

San Luis Obispo College of Law

Midterm Examination

Criminal Law & Procedure

Fall 2022

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 75-100 words.

MIDTERM EXAMINATION  
CRIMINAL LAW (SLOCL)  
PROF. STEPHEN F. WAGNER  
FALL 2022

Question #1

Don owns and operates the Muddy Duck, a sports bar and grill in Big Sid, CA. Don suspected that one of his regular customers, Mick was secretly dating Don's wife Jane. Jane worked evenings and weekends at the Muddy Duck and served primarily as a hostess. Don asked Joe, the manager of the Muddy Duck to "keep an eye out on Mick and Jane and to report back to me (Don.)" Don knew that Joe would be the right man for the job because Joe was both intelligent and dangerous. Joe realized the importance of this assignment because he owed Don several thousand dollars. Two nights later, Joe approached Mick and Jane as they were walking towards Jane's car. Just as Mick was about to open the car door for Jane, Joe yelled out, "Don ordered me to put your eyes out, business is business." Joe then lunged toward Mick and Jane and stabbed Jane in the face with a corkscrew. Mick, realizing that Jane was in great danger, retrieved a pistol from inside his car. Mick pointed the loaded pistol at Joe and told Joe to "drop his wallet on the ground and start walking."

As Joe started walking away, Jane told Mick that during the struggle by the car Joe took a strand of emeralds that she was wearing. Mick, with pistol in hand, ran after Joe and demanded the return of the emeralds. When confronted by Mick, Joe punched Mick in the nose, causing Mick to fall to the ground. The police arrived just as Mick fell to the ground. Both Mick and Joe were arrested. At the time of his arrest, Joe was not in possession of the emeralds. Joe told the arresting officer that he was just carrying out the orders given by Don. The Big Sid police have submitted incident reports to the appropriate prosecuting agency. Assume for purposes of this question that Joe's statement to the arresting officer is legally admissible.

1. Discuss all the criminal charges that Joe may face and the likely defenses that he would assert.
2. Discuss all the criminal charges that Mick may face and the likely defenses that he would assert.
3. Discuss all the criminal charges that Don may face and the likely defenses that he would assert.

*END QUESTION*

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Question #2

For several weeks, Alex, Blake, Clem and Duke planned to rob the Safe & Speedy Co., which was in the business of transporting bank deposits and negotiable bonds. On the day set for the robbery, they drove to the location of Safe & Speedy Co. Alex stayed in the car parked at the corner, Duke stood near the entrance at a point where he could see Alex, while Blake and Clem entered the Safe & Speedy office, drew guns and ordered the cashier to unlock the vault. At the time loud noises were heard, Duke dashed in and yelled to Blake and Clem to “beat it” and, as they were running to their car, Duke told Blake and Clem that Alex had started a fight with a pedestrian and a crowd was gathering. The instant Blake and Clem began to run, the cashier of the Safe & Speedy Co., got his revolver, chased them, and shot and killed Blake. When Clem and Duke reached the car, Clem, infuriated at Alex’s stupidity in upsetting their plans, cursed him, drew his gun and killed Alex.

Metro police officers responded to the scene when a silent alarm was triggered. Clem and Duke were arrested and the Metro Police Department has submitted reports to the Metro County District Attorney. The Metro County DA’s Office policy is to carefully consider all potential homicide-related theories and to advance alternative theories, if appropriate.

1. Discuss the criminal liability of Clem for the death of Blake.  
What potential defenses would you expect Clem to advance? Discuss.
2. Discuss the criminal liability of Clem for the death of Alex.  
What potential defenses or factors in mitigation would Clem likely claim? Discuss.
3. Under what theory or theories might the prosecution file homicide-related charges against Duke for the death of Alex?  
Discuss.
4. Discuss the criminal liability of Duke for the death of Blake.  
If you determine that Duke’s criminal liability for the death of Blake is the same as Clem’s, clearly discuss the legal theory or theories.

*END QUESTION*

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**ISSUE OUTLINES / PROFESSOR COMMENTS, 2022 MID TERM Q'S TWO AND THREE**

**Prof. S. Wagner, Criminal Law & Procedure**

QUESTION TWO (State vs. Clem and Duke)

1. Clem was not the actual killer of Blake. Students were expected to discuss the possible theories of criminal liability/culpability in a setting where the target defendant was not the actual killer. It was important to identify the fact that some type of "implied malice" theory should have been considered (either FMR or wanton-reckless, extreme indifference) in order to find Clem criminally liable for the death of Blake.

The two malice theories share the attribute of "extreme recklessness" and each naturally trigger a discussion on the topic of whether Blake's death was foreseeable. The best method of framing the "foreseeability" issue would have been to ask whether, in light of all the circumstances, the cashier's actions/response was reasonably foreseeable.

Students were not expected to cite with precision the number of jurisdictions that would not apply the FMR on these facts (3<sup>RD</sup> Party Killer R.)

Did the cashier exceed the scope of self-defense? Was the cashier defending property? Was the cashier preventing a crime? If the cashier did in fact exceed the scope, does that necessarily mean that the cashier's actions were not foreseeable? These inquiries or a variation needed to be raised so as to address the issue of causation.

There was an overwhelming amount of facts to be used to support and bolster a hearty "causation" and "foreseeability" discussion.

Clem did not have any affirmative defenses (no supporting facts for "justification" or "excuse"), meaning that the "potential defenses" prong of this interrogatory was inviting a discussion on challenging the prima facie elements of the potential substantive offenses. This was the cue to discuss "causation" and to label the cashier as an unforeseeable intervening act/actor – some type of "chain breaking" mission should have been considered.

2. Did the student cite to the facts that linked Clem as the actual killer and then move on to the potential malice theories? Premeditated, deliberate intent to kill was definitely a possibility on these facts. Did the student cite to the facts that may support premeditated, deliberate intent to kill? What is the rule re extent of “reflection?” Although “motive” is not a required element in a murder prosecution, did the student consider Clem’s motive(s) for wanting Alex dead? Might the presence or absence of “motive” impact the “intent to kill” component of either 1<sup>st</sup> Degree or 2<sup>nd</sup>? All of the malice theories could have been considered in this interrogatory – that is, there is factual support for all.

Would Clem attempt to mitigate the malice by claiming that the appropriate charge is voluntary manslaughter? There is no imperfect self-defense on these facts, so Clem would be left with HOP. What is the rule re legally adequate provocation? How is provocation measured? Do the facts support that Clem’s passions were aroused? Is the provocation here subjectively reasonable? Is it objectively reasonable?

3. A short discussion was expected here. *Pinkerton* liability (conspiracy,) accomplice liability and/or aiding and abetting theories were all good discussion points. Again the student was faced with the task of finding criminal liability even though Duke was not the actual killer of Alex. Did Duke encourage Clem to kill Alex? Did Duke’s actions arouse the passions of Clem?
4. The criminal liability of Clem and Duke for the death of Blake would in fact be the same. The same theories would apply. This marked a second opportunity for students to ID “group criminality” and to discuss the theories of complicity and the notion of vicarious liability.

#### QUESTION 1 (State v. Joe Mick and Don)

1. The evaluation of Joe’s criminal liability should begin at the point that he begins to follow/approach Mick and Jane. It was anticipated that students would follow Joe and identify all of the potential criminal acts, citing to the facts that link to the elements.

Although a brief discussion of Joe entering a conspiracy (with Don) may have been warranted, that discussion was best placed under State v. Don (see below). Assault (aggravated,) battery (also aggravated) and/or assault with a deadly weapon were required discussions. Raising and quickly dismissing a theory of attempted murder (with Jane as the victim) was appropriate, so long as precious time was not wasted – the problem was no specific intent to kill.

Mayhem was a potential crime on these facts. Of course this required the use of reasonable inferences (corkscrew to the face could have resulted in disfigurement.) Intent to disfigure could be shown by the overall conduct.

Did Joe commit a theft offense? The emeralds may have in fact been taken by Joe. The facts suggest that Jane saw this taking. Does this qualify as a robbery? The emeralds do in fact warrant a discussion on the crime of robbery and therefore call for a discussion of the notion of lesser-included offenses. Joe may have committed another battery when he punched Mick in the nose. The potential defense would be self-defense. What are the rules? Can the initial aggressor win back the right to use SD? It is expected that students would discuss the issue of Joe not being in possession of the emeralds when he was arrested.

Joe's defenses are rather limited. He can challenge the state of the evidence by arguing a lack of the prima facie elements (and arguing no mens rea) and he may assert a duress defense – financial, emotional form of coercion. It's a loser so hopefully it was addressed mildly.

2. Mick may be charged with assault, battery and a theft offense. Robbery is also a possibility (the drop the wallet = attempt?) and the "demand of the return of the emeralds." Hopefully these were all discussed/defined above, so you can cut to Mick's potential defenses. Mick's goal here will be to cloak himself in the "good Samaritan" role, acting to defend Jane and to thwart dangerous crimes. The factual and legal question is whether he went too far. What rules apply re defense of others? What are the rules re deadly force used to regain property?

3. Don's criminal liability (if any) must have been predicated on a "group Criminality" theory, as Don was not the actual bad actor. Did Don solicit or entice Joe to commit a criminal offense? Why or why not? The goal was to ID the problems proving specific intent. Did Don aid, encourage Joe? Can Don qualify as an accomplice? Is there an agreement to commit a criminal offense? Did the student cite to the difficulties with proof for any criminal charges, including conspiracy, against Don? Don will probably not be successfully prosecuted for any criminal offenses on these facts.

1)

### CRIMINAL CHARGES--JOE

Joe may be charged with the following criminal charges (1) conspiracy; (2) robbery; and the lesser included offenses of (3) battery; (4) assault; and (5) larceny.

### CONSPIRACY

Conspiracy is an agreement between two or more actors to commit a crime. A conspiracy is formed at the moment of agreement.

At CLC

Don asked Joe to keep an eye out on Mick. Joe agreed. Don's wording of what he was asking Joe to do may be objectively ambiguous, however, Joe perceived this to mean the literal removal of Mick's eye. It can be inferred that Joe's knowledge of this being an important job and the fact that he owed several thousand dollars to Don supports that Joe believed he was agreeing to a plan to commit a serious battery against Mick. Therefore, a conspiracy was formed upon Joe's agreement to Don's request.

Handwritten initials

problem is "plurality" - 2 or more minds

### ROBBERY

Robbery is the caption and asportation of the personal property of another where the true owner parts with the property by way of force or fear, with the intent to deprive the owner of the property permanently.

Joe may be charged with a robbery because of the allegation that he took Jane's emerald necklace, during his battery against her face, with a dangerous weapon--the corkscrew--which would also cause apprehension of an imminent threat of force in Mick. The facts are unclear whether Joe actually did take Jane's necklace. However, because he owed Don several thousand dollars, it may be inferred that he saw an opportunity to put a dent in the

F/A  
⊕

debt that he owed to Don, during his struggle with Jane, by taking and selling the necklace to repay Don. Even though Joe did not have possession of the necklace, he may have had constructive possession if he in fact tossed the necklace somewhere where he would know to retrieve it later.

*or momentarily*

### BATTERY

*nonconsensual*

Battery is the unauthorized harmful or offensive contact with another.

*Battery and Assault V's*

In his attempt to complete the target crime of serious battery against Mick, Joe stabbed Jane in the face. This is a serious aggravated battery because it involved a deadly weapon and caused maiming and likely disfigurement of Jane's face.

*good*

Additionally, Joe may be charged with battery for punching Mick in the face. Hitting Mick in the face, is a harmful and offensive contact.

### ASSAULT

*L10*

Assault is a failed battery or the creation of an apprehension, fear of imminent force or threat of force.

*←*

Joe failed in his attempted target crime of serious aggravated battery against Mick. However, this does meet the element for an assault as a failed battery and also in the creation of an apprehension of imminent force.

*⊖ P or*

### LARCENY

*L10*

Larceny is the taking and carrying away of the personal property of another with the intent to deprive the owner permanently.

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Facts like the money owed to Don support that Joe may have had the requisite intent to deprive Jane of her personal property.

## DEFENSES

Defense would argue that Don only asked Joe to keep a watchful eye on Mick, not Jane. Further, as Jane's boss, maybe Don was merely asking Joe to make sure that one of the regular patrons, Mick, was not harassing Jane. It isn't clear whether or not Don ever told Joe about the suspected affair. So it's reasonable for Don to ask a manager to "keep an eye out" on a patron who might be bothering staff.

As Mick was walking to Jane's car, Joe may have thought that Mick was trying to kidnap Jane. He may have attacked Mick in self defense of others because he reasonably thought Jane was about to be the victim of a crime. There aren't any facts to support that Joe even was aware of the affair. A reasonably objective person may have believed that another man's wife, getting into a man's car would seem strange. When added the fact that Don had just asked Joe to keep an eye out on Mick, together, it's reasonable that Joe may have thought Jane was in danger.

Regarding the theft of the necklace, defense would argue that Joe was not in possession of the necklace. The necklace may have broken and fallen to the ground when Joe missed his target of Mick and accidentally came into contact with Jane's face. Defense would argue that Joe never intended to harm Jane, in fact he was defending her, and he has no idea where the necklace is. Because this occurred at night, it is possible the necklace is on the ground somewhere. Defense would argue that Don's orders to Joe were reasonable...just an asking a manager to keep an eye out on a frequent patron who may be harassing the staff (Jane.) The fact that Joe referred to these instructions as orders is simply how Joe usually takes orders from the owner of his employment.

*1-2 A-C*  
*sub + obj factors?*

WHen Joe hit Mick, it was in self defense, as Joe was walking away when Mick approached him and it is valid self defense because he used reasonable force to defend against a serious threat because Mick had a gun.

CRIMINAL CHARGES--MICK

ATTEMPT

Attempt is an act, or a substantial step done in in furtherance of the target crime.

Mick may be charged with attempted robbery because he held up a gun to Joe and demanded that Joe put down his wallet onto the ground. Holding the gun to Mick was threat of force or fear. It is unclear whether or not Joe actually did put his wallet on the ground. Therefore, the facts do not support plain robbery. The absence of whether or not Joe put the wallet on the ground and whether or not Mick picked up the wallet mean that the charge can only be for attempt of the target crime.

*wallet dropped to ground would be completed crime*

*F/A*  
*(+)*

ROBBERY

Robbery is the caption and asportation of the personal property of another where the true owner parts with the property by way of force or fear, with the intent to deprive the owner of the property permanently.

ASSAULT

Assault is a failed battery or the creation of an apprehension, fear of imminent force or threat of force.

Holding the gun up to Mick created a apprehension of imminent threat of force.

*L10*

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## LARCENY

Larceny is the taking and carrying away of the personal property of another with the intent to deprive the owner permanently.

Absent other facts as to the motive for Mick demanding Joe put his wallet on the ground, we may reasonably infer that the only cause for this would be to deprive the owner of his wallet, permanently.

## DEFENSES

Defense might **advance an** argument that Mick held up his gun to Joe in self defense and defense of his friend. They are both valid defenses because Joe's violent attack created an apprehension of immediate, imminent force. Defense might also argue that Mick merely wanted Joe to put his wallet on the ground so that he could get an ID for the person that just attacked his friend, Jane.

*Others + Crime prevention*

*yes!*

## CRIMINAL CHARGES--DON

### ACCOMPLICE LIABILITY

### CONSPIRACY

Don asked Joe to Keep an eye out on Mick, which prosecution may argue was a planned agreement with Joe to cause physical harm or disfigurement to Mick, the suspected lover of Don's wife, Jane. Don knew Joe was an intelligent and violent person, and it is reasonable to think that Don deliberately left his comments ambiguous to Joe, in an attempt to avoid his own culpability, fully knowing Joe would interpret them in a violent way. Therefore, Don may be charged with conspiracy to commit aggravated battery.

*≠ a crime*

*What is problem = No S.I.*

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## PINKERTON RULE

Under the Pinkerton Rule, all accomplices are liable for any foreseeable crimes committed in furtherance of the target crime. Under this theory, all of Joe's criminal charges (above) extend to Don.

## DEFENSES

Defense would advance an argument that Don never specifically ordered Joe to do anything other than keep an eye out on a patron that was frequently seen near another employee at the bar. Defense would argue that Don would never intend to harm his own wife or maim her face, nor steal her necklace.

**END OF EXAM**

2)

1. Clem (C) , in relation to the death of Blake (B)

✓ **Burglary** is the unlawful breaking and entering the property of another with the intent to commit a felony or theft. Here, C committed a constructive breaking when he entered the Safe and Speedy with an unlawful purpose. His intent was to rob the business.

**Robbery** is the taking and carrying away the property of another from their person or possession through force or fear. Here, C was attempting to steal the money and bonds from the safe at Safe & Speedy. B and C used guns and ordered the cashier to unlock the vault which is both force and fear.

**Homicide** is the killing of one human being by another. Here, the Safe & Speedy cashier shot and killed B.

**Causation:** To be culpable for murder, actual and proximate causation must be proved beyond a reasonable doubt. Actual causation is the "but for" the actions of the defendant, the victim would not have been killed. In this case, the cashier was the actual cause of B's death. However, the proximate cause is C and the other members of the conspiracy because being shot in the commission of the robbery was a foreseeable consequence. Additionally, the felony murder rule imputes causation onto B (see below).

**Murder** is the unlawful killing of a human being with malice aforethought. Malice is proved through express malice, the intent to kill as evidenced by words or use of a deadly weapon, or through implied malice. Implied malice is proved one or more of three ways: through 1) intent to cause great bodily injury; 2) wanton, willful disregard for human life; or 3) the felony murder rule (FMR). Felony murder is first degree murder and is a killing that occurs during the attempt, commission, or flight from an enumerated felony or in

some jurisdictions, another inherently dangerous felony. The enumerated felonies are burglary, arson, rape, robbery, and kidnapping. Here, a burglary was committed and a robbery was attempted. The killing does not have to be committed by one of the defendants, a killing by another party involved in the crime falls under FMR also. Here, the cashier shot B as he was attempted to flee from the attempted robbery. Therefore FMR would apply.

3d P killer rule

**Defenses:** There aren't any apparent defenses available to Clem.

- FMR

- Accomplishes

- Aides

**Conclusion:** Clem is criminally liable for the death of Blake.

2. Clem (C), in relation to the death of Alex (A)

### Homicide/Causation/Murder

In this case, the cause of the homicide is more direct. C is the actual and proximate cause of A's death because he shot him. Here, express malice murder in the first degree would be a potential charge for C. That is the premeditated, deliberate, intent to kill. The premeditation doesn't have a specific time frame--any time that allows for deliberate action can be enough. Here, C, mad at A for ruining their plans, cursed A, drew his gun, and shot and killed A. If it can't be proven in court that the killing was deliberate and premeditated, express malice with intent to kill would be an alternate theory because C used a deadly weapon. If his curses toward A included a death threat, that would also go toward the intent to kill.

**Defenses:** C will likely argue that his actions were not premeditated in order to be culpable with second degree murder instead of first. Even though he was angry, heat of passion cannot be a defense because he was a cause of the situation and being angry at an accomplice would not be a legally adequate provocation.

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**Conclusion:** Clem is criminally liable for the death of Alex.

3. Duke, in relation to the death of Alex

**Conspiracy** is an agreement between two or more people to commit an unlawful act. Under common law, only an agreement, or meeting of the minds was necessary, but modernly, most jurisdictions also require an overt act by one of the members of the conspiracy. Here, our fact pattern tells us that Alex, Blake, Clem, and Duke had planned to rob Safe & Speedy for several weeks from which we can infer that they all agreed with the plan. Additionally, driving to the location with guns provides the overt act. The importance of the conspiracy in this situation is that all members of the conspiracy become liable for the actions of all the other members.

F/A  
⊕

**Accomplice liability:** all members of the conspiracy are culpable for crimes committed in furtherance of the conspiracy or any other foreseeable crimes committed by their co-conspirators. Although A's killing would not be in furtherance of the conspiracy, armed robbery is an inherently dangerous activity and it is not outside of the scope of foreseeability that one of the accomplices would be killed, even if at the hands of another accomplice.

✓

**Defenses:** Duke will most likely argue that C killing A was so far outside the scope of the planned crimes that accomplice liability doesn't apply.

**Conclusion:** The prosecution might file homicide related charges against Duke under the theory of accomplice liability.

4. Duke, in relation to the death of Blake

**Murder: FMR** (see #2) Duke could be liable for felony murder for exactly the the same reason as Clem.

+ Accomplice  
+ Aider

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Conclusion: Duke is criminally liable for the death of Blake under the felony murder rule.

**END OF EXAM**