

San Luis Obispo College of Law

Final Examination

Criminal Law & Procedure

Spring 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 75-100 words.

FINAL EXAMINATION  
SPRING 2023  
CRIMINAL LAW & PROCEDURE  
PROF. STEPHEN F. WAGNER

QUESTION #1

Abe, Brian and Cooper hatched a plan to bring 40 cases of specially-aged whiskey ashore from a ship anchored in the harbor near their town of Dunes Beach, CA and sell it to a local bar owner. They believed the whiskey had been produced abroad and was subject to federal import duty (tariffs and taxes). They also knew that smuggling items into the United States without paying duty required by the Tariff Act is a crime. In fact, however, the whiskey in this shipment had been produced in the United States.

The three met at Abe's house on Monday and agreed to bring the whiskey ashore by rowboat on Friday night. On Wednesday, however, Brian called Abe to say that he and his wife were going to a bowling tournament that weekend and Brian would not be able to assist in bringing the whiskey ashore. Abe said that would be all right, that he and Cooper could handle the boat and the whiskey, but that Brian would be cut out of the profits on this job.

When Cooper learned from Abe that there would be just two of them he became apprehensive, but he was afraid of what Abe might do to him if he tried to back out. Therefore, on Thursday, Cooper informed the police of Abe's plan and did not show up on Friday night. Abe was lawfully arrested on Friday night as he came ashore, alone, with the whiskey as he was loading it into a truck he had stolen from a nearby parking lot.

Abe, Brian and Cooper have been charged with theft of the truck and conspiracy to import dutiable goods without payment of duty. Abe has also been charged with attempt to import dutiable goods without payment of duty.

Based on the above facts:

1. Should Abe, Brian or Cooper be convicted of:
  - (a) Conspiracy to violate the Tariff Act? Discuss.
  - (b) Theft of the truck? Discuss.
2. Should Abe be convicted of attempt to import dutiable goods without payment of duty in violation of the Tariff Act? Discuss.

*END*

QUESTION #2

Sam and Ryan were involved in the transportation and distribution of Fentanyl, a potent synthetic opioid. Ryan delivered the Fentanyl to distribution points throughout the city. Sam suspected, correctly, that Ryan was being followed and routinely observed by undercover drug enforcement officers. Unbeknownst to Ryan, Sam hired Lou to be Ryan's bodyguard and told Lou that Ryan needed protection from robbers because Ryan delivered rare jewels. Lou's assignment was to follow Ryan at a distance and protect him from assault.

On his second day of work as a bodyguard, Lou saw a man confront Ryan, grab on to him and begin to search him. Ryan resisted vigorously. Lou ran up and beat the man severely about the head, killing him. Police officer, Drew, arrived and apprehended Ryan and Lou and placed them together in the rear seat of his patrol car. Once placed in the patrol car, Lou looked over at Ryan and said, "Don't say shit to these cops, I'll explain everything later. Your pal Sam asked me to look out for you." Ryan responded, "I didn't know you were involved. Who was that guy?" The verbal exchange between Lou and Ryan was captured by a recording device inside the patrol car.

Sam was arrested soon after this when Lou voluntarily told police that Sam hired him to act as a bodyguard. The dead man was Rooney, an undercover detective who had a valid warrant for the arrest of Ryan. A briefcase Ryan had been carrying was searched and it contained a large amount of cash and hundreds of Fentanyl pills.

1. Both Lou and Ryan have moved to suppress:  
(a) Their statements made in the patrol car. Discuss.  
(b) The cash and Fentanyl. Discuss.
2. On what theory or theories might Sam be prosecuted for the murder of Rooney? Discuss.
3. If Lou is charged with the murder of Rooney, what defenses should he offer and of what degree of murder or lesser included offense, if any, should he be convicted if those defenses are accepted by the trier of fact? Discuss.

*END*

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QUESTION #3 (Part 3)

At each of the ten (10) fact passages, make the selection "True" or "False" along with an explanation that supports your answer. Each question is worth a total of 10 points and points may still be awarded despite arriving at the incorrect answer choice so long as your explanation demonstrates an understanding of the concepts that are being tested.

1. A dependent intervening act does not break the chain of causation.

T or F (Explanation)

2. Legally adequate provocation has the legal effect of reducing a killing from murder in the first degree to murder in the second degree.

T or F (Explanation)

3. D has committed a bank robbery. As he is leaving the bank with his loot, he pushes the door open (in normal fashion) and accidentally bumps V who is then entering. The door cuts V's head. V, a hemophiliac, dies of the resulting hemorrhage. D is not chargeable with felony murder.

T or F (Explanation)

**Questions 4 through 8 require you to adopt the role of Peace Officer or Detective.**

4. You suspect a driver of being intoxicated, and shortly into the detention, you ask, "Had anything to drink tonight?" This question constitutes "interrogation" under Miranda.

T or F (Explanation)

5. If you inadvertently fail to Mirandize a suspect (for example, because you did not recognize that he was in "custody") and he tells you, in response to your questioning, where the murder weapon (or other evidence) is, that evidence will be inadmissible in court.

T or F (Explanation)

6. If you go interview a suspect at his home and he tells you that he wants to talk to his lawyer, he has invoked his right to counsel and you are precluded from coming back the next day and trying again.

T or F (Explanation)

7. The cellmate of a jailed murder suspect contacts you and says the suspect has been talking about a robbery he committed. If you send the cellmate back with directions to ask the suspect some questions about the robbery, you probably have a serious Miranda and/or Sixth Amendment problem.

T or F (Explanation)

8. A jailed suspect has been charged, arraigned and obtained a lawyer. If the lawyer calls you up, tells you his client does not want to talk to you, and directs you not to interview his client, that phone call prevents you from lawfully interviewing the suspect/client.

T or F (Explanation)

9. Any person who is chargeable as a principal in the first or second degree is also chargeable as a conspirator.

T or F (Explanation)

10. D is visiting the home of V. D sees a cigarette lighter which he believes to be one he has loaned to V on one occasion and has been attempting to get back. The lighter in fact is one recently purchased by V. D takes the cigarette lighter with him when he leaves. D is chargeable with larceny if it can be shown that his mistake was unreasonable under the circumstances.

T or F (Explanation)

*END*

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ANSWER -QUESTION #1

*ISSUE OUTLINE / COMMENTS*

*ROG 1A (ABE): COMMON LAW AND MODERN CONSPIRACY TO COMMIT UNLAWFUL IMPORTATION WOULD BE THE EXPECTED DISCUSSION. THE FACTS PLACE US IN CALIFORNIA, AN "OVERT ACT" JURISDICTION, WHICH IS A PIVOTAL ISSUE AS IT RELATES TO THE TIMELINESS OF B AND C'S EFFORTS TO WITHDRAW FROM THE CONSPIRACY.*

*ALTERNATIVE GROUP CRIMINALITY THEORIES WOULD ALSO BE APPROPRIATELY RAISED (ACCOMPLICE LIABILITY). ABE APPEARS TO BE THE LEADER/HEAVY ON THESE FACTS, AS HE HOSTED THE MEETING AND HE APPEARS TO BE THE SHOT-CALLER (BRIAN AND COOPER SEEM TO CATER TO ABE). STUDENTS ARE EXPECTED TO DISCUSS THE FACTS THAT SUPPORT THE FORMATION OF A CONSPIRACY AND THEN MOVE TO THE DEFENSE ISSUES (IMPOSSIBILITY AND THE IMPACT OF ANY WITHDRAWAL DEFENSES THAT WILL BE ASSERTED BY BRIAN AND COOPER*

*ROG 1A (BRIAN): DID BRIAN EFFECTIVELY WITHDRAW FROM THE CONSPIRACY? WHAT IS WITHDRAWAL? WHEN IS WITHDRAWAL SUCCESFULLY ACCOMPLISHED? MERELY TELLING ABE THAT HE IS BUSY OR HAS A CONFLICT (BOWLING) IS NOT ENOUGH TO EVIDENCE INTENT TO RENUNCIATE (ACTION WOULD CENTER ON HIS EFFORTS TO NEUTRALIZE HIS PRIOR SUPPORT OF THE CONSPIRATORIAL OBJECTIVE.  
RESULT: TOO LITTLE, TOO LATE. WITHDRAWAL NOT LEGALLY EFFECTIVE.*

*ROG1A (COOPER): THIS CALLS FOR A REDUX OF ABOVE, BUT COOPER WENT THE EXTRA MILE BY ACTUALLY TRYING TO THWART THE CRIME. DID COOPER'S WITHDRAWAL COME AFTER THE OVERT ACT OCCURRED? THERE IS A TIMELINESS ISSUE LURKING HERE. COOPER HAS AN ADDITIONAL DEFENSE OF DURESS (FEAR OF ABE).*

*ROG 1B (ALL 3 BAD ACTORS): ABE WOULD BE LABELED AS THE ACTUAL PERP, AS HE TOOK THE TRUCK. THIS WOULD BE LARCENY. B AND C MIGHT NOT BE CULPABLE IF THEY BOTH SUCCESSFULLY WITHDREW FROM THE CONSPIRACY.*

*ROG #2 (ABE FOR "ATTEMPT"): DEFINE ATTEMPT AND ADDRESS MISTAKE OF FACT AS DEFENSE. THERE IS NO "MERGER" FOR CONSPIRACY AND THUS ABE CAN BE CONVICTED OF BOTH CONSPIRACY AND ATTEMPT.*

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ANSWER - QUESTION #2

*ISSUE OUTLINE / COMMENTS*

*ROG #1*

*BOTH 4TH AND 5TH AMENDMENT DISCUSSIONS ARE ANTICIPATED HERE.*

*1A: WERE THE STATEMENTS MADE UNDER CIRCUMSTANCES THAT MAY HAVE REQUIRED "MIRANDA" WARNINGS? WAS THIS A CUSTODIAL SETTING? DID INTERROGATION (DIRECT OR FUNCTIONAL EQUIVALENT) ENSUE? THE POINT OF CONTENTION WOULD CENTER ON THE FORMAL DESCRIPTION OF THE NATURE OF LOU AND RYAN'S CONFINEMENT (FACTS STATE THEY WERE "APPREHENDED") STUDENTS WERE EXPECTED TO NOTE THIS TENSION/AMBIGUITY; LEADING TO A DISCUSSION OF THE FORMAL DEFINITION/TEST FOR "ARREST" (NEED DISCUSSION RE SUBJECTIVE AND OBJECTIVE STD). RESULT: NO COERCION AND NO INTERROGATION, SO THESE STMS WOULD LIKELY BE DEEMED ADMISSIBLE.*

*FOURTH AMENDMENT DISCUSSION: A "KATZ" DISCUSSION IS EXPECTED HERE - NO EXPECTATION OF PRIVACY IN THIS SETTING. RESULT? STATEMENTS ARE ADMISSIBLE AND LIKELY USED TO IMPLICATE ALL THREE ALLEGED BAD ACTORS (CO-CONSPIRATOR STMS.)*

*1B: THE SEARCH OF THE BRIEFCASE WAS CONDUCTED WITHOUT A WARRANT. WHAT SEARCH WARRANT EXCEPTION APPLIES? SEARCH INCIDENT TO LAWFUL ARREST? IF NOT ALREADY DISCUSSED IN ROG 1, STUDENTS WOULD BE EXPECTED TO ADDRESS THE PRESENCE OR ABSENCE OF PROBABLE CAUSE TO ARREST RYAN. FACTS ARE INTENTIONALLY UNCLEAR RE OFFICER DREW AS A WITNESS TO THE INCIDENT.*

*ROG #2*

*SAM WAS NOT THE ACTUAL KILLER, SO IF HE IS CULPABLE IT MUST REST ON A GROUP CRIMINALITY (LIKLEY COMPLICITY OR ACCOMPLICE - AIDER THEORY).*

*SEVERAL MALICE THEORIES APPLY ON THESE FACTS; INCLUDING THE FELONY MURDER RULE (MODERN APPLICATION THAT DOES NOT FOLLOW/ADHERE TO THE STRICT COMMON LAW "ENUMERATED FELONIES" RULE). CONSPIRACY AND THE RULE FROM "PINKERTON" WOULD LIKELY APPLY. ALTERNATIVELY, ACCOMPLICE CULPABILITY THEORY IS DISCUSSABLE.*

*ROG #3*

*MURDER REDUX HERE. LOU IS THE ACTUAL KILLER, SO EXPRESS INTENT TO KILL IS THE LIKELY MALICE THEORY. LOU WILL ASSERT THAT HE ACTED UNDER LAWFUL "DEFENSE OF OTHERS" AND AS PLAN-B; IMPERFECT S-D OF OTHERS. IF ISD IS SUCESSFULLY ASSERTED, THEN THE RESULTING CRIME WOULD BE VOLUNTARY MANSLAUGHTER.*



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***WITH ISSUE OUTLINE ANSWERS (CONTROLLED DOCUMENT)***

QUESTION #3 (Part 3)

At each of the ten (10) fact passages, make the selection “True” or “False” along with an explanation that supports your answer. Each question is worth a total of 10 points and points may still be awarded despite arriving at the incorrect answer choice so long as your explanation demonstrates an understanding of the concepts that are being tested.

1. A dependent intervening act does not break the chain of causation.

T or F (Explanation)

ANSWER IS FALSE. A DEPENDENT INTERVENING ACT MAY OR MAY NOT BREAK THE CHAIN OF CAUSATION DEPENDING UPON WHETHER IT CAN BE CONSIDERED A NORMAL OR AN ABNORMAL RESPONSE. AN ABNORMAL RESPONSE MAY BREAK THE CHAIN OF CAUSATION IF IT IS DETERMINED TO BE UNUSUAL AND NOT A NATURAL REACTION TO THE TRIGGERING EVENT. THIS TYPE OF LABELING IS SUBJECT TO DEEP FACTUAL INTERPRETATION AND IS OFTEN A MAJOR “POC.”

2. Legally adequate provocation has the legal effect of reducing a killing from murder in the first degree to murder in the second degree.

ANSWER IS FALSE. “LAP” HAS THE LEGAL EFFECT OF REDUCING A KILLING FROM MURDER TO VOLUNTARY MANSLAUGHTER, NOT MERELY FROM FIRST TO SECOND DEGREE. “LAP” IS A MEANS OF MITIGATING MALICE. IN CIRCUMSTANCES WHERE THE ALLEGED BAD ACTOR IS ACTING UNDER “LAP” FIRST DEGREE MURDER WOULD LIKELY NOT BE A CHARGING OPTION.

T or F (Explanation)

3. D has committed a bank robbery. As he is leaving the bank with his loot, he pushes the door open (in normal fashion) and accidentally bumps V who is then entering. The door cuts V’s head. V, a hemophiliac, dies of the resulting hemorrhage. D is not chargeable with felony murder.

ANSWER IS TRUE. THIS IS A CLOSE CALL, BUT IT IS LIKELY THAT THE ACTION WOULD CENTER ON THE "CAUSAL CONNECTION" OR LACK THEREOF. ON THESE FACTS, THERE IS NOT ENOUGH OF A CAUSAL CONNECTION BETWEEN THE FELONY AND THE DEATH OF V. SINCE D PUSHED OPEN THE DOOR IN A NORMAL FASHION, IT IS ONLY COINCIDENTAL THAT HE ALSO HAPPENDED TO BE IN THE PROCESS OF LEAVING THE ROBBERY WITH THE LOOT. THUS, D IS LIKELY NOT CHARGEABLE WITH FMR.

T or F (Explanation)

**Questions 4 through 8 require you to adopt the role of Peace Officer or Detective.**

4. You suspect a driver of being intoxicated, and shortly into the detention, you ask, "Had anything to drink tonight?" This question constitutes "interrogation" under Miranda.

T or F (Explanation)

THE ANSWER IS TRUE. "INTERROGATION" MEANS ANY DIRECT QUESTIONING OR CONDUCT AND ACTIONS AIMED AT ELITING AN INCRIMINATING RESPONSE AND THIS QUESTION WOULD PROBABLY QUALIFY. HOWEVER, THERE IS NO "CUSTODY" SINCE THE DRIVER, ALTHOUGH NOT FREE TO LEAVE, HAS NOT BEEN ARRESTED OR SUBJECTED TO EQUIVILENT RESTRAINTS ON HIS FREEDOM OF MOVEMENT.

5. If you inadvertantly fail to Mirandize a suspect (for example, because you did not recognize that he was in "custody") and he tells you, in response to your questioning, where the murder weapon (or other evidence) is, that evidence will be inadmissible in court.

T or F (Explanation)

THE ANSWER IS FALSE. NON-COERCIVE NON-COMPLIANCE WITH "MIRANDA" RESULTS ONLY IN THE STATEMENT'S INADMISSIBILITY IN THE PEOPLE'S CASE-IN-CHIEF. TANGIBLE "FRUITS" OF THE STATEMENT ARE NOT TAINTED BY THE "MIRANDA" VIOLATION. THIS QUESTION IS TESTING "ELSTAD" AND "BREWER."

6. If you go interview a suspect at his home and he tells you that he wants to talk to his lawyer, he has invoked his right to counsel and you are precluded from coming back the next day and trying again.

T or F (Explanation)

THE ANSWER IS FALSE. THE SUSPECT CAN'T INVOKE WHAT HE DOESN'T HAVE (MCNEIL IS THE SEMINAL CASE). THE "MIRANDA" SAFEGUARDS, INCLUDING THE RIGHT TO COUNSEL, DO NOT COME INTO EXISTENCE UNLESS AND UNTIL BOTH "INTERROGATION" AND "CUSTODY" EXIST, AND HERE, THERE WAS NO "MIRANDA" CUSTODY.

7. The cellmate of a jailed murder suspect contacts you and says the suspect has been talking about a robbery he committed. If you send the cellmate back with directions to ask the suspect some questions about the robbery, you probably have a serious Miranda and/or Sixth Amendment problem.

T or F (Explanation)

THE ANSWER IS FALSE. NO MIRANDA PROBLEM EXISTS ON THESE FACTS BECAUSE THE SUSPECT DOES NOT NOT HE IS TALKING TO A PEACE OFFICER. THEREFORE, THE SUSPECT IS SAID TO NOT BE FEELING THE INHERENT COMPULSION NORMALLY ASSOCIATED WITH POLICE INTERROGATION ("PERKINS"). THERE IS NO SIXTH AMENDMENT VIOLATION DUE TO THE FACT THAT THE QUESTIONING RELATES TO ANOTHER CRIME ("OFFENSE-SPECIFIC" RULE).

8. A jailed suspect has been charged, arraigned and obtained a lawyer. If the lawyer calls you up, tells you his client does not want to talk to you, and directs you not to interview his client, that phone call prevents you from lawfully interviewing the suspect/client.

T or F (Explanation)

THE ANSWER IS FALSE. THE PHONECALL IS IRRELEVANT, BECAUSE MIRANDA RIGHTS AND SIXTH AMENDMENT RIGHTS ARE PERSONAL TO THE SUSPECT - ONLY SUSPECT MAY WAIVE OR INVOKE.

9. Any person who is chargeable as a principal in the first or second degree is also chargeable as a conspirator.

T or F (Explanation)

THE ANSWER IS FALSE. PARTIES WHO QUALIFY AS PRINCIPALS IN THE FIRST OR SECOND DEGREE ARE NOT NECESSARILY CONSPIRATORS. ONE CAN BE A PARTY TO A CRIME EVEN IN THE COMPLETE ABSENCE OF AN EXPRESS OR IMPLIED AGREEMENT TO PARTICIPATE.

10. D is visiting the home of V. D sees a cigarette lighter which he believes to be one he has loaned to V on one occasion and has been attempting to get back. The lighter in fact is one recently purchased by V. D takes the cigarette lighter with him when he leaves. D is chargeable with larceny if it can be shown that his mistake was unreasonable under the circumstances.

T or F (Explanation)

THE ANSWER IS FALSE. IF ONE TAKES PROPERTY OF ANOTHER UNDER THE MISTAKEN BELIEF THAT THE PROPERTY IS HIS OWN, HE LACKS THE REQUISITE INTENT FOR LARCENY. THE REASONABLENESS OR UNREASONABLENESS OF THE MISTAKE IS NOT SIGNIFICANT.

80

1)

Abe (A) Brian (B) Cooper (C)

1. Conspiracy to violate the Tariff Act, A, B, C? YES, ALL

## GROUP CRIMINALITY

### CONSPIRACY

Conspiracy is an agreement by two or more persons to commit a target crime. At common law, culpability attaches at the point of the agreement. Modernly, in a majority of jurisdictions, culpability attaches when there is an overt act in furtherance of the target crime.

Here, A, B, and C "hatched a plan" to obtain whiskey they believed to be produced outside the US, and smuggle it ashore, without paying the federal import duty. The three "knew smuggling items into the US without paying duty required by the Tariff Act was a crime." The three formed a conspiracy in the modern, majority jurisdiction because they also made an overt act in furtherance of the conspiracy. Meeting at A's house to discuss details of how they would bring the whiskey ashore may be argued as an overt act as it is a step further than the mere agreement to commit a crime. A stole a truck to assist with completion of the target crime and move the whisky on land. This is also an overt act in furtherance of the crime. Thus, a conspiracy was formed at common law and modernly because A, B, C, formed an agreement to commit a crime (selling imported whiskey without the proper federal taxation, in violation of federal law, The Tariff Act), and A made an overt act in furtherance when the three met to discuss details of how to bring the whisky ashore in the rowboat. A, B, and C should be convicted of conspiracy at common

Acts  
occurred  
in  
CA.

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law. A would be convicted of the conspiracy in a modern, majority jurisdiction as he committed an overt act in furtherance of the target crime.

### TARGET CRIME

The target crime in these facts is the crime of avoidance of the Federal Tariff Act.

✓ Smuggling whiskey ashore without paying federal taxes, and selling them to a bar, is a violation of the Tariff Act. Even if the conspirators do not complete the target crime, the three are still culpable for the crime of conspiracy. Agreements to commit criminal acts are dangerous in and of themselves and are separate from the target crime. It is not relevant that the target crime was not technically a crime because the whiskey was produced domestically and not subject to the Tariff Act.

### CONCLUSION

A, B, and C formed an agreement to commit a crime and would be convicted of conspiracy at common law.

Theft of the Truck, A, B, C? YES, ALL

### GROUP CRIMINALITY

### PINKERTON DOCTRINE

The Pinkerton Doctrine, at common law, states that all coconspirators are culpable for any foreseeable criminal acts committed by any members of the conspiracy, in furtherance of the target crime.

\_\_\_\_\_ He's a PI  
Here, A stole a truck in furtherance of getting away with the smuggled whiskey/target crime once it was brought ashore. Using a stolen vehicle to move the smuggled whiskey from the shore to its on-land safe house is a foreseeable criminal act in furtherance of the

target crime. The row boat cannot be used to transport the whiskey on land, thus this  
overt act is foreseeable and A, B, and C will be convicted of the theft of the truck at  
common law, under the Pinkerton Doctrine.

## DEFENSES

### WITHDRAWAL

Effective withdrawal from a conspiracy requires that the withdrawal be communicated to  
the coconspirators and timely (in time to thwart the target crime and inform police.) At  
common law, an effective withdrawal will allow the person withdrawing to avoid  
culpability for the target crime but not the conspiracy itself. Conspiracy culpability  
attaches at the time the agreement is formed.

overt  
act  
rule?

B's Withdrawal, effective?

Here, B attempts to withdraw when he calls A and informs A that he has bowling plans  
and will not be joining in the execution of the target crime. A acknowledges the  
withdrawal and replies that B will not receive profits from the crime. C appears to  
somehow find out later but the facts do not indicate how C learned of B's withdrawal. On  
these facts, B's withdrawal is ineffective. It is irrelevant that B will not receive profits.  
Even if B had communicated his withdrawal to all coconspirators, B still failed to meet  
the element of timely communication to law enforcement in time to thwart the target  
crime. Thus, B does not have an effective withdrawal.

fact

C's Withdrawal, effective?

Here, C communicates his withdrawal to law enforcement in time to thwart the target  
crime but C fails to communicate his withdrawal to his coconspirators. Thus, C's  
withdrawal is not effective.

Does C have a duress defense?

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## MISTAKE of LAW or IMPOSSIBILITY

✓ Mistake of law is a defense available when the law is either incorrect or the person relies upon an interpretation of the law from a government official. Mistake is not an available defense when a person is simply mistaken about what the law is.

Here, A, B, and C were mistaken about the whiskey being produced overseas and the applicable federal laws. Defense will argue that it is impossible to charge the three with conspiracy to commit a target crime that is not technically a crime, due to the defendants' mistake. Mistake or impossibility of the target crime are not defenses for conspiracy.

## CONCLUSION

A, B, and C will likely be convicted of the theft of the truck under a group criminality and the Pinkerton Doctrine.

A = PI re theft

2. Attempt to import dutiable goods without payment in violation of the Tariff Act, A?

## ATTEMPT

direct, but ineffectual

Attempt is an ~~overt act~~ in a substantial step of committing the target crime.

Here, A stole a truck and that would qualify as a substantial step in furtherance of the target crime. A may assert a defense that because of impossibility he is not guilty of the attempt of a criminal act that is not even a crime. This defense will not be successful because the attempt can be charged on its own. If he had completed the target crime/not an actual crime, he would not be guilty because the target crime and attempt merge.

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However, here, the charge is a stand alone crime of attempt. Thus, A will be convicted of Attempt due to the substantial overt act in furtherance of the target crime.

**END OF EXAM**

85

2)

## 1. LOU AND RYAN'S MOTIONS TO SUPPRESS.

### 1.a. Patrol Car Statements.

Under the **Fifth Amendment** (5th Am.) individuals are protected from making incriminating statements about themselves. Further individuals are protected from unreasonable governmental searches and seizures under the Fourth Amendment (4th Am). To establish a claim under the 4th, it must be established that there was a **government actor** and that the party asserting the challenge has standing. Here, because Lou and Ryan were apprehended by Officers Rooney and Drew, the government actor element has been met.

✓ **Standing** requires that the individual have a subjective expectation of privacy. More rigorous, is the requirement that individuals have an objectively reasonable expectation of privacy, meaning that the average (reasonable) person would feel that they had an ✓ expectation of privacy under the circumstances. Here, Lou and Ryan were in the back of a patrol car after a homicide took place. It is unlikely that a reasonable person would believe they had a reasonable expectation of privacy in the back of a patrol car. As such, the standing element is likely not met.

obj.  
veas.

Lou and Ryan may assert that they were entitled to warnings under *Miranda v. Arizona*, because they were in a custodial setting. Custodial Settings are established when an individual is not free to leave. Custodial settings can also be established by probable cause on the part of Law Enforcement Officers ("LEO"s). It would not be difficult to argue that they were in a custodial setting.

✓  
Subjects are entitled to Miranda Warnings when they are **interrogated in a custodial setting**. Here, as mentioned above, it could easily be argued that Lou and Ryan were in custody. However, a requirement of interrogation will be more difficult to prove.  
Interrogations can occur formally, where a suspect is interviewed by LEO. Another method is the functional equivalence of interrogation, generally when law enforcement provokes a suspect to speak by some (usually coercive) act by law enforcement without direct questioning. An example of functional equivalence is when officers speak amongst themselves in an attempt to evoke a response from the suspect. Here, there is an absence of law enforcement in the vehicle, and also any facts that lend to a plan or intent to draw a confession out of Lou and Ryan. It is unlikely that the Defense will be able to establish their burden of proving that LEO interrogated them when they discussed the crime in the patrol car.

FLA  
⊗  
Conclusion: as such, it is likely that Lou and Ryan's statements will come in, i.e., the motion to suppress the statements will be denied.

### 1b. Cash and Fentanyl

✓ Under the Fourth Amendment (4th Am), Defendants are privileged against unreasonable governmental intrusions and require warrants with probable cause and particularity of the persons or items to be searched or seized, and that warrants be issued by a neutral and detached magistrate. As noted above, both standing and a government actor must be established to prevail on a 4th Am. challenge.

Government actor element is met, see discussion above.

✓ **Standing.** Standing as discussed above requires both an objective and subjective expectation of privacy. Generally a warrantless search is qualified as (presumptively) per

se unreasonable. When law enforcement opened the briefcase, a warrant was required unless the search qualified under a search warrant expectation.

At the time that the briefcase was searched, Officer Drew apprehended Lou and Ryan after killing Officer. Dew placed both suspects into a patrol car. As discussed above, it is likely that in the patrol car, Lou and Ryan were in a custodial setting, likely after an arrest (although the facts are silent). **Search incident to lawful arrest** is an exception to the search warrant requirement, which permits officers to search the person and any personal property items within his wingspan. This exception is made for public policy reasons surrounding officer safety. As such it is likely that the search of the briefcase was not in derogation of 4th Amendment privileges.

pc =  
Does  
apprehend  
=  
custody  
?

**Standing not vicarious.** 4th and 5th Am protections are not vicarious, meaning that a third party cannot bring a motion to suppress items that were found on the person of another individual.

**Conclusion.** Here, although it is **unlikely that Ryan will prevail** in his motion to suppress, it is **almost impossible for Lou to prevail** in this motion because the search of Ryan's briefcase was not in derogation of Lou's right to be free from searches and seizures.

## 2. PROSECUTION OF SAM FOR MURDER?

Group  
Criminality

**Conspiracy.** Conspiracy is an agreement between two parties to commit a breach of the peace. Here, Sam and Ryan were in the drug business together, thus it can be safely asserted that they were a part of a conspiracy to traffic and distribute drugs.

Sam's involvement is not so clear. Sam hired Lou and told him that Ryan was carrying rare gems and required protection. Lou and Sam's prior relationship is not mentioned, but if Lou had some knowledge that Ryan and Sam were involved in criminal activity, or if

yes

Lou was cognizant of a possibility that he would be expected to break the laws in his security duties, it can be established that a conspiracy was formed. Based upon Lou's statements in the car it can be asserted that he knew he was getting involved and committed a substantial step in furtherance of the target of his co-conspirator(s). It is likely that Lou can be labeled as a co-conspirator.

An undercover detective was attempting to arrest Ryan. Ryan resisted, and Lou, who was not aware of the true contents of Ryan's briefcase, stepped in. When Lou killed the undercover cop, Rooney, he was under the belief that Sam and Ryan were in the business of rare diamonds, and likely believed that Ryan was being robbed. Lou beat Rooney upside the head, killing him.

✓ Homicide is the unlawful killing of a human by another human. Murder is differentiated from homicide in that it requires malice aforethought. Malice is the requisite mental state of murder.

Here when Lou attacked Rooney by striking him severely about the head, malice can likely be established by the implied malice theory of intent to cause great bodily injury or wanton willful disregard for human life. ✓

Under the Pinkerton doctrine, all co-conspirators are culpable for the crimes of their co-conspirators when the conduct is a foreseeable result and in furtherance of the target crime. Here, the commission of the crime of drug possession or trafficking was being thwarted by Rooney. When Lou attacked him, it can likely be established that the conduct was a foreseeable outgrowth, but the heavy lifting will be with Lou's understanding of the activity he was hired to protect.

**Conclusion.** If it can be established that Lou volitionally agreed to commit a breach of the peace, whether by way of the drugs or by the violence he was potentially hired to

inflict, Culpability for Lou's murder of Rooney is likely attributable to Sam as a co-conspirator.

### 3. LOU'S DEFENSES AND LIOs

*malice  
theory?*

The crime of murder may be mitigated by the assertion of a class of defenses where the individual was provoked to act. Here, Lou was not aware of the drugs in the briefcase, and was warned by Sam that Sam was concerned with Ryan being assaulted. Further, Officer Rooney was in plain clothes as he was undercover, and was likely not identifiable as Law Enforcement to Lou. Lou likely saw a scuffle between Ryan and Lou and acted quickly.

**Imperfect self defense** is available when an individual had a mistaken but good faith belief that he was in grave danger. Because Lou likely believed that Ryan was being assaulted, he sought to defend Ryan. If Lou successfully asserted imperfect self defense, it would not relieve him completely, but reduce the murder to voluntary manslaughter. Imperfect self defense will likely fail, because Rooney was not physically harming Ryan, but simply seaching him. There are no facts that suggest Ryan was struck, or that a weapon was seen by Lou. Although defense of others can be asserted similar to defense of self, an individual cannot escalate the situation further, and he must act in response to a fear for at least someone's livelihood. *good!*

Lesser Included offenses of murder are assault <sup>✓</sup> and battery. Lesser included offenses cannot be charged simultaneously for the same act if the greater offense is being plead. As such, prosecutors should likely stick with a charge for murder.

*Outstanding  
response!*

**END OF EXAM**

3)

1. True

(7)

not always

unless unforeseeable

A dependent intervening act does not break the chain of causation, but an independent intervening act does. Dependent acts are foreseeable and therefore don't end culpability.

For example, if a suspect shoots someone in the arm and the ambulance taking them to the hospital is involved in a traffic accident and they get a concussion, that's a foreseeable and wouldn't have happened if the suspect didn't shoot them. An independent act would be something like lightning striking the ambulance (and act of god) or a completely separate suspect robbing the ambulance and shooting the victim in the other arm.

2. False

(10)

Legally adequate provocation has the legal effect of reducing a killing from murder in the first degree to voluntary manslaughter, not murder in the second degree. The same circumstances that provoke the suspect into the killing can either be heat of the moment without time to contemplate the action--voluntary manslaughter, or there can be time to "cool off," even just for a second, which turns the same act into deliberate premeditated murder.

3. False

(5)

Need "causation" Not treated as strict culpability

Similar to torts, the suspect must take the victim as he finds her. In this case, the victim is a hemophiliac. It doesn't matter that D didn't intend to kill her because his actions were in the flight from an enumerated felony. D is culpable of Felony Murder if a killing occurs during the attempt, commission or flight from a burglary, arson, robbery, rape, or kidnapping. In some jurisdictions felony murder includes any inherently dangerous felony.

4. True

(8)



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a Miranda violation because the suspect is not aware that the cellmate is acting at the behest of law enforcement so there is no coercive environment.

8. False (8) ✓

The lawyer's call does not prevent law enforcement from interviewing the suspect.

(9) - However, the sixth amendment probably does. Unless the suspect has given a voluntary, knowing waiver of his right to counsel, the sixth amendment gives the suspect the right to counsel at each critical stage of the proceedings. An interview with law enforcement is a critical stage.

9. False (10)

(10) - Not all accomplices are conspirators. More facts would be needed to know whether or not there was a conspiracy. The principal in the first is not necessarily in a conspiracy with any aiders or abettors. The principal in the second could be an accomplice before the fact, but not in a conspiracy with the principal in the first.

10. False (10) ✓

(10) - Theft crimes are specific intent and therefore mistake of fact does not need to be reasonable to be a defense. Specific intent crimes require a mens rea of more than just the act. For larceny, there must a taking, but also an intent to take the property of another to permanently deprive. Here, D just thought he was taking back his own lighter and didn't have the necessary mental state for larceny.

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**END OF EXAM**