

San Luis Obispo College of Law

Midterm Examination

Criminal Law & Procedure

Fall 2023

Professor S. Wagner

Instructions

1. This examination consists of three sections of equal value. There is a three (3) hour time limit to complete the exam.
2. Questions 1 and 2 are essay questions. Make sure that you read each essay question carefully before answering. Attempt to organize your answer before you start writing. The essay questions test your ability to apply the law to the facts. After stating the issue, provide a succinct statement of the relevant legal principles, followed by a detailed analysis of how these legal principles apply to the facts, and a conclusion.
3. Question 3 is comprised of 10 (ten) True-False Questions. Each question is worth 10 points. Points will be assigned based upon the selection of the correct answer and a brief explanation that supports the reasoning/rationale for the correct answer choice. It is anticipated that the associated "explanations" will require a maximum of 50-80 words.

MID TERM EXAMINATION
FALL 2023
CRIMINAL LAW
PROF. STEPHEN F. WAGNER

Question #1

One night Abe was drinking heavily at Dewey's Tavern. While playing "Liar's Dice" with Ben, Abe accused Ben of cheating and demanded that Ben return the \$200 cash that he had lost in the last round of play. The argument was so loud that Ned, the bartender, separated the two men and ordered Abe out of Dewey's, telling Abe to "go sober up." Ben was allowed to remain, but warned by Ned to "knock-off that sneaky play." Abe stormed-out of Dewey's in a rage and retrieved a handgun from his car and snuck past the bouncer/doorman and re-entered Dewey's. Upon re-entering Dewey's, Abe aggressively confronted Ben and said, "you have five seconds to return my money or I'll shoot you dead right here." Ben laughed and told Abe to "fuck-off." Abe then pulled his handgun from his waistband and fired a round at the ceiling, intending to let Ben know he was serious. At the sound of the gunshot, Ben and several other Dewey's patrons rushed outside. Clem, one of the fleeing patrons, ran into the path of a city bus and was killed instantly.

When Abe fired the gun, the bullet struck a ceiling fan, bounced off the fan, and hit another Dewey's patron, Veronica, in the arm. She was rushed to the hospital to receive emergency medical treatment. Unfortunately, Veronica contracted an infection while at the hospital and later died.

Assume that Abe was lawfully arrested and that he claims he was so drunk he did not know what he was doing. He insists he never wanted to hurt anybody.

1. With what crimes, if any, can Abe reasonably be charged? Discuss.
2. What defenses, if any, can Abe reasonably raise? Discuss.

MID TERM EXAMINATION
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Question #2

Boone, Sly and Rex devised a plan to steal prescription drugs from the San Luis Obispo Rite Aid Pharmacy. The plan was mainly Boone's idea and he recruited Sly and Rex to join him. At first, Sly did not want to participate, but when Boone threatened to report Sly's drug use to Sly's probation officer, Sly reluctantly agreed. Rex was the night janitor at the Rite Aid that the group was targeting.

The plan called for Rex to intentionally leave the back service door unlocked to allow both Boone and Sly to enter at exactly 10:45 p.m., which was forty-five minutes after the store was set to close. Rex agreed to participate, so long as his role would be limited to leaving the back service door unlocked. At exactly 10:45 p.m. Boone and Sly entered the store through the back service door. They went directly to the pharmacy department, a separate and secure part of the store, and began cutting the glass with glasscutters. Unbeknownst to Boone and Sly, Rex left the store after calling Vern, the store's security guard and telling Vern about the whole plan. Rex left and made his call to Vern at approximately 10:40 p.m. At approximately 11:00 p.m., Vern, armed with a handgun rushed into the store just as Boone and Sly had made their first cuts through the glass. As Vern quickly approached Boone and Sly, Sly struck Vern in the head with a large piece of the broken glass. As Vern was lying on the floor screaming in pain, Sly took Vern's wallet and his Rolex watch. Boone picked up Vern's gun, which had slid under a counter display, and the two ran right into the arms of the police who had surrounded the store. All three men were lawfully arrested. Vern was treated and released from the hospital. He will require future reconstructive surgery on his face.

Assume that Boone, Sly and Rex have each been charged with the following crimes: conspiracy to commit burglary, burglary, attempted burglary, robbery, three counts of larceny, aggravated assault and aggravated battery.

1. Do the facts and evidence support the filing of these charges against Boone? Discuss. What defenses would you expect Boone to assert? Discuss.
2. Do the facts and evidence support the filing of these charges against Sly? Discuss. What defenses would you expect Sly to assert? Discuss.
3. Do the facts and evidence support the filing of these charges against Rex? Discuss. What defenses would you expect Rex to assert? Discuss.

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Question #1
ISSUE OUTLINE

1. **CRIMES COMMITTED BY ABE: AGGRAVATED ASSAULT / CRIMINAL THREATS (BEN AS VICTIM).** FACTUAL SUPPORT: ABE AGGRESSIVELY CONFRONTS BEN AND ISSUES A THREAT LIKELY CAUSING MAJOR APPREHENSION. THE THREAT IS IMMEDIATE IN NATURE AND LIKELY INSTILLING FEAR IN BEN. FACTS ARE UNCLEAR AS TO DISPLAY OR BRANDISHING OF THE GUN, BUT STRONG INFERENCE CAN BE MADE.

STUDENTS WOULD BE EXPECTED TO ID THE REQUISITE MENS REA FOR THE CRIME OF ASSAULT (**SPECIFIC INTENT** - EITHER AN ATTEMPTED BATTERY OR AN INTENTIONAL PLACING OF ANOTHER IN FEAR OF BODILY HARM. BOTH FORMS OF ASSAULT REQUIRED SPECIFIC INTENT AT COMMON LAW.

THE ACT OF FIRING-OFF A ROUND IN A PUBLIC SETTING CAUSING PATRONS TO FLEE MEANS THAT **NUMEROUS COUNTS** OF AGGRAVATED ASSAULT WERE COMMITTED (COUNT VICTIMS WHO EXPERIENCED APPREHENSION).

ATTEMPTED ROBBERY (BEN AS TARGET/VICTIM). BOTH FORCE AND FEAR EXHIBITED HERE? LARCENY/ASSAULT/BATTERY AS LIOS

DEATH OF CLEM: STUDENTS WERE EXPECTED TO WORK METHODICALLY THROUGH HOMICIDE/MURDER/MITIGATION. **HOMICIDE?** YES, CLEM DIED, ARGUABLY, **AT THE HANDS OF ANOTHER** (CAUSATION DISCUSSION EXPECTED). BUT-FOR ABE'S DISCHARGING THE FIREARM, CLEM WOULD NOT HAVE NEEDED TO FLEE,... CLEM'S DEATH FORESEEABLE (PROXIMATE CAUSE)? YES. DOES CLEM'S POTENTIAL NEGLIGENCE IN RUNNING INTO THE PATH OF THE CITY BUS RELIEVE ABE OF CULPABILITY? NO, AS LONG AS ABE IS STILL A SUBSTANTIAL FACTOR (BOTTOM LINE IS THAT FLIGHT IS FORESEEABLE/REASONABLE).

CAN A **MURDER CHARGE** BE SUSTAINED? THE **REQUISITE MENTAL STATE IS MALICE** AND IT MUST REST UPON AN IMPLIED MALICE THEORY ON THESE FACTS. STUDENTS WERE EXPECTED TO FOCUS ON "EXTREME INDIFFERENCE - WANTON WILLFUL DISREGARD (WWD)" OR "FELONY MURDER" AS VIABLE MALICE THEORIES. BEST APPROACH WAS TO WORK THROUGH FMR FIRST AND THEN PIVOT TO WWD. THE UNDERLYING FELONIES WOULD BE "ATTEMPTED ROBBERY" WITH BEN AS VICTIM AND/OR COMMERCIAL BURGLARY (THE RE-ENTRY INTO DEWEY'S).

ALTHOUGH ROG #2 CALLS FOR DEFENSES, STUDENTS WOULD BE DRAWN TO THE DEFENSE DISCUSSION UNDER FMR, AS THE REQUISITE MENS REA FOR THE ENUMERATED FELONY MAY WELL BE NEGATED BY ABE'S INTOXICATION DEFENSE (STILL A POINT OF CONTENTION ON THESE FACTS). STUDENTS MUST NOT TREAT "INTOXICATION" AS A SLAM-DUNK. THE PIVOT TO WWD SHOULD COME AFTER A WELL-ROUNDED FMR DISCUSSION. **UNDER WWD THEORY, ABE'S INTOXICATION WILL NOT RELIEVE HIM OF CULPABILITY.** AFTER THE WWD (SECOND-DEGREE MURDER DISCUSSION), AN **INVOLUNTARY MANSLAUGHTER** DISCUSSION SHOULD FOLLOW (ARGUMENT WOULD BE THAT THE CONDUCT IS **CRIMINALLY NEGLIGENT**). NOTE, **NO ROOM FOR VOLUNTARY MANSLAUGHTER** HERE, AS ABE DID NOT INTEND TO KILL.

DEATH OF VERONICA: SAME AS ABOVE RE CLEM, BUT DIFFERENT SPIN/ANALYSIS ON CAUSATION. POINT VALUE HERE RESIDES IN THE "PROXIMATE CAUSE" DISCUSSION. DOES THE INFECTION BREAK THE CHAIN OF CAUSATION? NO! HERE, NO EVIDENCE OF EXTREMELY NEGLIGENT MALPRACTICE BY HOSPITAL PERSONNEL (OKAY TO MAKE THIS A POINT OF CONTENTION, BUT DON'T GO TOO LONG ON THE TOPIC).

ROG#2 DEFENSES: THE **CARDINAL RULE** RE DEFENSES TO FMR IS THAT DEFENSES AIMED AT **NEGATING MENS REA** FOR THE ENUMERATED FELONY ARE ALWAYS THE MOST POTENT BECAUSE A DEFENSE TO THE UNDERLYING FELONY **RENDERS THE FMR THEORY DOA.** INTOXICATION WAS MOST LIKELY TROTTED-OUT IN THE ABOVE FMR DISCUSSION, SO IT CAN BE FORMALLY DEFINED HERE AND TREATED WITH SOME DISPATCH. THE ABOVE WARNING RE "NO SLAM-DUNK" RELATES TO THE NEED TO **ID SPECIFICALLY WHETHER ABE WAS LABORING UNDER A LEVEL OF INTOXICATION** SO AS TO RENDER HIM UNABLE TO FORM THE REQUISITE MENS REA. WELL,...? WAS HE? LOTS OF ROOM TO ARGUE BOTH SIDES.

IF INTOXICATION IS ESTABLISHED, IT WOULD POTENTIALLY SERVE AS A DEFENSE TO ANY AND ALL SPECIFIC INTENT CRIMES - MEANING THAT ON THESE FACTS, IT MAY BE SUCCESSFULLY ASSERTED IN ALL CRIMES ACCEPT WWD (SECOND-DEGREE MURDER).

THE OTHER DEFENSE THAT IS LURKING HERE WITHOUT ALL THE FANFARE OF "INTOXICATION" IS "**CLAIM OF RIGHT**" OR POSSIBLY PACKAGED AS "**DEFENSE OF PROPERTY.**" BARROWING (CAUTIOUSLY) FROM TORTS AND "RECAPTURE OF CHATTEL" CONCEPTS, ABE MAY ASSERT THAT HE HAD A RIGHT TO RE-CLAIM HIS MONEY/WAGER. THE PROBLEM? HE USED DEADLY FORCE. CAN'T DO THAT.

QUESTION 2

ISSUE OUTLINE / PROF. COMMENTS

THE DESIGN PLAN FOR THIS QUESTION IS UNIQUE IN THAT THE PROMPT BEFORE THE INTERROGATORIES FEEDS STUDENTS THE SUBSTANTIVE CRIMES THAT CALL FOR DISCUSSION. THERE IS NO SUBSTANTIVE CRIMES TREASURE HUNT HERE. HOWEVER, THERE IS A REQUIREMENT TO RECITE THE ELEMENTS AND NUANCES OF THE PROMPTED CRIMES.

ALL THREE BAD-ACTORS ARE EQUALLY CULPABLE. BOONE IS CAST AS THE "HEAVY," AS HE HATCHED THE PLAN AND RECRUITED (**SOLICITED**) SLY AND REX. THE SOLICITATION **MERGES** WITH THE **CONSPIRACY**. SLY RELUCTANTLY AGREED (ARGUABLY UNDER DURESS) AND REX TRIED TO TEMPER HIS AGREEMENT BY TRYING TO LIMIT HIS ROLE/PARTICIPATION.

UNDER COMMON LAW "**PARTIES TO A CRIME**" LABELING, BOTH BOONE AND SLY WOULD BE P1'S, AS BOTH ARE INSTRUMENTAL AND ACTUAL PERPS. MODERNLY, ALL THREE MEN WOULD BE **ACCOMPLICES** PER GROUP CRIMINALITY PARLANCE/CONCEPTS.

THE OPERATIVE FACTS TAKE PLACE IN **CALIFORNIA**, AN **OVERT ACT** JURISDICTION FOR PURPOSES OF THE LAW OF CONSPIRACY. THE RULE FROM "**PINKERTON**" IS IMPLICATED AND IS MOST RELEVANT IN CONNECTION WITH THE NON CONTEMPLATED CRIMES (**ROBBERY** OF VERN - WALLET, WATCH AND GUN). ACTION CENTERS ON FORSEEABILITY AND WHETHER THE ROBBERY WAS "IN FURTHERANCE" OF THE CONSPIRATORIAL OBJECTIVES. ROOM TO ARGUE HERE.

SLY WILL ASSERT THE DEFENSE OF **DURESS/COMPULSION** IN AN EFFORT TO **NEGATE MENS MEA**. WOULD THIS DEFENSE RELATE TO BOTH CONSPIRACY AND THE COMPLETED CRIMES?

REX WILL ASSERT THAT HE MADE **EFFORTS TO THWART** THE CRIME BY TIPPING-UP TO VERN. THIS RAISES **WITHDRAWAL** AND POSSIBLY **RENUNCIATION** AS A DEFENSE. THE PROBLEM FOR REX IS THAT HIS CALL TO VERN WAS TOO LATE TO PREVENT OR THWART THE CRIME (SPLIT OF JURISDICTION AS TO AFFIRMATIVE ACTS REQUIRED TO EFFECTIVELY W/D.

1)

CRIMES COMMITTED BY ABE:

BURGLARY:

At common law, burglary is the breaking and entering the dwelling house of another with the intent to commit larceny or another felony therein at nighttime. Modernly, the rule for burglary has been modified significantly to allow for numerous exceptions. There is no longer a physical breaking requirement, nighttime requirement, and dwellings are no longer limited to houses. To satisfy concurrence, the mens rea for burglary (intent to commit larceny or another felony therein) must be present at the time of the actus reus (entry into the dwelling).

Here, Abe committed commercial burglary when he re-entered the tavern. He initially left to retrieve his handgun and returned by sneaking past the bouncer. By retrieving the handgun, he demonstrates his criminal mind to satisfy the mens rea requirement. He also made entry by sneaking in, which further supports his criminal mindset in knowing that he had to sneak in because he was not lawfully entering as any other innocent patron. The criminal intent was present at the time of entry when he snuck into the tavern. Therefore, concurrence is established and the elements are met.

he was sc'd!

Abe can reasonably be charged with commercial burglary.

ASSAULT:

Assault is an intentional act that causes reasonable apprehension of an imminent harmful or offensive touching. Assault is also a failed battery and a lesser included offense of robbery.

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✓ Here, Abe committed assault against Ben when he said "you have five seconds to return my money or I'll shoot you dead right here." Although Abe gave Ben five seconds, this is still sufficient to qualify as "imminent." Abe caused Ben reasonable apprehension that an imminent harmful or offensive touching, aka battery, would occur if he did not comply with his demand.

good Abe committed another ✓ assault when he fired a warning shot. The firing of the gun was sure to cause reasonable apprehension in Ben and all other patrons in the tavern that they were in imminent danger of a harmful or offensive touching. # of counts

Abe can reasonably be charged with assault.

BATTERY:

Battery is a willful, intentional, and ✓ non-consensual act that causes ✓ harmful or offensive touching. Battery is also a lesser included offense of robbery.

When Abe aggressively confronted Ben, it is unclear if they made any physical contact. If they did, Abe would be culpable for battery.

Further, the acts that led to the deaths of Veronica and Clem would constitute aggravated ^{signif. inj} battery if the murder charges were deemed inapplicable. If the murder charges to apply, battery merges with murder.

Abe could possibly be charged with battery of Ben if they made physical contact when Abe confronted him, and he could be charged with aggravated battery if it is determined that the murder charges do not apply.

ATTEMPTED ROBBERY:

Attempt is an act with the intent of committing a crime that falls short of committing the crime. An act is qualified as an attempt by applying the substantial step test to measure whether the defendant's conduct was mere preparation or perpetration. We can also apply the proximity test to establish whether the defendant was in the zone of danger to commit the crime. The possible attempted crime here is robbery. Robbery is the trespassory taking and carrying away the property of another with intent to permanently deprive through force or fear without consent or privilege.

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Here, it is possible that Abe committed an attempted robbery of Ben. Abe made a threatening statement toward Ben to return money that he claimed to be his. It is unclear if Abe or Ben is the rightful owner of the money. However, Ben was the possessor of the money. Abe issued a threat to establish force and/or fear to get Ben to part with the money. It can be inferred that he intended to permanently deprive Ben of the money since Abe believed it to be his. His threat serves as an attempt because he was in the zone of danger and he took substantial steps toward obtaining the money, i.e. issuing a threat.

Abe can probably be charged with attempted robbery.

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both fear and force apply

mtg. the LIO of robbery

EXTORTION:

Extortion is a threat of future danger if the recipient does not comply with a demand.

It could be argued that Abe's statement to Ben is extortion because he gave him five seconds to give him money otherwise he would shoot him.

Abe can possibly be charged with extortion.

HOMICIDE (KILLINGS OF CLEM AND VERONICA):

HOMICIDE:

Homicide is the killing of one human being by an act or omission of another. Here, there were two deaths: Clem and Veronica. Clem died when he fled from the tavern and was struck by a city bus. Although he was killed by a bus, Abe was the reason that Clem ran out of the tavern and ended up being struck. Thus, Clem died as a result of an act by Abe. Veronica died because she was struck in the arm by a bullet from the gun that Abe fired, she contracted an infection at the hospital, and died. A homicide is established because Veronica died as a result of an act by Abe.

CAUSATION:

A defendant must be the actual and proximate cause of the victim's death. Actual cause, or factual cause, can be measured by the "but for" test or the substantial factor test. Proximate cause, or legal cause, is a liability limiting device. The defendant is the proximate cause of the victim's death if the death was a natural and probable consequence of the defendant's conduct. The death must have been a foreseeable result of the defendant's conduct.

In Veronica's death, Abe is the actual cause because he fired the gun that struck her. But for Abe firing the gun, Veronica would not have been shot and died as a result of an infection in the hospital. Abe was a substantial factor in Veronica's death. Abe is also the proximate cause of Veronica's death. Death is a natural and probable consequence of firing a gun, even if it was fired up at the ceiling. It was inside a tavern where it is foreseeable that the bullet could ricochet and strike a patron. Thus, Abe is both the actual and proximate cause of Veronica's death. *→ what about the infection?*

In Clem's death, Abe is the actual cause because he created the chaos in the tavern that caused several patrons to flee, including Clem. But for Abe firing a gun inside the tavern, Clem would not have ran outside and been struck by a city bus that caused his death. Abe was a substantial factor in Clem's death. Abe is also the proximate cause of Clem's death

because it is foreseeable that patrons would run outside the tavern after hearing gunshots. The city bus striking Clem is not a superseding event that breaks the chain of causation. Rather, Clem running out of the tavern is a natural and probable consequence of Abe firing a gun inside the tavern. Thus, Abe is the both the actual and proximate cause of Clem's death.

If homicide is established, and the defendant is the actual and proximate cause of the victim's death, culpability may attach for murder.

MURDER

✓
A. Murder is the unlawful killing of a human by an act or omission of another with malice aforethought. Malice is the requisite mens rea for murder. There are four malice theories that can attach culpability for murder: intent to kill (express malice); intent to cause great bodily injury (implied malice); depraved heart murder/wanton willful disregard for human life/extreme recklessness (implied malice); and the felony murder rule (implied malice).

Murder in the first degree is the premeditated and deliberate intentional killing of another.

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Felony murder is also often charged in the first degree. Murder in the second degree consists of all murders other than first degree murders. Murders generally are all second degree murders and are either moved up to murder in the first degree if there are aggravating factors, moved down to manslaughter if there are mitigating factors, or stay put at second degree murder.

INTENT TO KILL: Express malice intent to kill is typically demonstrated by a defendant's words and conduct together. It is often a defendant's statements plus the use of a weapon to intentionally kill another that fit within this category. Words alone are not sufficient to establish express malice intent to kill.

✓ Although Abe did leave the bar to retrieve his handgun and re-entered with it, demonstrative of a criminal mind and some degree of premeditation and deliberation, there is no indication that Abe specifically intended to kill Clem or Veronica. Thus, this malice theory is inapplicable.

✓ INTENT TO CAUSE GBI: Implied malice intent to cause GBI is usually demonstrated by a defendant's conduct. This malice theory applies if the defendant intended to cause serious bodily injury and the victim died as a result of the injury. The death of the victim is unintentional but the defendant's conduct evaluated by the totality of the circumstances demonstrates that the defendant intended to seriously harm the victim.

✓ This malice theory is also inapplicable for the deaths of Clem and Veronica. There is no indication that Abe intended to harm either victim. Thus, this malice theory is inapplicable for the deaths of both Clem and Veronica.

✓ DEPRAVED HEART MURDER/WANTON WILLFUL DISREGARD FOR HUMAN LIFE/EXTREME RECKLESSNESS: Murders under this malice theory are the unintentional killings that occur as a result of the defendant's extremely reckless behavior. The defendant must have both notice and awareness that he is engaged in extremely dangerous conduct in which death is highly likely to occur from said conduct. The defendant has knowledge, notice, and awareness of the dangerous conduct, acknowledges it, and proceeds with the dangerous conduct anyway with no regard for others. These unintentional killings often happen when there are several people or bystanders in the area.

Here, Abe can be culpable for the deaths of both Clem and Veronica under this malice theory.

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For the death of Veronica, Abe fired a gun as a warning shot, which struck a ceiling fan, bounced off the fan, and hit Veronica. Firing a gun inside a crowded tavern is certainly dangerous conduct with a wanton and willful disregard for human life. It is extremely reckless and highly likely to result in death. The act rises far above ordinary negligence and is indeed extremely dangerous. The fact that Abe did not aim at Veronica, rather the bullet bounced around the tavern before striking Veronica, does not matter. Intent follows the bullet; therefore, Abe did not need to have the specific intent to kill Veronica. His complete disregard for her safety, as well as the safety of the other patrons, places liability on him for the depraved heart murder of Veronica.

✓

For the death of Clem, the same circumstances apply. Abe fired the gun inside the tavern extremely recklessly with no regard for what other patrons did, whether that was them actually being shot or frantically running out of the tavern. Here, Clem fell into the second category of those running out of the tavern toward safety. Abe knew but did not care that it is dangerous to fire a gun inside a tavern and allow patrons to run into the street to seek safety. Abe is culpable for the death of Clem under the depraved heart murder malice theory.

✓

FELONY MURDER RULE: Felony murder culpability attaches to a defendant for the unintentional deaths that occur during the attempt, commission, or flight from an inherently dangerous felony. The enumerated inherently dangerous felonies includes burglary, arson, rape, robbery, and kidnapping.

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force /
fear

It could be argued that the deaths of Clem and Veronica happened during the commission of a robbery or attempted robbery. Although Abe claims that the money that Ben had was his, Ben was the possessor of the money, and it is unknown whose money it truly was. Immediately prior to both deaths occurring, Abe aggressively confronted Ben and said "you have five seconds to return my money or I'll shoot you dead right here." The events that led to Clem and Veronica's deaths occurred immediately after Ben

laughed off Abe's demand. Because Abe was in the attempt or commission phase of the robbery, and the unintended deaths both occurred as a result of Abe's firing of a warning shot, felony murder culpability may attach.

clever theory
Abe can be held liable for the death of Veronica under the felony murder rule, but his culpability for the murder of Clem under this theory is questionable. There is a limitation to the felony murder rule for third party killers. Clem was technically killed by a city bus and whoever was operating it. Some jurisdictions hold that the defendant is still culpable for the death, as it was a natural consequence of the defendant's conduct, while other jurisdictions would rule that felony murder culpability would not attach because Clem's death was technically caused by a third party killer. *usually applies when 3rd is an intervenor*

✓ Abe can reasonably be charged with the murder of Veronica under a depraved heart murder malice theory (second degree) or under the felony murder rule (first degree). Abe can reasonably be charged with the murder of Clem under a depraved heart murder malice theory (second degree) and possibly under the felony murder rule (first degree).

CONCLUSION: Abe can reasonably be charged with burglary, assault, battery, attempted robbery, extortion, and two counts of murder for the deaths of Veronica and Clem.

ABE'S DEFENSES/FACTORS IN MITIGATION:

VOLUNTARY INTOXICATION:

Abe will probably raise a voluntary *✓* intoxication defense in an attempt to negate mens rea. This defense could apply to specific intent crimes. The argument here is that Abe was so intoxicated that he was unable to form the requisite mens rea to commit the crimes of which he is accused. Abe was heavily drinking at the tavern and when he was initially told to leave, the bartender told Abe to "go sober up." *✓* This statement serves to support Abe's

May serve as defense to underlying felonies for FUR defense

level of intoxication. If Abe can successfully convince the trier of fact that he was too intoxicated to form the requisite intent to commit the crimes, he may prevail on some of them. However, voluntary intoxication is an aggravating factor for general intent crimes and may hurt him more than help him pertaining to those crimes.

INVOLUNTARY MANSLAUGHTER:

✓ Abe will likely assert that the murder charges are too harsh and his conduct is more in line with involuntary manslaughter. Involuntary manslaughter is the unintentional killing of another without malice that is a result of criminal negligence. Abe will assert that his killings were both unintentional and his conduct was not extremely reckless and dangerous; rather, it leans more toward criminal negligence. It is possible that he would prevail on this argument.

LEGALLY ADEQUATE PROVOCATION:

✓ Abe may argue that he was provoked by Ben and all of his conduct in the tavern was a result of his provocation and done in the heat of passion. He could point to the bartender's statement to Ben to "knock off that sneaky play" as further support of Ben's provocation. Typically, legally adequate provocation and/or imperfect self-defense give rise to a charge of voluntary manslaughter. However, voluntary manslaughter is inapplicable here because the killings of Veronica and Clem were unintentional. Voluntary manslaughter applies to intentional killings resulting from legally adequate provocation and/or imperfect self-defense. Abe's assertions could possibly apply if he intentionally killed Ben in the heat of passion from legally adequate provocation aroused by Ben or imperfect self-defense in response to an act by Ben. However, the victims in the killings are Veronica and Clem. Neither Veronica nor Clem provoked Abe, and for voluntary manslaughter to attach, the provocation must come from the victim(s). Therefore, Abe

good job ruling out ✓

cannot point to his arguments with Ben to mitigate malice for his killings of Veronica and Clem.

DEFENSE TO ATTEMPTED ROBBERY:

Yes | Abe will likely assert two separate defenses to the charge of attempted robbery. If he can eliminate culpability for attempted robbery, he would also eliminate culpability for the deaths of Veronica and Clem under the felony murder rule malice theory. First, he would argue that he was the rightful owner of the money, so a robbery would be factually and legally impossible if he regained possession of his money. His second defense for the charge of attempted robbery would be to attach the attempt element. He would argue that his conduct was mere preparation rather than perpetration. It is unlikely that he would prevail on either defense because he used force and fear in firing a warning shot and all there was left to do was to actually commit the robbery by exerting caption and asportation of the money.

SELF-DEFENSE:

✓ Abe may try to argue that he was justified in his use of the gun because he was defending himself from Ben. However, deadly force can only be used in self-defense if one is faced with deadly force. Ben never displayed deadly force toward Abe. Ben simply laughed at him and made a dismissive remark. Abe was not faced with deadly force, and therefore, was not justified in his use of his gun, even if it was only to fire a warning shot.

DEFENSE OF PROPERTY:

✓ Abe may try to assert that he utilized his handgun and fired a warning shot because Ben was in possession of money that Abe believed to be his. Even if Ben did have Abe's money, Abe's use of his handgun was not justified. Deadly force cannot be used in defense of property. Thus, this defense will not apply.

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END OF EXAM

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QUESTION 2

1. State v. Boone

Conspiracy to commit burglary

Conspiracy is an agreement between two or more parties with the intent to commit a crime. Under common law, conspiracy was formed upon agreement when the party members had both the intent to enter into an agreement and commit the target crime.

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Modernly, however, many jurisdictions follow the Modern Penal Code (MPC) in requiring an overt act in furtherance of the conspiracy. Because the crimes in the fact pattern took place in San Luis Obispo, CA, an overt act is required because California follows the MPC. Here, Boone and Rex entered the conspiracy to steal prescription drugs, which was formed when Rex committed the overt act of "leaving the back service door unlocked" when leaving his shift at the targeted Rite Aid Pharmacy. As will be discussed below, that Sly entered the conspiracy under duress puts his membership of the conspiracy under question.

when
then
That Boone and Rex entered into an agreement to commit a crime and committed an overt act makes them culpable for conspiracy to commit burglary.

Accomplice Liability

When the fact pattern gives rise to group criminality, the act of any one party member in the commission of the target crime puts the other party members into play for culpability.

✓ Under Pinkerton, party members can also be culpable for the crimes of other party members that were not part of the original plan so long as they are foreseeable outgrowths and within the scope of the crime. Here, Boone and Rex, as members of a

Sol. zitation → Consp.

conspiracy, are encompassed under accomplice liability, and are therefore culpable for each other's crimes. Sly, having entered only under duress, may be exempt from group criminality in so far as the crimes relate to the conspiracy.

possibly

Burglary

✓ Under common law, burglary was the breaking and entering the dwelling of another in the nighttime with the specific intent to commit a crime therein. Modernly, however, the elements of burglary have been modified and expanded considerably. Relevant to the present facts, the "breaking" element has been expanded to include constructive breaking ✓ (e.g., the bad actor enters the premises via fraud or misrepresentation). "Dwelling" has also been expanded to include other structures beyond "dwelling houses," and commercial burglary is encompassed under this expansion. Here, Boone certainly entered into the pharmacy through the back service door that was left unlocked by Rex with the specific intent to commit larceny. Additionally, Boone engaged in constructive breaking, where he passed through the usually locked door, engaging in a trespassory entry. If, however, entering through an unlocked door is insufficient, Boone also entered into a ✓ "separate and secure part of the store" (para. 2) where the prescription drugs were presumably held. Because the requisite elements of burglary can be formed before entering a room within a structure, where the bad actor entered the structure without the requisite intent, Boone satisfied the elements of burglary when he entered the secure part of the pharmacy.

Boone, therefore, could be held culpable for burglary.

Attempted Burglary

Attempt occurs when the bad actor has the specific ✓ intent to commit a crime and takes substantial steps in doing so, but falls just short of completing the crime. The point of

Attempt re cutting the glass?

contention regarding attempt rests on preparation versus perpetration, since the bad actor must be sufficiently through the zone of perpetration to be held culpable for attempt. Traditionally, attempt was determined using a proximity test, where how close the bad actor came to committing the crime was the determining factor. Modernly, the MPC uses the substantial step test, where a substantial step in the furtherance of the crime's commission can be sufficient to establish attempt. Here, Boone met the aforementioned elements of burglary; therefore, the attempt charges merges with the completed crime of burglary.

Therefore, Boone will not be liable for attempted burglary.

Here, there is a completely Burg and attempted burg.

Robbery

Robbery is the taking of the possession of another from their person or presence by force or fear with the intent to permanently deprive the owner of the possession. Here, although Boone "picked up Vern's gun" and "slid [it] under a counter display," he did not have the requisite intent of permanently depriving the owner of the possession. Indeed, Boone was seemingly disarming Vern rather than using force or fear to dispossess him of his weapon. Furthermore, although intent to deprive owner of possession can be established in some cases by putting the possession beyond retrieval of the owner, sliding the gun under a display case, where it is easily retrieved, does not constitute the requisite intent.

good

Therefore, Boone is not likely culpable for robbery.

Larceny

Larceny is the trespassory taking (caption) and carrying away (asportation) of the possession of another without privilege or authorization with the specific intent to permanently deprive. Larceny is a lesser-included offense (LIO) of robbery, as larceny's

elements are also encompassed in robbery's. As an LIO, Boone may still be culpable for larceny. In the present facts, Boone used a glasscutter in an attempt to reach the drugs. However, the facts do not establish that Boone reached the drugs, thus failing to satisfy the taking and carrying away elements of larceny.

Therefore, Boone is likely not culpable for larceny.

Aggravated Assault

Assault occurs either as an attempt to commit battery or as the intentional creation of reasonable apprehension of imminent bodily harm in another. Mere words are insufficient to establish reasonable apprehension; an additional act is required. Assault is an LIO of robber, as the "by fear" element connotes assault. Aggravated assault occurs when the bad actor uses a deadly weapon. Here, Boone did not have a weapon. Indeed, Boone did not create reasonable apprehension of imminent harm in Vern, either.

Therefore, Boone is not likely culpable for aggravated assault.

Aggravated Battery

Battery is the application of unlawful force upon another, directly or indirectly, causing bodily injury or offensive touching. As noted, battery can be caused indirectly if the bad actor puts in motion some force (e.g., a rock) or makes contact with some object attached to the victim (e.g., a backpack). Here, Boone did not make contact, directly or otherwise, with Vern.

Therefore, Boone is not likely culpable for aggravated battery.

2. State v. Sly

Conspiracy: whether Sly actually joined the conspiracy when under duress

attempt to
enter sep.
structure -
enclosure?

As stated above, Boone and Rex both entered into a conspiracy when they agreed to commit the crime and when Rex committed the overt act of leaving the pharmacy door unlocked. However, whether Sly entered the conspiracy is more dubious because he acted under duress. Duress can be a defense to a crime (though not where deadly force is concerned) when one person commits a crime only because they were threatened by another to do so. Here, Sly "did not want to participate" at first, and only joined when Boone "threatened to report Sly's drug use to Sly's probation officer" (para. 1). Presumably, had Boone not threatened Sly, the latter would not have participated at all. Sly, therefore did not intend to enter into an agreement to commit the target crime, and thus did not have the requisite mental state to make him culpable of conspiracy. Sly's lack of membership to the conspiracy also prevents him from being culpable for the subsequent crimes within the scope of the conspiracy and target crime. However, Sly is culpable for other crimes that were committed outside the scope of the conspiracy.

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Aggravated Battery

✓ The rule for battery established above, Sly is likely culpable for battery. In the fact pattern, Sly "struck Vern in the head with a large piece of the broken glass," thus satisfying the elements of battery. That Sly used a potential lethal weapon similarly makes him culpable for aggravated battery.

Therefore, Sly is likely culpable for aggravated battery.

Aggravated Assault

✓ The rule for assault established above, Sly is likely culpable for assault, having satisfied the elements of the offense. Furthermore, Sly is liable for aggravated assault since he wielded the potentially lethal weapon of a shard of glass. Indeed, although under Common Law, mayhem was a separate offense, modernly, mayhem is a form of aggravated assault.

Mayhem can be established through disfigurement (while CL required full dismemberment), and the facts establish that Vern will require "future reconstructive surgery on his face."

Therefore, Sly is likely culpable for aggravated assault.

Defense: Duress

Because Sly entered into the conspiracy only because of Boone's threat to tell Sly's probation officer about Sly's drug use, Sly may be successful in exerting the defense of duress to the crimes within the scope of the conspiracy. However, duress will not be viable for the crimes executed outside of the conspiracy's scope, such as assault and battery.

Defense: Diminished Capacity

Sly may argue for diminished capacity as a defense since the facts suggest he was using drugs. If Sly was suffering from withdrawal or using drugs on the night in question, then he may advance the defense of duress. However, the facts are insufficient to suggest this.

3. State v. Rex

As discussed above, Rex entered the conspiracy with Boone and committed an overt act in furtherance. Rex, then, is liable for conspiracy to commit burglary. However, Rex's attempt to withdraw may have barred culpability for the other crimes.

Withdrawal

Most jurisdictions allow withdrawal as a defense from crimes committed after the conspiracy is formed (notably, withdrawal is not viable for the crime of conspiracy itself). While some jurisdictions merely require that the party member communicate his

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✓
withdrawal to his fellow party members, others require that the member attempt to neutralize or thwart the commission of the crime. The communication of withdrawal and crime-thwarting (if applicable), must be timely. Here, Rex did not communicate his withdrawal to his fellow conspirators. Furthermore, Rex did not attempt to thwart the commission of the crime until 10:40, a mere five minutes before Boone and Sly were set to arrive. Therefore, Rex may not be successful in his withdrawal attempt, likely making him culpable for the same crimes Boone is liable for.

END OF EXAM