Lawyers and Ethics

Section 4

Prof. Fletcher

Preliminary Fact Patterns for Final Exam

Instructions:

Attached are four fact patterns. One of the four fact patterns will comprise the bulk of the final exam. I will add questions on the exam for you to answer.

1. Lawyer William MacGillicuddy, or Willie Mac as his friends call him, is called to jury duty in federal court. He is questioned during voir dire about his views on the death penalty, as the case he may be called to decide involves an alleged federal crime for which the defendant, if convicted, could be executed. Willie has never really considered his position on the death penalty, and during voir dire he says he is of an open mind. Ultimately, Willie is called to serve.

The case is a murder case in Indian country, punishable by death if the local Indian tribe consents to the death penalty. In this case – because of this case, in fact – the local tribe has informed the court that it consents. The facts of the case are gruesome – the defendant, a non-Indian who turned 18 on the day he allegedly committed the murder – was still in high school at the time. He had been driving around the reservation in his parents' case with his girlfriend. They both had been drinking, and he lost control of his vehicle as a result of his inebriation. He plowed into a tree, the impact killing his girlfriend. The tree fell on a stroller on the sidewalk near the road, killing a toddler and the toddler's mother. The defendant was paralyzed as a result of the accident from the neck down. The tribe's decision to consent to the death penalty in this case was a political decision based on the tribal government's concern about drinking and driving on the reservation by non-Indians.

Willie is easily convinced by the evidence presented at trial that the defendant is guilty. He is becomes convinced that 18-year-olds, especially paralyzed 18-year-olds, should not ever – under any circumstances – be subject to the death penalty. He does not believe young persons of that age have the capacity to truly understand the import of their decisions. Willie knows that if he held this view at the time of voir dire, and answered that he was opposed to the death penalty in a case like this one, he would immediately be disqualified by the judge and sent home. As the jury is sequestered for deliberation, he keeps his views on the death penalty to himself.

The jury quickly reaches a decision that the defendant is guilty. Under the law, the jury must be unanimous on guilt in order to make the defendant "death eligible." The defendant could still be declared guilty if the jury votes 11-1.Willie is convinced of the defendant's guilt as well, but he is thinking about voting against the guilt of the defendant so that he will not be executed. A second trial, with a new jury, will review evidence in a sentencing phase to determine whether or not the defendant will be sentenced to death. Willie has no way of knowing whether the defendant will be sentenced to death in the second trial.

2. You and your best friend, Socrates Llewellyn, are partners in a large law firm, Berkman, Deloria, Goldman, and Petoskey. Both of you are licensed in the State of Mississabama, a poverty-stricken and largely rural southern state. Normally, you and Socrates are transactional lawyers, but you're both a little burned out from the grind of commercial law. Socrates comes into your office one afternoon, excited about a pro bono case he has heard about from a lawyer friend.

"It's a death penalty case," he says.

Apparently, in Mississabama, there is no formalized public defender or capital defender system. Instead, the Mississabama Supreme Court enacted a court rule requiring all members of the state bar to be placed in a lottery. If a lawyer is selected by the Court to serve as a defender for an indigent defendant, that lawyer must either accept the appointment or find someone else (obviously, a state-barred or otherwise qualified lawyer) to fill his or her appointment. The Court pays each lawyer $5000 to cover both the lawyer's fees and the expenses of defending the

client. Lawyers usually take a major pay cut to handle the case. There is a market of Mississabama lawyers who agree to fill in and accept the $5000 fee. Frankly, it costs far more than $5000 to adequately defend even a minor felony, let alone a capital case. To put it mildly, the Mississabama defender system is in shambles, and subject to many constitutional challenges at this time.

Berkman Deloria's managing partner is a fan of your work, and so she agrees to allow you and Socrates to take a leave of absence to handle the case. She even offers firm capital to cover up to $100,000 in expenses to investigate and litigate the case. It is, after all, good publicity – and therefore good business – to take a high-profile pro bono case like a capital case.

As soon as you and Socrates agree to take the case (and accept the paltry $5000 fee), Berkman Deloria implodes. The firm dissolves after the Intellectual Property practice group loses hundreds of millions in a major malpractice case. All of the equity partners, including you and Socrates, lose everything.

A few weeks later, you meet Socrates at lunch to discuss the capital case. Socrates, you have learned, has already spent his half of the $2500 to pay off his credit card. He urges you to use the money for your own personal benefit as well. You have a $2400 mortgage payment due in a week, and worry you might lose your house if you don't make the payment. Socrates says it might be awful but the court rule appointing lawyers to represent indigent defendants says nothing about how the money is to be spent.

"We all know everyone pockets the money and puts on a cheap defense," Socrates says. "It's standard. It's expected. So we can't afford to hire an expert to review the prosecutor's case. We wouldn't be able to do it with the full $5000 either. At least the guy's gonna have two experienced lawyers."

Experienced at what, you wonder.

3. You are in-house counsel for a large construction company, Unger Underground LLC. One day, while sitting around reading stacks of complicated construction contracts, you receive a phone call from the CEO – Bob Unger. Bob wants your advice on a tricky moral question.

"We got a crew in Harbor Springs, Michigan," he says, "digging up the road in downtown. We're putting in a new sewer and road. Anyway, the road is right in front of an old school called Holy Childhood. A few hours ago, we hit bones."

"Bones?" you ask, incredulous. "What kind of bones?"

"Indian bones, I guess," Bob says. "I wanna know what you think we should do."

After a few more minutes of talking to Bob, you learn that his construction foreman, who is a resident of the area, phoned a friend of his who works for the Little Traverse Bay Bands of Odawa Indians, the tribe down the road about five miles. The tribal representative immediately arrived with a crew of tribal workers to unearth the rest of the human remains and rebury them in a nearby tribal cemetery.

You have a little experience in American Indian law, and know that federal law prohibits the excavation of American Indian human remains on federal or tribal lands, or in a project funded by federal dollars. You know – from negotiating and writing the contract for this particular job – that this road is not on federal or tribal lands, and no federal dollars are being expended. You also know, since you are licensed to practice in Michigan, that there is no applicable state law on the subject.

"There's no law that says you can't continue," you tell Bob.

Bob sighs. "I know that, counselor. The tribe guy told me that, and I believed him because it was against his interest to say it. But the guys are pretty creeped out about this development. We're talking human bones, little kids mostly. This Holy Childhood place was a boarding school for Indian kids, and apparently they started a little secret cemetery for the kids that died on their watch, and just buried them in the front yard."

From your studies of Michigan Indian history, you also know a little bit about schools like Holy Childhood. Often, you recall, church officials, federal military officials, and sometimes state social workers would coerce local Indian parents to give up their children to these boarding schools. Many of them never saw their children again. You also know that the Michigan tribes take very

seriously their obligations to the people buried on the grounds at schools like Holy Childhood. For these tribes and their members, those "bones" are relatives.

"I need to know what you think pretty quick, counselor," Bob says. "We're way behind on this project, and we stand to lose half a million bones … uh, excuse me for that … if we delay. The tribe guy says it'll take a couple days, and a couple days will put us way over the deadline for completion of this project."

[While this won't part of the exam at all, you can learn more here: http://turtletalk.wordpress.com/2007/10/01/holy-childhood-oral-histories/]

4. You are a high-level federal prosecutor with jurisdiction over certain crimes committed by American citizens overseas. An American military official has referred to you for possible prosecution an American serviceman – known only as "K." – who engaged in what newspapers are calling "one extraordinary and heroic act."

K had developed a specialty in the field of aggressive interrogation of terrorist suspects and persons of interest. He worked closely with American intelligence officers over the course of the past 10 years, helping those officers to interrogate non-Americans. His method, simply, was the torture of those individuals. Virtually everything about those interrogations has been declared classified. The names of the persons involved, the information gathered, and the interrogation techniques are all classified information. K cannot and will not be prosecuted for those acts of torture. A legal doctrine known as the state secrets privilege protects him.

This most recent act of torture, however, was different in two respects. First, nothing about this recent interrogation could be effectively classified. The interrogation was videotaped, and broadcast live around the world via YouTube – inadvertently, it turns out. K was shown using hot pokers, pliers, scalpels, and several other medieval devices of pain. The torture subject is shown clearly screaming in mortal agony, and repeatedly pleading for cessation of the torture. Second, the torture victim was an American citizen.

Within minutes of revealing the information, the torture victim died.

The information gathered from the bleeding, tormented torture victim involved a nuclear device that terrorists of an unknown origin and ideology had smuggled into Kansas City. Because of the information gathered by K, law enforcement and military officials were able to prevent a major nuclear incident that could have killed hundreds of thousands of Americans.

Since you are the prosecutor charged with deciding whether or not K should be indicted for torture (yes, torture of an American is a serious crime, no matter what the American knew), you have the right to decide whether to charge the serviceman with the crime of torture. You are leaning toward not indicting the serviceman. After all, his actions – no matter how gruesome – did save many, many lives.

On the eve of the deadline for you to make your decision on whether to prosecute, a shadowy Internet group called INFO LEAKS releases thousands of documents and other files that graphically detail virtually the entire interrogation career of K. These files show that K's career in torture prior to his "heroic," public moment was bumbling, pathetically ineffective, and inhumanly brutal. Fourteen interrogation subjects died during or immediately after interrogation episodes with him. More than two dozen others suffered permanent trauma. In all but one case, the interrogation subjects were innocents, innocents who by virtue of accident or ineptitude, American intelligence officers believed had critical intelligence information about terrorists. In the one case where the torture subject likely was a terrorist, K tortured the subject to death without ever seeking any intelligence information. This interrogation seems to have been plainly murder by torture. In fact, until the last event K's efforts had not generated a single snippet of useful intelligence.

You return to the record in the case at hand and learn that in fact the subject of the interrogation that resulted in the necessary intelligence information about the nuclear device also was an innocent. This time, the deceased interrogation subject had important information, but because of a misleading trick by the actual terrorists, he believed he was correct and morally justified in not revealing the intelligence information. Only because of the torture that ultimately killed him did the subject reveal the information.