

EXAM

Instructions

DO NOT GO BEYOND THIS PAGE UNTIL YOU ARE TOLD TO BEGIN.

THIS EXAM WILL LAST 3 HOURS. It is a modified OPEN BOOK exam. You may use any notes you have made yourself, your textbook, and any outlines that I have distributed to you. YOU MAY NOT use any commercially printed outlines, hornbooks, treatises, articles, etc., except that you may use up to 50 pages photocopied from such materials.

While waiting for the exam to begin, be sure that you have written your EXAM NUMBER on each bluebook AND ON THE MULTIPLE CHOICE ANSWER SHEET, that you have read these instructions, and that you are otherwise ready to begin. For each of the questions, START A NEW BLUEBOOK.

THE MODEL PENAL CODE APPLIES TO ALL QUESTIONS, except for Question 2½. You are only responsible for those portions of the Code that were previously identified. When the question asks whether a person could be convicted of a crime, answer based on an evaluation of whether, on the facts given, a judge would grant a motion to dismiss the charge; if not, your answer should be yes. Please assume that this jurisdiction does NOT impose the death penalty.

(1) MULTIPLE CHOICE: Please select the *best* answer. Some answers may give a wrong reason for an otherwise correct result. Make sure that you read all the answers thoroughly and select the one that comes closest to a correct statement of the law.

(2) ESSAYS: You will have two essay questions that ask for an analysis of the situation under the Model Penal Code. One question (2½) asks for an analysis assuming the MPC was rejected in your jurisdiction. Please DOUBLE-SPACE!

POINTS are assigned based upon the rough number of minutes it should take to complete each section. The division is as follows:

Multiple Choice/True False:	30 points;
Question 1:	50 points
Question 2:	60 points
Question 2½	10 points
	-----
TOTAL	150 points

In the case of ambiguity, please consider the alternatives that could be reasonably construed from the facts or the statute, and advise accordingly.

GOOD LUCK! MERRY CHRISTMAS!

## MULTIPLE CHOICE (30 points)

1. Identify the author of the following quotation:

"If . . . the primary function of the courts is conceived as the prevention of forbidden acts, there is little cause to be disturbed by the multiplication of offences of strict liability. If the law says that certain things are not to be done, it is illogical to confine this prohibition to occasions on which they are done from malice aforethought; for at least the material consequences of an action, and the reasons for prohibiting it, are the same whether it is the result of sinister malicious plotting, of negligence or of sheer accident."

- a. Lady Wooton
- b. Sir James Fitzjames Stephen
- c. Immanuel Kant
- d. H.L.A. Hart
- e. Sanford Kadish

FACT PATTERN FOR QUESTIONS 2 through 4: John approaches Nathan with a proposal that Nathan help John sneak into an abortion clinic at night, located in a medical office building, and pour acid onto the instruments used by the personnel who work in the clinic, rendering them useless. Nathan agrees that this is a good idea, but warns John that he gets very nervous and that he probably couldn't assist him during the actual break-in and property destruction. However, he agrees that he will purchase the acid and get it to John.

2. At this stage, has a crime been committed?

- a. Yes, because they have conspired to commit the crime of burglary (MPC § 221.1).
- b. Yes, because John has solicited Nathan to commit the crime of burglary.
- c. Both (a) and (b) are correct.
- d. No, because no substantial step has been taken.

3. For purposes of this question only, assume that Nathan calls up his sister Mary and asks her to pick up some acid at the hardware store, and drop it off at John's house. Mary does so and John carries out his attack on the abortion clinic. Which of the following is correct?

- a. Mary could be convicted of burglary, but only if she provided her assistance with the purpose of facilitating the commission of the crime of burglary.
- b. Mary could be convicted of burglary so long as she knew or should have known of the use to which the acid would be put.
- c. Nathan could not be convicted of burglary, because he committed no *actus reus*.
- d. Nathan could be convicted only of conspiracy to commit burglary.

4. Suppose (for purposes of this question only) that all of the facts recited in Question 3 are correct, but that while at the abortion clinic, John ran into a night watchman who picked up his radio to call for police assistance. Without thinking, John grabbed the radio away from him in order to smash it. The two struggled, and John pushed the night watchman, who fell, striking his head on the sharp edge of a counter. The night watchman was found the next day and now suffers permanent brain damage. Which of the following is correct:

- a. John would be guilty of attempted murder if, in the course of committing a felony, he caused life-threatening injury to the night watchman.
- b. Nathan would be guilty of complicity in committing aggravated assault if he facilitated conduct that had the natural and probable consequence of resulting in aggravated assault.
- c. Nathan would be guilty of complicity in committing aggravated assault if, but only if, he was at least reckless with respect to the possibility that an assault would occur.
- d. None of the above is correct.

FACT PATTERN FOR QUESTIONS 5 and 6: Barbara is an employee in an adult bookstore in the State of North York (which follows the Model Penal Code completely), and she has been charged with violating one section of the North York Criminal Code, which reads as follows:

Any person is guilty of obscenity involving a minor, a third degree felony, if he knowingly sells or delivers, by any means including by computer or mails, or knowingly receives or distributes, any visual depiction, if

1. the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
2. such visual depiction is of such conduct;

5. Barbara sold a videotape to an undercover police officer that contained a visual depiction of a minor engaging in sexually explicit conduct. Barbara admits that she was aware of the risk that some of the tapes that she sold might contain such depictions, but she did not know the contents of any of the tapes that she sold. Which of the following is correct?

- a. Barbara cannot be convicted because the statute requires that she know the contents of that which she is selling.
- b. Barbara can be convicted because the statute only requires that she was at least reckless with respect to the contents.
- c. A good argument can be made for either (a) or (b).
- d. Barbara can be convicted if she was at least negligent with respect to the age of the victims portrayed in the videotape.

6. Suppose (for purposes of this question only) that another section of the Code defines a minor as anyone under the age of 21, and that Barbara knew that the person portrayed in the videotape was 19, but mistakenly thought that a minor is anyone under the age of 18. Which of the following is correct?
- Her mistake was one of fact, so therefore it would negative the requirement that she knowingly sold a depiction of a minor.
  - Her mistake was one of law, and therefore would not provide a defense.
  - If, but only if, she was at least reckless with respect to the definition of a minor, then she would have no defense.
  - She would have a defense if her mistake regarding age was a reasonable one.

### ESSAY QUESTIONS

#### Question 1 (50 points)

You are an assistant prosecutor assigned to the major felonies division. The following case, involving a fatal stabbing by the defendant of her husband, is presented for your review:

Mary Elaine Zenyuh and Mr. Ronald Zenyuh dated for six years and had been married approximately one year on the date of the incidents described herein. Their relationship was marked by frequent arguments, during which Mr. Zenyuh often beat Mary Elaine. After several of these beatings, Mary Elaine sought treatment at a hospital emergency room. The hospital records support her claim. It was also necessary for her to seek medical treatment for injuries to her ear and to her eye, both of which resulted from beatings by her husband. Letters from the doctors treating those injuries substantiate her claim. Mary Elaine also claims that her husband had threatened to kill her if she ever left him.

On the date of the stabbing, Mary Elaine and her husband began arguing early in the evening. At about 9:00 p.m., Mary Elaine and her husband went to a lounge in Dauphin County to meet Mr. Zenyuh's brother, Greg, and Greg's girlfriend Nancy. The purpose of the gathering was to celebrate the Zenyuhs' coming wedding anniversary. Both Mary Elaine and her husband were drinking that night. Tests showed Mary Elaine's blood alcohol level to be .13 and her husband's to be .17. At first the evening was pleasant. However, an argument developed. [Greg has given a statement that Mary Elaine was the one who kept bringing up sore subjects that led to the argument. According to Greg, Mary Elaine "wouldn't leave it alone," and seemed to be "spoiling for a fight."] At 10:30 p.m. Mary Elaine asked her husband for the keys to her car so that she could leave. Mr. Zenyuh refused to give her the keys. When they did leave, her husband began to hit and kick her. Pictures taken a few days later while Mary Elaine was in jail showed bruises on her legs, arms and neck. The hitting continued in the car. Mary Elaine retaliated by pulling her husband's hair. When they arrived at the house, Mary Elaine told her husband she was leaving him and again asked for her keys. Mr. Zenyuh again refused. Mary Elaine entered the house and began looking for her extra set of keys. While she

was looking in the kitchen, her husband entered the room. Mary Elaine claims that he was in a rage and she believed that he was at least going to beat her, and possibly would kill her. She picked up a kitchen knife. Mr. Zenyuh came at her and grabbed her arms. A struggle began, during which Mr. Zenyuh was cut or stabbed several times. He then left the house and went next door to seek help. The neighbors asked what happened, and he said, "She wanted me out of her life," and slipped into a coma. Mr. Zenyuh died shortly thereafter from his injuries. After the stabbing Mary Elaine didn't call the police or an ambulance, claiming she was stunned by what had just happened.

Please prepare a memo analyzing your recommendations for prosecuting Mary Elaine, and what you believe are the prospects for conviction.

Question 2 (60 points)

[You are a new associate in a firm specializing in criminal defense. Your firm has been representing Mark Sette, whose trial is almost complete:]

In March 1993 Mark Sette, then age 23, lived in the basement bedroom of a four-bedroom condominium in Plainfield. The three other bedrooms were occupied by Peter Johnson, Amy Cavalli, whose parents owned the condominium, and Rosemary Devaney. Johnson and Sette had been good friends for a long time and Sette had been friendly with Cavalli and her friend, Devaney, for several years.

At about 1 a.m. on March 21, 1993, in the condominium, Sette stabbed Devaney to death with a hunting knife and also stabbed Johnson. Sette then left the building and entered a nearby condominium occupied by Michael Triano and Gina Columbus, whom Sette also tried to stab. Sette claimed to have little or no recall of these events, a phenomenon he and his expert witnesses attributed to several factors and events which occurred in the years and months leading up to the night of March 21.

Sette had been employed since his high school graduation in the gardening and landscaping business. At these jobs Sette had been exposed to pesticides, herbicides and chemicals, including the bug killer, Sevon, although the level and concentration of exposure to these chemicals was disputed. He had often used cocaine on weekends. Sette claimed to have experienced severe diarrhea, nausea, tingling in his fingertips and headaches with increased frequency for the two years prior to March 1993, although Sette did not complain of these symptoms to friends or coworkers, nor did he seek any medical attention.

About one week before March 21, Sette had an argument with his long-standing female friend, Robin Nadel, after which he went to Florida for several days to think about their relationship and to relieve feelings of stress from his job. He returned on either Tuesday, March 15 or Wednesday, March 16 and promptly argued again with Nadel, who immediately left on her own trip to Florida. On Wednesday, Thursday and Friday nights (March 16-18) Sette, feeling upset from his disputes with Nadel, went to a bar called the "Goal Post" and drank

heavily. On Thursday night, Kelly Fitzgerald, a female friend of Nadel's, went to a diner with Sette after leaving the "Goal Post" and returned with him to the condominium to spend the night. With the exception of visiting the diner, they did the same thing on Friday night. Fitzgerald did not think Sette was depressed about Nadel nor did he complain about Nadel's absence to her.

On Saturday morning, March 19, Sette was having trouble with nasal congestion, prompting Fitzgerald to warn him to stop using cocaine. After Fitzgerald left the condominium on Saturday, Sette made arrangements with Kurt Terry to get some cocaine which Terry delivered to Sette at about 7 p.m. on Saturday night. Sette snorted some cocaine as people in the house were preparing to go out on Saturday night to the "Hunka Bunka Ballroom," another local bar. His sister, Maria, recalled Sette asking in the car that night whether any of his friends would miss him if he died or whether they would attend his funeral. He drank heavily that night and awoke around noon Sunday with a hangover.

Sunday passed in a desultory fashion until evening, when Sette joined Kurt Terry and Terry's girlfriend, Tracy Martin, in snorting cocaine. Terry, Martin and another friend, Lawrence Guarino, saw that Sette was snorting uncharacteristically large amounts of cocaine with unusual frequency, and warned him to slow down or stop. Between 8:30 and about 11:30 on Sunday evening, while Sette continued to ingest cocaine, Guarino and Sette played a war game titled "Axis and Allies" in the kitchen while the others were in the living room watching videotapes. Toward midnight several people, including Sette, smoked marijuana; Sette took several puffs from a marijuana cigarette and two "hits" from a bong or water pipe.

Sette testified that he was despondent because he had not heard from Robin Nadel during the four days preceding Sunday night. Shortly after 7 p.m. he called Fitzgerald and told her he was "wired" from cocaine. To Fitzgerald, he did not seem depressed nor was he complaining about Nadel's absence. Kurt Terry and Tracy Martin recalled that Sette made several uncharacteristic remarks on Sunday night to the effect that "nothing matters." However, he also told Martin he did not care about Nadel, and told Guarino that there would be "trouble" when Nadel returned because Sette had stayed with Fitzgerald.

At about 11:30 p.m. on Sunday, March 20, 1993, Johnson went upstairs to sleep in his bedroom. By midnight, when Guarino left the condominium, Martin, Chris Smith and the other friends who had been there during the evening had already left. Erin Devaney, who had been there after returning from a family dinner with her sister Rosemary, left at about 12:50 a.m., or in the early morning of March 21. When Erin Devaney left, Sette was in his basement bedroom where he had gone at about 12:30 a.m., while Rosemary was in her second floor bedroom. Amy Cavalli had come home to the condominium at about 12:30 a.m. and had left at about 12:50 a.m. At that time there were lights on in Rosemary Devaney's bedroom.

Sette remembered going downstairs to his room and thinking he wanted to die. To accomplish this he ingested the rest of his cocaine and swallowed most of the tablets in a Co-Tylenol box on his dresser. Then, he said, everything went "crazy" and he could recall little

except that he thought he was dead and nothing was real.<sup>1</sup>

Notwithstanding this memory lapse expressed at trial, Sette gave several statements to police when arrested on March 21 in which he recounted going up to Devaney's room and stabbing her when she opened the door, chasing her as she fled into Cavalli's empty room, and then stabbing Johnson in the chest as Johnson tried to help the screaming Devaney. In his statement to police, Sette remembered Johnson fleeing the room after which Sette pursued Devaney down the stairs and slit her throat in the living room.

According to Johnson, he was awakened by Devaney's screams for help. He ran to Cavalli's room where he saw Sette holding a hunting knife which Sette had purchased about three weeks earlier at a hunting convention. He told Sette to stop. Johnson put his arms on Sette's shoulders to get his attention but Sette stabbed Johnson in the chest. This wound measured three inches in width and seven to eight inches in depth and posed a substantial risk of death. Devaney was bleeding from the stomach area and yelled for Johnson to get help. She bled to death as the result of the many stab wounds inflicted by Sette. Johnson ran downstairs, unchained the front door and ran out to the yard, all the while hearing Devaney screaming for Sette not to kill her as she crashed down the stairs. Annie Latimore, a neighbor in the next condominium, was awakened by a woman's screams after which she saw Sette leaving the condominium at a normal pace carrying a bloody knife and saying "I have tried," several times.

Johnson ran screaming to a nearby condominium and was let in by Stephen Bodmer. Bodmer, his brother Richard, and their roommate Jeffrey Wenel, heard Johnson screaming hysterically that Sette had stabbed him and was chasing him. Johnson was bleeding and screaming for them to stop Sette. At about this time they heard sounds of a physical confrontation and a woman's screams coming from the condominium next to the Bodmers. Michael Triano, who lived next to the Bodmers, had been awakened by Johnson's calls for help and opened his door to see Johnson's blood all over his porch. Triano told Gina Columbus, his friend, to phone for the police.

---

<sup>1</sup> Some additional information has been obtained concerning Sette's drug use: Sette concedes his "massive ingestion of cocaine" on March 20 and 21 before the homicidal events. On the evening of March 16 he alternated drinking beer and tequila. The next night he drank what he described as "pretty much" beer and tequila, becoming intoxicated. The following night he went to the "Goal Post" again, the third night in a row, and "had quite a bit to drink." The next morning, Saturday, March 19, Sette and Terry shared some cocaine. He then went to a night club in Sayreville where he drank vodka and tonics and left early Sunday morning, March 20. He got so drunk that night that Amy Cavalli said it took him five full minutes to get the door to the condo open. He snorted cocaine that Sunday afternoon with Kurt Terry and this apparently continued into the evening. Tracy Martin described him snorting "massive lines of cocaine that night," much faster and in much larger quantities than she had ever seen him do. Sette himself also admitted using more cocaine faster that night than he ever had done before. Terry warned him to slow down to avoid a heart attack. He was doing four to six lines every ten minutes. Sette admitted that he was "really wired" by this point. He unsuccessfully tried to feed cocaine to his fish. Sette continued to use cocaine as he played "Axis and Allies," a board game, and also smoked some marijuana. Around midnight he took "several hits from a bong" of marijuana. When he went to his downstairs room at 12:30 a.m. on March 21 he snorted the last of his cocaine. He then "punched out" an entire card of 12 Co-Tylenol tablets and swallowed them in his self-described suicide attempt. The maximum recommended dosage is two tablets.

As Columbus was phoning the police, Sette rushed in through Triano's open door covered in blood and began swinging his hunting knife at Triano. Sette pushed Triano aside and ran for Columbus, who fled out the rear door as Sette chased her with the bloody knife raised over his head. Sette chased Columbus around to the front of the buildings and down the street. Columbus ran into three people who brought her inside their house and called the police as Sette strode past the house still holding the knife.

When the police arrived, Columbus got into their patrol car and pointed them in the direction Sette had taken. Two police cars converged on Sette, a short distance away. He was arrested, handcuffed and placed in a patrol car. The police then saw that Sette was kicking the rear window of the car, trying to break out of the car. When Sergeant Edwards of the Plainfield Police opened the patrol car door, Sette coiled his legs and kicked, missing Sergeant Edwards by inches. The officers then put ankle cuffs on Sette's legs and took him to the station.

At his "booking," Sette responded appropriately and accurately to questions about his biographical information and had no trouble walking without assistance to places he was directed toward. He was later read his rights and signed a waiver, after which he responded to police questioning by giving the details of Devaney's death as described. Several times during the questioning Sette claimed he could not recall some things and repeated that he felt he had died during the entire incident. At one point the police interviewer told Sette he thought he was lying about not being able to recall the stabbing, after which Sette admitted he had been wrong and described how he had stabbed and slashed Devaney and Johnson.

On the evening of Monday March 21, Sette was interviewed by a psychiatrist, Dr. Robert Latimer, who went to the county jail at the request of Sette's father. Dr. Latimer determined that Sette was delusional and acutely psychotic during the killing spree of the previous night and signed the first of two required "commitment" letters for Sette's transfer to a psychiatric hospital. On March 22 Sette was taken to an emergency room for sutures to a wound on his left leg and was examined there by the staff psychiatrist, Dr. Chong Jaw, who found him dazed but fully cognizant of what had happened and of the charges of murder lodged against him. However, since Sette claimed to be contemplating suicide, Dr. Jaw concurred with the recommendation that Sette be sent to a psychiatric hospital, although he felt that Sette's problems were strictly related to substance abuse.

Sette was transferred to Trenton Forensic Hospital where he was treated from March 22 to April 13, 1993 by Dr. Terrence Chamberlain, another psychiatrist. Dr. Chamberlain rendered no opinion at trial about Sette's mental capacity at the time of the killing and assaults, but diagnosed Sette's admission and discharge condition at Trenton Psychiatric as atypical psychosis secondary to substance abuse.

At trial Dr. Latimer testified that Sette did not know the nature and quality of his acts on March 21, 1993, as a result of psychosis induced by the various intoxicants. The State's psychiatrist, Dr. Daniel Greenfield, thought that Sette was not psychotic on March 21 and acted in a knowing, purposeful and goal-directed manner evincing awareness of both the nature and



quality of his acts. There were also conflicting opinions offered at trial from several pharmacologists concerning the effect of his exposure to pesticides and chemicals during his work as a landscaper and their interaction with cocaine, marijuana and Co-Tylenol upon Sette's behavior and ability to act knowingly and with purpose on March 21. The defense experts said that Sette's conduct was a result of psychosis produced by the interaction of the drugs he took and his occupational exposure to toxic substances.

\* \* \* \*

It is now time for the jury instructions to be prepared and for final argument. Assume that the jury instructions are prepared consistent with the Model Penal Code. Please prepare a memo summarizing the worst case scenario that Sette would face if the jury viewed the evidence in a light least favorable to him; on the other hand, please prepare a best case scenario of what could happen at trial if the jury views the evidence in a light most favorable to him.

QUESTION 2½ (10 points)

How would your analysis in Question 2 have been different if the jurisdiction chose not to follow the Model Penal Code?

EXAM NUMBER \_\_\_\_\_

**MULTIPLE CHOICE ANSWER SHEET**

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_
6. \_\_\_\_\_

**TEAR THIS OFF AND PUT IT IN YOUR BLUEBOOK!**