

MONTEREY COLLEGE OF LAW  
MIDTERM EXAMINATION  
FALL 2015

**CRIMINAL LAW**

Professors S. Stevens & R. Wade

Instructions

1. Bluebook Users -- Please write your ID number (not your name) on the cover of each of your bluebooks. Write your professor's name. Number your bluebooks. Return every page of this examination along with your bluebooks. Write on only one side of each bluebook page. Your answer must be double-spaced. Make sure your answer is legible. You will get no credit for words or sentences that we cannot read.
2. Computer Users -- Please type your ID number (not your name) at the beginning and end of your essay. Also type the name of your professor at the beginning. Return every page of this examination along with your answer.
3. Make sure that you read the question carefully before answering. Attempt to organize your answer before you start writing.
4. This examination consists of three (3) questions of equal value. There is a three (3) hour time limit to complete your answers. You are being tested primarily on your ability to apply the law to the facts. The best answer is one that includes a succinct statement of the relevant legal principles, followed by a detailed analysis of how these legal principles apply to the facts and a conclusion.
5. There are multiple issues to address in this exam. Some issues are fairly straightforward and do not require detailed analysis. Other issues are more complicated; those issues merit more extended discussion.
6. This exam has four (4) pages including this instruction sheet.

## Question 1 Seaside-Santa Cruz Midterm 2015

Branson, a prison inmate serving a life term for multiple murders, is the charismatic leader of a white supremacy gang operating both inside and outside the prison. Gatling, a correctional officer who works at the prison, is an admirer of Branson because of the gang's white supremacy philosophy and Branson's success in cultivating many devoted gang members. Officer Gatling and Branson talked and decided they would procure illegal narcotics for sale and distribution to the prison inmates.

Later Officer Gatling decided to give Branson a cell phone so that Branson could freely communicate with members of his gang outside the prison. Officer Gatling wished to surprise Branson with the cell phone gift; however, because it is a crime for an inmate to possess a cell phone, Gatling did not want to purchase the cell phone himself.

Carter is an inmate who has a prison job assisting staff employed by the prison in the prison's administration building. Each day he is released from the secure perimeter of the prison to go to work in the adjacent but unsecured prison administration building. Officer Gatling told Carter to deliver to Branson a "burner" phone. Carter knew that a burner phone is an inexpensive pre-paid cell phone that may be purchased with cash and disposed of after use. Officer Gatling threatened that if Carter did not get the phone, Gatling would arrange Carter's transfer to a cell occupied by an inmate nicknamed "Deviant."

Deviant is a notoriously violent prisoner with a reputation for intolerance toward his cellmates. In fact, recently Deviant's last cellmate died of asphyxiation in their shared cell under suspicious circumstances, though Deviant claimed his "cellie" hung himself. Deviant had been single celled ever since. Both Officer Gatling and Carter knew of Deviant's reputation and recent history.

Carter had cultivated a friendship with Nancy, a secretary employed by the prison in the administration building. Carter, whose mother puts lots of money on his "books" (his inmate account), promised to pay Nancy a large sum of money if she would obtain a burner phone for him. However, Carter had no intention of paying Nancy. Nancy agreed, and after work that day she purchased a burner phone. However, the next day Nancy reconsidered and instead of bringing the phone to work she told her boss about her conversation with Carter.

Investigators subsequently questioned Carter who admitted to the facts set forth above. Investigators also questioned Officer Gatling and Branson who both admitted to the facts set forth above.

Discuss Carter's criminal responsibility and defenses, if any.  
Discuss Branson's criminal responsibility and defenses, if any.

## Question 2 Seaside-Santa Cruz Criminal Law Midterm 2015

Dave, who was in the middle of divorce proceedings, accepted an invitation to an office party. There he observed his wife Mary being overtly affectionate with his co-worker Vince. After drinking heavily, Dave left the party and drove in his car toward home. On the freeway he passed a car he recognized and saw Vince behind the wheel and Mary in the passenger seat draped over Vince.

Angry, Dave changed lanes and began to repeatedly brake hard directly in front of Vince's car. Dave's erratic driving caused Vince to brake in a panic to avoid a rear end collision with Dave's car. Finally, Dave changed lanes and pulled alongside Vince's car.

Dave made an obscene gesture at Vince and angrily pointed toward the side of the road screaming for Vince to pull over to fight. Although Vince immediately slowed down and pulled over, Dave thought better of the idea. Vince was 6 feet 3 inches, weighed 210 pounds, and was very athletic. Dave knew that Vince had recently become an avid martial arts student. Dave was 5'11 and weighed only 160 pounds. Afraid he would lose in a fight, Dave sped off, leaving Vince and Mary in their car stopped on the side of the road.

Minutes later, Dave pulled into a gas station to fill up. Suddenly Vince and Mary pulled into the same station. Vince got out and began yelling at Dave, screaming and gesturing wildly, while threatening to kill Dave for almost causing a collision on the freeway. Dave, whose car was positioned between himself and Vince, jumped into his car and locked the doors. Vince grabbed Dave's passenger door handle and yanked ineffectively on the locked door, rocking Dave's car. Unable to force his way into the car, Vince continued to scream epithets and threatened to kill Dave. Next, Vince stepped back and charged at the passenger window. Jumping and thrusting his leg, Vince shattered the passenger window. Dave, fearing for his safety, quickly grabbed a loaded pistol from his glove box and shot once through the passenger window as Vince reached inside the car to open the door. The bullet hit Vince in the head killing him instantly.

Numerous persons at the scene witnessed these events and called the police early in the altercation. The police arrived immediately after the shooting and arrested Dave who was still in his car.

Discuss David's potential homicide culpability only and his potential defenses. Do not discuss involuntary manslaughter.

### Question 3 Seaside-Santa Cruz Criminal Law Midterm 2015

Gizmo James decided to steal a bottle of whiskey from a local liquor store. Kevin, the store clerk, observed Gizmo hurriedly leaving the store without paying for a bottle of Jack Daniels Whiskey stuffed in his back pants pocket. Kevin yelled at Gizmo who ran from the store into the surrounding high crime neighborhood. Kevin caught up with Gizmo and, after cornering him in a deserted alleyway, identified himself as a store employee and demanded the return of the stolen bottle of whiskey. Kevin, receiving no response from Gizmo, pulled out his cell phone to call the police. Gizmo, seeing the gray metal reflection off the cell phone, believed that the clerk pulled a gun on him. Gizmo grabbed a pipe he observed nearby on the ground and repeatedly struck Kevin in the side of his head.

Dazed and bleeding, Kevin ran from the alley into the connecting street. Unfortunately, Kevin ran directly into the path of an oncoming school bus. Mookie, a medical student who had witnessed the accident, ran over to administer aid to the fallen man. As Mookie was tending to Kevin on the shoulder of the street, a transformer box from a damaged telephone pole fell and struck Mookie in the head. Mookie was killed instantly.

Police responded but when they arrived Kevin had died. Investigators determined that the school bus, which swerved after striking Kevin, struck the telephone pole which caused the transformer box to become dislodged. They also discovered that the school bus driver was not wearing her corrective lenses, as required by the Department of Motor Vehicles. A pathologist who performed Kevin's autopsy determined that he died from blunt force trauma inflicted by the school bus.

Gizmo was arrested as he left the alleyway with the bottle of Jack Daniels still in his pants. As he was handcuffed Gizmo stated, "He pulled a gun on me, I had to defend myself."

Discuss Gizmo's potential homicide culpability, if any. Discuss Gizmo's defenses, if any. DO NOT discuss Gizmo's manslaughter culpability, if any.

1)

===== Start of Answer #1 (1285 words) =====

Prof.: Brannon &amp; LaBerge

Carter Crimes:

Attempt to obtain a cell phone

Carter may be charged with attempt to commit a crime. Attempt is the act of willful intentions to commit a crime, and due to an outside force, the crime was unable to be committed. Attempt cannot occur if the party himself decided not to commit the crime. The crime would be obtaining a cell phone, of which is an item that inmates are not allowed to possess. The only reason that Carter never actually received the phone is because of an intervening force. The force that stopped Carter from receiving the phone, in this case, was Nancy's withdrawal. Had Nancy not withdrawn, Carter would have gained possession of the cell phone. If Nancy did not withdraw, Carter would not be charged with Attempt. Instead, the Merger Doctrine would apply and the charge would only be that of the concluded target crime. ?

Attempt to commit Larceny

Carter may be charged with attempt to commit larceny. Carter entered into a deal with Nancy, that if Nancy procured the cell phone for Carter, Carter would pay her back. Carter entered into this agreement with no intention of paying Nancy back. Carter would be gaining an item of value from Nancy, without intentions of reimbursement. If Nancy ever did hand over the phone to Carter, and Carter did not return to her the funds, he would have gained property from Nancy that he never rightfully was allowed to have in the first place.

Solicitation

Carter may be charged with Solicitation. Carter knew that it was a crime for an inmate to possess a cell phone. Carter asked Nancy if Nancy would procure the phone for him. Under the rule of Solicitation, the requirement is that a party intentionally tries to get another party to commit a crime. The act of Soliciting is a crime in itself. Solicitation stands as long as the soliciting party attempted to encourage another to commit a crime. The target crime does not need to actually occur, and the party being solicited does not have to receive the communication. The act in itself is sufficient.

#### Conspiracy to obtain a cell phone

Carter may be guilty of conspiracy with Nancy. Carter conspired with Nancy to obtain a cell phone, which is an illegal item for an inmate to possess. Conspiracy consists of two or more parties, who enter into an agreement to commit a crime, and an overt action is taken towards the commission of that crime. In our case, Nancy and Carter conspired about the cell phone, and Nancy overtly acted upon buying the cell phone for Carter. Since an overt action had occurred, after the plan of the crime, Carter can be guilty of Conspiracy.

#### Carter Defense(s):

##### Duress

Carter can argue that he acted under Duress. Duress is a valid defense when a person commits an illegal act, that as a law abiding citizen they would ordinarily not commit, under the fear or apprehension, that great bodily injury or death would occur to themselves, or a family member, if they do not comply with the requests of the party perpetuating the duress. In our case, Carter was threatened by Gatling that if he did not obtain a cell phone for him, he would place him in a cell with Deviant. Deviant is known to be a violent inmate, and has recently been under suspicion regarding the death of his

cell mate. Carter would have reasonable fear of great bodily injury if he did not comply with the request of Gatling. A counter argument can be made to cancel out the Duress defense, under the logic that Carter had ample time to report this incident to another officer in the prison and avoid injury to himself.

Branson:

Conspiracy to sell drugs

Branson can be guilty of conspiracy for the planned sell and distribution of narcotics to the prison inmates. (See Supra for explanation of conspiracy) Branson and Gatling agreed that they would sell drug to prison inmates. Gatling took a direct step towards the commission of this planned crime by approaching Carter to purchase a cell phone. Since one of the conspiring parties had the mens rea to commit the crime, and also followed through with an overt act, Branson can be charged with conspiracy to commit a drug related crime.

Conspiracy to obtain a cell phone

A cell phone is an illegal object for an inmate to possess. Since Branson and Gatling agreed to sell drugs to inmates, and then Gatling approached a third party for the cell phone, Branson can be Vicariously Culpable for any acts committed by Gatling, that were intended to commit the target crime. Vicarious Culpability is introduced when two or more parties conspire to commit a crime, and when at least one party has the mens rea to follow through with the commission of the target crime, and takes a direct step towards the furtherance of the crime. If this happens, the original conspirators can all be charged with any further, subsequent, and foreseeable crimes that are a result of the commission, or attempted commission, of the intended target crime.

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Assault

Assault is the willful act of making someone believe that they are in danger of serious bodily injury, or death. The party being assaulted does not have to know that the assault occurred. The party committing the assault can only be charged with the assault if they had the present ability to carry out the assault. When Gatling threatened Carter that he would be placed in a dangerous cell if he did not carry out his demands, Branson became vicariously culpable for the threat. Branson and Gatling conspired to commit an illegal act of selling drugs to inmates. This crime carries a reasonably foreseeable chance for violence and harm. Since Gatling made this threat to ensure the cell phone was procured, in order to further the commission of the target crime, Branson becomes liable for the assault as well.

Branson Defense(s):

Branson could raise the defense that Gatling and him only agreed to procure and sell illegal narcotics. Never did they conspire as to how this crime was to be committed. Branson could argue that Gatling acted on his own behalf in procuring the cell phone as it was not reasonably foreseeable to Branson that Gatling would give him a phone, since he is legally not allowed to have one. Branson could also argue that since Gatling intended to give the cell phone as a gift, that it became a separate crime in itself on the behalf of Gatling. The counter argument to that would be that since Gatling was already conspiring to commit an illegal act with an inmate, it was absolutely foreseeable that Gatling would do other illegal acts to finish the commission of the conspired crime.

Bransons could attempt to raise the argument of entrapment. Even though Branson is an inmate because he has committed murders, and also happens to be the leader of a gang, the facts do not state what Branson's opinion is regarding the sell and distribution of narcotics. Entrapment is when an officer convinces a law abiding citizen to commit a crime that they would ordinarily not commit, had it not been for the advice of the officer. Branson could claim that since Gatling is an officer of the prison, that he felt it necessary to comply with his requests or suffer further consequences. Just because

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 CARTER



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Branson is in prison on murder charges, does not absolutely mean that he would ordinarily partake in crimes revolving around narcotics. The counter argument would be that, statistically, individuals who will commit murder will have no problem committing a lesser offense.

===== End of Answer #1 =====

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

Issues range in magnitude from + to +++

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

No credit = ∅

### Carter

#### Issue 1: Did Carter conspire with Officer Gatling to illegally possess a cell phone?

1. +++Conspiracy rule: Agreement between two or more persons to commit a crime. A conviction for conspiracy carries the same punishment as the completed target crime.

Actus Reus: Agreement + at least one overt act (committed in California) by one co-conspirator required. An overt act may be less than a direct step (the actus reus for an attempt).

Mens Rea: 1) Intent to agree to commit target crime; and 2) intent that at least one member would commit target crime. Requires specific intent to commit target offense.

2. ++Conspiracy analysis: Carter never explicitly agreed with Gatling to procure the phone. However, evidence of the agreement may be circumstantial. It appears both Gatling and Carter had the mens rea to commit the target crime. Carter both demonstrated that mens rea and committed an overt act to further the conspiracy when he offered to pay Nancy for a cell phone.

#### Issue 2: Did Carter attempt to steal from Nancy?

1. ++Theft by false pretences rule:

1) D takes property by knowingly and intentionally deceiving owner or agent by falsehood (false pretense).

a) Includes D making a promise intending not to perform.

2) D intends to acquire possession and ownership of property OR money.

3) The V consents to transfer of possession and ownership relying on the falsehood. Not trespassory.

2. ++Theft by false pretences analysis: Because Carter offered to purchase a phone from Nancy with no intention of performing (false pretence) in return for property (a burner phone), Carter intended to commit a theft by false pretences. If Carter intended to pay Nancy, he would not be guilty of any form of theft. Carter did not complete this crime because he never obtained the phone.

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<sup>1</sup> This outline is not a model answer because it does not attempt to thoroughly analyze facts and may not offer a conclusion. The outline is designed to assist professors in grading exams and as a key for students to identify issues and the applicable law. See best student answer for examples of analysis and conclusions.

3. +++Attempt rule:

1) Actus Reus [ a direct step beyond planning or preparation]:

a) Beyond planning and preparation;

b) A direct but ineffective step which puts plan into action so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

2) Mens Rea: Intentionally perform an act with the specific intent to commit the target offense. An attempt is always a specific intent crime even where the target offense is a general intent or strict liability crime.

3) Factual impossibility is not a defense regardless of whether it is factually impossible to accomplish an element of the crime. D need only have the apparent ability to commit the crime even if, unknown to the D, it is factually impossible.

4. +++Attempt analysis: It appears that Carter had the specific intent to commit the target crime, which was theft by false pretences. Carter probably took a direct step by making the fraudulent representation to Nancy that he would pay her as soon as she gave him the phone. He did everything he could do to complete the crime short of actually receiving the phone. Carter's false representation even caused Nancy to purchase a burner phone. Although Nancy reconsidered, this seems a circumstance outside the plan that interrupted the attempt, rather than evidence Carter never took a direct step. The facts do not implicate factual impossibility. Students might be fooled into thinking that because Carter did not intend to pay Nancy, he did not commit an attempt. Of course, Carter's attempt was not to pay Nancy, Carter's attempt was to defraud Nancy.

++Issue 3: Did Carter attempt to illegally possess a cell phone?

The facts say that it is illegal for a prisoner to possess a cell phone. The attempt analysis is covered above. If students miss the theft by false pretence issue, this crime provides another path to discuss attempt.

Issue 4: Did Carter conspire with Nancy to illegally possess a cell phone?

1. ++Conspiracy analysis: Carter obtained Nancy's agreement to procure a cell phone and Nancy committed an overt act in furtherance of the agreement when she purchased the phone. Carter did conspire with Nancy to illegally possess a cell phone. (Nancy did not withdraw from the conspiracy because she first committed an overt act. Carter would still be guilty of conspiracy even if Nancy withdrew, as long as one conspirator committed an overt act.).

Defenses:

1. ++Entrapment rule: A person is entrapped if a law enforcement officer engaged in conduct that would cause a normally law-abiding person to commit the crime.

- When deciding whether D was entrapped, consider what a normally law-abiding person would have done in the situation. The jury should focus primarily on the conduct of the officer (an objective test). The jury shall not consider D's particular intentions or character, or whether D had a predisposition to commit the crime.
- D has the burden to prove to a preponderance that D was entrapped.

2. ++Entrapment analysis: Although the rule uses a "normally law-abiding person" standard, Carter should argue that an inmate can be entrapped. He should argue that because Gatling is a correctional officer, Gatling's threat to house him with Deviant under these circumstances would cause a normally law-abiding inmate to commit a crime if necessary to obtain a burner phone. The conduct of the officer was reprehensible and probably was even criminal if Gatling's threat constituted an assault. Carter's criminal "character" is irrelevant to determine whether Gatling entrapped him. The test focuses on the conduct of the officer.

3. ++Duress rule:

- 1) D must have committed the crime because of an actual and reasonable belief in the following:
- 2) There existed a threat or menace of danger to someone's life (deadly or GBI force) unless D committed the offense; AND
- 3) The danger to life must have been imminent. A threat of future harm is not sufficient.
- 4) It is the prosecution's burden to prove beyond a reasonable doubt that D did not act under duress.

4. ++Duress analysis: It appears Carter had a reasonable belief Gatling would transfer Carter into Deviant's cell. Students should discuss whether there existed a reasonable belief of a threat of deadly or GBI force to Carter if Gatling transferred him, given Deviant's reputation of violence and known animosity toward cellies and the suspicious demise of his previous cell-mate. Students should discuss whether the threat was imminent in the context of an inmate threatened by a prison official with a cell transfer completely out of the inmate's control.

5. ++Necessity rule: Carter has the burden to prove to a preponderance that he acted in an emergency to prevent a significant bodily harm or evil; that he had no legal alternative; that his crimes of conspiracy and attempted false pretences did not create a greater danger than avoiding death or a severe beating at the hands of Deviant; that Carter believed his crimes were necessary to prevent that outcome; that a reasonable person would agree the crimes were necessary under these circumstances; and that Carter did not substantially contribute to the emergency.

6. ++Necessity analysis: The defense of duress seems preferable on these facts. First, Carter has the burden of proof for necessity. Second, students should discuss whether Carter had a legal alternative

under necessity. If Carter told prison authorities of Gatling's threat, would they have prevented his transfer? Would it have been possible thereafter, even if Gatling denied he threatened Carter, for Gatling then to arrange such a transfer?

### Branson

**Issue 1: Did Branson conspire to procure illegal narcotics for sale and distribution to prison inmates?**

1. Conspiracy rule: See above under Carter. Credit awarded only once for statement of conspiracy rule.

2. +++Conspiracy analysis: There is no question that Branson agreed with Gatling to commit the target crime of procuring narcotics for sale and distribution to prison inmates. The facts explicitly state that procuring narcotics for prison inmates is illegal. The members of the conspiracy were Branson and Gatling (and perhaps members of Branson's gang). The only issue is whether Gatling committed an overt act to accomplish the conspiracy, by threatening Carter to obtain a burner phone. The overt act requirement does not require knowledge of the overt act by all conspirators, so the fact that Gatling did so to surprise Branson is of no legal significance. Gatling propositioned Carter to accomplish the agreed upon crime, since Gatling wished to procure Branson a cell phone so he could freely communicate with gang members. The overt act occurred after their agreement. An overt act need not be a crime. Therefore, Branson and Gatling conspired to illegally introduce narcotics into the prison.

**Issue 2: Is Branson vicariously culpable for Gatling's resulting crime of attempting to illegally provide a cell phone for an inmate?**

1. +++Conspiracy vicarious culpability for substantive crimes rule: Branson is culpable for all substantive crimes committed by Gatling if the crime 1) is committed to further the conspiracy and 2) is a natural and probable consequence of the design of the conspiracy. Branson is vicariously culpable for substantive crimes that are non-target resulting crimes committed by Gatling in furtherance of conspiracy and foreseeable, even if Branson neither intends or knows of Gatling's commission of crime.

2. Attempt rule: See above under Carter. Credit awarded only once for statement of attempt rule.

3. +++Analysis: There is no question that Gatling acted to commit the resulting crime of illegally providing a cell phone to an inmate. The facts explicitly state this is a crime. If Gatling attempted to commit this crime, there is no question that the substantive resulting crime of attempt was in furtherance of his conspiracy with Branson, since a cell phone would allow Branson to freely communicate with fellow gang members and would allow Branson to covertly plot the introduction of narcotics into the prison. Students should also discuss whether Gatling's demand to Carter to procure him a burner phone, coupled with Gatling's threat to house Carter with Deviant, constituted a sufficient direct but ineffective step for an attempt. Assuming Gatling committed an attempt, students should discuss whether this resulting attempt crime was foreseeable (a natural and probable consequence of the conspiracy) although Branson did not know about it.

**Issue 3: Is Branson vicariously culpable for Gatling's resulting crime of assault on Carter?**

2. ++Assault rule: An assault is a general intent form of an attempt. If Gatling willfully did an act that would foreseeably result in the application of force to Carter; and if Gatling was aware of facts that would cause a reasonable person to foresee the application of force to Carter; and if Gatling had the present ability to apply force to Carter, then Gatling committed an assault.

3. ++Assault analysis: Gatling arguably committed an assault on Carter, although Gatling's guilt is tenuous. The act is Gatling's threat to place Carter in Deviant's cell where an application of great bodily injury was foreseeable. In CA, a CYA ward cut the brake lines of V counselor's car. After getting in the car, V pushed brake and pedal went to floor. Assault with a deadly weapon conviction affirmed. The facts in the hypothetical raise the question of whether a threat can be an act for an assault.

4. ++Vicarious culpability analysis: Although the assault was in furtherance of the conspiracy since Gatling committed it to facilitate the introduction of narcotics into the prison, it is arguable whether it is foreseeable that a correctional officer cohort would commit an assault in furtherance of that crime. However, the prosecution would argue that violence is common, if not routine, in the drug trade. This was a conspiracy to sell drugs to inmates, and violence was foreseeable if not inevitable.

++Issue 4: Is Branson vicariously culpable for Carter's crimes? No, because of the structure of the Branson-Gatling conspiracy. Carter was not a member of the Branson-Gatling conspiracy. Carter did not agree with Gatling or with Branson to illegally introduce narcotics into the prison. Therefore, Branson is not vicariously culpable for crimes committed by a person outside the conspiracy, even if the crime was a foreseeable result of the conspiracy (which seems doubtful anyway). Therefore, students should not discuss whether Carter's crimes were foreseeable. They were not committed in furtherance of Branson's conspiracy with Gatling.

+Issue 5: Did Branson himself attempt to procure illegal narcotics for sale and distribution? Attempt: An agreement alone is not an attempt, so Branson is not guilty as a perpetrator for attempting to procure illegal narcotics for distribution in the prison.

+Issue 6--Solicitation: Although we did not discuss solicitation in class, it was not a topic on the syllabus, none of the assigned cases dealt with solicitation, and this topic was not assigned reading in the outline, a number of students discussed this theory of culpability. Solicitation occurs when a D invites, commands, or encourages another person to commit a crime. The actus reus is less than an attempt, and is complete with words or deeds that constitute the solicitation. The mens rea is the specific intent to commit the crime solicited. Under the facts, Gatling solicited Carter to illegally possess a cell phone in the prison. Under a conspiracy theory, Branson is likely vicariously culpable for Gatling's solicitation. Carter also solicited Nancy to illegally give Carter possession of a cell phone in prison. If not for Carter's defenses, Carter would be guilty of solicitation.

+Issue 7: Did Branson aid and abet any crime? Aiding and abetting: At our review class, students were told that if there is a conspiracy, not to discuss aiding and abetting inchoate offenses (aiding and abetting an attempt). Prosecutors should not argue both theories and therefore the defense should

never have to defend both. This is because the punishment for aiding and abetting an attempt is half of a completed crime, while conspiracy to commit a crime is punished the same as a completed crime. In addition, an attempt is harder to prove and requires more actus reus than a conspiracy. Finally, a defendant can only be punished once for conspiracy to commit a crime and for aiding and abetting that crime. The following discussion of Branson's aiding and abetting culpability further demonstrates the problems: 1. Did Branson aid and abet an attempt to procure illegal narcotics in prison? 2. Is Branson vicariously culpable for Gatling's attempt to provide Branson with illegal possession of a cell phone? For aiding and abetting, Branson must successfully aid, promote, encourage or instigate Gatling's commission of a crime. Branson's target crime was procuring illegal narcotics. However, Branson did not aid and abet procuring illegal narcotics because that crime was never completed; and it is arguably unlikely that Gatling, as a perpetrator, ever demonstrated enough actus reus to attempt that crime. Branson did not aid or abet Gatling's attempt to illegally procure a cell phone as a target crime, since Branson was unaware of Gatling's attempt. However, two tenuous arguments under an aiding and abetting theory exist: 1. If Branson and Gatling attempted to procure illegal narcotics (arguably accomplished if Gatling's attempt to procure a cell phone was a direct step toward completion of the target crime of procuring illegal narcotics) Branson could be culpable for aiding and abetting an attempt to procure illegal narcotics and could be vicariously culpable for Gatling's attempt to commit the resulting crime of illegally procuring a cell phone. 2. Arguably, even if neither cohort attempted any target crime, if Branson aided and abetted Gatling's attempt to procure a cell phone, (where that resulting crime was foreseeable result of the intended target crime that Branson had the mens rea to aid and abet) Branson could arguably be vicariously culpable for Gatling's attempt. Even if these tenuous arguments exist, the prosecution would not bother with them. Conspiracy provides the better prosecution argument for Branson's vicarious culpability. This is because it is much easier to prove that Gatling's resulting attempt to procure a cell phone was in furtherance of the completed conspiracy to procure illegal narcotics and was foreseeable, than to argue: 1. Branson is guilty of aiding and abetting Gatling's attempt to procure illegal narcotics because Gatling's attempt to commit a different crime was enough of a direct step to commit the target offense, and Branson is therefore guilty of aiding and abetting Gatling's attempt to illegally procure narcotics and is also vicariously culpable for Gatling's illegal attempt to procure a cell phone; or 2. Even more tenuously, although Branson and Gatling did not commit their target crime (because Gatling's actus reus was insufficient for attempt to illegally procure narcotics), the agreement itself aided and abetted Gatling's resulting crime--Gatling's unilateral attempt, unknown to Branson, to surprise Branson with an illegal gift of the phone. Again, if culpability under a conspiracy theory is established, there is no additional punishment available on an aiding and abetting theory. Further, if Branson is guilty of conspiracy, Branson is punishable for the completed crime. If Branson aids and abets an attempt, Branson is only punished for an attempt, generally half of a completed crime. Therefore, the prosecution would pursue the easier argument and dispense with duplicative, tenuous, and complicated arguments that afford less, and no additional, punishment.

2)

===== Start of Answer #2 (1511 words) =====

People v. Dave

Homicide: the killing of another human being.

First Degree Murder: (specific intent crime) the intentional killing of another human being with malice aforethought; must be premeditated and deliberated. Here, Dave grabbed a loaded pistol from his glovebox and shot Vince in the head once through his broken passenger window. To prove Dave had specific intent it must be proved that he had the intent to kill Vince. The gun was in Dave's car and was presumably Dave's since he knew that it was in the glovebox. Dave therefore knew that it was loaded and had to have at least some experience with it. Dave therefore would know that a point blank shot with a gun is capable of inflicting great bodily injury and very possibly death. When he shot Vince then at point blank in the head it can be decided that Dave had the specific intent to kill Vince, especially since a head shot a point blank is not very difficult, even for a beginner shooter. It is, therefore, likely that Dave had the specific intent to kill Vince however it is not a "bullet proof" argument and it could be argued that Dave was not an avid shooter, only kept the gun for safety, and pointed it in Vince's direction and shot to merely stop Vince and not kill him. (Malice aforethought is the desire to harm another individual.) In this case, since Vince was flirting with Dave's wife (not an ex yet) and was likely taking her back to his place to fornicate (or so it would appear from the facts) it can be deduced that Dave had malice aforethought towards Vince since a reasonable person would harbor ill feelings towards another who was flirting with and about to sleep with their wife. Premeditation and deliberation require the pre-planning of the act and the careful consideration of the consequences of the act. In this case, Dave's shot was more of a reflexive shooting than a premeditated and deliberated shooting. Dave had plenty of opportunities before then to pull out his gun and shoot Vince however he didn't. If Dave had planned to kill Vince he would have done so at an earlier opportunity so it is clear that he did not premeditate and deliberate the killing of Vince so it is unlikely that would be charged with first degree murder.

Felony Murder: Killing of another person while in the commission of a felony. Dave's



ID: (CrimLawProc-F15)

*assault not premeditated felony 0*

erratic behavior of braking in front Vince's car and pulling alongside Vince's car to try to start a fight is an assault. An assault is the immediate apprehension of great bodily injury or death by a victim; the perpetrator must specifically intend the apprehension (attempted battery). In this case Dave specifically intended to place Vince in the immediated apprehension of great bodily injury or death (attempted a battery) by trying to fight him and force him off the freeway. Dave however drove off after the act was committed and was in a place of safety when the killing happened which means the assault was already completed by that time. If however the assault had been ongoing, which is what the court may try to argue, the killing would have been committed in the commission of the assault and Dave could be charged with felony murder.

Second Degree Murder: anything that doesn't fall under first degree murder. The actor does not premeditate the murder, does not have the specific intent to kill. Malice can be express or implied. See premeditation above. Here, it is clear that Dave did not premeditate the murder as seen above. It also can be proved that Dave had the specific intent to kill Vince (see above). In order to have express malice dave must have had the specific desire to harm Vince. As can be seen above, by Vince's actions with Dave's wife and by Dave's witnessing those actions, it can be concluded that Dave harbored express malice towards Vince. Dave will likely be charged with Express Malice Second Degree Murder. *what about implied malice 2ND?*

*= intent to kill*

Voluntary Manslaughter: Dave's malice could however be mitigated by heat of passion which would drop the homicide charge to voluntary manslaughter. Voluntary manslaughter requires the killing of another human being due to intense heat of passion on the part of the defendant. The heat of passion must be from a provocation that is more than mere words and the provocation must have been enough to cause a reasonable person in the same circumstances to lose control. The perpetrator must not have had sufficient time to cool off from the heat of passion in order for voluntary manslaughter to stick. Here, Vince was flirting with Dave's wife all night and was taking her back to his place to possibly fornicate. This could easily be called provocation since Vince likely knew it was Dave's wife since they were co-workers and since it was a work party, would know that Dave would be there. Dave would likely see this as provocation and it would likely cause a reasonable person to lose control and undergo intense heat

of passion. The act of flirting and the seeing his wife draped over another man is provocation beyond mere words. It can be deduced from Dave's erratic driving and attempt pull over to fight Vince that Dave was undergoing and intense heat of passion from what he just saw and realized. However, since Dave realized that Vince would likely win the fight and subsequently sped off it can be deduced that Dave's heat of passion wore off because his wits and self control came back to him and he left the scene. The fact that a few minutes went by before Dave ran into Vince and Mary again is further proof that Dave had cooled off since the extra time would have further cooled him off. In this case, Dave's heat of passion had sufficient time to cool off and his actions showed that he had indeed cooled off so it is unlikely that Dave would be charged with Voluntary Manslaughter.

Defenses:

Voluntary Intoxication: can mitigate specific intent. Since Dave left the part after drinking heavily it can be deduced that he was intoxicated and that the intoxication was voluntary since he wasn't under any kind of duress and the facts don't state he was poisoned. The defense will raise this issue to mitigate the specific intent required for first degree murder.

Self Defense: a person can use self defense if they reasonably believe they are about to suffer death or great bodily injury if they do not use self defense. Defender can use force that is equal to the force used against them. The original aggressor can use self defense if the aggressor has attempted to retreat or the fight has escalated beyond what the original aggressor intended due actions by the victim. In this case Dave was the original aggressor so if he had retreated or if the altercation had escalated beyond what he intended it to be then he had the right of self defense against Vince. In this case, Dave did indeed retreat after his original aggressive behavior by speeding off in the middle of the altercation. So, when Vince caught up with Dave and attempted to restart the altercation and was aggressive towards Dave after Dave had already retreated, Dave had the right of self defense. The fact that Dave further retreated to the inside of his car when Vince got out of his own car and came after him only further proves

*Good  
argument*



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

Issues range in magnitude from + to +++

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

No credit = ∅

The question presents an intentional killing (or alternatively one committed with at least a conscious disregard for human life) and raises the following potential issues: 1) Express malice murder with deliberation and premeditation; 2) second degree murder; 3) imperfect self-defense voluntary manslaughter; 4) heat of passion voluntary manslaughter; 5) self-defense; 6) voluntary intoxication. The question presents no causation or actus reus issues. The question presents straightforward homicide mens rea issues and the two listed defenses. The question is fact intensive and therefore requires in-depth analysis.

+Homicide definition: An act--or an omission with a duty--with a culpable mens rea that causes the unlawful killing of a human being. All crimes, including all forms of criminal homicide, require a concurrence of actus reus and mens rea. This means the defendant's act that causes death must be accompanied by a wrongful intent.

### Issue 1: Did Dave commit first degree murder?

++Rule: Intent to kill (express malice) + deliberation and premeditation. Premeditation exists if D decided to kill before committing the act that caused the death. Deliberation means D carefully weighed the considerations for and against the choice, and knowing the consequences, decided to kill.

+++Analysis: The prosecution's argument for deliberation is not strong under these circumstances: Dave had a motive to kill because of jealousy. He had seen his wife overtly bestowing her affections to a co-worker. Dave used his car to aggressively harass and endanger Vince's life. He challenged Vince to fight and then chickened out. He then finished the job at the gas station using a concealed pistol. The prosecution could argue that because it appears Dave was carrying a loaded gun in his car, he was looking for a "make my day" moment. When Vince obliged, Dave weighed the considerations and deliberated as he reached for the gun, aimed, and accurately delivered a round to Dave's head. A cold calculation to kill can be made quickly. Instead of warning Vince or using his pistol to dissuade Vince, which arguably would have been successful, Dave instead executed an unarmed man. The prosecution's argument for Dave's intent to kill is stronger. Dave aimed and fired at point blank range and shot Vince in the head. A person who shoots another in the head intends to kill him. The defense would argue that Dave did not have time to, and did not deliberate. He simply reacted rashly and impulsively in fear to protect his life. Dave also did not consciously form the intent to kill, but simply reacted and fired his gun. The defense would use arguments for a reduction to voluntary manslaughter discussed below to

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<sup>1</sup> This outline is not a model answer because it does not attempt to thoroughly analyze facts and may not offer a conclusion. The outline is designed to assist professors in grading exams and as a key for students to identify issues and the applicable law. See best student answer for examples of analysis and conclusions.

rebut deliberation and intent to kill. The defense would argue (see below) that even if Dave did deliberate, he acted in self-defense.

### Issue 2: Did Dave commit second degree murder?

++Rule (two types): 1. Intent to kill (express malice) *without* deliberation or premeditation. 2. Implied Malice: a) Actus Reus: Natural and probable consequence of act dangerous to human life (it was foreseeable a person could die); and b) D *knew* act dangerous to human life; and c) D purposely acted with conscious disregard for human life. Defense limitation: Voluntary intoxication is not a defense to implied malice second degree murder unless D unconscious.

++Analysis: Dave either acted with the intent to kill or at least a conscious disregard for human life. At a minimum, Dave knew that shooting Vince in the head was dangerous to human life. He purposely pulled the trigger of his gun at close range. Under the law, Dave cannot argue that voluntary intoxication prevented him from forming a conscious disregard for human life. The defense will argue for mitigation to voluntary manslaughter or self-defense. Either way, Dave had at least a conscious disregard for human life when he fired his pistol.

### Issue 3: Is Dave's killing of Vince mitigated to heat of passion voluntary manslaughter?

+++Rule: With a mens rea of intent to kill or conscious disregard for human life, a murder is mitigated to voluntary manslaughter if committed in a sudden quarrel or heat of passion. The prosecution must prove beyond a reasonable doubt that murder is not mitigated to manslaughter: a) **D must act rashly under the influence of intense emotion that obscures reasoning or judgment.** This is the subjective element. The following are required objective elements: b) If sufficient time for average person to "cool off," no reduction to manslaughter. c) Requires sufficient **provocation by V** or conduct D reasonably believes V engaged in; & d) **Provocation would cause a person of average disposition (reasonable person) to react from passion and without reflection rather than from judgment.** Provocation may occur over a long period of time. However, provocation need not objectively cause a person of average disposition to kill. e) The claim of provocation cannot be based on events for which D is culpably responsible. D may not provoke a fight, become the aggressor, and, without first seeking to withdraw from the conflict, kill an adversary.

+++Analysis: Dave will argue that Vince's violent attack, committed in a rage, caused Dave to act rashly. Dave clearly had no time to cool off during Vince's attack. Vince did sufficiently provoke Dave at the gas station with Vince's attack. Dave can also argue that Vince also provoked Dave by dating Dave's wife and deliberately engaging in a public display of affection at an office party with Dave present, since provocation can occur over a period of time. Dave may argue Vince's behavior with Mary was intended to humiliate Dave. All of this provocation would cause a reasonable person to react with passion. The prosecution will argue that Dave provoked Vince by trying to cause a potentially deadly collision on the roadway. Dave was the first aggressor, provoked the fight and never withdrew (the latter is a particularly weak prosecution argument). The prosecution would argue that Dave was culpably responsible for Vince's anger at the gas station. Dave cannot set up his own standard of conduct. Vince understandably reacted to Dave's egregious and potentially deadly aggression and therefore a

reasonable person in Dave's position under the circumstances would not have reacted with passion. A reasonable person would have reflected and tried to make peace with Vince and tried to apologize, or at most threatened Vince with the gun. Dave did none of these. Instead, Dave carried around a loaded gun looking for a "make my day" moment, which Vince obliged. Thus, Dave was not a person of average disposition. Dave would counter that by locking his car doors, and earlier by driving away from a fight, he clearly indicated to Vince that he did not want to fight and had withdrawn from any physical conflict. He therefore was not the aggressor in the confrontation that mattered at the gas station and had withdrawn after his earlier aggression. He did all that a reasonable person need do in the face of sudden violence and threats to kill.

#### Issue 4: Did Dave act in self-defense?

+++Rule: Self-Defense: D may use deadly force in response to deadly/GBI force when:

1. D had reasonable belief (even if D wrong [mistake of fact]; an actual [subjective] + reasonable [objective] belief):
  - a. There was an imminent danger of GBI/death [or rape or robbery];
    - i. Belief in future harm is not sufficient, no matter how great or likely the harm.
    - ii. D must act only because of D's belief in GBI/death. **AND**
  - b. Deadly force was necessary; **AND**
2. D used no more force than was reasonably necessary to defend against the (believed) danger [force must be proportional];
  - a. D may stand ground and need not retreat even if defendant could have.
  - b. The right to use force exists as long as the danger exists or reasonably appears to exist. **AND**
3. D was not an aggressor.
  - a. Exception: If D is initial aggressor using non-deadly force and opponent responds with deadly force, D may use deadly force in response. The initial aggressor has no duty to withdraw and may stand his or her ground.
  - b. Exception: If D stops physical aggression and reasonably communicates the desire to stop, D regains right to self defense if opponent either continues to fight or attacks.
  - c. A person does not have the right to self-defense if he or she provokes a fight with the intent to create an excuse to use force.

++++Analysis: Dave will argue that he had a reasonable belief that Vince wanted to inflict great bodily injury upon Dave. Vince was a bigger man and an avid martial arts student. He was in a rage and threatened to kill Dave. He clearly wanted to use violence on Dave's person. Dave's small stature meant he stood no chance to avoid serious bodily harm at Vince's hands. No doubt Vince presented an imminent threat. Even after Dave locked the doors to his car demonstrating he was no threat to Vince, Vince persisted his violent attack, even shattering Dave's window to get to Dave. Vince made clear he was going to at least violently beat Dave. At that point, Dave was entitled to stand his ground and use deadly force. Vince was obviously a threat and Dave's belief was reasonable. Otherwise bystanders who witnessed his tirade would not have called police early in the altercation.

The prosecution would argue that Dave's use of force was not objectively necessary, nor was it proportional since Vince was unarmed. And a reasonable person would not believe that Vince intended

to kill Dave or inflict GBI; his angry threats merely represented passion, not a desire to seriously harm or kill. Vince was an acquaintance and co-worker of Dave's, not an unknown, maniacal stranger. (But the San Bernardino shooting will not help the prosecution here). Dave, as someone who carries a loaded gun in his car (which is illegal), starts from an unreasonable belief in the need to potentially use it. A person looking for a "make my day" moment is not a reasonable person. Further, Dave was the aggressor here. His actions seriously endangered Vince's and Mary's lives. Dave not only started the conflict, he finished it.

The defense would argue that Dave regained his right to self-defense for two reasons: He withdrew from further physical conflict when he drove away from Vince, who had pulled over to fight; and he further reasonably communicated a desire to stop the conflict when he retreated into his car and locked the doors, rather than engage in a physical conflict with Vince.

The prosecution would respond that Dave provoked the fight with the intent to create an excuse to murder Dave. Dave was bent on revenge and when the opportunity presented itself, he executed Vince. The prosecution would argue that shooting an unarmed man was not a proportional or reasonable use of force under these circumstances as required by self-defense. Dave did not have a reasonable belief that he needed to kill Dave. Dave could have started his car and driven off, rather than retrieved a gun and killed an unarmed man. At most, Dave had a reasonable belief he needed to threaten deadly force, not use it.

#### Issue 5: Is Dave's killing of Vince mitigated to imperfect self-defense voluntary manslaughter?

+++Rule: With a mens rea of intent to kill or conscious disregard for human life, a murder is mitigated to voluntary manslaughter if committed in imperfect self-defense (with an actual but unreasonable belief in the need for self-defense). The prosecution must prove beyond a reasonable doubt that murder is not mitigated to manslaughter:

1. D actually believed self or another was in **imminent** danger of death or GBI; and
2. D actually believed **immediate** use of deadly force was necessary; and
3. At least one of above beliefs was unreasonable and mistaken. (If D's belief is not mistaken or is reasonable, then D has acted in perfect self-defense)
  - a. Belief in future harm insufficient.
  - b. In evaluating D's beliefs, consider all circumstances as known and appeared to D.
4. Is a mistake of fact defense predicated on a negligent perception of facts. **The facts as D actually believed them must, if D's belief had been reasonable, constitute lawful self-defense.** This means the force D used must be proportional to the believed danger, D cannot be an aggressor, and the victim must not have had a lawful right to use force that constituted the believed danger. Imperfect self-defense does not allow D to argue any mistake of law. Look at the set of facts as D actually believed them. If those facts could constitute self-defense had they existed (aside from whether any belief in them was reasonable) D has the right to imperfect self-defense even though D's belief in them was unreasonable. **If the facts D actually believes cannot constitute perfect self-defense, then they cannot constitute imperfect self-defense.**

++++Analysis: If Dave's perfect self-defense claim fails, he has a strong argument for imperfect self-defense. Dave will argue that if the jury does not believe Dave had a reasonable belief in self-defense, they must believe that Dave had an actual, though unreasonable, belief that Vince would inflict GBI on Dave under these circumstances. Even if Dave overacted, as long as he had an actual belief he needed to kill Dave to avoid a severe beating by a bigger, athletic avid martial arts student, Dave is guilty of nothing more than voluntary manslaughter. His use of deadly force was proportional to the danger he actually, if unreasonably, believed existed.

The prosecution would argue that Dave did not actually believe Vince would inflict GBI. Sure, Vince was angry, as anyone would be after Dave endangered Vince's and his girlfriend's life. Even so, Dave not only didn't believe he was in serious danger, his real plan was to provoke Vince to create an excuse to kill him. Dave's act was about revenge and jealousy rather than defending himself. Second, the prosecution would argue that Dave did not have the right to imperfect self-defense even if Dave actually believed that Vince would inflict GBI. This is because Dave does not have the right to imperfect self-defense if he did not have any right to self-defense. The prosecution would reiterate the argument that Dave was the aggressor. Dave would again respond that he clearly and repeatedly withdrew from any physical conflict, and therefore preserved his self-defense rights under the law.

#### **Issue 6: Defense of voluntary intoxication**

+++Voluntary intoxication may negate a specific intent. Dave may be able to effectively argue that he did not deliberate--consciously weigh the considerations for and against killing Vince--because he was drunk. Dave drank heavily at the party. He was in no condition to weigh considerations or consider consequences. His judgment was impaired because he was drunk and therefore he did not premeditate or deliberate and is not guilty of first degree murder. Dave could argue that he was also too drunk to form the intent to kill. He simply reacted rather than deciding he wanted to kill Vince. However, Dave cannot argue that due to voluntary intoxication he did not have a conscious disregard for human life for second degree implied malice murder. Dave's intoxication could assist with his imperfect self-defense claim. In his drunken state, he concluded that Vince would seriously harm him. Even if he was mistaken, his impaired judgment caused him to harbor that belief (contrary to the prosecution's argument that Dave did not really believe he was in actual danger). Similarly, Dave could argue that his intoxication contributed to the subjective element in heat of passion voluntary manslaughter, fuelling, along with Vince's violence, the intense emotion that obscured his reasoning and caused him to react rashly. However, Dave's intoxication would not assist him with the objective component of heat of passion, since that element requires a reasonable person to react from passion, not a reasonable intoxicated person. For the same reason, Dave's intoxication will not assist with whether he had a reasonable belief in the need for perfect self-defense. The prosecution would argue that Dave's intoxication did not interfere with his ability to deliberate or make decisions. Dave chose to provoke Vince on the freeway. He chose not to fight Vince there. He decided to pull a gun, had no trouble quickly extracting it from his glove box, and accurately aimed and fired it. Dave's intoxication did not prevent him from forming intent or interfere with his perceptions. The prosecution would argue that intoxication is not an excuse to kill nor does it mitigate the murder of another person.



3)

===== Start of Answer #3 (1035 words) =====

People v. GizmoHomicide

Homicide is the killing of a human being or fetus. It is murder when done with malice aforethought. There are two types of homicides- intentional and unintentional.

Actus Reus

The actus reus for a homicide is an act, or an omission to act with a duty. In this case Dave grabbed a pistol from his glovebox and fired a bullet that killed Vince. This satisfies the actus reus element of homicide.

NOT  
THIS TIME!

Mens Rea

A homicide takes place with either one of two mens rea's: express malice, which is the intent to kill or; implied malice, which is an act that would foreseeably cause death that is done with a conscious disregard for human life. Malice can also be imputed through the doctrine of Felony Murder.

First Degree: express malice, premeditation, and deliberation

Express Malice is the intent to kill. The facts here do support a finding that Gizmo did intend to kill Kevin since he hit him repeatedly on the head, however Gizmo could argue that he only meant to maim him so that he would not shoot at him. The facts do not support premeditation or deliberation since Gizmo was fleeing from Kevin and only started hitting him once Kevin pulled out his cell phone, which he mistook for a gun.

Second Degree: express malice or implied malice

It might be easier to convict Gizmo of 2d degree murder as there is no need for premeditation or deliberation. As discussed above, this is absent from these facts, and the issue is whether Gizmo intended to kill Kevin, or intended only to beat him. It could be argued that his act of repeatedly beating Kevin on the head was evidence that he wanted him to die. Gizmo could respond that he didn't mean to kill him. He would then be liable under 2d degree murder with implied malice. Beating someone on the head repeatedly with a metal pipe is an act that could foreseeably cause death. This also shows that you have no concern about what might happen to the individual on the other end- a conscious disregard for human life.

First Degree: Felony Murder

DEFENSE

Felony murder is an accidental killing that takes place during the commission of an enumerated felony- one of which is burglary. In this case Gizmo was acting during the commission of the robbery when he began beating Kevin on the head with the pipe. He had just committed a burglary from Kevin's store and had not yet reached a place of safety since he was still running from Kevin. Because he was not yet in a place of safety the chain of causation linking Kevin's death, and that of Mookie, was started during the commission of a felony and Gizmo could be liable for 2 counts of 1st degree murder as a result. Even if it was determined that Gizmo committed a 2d degree on Kevin, he could still be liable for 1 count of first degree felony murder for Mookie. (see causation discussion below)

NO - G HAD ONLY ONE MENS REA.

Causation

In order to be responsible for the death of Kevin and Mookie, it must be shown that Gizmo was the actual (but for) cause, and the proximate (foreseeable) cause. There must have been no intervening factors which break the chain of causation.

Kevin's Death

Actual Cause:

Gizmo was the actual cause of Kevin's death because, but for beating him on the head with a pipe, he would not have been in a daze that led him to run into the street where he could be hit by the bus.

Proximate Cause:

Once Kevin ran into the street he was struck by a bus. It is foreseeable that someone who had just been hit in the head with a pipe would not have all of their faculties when they tried to run away. It is also foreseeable that someone without all their faculties might run into danger that they would otherwise avoid. It is likely that Gizmo will be found the proximate cause of the death because of this.

Independent Intervening Cause:

An independent intervening cause is a cause that occurs independently from the defendant or his act. It can break the causal chain unless it was foreseeable, or unless it brought about the defendant's intended consequence upon the victim. In this case the bus driver had some troubles with his contacts- it could be argued that this was an independent intervening cause which should break the chain of causation since it was completely independent of the defendant or his act. On the other hand, the negligence of others does not necessarily break causation if it was foreseeable. In addition to this, the intended consequence doctrine holds a defendant liable for a death if they intended it, even if they were not the ultimate cause. Because of this, Gizmo will likely be liable for Kevin's death.

Mookie's Death

Dependent Intervening Cause:

A dependent intervening cause will not break the chain of causation unless it was highly

extraordinary. In this case Mookie's death could be the result of a dependent intervening cause. If causation was not broken by the bus driver, then the electric box falling onto Mookie from the pole hit by the bus, would be a dependent intervening cause. Were it not for the bus striking the telephone pole, the electric box would not have fallen on him. The only issue is whether this was so extraordinary as to be unforeseeable. It could be argued that everything had to happen just perfectly- the stars had to align- in order for Mookie to be in the wrong spot at the wrong time. However, it could be foreseeable that causing a bus to swerve in a crowded area might knock things down that should stay up, and that those things might land on someones head.

**Defenses**

**Self Defense**

Mookie could argue that he was acting in self defense. Self defense is when a person believes that they are in imminent danger of death or GBI, that they need to use deadly force, and both of these beliefs are objectively reasonable. The state would probably argue that the belief that he needed to respond with deadly force to a cell phone was objectively unreasonable.

===== **End of Answer #3**=====

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**END OF EXAM**

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

Issues range in magnitude from + to ++++

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

No credit = ∅

The central issues in this question are felony murder, the felony murder agency limitation, second degree implied malice murder, and causation (students were instructed to apply common law causation principles). If Gizmo had the intent to kill Kevin, first degree murder with premeditation and deliberation and express malice second degree murder are possible. Whether self-defense justifies any murder Gizmo committed is also an issue.

### Issue 1: Did Gizmo commit first degree felony murder?

++++Rule 1: Felony murder is a killing, even if unintentional or accidental, committed in perpetration or attempted perpetration of enumerated felonies including robbery and burglary. The commission of the felony must cause the death.

1. Requires specific intent to commit enumerated felony.
2. Extends to flight after felony or until D reaches place of temporary safety.
3. Agency/proximate cause limitation: However, it is not felony murder if an actor other than a perpetrator in the felony (here the school bus driver) commits the fatal act. In this situation, the actor rather than a co-felon is the last human cause of the V's death.
4. Self-defense is not available to a defendant who commits felony-murder; the purpose of the felony-murder rule is to deter even accidental killings by imposing strict liability on persons who kill while committing felony murder.

+Rule 2: Burglary is committed when a defendant enters a store with the intent to commit theft.

++Rule 3: Robbery is committed when a defendant takes property (trespassory taking) using force or fear against the V's will when the defendant intends to permanently deprive owner of property. Also, because larceny requires asportation, which is a carrying away of the property, and continues until the perpetrator reaches a place of temporary safety, a defendant who uses force or fear in an attempt to escape with property taken by larceny has committed robbery. This is called an Estes robbery and occurs even when the property was not originally acquired by force.

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<sup>1</sup> This outline is not a model answer because it may not attempt to thoroughly analyze facts and may not offer a conclusion. The outline is designed to assist professors in grading exams and as a key for students to identify issues and the applicable law. See best student answer for examples of analysis and conclusions. Also, it is not possible due to time constraints to obtain all credit available. However, different answers will score points under different headings to differing degrees. Better answers address major issues thoroughly where more points are available. Points may be deducted if an answer addresses minor issues without spotting central issues, or for issue spotting unsupported by accurate rules or thoughtful analysis.

+++Analysis: Gizmo committed two predicate felonies, burglary of the liquor store (if Gizmo intended to steal when he entered the store) and an Estes robbery of Kevin, the clerk (assuming he ever reached a place of temporary safety—otherwise he committed an attempted robbery). During the commission of both felonies Gizmo did not reach a place of temporary safety before his confrontation with Kevin. Kevin yelled at Gizmo when he left the store and apparently immediately followed him out of the store and confronted him a short distance away in a deserted alley. The defense might argue that Gizmo was not attempting to escape with property as required for an Estes robbery, he merely intended to defend himself from being shot. However, the argument would likely fail since Gizmo still had the bottle when arrested. In fact he escaped from Kevin with the whiskey that Kevin tried to retrieve. Gizmo cannot defend felony murder by claiming self-defense. However, due to the felony murder agency limitation, Gizmo is not culpable for Kevin's and Mookie's deaths. This is because another actor, the bus driver, committed the fatal act that killed Kevin and Mookie. The pathologist determined that Kevin died from blunt force trauma inflicted by the school bus. Therefore, the last human cause of Kevin's death was the school bus driver. Because she also collided with a pole which later dislodged the transformer box that killed Mookie, she was also the last human cause of Mookie's death. The felony murder agency limitation does not depend on foreseeability and relieves Gizmo of culpability even if he was an actual cause of either death.

#### Issue 2: Did Gizmo commit second degree murder?

++Rule (two types): 1. Intent to kill (express malice) *without* deliberation or premeditation. 2. Implied Malice: a) Actus Reus: Natural and probable consequence of act dangerous to human life (it was foreseeable a person could die); and b) D *knew* act dangerous to human life; and c) D purposely acted with conscious disregard for human life. The act must cause the death of a human being (causation discussed below).

+++Analysis (mens rea and actus reus only): The prosecution would argue that by striking Kevin repeatedly in the head with a pipe, Gizmo knew his act was dangerous to life but didn't care because he wanted to get away with the stolen whiskey. The defense must argue either that the force Gizmo used made it unforeseeable that Kevin could die from the blows or that under the circumstances Gizmo did not realize hitting Kevin in the head with a pipe was dangerous to human life. Perhaps Gizmo's fear of being shot prevented his subjective realization of the danger. The prosecution has a good argument for CDHL mens rea; however, intent to kill seems unlikely on these facts. First, Gizmo did not kill Kevin by his own hand. Kevin was able to run away. He was only dazed and died of blunt force trauma inflicted by the school bus. Second, Gizmo did not follow Kevin. If Gizmo ever intended to kill, he changed his mind because he decided it not worth the effort. The prosecution would counter that because Gizmo believed Kevin presented deadly force, Gizmo intended to use deadly force in response. The defense would counter that Gizmo only intended to neutralize the threat using necessary force. Even if Gizmo intended GBI force, he did not intend to kill Kevin. The best evidence is that in fact Gizmo did not kill Kevin with the pipe. Gizmo did not swing and miss. The defense would argue that if Gizmo wanted to kill Kevin with what was presumably a steel pipe, he would have done so with the repeated blows he delivered. He would not have stopped until Kevin was at least incapacitated or dead.

### Issue 3: Did Gizmo premeditate and deliberate with intent to kill and commit first degree murder?

1/2  
+Rule: Intent to kill (express malice) + deliberation and premeditation. Premeditation exists if D decided to kill before committing the act that caused the death. Deliberation means D carefully weighed the considerations for and against the choice, and knowing the consequences, decided to kill.

+Analysis: The prosecution has two facts in its favor: Gizmo used a pipe to strike Kevin's head and delivered multiple blows. The defense would argue that Gizmo did not intend to kill for reasons stated above and reacted to a perceived threat without time to deliberate.

### Issue 4: Did Gizmo cause Kevin's death?

+++Causation rule: If the death would not have occurred but for the defendant's act, the defendant is an actual cause. If the death was foreseeable, the defendant is a proximate cause. Where there are multiple causes of the death, intervening causes may relieve a defendant of culpability (the defendant is not the proximate cause). A dependent intervening cause is one that occurs in response to the defendant's act. Negligence--for example by medical providers responding to treat injuries inflicted by the defendant or by police responding to an emergency created by the defendant--is considered a foreseeable dependent cause. Gross negligence may not be foreseeable. An independent intervening cause would have occurred in the absence of the defendant's conduct; that is, the defendant's conduct did not cause the subsequent independent intervening act. Although the test is still whether the harm was foreseeable, independent causes are more likely to favor breaking the causal chain and relieving the defendant of culpability for the death. If the defendant intended the death, the intended consequences doctrine favors culpability. If the victim reached a place of temporary safety, this doctrine favors a break in the causal chain. When an intentional act by someone other than the defendant is the primary cause of the death, the free, deliberate, informed human intervention doctrine favors a break in the causal chain relieving the defendant of culpability.

+++Analysis: Under felony murder, Gizmo did not cause Kevin's death due to the agency limitation. Therefore, assuming mens rea, the issue is whether Gizmo is guilty of second degree murder (or improbably first degree P & D murder) for causing Kevin's death. Gizmo was an actual cause of Kevin's death because but for the beating, Kevin would not have fled and would not have been killed by a passing school bus. But was Gizmo the proximate cause of Kevin's death? According to the pathologist, the school bus inflicted the blunt force trauma that caused Kevin's death. The prosecution would argue the collision was a dependent cause since Kevin would not have fled, and the collision would not have occurred, without Gizmo's act of beating Kevin. The defense would argue the school bus was an independent, coincidental cause. The school bus did nothing in response to Gizmo. Further, the driver wasn't wearing her glasses and was at least negligent. The defense would argue this chain of events was highly unlikely and unforeseeable. The prosecution would analogize to the rule that a responder's negligence is generally a dependent intervening cause and is foreseeable. Even if the school bus driver was negligent, people commonly drive without their glasses. The facts do not disclose the bus driver's degree of impairment without glasses. If she was grossly negligent, this favors breaking the causal chain. The prosecution would argue that Kevin had to flee from Gizmo, did so in a foreseeable panic,



was foreseeably dazed because of the blows Gizmo delivered to his head, and therefore foreseeably inattentively fled in a panic into the street. Finally, pedestrians in roadways are commonly struck by cars, sometimes driven by inattentive drivers. Death is foreseeable and happens all too frequently. The facts do not disclose whether the driver's eyesight was an actual cause of the collision. If it was, and especially if not wearing her glasses was grossly negligent, the defense would have a strong counter argument. In the unlikely event the jury believed Gizmo intended to kill Kevin, the prosecution could argue the intended consequences doctrine.

#### Issue 5: Did Gizmo cause Mookie's death?

Causation rule: See above.

+++Analysis: Under felony murder, Gizmo did not cause Mookie's death due to the agency limitation. Therefore, assuming mens rea, the issue is whether Gizmo is guilty of second degree murder (or improbably first degree P & D murder) for causing Mookie's death. Mookie's death adds the following facts to the causal chain: The school bus swerved after striking Kevin and hit a telephone pole. That collision later caused a transformer box to fall which happened to hit Mookie. Mookie was in that exact spot because as a Good Samaritan he came to aid Kevin. Although Mookie would presumably still be alive if not for Gizmo (therefore Gizmo is a but for cause), the sheer length of this chain of events, even if all were arguably dependent causes, makes it unlikely that Gizmo is a proximate cause. Also, the target of Gizmo's harm was not Mookie, it was Kevin. Although under a transferred intent theory it is possible that Gizmo could be culpable for the death of a person who was not the intended target of his mens rea, this is one more link in the causal chain that makes it difficult to persuasively argue Mookie's death was foreseeable. Less persuasively, the defense could argue that Mookie's conscious decision to aid Kevin was the cause of his death under the free, deliberate, informed human intervention doctrine. This argument would discourage all first responder assistance and subsequent medical treatment for victims. All forms of aid to victims are deliberate.

#### Issue 6: Did Gizmo act in self-defense?

+Rule: Self-defense is never available in response to a lawful use of force, such as reasonable use of force by a person trying to prevent a crime.

++Analysis: Even if Gizmo caused Kevin's or Mookie's death, the killing was justified if Gizmo acted in self-defense. However, since Kevin acted reasonably in trying to prevent Mookie from stealing whiskey, Gizmo cannot argue his mistaken belief that Kevin had a gun was reasonable under self-defense. A clerk or store owner has a right to prevent theft from a store, even in a high crime neighborhood and even when confronting a thief in a deserted ally. Although dangerous, Kevin's behavior was not unreasonable because Kevin was asserting his rights under the law.