

## QUESTION 5

Don has owned Don's Market in the central city for twelve years. He has been robbed and burglarized ten times in the past ten months. The police have never arrested anyone. At a neighborhood crime prevention meeting, a police officer told Don of the state's new "shoot the burglar" law. That law reads:

Any citizen may defend his or her place of residence against intrusion by a burglar, or other felon, by the use of deadly force.

Don moved a cot and a hot plate into the back of the Market and began sleeping there, with a shotgun at the ready. After several weeks of waiting, one night Don heard noises. When he went to the door, he saw several young men running away. It then dawned on him that, even with the shotgun, he might be in a precarious position. He would likely only get one shot and any burglars would get the next ones. With this in mind, he loaded the shotgun and fastened it to the counter, facing the front door. He attached a string to the trigger so that the gun would fire when the door was opened. Next, thinking that when burglars enter it would be better if they damaged as little as possible, he unlocked the front door. He then went out the back window and down the block to sleep at his girlfriend's, where he had been staying for most of the past year.

That same night a police officer, making his rounds, tried the door of the Market, found it open, poked his head in, and was severely wounded by the blast. Don is charged with assault and battery.

### QUESTION:

Discuss Don's potential defenses.

## DISCUSSION FOR QUESTION 5

1. Don lacked the mens rea for Assault Criminal assault includes both a specific intent to commit a battery, and a battery that is otherwise unprivileged committed with only general intent. Perkins and Boyce, Criminal Law, 3d ed, Foundation Press at 173. As Don intended the act, he had the necessary mind set for assault unless his act was otherwise excused. If Don committed an unprivileged assault on his victim, the fact that his victim turned out to be a police officer is not a defense to the charge of Assault. See States v. Feola, 420 U.S. 671 (1975).

2. Defense of Self and of Property All jurisdictions excuse the use of deadly force in the reasonable apprehension of imminent and serious bodily harm. See Perkins supra at 1113. Since Don was not on the premises defending himself at the time of the shooting, however, harm to himself was not imminent.

At common law and in the majority of jurisdictions, defense of property does not excuse deadly force unless there is an imminent risk to the person. Perkins supra at 1115. Once again, no such risk appears here.

3. "Shoot the Burglar" Defense. This applicability of this defense hinges on both a mistake of fact -- that a burglar would be shot -- and a mistake of law -- that the grocery was his residence.

c. Mistake of fact. Don believed the intruder would be a burglar. Had it been a burglar, his act would arguably have been privileged under the shoot-the-burglar statute. Whether it would or would not have been so privileged, however, the mistake of fact defense generally requires an objectively reasonable belief in the fact mistaken. Perkins and Boyce, supra at 1046. The MPC makes an exception where the mistake negates mens rea; MPC 2.04; this exception is not applicable here, see Answer 1, above. If the trier of fact finds Don unreasonable in his belief that a burglar would be shot, this defense is unavailable. If on the other hand Don is found reasonable in his belief, it only avails him if in fact he also qualified under the shoot-the-burglar statute.

d. Mistake of Law. The shoot-the-burglar statute enables a citizen to defend his or her "residence." If Don's grocery, under these facts, was his residence, then this defense might work. If it was not, however, (he had been, under the facts, living elsewhere with his girlfriend), although Don reasonably believed it was, his mistake was one of law. At common law and in the majority of jurisdictions, a mistake of law will not relieve one of criminal liability. Perkins, supra at 1029. Don may argue an exception here, however. The Model Penal Code provides for a mistake of law when made in reasonable reliance upon an official, if erroneous statement of law made by a public officer charged with its enforcement, Model Penal Code Sec. 2.04(3)(b), in Don's case the police officer. This defense is doubtful, however, because, under the facts given, although the officer informed Don of the shoot-the-burglar statute, there is no evidence the officer said anything to Don about his residence.

Examine # \_\_\_\_\_

Final Score \_\_\_\_\_

**SCORESHEET FOR QUESTION 5**  
**ASSIGN ONE POINT FOR EACH STATEMENT BELOW**

**SCORE SHEET**

1. Definition of assault: attempted battery or conduct placing another in fear of imminent bodily harm. 1. \_\_\_\_\_
2. Definition of battery: offensive contact. 2. \_\_\_\_\_
3. Recognition that lack of mens rea could amount to a defense 3. \_\_\_\_\_
4. D. had mens rea for the offenses 4. \_\_\_\_\_
5. Recognition that defense of property might apply 5. \_\_\_\_\_
6. Application: defense of property does not excuse deadly force 6. \_\_\_\_\_
7. Recognition of mistake of fact. 7. \_\_\_\_\_
8. As to specific intent crimes, D's mistake need not have been reasonable 8. \_\_\_\_\_
9. As to general intent crimes, D's mistake must have been reasonable. 9. \_\_\_\_\_
10. Recognition of mistake of law. 10. \_\_\_\_\_
11. Recognition of exception to Mistake of Law: reasonable reliance on official statement 11. \_\_\_\_\_
12. Recognition that elements of assault are not met here. 12. \_\_\_\_\_

## QUESTION 1

Matthew asked Drake if he could buy a gun from him. Drake agreed to sell a gun to Matthew at an agreed upon price. Later, Drake and his friend John decided they would only pretend to sell Matthew the gun. Their intent was to “rip off” Matthew. They figured they would point the gun at Matthew and scare him into letting them keep the money and the gun.

The next day, Matthew, Drake, and John met to complete the transaction. They got into Matthew’s car and drove to a nearby parking lot. Matthew gave Drake the money and Drake gave the gun to Matthew. Drake then told Matthew that he wanted to show Matthew an interesting feature, and asked Matthew to give the gun back to him. Matthew complied. Drake then loaded the gun, and he and John got out of the car with the money and the gun. Drake pointed the gun at Matthew’s head and said “You better not say anything about this to anybody.” At that moment the gun fired, killing Matthew.

### QUESTION:

Discuss what common law felony crimes Drake could be charged with, and what arguments he might make to counter those charges. (The jurisdiction where the trial is to be held follows the majority rule.)

## DISCUSSION FOR QUESTION 1

Drake could be charged with the following common law felonies: conspiracy to commit robbery, robbery, felony murder, and murder. With respect to the murder charge, Drake might more appropriately be convicted of the lesser included offense of manslaughter. If convicted of all crimes charged, the murder or manslaughter and robbery convictions would merge into the felony murder conviction. The conspiracy conviction would not merge into the robbery or felony murder convictions.

### Conspiracy

The elements of conspiracy are: (1) an agreement between two or more people, (2) with the specific intent to enter an agreement, and (3) with the specific intent to commit a crime. The majority rule is that the conspirators must also commit an overt act in furtherance of the conspiracy. Wharton's Criminal Law (15th Edition), §§ 678-684.

Here, Drake and John expressly agreed to sell Matthew a gun and then to retain both the money and the gun. The day after they entered into their agreement, they acted on their plan, thus committing overt acts in furtherance of the conspiracy.

### Robbery

The elements of robbery are: a taking of the property of another person from his person or in his presence by force or intimidation and without his consent with the intent to permanently deprive the victim of the property. The threats must be of immediate death or serious physical injury to the victim, and must be made either before or immediately after taking the property. Wharton's Criminal Law (15th Edition), §§ 454, 455, 457-63.

Here, after selling Matthew a gun and accepting his money, the gun became Matthew's property. Drake took the gun back with the intent to permanently deprive Matthew of the gun (contrary to his representation that he only wanted to show Matthew a feature of the gun, Drake never intended to give the gun back to Matthew). And, although Matthew gave the gun back to Drake when Drake said he wanted to show Matthew a feature of the gun, Matthew did not consent to letting Drake keep the gun permanently. Drake took the gun from Matthew's person, and pointed the gun at his head while cautioning him not to say anything, thus satisfying the requirement that the property be taken by force or threat.

Some examinees might argue that Drake is guilty of larceny rather than robbery. The elements of larceny are: the taking and carrying away (asportation) of the property of another without the victim's consent and with the intent to permanently deprive him of the property. The primary difference between larceny and robbery is that robbery involves the use of force or threats, while larceny does not. Here, Drake clearly used threats to steal the gun, so is guilty of robbery.

### **Felony Murder**

If a killing is committed in the course of committing a felony, it is felony murder. The majority rule is that a robbery can serve as a predicate offense for felony murder. To obtain a conviction for felony murder, the prosecution is required to show only that a person was killed during the commission of a felony, and that the victim was not a participant in the crime. The majority rule is that the death must have been a foreseeable result of commission of the felony. Wharton's Criminal Law (15th Edition), §§ 147, 149, 150.

Here, if Drake is convicted of the underlying felony (robbery), he should also be convicted of felony murder. Matthew was killed during the course of the robbery, and it was foreseeable that he would be killed when Drake pointed the loaded gun at his head.

### **Murder**

If Drake were acquitted of the robbery charge, he could not be convicted of felony murder. Thus, the prosecution should separately charge him with murder.

Murder is the unlawful killing of a human being with malice aforethought. Wharton's Criminal Law (15th Edition), §§ 114 and 139; Model Penal Code, § 210.2.

In the absence of facts excusing the homicide or reducing it to voluntary manslaughter, malice aforethought exists if the defendant has the intent to kill, or the intent to inflict great bodily injury, or if he acts with reckless indifference to an unjustifiably high risk to human life. Wharton's Criminal Law (15th Edition), § 139. Intentional use of a deadly weapon gives rise to a permissive inference of intent to kill. Wilson v. State, 832 S.W.2d 777 (Tex. App. 1992); see also Wharton's Criminal Law (15th Edition), § 141.

Nevertheless, here, Drake did not specifically intend to kill Matthew, and probably did not even intend to cause him serious bodily harm. However, Drake probably acted recklessly. A person acts recklessly when he consciously disregards a substantial or unjustifiable risk that a certain result will follow, and this disregard constitutes a gross deviation from the standard of care that a reasonable person would use under similar circumstances. Wharton's Criminal Law (15th Edition), § 145. By pointing a loaded gun at Matthew's head, even if just to scare him, Drake arguably knew of and consciously disregarded the risk that Matthew would be shot.

### **Manslaughter**

The prosecution should charge Drake with murder, but the jury might find him guilty of the lesser offense of involuntary manslaughter. Involuntary manslaughter is the criminally negligent killing of another person. A person is criminal negligent when he fails to be aware of a substantial and unjustifiable risk that a result will follow, and such failure constitutes a substantial deviation from the standard of care that a reasonable person

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**DISCUSSION FOR QUESTION 1**  
**Page Three**

would exercise under the circumstances. To determine whether a person acted negligently, an objective standard is used. Here, at the very least, by pointing a loaded gun at Matthew's head, Drake ignored the substantial risk that Matthew would be shot. 2 Wharton's Criminal Law (15th Edition), §§ 168, 169, 171.

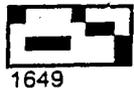
**Merger**

Lesser included offenses merge into greater offenses. A lesser included offense is one that consists entirely of some, but not all, elements of the greater crime.

Here, if Drake were convicted of all crimes charged (conspiracy to commit robbery, robbery, felony murder, and murder or manslaughter), some of his convictions would merge. Specifically, because the robbery was the underlying felony for the felony murder conviction, it is a lesser included offense of felony murder, and would merge into the felony murder conviction. See Boulies v. People, 770 P.2d 1274 (Colo. 1989).

Moreover, a criminal defendant cannot be convicted of two murder-related charges involving the same victim. See People v. Hickham, 684 P.2d 228 (Colo. 1984). In addition, murder and manslaughter are lesser included offenses of felony murder. Thus, if Drake were convicted of either murder or manslaughter in addition to felony murder, the murder or manslaughter conviction would merge into the felony murder conviction. See People v. Hickham, supra.

Conspiracy does not merge with the completed offense. Thus, conspiracy conviction would not merge into either the felony murder or robbery convictions.



1649

### Essay1 GradeSheet

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- 1. Recognition of Conspiracy Issue 1. \_\_\_\_\_
  - 1a. An agreement between two or more people with the intent to commit a crime requiring overt act. 1a. \_\_\_\_\_
  
- 2. Recognition of Larceny Issue 2. \_\_\_\_\_
  - 2a. Wrongful taking and carrying away of another's property with intent to permanently deprive . 2a. \_\_\_\_\_
  
- 3. Recognition of Robbery Issue 3. \_\_\_\_\_
  - 3a. Taking property from the presence of another by force or intimidation and with intent to permanently deprive. 3a. \_\_\_\_\_
  
- 4. Recognition of Assault Issue 4. \_\_\_\_\_
  - 4a. Attempted battery or intentional creation of reasonable fear of imminent bodily harm. 4a. \_\_\_\_\_
  
- 5. Recognition of Murder Issue 5. \_\_\_\_\_
  - 5a. Killing of another with malice aforethought. 5a. \_\_\_\_\_
  - 5b. Malice aforethought can be established by intent to kill, intent to seriously injure, depraved heart, or felony murder. 5b. \_\_\_\_\_
  
- 6. Recognition of Involuntary Manslaughter Issue 6. \_\_\_\_\_
  - 6a. Killing of another with criminal negligence. 6a. \_\_\_\_\_
  
- 7. Recognition of Merger Issue 7. \_\_\_\_\_

## QUESTION 2

Darrell picked up his eight year old daughter, Kate, at school on Friday afternoon. While they were riding home, she told him that her grandfather, Victor, had molested her six months earlier. Darrell's relationship with Victor was already estranged; they had not spoken for over a year.

The following Monday night, Darrell went to Victor's house, entered through the back door, and shot Victor in the chest, killing him.

### QUESTION:

Discuss potential crimes with which Darrell may be charged and possible defenses he may raise.

## DISCUSSION FOR QUESTION 2

### 1. Possible Crimes

Darrell potentially is guilty of either murder or manslaughter, and burglary.

#### A. Murder

##### Elements of Crime

Murder is the unlawful killing of a human being with malice aforethought. 2 Wharton's Criminal Law (15th Edition), §§ 114 and 139; Model Penal Code, § 210.2.

In the absence of facts excusing the homicide or reducing it to voluntary manslaughter, malice aforethought exists if the defendant has the intent to kill, or the intent to inflict great bodily injury. 2 Wharton's Criminal Law (15th Edition), § 139. Intentional use of a deadly weapon gives rise to a permissive inference of intent to kill. Wilson v. State, 832 S.W.2d 777 (Tex. App. 1992); People v. Muldrow, 332 N.E.2d 664 (Ill. App. 1975); see also 2 Wharton's Criminal Law (15th Edition), § 141.

Here, unless Darrell acted under a sudden heat of passion (see Section B, *infra*), the state should be able to prove the elements of murder without difficulty. Darrell killed Victor, another human being. When Darrell fired the gun (a deadly weapon) at Victim, the most reasonable assumption under these circumstances is that he intended to kill Victor, or at least cause serious bodily injury to him. Thus, he acted with the requisite malice aforethought.

#### B. Manslaughter

A killing that otherwise constitutes murder is mitigated to voluntary manslaughter at common law if it occurs in a "sudden heat of passion." The elements of the provocation mitigator are: (1) the provocation must have been one that would arouse sudden and intense passion in the mind of an ordinary person, such as to cause him to lose his self-control; (2) the defendant must have in fact been provoked by the victim; and (3) there must not have been a sufficient time between the provocation and the killing for the passions of a reasonable person to cool off. With respect to the third element, the provocation need not occur immediately before the act causing death, and the fact finder should consider the particular emotional state of the defendant, the nature of the provocation, and the attendant circumstances. Coston v. People, 633 P.2d 470 (Colo. 1981); People v. Wadley, 890 P.2d 151 (Colo. App. 1994); see also 2 Wharton's Criminal Law §§ 155-57, 166; Model Penal Code, § 210.3(1)(b).

Here, Darrell learned that Victor had molested Kate. This probably constitutes a sufficiently provoking act to arouse a sudden and intense passion in the mind of an ordinary person such as to cause him to lose his self-control. Thus, the first two elements of the offense will probably be met.

Whether the three-day delay between the time Darrell learned of the molestation and the time he killed Victor was a sufficient interval to allow a reasonable person to function rationally after having been severely provoked is a more difficult question, though the answer is probably yes.

### C. Burglary

At common law, the elements of burglary are an unlawful breaking and entry into a dwelling of another person at night with the intent to commit a felony therein. United States v. Brandenburg, 144 F.2d 656 (3rd Cir. 1944); Sanchez v. People, 142 Colo. 58, 349 P.2d 561 (1960); see also 3 Wharton's Criminal Law §§ 316-19, 328; Model Penal Code, § 221.1. A "breaking" requires only minimal force, and it is enough if the defendant merely opens a closed but unlocked door. United States v. Evans, 415 F.2d 340 (5th Cir. 1969); see also 3 Wharton's Criminal Law, 15th Edition) §318. Because Darrell's relationship with Victor was already estranged, and the two men had not spoken for over a year, we can assume that Darrell did not have Victor's consent to enter his house. Darrell's entry into Victor's house on Monday night satisfies the requirement of an unlawful breaking and entry into the dwelling of another at night.

Darrell might claim that, when he entered Victor's house, he did not intend to kill Victor, but only to confront him about his having molested Kate. The fact that Darrell had a gun, however, suggests that he at least intended to commit assault by using the gun to threaten Victor with serious bodily harm, if not to kill him. Moreover, if a felony is actually committed, the fact-finder may infer that the defendant intended to commit the felony at the time of the breaking and entry. Davis v. State, 165 So.2d 918 (Ala. App. 1969); State v. Rood, 462 P.2d 399 (Ariz. App. 1969); 3 Wharton's Criminal Law (15th Edition), § 328. Thus, Darrell will probably be found guilty of burglary.

### 2. Possible Defenses

There are no defenses (other than denial of the elements of the charged offenses) available to Darrell. Darrell, however, might seek to defend the murder/manslaughter charge by asserting the defense-of-another defense. More specifically, he might claim that he was acting to protect Kate from Victor. Under the defense-of-another defense, a person is justified in using deadly force to protect another person from an imminent unlawful deadly attack. However, a defendant has the defense of defense of others only if he reasonably believed or it reasonably appeared to him that the person he assisted had the legal right to use force in her own defense. A person may use deadly force in self-defense if she is: (1) without fault, (2) confronted with unlawful force, and (3) threatened with imminent death or great bodily harm. A person may not use deadly force to defend herself if harm is merely threatened at a future time. People v. Hawthorne, 190 Colo. 437, 548 P.2d 124 (1976); see also, 2 Wharton's Criminal Law (15th Edition), §§127 and 130; Model Penal Code, §§3.04 and 3.05.

Here, the molestation took place six months earlier, and there is no indication that it was life threatening or that it could have caused great bodily harm. Because Victor did not threaten Kate with death or great bodily harm immediately before Darrell shot him, Darrell will not be able to rely on the defense-of-another defense.



21321

**Essay 2 GradeSheet**

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1. Murder – the killing with “malice aforethought,” of another human being.. 1. \_\_\_\_\_
2. Malice aforethought -- 1) intent to kill, 2) intent to cause great bodily injury, 3) “depraved and malignant heart,” 4) intent to commit another felony. 2. \_\_\_\_\_
3. Facts support intent to kill or cause great bodily injury. 3. \_\_\_\_\_
4. Killing during the course of burglary amounts to felony murder. 4. \_\_\_\_\_
5. Manslaughter -- the intentional killing, with provocation, of another. 5. \_\_\_\_\_
6. Manslaughter established where provocation sufficient to cause sudden and intense passion; 6. \_\_\_\_\_
7. subjective and objective provocation; and 7. \_\_\_\_\_
8. no cooling off period. 8. \_\_\_\_\_
9. Burglary -- unlawful breaking and entering into the dwelling of another at night with intent to commit felony therein. 9. \_\_\_\_\_
10. Consideration of defense of others. 10. \_\_\_\_\_

## QUESTION 2

One evening while sitting in a bar, after having had a few drinks, Carrie thought of a way to get some fast cash. She stumbled from the bar to Valerie's house. The house appeared to be empty, so she went to the back door, found it unlocked and went inside where she grabbed some jewelry and cash. Then, in an attempt to cover-up her crime, she poured gasoline around the house, lit a fire, and ran. Unbeknownst to Carrie, Valerie was sleeping inside the house and died in the fire.

### **QUESTION:**

Discuss crimes Carrie may have committed and any defenses to her actions. (Carrie lives in a jurisdiction that follows traditional common law principles.)

## DISCUSSION FOR QUESTION 2

### Burglary

As an initial matter, Carrie is guilty of the crime of burglary. At common law, burglary is defined as the breaking and entering into the dwelling house of another in the nighttime with the intent to commit a felony therein. *Oken v. State*, 327 Md. 628, 612 A.2d 258 (1992). Unlawful entry into a building in which an individual is not authorized or invited to enter constitutes an unlawful entry. *State v. Howe*, 116 Wash. 2d 466, 805 P.2d 806 (1991). Moreover, even where that entry is through an unlocked door, that act is sufficient to constitute a breaking for purposes of sustaining a burglary conviction. *Id.* A "dwelling house" is defined as a building, which is regularly used as a place to sleep. A building does not become a "dwelling" by reason of the fact that someone may sleep there on rare occasion. *Poff v. State*, 4 Md. App. 186, 241 A.2d 898 (1968).

### Larceny

The intent to commit the larceny is evident from the fact pattern and, therefore, all of the necessary elements to establish the crime of burglary are present. The crime of larceny is the taking and carrying away of the personal property of another with the intent to unlawfully and permanently deprive the owner of its use. *Swift v. American Universal Insurance Company*, 349 Mass. 637, 212 N.E.2d 448 (1965). The facts as given clearly establish that Carrie has committed the crime of larceny.

### Arson

In order to establish the crime of arson, the Defendant must be shown to have maliciously and willfully burned the dwelling house of another. *State v. Oxendine*, 305 NC 126, 286 S.E.2d 546 (1982). Arson is a crime of general intent and is therefore not subject to the defense of diminished capacity. *Veverka v. Cash*, 318 N.W.2d 447 (1982). As is true with the above crimes, the facts clearly establish that Carrie is guilty of this crime as well.

### Felony Murder

Felony murder arises where an individual causes the death of another while committing or attempting to commit robbery, rape, arson or burglary. *See generally, Conrad v. State*, 75 Ohio St. 52. Moreover, where the felony relied upon involves a burglary, it is not necessary to prove the existence of items which could have been stolen, since it is only necessary to prove an attempt to commit the underlying felony. *State v. Davis*, 56 Ohio St. 2d 51. Again, the above discussion makes clear that Carrie is guilty of the underlying felony of arson since Valerie was killed as a result of the commission of that felony. Therefore, a claim of felony murder will lie against Carrie.

**Potential Defense**

The only potential defense that Carrie may raise with regard to the above acts is that she was voluntarily intoxicated and thus unable to intend to commit any of the above-mentioned crimes. Generally, voluntary intoxication is not a defense to any crime. *State v. Davis*, 81 Ohio App. 3d 706, 612 N.E.2d 343 (1992). An exception to the general rule is that voluntary intoxication may be a defense when specific intent is a necessary element of the charged offense in that the intoxication was significant enough to preclude the formation of such intent. *Id.* Voluntary intoxication therefore may be a defense to the specific intent crimes of burglary and larceny. Nevertheless, there would have to be proof that Carrie was so intoxicated as to not be able to form the requisite intent.



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## Essay 2 GradeSheet

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1. Recognize the crime of burglary 1. \_\_\_\_\_
2. Identify the elements of burglary (breaking and entering into the dwelling house of another at night with the intent to commit a felony). 2. \_\_\_\_\_
3. Even though door was unlocked, Carrie's entry constituted "breaking." 3. \_\_\_\_\_
4. Recognize the crime of larceny. 4. \_\_\_\_\_
5. Identify elements of larceny (the taking and carrying away of the personal property of another with the intent to unlawfully and permanently deprive the owner of its use). 5. \_\_\_\_\_
6. Recognize the crime of arson. 6. \_\_\_\_\_
7. Identify the elements of arson (the malicious burning of the dwelling house of another). 7. \_\_\_\_\_
8. Recognize the crime of felony murder. 8. \_\_\_\_\_
9. Identify elements of felony murder (causing of the death of an individual in the course of a felony). 9. \_\_\_\_\_
10. Recognize the potential defense of voluntary intoxication. 10. \_\_\_\_\_
11. Recognize that voluntary intoxication applies only to specific intent crimes. 11. \_\_\_\_\_

## QUESTION 7

Dixon was upset that his sister, Pam, was dating Vickers. One afternoon, Dixon went to the shoe store in the local mall where Vickers worked and confronted him. Dixon demanded that Vickers stop seeing his sister, and Dixon threatened to beat Vickers up if he did not agree. In response, Vickers seized Dixon, twisted his arm behind his back, and forced him out of the shoe store into the parking lot. Vickers told Dixon that he was going to kill him. Then Vickers released his hold and threw Dixon to the ground. Vickers laughed, turned his back and started to walk away. Dixon pulled out a knife, leaped up, and stabbed Vickers twice in the back, killing him.

### QUESTION:

Discuss the common law crimes Dixon may face, and any defense that may be available.

## DISCUSSION FOR QUESTION 7

### Murder

The defendant may be guilty of murder. Murder at common law is the unlawful killing of another human being with malice aforethought. The prosecution must prove beyond a reasonable doubt both that the defendant caused death and that he had malice. See generally 4 W. Blackstone, Commentaries on the Laws of England \* 195, 198 (T. Cooley ed. 1884), Joshua Dressler, Understanding Criminal Law 467 (2d ed. 1995), W. LaFave & A. Scott, Criminal Law 611 (2d ed. 1986).

Malice may be established by a) intent to kill (i.e., purpose or knowledge death will result), b) intent to inflict serious bodily injury (i.e., a grave injury that impairs health seriously), Commonwealth v. Dorazio, 365 Pa. 291, 74 A.2d 125 (1950), Dressler, supra, at 475-76, c) extremely reckless conduct that evidences "a depraved heart regardless of human life," 4 Blackstone, supra, 199-200; Dressler, supra, at 477-78; LaFave & Scott, supra, at 612-25, or d) intent to commit a felony (felony murder).

In this case malice may be proved by Dixon's intent to kill and his intent to inflict serious bodily injury. His intent may be inferred from the natural and probable results of his act (the stabbing with the knife), see Dressler, supra, at 471, though the jury must not be instructed that such inferences are required. See Francis v. Franklin, 471 U.S. 307 (1985) (holding that a jury instruction violated due process when it told jury to presume defendant intended natural and probable consequences of his acts but that presumption could be rebutted, because such an instruction might cause reasonable jurors to conclude that defendant bore burden of proving his own lack of intent, thus shifting the burden of proof from the state).

### Manslaughter

The defendant may be guilty of manslaughter. Manslaughter at common law is the unlawful killing of another human being without malice. See generally id. at 652; 4 Blackstone, supra, 191. A killing may be unlawful yet without malice in one of two ways. First, a killing that would otherwise suffice to establish malice may be found to be mitigated by circumstances that establish actual and adequate provocation where the defendant killed in a "heat of passion." (This is voluntary manslaughter.) Second, a killing that would not satisfy any of the criteria of malice will, nevertheless, be unlawful and constitute manslaughter where the defendant acted with criminal or culpable negligence in causing the death. (This is involuntary manslaughter.) Dressler, supra, at 468; LaFave & Scott, supra, at 652, 653.

To prove voluntary manslaughter, the state must first prove all the elements for murder. But murder will be mitigated (lowered) to manslaughter if Dixon acted

in a "heat of passion" as a result of actual and adequate provocation. Traditionally, the state bore the burden of proving absence of provocation in order to prove murder, but it is not unconstitutional for a state to define mitigating circumstances as an affirmative defense and to require the defendant prove such provocation. Patterson v. New York, 432 U.S. 197 (1977). The facts may support the inference that Dixon acted in a rage or "heat of passion" provoked by the victim's conduct, so actual provocation may be present. But at common law, even if he acted in such a rage, this "heat of passion" must result from certain recognized or legally adequate forms of provocation. Provocation is adequate where it is sufficient to arouse a sudden and intense passion in a reasonable person, without sufficient time for cooling off. And a forcible assault by the victim on the defendant would provide legally adequate provocation. LaFave & Scott, supra, 655-56; Dressler, supra, at 491. In this case, however, Vickers arguably did not assault defendant but rather employed legitimate defensive force in response to defendant's own assault. A defendant who provokes a blow may not claim it as adequate provocation to mitigate homicide to manslaughter. LaFave & Scott, supra 655..

Dixon is guilty of involuntary manslaughter if he caused the victim's death with criminal or culpable negligence. At common law, manslaughter is a death that results from an unlawful act or from an act done "in an unlawful manner and without due caution and circumspection." 4 Blackstone, supra, at \* 192. Such criminal or culpable negligence "involves a gross deviation from the standard of care that reasonable people would exercise in the same situation." Dressler, supra, at 498. Stabbing someone twice with a knife is evidence of (at least) criminal negligence with respect to the resulting death. There is no question that the defendant caused the victim's death; but for his stabbing the victim, the victim would not have died at this time and in this way. The defendant was also the legal or proximate cause of Victim's death, because the defendant's stabbing caused the victim's death in the natural and continuous sequence of events. Commonwealth v. Rhoades, 401 N.E.2d 342 (Mass. 1980). While foreseeability is not required by all jurisdictions, id., it is present in this case. Moreover, causation is still more readily established for manslaughter because of the general doctrine that "one is guilty of involuntary manslaughter who intentionally inflicts bodily harm upon another person, as by a moderate blow with his fist, thereby causing an unintended and unforeseeable death to the victim. . . ." LaFave & Scott, supra, 681 (citing many cases).

### Defenses

The defense of self defense is available when a defendant who employs deadly force had a reasonable actual belief that he faced the imminent danger of death or great bodily harm. People v. Lavoie, 155 Colo. 551, 395 P.2d 1001 (1964). Dressler, supra, 200-01. In most jurisdictions and at common law there was no retreat requirement: a defendant might stand his ground and employ protective force even if it were possible to flee safely. People v. Lavoie, 395 P.2d 1001 (1964).

Dressler, supra, 204. Accordingly, if the defendant believed he faced imminent risk of death or serious bodily harm from the victim, the defense of self defense might be available. Of course, the jury could very well disbelieve the defendant's claim that he believed it was necessary self-defense, especially in light of the fact that he stabbed the victim in the back. But even if the defendant is credible, there remain two problems with the application of the defense to the facts presented. First, the defendant's belief in the need to employ deadly force must not only be genuine, it must be reasonable. Some jurisdictions require that all the requirements of self-defense be present, so the defense would be unavailable to a killer who kills when it is not necessary or does so with the unreasonable belief in its necessity. Ross v. State, 211 N.W.2d 827 (Wis. 1973), Dressler, supra, 207, LaFave & Scott, supra, 457-58. But most jurisdictions recognize that a persons who kills in the unreasonable but genuine belief in the necessity have an "imperfect self defense" which provides a form of legally adequate provocation so as to mitigate murder liability to manslaughter. E.g., People v. Flannel, 25 Cal. 3d 668, 603 P.2d 1, 7 (1979), Commonwealth v. Carter, 502 Pa. 433, 466 A.2d 1328, 1332 (1983), Commonwealth v. Colandro, 231 Pa. 343, 80 A. 571 (1911); see generally LaFave & Scott, supra, 665, Dressler, supra, 207.

In general a person claiming the right to self defense may not be the initial aggressor in the sense of either attacking with deadly force or acting in a way likely to lead to fatal results. Dressler, supra, 202. There is probably a fact question about whether the defendant is disqualified as an aggressor by confronting the victim at his work place. If the defendant was not a deadly aggressor, however, and victim's response was disproportionate to the attack, escalating a nonlethal combat to the point where the defendant felt reasonably and in good faith that it was necessary to protect himself from death or serious bodily injury with deadly force, then jurisdictions are divided on whether the defendant's status as initial non-lethal aggressor prevents self-defense. People v. Cleghorn, 193 Cal. App. 3d 196, 238 Cal. Rptr. 82, 85 (1987)(initial nonlethal aggressor regains right to self-defense). (Again, it is subject to doubt that a mere statement "I am going to kill you" is a sufficient display of lethal force, especially when the person making the statement then turns his back.) But other jurisdictions permit the defendant in such a situation to employ protective force but rather than providing a perfect defense, they hold that homicide liability be mitigated to manslaughter. See Dressler, supra, at 203. Even jurisdictions that do not require a defender to retreat before deploying deadly force have held that a nonlethal aggressor must do so and, upon failing to retreat, permit only an "imperfect self-defense," mitigating homicide liability to manslaughter. E.g., People v. Flannel, 603 P.2d 1, 4 (Cal. 1979). See generally Dressler, supra, at 207, LaFave & Scott, supra, 459.



42345

### Essay 7 GradeSheet

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1. Dixon may be guilty of murder. 1. \_\_\_\_\_
2. Murder is the unlawful killing with “malice” of another human being. 2. \_\_\_\_\_
3. Malice may be established by defendant’s intent to kill, intent to inflict serious injury, recklessness amounting to a depraved heart, or intent to commit felony. 3. \_\_\_\_\_
4. Dixon may be guilty of manslaughter. 4. \_\_\_\_\_
5. Voluntary manslaughter is the unlawful, “heat of passion” killing of another. 5. \_\_\_\_\_
  - 5a. The requirements are provocation: sudden and intense passion in a reasonable person , with no time for cooling off. 5a. \_\_\_\_\_
6. Involuntary manslaughter is the unlawful, killing of another with criminal negligence, or in a criminal manner. 6. \_\_\_\_\_
7. Dixon may have self-defense as a defense. 7. \_\_\_\_\_
  - 7a. One claiming self-defense must have had reasonable fear of great bodily harm, and 7a. \_\_\_\_\_
  - 7b. that person must not have been aggressor. 7b. \_\_\_\_\_
8. Imperfect self-defense is also a possible defense. 8. \_\_\_\_\_

**QUESTION 3**

Thelma and Louise live together in a trailer in Paradise Acres. Louise hatched a plan to steal Thelma's diamond jewelry to sell to buy drugs. To keep Thelma from blaming her, Louise asked her friend Slim to break into the trailer on Friday night while Thelma was at work. He was to break into the trailer, ransack the bedroom, particularly Thelma's dresser where the jewelry was kept, and then leave taking nothing. Louise planned to come home shortly thereafter, steal the jewelry herself, and report the "crime" to the police. Louise promised Slim \$100 for his part in the plot.

On Friday night, Thelma returned home early from work because she felt sick. At the appointed hour, Slim entered the trailer by picking the lock on the front door, not realizing that Thelma was asleep in the bedroom. As Slim began to ransack the bedroom, Thelma awakened and reached for the loaded pistol that she kept on the night stand. Slim immediately ran from the bedroom and out of the trailer. Thelma leapt out of bed, ran to the open front door, and fired at Slim. Slim was critically wounded, but lived long enough to relate the facts of the plot to the police.

**QUESTION:**

Discuss the criminal charges that may be brought against Thelma, Louise, and Slim (had he lived), and any possible defenses to such charges.

### DISCUSSION FOR QUESTION 3

This question involves a variety of potential charges that could be brought against either Thelma or Louise, or both, including burglary, larceny or theft, conspiracy to commit burglary and theft, attempted burglary and theft and homicide (murder, voluntary manslaughter and/or involuntary manslaughter.) Slim is dead, so no criminal charges can be brought against him. However, responsibility for Slim's death by Thelma or Louise, or both, is at issue in this question, as well as Slim's participation in possible conspiracies with Louise.

Burglary is a crime against a habitation, and requires a breaking and entering of a dwelling of another at night with the intent of committing a felony therein. *Perkins*, Criminal Law (3d ed.) at 261. The entry must be unauthorized, i.e., without the consent of the lawful occupants. See *People v. Gauze*, 15 Cal. 3d 709, 712 (1975). Thus, a co-tenant such as Louise could not be guilty of burglary when breaking into her own dwelling no matter how criminal her intent. *Id.* Given that Louise and Thelma live in the trailer together, ownership or lease of the trailer by one or the other is irrelevant; burglary is a crime against lawful occupancy. *Id.* Nor could Slim, had he not died, been guilty of burglary because he had received Louise's consent to enter the premises. The fact that Slim's entry was without Thelma's consent would not have been controlling because Slim was authorized by a lawful occupant to enter. Slim's intent to commit a felony would also have been in question, given that Slim had only agreed to break in and ransack the premises, not steal the jewelry.

Larceny or theft consists of taking and carrying away the personal property of another without consent with the intent to deprive the owner permanently thereof. *Perkins* at 292. Although Louise certainly intended to steal Thelma's jewelry, a charge of larceny will likely fail because Louise never got to the point of actually taking or carrying away the jewelry.

A conspiracy is an agreement by two or more persons to accomplish an unlawful purpose which must amount to a crime. See *People v. Dowell*, Colo. 510 P.2d 436 (1973). At common law the agreement required knowledge and intent by both parties. See *Gebardi v. U.S.*, 289 U.S. 112 (1932) (this bilateral agreement requirement has since been broadened to include unilateral agreements by the Model Penal Code, Sec 5.04(1) and a few state modifications.) A charge of conspiracy to commit larceny/theft is possible here because Louise and Slim agreed that Slim would enter and ransack the trailer with the ultimate goal of Louise stealing Thelma's jewelry. However, while Louise had larceny in mind, she did not include Slim in on the act of stealing, and thus there may have been no agreement to commit larceny. A charge of conspiracy to commit burglary may also be viable. Although neither Slim's or Louise's entry into the trailer would have constituted burglary, it has been held in most jurisdictions that impossibility (either legal or factual) is not a defense to a charge of conspiracy to commit a crime. See *People v. Elkhatib*, 198 Colo. 287, 599 P.2d 897, 899 (1979) (impossibility is not a defense to conspiracy under our law.)

An attempt in criminal law requires the intent to do a criminal act and sufficient steps towards its completion to go beyond mere "preparation" and arrive at "dangerous proximity" to accomplishing the unlawful act. See *People v. Rizzo*, 246 N.Y. 334, 158 N.E. 888 (1927). While Louise intended to take Thelma's jewelry and sent Slim in to prepare her cover story, Louise never came into close proximity of the jewels themselves. Thus, there may be no basis for a charge of attempted larceny. A charge of attempted burglary is also problematic because neither Louise's nor Slim's conduct would have constituted the offense of burglary. Impossibility has been determined to be a viable defense to a charge of attempt, with legal impossibility (the underlying intended act was not a crime) sometimes prevailing, and factual impossibility (the intended act would have been criminal had the facts been as the defendant believed them

**DISCUSSION FOR QUESTION 3**  
**Page Two**

to be) rarely prevailing except in cases of entrapment. *See also Darr v. People*, 193 Colo. 445, 568 P.2d. 32 (1977) (defense of factual or legal impossibility is not available in a prosecution for the crime of attempt.)

Homicide is a crime encompassing both intentional and negligent states of mind. Murder is the unlawful killing of another with malice aforethought or reckless indifference. *Perkins* at 57-60. Voluntary manslaughter is intentional homicide with mitigating circumstances. *Perkins* at 84-85. Involuntary manslaughter is homicide by criminal negligence. *Perkins* at 104-5. Thelma shot Slim intentionally, as he was leaving the premises. Her physical safety did not appear to be in jeopardy at the time of the shooting, hence a complete self-defense likely would not be available. She was, however, defending her habitation and/or preventing what appeared to her to be a burglary or other felony. *Perkins* at 1109, 1198. Defense of dwelling/habitation and prevention of a felony at common law also allowed the use of deadly force where that force was necessary for that purpose. The question here is whether deadly force was justified in these circumstances. With regard to Louise, it appears that she did not intend to kill or even injure Slim, but her sending Slim into her trailer which was occupied by Thelma and a loaded pistol could be characterized as a degree of reckless indifference necessary for a murder charge or criminal negligence necessary for a charge of involuntary manslaughter.



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### Essay 3 GradeSheet

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#### Charges/Defenses Relating to Louise

1. Charge of burglary against Louise. 1. \_\_\_\_\_
2. Charge of larceny (theft) against Louise. 2. \_\_\_\_\_
3. Charge of conspiracy to commit burglary/larceny against Louise. 3. \_\_\_\_\_
4. Charge of attempted burglary/larceny against Louise. 4. \_\_\_\_\_
5. Charge of homicide (murder, voluntary manslaughter, involuntary manslaughter) against Louise through reckless indifference or criminal negligence by her act of putting Slim in dangerous situation. 5. \_\_\_\_\_
6. Defense that burglary requires an unauthorized entry (trespass) and as a rightful occupant Louise therefore cannot burglarize her own dwelling either herself or by authorizing another to enter. 6. \_\_\_\_\_
7. Defense that there was no actual taking and carrying away of the jewelry by Louise and therefore a fundamental element of the crime of larceny was not satisfied. 7. \_\_\_\_\_
8. Defense of legal impossibility (factual or legal) in either the attempt or conspiracy context. 8. \_\_\_\_\_

#### Charges/Defenses Relating to Slim

9. Charge of burglary against Slim. 9. \_\_\_\_\_
10. Charge of larceny (theft) against Slim. 10. \_\_\_\_\_
11. Charge of conspiracy to commit burglary/larceny against Slim. 11. \_\_\_\_\_
12. Charge of attempted burglary/larceny against Slim. 12. \_\_\_\_\_
13. Defense that burglary requires an unauthorized entry (trespass) whereas Slim received permission to enter the premises by a rightful occupant. 13. \_\_\_\_\_
14. Defense of lack of intent to commit a felony/larceny/steal by Slim. 14. \_\_\_\_\_
15. Defense of legal impossibility (factual or legal) in either the attempt or conspiracy context. 15. \_\_\_\_\_

#### Charges/Defenses Relating to Thelma

16. Charge of homicide (murder, voluntary manslaughter, involuntary manslaughter) against Thelma because Slim was retreating at the time Thelma shot him and therefore likely no longer posed a threat of personal attack against her that justified use of deadly force. 16. \_\_\_\_\_
17. Self-defense or defense of a dwelling by Thelma. 17. \_\_\_\_\_

## QUESTION 5

Al and Bob worked at the Capital City Pub. Dee, the Pub manager, fired both employees without giving them any reason. Afterwards, while Al and Bob were talking about being fired, Al outlined a plan to get back at Dee. He suggested that they steal Dee's car and burn it. Bob nodded his head in agreement, but he never intended to go through with the plan. Bob was afraid of Al and did not want to confront him. Al's plan was that they would go to the Pub and, while Bob distracted Dee, Al would steal her car.

The next day, Bob met Al outside the Pub at noon. Bob entered the Pub and walked Dee to her office where Bob explained the plan to her and then called the police. Meanwhile, Al "hot-wired" Dee's car and drove to her house. He smashed a window, reached through it, and removed Dee's valuable baseball card collection that was sitting within reach. Al put the baseball card collection in the trunk of the car and drove to a nearby park. At the park, Al took out the gasoline and lighter he had purchased earlier that day and lit Dee's car on fire. The car and its contents were completely destroyed.

### QUESTION:

Discuss whether Al and Bob could be charged with the common law crimes of arson, larceny, burglary, and conspiracy, and the likelihood of each man's conviction.

## DISCUSSION FOR QUESTION 5

### Arson

At common law, arson consists of:

- (i) The malicious;
- (ii) Burning;
- (iii) Of the dwelling;
- (iv) Of another.

Al could not be charged with arson, even though he intentionally started the fire that destroyed Dee's car. Dee's car does not satisfy the definition of 'dwelling.'

### Larceny

At common law, the elements of larceny consist of:

- (i) A taking;
- (ii) And carrying away;
- (iii) Of tangible personal property;
- (iv) Of another;
- (v) By trespass;
- (iv) With intent to permanently deprive the person of his interest in the property.

Al could be charged with two counts of larceny. Al took and carried away Dee's baseball card collection and car. Al intended to permanently deprive Dee of her interest in both items as evidenced by his plan to burn the car and his purchase of gasoline and a lighter. Al did not have Dee's consent to take either item.

### Burglary

At common law, the elements of burglary are:

- (i) A breaking;
- (ii) And entry;
- (iii) Of the dwelling;
- (iv) Of another;
- (v) At nighttime;
- (vi) With the intent of committing a felony therein.

Al could not be charged with burglary. Al did break a window at Dee's house, and entry is achieved by placing any portion of the body inside the structure, even momentarily. Because Al stuck his arm through the window to take the baseball card collection, this qualifies as entry. However, Al broke into Dee's house in the afternoon, not at nighttime; therefore, an important requirement is not present and he cannot be charged with burglary.

**Conspiracy**

At common law, the elements of a conspiracy are:

- (i) An agreement between two or more persons;
- (ii) An intent to enter into an agreement; and
- (iii) An intent to achieve the objective of the agreement.

Al could not be charged with conspiracy for his agreement with Bob to commit a criminal act because there was no agreement. Likewise, Bob cannot likely be convicted of conspiracy, as he only feigned agreement with Al out of fear; it can be argued that he never intended to commit the crime(s). Bob did not even know about Al's plan to steal Dee's baseball card collection. Bob also disclosed what he knew of the plan to Dee and called the police. Moreover, Bob cannot successfully be prosecuted with any of the underlying crimes.



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### Essay 5 GradeSheet

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1. Arson requires the malicious burning of the dwelling of another. 1. \_\_\_\_\_
2. Car is not a dwelling, therefore Al could not be charged with arson. 2. \_\_\_\_\_
3. Common law larceny requires a taking and carrying away of personal property of another by trespass (without consent) with intent to permanently deprive the owner of her interest in the property. 3. \_\_\_\_\_
4. Al could be charged with larceny for taking Dee's car. 4. \_\_\_\_\_
5. Al could be charged with larceny for taking Dee's baseball card collection. 5. \_\_\_\_\_
6. Burglary requires a breaking and entry of a dwelling of another at nighttime with the intent to commit a felony in the structure. 6. \_\_\_\_\_
7. Entry is made by placing any portion of the body inside the structure, even momentarily. 7. \_\_\_\_\_
8. Al could not be charged with burglary because it was not nighttime when he broke into the house. 8. \_\_\_\_\_
9. A common law conspiracy is an agreement by two or more persons to commit a criminal act by unlawful means. 9. \_\_\_\_\_
10. Al could not be successfully convicted of conspiracy because the two people did not agree. 10. \_\_\_\_\_
11. Bob could not be charged with conspiracy because he did not intend to commit a criminal act. 11. \_\_\_\_\_
12. Bob could not be successfully prosecuted for any of the underlying offenses. 12. \_\_\_\_\_

### QUESTION 3

After spending several hours drinking in a bar one afternoon, David walked into a music store. Victor, an off-duty police officer wearing his uniform, was working as a security guard at the store. Victor observed David conceal several CDs in the large overcoat he was wearing. He also noticed a 12 inch pipe with several keys attached sticking out of one of the overcoat's pockets.

Victor followed David as he walked toward the exit. When David exited the store, Victor stepped in front of him, identified himself as store security, and asked David to return to the store. David reached toward the pocket with the pipe and keys. Victor then lunged at David, attempting to keep David's hand away from his pocket. Victor was unsuccessful, as David grabbed the pipe and keys, swung them, and struck Victor in the face, breaking his jaw. David then walked to his truck and drove away. David was apprehended and arrested shortly thereafter.

#### QUESTION:

Applying the majority rule common law, discuss what crimes David faces and what defenses, if any, David might rely on with respect to each charge.

### DISCUSSION FOR QUESTION 3

David would be charged with aggravated battery and aggravated robbery. Based on the facts provided, David could argue that he acted in self defense when he struck Victor, and that, with respect to the aggravated robbery charge, he was intoxicated and could not form the necessary specific intent to commit the crime.

#### **Aggravated Battery**

Battery is an unlawful application of force to another person resulting in either bodily injury or an offensive touching. People v. O'Rear, 220 Cal. App. 2d Supp. 927, 34 Cal. Rptr. 61 (1963). Battery is a general intent crime. In most jurisdictions, a battery need not be intentional, and may be the result of recklessness or criminal negligence. See e.g. Bentley v. Commonwealth, 354 S.W.2d 495 (Ky. 1962); Banovitch v. Commonwealth, 42 U.S.C. 83 S.E.2d 369 (Va. 1954).

A battery that is either committed with a deadly weapon, results in serious bodily injury, or is committed against a police officer is an aggravated battery. People v. Satterfield, 552 N.E.2d 1382 (Ill. App. 1990); State v. Blackstein, 387 P.2d 467 (Idaho 1963).

Here, David used a large pipe with keys attached to the end to strike Victor. This is arguably a deadly weapon. Moreover, David broke Victor's jaw, and a broken jaw probably constitutes serious bodily injury. Finally, David is an off-duty police officer, in uniform, acting as a security officer, which examinees should recognize might qualify him as a police officer. David can thus be charged with aggravated battery.

#### **Aggravated Robbery**

The elements of robbery are: a taking of the property of another person from his person or in his presence by force or intimidation and without his consent with the intent to permanently deprive the victim of the property. The threats must be of immediate death or serious physical injury to the victim, and must be made either before or immediately after taking the property. See e.g., §18-4-301, C.R.S.; 2 Wharton's Criminal Law (15th Edition), §§ 454, 455, 457-63.

Here, David left the store in the presence of the store detective with property of the store without paying for it, and he used physical force against Victor in doing so. This evidence is sufficient to convict David of aggravated robbery. See e.g., People v. Foster, 971 P.2d 1082 (Colo. App. 1998)(if a retail store's security guard has the responsibility for safeguarding the store's inventory, a thief, who is encountered by such a guard and who assaults that guard to thwart the guard's attempt to recover the stolen property, removes that property from the guard's "presence" by force).

Some examinees might argue that David is guilty of larceny rather than robbery. The elements of larceny are: the taking and carrying away (asportation) of the property of another

without the victim's consent and with the intent to permanently deprive him of the property. The primary difference between larceny and robbery is that robbery involves the taking of property in the presence of the victim by use of force or threats, while larceny does not.

## **DEFENSES**

### **Voluntary intoxication**

The facts indicate that David had been drinking for hours before going to the store. This information is enough to permit an examinee to assume that David was intoxicated at the time of the offenses.

Intoxication is voluntary if it is the result of the intentional taking without duress of any substance known to be intoxicating. The person need not have intended to become intoxicated. See e.g., §18-1-804(5), C.R.S.; 2 Wharton's Criminal Law, (15<sup>th</sup> Edition), §110.

Evidence of the defendant's voluntary intoxication may be introduced when he is charged with a crime that requires purpose (intent or knowledge), to establish that the intoxication prevented him from formulating the requisite intent. Thus, it may negate the intent element of specific intent crimes, but not general intent crimes. See e.g., Cal. Penal Code §22(b) ("Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent . . . when a specific intent crime is charged"); §18-1-804(1), C.R.S. ("in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant when it is relevant to negative the existence of a specific intent if such intent is an element of the crime charged"); 2 Wharton's Criminal Law (15<sup>th</sup> Edition), §111.

The better answers will point out that voluntary intoxication is not a defense to the charge, but a denial that one of the elements of the crime has been proven. When a defendant raises a defense to a charge, he admits that the elements of the offense have been met, but claims that his conduct was justified or was not criminal because of the application of the defense (for example, self-defense).

David could present evidence of his voluntary intoxication with respect to the aggravated robbery charge since it is a specific intent crime, but not as to the aggravated battery charge since it is a general intent crime.

### **Self-Defense**

Although there is little evidence to support the defense, David could raise self-defense as to the aggravated battery charge. Specifically, David could claim that when Victor pushed

### DISCUSSION FOR QUESTION 3

Page Three

his arm away, Victor assaulted him and that he hit Victor in self-defense. There are two primary problems with this defense. First, David may not be entitled to use the defense of self-defense because he provoked Victor's conduct. More specifically, a person who is without fault may use such force as reasonably appears necessary to protect himself from the imminent use of unlawful force upon himself. However, a person who has initiated an assault or provoked the other party will be considered the aggressor. See e.g., §18-1-704, C.R.S.; Banner v. Commonwealth, 133 S.E. 2d 305 (Va. 1963); 2 Wharton's Criminal Law, (15<sup>th</sup> Edition), §§189-190. Here, David "provoked" the encounter with Victor in two respects: (1) he was stealing from the store, and (2) he reached for the pipe and keys, which Victor could reasonably have believed was an attempt to obtain a weapon to use against him. Second, a law enforcement officer may use whatever force is reasonably necessary to take the accused into custody, but the officer may not use force when no resistance is offered or use force that is disproportionate to the resistance offered. See e.g. NH Rev. Stats. Ann, §627:5(I); Graham v. Connor, 490 U.S. 386 (109 S.Ct. 1865 (1989); McQuarter v. Atlanta, 572 F. Supp. 1401 (N.D. Ga. 1983); 2 Wharton's Criminal Law (15<sup>th</sup> Edition), §185.

Here, Victor was arguably using the force reasonably necessary to effectuate David's arrest. However, the examinees should recognize that a store detective may or may not constitute a "law enforcement officer." It may also be worth noting that a person may lawfully repel an attack made by a police officer trying to arrest him if the individual does not know that the person is a police officer. Here, however, Victor identified himself as a store detective, so it would be difficult for David to establish that he did not know Victor was a law enforcement officer.

ESSAY Q3

SEAT

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ISSUE

	YES	NO
1. Recognition of Battery.	1. <input type="radio"/>	<input type="radio"/>
2. Elements of Battery: (a) unlawful application of force (b) resulting in bodily injury or offensive touching.	2. <input type="radio"/>	<input type="radio"/>
3. Recognition of Aggravated Battery.	3. <input type="radio"/>	<input type="radio"/>
4. Aggravated Battery committed if: (a) deadly weapon used; (b) or serious injury caused; (c) or against police officer.	4. <input type="radio"/>	<input type="radio"/>
5. Recognition of Robbery.	5. <input type="radio"/>	<input type="radio"/>
6. Elements of Robbery: (a) taking the property of another; (b) from the person or presence of another; (c) by force or threats; (d) with intent to permanently deprive.	6. <input type="radio"/>	<input type="radio"/>
7. Recognition of Larceny.	7. <input type="radio"/>	<input type="radio"/>
8. Elements of Larceny: (a) taking and carrying away; (b) of the personal property of another; (c) by trespass or without owner's consent; (d) with intent to permanently deprive.	8. <input type="radio"/>	<input type="radio"/>
9. Recognition of possible voluntary intoxication defense.	9. <input type="radio"/>	<input type="radio"/>
10. Voluntary intoxication negates specific intent; applies only to Robbery & Larceny.	10. <input type="radio"/>	<input type="radio"/>
11. Recognition of possible self-defense claim.	11. <input type="radio"/>	<input type="radio"/>
12. Recognition that self-defense is not available because D provoked V.	12. <input type="radio"/>	<input type="radio"/>
13. Recognition that self-defense is not available because D had no right to resist known police officer.	13. <input type="radio"/>	<input type="radio"/>

### QUESTION 5

Dan offered to pay Steve ten thousand dollars to kill Vince. Steve declined. The next day, however, Steve called Dan and offered to kill Vince for fifty thousand dollars. Dan agreed to the proposal. Steve bought an antique knife and used it to stab Vince to death. Days later, when Steve went to collect the money from Dan, Dan pointed a gun at Steve and demanded that Steve give him the antique knife. As Dan took the knife from Steve, Steve grabbed Dan's gun. The gun discharged, killing Steve.

#### **QUESTION:**

Discuss what common law crimes Dan has committed.

## DISCUSSION FOR QUESTION 5

Dan committed the crime of solicitation to commit murder by offering Steve money to kill Vince. A person commits solicitation by inducing another to commit a felony with the specific intent that the other person commit the crime and under circumstances strongly corroborative of that intent. People v. Washington, 865 P.2d 145, 148 (Colo. 1994). W.LaFave, Substantive Criminal Law, §11.1. The offense is complete at the time the solicitation is made. People v. Hood, 878 P.2d 89, 95 (Colo. App. 1994).

Dan committed the crime of conspiracy when Steve agreed to commit the murder and bought the knife. A person commits conspiracy if he or she is a party to an agreement between two or more persons to commit a crime and one of the participants commits an overt act, such as preparation, in furtherance of the conspiracy. People v. Hood, supra, 878 P.2d at 92; LaFave, §12.1

Dan committed the crime of murder when Steve killed Vince with malice aforethought. By his actions, Dan not only agreed with Steve that Steve would kill Vince, but he also induced and encouraged the killing. Dan would therefore be responsible as an accomplice to the murder. LaFave, §13.2(c).

Dan committed the crime of robbery when he took the antique knife from Steve by threatening him with a weapon. A person commits robbery by taking personal property from the person or presence of another by force or by intimidation. People v. Borghesi, 40 P.3d 15, 21 (Colo. App. 2001).

Dan committed felony murder when Steve was shot during the robbery and died. A person commits felony murder if an accidental killing occurs during the commission of a dangerous felony, such as armed robbery, and the killing is a foreseeable result. State v. Amado, 254 Conn. 184, 201, 756 A.2d 274, 284 (Conn. 2000).

ESSAY Q5

SEAT

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<u>ISSUE</u>	POINTS AWARDED
1. Recognition of Solicitation.	1. ○
2. Elements of Solicitation: (1) inducing another to commit a felony (2) with specific intent that the other person commit the crime.	2. ○
3. Recognition of Conspiracy.	3. ○
4. Elements of Conspiracy: (1) agreement between two or more parties; (2) intent to enter into an agreement; (3) intent to achieve the objective of the agreement.	4. ○
5. Purchase of the knife is evidence of an overt act, or the intent to achieve the objective of the agreement.	5. ○
6. Recognition of Murder (of Vince).	6. ○
7. Elements of Murder: (1) killing of another human (2) with malice aforethought.	7. ○
8. Definition of Malice Aforethought: (1) intent to kill, (2) intent to inflict great bodily injury, (3) reckless indifference to human life, or (4) intent to commit a felony.	8. ○
9. Recognition of Robbery.	9. ○
10. Elements of Robbery: (1) taking of personal property of another (2) from his person or presence (3) by force or intimidation (4) with intent to permanently deprive.	10. ○
11. Recognition of (Felony) Murder (of Steve).	11. ○

## QUESTION 6

Mark Marketer, Cathy Coder, and Paul Programmer all lost their jobs when the internet company where they worked filed for bankruptcy protection. The three went to a coffee shop to commiserate. While at the coffee shop, Marketer looked out the window and remarked: "We should rob that bank across the street."

Coder and Programmer agreed to participate in the robbery with Marketer. Coder walked down the street to a gun store and purchased a pistol. Coder returned to the coffee shop and showed the pistol to Marketer and Programmer. Programmer became very nervous and told Marketer and Coder: "This is a bad idea, and I don't want anything to do with it." Programmer then walked out of the coffee shop.

After Programmer left, Coder noticed an article in the newspaper which indicated that the bank across the street had gone out of business two weeks earlier because it had made too many bad loans to internet companies. Coder told Marketer the disappointing news. Marketer then walked out of the coffee shop.

A few minutes later, Coder wrote the following words on a napkin: "Give me a pound of coffee or I will shoot you." Coder put the napkin in her pocket with the gun and began to walk toward the owner of the coffee shop. Just as Coder was about to hand the napkin to the coffee shop owner, an undercover police officer intervened and arrested Coder, as the officer had overheard the three person's discussion.

### QUESTION:

Discuss any crime(s) that Programmer, Marketer, or Coder may have committed, and any possible defense(s) or limitation(s) to each person's criminal liability.

## DISCUSSION FOR QUESTION 6

Marketer, Coder, and Programmer are all guilty of conspiracy to commit the crime of robbery. A conspiracy is formed when two or more persons agree to accomplish a criminal objective. People v. Morante, 20 Cal. 4th 403, 975 P.2d 1071 (Cal. 1999). The elements of the crime of robbery are: the taking of personal property, from the person or presence of another, by force or intimidation, with the intent to permanently deprive the person of the property. State v. Olin, 111 Idaho 516, 725 P.2d 801 (Idaho Ct. App. 1986) (discussing 2 W. LaFave & A. Scott, Substantive Criminal Law 8.11, at 437 (1986) and 4 C. Torcia, Wharton's Criminal Law 469, at 39-40 (14th ed. 1980)), aff'd, 112 Idaho 673, 735 P.2d 984 (Idaho 1987).

Under the common law, a conspiracy was complete at the point that the unlawful agreement was formed. However, many jurisdictions now require that there also be commission of an overt act in furtherance of the conspiracy. People v. Morante, supra. Under either rule, a conspiracy was committed in this case because Coder completed an overt act when she purchased the pistol. See United States v. Ruggiero, 754 F.2d 927 (11th Cir. Fla. 1985)(observing, in dicta, that purchase of a gun with which to rob a bank would constitute an overt act in furtherance of a pre-existing conspiratorial agreement to commit a bank robbery), cert. denied, Ruggiero v. United States, 471 U.S. 1127, 105

S.Ct. 2661, 86 L.Ed.2d 277 (1985).

Programmer withdrew from the conspiracy when he notified all members of the conspiracy of his intent to withdraw. United States v. Starnes, 14 F.3d 1207 (7th Cir. 1994), cert. denied, 512 U.S. 1224, 114 S.Ct. 2717, 129 L.Ed. 2d 842 (1994). However, Programmer's withdrawal does not constitute a defense to the charge of conspiracy because the unlawful agreement had already been formed and an overt act had already been committed. United States v. Gonzalez, 797 F.2d 915 (10th Cir. Okla. 1986). Although Programmer's withdrawal would absolve him of criminal liability for any subsequent criminal acts that Marketer or Coder committed in furtherance of the conspiracy, United States v. Gonzalez, supra, no such acts are indicated by the facts here.

Factual impossibility is not a defense to conspiracy. State v. Houchin, 235 Mont. 179, 765 P.2d 178 (1988). Therefore, it is irrelevant that the bank had gone out of business.

Coder committed an attempted robbery because she was acting with the requisite intent to commit robbery when she took a substantial step (or overt act) towards robbing the owner of the coffeehouse. People v. Chavez, 764 P.2d 356 (Colo. 1988). However, Programmer and Marketer are not liable for this attempted robbery because it was not committed in furtherance of the conspiracy to rob the bank of money and it was not a foreseeable consequence of that conspiracy. Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).

ESSAY Q6

SEAT

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<u>ISSUE</u>	POINTS AWARDED
1. Recognition of conspiracy.	1. ○
2. Definition of conspiracy: agreement between two or more people to accomplish a criminal objective.	2. ○
3. Recognition of robbery.	3. ○
4. Definition of robbery: the taking of <u>property</u> , from the <u>person or presence</u> of another, by <u>force or intimidation</u> , with the <u>intent to permanently deprive</u> the person of the property.	4. ○
5. Recognition of "overt act."	5. ○
6. Here, all three may be charged with conspiracy.	6. ○
7. Recognition of the concept of withdrawal.	7. ○
8. P still liable for conspiracy at common law since he agreed with others to accomplish criminal objective.	8. ○
9. Recognition of "factual impossibility."	9. ○
10. Impossibility is no defense to conspiracy.	10. ○
11. Recognition of attempted robbery of coffeehouse.	11. ○
12. Attempt requires "substantial step."	12. ○
13. P and M are not liable for this attempted robbery because it was not committed in furtherance of the conspiracy to rob the bank of money and it was not a foreseeable consequence of that conspiracy.	13. ○

## QUESTION 5

David suffered from hallucinations that caused him to believe that insects were crawling on him and had been committed to a state mental hospital for five years. Because medication was able to manage his condition, David was released to live with his mother, Marta. Marta, however, believed that David was still mentally ill and told David he was not allowed to go outside without her.

Two months after his release, David again began having hallucinations. One evening while Marta was working, David left the house and ran to their neighbor's home. David believed the neighbor would have some sort of chemicals in his house that he could use to kill the imaginary bugs. David smashed a window in the neighbor's house and went inside. He saw a can of bug spray and immediately grabbed it. Unbeknownst to David, the neighbor was at home. When the neighbor heard the sound of the breaking glass, he rushed into the room where David had entered. David sprayed the neighbor in the face with the bug spray, dropped the can, and ran out. The neighbor suffered temporary blindness from the bug spray.

When Marta returned from work, David told her what he had done. Marta hid David in the basement, and when police came looking for him, she told them she hadn't seen him for a week.

### QUESTION:

Discuss what crimes under common law, and the Model Penal Code, that David and Marta can be charged with. Also discuss any defenses under the Model Penal Code that David could raise and which party has the burden of proof with respect to those defense(s).

## DISCUSSION FOR QUESTION 5

### Crimes David can be charged with

#### **Burglary**

At common law, the elements of burglary are an unlawful breaking and entry into a dwelling of another person at night with the intent to commit a felony therein. United States v. Brandenburg, 144 F.2d 656 (3rd Cir. 1944); Sanchez v. People, 142 Colo. 58, 349 P.2d 561 (1960); see also 3 Wharton's Criminal Law §§ 316-19, 328;. The unlawful breaking and entry at night elements are obviously satisfied here. The facts also indicate that David went to the neighbor's home with the intent to steal items that he believed would kill the bugs.

Some states require that the intended crime be a felony, but The Model Penal Code does not. Some examinees might discuss whether intent to steal bug spray constitutes a felony sufficient to satisfy the "commission of a felony" element of burglary. Those examinees might argue that David should be charged with and convicted only of the lesser-included offense of criminal trespass, which is the knowing and unlawful (or unconsented to) entry into a building or occupied structure. Model Penal Code and Comment, § 221.1 (2001).

#### **Battery**

Battery is an unlawful application of force to another person resulting in either bodily injury or an offensive touching. People v. O'Rear, 220 Cal. App. 2d Supp. 927, 34 Cal. Rptr. 61 (1963); Bentley v. Commonwealth, 354 S.W.2d 495 (Ky. 1962); Banovitch v. Commonwealth, 42 U.S.C. 83 S.E.2d 369 (Va. 1954). The common law offense of battery is called assault in the Model Penal Code. Model Penal Code and Comment, § 211.1(1) (2001) (a person who "purposely, knowingly, or recklessly causes bodily injury to another" is guilty of simple assault). If the examinees correctly set forth the elements of the offense, they should probably get credit regardless of what they call it.

At common law, a battery that results in serious bodily injury is aggravated battery. People v. Satterfield, 552 N.E.2d 1382 (Ill. App. 1990); State v. Blackstein, 387 P.2d 467 (Idaho 1963). People v. Satterfield, 552 N.E.2d 1382 (Ill. App. 1990); State v. Blackstein, 387 P.2d 467 (Idaho 1963). The terminology under the Model Penal Code for the same substantive offense is aggravated assault. Model Penal Code and Comment, § 211.1(2) (2001).

Here, David sprayed bug spray in the neighbor's face, causing him temporary blindness. Even though he didn't actually touch the neighbor, the contact suffices for battery. Temporary blindness may constitute serious bodily injury and therefore David likely committed aggravated battery.

### Crimes Marta can be charged with

#### **Accessory After the Fact**

## DISCUSSION FOR QUESTION 5

Page Two

A person commits the offense of accessory after the fact if she knowingly "harbors or conceals" a felon for the purpose of helping him avoid apprehension. The accessory after the fact is not liable for the underlying felony, as an accomplice would be. Instead, she has committed a distinct crime based upon obstruction of justice. The elements of the offense are: 1) a completed felony must have been committed; 2) the defendant must know that the felony was committed; 3) the assistance must have been given to the felon personally; 4) the defendant must have taken affirmative acts to hinder the felon's arrest. Model Penal Code and Comment, § 242.1 and 242.3 (2001); United States v. Barlow, 470 F.2d 1245, 1252-1253 (D.C. App. 1972) (the gist of being an accessory after the fact lies essentially in obstructing justice by rendering assistance to hinder or prevent another's apprehension and prosecution for a crime); Noblitt v. State, 808 P.2d 280 (Alaska App. 1991); People v. Sandoval, 791 P.2d 1211 (Colo. App. 1990).

Here, David's offenses had been completed. Marta knew what he had done, and she hid him in her basement to prevent police from finding and arresting him. Based on these facts, the elements of the offense are satisfied.

### David's defenses

#### **Insanity**

The question directs the examinees to discuss the defenses available under the Model Penal Code only. Accordingly, they should not discuss other tests for insanity, including the M'Naghten, irresistible impulse, and Durham (or New Hampshire) tests. Under the Model Penal Code, "a person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity either appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.

A criminal defendant is presumed sane, but under the Model Penal Code, once the insanity defense is raised, the prosecution has the burden of proving beyond a reasonable doubt that the defendant was sane at the time of the offense. Model Penal Code and Comment, § 4.01 (2001). Other jurisdictions require the defendant to prove his insanity, but the question asked only about the Model Penal Code. Therefore, once David raises the issue of his sanity, the basis of which could be his prior confinement in a mental institution, the prosecution has the burden of proof to establish that David was sane at the time he committed the crimes.

ESSAY Q5

SEAT

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ISSUE

POINTS  
AWARDED

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| <p>1. Elements of burglary</p> <p>1a. Common law: Unlawful breaking and entry into the dwelling of another person at night with the intent to commit a felony therein. (must get all)</p> <p>1b. MPC – enters building with intent to commit a crime therein.</p> <p>2. Question on elements: may not be a felony and/or issue of night time.</p> <p>3. MPC doesn't require felony.</p> <p>4. Under MPC, may be trespass – knowing and unlawful or unconsented entry into a building or occupied structure/property.</p> <p>5. Battery/Assault – unlawful application of force to another person resulting in either bodily injury or an offensive touching. (must get all)</p> <p>6. Aggravated Battery/Assault – battery that results in serious bodily injury.</p> <p>7. Accessory after the fact</p> <p>7a. a completed felony (crime) must have been committed/the defendant must have known that the felony was committed.</p> <p>7b. the assistance must have been given to the felon personally, the defendant must have taken affirmative acts to hinder the felon's arrest.</p> <p>8. Insanity</p> <p>8a. A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect.</p> <p>8b. He lacks substantial capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law.</p> <p>9. Burden of proof</p> <p>9a. Defendant is presumed sane until he brings forward evidence of insanity.</p> <p>9b. Prosecution then has burden of proving beyond reasonable doubt that defendant was sane at time of crime.</p> <p>10. David can raise issue and use prior confinement in mental institution as proof of insanity.</p> | <p>1a. <input type="radio"/></p> <p>1b. <input type="radio"/></p> <p>2. <input type="radio"/></p> <p>3. <input type="radio"/></p> <p>4. <input type="radio"/></p> <p>5. <input type="radio"/></p> <p>6. <input type="radio"/></p> <p>7a. <input type="radio"/></p> <p>7b. <input type="radio"/></p> <p>8a. <input type="radio"/></p> <p>8b. <input type="radio"/></p> <p>9a. <input type="radio"/></p> <p>9b. <input type="radio"/></p> <p>10. <input type="radio"/></p> |
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#### **QUESTION 4**

Doug worked at ABC, Inc., until he was fired for tardiness. When he left, Doug hid the laptop computer the company had let him use in his briefcase and took it with him.

The next day Violet, Doug's former manager at ABC, Inc., discovered the laptop was missing. Violet telephoned Doug and told him that she planned to call the police about the missing laptop. Doug apologized and pleaded with Violet not to call the police and said he would meet with her to return the laptop. Before his meeting with Violet, Doug slipped a pistol into his pocket.

At the meeting with Violet, Doug explained that he took the laptop because the company had never paid him what he was worth and urged her not to call the police. Violet disagreed with Doug's claim that he was underpaid and called the police. Doug took out the pistol and shot Violet in the chest. Although she didn't die, Violet was rendered unconscious. Doug dragged Violet outside and put her in the trunk of his car. He then drove out of town and dumped Violet by the side of the road.

Violet was in a coma for six months, but died after her husband took her off life support.

#### **QUESTION:**

Discuss the common law crimes Doug could be charged with, and any defenses he might offer.

## DISCUSSION FOR QUESTION 4

Doug can be charged with larceny, battery, and murder. The examinees should not argue that the prosecution should charge Doug with involuntary manslaughter. The mental state required for involuntary manslaughter is criminal negligence, and the facts indicate that Doug acted with greater mental culpability (deliberation or recklessness).

Doug will argue that he is not guilty of murder because Violet's death was the result of an intervening cause. In the alternative, he will claim he killed Violet in a sudden heat of passion, and is thus guilty of voluntary manslaughter, not murder.

Note that the question asks the examinees to discuss the crimes Doug can be charged with, not whether he will be convicted of those crimes. Accordingly, the examinees should not discuss the fact that if convicted of all the charges, some of the convictions would merge.

### **Larceny**

Larceny is the wrongful or trespassory taking and carrying away of tangible personal property of another with intent to permanently deprive the other of the property.

Here, Doug's hiding the laptop in his briefcase, and carrying it away was wrongful or trespassory. Although as an employee of ABC Doug had been permitted to use the laptop, after he was fired and told to leave, that permission expired. By hiding the laptop, he undercuts any claim that he might have somehow been entitled to take it. The element of intent to permanently deprive applies to the time of the taking and carrying away; Doug's later offer to return the laptop does not vitiate that intent to deprive ABC of the laptop permanently.

### **Battery**

Battery is an unlawful application of force to another person resulting in either bodily injury or an offensive touching. People v. O'Rear, 220 Cal. App. 2d Supp. 927, 34 Cal. Rptr. 61 (1963). In most jurisdictions, a battery need not be intentional, and may be the result of recklessness or criminal negligence. See e.g. Bentley v. Commonwealth, 354 S.W.2d 495 (Ky. 1962); Banovitch v. Commonwealth, 42 U.S.C. 83 S.E.2d 369 (Va. 1954).

In most jurisdictions and under the Model Penal Code, heat of passion is a defense only to specified forms of murder. See Dandova v. State, 72 P.3d 325 (Alaska App. 2003); Model Penal Code\* 210.3; but see Colo.Rev.Stat. 18-3-202(2)(a) (providing that the felony classification of an assault conviction is reduced if the defendant acted

under a sudden heat of passion). Thus, the examinees should discuss the heat of passion defense in the context of the murder charge, not the battery charge.

## DISCUSSION FOR QUESTION 4 Page Two

### **Murder**

Murder is the unlawful killing of a human being with malice aforethought. 2 Wharton's Criminal Law (15th Edition), §§ 114 and 139; Model Penal Code, § 210.2. Malice aforethought exists if the defendant has the intent to kill, or the intent to inflict great bodily injury, or if he acts with reckless indifference to an unjustifiably high risk to human life, or if the killing is done in the course of the commission of a felony. 2 Wharton's Criminal Law (15th Edition), § 139. Intentional use of a deadly weapon gives rise to a permissive inference of intent to kill. Wilson v. State, 832 S.W.2d 777 (Tex. App. 1992); see also 2 Wharton's Criminal Law (15th Edition), § 141.

Here, the fact that Doug concealed a pistol in his pocket suggests that he planned and intended to kill Violet if he could not talk her out of calling the police. But even if a jury were to conclude that Doug did not act with specific intent, the facts support the alternative conclusion that he acted recklessly.

A person acts recklessly when he consciously disregards a substantial or unjustifiable risk that a certain result will follow, and this disregard constitutes a gross deviation from the standard of care that a reasonable person would use under similar circumstances. 2 Wharton's Criminal Law (15th Edition), § 145. By shooting Violet in the chest with a pistol, Doug consciously disregarded the risk that she would be killed.

### **Heat of Passion/Voluntary Manslaughter**

Doug will raise a "heat of passion" defense to the murder charge. A killing that otherwise constitutes murder is mitigated to voluntary manslaughter at common law if it occurs in a "sudden heat of passion." The elements of the provocation mitigator are: (1) the provocation must have been one that would arouse sudden and intense passion in the mind of an ordinary person, such as to cause him to lose his self-control; (2) the defendant must have in fact been provoked by the victim; and (3) there must not have been a sufficient time between the provocation and the killing for the passions of a reasonable person to cool off. Coston v. People, 633 P.2d 470 (Colo. 1981); People v. Wadley, 890 P.2d 151 (Colo. App. 1994); see also 2 Wharton's Criminal Law §§ 155-57, 166; Model Penal Code, § 210.3(1)(b).

Although the facts do not support the argument that Doug acted under a sudden heat of passion, the examinees should point out that Doug will argue that they do.

## Intervening Cause

Doug will argue that, although he caused Violet's injuries, her death was the result of an intervening cause (her husband taking her off life support).

### **DISCUSSION FOR QUESTION 4 Page Three**

To be criminally liable for another person's death, the defendant's conduct must be the proximate cause of the death (i.e., the result would not have occurred but for the defendant's conduct). The general rule is that a defendant is responsible for all results that occur as a "natural and probable" consequence of the conduct, even if he did not anticipate the precise manner in which the injuries would occur.

However, unlawful conduct that is broken by an independent intervening cause cannot be the proximate cause of death to another. People v. Stewart, 55 P.3d 107 (Colo. 2002)(an independent intervening cause is an act of an independent person or entity that destroys the causal connection between the defendant's act and the victim's injury and thereby becomes the cause of the victim's injury); People v. Saavedra-Rodriguez, 971 P.2d 223, 225 (Colo. 1998).

The majority of jurisdictions hold that the removal of a brain-dead victim from life support does not constitute an independent intervening cause capable of breaking the chain of causation triggered by the defendant's wrongful actions. See e.g., State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (S.C.App. 2006); State v. Pelham, 176 N.J. 448, 824 A.2d 1082 (N.J. 2003); Williams v. State, 782 N.E.2d 1039 (Ind.App. 2003); Ewing v. State, 719 N.E.2d 1221 (Ind. 1999); People v. Bowles, 234 Mich.App. 345, 594 N.W.2d 100 (Mich.App. 1999); State v. Guess, 244 Conn. 761, 715 A.2d 643 (Conn. 1998).

**ESSAY Q4**

SEAT

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<u>ISSUE</u>	POINTS AWARDED
1. Recognition of Larceny.	1. ○
2. Elements of Larceny: wrongful taking and carrying away of tangible personal property of another with intent to permanently deprive the other of the property.	2. ○
3. Recognition of Battery.	3. ○
4. Elements of Battery: unlawful application of force to another person resulting in either bodily injury or an offensive touching.	4. ○
5. Recognition of Murder.	5. ○
6. Elements of Murder: unlawful killing of a human being with malice aforethought.	6. ○
7. "Malice Aforethought" supplied by Intent to kill.	7. ○
8. "Malice Aforethought" supplied by "Depraved heart" - reckless indifference to unjustifiable risk to others.	8. ○
9. "Malice Aforethought" supplied by Intent to cause grave injury.	9. ○
10. "Malice Aforethought" supplied by Felony murder - killing during commission of felony.	10. ○
11. Recognition of independent intervening cause defense.	11. ○
12. Recognition of Manslaughter.	12. ○
13. Elements of Manslaughter: killing provoked by heat of passion.	13. ○
14. Element of Heat of Passion: provocation arousing sudden and intense passion without sufficient time for cooling off.	14. ○