You have three hours for the examination. The test is open book and notes. The exam consists of two essay questions drawn from class discussions, four short essay questions, and 10 multiple choice questions. ANSWER ON TEST, NOT ON COMPUTER. The class evaluation is 10 points – those numbers will be added to the exam score by the Dean’s office.

The test is being given on two dates. Don’t discuss the test with anyone who is taking the test on a date other than the date you’re taking the test on. The Honor Code is applicable.

1: (25 points) You are the Commonwealth’s Attorney in a small town in a rural part of Kentucky. Accident between a north-bound out-of-state truck and a south-bound passenger car. The truck driver drifted off and the truck crossed the median on the four-lane and struck the car head-on, killing the driver. The truck driver had not been drinking, was not on drugs, and was not texting. He had, however, been driving all-night when the accident occurred (12 hours straight) and had been unable to sleep the previous day. He had been without significant sleep for 24 hours.

The person killed was Dr. Randy Clark, 45 years old, a pediatrician and local philanthropist. He was survived by his widow, Joan, age 35, and two small children. Over 500 people were at the funeral.

The truck driver, Andy Sims, age 50, is a resident of Louisiana and a 25 year independent trucker. At the time of the accident he was hauling freight for Interstate Trucking and passing through the state on his way from Knoxville to Cleveland. He has no convictions and only two speeding tickets, both incurred while driving the family car. By driving 12 hours with no sleep he admittedly was in violation of federal regulations and Interstate’s rules. His explanation to the police was that he needs to be available when he gets a call to handle a load; that he can’t afford to pass up a trip.

Sims is married with two adult children. He owns his home in Baton Rouge.

The police arrested Sims for reckless homicide and he was immediately released on a $1000 personal recognizance bond. In this county it is the policy of the County Attorney to turn homicide cases over to the Commonwealth Attorney. You must make the decisions about charging, presentation to the grand jury, and plea bargaining.

Dr. Clark’s widow is a lovely person and is not vindictive toward Sims. However, the townspeople are irate. They have been complaining about truck traffic on the four-lane for years; they accuse truckers of driving too fast, tailgating, and texting. What is particularly galling in this case is that the driver was from out-of-state, taking a short cut on the four-lane, and knew he shouldn’t have been driving. The
local newspaper fanned the flames when the editor learned Sims was driving a semi without having slept for 24 hours.

Assume the following criminal statutes apply.

Murder: a death caused by the operation of a motor vehicle, under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct creating a grave risk of death to another person and thereby causes the death of another person. Murder is a Class A felony (20 to life).

Manslaughter in the second degree: a person is guilty of manslaughter when, in the operation of a motor vehicle, he wantonly causes the death of another person. Second degree manslaughter is a Class C felony (5 to 10).

Reckless Homicide: a person is guilty of reckless homicide when with recklessness, he causes the death of another person. Class D felony (1-5).

In Kentucky, “wantonly” is defined as: 1) a substantial an unjustifiable risk; 2) a gross deviation from the standard of care of a reasonable person; 3) a conscious disregard of the risk.

“Recklessly” is defined as: 1) a substantial an unjustifiable risk; 2) a gross deviation from the standard of care of a reasonable person.

Discuss fully.

2. 25 points. While driving through an African American neighborhood in his white Mercedes, Danny, a 75 year old white lawyer, struck and killed Victoria Mason, a five year old black child, crossing the street against the light but in the crosswalk. The grand jury indicted Danny for manslaughter.

For purposes of this exercise assume the prosecutor and defense counsel each had eight peremptory challenges. At trial the venire from which the jury was drawn consisted of 25 whites and 5 blacks. Two white jurors were excused for cause and the jury venire at the time when the attorneys exercised peremptory challenges consisted of 23 whites and 5 blacks. The prospective 12 person jury was 11 whites and one black, 8 men and 4 women. Examination of the strike sheets showed that the defense counsel had exercised four of his eight peremptory challenges to strike black jurors 1, 7, 9 and 13, and two of his peremptory challenges to strike Jurors 8 and 20, white women. The other two peremptories were exercised against men who admitted they didn't like lawyers.

When the prosecutor saw that the defendant had struck four black jurors, she objected on the basis of Batson. You are the judge; you believe the prosecutor sustained her initial burden, and you then asked the defense counsel to explain the basis for striking the four black jurors. They are:

Juror 1 is a 45 year old married woman working part time in a fast food restaurant; she has two grown children.

Juror 7 is an unmarried unemployed 22 year old man.

Juror 9 is a 23 year old unmarried man, employed by the XYZ Company as a maintenance man.

Juror 13 is a 40 year old unmarried woman, drawing disability payments. She does not drive.

The black juror who was not struck (Juror 22) is a married 65 year old drug store owner.
Here is the dialogue between you and defense counsel when you asked for an explanation of the strikes.

Judge: Okay, let’s take these one at a time. What about Juror 1?

DC: She’s a mother and I just don’t think a mother can be fair in a case like this.

J: But her children are 20 and 22. They’re not young. And you didn’t strike the white juror (15) who had three children at home. And juror 28 is another mother with young children – you didn’t strike her.

DC: Judge, I just felt Juror 1 would empathize with Victoria’s mother – more than 15 and 28, I just felt Juror 1 couldn’t help but put herself in the position of a mother whose child was killed.

J: OK, let’s go on to Juror 7. What about him?

DC: Judge – the way he’s dressed and the dreadlocks. He’s unemployed. My client had a terrible feeling about him. My client is a 75 year old white lawyer driving a Mercedes in a black neighborhood. My client feels – and I do too – that the juror couldn’t help but be prejudiced.

J: And Juror 9?

DC: Judge, he lives two blocks from Victoria’s family. I know he said he didn’t know them and didn’t know anything about this case – but that’s just impossible – at a minimum this is the kind of thing that would have been discussed. He gave my client a real hostile stare like he knew exactly what happened. He can’t be fair.

J: Juror 13?

DC: Judge, she’s a woman. She’s bound to feel for Victoria’s family more than a man would. And she doesn’t drive. No way she could see understand how this happened from the point of view of a driver.

J: You’re saying women can’t be fair?

DC: Not normally but in a case like this it’s different.

J: So you struck her, not because she’s black, but because she’s a woman?

DC: Not exactly. I didn’t strike all the white women. There are three women on the jury – I could have struck two of them. No – its’ because juror 13 is on disability; obviously poor and doesn’t drive. She would have difficulty being fair in a case where a guy in a Mercedes kills a child.

J: So you struck her because she’s black and a woman?

DC: The primary reason was that she doesn’t drive. That should be enough. I struck two white women and two white men. Surely, that doesn’t suggest I’m biased against women.

J: Let me have a minute to think about this.

DC: Judge, if I may. I didn’t exercise all my challenges on black jurors or women jurors. I didn’t challenge Juror 22 and he’s black. I didn’t challenge Jurors 17 and 23 and they’re women. Furthermore, Judge, I have a responsibility to my client. If there are jurors I don’t feel can be fair – for whatever reason – it’s my duty to try to make sure they’re not on the jury. And it’s important to my client to be able to be involved in this process. This is critical stage of the case and my client has the right to have a say.
Analyze this fact situation and make a finding as to each of the four black jurors who were struck. Provide your reasons for upholding (or not upholding) the peremptory strikes.

Short essays

3. 10 points. Davis was arrested in 2005 for rape of his thirteen year old stepdaughter. The charge was dismissed at the preliminary hearing on the prosecution’s motion because the child refused to testify. Davis divorced his wife and moved to Georgia. In 2010 he was convicted of manslaughter in Georgia and sentenced to ten years in the Georgia State Penitentiary. In 2012, a Kentucky grand jury indicted Davis for rape on the basis of the testimony of the stepdaughter, then fifteen, who came forward on the advice of her therapist. The Kentucky prosecutor notified the Georgia Penitentiary about the indictment but the Kentucky prosecutor did not file a detainer. The effect of the pending Kentucky charge was to change Davis’ custody level from medium to high, depriving him of certain benefits (working outside the walls, visitations etc). Kentucky made no effort to bring Davis back from Georgia because of expense and the fact the case was not pressed by the ex-wife and stepdaughter. In 2013, through a jailhouse lawyer, Davis wrote the Kentucky court to ask that the indictment be dismissed. The letter was ignored. In 2015 Davis was paroled and arrested on a complaint from his ex-wife when he returned to Kentucky to visit his parents. Davis has moved to dismiss the charge on Due Process and Speedy Trial grounds. Discuss the issues.

4. 10 points. A stranger lured ten year old Laura into his car and sexually fondled her. He released her when she began to cry. Laura complained to her mother, who called the police. The police suspected Douglas, a recently released sex offender who lived in the area. The police showed Laura a ten photo array containing Douglas’ photo. Laura did not pick anyone out of the array. The police continued to suspect Douglas and picked him up for questioning. They arranged for Laura to view him and she said he was the one who had fondled her. Douglas adamantly denied his guilt and said he was working at the time of the incident. His employer, a contractor named Bob, had time records indicating Douglas was working on a construction site at the time Laura was molested. Douglas was given a polygraph by the police; the operator said he was being deceptive when he denied the event. Based on the above, the prosecutor sought an indictment from the grand jury on the basis of the testimony of Laura and her mother. Because of Laura’s youth, the prosecutor allowed Laura’s mother to hold the child in her lap while Laura testified. The prosecutor did not tell the grand jury about Laura’s failure to pick Douglas’ picture out of the spread, nor did the prosecutor tell the grand jury about Douglas’ alibi. He did tell the grand jury that Douglas was a recently released sex offender and had failed a polygraph. The polygraph would be inadmissible at trial; the prior sex offenses might be admissible. The defendant has moved to dismiss the indictment on the basis of grand jury abuse. Discuss.

5. 10 points. An IRS agent interviewed David, a lawyer, in connection with business income reported on his 2014 tax return. At the time of the interview, Andy, David’s accountant had
possession of his work sheets and David’s financial records. On request, Andy gave the work sheets and records to David, who gave them to Lennie, David’s lawyer. The IRS has served an administrative summons on David and Lennie for “all documents, records and papers used or reviewed in connection with David’s tax returns for the years 2008 to 2014.”

David and Lennie object on the basis of the privilege against self-incrimination and the attorney client privilege.

What’s the analysis? What result?

6. 10 points. A federal grand jury indicted Owner and Veterinarian for conspiracy to commit mail fraud involving the death of a racehorse named Biscuit, which was found dead by poison in its stall at Keeneland. The prosecution’s theory is that Vet poisoned the horse for Owner who had heavily insured it. A groom saw Vet in the barn on the morning the horse died, and police detective Jones interviewed Vet the next day.

The prosecutor tried Owner and Vet together and called Jones as a witness to testify to her investigation.

Prosecutor: What did Vet say he was doing at the barn that morning?

Counsel for Owner: Object

Judge: Overruled

Jones: He was checking on the horse for Owner . . ..

Counsel for Owner: Object. May we approach?

Judge: Come up. What is it?

Counsel for Owner: Judge, that’s a statement taken by a police investigator about my client. That violates my client’s right of confrontation. I move for a mistrial.

Prosecutor: It’s totally harmless. There’s nothing incriminating.

Judge: I’m inclined to grant a mistrial.

Prosecutor: You can’t be serious.

Counsel for Vet: I object. My client doesn’t want a mistrial. Give him a mistrial but I don’t want a mistrial.

Judge: You (to prosecutor) knew you can’t ask about a statement taken by a police investigator unless the person who made the statement testifies.

Prosecutor: Well, we think Vet is going to testify.

Judge: Well, you can’t make him testify. The mistrial as to both defendants is granted.
Counsel for Vet: Judge, just to be clear. I don’t want a mistrial. I don’t mind the detective testifying to what my client said. Give an admonition -- or declare a mistrial as to him if you think that’s needed -- but my client wants to get this over with.

Judge: So noted. (to the jury) Ladies and gentlemen, you’re discharged.

The case has now been docketed for retrial and both counsel object on double jeopardy grounds. Analyze.

Multiple choice (one point apiece) – answer on test

1) At a preliminary hearing
   i) a finding of probable cause eliminates the need for grand jury review;
   ii) a finding of no probable cause precludes the government from further prosecution of the defendant;
   iii) objections may not be made to evidence on the ground that it was seized in violation of the fourth amendment;

* * *

   a) all of the above are true
   b) (i) and (iii) are true
   b) (i) only is true
   c) (iii) only is true

2) There is a right to trial by jury under the Federal Constitution:
   a) if the defendant is sentenced to incarceration for a year or more
   b) if the maximum period of incarceration is a year or more
   c) the defendant is sentenced to incarceration for six months or more
   d) the maximum period of incarceration is six months or more

3) In the taking of a guilty plea:
   a) the judge may reject a plea agreement which embodies a particular sentence;
   b) the judge must permit the defendant an opportunity to withdraw a guilty plea if a plea agreement is rejected;
c) the judge must determine if there is a factual basis for the plea;
d) all of the above are true.

4) Duplicity in an indictment refers to:
   
a) charging more than one crime in a single count
b) charging one crime in more than one count
c) failure to allege an element of the crime
d) constructively amending the indictment

5) A grand jury subpoena duces tecum to produce records for the grand jury
   
i) must be supported by probable cause
ii) must state why the grand jury wants the records
iii) may be quashed if unduly burdensome
   
*   *   *
   
a) all of the above are correct
b) (i) and (iii) are correct
c) (ii) and (iii) are correct
d) (iii) is correct
e) none of the above are correct

6) The police have charged Able with two unrelated robberies, a liquor store robbery on July 1 and a convenience store robbery on September 1.

   i) Initial joinder of the charges in a single indictment is proper
   ii) It is within the court’s discretion to grant a severance on a showing that Able would be prejudiced by a trial involving both robberies
   iii) The prosecutor must present the charges in a single indictment
   
*   *   *
   
a) all of the above are correct
b) (i) and (ii) are correct
c) (i) only is correct
d) (ii) only is correct

7) In entering into a plea bargain, a prosecutor:

i) may require a proffer from the defendant as a pre-condition to agreement

ii) is legally obligated as a pre-condition to reveal all exculpatory and impeaching evidence to defense counsel

iii) is entitled to rescind the plea bargain if the defendant does not comply with its terms

* * *

a) all of the above are correct
b) (i) and (ii) are correct
c) (i) and (iii) are correct
d) (i) only is correct

8) After Crawford, a hearsay statement offered against a defendant who does not have an opportunity to cross-examine the declarant, violates the Confrontation Clause if:

a) the statement inculpates the defendant
b) the statement is not admissible under state hearsay rules
c) the statement is unreliable
d) the statement is made with knowledge that it might be used in a criminal case

9) What is the standard of materiality that the defendant must show based on exculpatory evidence not disclosed by the prosecutor during or at trial:

a) that the new evidence would beyond a reasonable doubt have caused the jury to acquit
b) that the new evidence would probably have caused the jury to acquit
c) that the new evidence creates a reasonable probability that the jury would have acquitted
d) that the new evidence might have caused the jury to acquit

10) Depositions under the Federal rules

a) may be taken for discovery on notice to opposing counsel
b) require that the defendant be personally present or have waived his right to be present
c) may be freely used in lieu of oral testimony at trial

d) all of the above are correct