

MONTEREY COLLEGE OF LAW  
MIDTERM EXAMINATION  
FALL 2016

**CRIMINAL LAW**

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Instructions

1. This examination consists of three sections of equal value. There is a three (3) hour time limit to complete the exam.
2. Section 1 consists of 30 multiple choice questions. Circle the letter corresponding to the correct answer. Please write your ID number (not your name) and your professor's name on page 1 **NOT AVAILABLE TO STUDENTS**
2. Two essay questions comprise the remainder of the exam. Make sure that you read each essay question carefully before answering. Attempt to organize your answer before you start writing.
3. The essay questions test primarily on your ability to apply the law to the facts. The best answer is one that includes 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.
4. There are multiple issues to address in the essay questions. Some issues are fairly straightforward and do not require detailed analysis. Other issues are more complicated; those issues merit more extended discussion.
5. Bluebook Users/Essays -- Please write your ID number (not your name) on the cover of each of your bluebooks. Write your professor's name. Number your bluebooks. Return every page of this examination along with your bluebooks. Write on only one side of each bluebook page. Your answer must be double-spaced. Make sure your answer is legible. You will get no credit for words or sentences that we cannot read.
6. Computer Users/Essays -- Please type your ID number (not your name) at the beginning and end of your essay. Also type the name of your professor at the beginning. Return every page of this examination along with your answer.
7. This exam has nineteen (19) pages including this instruction sheet.

Criminal Law Mid-term Exam 2016

Question 2

Bob was 60 years old and had experienced extreme difficulty with alcoholism his entire adult life. But most recently Bob had managed to remain sober for six consecutive months. Unfortunately last Friday Bob went out with his favorite drinking buddy Mark. Mark was 20 years younger than Bob and Bob knew that when Mark drank he often became belligerent. Bob also knew Mark had been arrested several times for assaulting other bar patrons.

Bob and Mark both became very intoxicated while playing pool at a local bar. Mark cruelly taunted Bob about Bob's inability to keep a job and Bob's unhappy marriage. Mark also taunted Bob about Bob's impotency. Mark continued to demean Bob in the presence of other bar patrons for over an hour. Finally, Mark loudly bragged to all present that Mark was having an affair with Bob's wife.

Bob picked up his pool cue and threatened to knock Mark's head off. Holding his pool cue, Mark laughed and pushed Bob with his open hand. Bob smashed his pool cue repeatedly across Mark's forehead, splitting his skull, and causing Mark's death.

At his homicide trial Bob testified that he did not intend to kill Mark, but was trying to stop him from blurting out hateful comments and he feared Mark would strike him with a pool cue.

**Only** discuss forms of **homicide** and any **defenses** reasonably implicated by these facts.

What would the prosecution argue?

What would the defense argue in response?

What in your opinion would a jury decide?

## Criminal Law Mid-term exam 2016

### Question 3

Dave and Joe met to plan a bank robbery. They agreed that Joe would drive Dave to the Community Bank, drop Dave off, and return in 15 minutes to pick up Dave from an underground parking area 2 blocks from the Community Bank. The two would split up the stolen funds when they had returned to Joe's house.

On the designated day, Joe dropped Dave off at the Community Bank and drove away. Dave entered the Community Bank and saw a uniformed police officer in the office of the bank manager. Dave abandoned the plan to rob the bank. Frustrated, he walked quickly to a neighboring jewelry store, entered the store, pistol whipped the clerk, and fled with his hands full of stolen jewelry and Rolex watches.

Joe picked up Dave 15 minutes later at the agreed upon underground garage location.

As Joe drove away from the parking garage Dave explained why he robbed the jewelry store instead of the bank. Joe was enraged. He told Dave that he was friends with the clerk at the jewelry store and wanted no part of the robbery proceeds. Joe parked on a side street and demanded that Dave get out of his car.

With all of the loot, Dave got out of Joe's parked car without looking. He accidentally bumped a passing cyclist who crashed into a parked car, killing the cyclist immediately. The police quickly arrived and arrested both Joe and Dave.

What crimes should the DA consider filing against Joe? Why?

What should Joe's attorney argue in defense to each of the potential charges?

Should Joe be found guilty or not guilty of each potential crime? Why?

Do not discuss aiding and abetting.

## QUESTION 2 ANSWER OUTLINE<sup>1</sup>

Scoring ranges in magnitude from + to +++++

Credit will be denoted by the number of + symbols awarded. ½ = half of a +

No credit = Ø

Overview (students should not include an overview and no credit is available for one): The question presents a vehicle for students to discuss homicide mens reas and to apply facts to the law. There are no actus reus or causation issues. The central issue in this question is whether Bob is guilty of murder or voluntary manslaughter. Students should discuss both express and implied malice and both heat of passion and imperfect self-defense voluntary manslaughter. For defenses, students should explain why perfect self-defense is not viable and discuss voluntary intoxication. Involuntary manslaughter is not reasonably implicated because by law voluntary intoxication cannot negate the mens rea of a conscious disregard for human life. Therefore, this mens rea is clearly present on these facts. The best answer will thoroughly analyze the facts on both sides because with a basic understanding of homicide law, the issues presented are fairly obvious. The analysis is more complex.

### **+Issue 1: Did Bob commit first degree premeditated murder?**

**++Rule:** Requires the intent to kill.

Premeditation and deliberation: Before completing the acts that cause death, D carefully weighed the considerations for and against the killing and decided to kill.

**+++Analysis and conclusion:** Did Bob have the intent to kill? He testified otherwise and Mark was his buddy. Voluntary intoxication can negate premeditation and deliberation. Did Bob carefully weigh the considerations? The prosecution would argue that repeated blows with enough force to kill constitutes deliberation. Bob also threatened Mark with the pool cue, did not use it immediately, but instead had time to deliberate before he did use it. The defense would argue that Bob did not carefully weigh any considerations, but instead reacted from rage fueled by intoxication. He reacted to Mark's use of force and taunting rather than deliberating.

### **+Issue 2: Did Bob commit second degree murder?**

**Rules (Two types):**

+1. Intent to kill (**express malice**) *without* deliberation or premeditation; **OR**

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<sup>1</sup> This outline is not a model answer because it may not include model analysis (a complete and thorough analysis of all facts) and may not offer a conclusion. The outline is designed to assist professors in grading exams and as a key for students to identify issues and the applicable law. See best student answer for examples of analysis and conclusions. Better answers address major issues thoroughly where more points are available. Points will be deducted for failure to use IRAC. Points may be deducted if an answer addresses minor issues without spotting central issues.

**+2. Implied Malice:**

- a) Natural and probable consequence of act dangerous to human life (it was foreseeable a person could die); and
- b) D purposely acted knowing the danger to, and with conscious disregard for, human life.
- c) Defense limitation: Voluntary intoxication is not a defense to implied malice second degree murder unless D unconscious (credit given once under defenses below).

**+++Analysis and conclusion:** The prosecution would argue that Bob acted with at least a conscious disregard for human life. A person does not strike another in the head repeatedly with lethal force resulting in death using a deadly weapon without consciously harboring a disregard for another's life. Bob's act was clearly more than grossly negligent, which is the next lesser unintentional mens rea. Because Bob's intoxication as a matter of law cannot cloud his judgment concerning conscious disregard, Bob had a conscious disregard for human life. The defense would argue that Bob did not harbor express malice as he testified, but the argument that he did not have a conscious disregard is weak on these facts.

**++Issue 3: Did Bob commit voluntary manslaughter?**

**Rules:**

+Voluntary manslaughter requires intent to kill or conscious disregard for human life, but mitigated. There are two types of mitigation. Prosecution must prove beyond a reasonable doubt murder is not mitigated by either type.

**++1. Sudden quarrel or heat of passion:**

- a) D must act rashly under the influence of intense emotion that obscures reasoning or judgment. This is the subjective element. The following are required objective elements:
- b) If sufficient time for average person to "cool off," no reduction to manslaughter.
- c) Requires sufficient provocation by V; &
- d) Provocation would cause a person of average disposition (reasonable person) to react from passion, without reflection or judgment. However, provocation need not objectively cause a person of average disposition to kill. Passion must be so strong that judgment could not intervene in a reasonable person, and did not intervene in D's own reaction.
- e) The claim of provocation cannot be based on events for which D is culpably responsible. D may not provoke a fight, become the aggressor, and, without first seeking to withdraw from the conflict, kill an adversary.

**OR**

**++2. Imperfect self-defense (actual but unreasonable belief in the need for self-defense):**

- a) D actually believed self or another was in **imminent** danger of death or GBI; and
- b) D actually believed **immediate** use of deadly force was necessary; and
- c) At least one of above beliefs was unreasonable and mistaken. (If D's belief is not mistaken or is reasonable, then D has acted in perfect self-defense).

--Belief in future harm insufficient.

--In evaluating D's beliefs, consider all circumstances as known and appeared to D.

d) A mistake of fact defense predicated on a negligent perception of facts. **The facts as D actually believed them must, if D's belief had been reasonable, constitute lawful self-defense.** This means the force D used must be proportional to the believed danger, D cannot be an aggressor, and the victim must not have had a lawful right to use force that constituted the believed danger. Imperfect self-defense does not allow D to argue an unreasonable mistake of law. Look at the set of facts as D actually believed them. If those facts could constitute self-defense had they existed (aside from whether any belief in them was reasonable) D has the right to imperfect self-defense even though D's belief in them was unreasonable. **If the facts D actually believes cannot constitute perfect self-defense, then they cannot constitute imperfect self-defense.**

**++++Analysis and conclusion:** Voluntary manslaughter is the heart of the hypothetical, and Bob's best argument is heat of passion.

The prosecution would argue that Bob did not act in imperfect self-defense because there is no credible evidence Bob incorrectly but actually believed that Mark presented deadly or GBI force. Mark was his buddy, and although Mark had been arrested for assault in the past, had a history of drunken belligerence, and shoved Bob (though he laughed when he did so), none of these facts support Bob's claim that he believed Mark threatened deadly or GBI force. Mark's past behavior discloses no past threats or present threat of deadly or GBI force. If Mark wanted to inflict GBI, he would have hit Bob with the pool cue but he did not, especially after Bob threatened Mark with GBI force using his own pool cue. Finally, because Bob was the aggressor (the first of the two to threaten deadly force), as an aggressor Bob did not have the right to self-defense and therefore did not have the right to imperfect self-defense. The defense would argue that because Mark held a pool cue and had a violent history, Bob did actually believe Mark would imminently use the pool cue, even if his belief was unreasonable. Therefore, Bob's threat to knock Mark's head off was caused by an actual and unreasonable belief that Mark would imminently use GBI force, and Bob's subsequent use of the pool cue was so motivated. Mark's shove does not change the analysis. According to this argument, Bob was not factually the aggressor. The argument is tenuous because the prosecution would argue that playing pool with a buddy requires that the buddy have a pool cue, and Mark never threatened physical force until Bob threatened GBI force first. Even then, Mark only laughingly responded with a shove, not GBI force. Also, it is unlikely that Bob actually believed Mark would imminently use GBI force on these facts. Because in fact Bob was the aggressor, it is unlikely that Bob had the right to imperfect self-defense. However, if the jury had a reasonable doubt, the jury should acquit Bob of murder and convict him of imperfect self-defense voluntary manslaughter.

The defense has a better argument that Bob acted in a heat of passion. Bob acted rashly due to Mark's incessant and extreme verbal taunting and physical shove. Therefore, Bob was provoked and had no time to cool off. Further, a reasonable person would have reacted from passion rather than judgment. Mark's taunting was very personal and he did it to maliciously humiliate Bob in

public. Any reasonable person would feel angry and passionate because of Mark's physical and emotional provocation. The prosecution would argue that Bob's passion was not so strong that judgment could not intervene in a reasonable person. Bob knew Mark got belligerent when drinking, and he therefore willingly assumed the risk of mere taunting from a drinking buddy. A few bad jokes do not cause reasonable people to abandon judgment. The prosecution would further argue that Bob was actually the aggressor here because he was the first to threaten physical force, and therefore Mark's shove cannot be part of the provocation. Bob may not provoke a fight, become the aggressor, and, without first seeking to withdraw from the conflict, kill an adversary. Even so, the defense would argue that Bob was not culpably responsible for Mark's verbal taunting which was the primary cause of the sudden quarrel and Bob's responsive heat of passion. If the jury had a reasonable doubt concerning whether a reasonable person would react from passion rather than judgment on these facts, they should acquit Bob of murder and convict him of voluntary manslaughter.

**++Issue 4: Does Bob have a defense to murder or manslaughter because he was voluntary intoxicated?**

**Rules:**

+++Voluntary intoxication is a defense if D so intoxicated D did not form specific intent required for crime.

- Prosecution's burden to prove beyond a reasonable doubt that D had the specific intent required for crime.
- In homicide prosecutions, admissible on whether D had intent to kill, acted with deliberation and premeditation, or on whether D unconscious.
- In homicide prosecutions, NOT admissible to negate implied malice (conscious disregard for human life). This is simply a policy judgment.

+++**Analysis and conclusion:** Bob can argue that he did not form the intent to kill nor did he deliberate because he was intoxicated. This defense could raise a reasonable doubt in the jury's mind that Bob did not commit either first degree murder or express malice second degree murder, but is not a defense for Bob's culpability for implied malice second degree murder or either type of voluntary manslaughter committed with a conscious disregard for human life. Students may argue, and will receive credit for arguing, that Bob's intoxication was a factor showing in fact Bob acted rashly (the subjective element) for heat of passion voluntary manslaughter, and that voluntary intoxication was a causal factor for Bob's actual and unreasonable belief in the need to use deadly force for imperfect self-defense. But Bob's intoxication is not a proper consideration for whether a reasonable person would have harbored a heat of passion because of Mark's provocation, which is the issue at the heart of this hypothetical.

**+Issue 5: Did Bob act in (perfect) self-defense?**

++**Rule:** D may use deadly force in response to deadly/GBI force when:

1. D had reasonable belief (an actual [subjective] + reasonable [objective] belief): Reasonable mistakes of fact are allowed—D need not be correct about the facts.

- a) There was an imminent danger of GBI/death [or rape or robbery]; **AND**
- b) Deadly force was necessary; **AND**

2. Proportionality: D used no more force than was reasonably necessary to defend against the (believed) danger; **AND**
3. D was not an aggressor.

Note that although self-defense need not involve a mistaken belief, it may be and often is a defense based on a reasonable mistake of fact. As a justification defense, it does not negate mens rea. The defendant's use of force is justified and is a complete defense to the crime even though all elements are otherwise proven.

+++**Analysis and conclusion:** The defense must argue that Bob acted reasonably because he believed (mistakenly it appears on these facts) that Mark imminently threatened deadly or GBI force because he held a pool cue. Mark's taunts did not threaten violence, but instead only provided Bob's motive to retaliate with deadly force. It is unlikely that Mark's history of non-GBI violence would, in combination with verbal harassment and holding a cue while playing pool, cause a reasonable person to believe Mark imminently threatened Bob with GBI force. Also, reasonable people do not react from anger fueled by voluntarily becoming too intoxicated. Also, a jury should find that Bob was the aggressor here, when he violated the proportionality rule and first used deadly force.

#### ½Issue 6: Is Bob guilty of involuntary manslaughter?

½**Rules:** 1. D commits crime (perhaps a felony, but not one enumerated for felony murder), usually a misdemeanor (or rarely a general intent infraction—not strict liability) that is dangerous to human life or safety under the circumstances of its commission; **OR**

2. D acted with criminal negligence:

- a) D acts in a reckless way that creates a high risk of death or GBI; and
- b) A reasonable person would have known that the act would create a high risk of death or GBI.
  - 1) Based on facts known to D.
- c) D is **not** subjectively aware of risk.

½**Analysis and conclusion:** Only if the jury acquitted Bob of implied malice murder and voluntary manslaughter (unanimously agreed they had a reasonable doubt about whether Bob had a conscious disregard for human life) when he smashed a pool cue **repeatedly** across Mark's forehead with enough force to **split his skull and kill him**, could the jury reach the question of whether Bob is guilty of involuntary manslaughter. Because voluntary intoxication under the law cannot negate the mens rea of conscious disregard for human life, under these facts and the law, it is unreasonable to conclude that Bob did not have at least a conscious disregard for human life.

Extra credit:

Scoring deductions:



1)

State v. Bob

### **First Degree Murder**

Bob could be charged with first degree murder for the killing of Mark. Murder is the unlawful killing of another human being. First degree murder is the unlawful killing of another with the intent to kill accompanied by premeditation and deliberation. Here, during the conversation between Bob and Mark, Bob could have possibly contemplated killing Mark, but there are no facts suggesting this is the case. Thus, Bob would likely not be convicted of first degree murder.

### **Second Degree Murder**

Bob could be charged with second degree murder. Second degree murder is the killing of another with either the intent to kill (express malice), or with a conscious disregard for human life (implied malice). Here it can be argued that Bob likely intended to kill Mark when he struck him on the head with a pool cue. The fact that Bob struck him multiple times further shows that Bob was acting with express malice and intent to kill. If he had stopped after the first blow, it may have been possible that Bob struck out at Mark out of anger, but after the first blow Bob chose to keep hitting Mark, and each subsequent hit required another decision by Bob to continue hitting. The fact that Bob hit him so many times, and the fact that he hit him in the head, shows that Bob likely wanted to kill Bob. The defense may argue that Bob was too intoxicated to form the necessary intent, or that he was acting out of self defense (see defense discussion below).

### **Voluntary Manslaughter**

Bob could be charged with voluntary manslaughter. Voluntary manslaughter occurs when a second degree murder is mitigated due to the defendant acting out of heat of passion or in imperfect self defense. The mens rea of voluntary manslaughter is the same as second degree murder - the defendant must have the intent to kill or have acted with a conscious disregard for human life. In this case, it could be argued that both heat of passion and imperfect self defense may apply to mitigate the second degree murder charge down to voluntary manslaughter.

### *Heat of Passion*

Bob may have acted out of heat of passion when he killed Mark. A person acts with heat of passion when there has been sufficient provocation that would make an ordinary and reasonable person act without reflection or judgement. There also cannot be a cooling off period between the provocation and the act. Here, Mark had been repeatedly taunting Bob and was sharing very embarrassing facts about Bob that the other bar patrons could hear. Mark's last statement about Mark having an affair with Bob's wife may have been the last straw for Bob, causing him to become so enraged that he began to attack Mark without thinking. Bob may have struck Mark so many times because he was so enraged and was acting in a heat of passion. However, as cruel as Mark's taunts were, it is likely that they would not be sufficient to cause a reasonable person to react how Bob did. Just hearing about your wife's alleged affair in a drunken argument is not enough to cause a reasonable person to kill - the provocation must be something stronger, such as actually witnessing the affair. Therefore, it is not likely that Bob's second degree murder charge would be mitigated to voluntary manslaughter due to heat of passion.

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### *Imperfect Self Defense*

Bob claimed that he was afraid that Mark was going to strike him with his pool cue, so Bob may have acted in imperfect self defense. A person acts in imperfect self defense when they have an actual but unreasonable belief in the need to use deadly force to protect themselves from imminent harm of death or great bodily injury. Bob had been drinking with Mark before, and knew that Mark had a tendency to become belligerent when drunk, and also that he had been arrested multiple times for assaulting other patrons. Mark was also 20 years younger than Bob, and possibly stronger. So when Bob got pushed by Mark while Mark was holding a pool cue, Bob may have feared that Mark was about to hit him, so he struck Mark first in what he believed was self defense. However, even if it is true that Bob feared that Mark would strike him, Bob would actually be considered the first aggressor, as he is the one who first picked up his pool cue and threatened Mark with it. Mark responded by pushing Bob with an open palm, which was a nondeadly move that did not give Bob the right to respond with deadly force. Therefore, it is not likely that Bob's second degree murder charge would be mitigated due to imperfect self defense.

### **Defenses**

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*Voluntary Intoxication*

Bob could argue the defense of voluntary intoxication. Voluntary intoxication serves a defense if the defendant was so intoxicated that they could not form the specific intent for a crime. The burden of proof would be on the prosecution to show that Bob did indeed possess the required mens rea for the charged crime. Here the prosecution must prove that Bob was still able to form the intent to kill. Both Mark and Bob were very intoxicated after drinking at the bar. However, Bob's own statement at trial that he wasn't trying to kill Mark, but was just trying to stop him from talking, helps prove that Bob was not too intoxicated to form intent. If Bob was able to form the intent to hit Mark with the goal of making him stop talking, then Bob also was likely able to form the intent to kill. Therefore, the defense of voluntary intoxication would likely not relieve Bob of culpability.

*Self Defense*

Bob may claim that he was acting in self defense when he hit Mark. A person acts in self defense if they used deadly force in response to an imminent danger of death or great bodily injury, and they must not be the first aggressor in the situation. Here the prosecution must prove that the defendant did not act in accordance with the requirements of the defense. As stated above, it is reasonable that Bob may have been apprehensive that Mark could possibly hurt him. However, there are no facts to suggest that Bob was in imminent danger. In addition, Bob was the first aggressor when he raised his pool cue and threatened to knock Mark's head off. Finally, the number of times that Bob hit Mark was much more than what would have been necessary to merely stop the threat (if there was one). Therefore, Bob was not acting in self defense when he killed Mark.

**Conclusion**

Based upon the facts in the case, and for the reasons stated above, the jury would like to convict Bob of second degree murder. Bob did not act in heat of passion or imperfect self defense, and his actions are not excused or justified by any defense.

## QUESTION 3 ANSWER OUTLINE<sup>1</sup>

Scoring ranges in magnitude from + to +++++

Credit will be denoted by the number of + symbols awarded. ½ = half of a +

No credit = ∅

Overview (students should not include an overview and no credit is available for one): The question primarily requires a straightforward application of the law of conspiracy and the vicarious culpability of a co-conspirator. The substantive crimes presented are attempted robbery, burglary, battery, and robbery. There are two issues whose resolution is debatable: (1) Whether Joe is vicariously culpable for Dave's robbery of the jewelry store. This requires a discussion of whether Dave's jewelry store robbery was foreseeable and in furtherance of the target crime of robbery of a bank. (2) Is Joe culpable for Dave's felony murder of the bicyclist? This depends on which causation law governs: If vicarious culpability for a co-conspirator, Joe withdrew and is not culpable. If felony murder causation analysis instead applies, Joe is probably culpable.

→ →  
**++Issue 1: Joe is guilty of a conspiracy to commit robbery and burglary.**

**Rules:**

→ →  
+++Conspiracy definition and mens rea: Agreement between two or more persons to commit a *crime or crimes*. Requires specific intent to commit target offense. A conviction for conspiracy carries the same punishment as the completed target crime.

→ →  
++Actus reus: Agreement + at least one subsequent **overt act** (committed in California) by one co-conspirator required. An overt act may be less than a direct step (the actus reus for an attempt) but is more than agreeing and planning.

→ →  
++**Analysis and conclusion:** Joe agreed with Dave to commit a bank robbery, which includes burglary. The co-conspirators engaged in an overt act when Joe drove Dave to the bank.

→ →  
**++Issue 2: Is Joe guilty of the substantive crime of burglary and attempted bank robbery?**

**Rules:**

∅  
+**Vicarious culpability for target crimes committed by a co-conspirator:** Substantive crimes that are the **target/object** of the conspiracy are always committed to further the conspiracy and are foreseeable, even if D is unaware of co-conspirator's subsequent commission of such crime.

→  
+Burglary: Entering a structure with the intent to steal or commit a felony.

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+++Attempt: Actus Reus [Direct Step Beyond Planning or Preparation]: A direct but ineffective step, beyond planning and preparation, which puts plan into action so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt. A direct step indicates a definite and unambiguous intent to commit the crime.

Mens Rea: Intentionally perform an act with the specific intent to commit the target offense.

++Robbery: A trespassory taking of another person's property from their immediate presence using force or fear and with the intent to permanently deprive the other person of the property.

+Merger: Convictions for conspiracy and substantive crimes do not merge. However, by statute in CA one criminal act may only be punished once. Therefore, generally a conspirator may be **punished only once** for conspiracy, any attempt, and the commission of a substantive crime which is the object of the conspiracy.

++++**Analysis and conclusion:** Joe clearly had the mens rea for attempted robbery; the issue is actus reus. Joe is guilty of the substantive crime of attempted bank robbery if either his own actus reus was sufficient for an attempt, or if Dave attempted to rob the bank, since Joe is vicariously culpable for the object crime of a conspiracy committed by a co-conspirator. It is likely that both Joe and Dave committed the substantive crime of attempted robbery because each of them took a direct step. However, to convict Joe of attempted robbery of the bank, the prosecution need only prove that Dave's actus reus was sufficient because Joe, as a co-conspirator, is automatically culpable for substantive target crimes committed by a co-conspirator that are the object of the conspiracy. Therefore Joe is guilty of the burglary Dave committed, which was also a target crime of the conspiracy to rob a bank. Joe is also guilty of attempted robbery if Dave's actus reus went far enough to constitute an attempt. Dave put the robbery plan into action and went beyond planning and preparation by entering the bank apparently armed. It appears Dave would have completed the robbery if a uniformed officer had not unexpectedly been present in the bank, which interrupted the attempt. Dave took many direct steps, but under the law he need only perform one.

**Issue 3: Did Joe's withdrawal from the conspiracy avoid Joe's culpability for Dave's jewelry store robbery?**

+++**Rule/Conspiracy withdrawal:** To avoid culpability for a conspiracy, withdrawal from a **conspiracy** must occur before a conspirator commits an overt act. To avoid culpability for a **substantive** crime committed by a co-conspirator, withdrawal must occur before commission of substantive crime. D must communicate rejection of conspiracy by word or deed to other members of the conspiracy known to D.

+**Analysis and conclusion:** Joe did not withdraw from the conspiracy in time to avoid culpability for Dave's jewelry store robbery (see rule below), because Dave had already committed the robbery, a substantive crime committed by Joe's co-conspirator.

**++Issue 4: Is Joe vicariously culpable for Dave's crimes (burglary, battery and robbery) on the jewelry store clerk?**

**Rules:**

++ Vicarious culpability for **resulting crimes** committed by a co-conspirator: D is vicariously culpable for substantive crimes that are non-target **resulting** crimes committed by a co-conspirator if in furtherance of the conspiracy and foreseeable, even if D neither intends nor knows of co-conspirator's commission of crime.

+Battery: A willful and unlawful harmful or offensive touching of another. [During the review class, students were told not to discuss assault if a battery occurred, since a battery is a completed assault and assault requires specific intent, rather than the general intent (which is easier to prove) that a battery requires].

++++**Analysis and conclusion:** The prosecution would argue that the conspiracy's target crime was robbery and Dave committed a robbery; therefore Dave committed the target crime, not a resulting crime, and robbery was of course foreseeable, since that is the crime Joe and Dave conspired to commit. Joe's attorney would argue that instead of carrying out the target crime of the conspiracy—robbery of the bank—Dave committed resulting crimes of robbery of the jewelry store and battery of the clerk. According to this view, Joe is vicariously culpable of these crimes only if they were foreseeable and in furtherance of the conspiracy. The prosecution would argue that even if Dave committed a "resulting crime" rather than a "target crime," any type of robbery is in furtherance of a conspiracy to rob, even if Dave decided to change the intended victim. But was Dave's decision to rob the jewelry store a foreseeable consequence of the conspiracy to rob a bank? Joe's attorney will argue that no reasonable person in Joe's position could foresee that Dave would rob a friend of Joe's. The conspirators targeted a particular location for particular proceeds—cash, not jewelry—and the jewelry store robbery was not part of their plans. The prosecution would counter that it is foreseeable that one who plans to rob might decide to rob different victims. Joe's attorney would respond that while perhaps true of victims in and around the target bank, it is not so as to victims at an unexpected (for Joe) and unplanned location. Borrowing from the law of proximate cause which determines whether harm is foreseeable, Joe's attorney would argue that Dave's decision to rob the jewelry store was an independent intervening cause that resulted in unforeseeable harm. The prosecution would claim that the main and substantial cause of Dave's jewelry store robbery was the conspiracy, and that the presence of the officer which caused Dave to change targets was a dependent intervening cause that did not break the causal chain and was foreseeable. Concerning the battery, the prosecution would argue that the conspirators apparently contemplated that Dave would commit the robbery armed with a firearm. It was therefore foreseeable that Dave would use the firearm against anyone who resisted. The prosecution would argue that the identity of Dave's victims was unknowable and could include anyone who resisted the robbery. Joe's attorney would argue that only persons in, or at most around, the bank were foreseeable victims.

**++Issue 5: Is Joe not culpable for Dave's murder of the cyclist because Joe first withdrew from the conspiracy, or is Joe culpable on a felony murder theory?**

**Rules:**

+++Felony murder: A killing, even if unintentional or accidental, committed in perpetration or *attempted* perpetration of enumerated crimes including robbery and burglary.

- a) Requires specific intent to commit enumerated felony.
- b) Includes culpability for *aiding and abetting* and **conspiracy** to commit felony.
- c) Actus reus: Extends to flight after felony or until D reaches place of temporary safety.

++Felony murder causation (proximate cause/foreseeability determined as follows). Includes accidental killings: If a co-felon commits an act of force or violence against the decedent, D caused the death if there is a *logical nexus* between the underlying felony and the co-felon's act and if the felony and homicidal act are part of *one continuous transaction*. If so, D caused the death (no further proximate cause analysis required).

++++**Analysis and conclusion:** Dave is guilty of first degree felony murder since Dave committed a direct act of force upon the cyclist that caused his death during the commission of robbery, an enumerated felony. Dave very likely had not reached a place of temporary safety. But is Joe guilty of felony murder? This depends on whether conspiracy or felony murder law governs, since the conspiracy withdrawal rule conflicts with the felony murder causation rule. Joe's attorney would argue that because Joe withdrew from the conspiracy before Dave, Joe's co-conspirator, committed the substantive crime of felony murder, Joe is not vicariously culpable. Joe's attorney would argue that even under a felony murder theory Joe's culpability depends on a conspiracy to rob; therefore, Joe is only culpable for any crime Dave committed before the conspiracy to rob ended upon Joe's withdrawal. Since Joe withdrew from the conspiracy to rob, he cannot be convicted of a subsequent felony murder by a co-felon. To counter, the prosecution would first argue that if Joe is vicariously culpable for Dave's jewelry store robbery (issue 3 above), Joe is clearly guilty of felony murder of the cyclist since Dave killed during the commission of that robbery, assuming Dave had not reached a place of temporary safety. The prosecution's point is that although Joe may have withdrawn from the conspiracy, if he is vicariously culpable under a conspiracy theory for Dave's jewelry store robbery (this depends on whether it was in furtherance of the conspiracy and a foreseeable consequence), he is culpable for any killing by a co-felon committed during the commission of that felony (assuming Dave had not reached a place of temporary safety) according to the felony murder causation rule. The prosecution should also argue a different theory: Even assuming Joe is not vicariously culpable on a conspiracy theory for Dave's jewelry store robbery, Joe's culpability for robbery felony murder relies on Joe's conspiracy to rob and under a felony murder causation analysis, he is guilty. According to this argument, once Joe conspires to commit a robbery, he is guilty for any killing his co-felon Dave commits if there is a logical nexus between the conspiracy to rob the bank and the cyclist's death, and if the conspiracy to rob the bank and Dave's homicidal act are part of one continuous transaction. If Joe's attorney is right that withdrawal from the conspiracy means that felony murder causation analysis does not apply, Joe is not guilty of felony murder. If the prosecution is right that felony murder causation analysis applies once the conspiracy to rob is formed and once someone dies at the hands of a co-felon, then the prosecution's most difficult showing is whether the conspiracy to rob the bank and the death of the cyclist were part of one continuous transaction. The policy issue is whether broad culpability for felony murder when a co-felon kills an innocent person replaces the normal withdrawal rules that attend vicarious culpability for conspiracies.

Extra credit:

Scoring deductions:

3)

Prof: Brannan/LaVerge

Crimes the DA should consider filing against Joe:

Conspiracy:

(Specifically, Conspiracy to Commit Robbery and Conspiracy to Commit Burglary)

A conspiracy is agreement, between 2 or more persons, to commit a crime. They must intend that at least one member of the conspiracy would commit the target crime.

The conspirators must intend to commit the target crime and make at least one overt act towards its commission. An overt act is more than an agreement but less than a direct step.

A robbery is a crime, and in this case, Dave and Joe, who are 2 people, did make an agreement to commit the crime of robbery. They planned the crime and intended that it would be committed. While the 2 did much more than an overt act, the overt act requirement was satisfied when they drove to the Community Bank to rob it.

Conspiracy to Commit Robbery:

Robbery is the trespassory taking and carrying-away/asportation of the property of another through force or fear.

The taking was trespassory because the bank's money did not belong to Dave or Joe, and we can safely assume that the money would not be given up by true consent.

The force or fear requirement was satisfied because Dave planned to use a gun to frighten the bank clerks into giving up the money.

Burglary:

Burglary is when a defendant enters a building (or room or locked car) with the intent to commit theft or other felony.

Not only did the two conspire that Dave should enter the building with the intent to commit the robbery (a felony), but Dave actually did enter the building with the intent to commit the robbery. Upon entering the building, Dave was guilty of Burglary, and so was Joe (because of his liability as a conspirator).

Attempted Robbery:

Attempt is when a defendant takes a direct step towards the commission of a crime and

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would have completed the crime but for some intervention.

The direct step demonstrates the intent to commit the crime.

In this case, Dave entered the bank with a gun, a direct step, and would have robbed it, but for the police officer he saw in the bank office. Joe is guilty of this crime because of his liability as a conspirator.

Co-conspirator Liability/Natural and Probable Consequences Doctrine:

A co-conspirator is vicariously culpable for the crimes of his co-conspirators if those crimes are:

1. done in furtherance of the conspiracy; and
2. a natural and probable consequence of the conspiracy.

Joe's attorney may argue that Joe is only vicariously culpable for above-mentioned crimes and not for Dave's crimes of robbing the jewelry store and whatever Dave is charged with as a result of accidentally killing the cyclist (invol?). The reason is that Dave's robbing the jewelry store was not part of the conspiracy's design. It was not done to further the conspiracy to rob a bank, and it was not a natural and probable consequence of the conspiracy to rob the bank. It was not foreseeable that Dave would select an entirely different target and commit an entirely different crime. If Dave and Joe conspired to rob a bank, but then Dave robbed an old lady instead, that would not have been foreseeable by Joe. Dave went off and did that on his own and it had nothing to do with the plan.

Further, Joe is not liable for Dave's accidental killing of the cyclist. While it is true that Dave and Joe were fleeing from the commission of a felony, and this would normally trigger the felony murder rule, Joe's attorney should argue that the two had reached a place of temporary safety, and were no longer fleeing the felony. A jury could infer this because Joe felt safe enough to pull the car over and tell Dave to get out.

Withdrawal from Conspiracy:

Joe's attorney could also argue that Joe effectively withdrew from the conspiracy. In order to completely withdraw from a conspiracy, a defendant must do so by informing the other conspirators, before the commission of the overt act. The prosecution would argue that Joe did not withdraw before the overt act, and it would be right. As a matter of law, Joe did not withdraw in time to avoid culpability for the conspiracy and target crimes. So Joe is still culpable for the conspiracy to commit robbery, and to commit burglary, and the actual burglary that occurred. But he withdrew after he learned that Dave had robbed a

jewelry store, so he was not culpable for any crimes Dave committed after that. Therefore Joe is not vicariously culpable for the killing of the cyclist, however the DA decides to classify the killing.

Joe should be found guilty for conspiracy to commit robbery, conspiracy to commit burglary, an actual burglary, and an attempted robbery. *-BANK*  
Unlike attempts, conspiracy charges do not merge with their target crimes.

The DA should not consider charging Joe with the robbery of the jewelry store or the accidental killing of the cyclist because there is insufficient prima facie evidence of Joe's culpability in those crimes. Joe's attorney should explain to Joe that he is pretty well screwed already when it comes to conspiracy to commit robbery, conspiracy to commit burglary, an actual burglary, and an attempted robbery, so they should probably try to work out a plea bargain, and ask the DA to back off on the jewelry store and the cyclist.

*MURDER IS BY  
FIVE THE  
MOST SERIOUS  
CHARGE JOE  
FACES*

**END OF EXAM**