

Practice Midterm

ASP – Criminal Law (Prof. Steinman) – Fall 2005

Santa Clara University School of Law

Saturday, 8 October 2005 10:00 AM – 12:00 PM

Instructions: This sample midterm examination consists of one question, for which you will have 75 minutes to answer. If you believe it is necessary to assume further facts, or to resolve ambiguities in the question, make your assumptions or resolutions explicitly. To the extent that time permits, indicate the effect of alternate assumptions. Please write only on once side of a page and on every other line of that page (i.e. double space). Good Luck!

Bud Wiser had seen his life go from riches to rags in the last few years. Unable to control his craving for alcohol, Wiser lost his job, his family and his home. Now homeless on the streets of San Jose, he spends most of his days attempting to scrape together enough money to buy cheap wine.

Yesterday afternoon, after having consumed his “usual” amount of alcohol, Wiser decided to take a leisurely stroll in an upper middle class San Jose neighborhood. As he walked along a sidewalk shaded by tall trees and foliage, he stopped near a large two-story house. He noticed, through an open sliding door in the living room of the house, a picture of a loving family encased in an attractive silver picture frame. Since the picture reminded Wiser of his own estranged family, he walked into the house through the door, picked up the picture frame, and held it close to his chest. Suddenly, Missy Demeanor, the owner of the house, emerged from the next room, brandishing a revolver that belonged to her late husband.¹

Trembling, Demeanor cried: “You miserable wretch! What right have you to invade my home? People like you will pay for this. You may have gotten my husband, but this gun will make sure you won’t get me or my family!”² Wiser, fearing the worst, hurled the picture frame at Demeanor. It struck her in the forehead. Startled, she fired the gun at Wiser.

Meanwhile Moe D. Lawn, a San Jose police officer, was walking to his home after finishing his morning shift. Lawn heard Demeanor’s shouting and walked over to the open door and peered inside. It was at that moment that Demeanor fired the gun. The bullet missed Wiser, but struck Lawn in the chest. Lawn slumped in the doorway.

¹ Demeanor’s husband had obtained a license for the gun, but the license had expired two months ago.

² Demeanor’s husband had been murdered in their home 11 months ago. Demeanor believed that her husband’s killer was a homeless person. At the time of her husband’s murder, many homeless people had been sleeping in the neighborhood, to the consternation of Demeanor and other community residents. The police had been unable to determine how the killer had entered the home or what the motive might have been.

Scared by the gunfire, Wiser raced out the open door, hurdling Lawn's body in the process. Meanwhile, Demeanor had fallen after firing the gun and lay dazed on the floor having hit her head on the coffee table as she fell. The gun had slipped out of her hand. Lawn, fearing that the woman might try to shoot again, began crawling across the room in an effort to grab the revolver. As he drew near the gun, Patty Larceny, Demeanor's 22-year-old daughter, came down the stairs. Seeing her mother on the floor and Lawn crawling toward the gun, Larceny quickly grabbed the gun and shot Lawn a second time in the chest.

After catching their breath, Demeanor and Larceny (who was still carrying the gun) walked outside in hopes of finding the intruder. They spend fifteen minutes in a futile search for the intruder and then returned home. Lawn was lying dead on the living room floor when they returned. The autopsy report for Lawn listed the cause of death as blood loss and shock. Wiser was arrested late last night and is now in custody.

You are a deputy district attorney for Santa Clara Country. Your boss (who told you to assume that the aforementioned facts are true) wants to know – based on these facts – what is the most serious homicide offense that has “realistically” been committed, how you would proceed in prosecuting that offense and what problems you would face in such a prosecution. Also, your boss also wants an evaluation of other serious homicide or non-homicide charges you would pursue based on these facts.

Please write a memorandum discussing and analyzing the issues posed by your boss' request. For your assistance, the California homicide statutes are listed below. In addition, the following four statues (assume that they are the law in your jurisdiction) may or may not be helpful in writing the memorandum.

Cal. Penal Code Extracts

Cal. Penal Code § 90.484 – Larceny

Whoever steals, takes or carries away the personal property of another is guilty of larceny. When the value of the personal property exceeds \$400, it is a grand larceny punishable by imprisonment for not more than one (1) year. All other larceny is punishable by a fine of not more than \$1,000.

Cal. Penal Code § 90.456 – Burglary

Whoever enters a building with the intent to commit larceny or any felony therein, unless the premises are open to the public at the time, is guilty of burglary, and shall be punished by imprisonment for not more than ten (10) years and/or a fine or not more than \$10,000.

Cal. Penal Code § 90.759 – Murder of a Peace Officer

Whoever intentionally or knowingly kills a peace officer, in circumstances otherwise constituting murder as defined in this state, is guilty of murder of a peace officer, and shall be punished by imprisonment for life without possibility of parole.

Cal. Penal Code § 90.790 – Use or Possession of an Unlicensed Handgun

Whoever possesses or uses any handgun without having, in his or her possession, a valid license for an authorized law enforcement agency is guilty of possession or use of an unlicensed handgun, and shall be punished by imprisonment for not more than six (6) years and/or a fine of not more than \$6,000 if found guilty of possession of an unlicensed handgun, and for not more than ten (10) years and/or a fine of not more than \$10,000 if found guilty of use of an unlicensed handgun.

Cal. Penal Code § 187 - Murder Defined

(a) Murder is the unlawful killing of a human being, or a fetus with malice aforethought...

Cal. Penal Code § 188 - Malice defined

[M]alice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice.

Cal. Penal Code § 189 - Degrees of murder

All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206 [Torture], 286 [Sodomy], 288 [Lewd or lascivious acts involving children], 288a [Oral copulation], or 289 [Sexual penetration by foreign object], or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree...

To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.

Cal. Penal Code § 190 - Punishment for murder

- (a) Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life...
- [E]very person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life. ...

Cal. Penal Code § 192 - Manslaughter

Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:

- (a) Voluntary – upon a sudden quarrel or heat of passion.
- (b) Involuntary – in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. This subdivision shall not apply to acts committed in the driving of a vehicle.
- (c) Vehicular – ...