing to receive their grade may do so by leaving a post card or envelope with sufficient postage with Professor Reamey. Grades will be mailed as soon as they are available. Please do not ask the secretary for grades. Students not leaving a post card or envelope will receive their grades when they are sent from the University. Students may leave a post card or envelope with Professor Reamey anytime until the grades are mailed by the University.

8. All copies of the examination will be turned in with the answers.

9. Read the fact situations and questions carefully. Answer only what is asked, and write your answers legibly. Remember that you do not receive credit for what you know if it does not appear in your answer. Remember also that you will get no credit for irrelevant or incorrect information included in your answer.

10. Enjoy the summer.

I.
(15 minutes)

Officer Thurston Thursday, a member of the narcotics "task force" of the Tinytown, Texas, Police Department, suspected that Phred Phlowers, the town hippy, sometimes smoked marijuana. One day Judas Jeepers, a friend of Phred's, was stopped by Officer Thursday for speeding. Because Judas was afraid he would lose his license if convicted of the offense, in exchange for a warning ticket he told Thursday that he had seen a marijuana plant growing in Phred's bedroom closet a week ago when he was last at Phred's. Thursday drafted an affidavit for a search warrant based on this information which contained the following statement: "The confidential informant observed marijuana growing in the residence of Phred Phlowers within the past forty-eight hours." Officer Thursday did not mention the fact that Judas Jeepers had twice been convicted of aggravated perjury.

I. If you were to attack the warrant obtained by Thursday, what would be the basis of your argument and what steps would you take? Assess the your chances of prevailing.

II. How would you attempt to determine the identity of the confidential informant? Discuss fully what you would do and whether you would expect to succeed.

II.
(15 minutes)

The search warrant described in the fact situation above issued on a Friday afternoon. Since Officer Thursday was just about to get off work, he left the warrant on his desk until Monday when he went to Phred's apartment to conduct the search. No one answered his knock, so he had the manager open the door with a pass key. Once inside the apartment, he searched high and low but never found the marijuana plant. However, he did see a pipe lying on a kitchen counter which he seized. Subsequent testing of scrapings taken from the pipe showed that it had been used to smoke marijuana.

Thursday also saw a .38 calibre pistol which he seized. When the serial number of the weapon was later checked by computer, it was determined that the gun was stolen. The pistol and pipe were the only items seized. Since this was the first search warrant Officer Thursday had ever obtained, he did not realize he was supposed to return the warrant.

If you are representing Phred Phlowers, what challenges might be made to the admission of the pipe and/or pistol in a prosecution against him? Discuss fully the effect of any irregularities in the execution of the warrant.

III.
(25 minutes)

Several days after Officer Thursday had searched Phred's apartment and received reports on the items seized, he saw Phred driving down Main Street. Before Thursday could stop him, Phred had parked his car and entered Billy Bob's Speedy Market, a place Thursday suspected of being a meeting place for drug users. Officer Thursday followed Phred into the market, found him squeezing melons, and placed him under arrest for Possession of Marijuana under 2 ounces and Theft under $750. A search conducted incident to Phred's arrest uncovered a switchblade knife in his pocket.

On the way to the police station a short time later, Phred exclaimed, "Oh man, why do you want to hassle me for doing a little dope?" He was held in the Tinytown jail for six days, repeatedly given his Miranda warnings, and interrogated. On the sixth day, Thursday finally struck a deal with Phred that the theft and possession of a deadly weapon charge (for the switchblade) would be dropped in exchange for a confession on the possession of marijuana charge.

After Phred signed a written statement admitting his possession of the marijuana, he was taken for the first time before a magistrate who advised him of the charge against him, read him his rights again, and set bail at $50,000. The theft charge was dropped just as promised by Officer Thursday.

What arguments could be made on Phred's behalf? Which ones have merit, and why? What procedures should be instituted on Phred's behalf, when, and why?

IV.
(10 minutes)

In his confession, Phred implicated a friend, Mike "the Mule" Mulligan, as a supplier of marijuana. A warrant was issued for Mike and he was arrested for Delivery of Marijuana over 1/4 ounce, a felony offense.

You are the Assistant District Attorney assigned to Mike's case. He wants an examining trial, but you would prefer that he not have one.

I. What do you anticipate Mike's purpose to be in requesting an examining trial?

II. Describe four (4) ways in which Mike might be effectively deprived of his examining trial by actions of Mike, yourself, or the court.

V.
(20 minutes)

The Grand Jury of Dimwit County was convened and heard several witnesses testify that Mike Mulligan was involved in the distribution of marijuana. Since this was an unusual situation for Tinytown, all of the police officer witnesses who testified stayed in the Grand Jury room to hear all of the witnesses.

After deliberating and voting the Grand Jury returned the following indictment (the indictment was drafted by the Assistant District Attorney who had been assigned to the Grand Jury):

INDICTMENT

IN THE NAME OF THE STATE OF TEXAS:

THE GRAND JURY, for the County of Dimwit, State of Texas, duly selected, empaneled, sworn, charged, and organized as such at the April Term, A.D. 1985, of the 999th Judicial District Court for said County, upon their oaths present in and to said court at said term that MULE MULLIGAN, hereinafter styled Defendant, heretofore, on or about the 2nd day of June, A.D. 1958, in the State of Texas, County of Dimwit,

did then and there deliver a quantity of marijuana of less than four ounces but more than one-fourth ounce,

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Frank Foreman
Foreman of the Grand Jury

I. If you are the Assistant District Attorney assigned to try this case, what objections do you anticipate to the Grand Jury proceedings? Discuss the merit, if any, of all arguments the defendant might raise.

II. What objections to you anticipate to the indictment? For any defect you find, indicate whether an objection must be made pretrial, or whether an objection may be made during or after the trial. Also assess the merit of the objection and what steps you may take to prevent reversal of the conviction. On the next page you will find a copy of Section 4.05 of the Texas Controlled Substances Act and relevant definitions.

§ 4.05. Unlawful Delivery of Marihuana.

(a) Except as authorized by this Act, a person commits an offense if he knowingly or intentionally delivers marihuana.

(b) An offense under Subsection (a) of this section is:

(1) a Class B misdemeanor if the amount of marihuana delivered is one-fourth ounce or less and the person committing the offense does not receive remuneration for the marihuana;

(2) a Class A misdemeanor if the amount of marihuana delivered is one-fourth ounce or less and the person committing the offense receives remuneration for the marihuana;

(3) a felony of the third degree if the amount of marihuana delivered is four ounces or less but more than one-fourth ounce;

(4) a felony of the second degree if the amount of marihuana delivered is five pounds or less but more than four ounces; and

(5) a felony of the first degree if the amount of marihuana delivered is 50 pounds or less but more than 5 pounds.

(c) A person commits an aggravated offense if the person commits an offense under Subsection (a) of this section and the amount of marihuana delivered is more than 50 pounds.

(d) An offense under Subsection (c) of this section is:

(1) punishable by confinement in the Texas Department of Corrections for life or for a term of not more than 99 years or less than 5 years, and a fine not to exceed $50,000, if the amount of marihuana delivered is 200 pounds or less but more than 50 pounds;

(2) punishable by confinement in the Texas Department of Corrections for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of marihuana delivered is 2,000 pounds or less but more than 200 pounds; and

(3) punishable by confinement in the Texas Department of Corrections for life or for a term of not more than 99 years or less than 15 years, and a fine not to exceed $250,000, if the amount of the marihuana delivered is more than 2,000 pounds.

(Amended by Sec. 13, Ch. 425, Acts of the 68th Leg., 1983, eff. Aug. 29, 1983.)

(8) "Deliver" or "delivery" means the actual or constructive transfer from one person to another of a controlled substance, whether or not there is an agency relationship. For purposes of this Act, it also includes an offer to sell a controlled substance. Proof of an offer to sell must be corroborated by a person other than the offeree or by evidence other than a statement of the offeree.

VI.
(15 minutes)

Phred Phlowers has given a statement to the police and again before the Grand Jury describing the occasion on which he bought marijuana from "the Mule." The defense is unaware of this statement and you do not want them to know of it since Phred subsequently changed his story about several particulars in the statement. Phred will have to testify at Mulligan's trial.

List the various ways the defense may discover this statement, pretrial or during trial, and describe what you can do as prosecutor in the case, if anything, to reduce the chances of their getting it.

VII.
(20 minutes)

Before his trial, Mike Mulligan moved to suppress 5 pounds of marijuana found in his apartment when he was arrested. The suppression motion was overruled. When he found out that Phred was going to testify against him, he decided to plead guilty. He agreed to a plea in exchange for the prosecutor's recommendation of two years imprisonment.

Before accepting Mike's plea, the judge admonished him on the applicable range of punishment for delivery of marijuana but misstated the range (the judge was unaware that the law had changed). He failed to inquire into the voluntariness of Mike's plea or whether is was voluntarily and freely made. Nor did he tell Mike that the recommendation of the prosecutor was not binding on the court.

Despite the judge's errors, Mike plead guilty and judicially confessed to the offense. The marijuana seized by the police was not introduced into evidence, and the court accepted the plea.

As Assistant District Attorney, what possible grounds of error do you anticipate Mulligan may argue on appeal? Are any of these arguments likely to succeed? May Mulligan appeal the overruling of his suppression motion? Discuss fully.