CRIMINAL PROCEDURE
S95-- FORTUNE

May 5, 1995

You have three hours for the test. Closed book and notes.

Please write on every other line. Question A (25 points -- no
more than an hour) is a traditional essay question. Question B
(50 points -- an hour and a half) is a "directed essay" question
consisting of twelve sub-parts. In answering Question B there's
no need to repeat yourself -- you may incorporate by reference
arguments previously made. Question C (10 points) is short
answer, to be answered in a sentence or less. You already have 15
points toward your final grade.

A): (25 points) The state indicted Clark and Nutter for
possession of marijuana with intent to distribute. The following
facts are stipulated:

1) On Jan. 8 at about 10:00 pm on a two lane highway in
Rural County, a dry county, Trooper Keith Taylor began following
a 1988 Ford occupied by two long-haired white males on the
suspicion they might be transporting alcohol in a dry county.

2) The driver of the 1988 Ford immediately slowed from 60
mph to 40 mph, which caused Trooper Taylor to believe the
occupants were engaged in some kind of illegal activity.

3) Trooper Taylor bluelighted the car and it stopped.

4) The driver, Clifford Nutter, had only a learner's permit,
which was valid only when a licensed driver was in the car.
passenger, Philip Clark, did not have a driver's license.

Clifford Nutter stated that the car belonged to his brother, Frank.

5) A license search indicated no warrants for the two men and indicated that the car was registered to Frank Nutter.

6) On the back seat of the car, in plain view, were three packages wrapped in brown paper.

7) When asked what was in the packages Nutter stated clothes. Trooper Taylor picked up the packages and shook them. The packages were heavier than they should have been if they contained clothes.

8) Taylor asked Nutter and Clark if he could open the packages. Clark said it was okay with him because they weren't his. Nutter said he didn't want the packages opened.

9) Taylor arrested Nutter for driving without a license and told Clark that he would take him home. Taylor placed Nutter in the rear seat of the cruiser (behind the screen) and Clark in the front seat.

10) Taylor then returned to the 1988 Ford and opened the packages. Each package contained ten pounds of pressed marijuana double-wrapped in plastic.

11) Kentucky State Police procedures provide that when there is no authorized driver for a vehicle that the vehicle can either be impounded or left alongside the highway. If impounded all contents of a car are to be inventoried.
12) Trooper Taylor made no attempt to contact Frank Nutter nor did he ask Clifford Nutter what he wanted to do with the car. The car would not have posed a safety hazard if left on the highway.

13) After discovery of the marijuana Trooper Taylor arrested Clifford Nutter and Philip Clark for possession of marijuana.

Clifford Nutter and Clark have moved to suppress the marijuana. Consider all issues raised by this problem. State your assumptions clearly.

B): (50 points) Frank Nutter (Clifford's brother) has been indicted for capital murder following the discovery in the trunk of the car referred to in Question (A) of clothes allegedly belonging to the victim of a kidnapping/rape/murder. After arresting Clifford Nutter and Philip Clark for trafficking in marijuana, Taylor asked Clifford what was in the trunk. Clifford replied that he didn't know because he had just borrowed the car from his brother. Taylor said, "Well, I'll have a look, okay?" and Clifford replied, "Okay." Taylor opened the trunk and found a duffle bag containing clothes. He opened the bag and found a torn dress and women's undergarments, which appeared to be bloodstained. Clifford and Clark denied any knowledge of the items.

1) The clothes are important evidence against Frank Nutter and he has moved to suppress them. Discuss.
After discovery of the clothes, Detectives were immediately called in and they tentatively connected the items with the disappearance of Carla Peterson, a Convenient store clerk, three weeks before in Urban County. Clifford provided his brother's address (Apartment # 3, 2120 Western Road, Urban City), which corresponded to the address on the registration. Clifford described his brother as male, white, 5'10", 160 pounds, 25 years old, mustache, dark hair. Doug Dixon, a customer who was the last person to see Carla Peterson on the night of her disappearance, saw a young man enter the Convenient store as he left. Dixon described the man as male, white, 6'0", about 20, mustache, dark hair.

2) Detective Hardy and Officers Sims and White went immediately to Apartment # 3, 2120 Western Road, arriving there about 2:00 am. Hardy knocked and the following dialogue took place:

Sleepy voice: Who's there?

H: Police Officers. We want to talk with you.

Voice: Just a minute and I'll put some clothes on.

H: Open the door. We want to talk to you.

After five seconds the occupant, a 5'6" 150 pound male with dark hair and a mustache, opened the door. He was in his underwear.

Detective Hardy and Officers Sims and White entered. Sims and White were in uniform and armed. Their weapons were not drawn.

Detective Hardy questioned the occupant as follows:

H: Are you Frank Nutter?

FN: Yes

H: We want to talk to you about the disappearance of a woman from a Convenient store two weeks ago.
FN: I didn't shoot her. She was okay when I let her out.

H: You're under arrest for kidnapping and murder. You're going downtown. Let's get some clothes.

Nutter moves to suppress his statement. Discuss.

3) Same as in (2) except that the Detective and Officers did not knock and announce. Hardy tried the door and found it to be unlocked. They entered, found Nutter in bed with his wife, woke him, and the dialogue set out above followed. Nutter moves to suppress his statement.

4) Same as in (2) with the addition that, on the way to the station Hardy, driving the car, said to Officer Sims, his front-seat passenger, "This case bothers me a lot. That girl was an only child -- an honors student and her parents just adored her. I sure wish we could find her -- her parents are real good people and it would help ease their minds to know what happened to her."

Nutter, in the back seat of the cruiser, said, "I'll show you where I buried her." Nutter moves to suppress this statement.

5) Same as in (4) with the addition that, Nutter took the Officers to the body buried in a shallow grave in the Red River Gorge. Nutter moves to suppress all evidence derived from the body and its location.

6) Same as in (2) with the addition that, after arrival at the station, Hardy put Nutter in an interrogation room to be questioned. Hardy then was told by the desk sergeant that an attorney had called to say that he was on the way to the station to talk to Nutter and for the police not to question Nutter.
Hardy did not pass this information on to Nutter; instead he gave Nutter the Miranda warnings. Nutter waived his rights and made a full written confession which he now seeks to suppress.

7) Same as in (2) with the addition that, after arrival at the station and being given his Miranda rights Nutter said, "I think I should have a lawyer." Hardy replied, "Are you willing to talk to us without a lawyer?" Nutter replied, "Yes, I guess so but nothing in writing." Hardy replied, "Okay, nothing in writing; it's just between me and you." Nutter made a full oral confession which he now seeks to suppress.

8) Same as in (2) with the addition that, after arrival at the station and being given his Miranda rights Nutter agreed to waive his rights and talk. His story was that he had gone to the Convenient store to get cigarettes, engaged Ms. Petersen in conversation, persuaded her to leave with him, that they had consensual sex, and he had driven her back to the store and let her out. He denied any knowledge of the bloodstained clothes found in his car. After about an hour Detective Hardy told Nutter (falsely) that the bloodstains on the clothes had been positively matched through DNA testing with hair taken from Carla Petersen's hairbrush. In fact no DNA tests had been performed. Detective Hardy then said, "I know how it is. She asked for it and things got out of hand. No one is going to blame you." Nutter then made a full written confession, which he now seeks to suppress.

9) Same as in (8) except that Nutter did not confess. He said he didn't want to talk anymore and Hardy ended the session. Nutter was taken to his cell. Nutter's wife arrived and demanded an
opportunity to talk with her husband. Hardy was reluctant to allow a visit but finally told her that she could talk to Nutter in the presence of Officer Sims. She agreed and was seated in the interrogation room with Officer Sims when Nutter was led in. She jumped up and shouted, "You bastard. What did you do to that girl?" and Nutter replied, "I didn't mean to hurt her." Sims heard this statement and would testify to it. Nutter moves to suppress the statement.

10) Same as in (8) except that Nutter did not confess. The next morning he was arraigned and counsel appointed. That night Hardy arranged for an inmate named Frank Jenkins, anxious to curry favor, to share Nutter's cell on orders from Hardy to "keep his ears open." Jenkins engaged Nutter in conversation about the homicide and Nutter eventually admitting kidnapping and murdering Ms. Petersen. Nutter moves to suppress his statement to Jenkins.

11) Same as in (8) except that Nutter did not confess. Hardy terminated the interrogation and Nutter was jailed for the night. Nutter was arraigned the next day and counsel appointed. Two days later Nutter appeared to suffer a mental breakdown, perhaps from drug withdrawal. He was taken to the jail infirmary and there made statements, overheard by a deputy jailer, which indicated that he had shot and killed Ms. Petersen. Nutter claims that he has no memory of the statements and moves to suppress them.

12) Same as in (8) except that Nutter did not confess. Two days after he was arraigned and counsel appointed the police brought Doug Dixon, the eyewitness, to the station to take a look at
Nutter. Hardy seated Dixon in the interrogation room and had a guard bring Nutter in. When he saw Nutter Dixon said, "That's the guy I saw. No doubt about it." Nutter responded, "Where were you? I didn't see you." Nutter moves to suppress Dixon's identification and his statement.

C): Short answer

1) State X amended its Rules of Criminal Procedure to provide that "the voluntariness of a confession shall be decided by the jury." Is this Constitutional? Why or why not?

2) For Fourth Amendment purposes what is the significance of describing a location as being in an "open field?"

3) For Fifth Amendment purposes what is "use immunity?"

4) Give an example of a search or seizure that would be legal if performed for administrative purposes but illegal if done to seek or collect evidence for a criminal prosecution.

5) Give an example of permissible use of illegally seized evidence -- where the state will be permitted to use the evidence even though it was seized illegally.