Criminal Appellate Exam Sample Questions:

These questions are provided only as a helpful guide to Applicants. They should not be overly relied upon and are not a substitute for self-study and experience. The following questions/model answers provided, while correct at the time the questions were written, may not reflect current law. The Board Certification Committee annually reviews, updates, and creates actual examination questions in an effort to ensure that the examination accurately tests those areas embraced by Criminal (Appellate) Law. Good luck on the exam.

Same Essay Question 1

On August 1, 2010, Deputy Sheriff Derrick Smith ("Smith") of the Lemon County (Florida) Sheriff's Office received an anonymous tip that Danny Defendant ("Defendant") was "a major drug dealer" in Lemon County. That same day, shortly after receiving the tip, Smith observed Defendant's pickup truck in the parking lot of a local bar. Without obtaining Defendant's consent, Smith placed a magnetized mobile global positioning tracking device ("GPS") on the undercarriage of Defendant's pickup truck. Over the next thirty days, Smith tracked the movements of Defendant's pickup truck throughout Lemon County.

On September 1, 2010, Smith received an anonymous tip that Defendant had an outstanding warrant in neighboring Grapefruit County (Florida) for failure to appear in Court in Grapefruit County for a charge of driving on a suspended license ("DWLS/R"). Using his computer, Smith checked the website for the Grapefruit County Sheriff's Office, which showed that Defendant had an outstanding warrant in Grapefruit County for DWLS/R.

That same day (September 1, 2010) Smith resumed the GPS track on Defendant's pickup truck. Smith determined that Defendant's pickup truck was traveling in Lemon County towards Defendant's residence. Smith went to Defendant's residence in Lemon County and immediately observed Defendant's pickup truck enter the driveway at Defendant's residence. Defendant, who was alone in the pickup truck, got out of the pickup truck and walked about twenty (20) feet towards Defendant's residence. Smith advised Defendant that Defendant was under arrest for the outstanding Grapefruit County warrant, and Smith placed Defendant in custody by handcuffing Defendant.

Without asking Defendant for permission or consent, Smith searched Defendant's pickup truck. Smith located a purple velvet Crown Royal bag underneath the driver's seat in Defendant's pickup truck. Inside the purple velvet Crown Royal bag were a digital scale and a plastic baggie containing thirty (30) grams of a powdery substance, which Smith believed was methamphetamine. Smith conducted a field test on the powdery substance; the presumptive result of the field test was that the substance was methamphetamine. Using Defendant's keys, Smith unlocked and searched a toolbox in the bed of the pickup truck, and located a short-barreled rifle. Smith arrested Defendant for possession of drug paraphernalia, for trafficking in methamphetamine, for possession of a short-barreled rifle, and for driving with a suspended license out of Grapefruit County.

The next day (September 2, 2010), the Lemon County Court conducted a first appearance for Defendant's Lemon County charges. At that time, the Lemon County Judge appointed the Office of the Public Defender for Lemon County to represent Defendant on his Lemon County charges. The Lemon County first appearance Judge also arraigned Defendant on a pending Lemon County Court charge of disorderly intoxication. On the disorderly intoxication charge, Defendant waived his right to counsel and plead guilty. The Lemon County Court Judge sentenced Defendant to sixty (60) days in the Lemon County Jail on the disorderly intoxication charge.

On September 3, 2010, Smith received information that Defendant may have sexually molested Child Victim ("Victim"), a seven-year-old boy. Smith went to the Lemon County Jail. Smith was escorted out of his general population location within the Lemon County Jail and taken to the interrogation room. At that time, Smith advised Defendant of his Miranda rights. Smith attempted to question Defendant about the allegations concerning the sexual abuse of Victim. Defendant advised Smith that Defendant wanted to speak to his lawyer. Smith terminated the interview and Defendant was returned to his cell in the general population in the Lemon County Jail.

On September 20, 2010, Lemon County Deputy Sheriff Dennis Sanders ("Sanders") learned about the allegations that Defendant may have sexually molested Victim. Without knowing that Smith had previously attempted to interrogate Defendant, Sanders had Defendant brought from his general population cell to the Lemon County Jail interrogation room. Sanders advised Defendant of his Miranda rights. Defendant gave Sanders a tape-recorded statement, admitting to sexually molesting Victim.

On September 21, 2010, Defendant's family hires you to represent Defendant. That same day, you personally travel to the Clerk's of the Court's Office in Grapefruit County. You discover that on August 30, 2010, the Grapefruit County Court issued an Order withdrawing Defendant's DWLS/R warrant. You further discover that the Grapefruit County Clerk of the Court removed the information concerning Defendant's DWLS/R warrant that same day (August 30, 2010). On September 21, 2010, you personally check the Grapefruit County Sheriff's Office website, which still shows that Defendant has an outstanding warrant in Grapefruit County for DWLS/R.

1. **Analyze the legal issues present in this case, including potential pretrial motions you may file, and anticipate how the Court may rule in this case and why.**

SAMPLE ESSAY MODEL ANSWER 1

In this case, there are 4th Amendment search and seizure issues and 5th Amendment right to counsel issues.

A. Fourth Amendment Issues:

1) **GPS:** Defendant's counsel should file a motion to suppress Smith's use of the GPS tracking device, on the grounds that the use of the GPS tracking device constituted an illegal search and seizure. The trial court will likely reject Defendant's argument, likely concluding that Defendant had no reasonable expectation of privacy in the exterior of his pickup truck. ***See New York v. Class***, 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986). While the United States Supreme Court has not dealt with this issue directly, decisions hold that the placement of a GPS tracking device on the undercarriage of a motor vehicle does not violate the 4th Amendment to the United States Constitution. ***See, e.g., U.S. v. Pineda-Moreno***, 591 F.3d 1212 (9th Cir. 2010); ***U.S. v. McIver***, 186 F.3d 1119 (9th Cir. 1999); ***U.S. v. Pineda-Moreno***, 591 F.3d 1212 (9th Cir. 2010).

2) ***Arizona v. Gant***: Relying on ***Arizona v. Gant***, 556 U.S._ , 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), Defendant's counsel should file a motion to suppress the evidence seized from Defendant's pickup truck (the Crown Royal bag and the contents therein [paraphernalia and methamphetamine] and the short-barreled rifle). In ***Gant***, the U.S. Supreme Court ruled that law enforcement officers may search a vehicle incident to arrest only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted; and (2) it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. When the police engage in a Belton search of an automobile of a person arrested in the vehicle, the Leon good faith exception applies when the search was conducted prior to the Gant decision. State v Harris, So.3d ,36 F.L.W.D133(1st DCA 1/19/2011). The defendant was arrested in her car, and her purse was searched incident to arrest after she was placed in the patrol car. While the search was lawful under pre-Gant v. Arizona law, Gant determined Belton

not to be applicable when the defendant was secured by the police and was not able to reach items located in the car. The trial court found Gant applied and suppressed the evidence, and the First DCA reversed. " The Supreme Court has made it clear that the exclusionary rule is intended to deter police misconduct, not to remedy the prior invasion of a defendant's constitutional rights. Illinois v. Krull, 480 U.S. 340, 347(1987). Application of the exclusionary rule in the case at bar would not deter future police misconduct, nor would it deter appellate courts from issuing erroneous rulings, or lower courts from following the lead of higher courts. Instead, the officers who relied on Belton and society which benefits from apprehension of law breakers, would be punished for the Supreme Court's decision that a prior ruling was error. Particularly when law enforcement officers have acted in objective good faith, the magnitude of the benefit conferred on such guilty defendant's by the exclusionary rule offends basic concepts of the criminal justice system. Leon, 468 U.S. at 907-08.

In this case, Defendant's counsel should argue at the time Smith conducted the search, the Defendant was not within the reaching distance of his pickup truck. Additionally, Defendant's counsel should also argue that none of the items Smith recovered (paraphernalia, methamphetamine and the firearm) were relevant to the crime for which Smith arrested Defendant (failure to appear in Grapefruit County for driving with a suspended license).

In this instance, the State will likely argue that Smith's search of the vehicle and the toolbox constituted a valid inventory search. It has been well recognized that police may conduct an inventory of the contents of lawfully impounded vehicles as a routine, administrative community caretaking function, in order to protect the vehicle and property in it, to safeguard the police and others from potential danger, and to insure against claims of lost, stolen, or vandalized property. South Dakota v. Opperman, 428 U.S. 364, 369, 96 S.Ct.3092,3097 (1976). Respecting the inventory, the Court ruled that such intrusions into automobiles legally "impounded or otherwise in lawful police custody" have been widely sustained as reasonable under the Fourth Amendment "where the process is aimed at securing or protecting the car and its contents".

3) ***Herring v. U.S.***: Defendant's counsel should argue that because there was no valid arrest warrant pending in Grapefruit County, Smith's arrest of Defendant and

Smith's subsequent seizure of evidence from Defendant's pickup truck violated Defendant's 4th Amendment rights.

In this case, however, the State will rely on ***Herring v. U.S.***, 555 U.S. 1, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009). In ***Herring***, the U.S. Supreme Court ruled that if law enforcement negligently fails to note the recall of an arrest warrant, so long as the official did not act "recklessly or deliberately" the exclusionary rule would not apply. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Suppression was unwarranted because an error in record keeping, not flagrant or deliberate misconduct led to Herring's arrest. The court also warned that it was not "suggesting that all recordkeeping errors by the police are immune from the exclusionary rule. If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should misconduct cause a Fourth Amendment violation"

Given the circumstances of this case, the trial Court will likely rule 1) Smith's placement of the GPS did not violate Defendant's 4th Amendment rights; 2) while Smith's conduct violated Gant, Smith likely conducted a valid inventory search of Defendant's vehicle; and 3) because Smith did not act "recklessly or deliberately" in arresting Defendant on an invalid arrest warrant, the items seized will not be subject to the exclusionary rule.

B. Fifth Amendment Issues:

In this case, Defendant's counsel should argue that the Sanders violated Defendant's Fifth Amendment right to counsel when Sanders obtained Defendant's confession concerning the sexual abuse of Child Victim. However, Defendant's counsel will not be successful in light of the U.S. Supreme Court ruling in ***Maryland v. Shatzer***, 559 U.S._, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010). In ***Shatzer***, the U.S. Supreme Court noted that in ***Edwards v. Arizona*** [451 U.S. 477 (1981)], once a defendant asserts his or her right to counsel at a custodial interrogation, a law enforcement officer may not conduct further custodial interrogation until the defendant has counsel for questioning or

if the defendant initiates further communication with the officer. The ***Shatzer*** opinion held that after a "break in custody" occurs after a defendant asserts his right to counsel, lasting fourteen (14) days or more law enforcement may reinitiate the custodial interrogation after giving ***Miranda*** warnings and receiving a waiver of ***Miranda*** rights. Notwithstanding that Defendant remained in the Lemon County Jail, the Court in ***Shatzer*** held that there was a break in custody under these circumstances. When a Defendant has been released from custody and returned to normal life before the police later attempt interrogation, there is little reason to believe that the suspect's change of heart was coerced. The Court then stated that the appropriate period of time for a person to be re-acclimated to normal life was 14 days.

Given the circumstances of this case, the trial Court will likely rule Defendant's confession to Sanders did not violate Defendant's Fifth Amendment right to counsel and did would be admissible at trial.

Date of question: 2011. (criminal appellate and criminal trial exams)

SAMPLE ESSAY QUESTION 2

Mr. T., a small time drug dealer, has just been indicted in federal court on 2 counts: possession with intent to distribute a mixture or substance containing 100 grams or more of heroin, 21 U.S.C §§ 841(a)(1) and 841 (b)(1)(B)(i) (count 1); and possession of a firearm by a convicted felon, 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (count 2). The facts, according to the agents, which Mr. T doesn't dispute, are as follows:

On November 30, 2008, Mr. T was rolling along in his van, just looking for a deal on gold chains. He got a call from Colonel Hannibal Smith, who suggested Mr. T come by the hideout (room 212 at the Comfort Inn) and relax with a little heroin. Mr. T had a better idea. He said he would sell the Colonel all of his remaining stash of heroin because he wanted to go into rehab and get off the stuff. He said he had a little over 100 grams left in his possession. When Mr. T arrived at the Colonel's hideout, he gave the Colonel the baggie of heroin and suggested the Colonel try it because it was real good stuff. The Colonel said he didn't want to mix business with pleasure. But Mr. T's girlfriend, who had come with him said she would try some. She was drunk. He told her no, and she started whining. So Mr. T gave her some to shut her up. She snorted some of the heroin because she was too unsteady to cook it. Then she started throwing up. Just then, the authorities busted in. It turned out Colonel Smith was working for the government. This was part of a "Joint Task Force" situation where 2 DEA agents watched 10 local deputies do all the work.

The girlfriend was taken to the hospital. It was later learned that she snorted too much of the high-quality heroin. It shocked her system, and, along with the largequantity of alcohol she had previously ingested, made her violently vomit until she dry heaved for hours. Once she left the hospital, she disappeared and wasn't available for further comment on her condition.

Meanwhile, back at the scene of the arrest, Mr. T was cooperative. He was searched pursuant to arrest, and Deputy Doright, a local sheriff's deputy, recovered a loaded 9mm handgun from his waistband. Mr. T admitted, post-*Miranda*, that he "pities himself" and that the gun was his. He said he was taking it to the local pawn shop to raise money to leave for his kids while he was in rehab. The gun had Mr. T's fingerprints on it. And the gun is engraved with the words "Mr. T's gun." Although the deputies did not notice the Kevlar bullet-proof vest under all of Mr. T's bling, a DEA agent pointed it out. Mr. T said the Kevlar kept his chains from chafing and the bullets away from the vital organs.

In addition to a number of prior drug arrests that were nol prossed, Mr. T's prior criminal history includes the following convictions:

Burglary of a dwelling	Pled guilty, adjudicated guilty, sentenced to 15 months' imprisonment	Released 2/13/2001
Grand theft auto	Pled guilty, adjudicated guilty, sentenced to 21 months' imprisonment	Released 7/1/2006
Trespass	Pled nolo, adjudicated guilty, sentenced to 45 days in jail	Released 11/18/2008
Burglary of a dwelling	Pled guilty, adjudicated guilty, sentenced to 1 year and 1 day months' imprisonment	Released 8/4/2007

Mr. T will admit his guilt and does not want to go to trial. He also thinks "Face" needs to get his. Mr. T has information about significant drug trafficking "Face" has been involved in ever since his time in Vietnam, and the DEA agents have mentioned they wanted to get him bad.

1. **Discuss the possible sentencing options available to Mr. T, including any enhancements, adjustments, and departures that may apply based on the facts presented. This case will resolve by October 31, 2009. The following materials may assist you:**

21 U.S.C. § 841

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

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(1)(B) In the case of a violation of subsection (a) of this section involving—

- 100 grams or more of a mixture or substance containing a detectable amount of heroin;

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such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment

and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

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18 U.S.C. 922(g)(1)

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

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to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

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18 U.S.C. § 924(a)(2)

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

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18 U.S.C. § 924(e)

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

U.S.S.G § 2D1.1(c)(7)

At least 100 G but less than 400 G of Heroin	Level 26

U.S.S.G. § 4A1.1 Criminal History Category

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If 2 points are added for item (d), add only 1 point for this item.

(f) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was counted as a single sentence, up to a total of 3 points for this item.

U.S.S.G. § 4B1.1 Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory Maximum		Offense Level *
(A)	Life	37
(B)	25 years or more	34
(C)	20 years or more, but less than 25 years	32
(D)	15 years or more, but less than 20 years	29
(E)	10 years or more, but less than 15 years	24
(F)	5 years or more, but less than 10 years	17
(G)	More than 1 year, but less than 5 years	12.

* If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

U.S.S.G. § 4B1.4 (armed career criminal)

(a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal.

(b) The offense level for an armed career criminal is the greatest of:

(1) the offense level applicable from Chapters Two and Three; or,

(2) the offense level from §4B1.1 (Career Offender) if applicable; or

(3)(A) 34, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in §4B1.2(a), or a controlled substance offense, as defined in §4B1.2(b), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)*; or,

(B) 33, otherwise*

*If an adjustment from §3EI.I (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) The criminal history category for an armed career criminal is the greatest of:

(1) the criminal history category from Chapter Four, Part A (Criminal History), or §4BI.l (Career Offender) if applicable; or,

(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in §4BI.2(a), or a controlled substance offense, as defined in §4BI.2(b), or if the firearm possessed

by the defendant was of a type described in 26 U.S.C. § 5845(a); or,

(3) Category IV.

Sentencing Guideline Table:

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

SAMPLE ESSAY MODEL ANSWER 2

This is a process question that should address three components: Minimum mandatory sentences, a guidelines calculation and a method for avoiding the minimum mandatory.

I. Min/Man:

The Minimum Mandatory for Count I is 5 years. It would be 20 years if death or serious bodily injury resulted from the use of the heroin. Although, the facts here do not establish serious bodily injury, this is something the person should be aware of in case the girlfriend shows up dead or seriously ill by sentencing and the government can prove it is a result of the heroin.

There is no minimum mandatory on Count II, although there would be if the armed career criminal enhancement applied. There are only 2 qualifying predicates under § 924(e), the 2 burglaries. To qualify under ACCA, there must be 3 violent felonies or serious drug priors. If the ACCA enhancement kicked in, the statutory penalties on count II would jump from 0 – 10 years to 15 to life.

Thus, the answer should address a 5 - 40 year exposure window, with 5 being min/man.

II. The advisory sentencing guideline calculations.

This will require the review of the attached materials. The following steps must be covered:

A Ascertain the drug weight – a little more than 100 grams of heroin, which is less than 400 grams & therefore falls under U.S.S.G. § 2D1.1(c)(7), base offense level 26.

B. Assure no victim impact – none from the facts.

C. No adjustment for obstruction of justice – not from these facts.

D. Acceptance of Responsibility – 2 points from this fact pattern. UPON MOTION OF THE GOVERNMENT an additional 1 point may be applied. Some may add it, some people might not. It is ok either way.

E. Offense Level Computation –

1. Using the November 1, 2008 Manual (there may be a discussion on the Rule of Lenity, the use of different Manuals, the One-Book Rule, but not really relevant to the Question).

2. Counts I and II will be grouped together pursuant to §3D1.2(d) because Count II includes conduct that is treated as a specific offense characteristic in, or an adjustment to, the guidelines applicable to Count I.

3. BASE OFFENSE LEVEL. Using §2D1.1(a)(3) and (c)(7) the level is **26.**

4. There is a specific offense characteristic for the firearm under U.S.S.G. § 2D1.1(b)(1) (If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.).

5. No Victim-Related Adjustments

6. No Adjustment for Role in Offense based on this fact pattern.

7. No Obstruction of Justice based on this fact pattern.

8. Acceptance of Responsibility gives you 2 points off. Some people may give the 3rd point.

9. Adjusted point total is **26, maybe 25**

10. Chapter four enhancement for the bullet proof vest is found under §3B1.5, and since Mr. T was wearing the bullet proof vest at the time, he gets **4** points.

11. TOTAL OFFENSE LEVEL = **30 (maybe 29)**

12. CRIMINAL HISTORY

Based upon the prior history and §4A1.1, Mr. T scores:

(a)	Burglary of a Dwelling	(convicted, 15 months prison – released 2/2/1999)	3
(a)	Grand Theft Auto	(convicted, 21 months prison – released 7/1/2006)	3
(c)	Trespass	(convicted 45 days in jail – released 8/4/2007)	1
(b)	Sale of Cocaine	(convicted, 1 year and 1 day – released 11/18/2008)	2
		Total:	9

PLUS 2 points for committing the instant offense within 2 years of his release from prison.

§4A1.1(e)

Total Criminal History Points	11
Criminal History Category	V

13. TOTAL SENTENCE RANGE:

Level 30/category V/range **151-188**

Level 29/category V/range 140-175

III. Enhancements/Departures

A. Career Offender.

Mr. T's statutory max for the drug offense is 40 years. So his base offense level is 34. If someone raises the issue of whether the government can prove that serious bodily injury resulted, the stat max would be life and the offense level would be 37. They should get points for recognizing this potential issue. Acceptance is deducted from the career offender guideline, so subtract 2 or 3 levels for acceptance, depending on whether the government files the motion. None of the other adjustments apply. So if Mr. T had an offense level of 34, his offense level is 32 or 31 (if it was 37, it will be 35 or 34). His criminal history is automatically VI.

As a career offender, Mr. T's TOTAL SENTENCE RANGE is:

Level 32/category VI/range 210-262 **or** Level 31/category VI/range 188-235

Or maybe Level 35/category VI/range 292-365 **or** Level 34/category VI/range 262 - 327

B. Armed Career Criminal Enhancement

Like the career offender enhancement, chapter 4 of the guidelines contains an armed career criminal enhancement that significantly increases the guidelines. But it requires a 3rd predicate offense. Mr. T does NOT have the required prior 3rd violent felony offense or a serious drug offense. The grand theft auto and trespass do not qualify. Nor does the offense of conviction even though he is being convicted of two offenses. (If his second offense was a 924(c) offense, there would be a different issue under the career offender guideline, but that is too confusing.)

C. Departures

The most common departure is substantial assistance under 5K1.1. It is totally in the government's discretion. There could be a Safety Valve, since this is a drug case. BUT, since Mr. T's criminal history points are 11, he fails to qualify. Plus he had a

weapon and that is also a disqualifier. BUT if they mention Safety Valve, there should be some recognition of that. Remember, safety valve not just gets the defendant below the min/mand, in drug cases it can give 2 levels off under §2D1.1(b)(7). So if they mention this aspect, they should get extra credit, just like they should know substantial assistance motions need to refer to 18 U.S.C. §3553(e) to get under the minimum mandatory. Here, of course, Mr. T should be happy to get down to the min/mand. But we want to be sure the answer addresses the correct type of Substantial Assistance motion.

An examinee might throw in an argument about an over representation departure. Anytime two priors that landed someone in jail for less than two years increases his sentencing range from around 12 or 15 to around 20 or 30, that criminal history is over represented. Under 4A1.3 and 11th Circuit law, any over-representation departure is limited to one level horizontally. There is a circuit split on whether a vertical departure is authorized. I doubt anyone will pick up on that. But there are always the 18 U.S.C. 3553 factors.

IV. 3553(a) factors

The guidelines are advisory. The man/min is only 5 years. There are a lot of mitigating facts, like Mr. T was real remorseful and cooperative from the start; he was trying to get rid of his stash so he could go to rehab; he was going to pawn his gun, not sell it on the street, to leave money for his kids; he had a little over 100 grams and the scale for level 26 is 100 to 400 grams, so if he had a few grams less, he would have been two levels lower; he was almost 300 grams from the top of the scale; he has never been sentenced to more than 21 months in prison and now he is looking at about 10 times that amount at the low end of the range.

If the person is a prosecutor, he can talk about Mr. T letting his drunk girlfriend snort H and what a bad father he is, so he deserves the high end.

They should be able to link these and other facts to the following 3553(a) factors:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(3) the need for deterrence;

(4) the need to protect the public;

(5) the need to provide the defendant with needed educational or vocational training or medical care;

(6) the kinds of sentences available;

(7) the Sentencing Guidelines range;

(8) pertinent policy statements of the Sentencing Commission;

(9) the need to avoid unwanted sentencing disparities; and,

(10) the need to provide restitution to victims.

The **Best** answer will have the correct identification of the statutory minimum mandatory issues, the guideline range, departures/enhancements, and the 3553 factors.

A **Moderate** answer will get 2 or parts of 3 of the 4 components correct. A

Poor answer will only adequately address one component.

Date of question: 2010. (criminal appellate and criminal trial exams)

SAMPLE ESSAY QUESTION 3

Dan Douglas and Pete Phillips meet up together at the Hilton hotel bar in Tampa, Florida, the night before the Criminal Law Board Certification Exam. Dan and Pete went to law school together 7 years ago, and both worked as prosecutors when they graduated from law school. Dan left the Office of the State Attorney two years ago to open his own criminal defense and civil law practice. Pete has stayed on and now works as a supervisor in the homicide division.

Dan and Pete are two beers in when Dan's cellphone rings. Dan puts the phone on speaker and begins a conversation with a client. Carl Cooper is pretty upset and starts yelling at Dan about not returning his calls or emails about his case and that Carl "doesn't know what's going on." The call lasts about 3 minutes and then Dan tells Carl that he is about to drive into a tunnel and he will lose cellular service. When he hangs up, Dan tells Pete that Carl is his first client from when he opened his practice and that Carl is a real pain in the butt. Dan says he has talked to Carl one other time on the phone since he took the case, but he did meet with him once to take a large fee.

Dan then confides in Pete that it is good he called because Carl's case does have something to do with the Office of the State Attorney. Carl was prosecuted by Dan for a sale of cocaine case in 2010. As part of that case, Carl's car was seized by the Florida Highway Patrol. Carl thought Dan did a good job prosecuting him, and was really reasonable in his plea offers – so Carl hired Dan the week after he opened his law office to sue the State of Florida to get his car back because of a faulty and misleading probable cause affidavit. Dan was initially excited, but has lost interest over the last couple of years and doesn't want to tell Carl there is a Motion to Dismiss hearing set for next week which will probably result in the case being dismissed.

Dan orders another beer and tells Pete that Carl might have some information about a major drug dealer operating out of the Florida Bar Offices in Tallahassee. Pete is listening while nursing his third beer. Dan tells Pete that the information is sensitive and Carl told him in confidence on their first phone call, but told Dan that he could use the information to help him in the civil suit. The only thing that could really help out

Carl's civil suit is an affidavit from the passenger in the car the day Carl was arrested. Dan tells Pete that he has tried getting the affidavit from the passenger and has left her several messages, but he thinks she may not want to talk to him. Dan tells Pete that the last message he left for her might work, because he said he was a former prosecutor just trying to clear up an old case that he really didn't have a "dog in the fight." Dan swears he was convincing.

Dan closes out the tab after another three beers and he and Pete part ways to go and start studying for the exam tomorrow.

Questions:

1. **What Rules of Professional Conduct are implicated by Dan Douglas' conduct? What are Dan Douglas' obligations?**

2. **What about Pete Phillips – does he have any obligations under the Rules of Professional Conduct?**

SAMPLE ESSAY MODEL ANSWER 3

The Rules of Professional Conduct implicated are:

Rule 4-1.4: Communication

Rule 4-1.9: Conflict of Interest

Rule 4-4.3: Dealing with Unrepresented Person

Rule 4-8.3: Reporting Professional Misconduct

Rule 4-1.6: Confidentiality of Information

Dan clearly has failed to reasonably communicate with Carl. He has only met with him one time, and talked to him twice on the phone in two years of representation.

Additionally, Carl has a Motion to Dismiss hearing pending that Dan has not told him about. Dan has failed to comply with Rule 4:1-4(a)(1)(3)(4) and (b).

Dan has a conflict of interest in representing Carl based on his previous handling of the prosecution on behalf of the State of Florida. It does not matter that the forfeiture was made by the Florida Highway Patrol. The State of Florida was Dan's "client" when he was a prosecutor. See Comment under Rule 4:1-9. The question does not ask if Dan obtained consent from the State of Florida and a good answer will mention that informed consent can act as a waiver of the conflict. But clearly the facts of this question fall within the prohibited conduct as set forth in the Rule and Comment.

Dan's conduct with the passenger is prohibited. Dan can't imply or state that he is disinterested. Notwithstanding he is lying, he is specifically violating Rule 4-4.3(a)

Dan's disclosure of the information from Carl about the drug dealer is not as tricky as it seems. Dan MAY reveal confidential information to serve the client's interests unless the client specifically requires the information not be disclosed. But Pete is a homicide prosecutor and there is nothing from the facts that suggests disclosure of the information benefits Carl or his case against the State of Florida. This is a violation of the duty to maintain confidential material. An answer may try to stretch that Peter could assist Carl somehow, but that's a unrealistic stretch on the facts presented. Rule 4-1.6(c)(1).

Finally, Pete Phillips has a duty to report the misconduct he has observed. Rule 4-8.3 requires that a lawyer who knows of another lawyer who has committed misconduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness shall inform the appropriate professional authority. In this case, Pete knows Dan is lying to a witness to obtain an affidavit, has a conflict of interest, has disclosed client communications and is not communicated with a client.

The beer drinking at the hotel is a straw man that probably will draw answers, but nothing suggests impairment or a reason to contact Florida Lawyers Assistance.

An answer that adequately and accurately covers all five rules will score a 6.

Date of question: 2013. (criminal appellate and criminal trial exams)

SAMPLE MULTIPLE CHOICE QUESTIONS

1. In federal court, which of the following statements regarding sentencing is correct?

A. A prior conviction that increases the statutory maximum must be admitted by the defendant or proven beyond a reasonable doubt to the trier-of-fact.

B. The sentencing judge may sentence the defendant to above the statutory maximum based on a fact(s), other than a prior conviction, that the jury or trier-of-fact dd not find.

C. A federal sentence can be consecutive to an anticipated state sentence.

D. A federal judge cannot order a federal sentence to be concurrent or consecutive to a state sentence that has not yet been imposed.

Answer: C. See Apprendi v. New Jersey, Alleyne v. U.S., Setser v. U.S., 132 S. Ct. 1463 (3/28/12)

Date of Question: 2014 (criminal appellate and criminal trial exams)

2. After the District Court of Appeal issued its opinion, but before the time for rehearing expired, the State filed a notice to invoke the discretionary jurisdiction of the Florida Supreme Court based on conflict. The Defendant, within the rehearing time, but after the State filed the foregoing notice, then filed a motion for clarification. **Does the District Court have jurisdiction to rule on the clarification motion?**

A. No, because the timely filing of the notice to invoke divested the District Court's jurisdiction.

B. Jurisdiction to rule on the motion can be recaptured only if a motion to relinquish jurisdiction is filed with the Florida Supreme Court and is granted for the limited purpose of allowing the District Court to rule on the clarification motion.

C. The District Court, pursuant to Florida Rule of Appellate Procedure 9.600, has concurrent jurisdiction and can rule on the motion for clarification.

D. The District Court has jurisdiction to rule on the clarification motion since the notice to invoke was prematurely filed.

***Answer: D**. Portu v. State, 654 So.2d 169 (Fla. 3rd DCA 1995)*

Date of question: 2011. (criminal appellate exam)

3. A defendant was tried, convicted and sentenced to a term of years of incarceration in a Florida Circuit Court. The Defendant filed a Notice of Appeal on January 1. The Circuit Court entered an order designating the Office of the Public Defender as appellate counsel for the Defendant on February 1. The record on appeal was served on Appellate counsel for the Defendant on February 15. **The Defendant's initial brief must be:**

A. Filed (or time extended) within thirty days of February 1.

B. Served (or time extended) within thirty days of February 1.

C. Filed (or time extended) within thirty days of February 15.

D. Served (or time extended) within thirty days of February 15.

Answer: D. *Rule 9.140(g).*

Date of question: 2013. (criminal appellate exam)

4. Which of the following statements is correct regarding the Double Jeopardy Clause, based on U.S. Supreme Court case law?

A. Double Jeopardy Clause bars retrial (and the state's appeal) of midtrial directed verdict, except when the directed verdict was based on legal error regarding the elements (trial judge's order contained legal error misstating the correct elements).

B. Double Jeopardy Clause bars retrial (and the state's appeal) of midtrial directed verdict, even when the directed verdict was based on legal error regarding the elements (trial judge's order contained legal error misstating the correct elements).

C. Double Jeopardy Clause bars retrial on all charges when jury announced it rejected more serious charges but deadlocked on lesser included.

D. Double Jeopardy Clause bars retrial on charged offenses on which the jury was deadlocked even though it returned verdicts on other charges.

Answer: B. *(a) is wrong under Evans v. Michigan, 133 S. Ct. 1069 (2/20/13); (b) is correct under Evans v. Michigan, 133 S. Ct. 1069 (2/20/13); (c) is wrong under Blueford v. Arkansas, 132 S. Ct. 2044 (5/24/12) ; (d) is wrong under Yeager v. U.S., 129 S.Ct. 2360 (2009) and Bravo-Fernandez v US, 137 S.Ct. 352 (2016)* CAQB *8 updated*

Date of question: 2019 (Criminal Appellate Exam)

5. Following a multi-day trial the Defendant is convicted of a felony offense. He takes an appeal to the District court. Due to a technical malfunction, the court reporter is unable to create a transcript of any of the proceedings except for one pre-trial suppression hearing. **Which of the following statements is correct?**

A. The Defendant/Appellant is automatically entitled to a new trial.

B. The Defendant/Appellant may be entitled to a new trial but the trial court and the parties must first attempt to reconstruct the record. If reconstruction were to fail, the Defendant/Appellant will be granted a new trial by the District Court due to the lack of transcripts.

C. The Defendant/Appellant may be entitled to a new trial. However the trial court and the parties must first attempt to reconstruct the record. If reconstruction were to fail, the Defendant/Appellant must also establish specific prejudice to obtain a new trial.

D. The Defendant/Appellant may be granted a new trial only if the State concedes.

Answer: C. *Jones v. State, 923 So. 2d 486 (Fla. 2006)* CAQB9

Date of question: 2019 (Criminal Appellate Exam)

6. A defendant in a misdemeanor criminal case prevailed in a motion to suppress. The state took an appeal to the Circuit Court which overturned the County Court's ruling. The Defendant/Petitioner filed a Petition for Writ of Certiorari in the District Court. Appellate counsel drafts the Petition and is assembling an appropriate Appendix. **Which of the following items must be included in the appendix?**

A. The motion to suppress that was filed in the trial court that is the subject of the petition.

B. The order being reviewed.

C. Portions of the trial transcript discussing the motion to suppress.

D. Copies of legal opinions on which the Petitioner is relying.

Answer: B. See Rule 9.220(b), Florida Rules of Appellate Procedure.

Date of question: 2019 (Criminal Appellate Exam)

7. While the defendant was on probation, he was charged with possession of cocaine. He filed a motion to suppress, which was denied, by the trial court. He entered a no contest plea to the possession charge reserving the right to appeal the denial. At the same hearing, the State trial court revoked the defendant's probation based only upon the fact he had been convicted for the new offense as a result of the plea. The defendant received concurrent sentences for the violation of probation and the new offense. On appeal of the denial of the motion to suppress, the district court held that appellant had been illegally searched and vacated his possession conviction. **Does the defendant have any remedy as to the revocation of his probation?**

A. No, one can still have his probation revoked based upon the commission of a new offense, even if he is acquitted of that new offense, because the standard of proof for a violation is by a preponderance and not beyond a reasonable doubt.

B. Yes, if a revocation of probation is based upon proof of a conviction alone, and that conviction is subsequently reversed, the revocation must also be reversed.

C. Yes, the trial court erred in relying on the no contest plea without any independent review of the facts.

D. No, because the reversal on appeal was based upon the denial of a motion to suppress, not insufficiency of the evidence.

Answer: B. *See Stevens v. State, 409 So.2d 1051(Fla. 1982); Farley v. State, 740 So.2d 5 (Fla.1st DCA 1999)* CAQB17

Date of question: 2019 (Criminal Appellate Exam)

8. To what types of cases do <u>Crawford v. Washington</u> and the right to confrontation apply?

A. All criminal proceedings where evidence is presented.

B. All criminal trials.

C. All criminal trials, revocation of probation/community control, and restitution proceedings.

D. All criminal proceedings but bond hearings, pre-trial detention/probable cause hearings, and motions to suppress.

<u>Answer: B.</u> *See Box v. State, 33 Fla.L.Weekly D2498 (Fla.5th DCA Oct. 24, 2008); Peters v. State, 984 So.2d 1227(Fla. 2008); Godwin v. Johnson, 957 So.2d 39 (Fla.1st DCA 2007).*

Date of question: 2018 (Criminal Appellate Exam)

9. Clearwater police officers stopped Russell Simmons' car after noticing that it had a 6 or 7-inch hairline crack located on the lower right-hand side (passenger's side) of his windshield. A check of Simmons' identification revealed he was on probation for a felony. One of the officers spotted what appeared to be a handgun in plain view on the back seat. Simmons was arrested for felonious possession of a firearm. A search of his person turned up a felony amount of marijuana in his pocket. Subsequently the "gun" was determined to be a starter pistol. Simmons filed a motion to suppress asserting that the initial stop was improper. The officers testified they wouldn't have stopped Simmons, except for the crack in his windshield, although it didn't appear to be obstructing the driver's view. **Should the state trial court grant or deny Simmons' motion to suppress?**

A. Deny, because Florida Statute requires that every vehicle have a windshield, the officers lawfully stopped Simmons because his cracked windshield constituted a non-criminal infraction.

B. Deny, because Florida Statute authorizes a police officer to stop any vehicle and submit it to inspection if he has reasonable cause to believe that the vehicle is unsafe or that its equipment is not in proper repair.

C. Grant, because the existence of any visible windshield crack doesn't provide a legal basis for a stop. Such a stop is permissible only where the officer reasonably believes the crack renders the vehicle in such an unsafe condition as to endanger persons or property.

D. Grant, because the existence of the crack in the windshield on the passenger side could never provide a legal basis for a stop regardless of its size.

Answer: C. *See Hilton v. State, 961 So.2d 284 (Fla. 2007)* CAQB23

Date of question: 2016 (Criminal Appellate Exam)

10. A Florida law enforcement officer may make a warrantless arrest for which one of the following misdemeanor offenses, when the offense occurs outside of the officer's presence but there is probable cause to believe that the offense has been committed?

A. Driving under the influence.

B. Disorderly conduct.

C. Assault

D. Criminal mischief.

Answer: D. *Fla. Stat. § 901.15; Fla. Stat.*

Date of question: 2016 (Criminal Appellate Exam)