

ASP – Criminal Law (Prof. Steinman)
Fall 2005 – Practice Midterm Sample Answer
Santa Clara University School of Law
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Preface

Prof. Steinman says that the main issue is whether Lawn (the police officer) was wearing his police uniform. If you think that Lawn was wearing his uniform or can argue that Larceny knew or should have known that Lawn was a police officer (he was a neighbor, &c.), the most serious homicide offense that was committed was murder of a police officer (Lawn) via an abandoned and malignant heart (or some other theory) by Larceny. Prof. Steinman's notes indicate that most students chose to pursue a theory of *Taylor* murder, which is why this sample answer starts with that theory.

Taylor Murder of Lawn by Wisner

Realistically, the most serious homicide offense that has likely been committed is a first degree *Taylor*-style murder via the enumerated felony of burglary by Wisner. The main problems in this prosecution will be to show that (1) Wisner had the necessary specific intent to commit burglary via larceny prior to entering Demeanor's home; (2) Wisner's burglary was provocative of lethal resistance; and (3) no intervening acts broke the chain of causation.

Burglary by Wisner

The first problem with prosecuting Wisner for burglary with intent to commit a larceny in Demeanor's home is to show that he formed the intent to commit the larceny prior to the act of entering. Cal. Penal Code § 90.484 defines larceny as the taking of another's personal property. If the intent to commit the larceny is formed after the act of entering, then a burglary hasn't been

committed. Although Wiser took Demeanor's personal property, the silver picture frame, after he entered her house the problem will be to show that he formed the intent to take the picture frame before he entered.

Wiser can argue that he didn't plan on taking the picture either before or after he entered the home. He will contend that the reason he entered the home is that he saw the picture from outside of Demeanor's home and just wanted to get a better look at it because it reminded him of his estranged family and the happy days of his past. Wiser may also argue that he didn't form the intent to even touch the picture until he was inside the home and was very close to it; picking it up and holding it to his chest was a spur of the moment decision after he had entered.

We can overcome Wiser's arguments by considering his actions prior to entering Demeanor's. First, Wiser was homeless and spent his days scraping together enough money to buy cheap wine. Taking a silver picture frame and pawning it could allow Wiser to purchase some cheap wine for at least one or two days. Second, Wiser decided to take a stroll in an upper-middle class neighborhood during the afternoon. This is a time of day when many of the residents work and therefore fewer people are around to notice a stranger. Also the homes are generally larger and separated by larger distances, and in this case shaded by trees, which also makes it less likely that Wiser's presence would be noticed. Third, upper-middle class homes are larger and likely to have lawns in the front, so Wiser probably couldn't see the picture from the sidewalk and had to be fairly close to the home in order to see the picture frame and its contents. If his real interest was merely sentimental, he didn't have to enter Demeanor's home to take a look at it, he could have viewed it from outside the home. He might even have knocked at the front door and asked permission to look at the picture if he was that emotional. Some weight should also be given to the fact that Wiser held the picture close to his chest after picking it up;

this could be show that he was trying to hide it in his clothing and therefore had an intent to take the picture prior entering the home.

Wiser may also argue that he did not have control of the picture frame for long enough to commit a larceny because Demeanor scared him by coming from the next room brandishing a gun. The problem with this argument is that burglary only requires a showing of intent to commit larceny prior to entering; it does not require a showing that the larceny was actually committed. Furthermore, it might even be possible to argue that a larceny was committed because Wiser deprived Demeanor of possession of her property for a few moments, which ought to be sufficient to constitute a larceny.

There is no problem in showing the requisite act, as Wiser entered Demeanor's home through the open sliding door. Although Wiser may suggest that because Demeanor had left the sliding door open her home was "open to the public" (anyone could have walked into her home through the door) the implication that any time one leaves a door open that their home is "open to the public" seems far-fetched. The legislature's motivation for the "open to the public" limitation is probably to ensure that defendants who commit a petty larceny (ie taking something worth under \$400) in a store during business hours they are not guilty of a felony.

Wiser's Voluntary Intoxication

Wiser's backup argument will likely be that he was so drunk that he couldn't form the necessary specific intent to commit larceny by taking the picture frame prior to entering Demeanor's home. If Wiser was so drunk that he couldn't form the requisite specific intent for larceny, he would not have committed the burglary and thus would not be guilty of murder under a *Taylor* theory.

Wiser will probably argue that he had an uncontrollable craving for alcohol and that he

had consumed his “usual” amount of alcohol prior to taking a walk. He may argue that he is addicted to alcohol therefore his usual amount is quite a bit of alcohol which leaves him in a state of heavy inebriation. Wiser may also argue that his intoxication is so severe that it has led to the loss of his family and his job. Wiser can contend that in light of his history of alcoholic addiction, it is not plausible to infer that he specifically intended to do anything.

Wiser’s suggestion that his “usual” amount was a lot of alcohol has several weaknesses as well. First, he generally buys cheap wine; these types of wines generally don’t contain much alcohol. Second, since he has no source of income; his usual amount of alcohol is likely limited to a small amount. Even if his usual amount of alcohol is quite high, he has probably built up a high tolerance to intoxication based on his continuous consumption.

Wiser’s intoxication argument can also be defeated because Wiser’s behavior gave no external indications of intoxication. He was able to decide to take a stroll. He was also able to notice the picture frame and was able to tell that it was silver. This would indicate that he was reasonably sober, as a heavily intoxicated person probably couldn’t tell the difference between a metal and silver picture frame. Additionally, he was both able to accurately throw the picture frame at Demeanor, dodge her shot and to jump over Lawn’s body to make his escape. He was also able to evade both Demeanor and Larceny who were searching for him.

Provocative of Lethal Resistance

The second problem is whether Wiser’s behavior was sufficiently provocative that it would lead Demeanor to resist with lethal force. The standard for determining whether or not Wiser’s behavior was sufficiently provocative is whether a reasonable person in the victim’s situation would have been provoked to use lethal force to resist.

Wiser can start by arguing that Burglary (via Larceny) is a property crime and

therefore never likely to provoke lethal resistance. Unlike the crime of Robbery, which involves force or fear, Burglary is merely the entering with the intent to commit a Larceny, which can be done in a completely non-violent way. In addition, Wiser can argue that his actions inside the home and prior to entering the home gave no indication that he was a threat to Demeanor. Prior to entering the home, he merely looked at the picture from outside. This isn't behavior that would give rise to the need to resist with lethal force. Furthermore, once Wiser entered he just picked up the picture but didn't take any other threatening steps. It was Demeanor who suddenly appeared brandishing a gun at an unarmed man. In that situation, Demeanor had the upper hand as she was armed and had caught Wiser off guard. Wiser may also argue that a reasonable person in Demeanor's position would likely have called 911 rather than confronted the burglar with a loaded gun. Also, Demeanor's words show that she wasn't behaving as a reasonable person. She was going to make him "pay" by making sure that he wouldn't get her or her family.

There are several flaws in Wiser's argument. First, Burglary is a crime that is frequently provocative of lethal resistance. Once a burglar has entered someone's home and has been seen by the homeowner, the burglar has little incentive to allow the homeowner to live, because the homeowner can identify him. Reasonable people could be afraid of that the burglar will kill or injure them. Second, we can focus on the victim's situation subjectively and to impute characteristics of the actual victim to the reasonable person. In this case, an intruder murdered Demeanor's husband in their home. A victim of a murder in their own home will likely be more apprehensive regarding uninvited and unknown persons entering their home than others. Furthermore, Wiser entered someone's home unannounced and proceeded to take an intimate family possession. This would make any reasonable person apprehensive and defensive.

Finally, Demeanor didn't fire the gun until she was hit in the forehead by the picture frame hurled at her by Wiser, indicating that Demeanor's overall response was reasonable.

Causation/Intervening Acts

The third problem is whether there were any intervening acts that were so unforeseeable that they broke the chain of causation. There potentially three intervening acts that Wiser can point to that may break the chain of causation: (1) it was unforeseeable that Larceny would shoot Lawn in the chest (esp. if he there was some external indication that he was a police officer); (2) it was unforeseeable that Larceny and Demeanor would leave Lawn to die and search for Wiser instead of calling 911 for help; and (3) that it was unforeseeable that Lawn would even be there in the first place.

Wiser's argument with regard to Larceny is likely two-fold. First, Wiser can argue that Demeanor's shot was not sufficient to cause death as Lawn was still crawling around after getting shot by Demeanor. Second, Wiser will argue that it was unforeseeable that a third party would come to the scene and then shoot a second time. Wiser can argue that the policy behind Taylor is that once the felon brings about a dangerous situation he is responsible for the actions of the victims of that situation, but the felon cannot be held accountable for a third party who was not a victim and whose actions were beyond the felon's control. In this case, Wiser will argue that only Demeanor was victim and that Larceny was third party beyond his control. Wiser may support his argument by stating that Lawn lived in the neighborhood therefore Larceny should probably have recognized him and may even have known that he was a police officer making the shooting evening more unforeseeable.

The problem with this argument is that Larceny was also a victim of the burglary as she was in the house at the time. She only came onto the scene because of the noise made by her

mother in response to Wiser's entry. Larceny may only have had a split second in which to ascertain the situation and react. She saw a man crawling towards a gun and her mother on the floor so she picked up the gun and fired. It is entirely plausible that a daughter might react (or overreact) given her view of the situation. Furthermore, Larceny was likely aware of the circumstances of her father's death and may have been afraid that the same situation was repeating itself.

Wiser may argue that it was unforeseeable that Larceny and Demeanor would not call for assistance after Larceny had effectively incapacitated Lawn. Wiser may argue that the first instinct for reasonable people in that situation is to call 911 and to report the situation. Instead of taking that reasonable course, Larceny and Demeanor went hunting for Wiser. Wiser may try to support his argument by suggesting that it Larceny and Demeanor's behavior was even more unreasonable because Lawn was a police officer as reasonable people do not allow cops to bleed to death. In addition, Lawn lived in the neighborhood so Larceny and Demeanor presumably should have recognized him.

In this situation, it is not clear that Lawn could be identified as a police officer because he was on his way home from work and may have changed at the station. Alternatively he may have been a plainclothes officer. Although Lawn lived in the neighborhood, he may not have been a direct neighbor to Larceny and Demeanor so they may not have recognized him. They might also have thought that Wiser and Lawn were working together, so they chased after Wiser because they were afraid the he might come back to help Law. Victims of a crime can experience a kind of "tunnel vision" where they do not explore all the rational options before them but rather act on instinct, which may explain why Larceny and Demeanor searched for Wiser instead of calling 911. Also, it is not clear whether Lawn died from the loss of assistance.

He may have died immediately – loss of blood and shock could have occurred after getting shot the first time. Also, there is no evidence that Lawn could have survived had he received prompt medical care.

Wiser will likely argue that the most unforeseeable event was the very presence of Lawn at the home. There was no evidence that the police had been alerted so Wiser can argue that he had no idea that a police officer would appear on the scene. Furthermore, Wiser can argue that he thought he was doing something perfectly innocent (viewing the picture frame) therefore he had no reason to suspect a police presence or the presence of any bystanders.

It may be possible to overcome this problem in several ways. First, it is likely that when a victim of a burglary is surprised by the burglary they usually make a lot of noise, which attracts people to render assistance or investigate. In addition, it is reasonable to assume that police often patrol middle class neighborhoods during the day because that is the time of day when fewer people are around in those neighborhoods. Also, Lawn lived in the neighborhood so it was foreseeable that he might investigate any disturbance. Police officer, even off-duty officers, generally try to investigate and resolve disturbances. Furthermore, the rationale behind *Taylor* is that when a victim is provoked there is no telling who might get killed, so we can probably stretch the concept of foreseeability a bit.

Other Serious Homicide Charges – Larceny Second Degree Murder (AMH)

In terms of other serious homicide charges, I would bring a charge of second-degree murder via an abandoned and malignant heart against Larceny for her shooting of Lawn. I will show that she subjectively appreciated the peril, acted with a base anti-social motive and wanton disregard for human life. It is difficult to get the sentence enhancement for killing a police officer because it seems very difficult to prove that Larceny knowingly and intentionally shot a

police officer because (1) it is not clear that Lawn was identifiable as a police officer (see above); (2) that she even recognized Lawn; and (3) even knew that Lawn was a police officer.

The first problem with this charge is to establish that Larceny subjectively appreciated the risk to Lawn. Larceny may argue that she was upset over discovering her mother on the floor and Lawn crawling towards a gun so she didn't subjectively appreciate the risk. She can argue that she was completely focused on her mother and was only thinking about incapacitating the person she presumed to be her mother's attacker. Larceny can suggest that she did not aim for Lawn's chest and didn't really know that she would kill Lawn by shooting at him. However, the problem with Larceny's claims is that she does seem to have aimed for Lawn's chest. Furthermore, she had control of the situation once she had the gun in her hand. Lawn was on the floor and was only capable of crawling. Larceny could easily have asked either Lawn or her mother about the situation instead of shooting at Lawn.

The second problem with this charge is that Larceny will argue that she didn't have a base anti-social motive. Larceny will claim that she was only out to protect her mother. Larceny will argue that her complete focus was on the danger to her mother and the need to protect her from that danger. Larceny will argue that from her perspective, she saw her mother on the floor in a daze and a man crawling towards a gun. She will argue that the only plausible inference at that moment was, that her mother was attacked and that needed protection. However, if protection was Larceny's goal, she could just as easily have grabbed the gun and prevented Lawn from using it. Given that Lawn was crawling on the floor, just grabbing the gun would have been enough to prevent his use of it. Also once she had the gun she could have asked who Lawn was – presumably Lawn wasn't so injured that he would have been able to tell her he was a cop. Given Larceny's rash actions, it is possible that her whole purpose was like that of her mother's: to

get revenge for the death of her father. Since Lawn lived in the neighborhood, it is entirely possible that Larceny knew him or knew about him so that she could recognize him. In such a case, her actions would be very anti-social. If she knew of his occupation (police officer), then her actions would be extremely anti-social.

Showing that Larceny acted with wanton disregard for human life will likely not be a problem. As shown above (base anti-social motive), the alternatives available to Larceny show that she didn't need to shoot Lawn in the chest to protect her mother.

Although Larceny might argue that the first shot was the real cause of Lawn's death, she can still be held accountable for Lawn's death provided that the first bullet wasn't the primary cause of Lawn's death. The general rule that an assailant takes her victim as she finds him would apply here. Larceny had to take Lawn as she found him. When she chose to shoot him in the chest she took him with the first bullet in his chest.

Other Serious Non-Homicide Charges – Use of an unlicensed gun

In terms of other serious non-homicide charges, I would charge both Demeanor and Larceny with use of an unlicensed gun pursuant to Cal. Penal Code § 90.790. The problem with charging possession is that one generally needs to know in order to possess, which would require a showing of mens rea. In this case it may be difficult to show that either Demeanor or Larceny knew that the gun was unlicensed. They may not have known about the need to license as the gun belonged to Demeanor's husband, who may not have told them of the need to license.

Charging use of an unlicensed gun probably wouldn't have these problems because both Demeanor and Larceny used the gun and the gun was unlicensed at the time of the use. The statute doesn't state whether the person who uses the gun must know that it is unlicensed. I would argue that no mens reas is required for using because of the relevant policy of controlling

the use of guns, especially unlicensed guns. By making ‘use’ a strict liability crime, the state is expressing its desire to cut down on unlicensed guns. Unlicensed guns carry a greater risk of being used in crime because no one is accountable for their use. This means that the state has a strong interest in punishing the use of such weapons. The one problem with this reading of the statute will be that use is punished more severely than possession (6 years for possession compared with 10 years for use). Since possession probably requires a showing knowledge, it maybe unlikely that the state would allow more severe punishment with a lesser showing of mens rea.