

Student Examination Number: _____

FINAL EXAMINATION

1. This examination consists of a total of 6 pages. There are 15 short answer questions, followed by three fact situations, and questions concerning each fact situation follow the material to which they relate.
2. An indication is given for each part of the exam of the approximate amount of time that should be devoted to that part. These estimates are closely related to the amount of credit that may be earned for each. Be sure you answer all questions asked; do not omit any. No additional time will be given, and the 2 hour time limit will be strictly observed.
3. No questions may be asked by students during the examination period unless the question deals exclusively with administrative matters.
4. No examination or examination answer may be removed from the testing room for any reason other than going directly to or from a typing room without obtaining prior permission of the person administering the test.
5. Students must place their student examination number on the cover the each Blue Book used. No names, Social Security numbers, or other identifying information may appear anywhere on the examination answer.
6. All copies of the examination will be turned in with the answers. Students may leave as soon as the examination is completed. Notes, books or reference materials of any kind may be used during the examination. No assistance may be given or obtained from any other person.
7. Read each fact situation and question carefully. Answer only what is asked, and write your answers legibly.
8. Enjoy the summer. (optional but encouraged)

I.
SHORT ANSWER QUESTIONS
(45 minutes)

1. In your defense of a black defendant, you notice that the prosecutor has peremptorily challenged every black venireman. You know that blacks have served on criminal juries in your county in the past. If you challenge the prosecutor's strikes, how will you present your objection, what will be the probable outcome, and why?

2. What response from the defendant should a prosecutor expect if she requests a very high bail in a particularly serious felony case? What is the possible result?

3. If a San Antonio police officer is vacationing in Corpus Christi and sees two men fighting on the beach, may he arrest them without first obtaining a warrant? If so, by what authority?

4. Eager to attend an upcoming judicial conference, the trial judge notified the parties on Thursday that a pretrial hearing was set for one week from the following Friday (the next day). The defense lawyer was unable to file his motion to set aside the indictment until Monday morning, and the judge refused to consider the motion as not timely filed. What arguments should be made on appeal? Will they prevail? Why or why not?

5. After he had been indicted but before his trial, the defendant discovered that one of the grand jurors who returned the true bill against him had been previously convicted of felony theft. What can the defendant do about this, if anything, and when must he do it?

6. If a police officer witness refers during his testimony at trial to the arrest report made by his partner but not to a report the witness himself made concerning the offense, is the defendant entitled to see either document? If so, why, and when would he receive it?

7. A police officer was called to a residence where the homeowner was holding a 17 year old boy he had caught walking off with the owner's newspaper that had been laying in the yard. May the officer arrest the boy without a warrant? Why or why not?

8. If a pretrial motion to suppress evidence based on an allegedly illegal search is denied, what two things should the defense attorney do at trial?

9. During voir dire a venireman told the judge that he was a criminal defense attorney. The court excused him from jury duty. How can you determine whether the court committed reversible error?

10. The defendant's pretrial motion to suppress was overruled, and the case was set for trial to the court. On the trial date, the State announced ready, but the defendant told the court he wanted to change his plea to guilty, judicially confess, and throw himself on the mercy of the court. When the judge was not as merciful as the defendant had

hoped, he decided to appeal the pretrial ruling on his suppression motion. May he do so? Explain why or why not.

11. An examining trial was held at which Lucy Lipz, the State's star witness, testified that the defendant sexually assaulted her. The defendant was later convicted of the charge and another indictment was returned charging him with a burglary which he allegedly committed during the same episode. Before the case came to trial, Lucy and her husband moved to Botswana. The State wants to use her testimony from the examining trial. If you were judge, would you admit the transcript? Why or why not?

12. In what two ways may a defendant preserve error when the jury charge in a criminal case omits an instruction to which the defendant believes himself entitled?

13. After each prospective juror had been individually questioned, the defendant's attorney realized that he could not strike all of the veniremen in the "strike zone" who were undesirable. Prior to peremptory challenges being made or the jury empaneled, the defense requested that the panel be shuffled. If the trial judge refuses to grant this request, has she committed reversible error? Why or why not?

14. The body of a murder indictment read: "That the defendant, MAURICE MAULER, did then and there intentionally and knowingly cause the death of an individual, to-wit: VIC DEMISED, against the peace and dignity of the State." On what basis could you challenge this indictment?

15. Police were called to a shooting at Little Joe's Knife and Gun Club on Culebra. When they arrived, they found Rod Wielder standing over a dead body with a smoking gun in his hand. One officer said, "Don't move! Drop the gun! You're under arrest." The other officer asked Rod, "Did you do this?" Rod replied, "Yeah, I killed the worthless dirtbag." Is this statement admissible for any purpose? Explain why or why not.

II.
(35 minutes)

The Tinytown, Texas, police department received an anonymous phone call from a person who said that a local resident, Clint Westwood, was a contract killer who was responsible for the mafia-style killing of a local bail bondsman. The caller told police Clint always used a .357 magnum with teflon coated bullets in his "hits," a fact known to police investigators but not reported in news accounts of the killing. According to the informant, the gun was never kept in Clint's apartment, but the caller said he had been present at a party in the apartment two weeks previously and had seen laying on the kitchen counter a picture of Clint with the deceased bondsman.

Tinytown detectives prepared an affidavit based on this information which contained, among other things, the following statement: "Affiant further has reason to believe and does believe that said described premises contain a photograph of the said Clint Westwood with Sam Surety, the victim of the shooting, which said

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photograph constitutes evidence of the relationship between the two men." No mention was made in the affidavit of when the photograph had been seen.

The affidavit was presented to the judge of the Tinytown municipal court and a warrant issued for the search of Clint's apartment for the photo and "any other item which might constitute evidence of a violation of the laws of the State of Texas." The warrant issued on Monday, but despite language in the warrant ordering the officers to search the premises immediately, it was not executed until the following Friday. When officers entered the apartment, no one was present, but the search was conducted anyway. In the search the photo was found almost immediately on the kitchen counter. When the officers reached the back bedroom, they found in the dresser drawer a .25 calibre chrome pistol with pearl handles. The serial number of the gun was checked and it was found that the pistol had been stolen in a pawn shop burglary three months earlier. The gun and photo were seized. Through an administrative error, no return or inventory was left in the apartment or filed with the court.

If Clint Westwood is prosecuted in separate trials for capital murder and burglary of a building, and the photograph and gun are introduced in the respective prosecutions, what arguments do you anticipate Clint's attorney to make regarding their admissibility; what response do you expect from the State's attorney; what is the correct ruling on admissibility of each item, and why?

III.

(25 minutes)

In the burglary prosecution of Clint Westwood, the following indictment was returned by the Grand Jury:

INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

The Grand Jurors for the County of Mesquite, State of Texas, duly organized at the April term, A.D. 1988, of the 999th Judicial District Court of said County, do present that CLINT WESTWOOD, on the 2nd day of January, A.D. 1987, in said county and State, did then and there enter a building without the effective consent of SILAS SHYLOCK, the owner, and therein committed theft.

Foreman of the Grand Jury

Using the foregoing indictment and the burglary statute which is reproduced below, answer the questions which follow.

30.01. Definitions. -

this chapter:

- (1) "Habitation" means a structure or vehicle that is adapted for the overnight accommodation of persons, and includes:
 - (A) each separately secured or occupied portion of the structure or vehicle; and
 - (B) each structure appurtenant to or connected with the structure or vehicle.
- (2) "Building" means any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.
- (3) "Vehicle" includes any device in, on, or by which any person or property is or may be propelled, moved, or drawn in the normal course of commerce or transportation, except such devices as are classified as "habitation."

§ 30.02. Burglary.

- (a) A person commits an offense if, without the effective consent of the owner, he:
 - (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft; or
 - (2) remains concealed, with intent to commit a felony or theft, in a building or habitation; or
 - (3) enters a building or habitation and commits or attempts to commit a felony or theft.
- (b) For purposes of this section, "enter" means to intrude:
 - (1) any part of the body; or
 - (2) any physical object connected with the body.
- (c) Except as provided in Subsection (d) of this section, an offense under this section is a felony of the second degree.
- (d) An offense under this section is a felony of the first degree if:
 - (1) the premises are a habitation; or
 - (2) any party to the offense is armed with explosives or a deadly weapon; or
 - (3) any party to the offense injures or attempts to injure anyone in effecting entry or while in the building or in immediate flight from the building.

a. If the defendant moves to set aside the indictment on the grounds that it does not allege how he "entered" the premises and, further, that it does not adequately describe the "building" allegedly entered, how should the court rule on these two grounds? Explain the reasons for the rulings.

b. If the defendant moves to set aside the indictment on the grounds that it violates article 21.09 by not generally alleging the location of the building within the county, how should the court rule on the motion? Explain the reason for the ruling.

c. The defendant's lawyer believes that the indictment fails to state an offense. Is he correct? Explain why or why not. If he is correct, when should he object to the defect, and may the State amend the indictment either before or during the trial?

d. If the defense lawyer knows that the burglary was actually committed on January 2, 1988, and that the complainant will testify to that fact, should he move to set aside the indictment? Why or why not? Should he wait to complain during trial, preserving his error for appeal? Why or why not? For each answer, if there will be a responsive argument by the State, discuss what it will be.

e. If the defendant moves to set aside the indictment for failure to allege the kind of "owner" Silas Shylock is (the Penal Code defines "owner" in three ways), should the motion be granted? Explain. Assume the trial court indicates it will grant the motion, and the prosecutor asks for permission to write on the indictment an amendment further describing Mr. Shylock's status as the "owner." Should the amendment be permitted over defendant's objection? Explain why or why not.

IV.
(15 minutes)

A jury charge which included the following paragraph was given at the end of the trial of Clint Westwood for burglary of a building:

"Now, if you find and believe from the evidence beyond a reasonable doubt that the defendant, CLINT WESTWOOD, on or about the 2nd day of January, 1988, in Mesquite County, Texas, did then and there without the effective consent of SILAS SHYLOCK commit or attempt to commit the offense of theft from SILAS SHYLOCK, then you will find the defendant, CLINT WESTWOOD, guilty, but if you do not so find, or have a reasonable doubt thereof, you will find the defendant not guilty."

Based on the quoted language, does the jury charge contain any defects? If so, what are they? For each defect found, discuss whether it was reversible error for the trial judge to give the charge.