
Final Examination
Criminal Law
West Virginia University College of Law

Instructor: James R. Elkins

Fall, 2002

Instructions: The time for the examination is 3 hours. The examination consists of three essay questions. The questions will be weighed differently for purposes of evaluation. Question I will constitute 50% of the grade. Questions II & III will constitute 25% each.

The examination will be taken in the assigned examination room.

Open Book Exam: This is an open book exam. You are free to use the course casebook, outlines, and other materials. An open book exam does not mean that you are free to confer with fellow students. During the time allotted for the examination you are to refrain from conversations with fellow students.

Questions About the Exam: There should be no reason to consult with me during the course of the examination absence some critical situation. If you find a problem or discrepancy (factual or legal) with any of the questions, you should resolve it, by setting out the discrepancy and any assumptions necessary to deal it.

Examination Numbers: Please place your examination number on *each* examination booklet. Your name should not be placed anywhere on the examination booklets.

Examination Booklets: The answers to the essay questions should be in examination blue books. Please write *legibly* and write on only side of each page of the blue book. Use as many examination booklets as need to fully respond to the questions. Please number the booklets consecutively: 1, 2, 3, 4, 5, etc.

Advice: Take time to organize your answer. Discuss all issues raised by a question, even if you believe a particular issue is dispositive and makes further discussion unnecessary. If your answer requires additional facts, state what they are and their significance.

Evaluative Weight of Each Question: Question I—50% of the grade; Questions II & III—25% each.

I.

Barbara Loudon was an eighteen year old college student attending Wilson State University living in the Quad Dormitory when police learned of the following events, all of which can be proven by way of witnesses and testimony. On Wednesday, February 8, 2002, at 3:30 a.m., Barbara Loudon gave birth to a baby girl in her room at the dormitory. At the time of the birth Loudon had not told neither her parents, who lived twenty miles away from the University, or her friends, she was pregnant.

Loudon gave a statement to the police to the effect that when she gave birth she was so emotionally distraught that she could not really believe what had happened and could not describe the events in any great detail. When asked whether the baby cried or moved or was breathing, she said, "I really don't know. It was never alive to me." After the baby was born, she remembered cleaning herself up, taking a shower, and after her shower realizing that she had to do something with the baby. She wrapped the baby in a towel, and took it to her parent's house, and placed it in an unused woodstove in the basement. She took another bath at her parents house (her parents were not home), and after bathing again, drove back to the University. She walked aimlessly around campus and, unable to get the baby off her mind, drove back to her parent's house and on the way decided to retrieve the baby and to bury it. She took the body from the woodstove, wrapped it in still another towel and placed it in a small wood box she found in her father's basement workshop. She placed the box containing the body and a shovel in the trunk of her car and drove by way of a back road to her grandfather's farm to an isolated spot. She attempted to bury the body but the ground was frozen and she found she could not dig a hole. She placed the shovel back in the trunk of her car, with the box, and returned to the University.

At mid-afternoon, Loudon called the psychologist at the Wilson State Counseling Center she had been seeing and said she needed an emergency appointment. When asked if she needed to be seen that day, she replied, "yes, I don't think things are right. Maybe Dr. Singh can help me."

During the session with Dr. Padar Singh, a clinical psychologist, Loudon told him she had given birth in the early morning hours and she now wanted to kill herself. When Dr. Singh suggested that they would need to contact the police, Loudon agreed, telling him, "anything to make this craziness stop." When the University campus police arrived, they located Loudon's car in the parking lot, and when Dr. Singh walked with Loudon to the car, she was read her Miranda rights and asked if she would permit the police to search the car. The police report indicates that Loudon appeared dazed and confused, and said little, shaking her head back and forth, as if to say, "no." But when the request to search the car was put to her again, she consented. Dr. Singh testified that she said, "Yes, yes, all is forgiven, there is no need to ask my permission." The officers discovered the baby's body in the trunk of Loudon's car, wrapped in two towels in a small wood box.

The baby's body was taken to Wilson Medical Center for an autopsy. After authorities learned from the autopsy that the baby was born alive, Loudon was arrested and charged with murder.

James Loudon, Barbara's father, immediately contacted Darren Wright, a local criminal lawyer. During the course of his investigation in preparation for Barbara's defense he learns that Barbara has had psychological problems but nothing so serious as to require hospitalization. The first sign of problems was when she was ten years old and began to withdraw, had trouble communicating with her parents, and problems at school. She saw a counselor for a few months and seemed to get better. At age seventeen, her final year in high school, she had six months of intensive counseling for an eating disorder. She was diagnosed as having anorexia nervosa (the clinical name for the eating disorder) and depression.

Darren Wright, working extensively now on Barbara's defense, learns that Loudon was treated for the eating disorder and depression by Dr. Marion Stills, a psychiatrist, for 6 months in 2000. Dr. Stills describes Barbara Loudon, at the time of the treatment, as totally preoccupied with food, experiencing both a great ravenous hunger and the sense that everything she ate was poisoning her. With these powerful thoughts dominating her thinking, she began to have difficulty interacting with friends and communicating with her parents. She began, again, to withdraw, was depressed, and was unable to accept the fact that she was seriously ill and that her illness was psychologically rooted. She was concerned that her body was not shaped right and that she must limit and "control" her eating in order to be a lovable person. Dr. Stills' records indicate that Loudon was in denial, both about her eating disorder, and the effects of her depression. At one point during the course of her treatment, Dr. Stills recommended institutionalization for more intensive treatment, but Loudon's parents disapproved of the idea, and she remained in out-patient treatment.

Dr. Stills treated Loudon with medication, originally, Anafranil (tricyclic antidepressant clomipramine), but switched her to Prozac when it was approved for treatment of obsessive-compulsive disorders. Barbara Loudon was in therapy with Dr. Stills for six months and continued another six months as an out-patient under a supervised medication regime after the counseling had been terminated against Dr. Stills' advice.

After the counseling and depression medication, Barbara Loudon seemed to recover from her eating disorder and felt so much better that she began dating Rob Barton, who was three years older than Loudon. Barton had a reputation for being a little wild, but Loudon found him so self-confident (so unlike herself), that she was drawn to him. And he had already established himself at Wilson State and that made him something of a catch for a high school girl. Loudon describes to her lawyer, Darren Wright, how Barton tried to boss her around from the beginning of the relationship, and, since she was afraid she wouldn't find another boyfriend, she let him do it.

At first he told her what kind of clothes he wanted her to wear and how she should do her hair, but after a few months he had begun to try to control her whole life. Now, again, beginning to feel out of control, as she had when she was in treatment with Dr. Stills, she found it all too easy to let Rob Barton be in charge. She felt good when she was seen with him and hoped they could get married when Rob finished school.

But things had gotten worse. Rob Barton was violently jealous and began to use physical violence and to make sexual demands that Loudon was afraid to refuse. On four different occasions, she had to go to the hospital after Barton's physical attacks and on several occasions the doctors asked her questions about her injuries that left her afraid they would suspect the cause of her injuries. (She found, however, that by being creative, she could fool the doctors, who were too busy to ask the detailed questions necessary to detect the cause of Loudon's injuries. The doctors can, however, testify that the injuries she received were consistent with the kind of physical abuse that Loudon now describes, abuse which was not detected by the doctors at the time.)

Barbara Loudon eventually told Rob Barton she was pregnant, but he laughed and told her he didn't believe it and that she must be imagining things. Barbara recalls him saying, "always the creative type, and now you're creating this idea your going to have a baby." She tried to listen to Rob and not to her own body (a body that she had learned to mistrust when she had anorexia nervosa). When she wasn't with Rob, she didn't allow herself to think about being pregnant. Life seemed most normal when she didn't think about the baby.

On still another occasion she tried to talk to Rob about her "situation" and he said, "Don't be crazy." And not wanting to be crazy, she decided she wouldn't allow it to happen. She wanted ever so much to believe Rob Barton because she loved him, notwithstanding his violent outbursts and abusive treatment. One day, she finally got Rob to admit she was pregnant, and he told her she'd have to take care of the situation and if she didn't, there wouldn't be any future for the two of them. "Take care of it, Rob, what do you mean?" Rob told her, "you'll have to figure that out for yourself. You got yourself into this situation now you'll have to do what's necessary to straighten things out." "But Rob," she said, "how can I kept things straight with us." "Simple," Rob said, "do whatever you've got to do. We can't have a baby now."

Barbara Loudon tells her lawyer that she made a telephone call to Rob Barton, immediately after the baby was born, to tell him that she had just had a baby. He told her: "Get rid of it. Bury it on your grandfather's farm where no one will ever find it. No one knows you were pregnant, and no one needs to know anything about this now. We'll go on just like nothing happened. You understand me?"

Dr. Elaine Wertz, a psychiatrist, was hired by the defense to examine Barbara Loudon. Dr. Wertz has diagnosed Barbara as suffering from depression and is willing to testify that Barbara Loudon's reaction to the pregnancy is directly related to her previous psychological problems and the on-going mental and physical abuse of Rob Barton. With her history of low self-esteem and depression, and the persistent abuse of Rob Barton, Barbara simply was no long capable of making good decisions. The denial of the pregnancy seemed, in her mental state, to be the only way out of a difficult situation. Whenever she tried a different strategy, it was Rob Barton who steered her back to denial, and then to the actions she took on the night the baby was born. Rob Barton had assumed his control over Loudon by at first denying she was pregnant (reinforcing Loudon's own denial), then telling her she was crazy (confirming what Loudon felt about

herself), and finally, instructing her on how to dispose of the baby.

Barbara Loudon, according to Dr. Wertz, was sufficiently disoriented from the continuing psychological effects of her eating disorder, depression, medication, and the move from her parents house to the University, and the episodic abusive relationship with Rob Barton, that she simply could not come to grips with her pregnancy and manage it in a realistic, psychologically mature way.

Darren Wright, Loudon's lawyer, obtains the state toxicologist's report during pretrial discovery. Dr. Jess S. Renedo, M.D., a pathologist, states in his report that the baby was born alive and while it suffered from various prenatal and birth delivery disorders, including acute respiratory distress syndrome, it would have lived longer if delivered in a hospital, perhaps for several months. Darren Wright locates a trial transcript of still another case in which Dr. Renedo testified in a case with a similar diagnosis. In that case, when asked by the prosecution whether the baby in that case (with a similar diagnosis), would have survived if it had been born in a hospital, he testified, "yes, for awhile." On cross-examination, the defense had asked Dr. Renedo to quantify the possibility that the baby would have survived in the hospital, he testified "that in approximately 1 in 20 cases, a baby with these conditions survives for as long as 6 months." In response to questions by the prosecution on redirect examination, Dr. Renedo had testified that, "While babies who suffer from this kind of prenatal disorder do not leave the hospital, we tell mothers that they should not give up hope. We find it better for them to have some hope that the baby will live."

Dr. Edward Benin, a forensic pathologist, hired by Darren Wright to review Dr. Renedo's report and to be available to testify for the defense, concludes that Barbara Loudon's newborn infant could be assumed to have suffered not only acute respiratory distress syndrome, but also intrauterine hypoxia and birth asphyxia. Dr. Benin reports that babies born with this array of medical problems generally survive anywhere from 20 minutes to several hours. Since there were no medical examinations of Barbara Loudon during her pregnancy, to establish the exact extent of the prenatal condition of the fetus, Dr. Benin finds Dr. Renedo's claims about the possible survival of the baby if born in a hospital speculative. Dr. Benin will testify that he found evidence of the presence of intrauterine hypoxia during the late stages of the pregnancy and that Barbara Loudon's baby died within minutes after birth. He concludes that the baby was born alive but that there is no reasonable medical grounds to assume the baby would have lived more than an hour even if it had been born in a hospital and received the best of medical care.

* * *

Barbara Loudon has been charged with murder. Defense counsel, Darren Wright, petitions the court to have Barbara Loudon examined to determine if she is competent to stand trial. In Darren Wright's petition to the court on the competency issue, he notes that Barbara Loudon is a difficult client. He reports that she talks only reluctantly about the case and when she is willing to talk, describes in only in vague, general terms what happened. Wright concludes that his client

has not, as yet, fully come to grips with her situation. She is, he notes, a smart girl and knows well enough, factually, that she is going to be tried for murder, but at times it's like she's sleepwalking through her days. Wright further observes that "she seems alright one day, and the next, it's like she's in a world of her own making. She's not been nearly as much help in her defense as he had hoped she would be. Wright says, "Sometimes, I get the sense she doesn't know herself exactly what happened when that baby was born. She is one awfully mixed up young lady."

At a hearing on defense counsel's petition for a competency to stand trial evaluation, the judge asks Barbara Loudon if she understands that she is going to stand trial for the death of her new born baby and she replies "yes." Asked if she had been meeting and working with her defense lawyer, she replied, "yes, he's doing what he can." The trial judge asks her if she understands the serious nature of the charges and that she may be severely punished for her actions, she tells the court, "yes, I've been punishing myself and now I know others must punish me for what I am, and what I have done."

The trial court rules that there is sufficient evidence in the record to establish that Barbara Loudon is competent to stand trial and that no further examination need be ordered by the court. The trial judge indicates that his finding is based on his personal examination of Loudon at the hearing on Wright's motion for a competency evaluation, his examination of reports of Dr. Singh and Dr. Wertz (reports which present facts as outlined above) and Darren Wright's affidavit describing his relationship with his client. The trial court rules that as a matter of law, the evidence before the court establishes Loudon's competence to stand trial.

Is the Court's denial of defense counsel's petition for a hearing on Loudon's competence to stand trial an error which can be successfully appealed?

* * *

At the close of the prosecution's case, the defense moves for a directed verdict of acquittal on the grounds that the prosecution has failed to present evidence that a homicide occurred. Assuming that the testimony at trial has established the facts as stated in the narrative above, how should a trial court rule on defendant's motion for a directed verdict?

* * *

The defense counsel must assume that it will be required to put on its case and cannot depend upon a favorable ruling from the trial court on its motion for a directed verdict. Based on this assumption, and the future assumption that the facts and expert testimony is as stated above, what defenses should Darren Wright consider for his defense of Barbara Loudon? Discuss all possible defenses, and indicate those on which Wright should focus his attention.

* * *

Upon these facts and expert testimony, is the prosecution entitled to have the jury instructed on

the elements of 1st degree murder? If the prosecution should seek to have the jury instructed on 1st degree murder, what arguments should defense counsel make to the judge as to the highest degree of homicide on which this case should be submitted to the jury?

* * *

Barbara Loudon's parents, after the trial of their daughter, demand that the prosecutor charge Rob Barton as an "accomplice" in the death of their daughter's baby. Should Barton have been charged as an "accomplice"?

II.

Walter Stillman had been friends with Claude Delaney for several months when they decided to spend the weekend in Charleston, visiting college friends and shopping for antiques, in which they both had an interest. They had made arrangements to stay with friends, but on arriving in Charleston, found their friends were not at home and so they got a room at the Holiday Inn.

After getting checked into the room, Stillman and Delaney had dinner at Antonio's Italian Bistro, where they had puttanesca and two bottles of Antonio's best red wine (a bottle of Santo Stefano Riserva, Bruno Giacosa, 1985, surprising delightful with strong hints of cherry, and the second bottle, a Cannubi Boschis, Sandrone, 1995, with a spicy flavor and a smooth finish; both wines perfect with the puttanesca). After dinner, Stillman and Delaney had traditional Italian liqueurs; Stillman had a Disaronno Amaretto, Delaney opting for the Sambuca Romano. Delaney had a second Sambuca, before they finally got out of Antonio's.

From the Bistro, they walked a bit and then decided the night was still too young, and there was nothing to do at the Holiday Inn but watch television. They caught a taxi to the Tavern on Broadway, where, according to the bartender, they drank four or five rounds of Irish whiskey, and finished the evening with a Sambuca (which the bartender told them was as old as Italy itself, that the Italians had always had a thing for licorice/anise flavored liqueurs, and this Sambuca made with elderberry was a special favorite). Both men, now intoxicated, catch a taxi back to the Holiday Inn.

It was at the Holiday Inn that Delaney, according to Stillman, took a shower, and with only a towel around him, came over to the bed where Stillman was laying, still dressed, watching TV, and laid down beside him and tried to hug him, telling him that he wanted to make love to him. Stillman says, he was totally surprised by Delaney's behavior, and had no knowledge that Delaney was a homosexual as he had never given him any reason to think he was so inclined. They were, so far as Stillman knew, only friends.

Stillman says he told Delaney that he, Delaney, was drunk, and shouldn't be kidding around, and should sleep it off. Delaney, told Stillman, he wasn't kidding, that he had been attracted to him ever since they met, and had even plotted with his Charleston friends to set up the situation so he would have an excuse to be alone with Stillman at the hotel.

At this point Stillman starts to get out of the bed, but Delaney tries to hold him down on the bed. Stillman pushes him away, but Delaney who weighs sixty or eighty pounds more than Stillman, and spends several days a week in a fitness club in Morgantown, is able to pin Stillman to the bed. Stillman, frighten and near panic, tells Delaney that if he'll let him go to the bathroom, he'll think over his proposition. When he gets clear of Delaney, he walks to the dresser console, picks up a massive glass ashtray (a size designed to encourage those who stay at the Holiday Inn to leave the ashtray behind rather than steal it), and turning back now to face Delaney, tells him to get dressed, that they are going to drive back to Morgantown. Delaney tries to dissuade Stillman

of this notion, saying he may be sober enough to have sex, but not to drive a car. Indeed, he says, neither of them are in any condition to be driving anywhere.

Stillman, still holding the ashtray, moves back a few steps, and shakes his head to try to clear it of his many confused thoughts. He doesn't know what to do. Delaney, gets up off the bed, and walks toward Stillman, saying, "come on buddy, just get in bed, you know your not going anywhere tonight." Stillman, now feeling the confines of the room, and fearing that Delaney will not let him out of the room, panics, and swings the glass ashtray around and hits Delaney in the temple, who upon being hit, crumbles to the floor.

Stillman dials 911 and after blurting out where they are staying, asks for medical assistance. He tells the 911 operator: "My best friend has hurt himself. I don't know what to do." The operator hears gasping and sobbing. "It was an accident, a terrible accident. I don't know how it happened." When the emergency medical crew arrive at the Holiday Inn, they found Delaney dead. When questioned by the police, Stillman maintained that Delaney had fallen and hit his head on the dresser. When confronted with the results of the police investigation which showed a smear of blood residue on the ashtray and no blood stains on the dresser, the police obtained a statement from Stillman which describe what happened (as presented here).

* * *

If the State charges Stillman with murder, what defenses would you consider on Stillman's behalf?

* * *

On the basis of the facts as set forth here, on what homicide (1st degree murder, 2nd degree, voluntary manslaughter, involuntary manslaughter) should the prosecution seek to have the jury instructed?

* * *

What argument should the defense make to the trial court concerning jury instructions if the prosecution attempts to have the jury instructed on 1st degree murder in this case?

III.

On July 22, 2002, Billy Wilson was driving around with friends, Andrea Polsinki and Larry Arnold, when they decided to stop at Seven-Eleven store to get cigarettes. Polsinki says, as they approach the store, "I didn't bring my bag, you guys will have to pay this time. I'm always paying. It gets old." Arnold replies, "I've not got my money yet from this piss-poor job I've been working on. I'm tired of going without the necessities and as far as I'm concerned cigarettes are a necessity. The government may try to tax us into quitting, but one old boy that ain't going to go down that road." Wilson joins the conversation, "No money, no cigs. Fundamental I'd think." Polsinki, trying to be helpful, "we can use a little self-help, I guess. That's what they call it ain't it, self-help." And to Arnold, Polsinki says, "Arnold, you'll well-equipped to do all the self-help you need these days." Wilson says, "yeah, that's right, self-help of the kind you'll are talking about gets you sent to Moundsville [the state penitentiary] to do hard time. I don't want me no self-help." As Wilson drives past the Seven-Eleven, Arnold, says, "swing back around, I'll get us some cigarettes."

Unknown to Wilson, Arnold, growing more angry about his economic situation, and the sense that everyone was doing well while he fell further behind, has started carrying a gun. Polinski knows that Arnold has been carrying a gun, as he told her earlier in the week that he had bought a gun and had learned to use it and wasn't going out again without it.

Wilson drives back around to the Seven-Eleven, and with the car engine still on, Polsinki steps out. Arnold, showing Wilson the gun, says "we're talking first class self-help here." Arnold, seeing now for the first time what is going-down, says, "you're stupid as any Wilson I've ever known, get your ass back in the car." Wilson laughs, gets out of the car, and walks with Polinski into the Seven-Eleven.

* * *

At this point, Wilson seeing big trouble ahead, informs the armed store security guard who patrols both the store and the parking lot (the store has a hired security guard because the store is in a area where high school kids hang-out and sometimes cause trouble), that Arnold and Polinski have in mind robbing the store, and the security guard walks in the store, gun drawn, and arrests Arnold and Polinski, while they stand at the large drink cooler, trying to decide which drink they want. Should Arnold, Polinski, and Wilson, based on testimony of their conversation and intentions as portrayed above, be charged with attempted armed robbery?

* * *

Assume that the armed guard, hearing Wilson's story, decides he doesn't want to walk into a situation where he might get himself killed (especially given the fact that he makes \$8/hr.) He decides to walk around to the edge of the store and wait to confront Arnold and Polsinki when they leave the store, to catch them red-handed, the fruits of the robbery in their possession. Inside

the store, Arnold leaves Polinski to decide about the drinks and when she finally joins him at the front of the store, sees Arnold with a gun pointed at the cashier, demanding cigarettes. The store tape (made by a security camera) shows Polsinki looking, rather startled, turning to Arnold, and saying, "Larry, what the hell are you doing? You can't do this." Arnold replies: "What the hell does it look like I'm doing, get your ass out to the car, and do it now."

At this point, Larry Arnold's attempt to liberate the Seven-Eleven Store of two cartons of cigarettes and the security guard's plan goes seriously awry. Arnold and Polsinki run from the store, Arnold clutching the cigarettes, and the cashier yelling, "damn it, someone do something, they've robbed the store." When Arnold sees Randall Hart, the newly hired and poorly trained security guard, he fires his pistol at Hart but misses. Hart takes a shot at Arnold, but hits the cashier. The cashier, critically injured, is taken to Wilson Central Hospital. After 5 days in intensive care, his life tottering on the edge, the cashier develops a staff infection (staphylococcus), and dies. Doctors at the hospital will testify that there was some minimal chance (10%) that the cashier would have survived the gunshot wound from the shooting and have lived had it not been for the infection.

* * *

You are the prosecutor. What homicide, if any, would you charge against Larry Arnold, Andrea Polinski, Billy Wilson, Randall Hart, and the physicians at the hospital in the death of the Seven-Eleven Store cashier?

