

Froelich  
Criminal Procedure  
Fall 1998

General Instructions:

**There is probably not enough time to answer every question as completely as you would like; however, everyone will be in the same position. Limit your answers to areas discussed in the case book and class.**

## **FACTS**

Sincinnati City Council permits a cross and a menorah on Fountain Square in downtown Sincinnati. Al Absolutist (as in the First Amendment, not the vodka) believes this is terrible. On a crowded morning, he and his partner (they are not formally married) Pat, go to the Square and in front of one thousand witnesses begin to tear down the religious symbols. As he knocks over the menorah, being the fourth night of Hanukkah, a flame ignites the cross, and causes thousands of dollars in damages.

Seeing this, Millie Militia, a member of a paramilitary citizens group, goes ballistic; she attacks Al. Needless to say, a riot ensues before the police can gain control of the situation. They clear the square and Al, Pat and Millie are arrested at their respective homes the next day.

Al and Pat are charged with Vandalism (which is defined as "intentionally destroying property valued at more than \$500") for tearing down the menorah and with Reckless Arson (which is defined as "recklessly causing a fire which does more than \$500 in damage.")

Millie is charged with Aggravated Assault (which is defined as "attacking another under a fit of sudden rage") and with Provoking a Riot (which is defined as "engaging in actions which a reasonable person would foresee probably will cause a riot").

The government wants this over with quickly to minimize the bad publicity to the city, to lessen the enormous expense of paying appointed attorneys and adding courthouse security, and to minimize the inconvenience of calling the many witnesses. Therefore, all the defendants are charged with all of the above-listed offenses in the same indictment and are scheduled for trial together.

I. The attorney for Al and Pat objects to the fact that (1) Al and Pat are being tried together, (2) that they are being tried together with Millie and (3) that the charges against them (Vandalism and Reckless Arson) are being tried together.

**Q: What are the legal arguments for and against the motion?**

II. During jury selection at the trial, one of the defendants' attorneys objects because only 50 people responded to their notices out of the 400 which were sent. Further, although the computer sent out the notices in a random fashion, the 50 people that appeared are all from two rather upscale zip codes, are all wearing suits or business dresses, and some have religious paraphernalia (e.g., crucifixes or mezuzah) prominently displayed. This attorney moves to discharge the entire panel, to send out new notices, and to start again.

**Q: What are the legal arguments for and against the motion?**

III. Assume the motion is denied. Jury selection continues and the prosecutor exercises two peremptory challenges. The defense counsel object and argue that the two challenged jurors are not wearing religious insignia and accuse the prosecutor of trying to end up with a jury of conservative, Godfearing, religious-practicing individuals who are much more likely to convict these particular defendants. The prosecutor notes that one of the excused jurors seemed to not be paying attention during the voir dire and has "Death to Infidels" carved in his hair. As for the other juror, the prosecutor adamantly denies that religion had anything to do with his decision to utilize a peremptory challenge.

**Q: What are the legal arguments (and what is the process) for and against excusing either or both of these jurors?**

IV. After the trial where they each testify that they and their partner were somewhere else when all this happened, Al is convicted of both the charges against him. Pat is acquitted. Al appeals, arguing that convicting him of Vandalism and Reckless Arson constitutes double jeopardy. Al's appeal also argues that since Pat was acquitted, the jury must have believed the defense that they weren't there and it is unfair for him to have been found guilty.

**Q: What are the legal arguments for and against both of these contentions?**

V. Millie also is convicted and appeals on two grounds. First, she found out the day after the conviction that her attorney is a former FBI agent who had previously been assigned to investigate militia groups. Reading the transcript from jail, Millie now argues that this is why the attorney did such a lousy job which resulted in her conviction. In fact, even before she knew of his past, she told the judge she did not want that attorney or any attorney to represent her because Court-appointed attorneys are mere pawns in a corrupt system and she would rather represent herself. However, when the judge found out that Millie had never gone to public school and had difficulty in reading or writing (although she apparently was a skilled survivalist), the request for self representation was denied.

**Q: What legal arguments should Millie make and how will the prosecutor**

**respond?**

VI. The appeals are all denied by the appellate court. As the next holiday season approaches, a newspaper reporter is recapping the previous year's riot and discovers that police had undercover officers throughout the crowd at the time of the incident. Although their names were in the one thousand given to the defendants by the prosecution in response to a discovery request, no addresses were given, they were not identified as law enforcement officers, and they were never interviewed by the defendants.

**Q. All the convicted defendants file a motion to have their convictions set aside; what are the arguments for and against this motion?**

VII. During the closing argument, the prosecutor argued that Millie is a member of a militia group just like Tim McVey -- the convicted Oklahoma City bomber. Millie's attorney objected and asked for a mistrial. The objection was sustained, but the mistrial motion was overruled. Millie now raises this issue on appeal.

**Q: If she wins the appeal and the appellate court agrees that the trial court should have granted a mistrial, what are the legal arguments for and against her being reprosecuted on the same charge?**