

## QUESTION 1

Jim and Fred armed themselves with handguns and drove to a store on Avon Street. They both went into the store, drew their guns, and demanded that Salma, an employee, give them the store's money. After Salma handed Jim the money, he nervously dropped his gun. The gun discharged when it hit the floor, and the bullet hit and killed Chris, a store customer. Salma then got a shotgun from under the counter and shot Fred, killing him. Jim picked up his gun, ran out of the store, and drove back to his apartment.

Later that evening, Jim saw Salma while walking down Park Street. Thinking that he could eliminate her as a witness, Jim shot at Salma with his gun, but the bullet missed her. Jim then drove away in his car.

A few minutes later, Police Officer Bakari saw Jim driving down the street. Officer Bakari, who had no knowledge of the events at the store or on Park Street, pulled Jim over because Jim looked nervous. When Jim got out of his car, Officer Bakari noticed a bulge under his shirt. Officer Bakari then patted Jim down and found Jim's gun. Officer Bakari arrested Jim for possession of a concealed firearm and seized the gun.

1. With what crime(s) could Jim reasonably be charged regarding the events at the store? Discuss.
2. With what crime(s) could Jim reasonably be charged regarding the incident on Park Street? Discuss.
3. Under the Fourth Amendment to the United States Constitution, can Jim successfully move to suppress Jim's gun from being introduced into evidence at trial? Discuss.

## QUESTION 1: SELECTED ANSWER A

### 1. Jim's crimes at the store

#### Conspiracy

A conspiracy is an agreement between two or more people to commit a crime. A conspiracy requires 1) an intent to enter into an agreement, 2) an intent to agree, and 3) an intent to carry out the target offense. Most modern jurisdiction also require an **overt act** which sets the conspiracy in motion. A conspiracy punishes the agreement.

However, a conspirator will be liable for not only the target offense, but for all substantive crimes that are the natural and foreseeable consequences of the target offense (Pinkerton rule).

Here, Jim(J) will likely be found guilty of a conspiracy with Fred(F) to rob the store. 1) J and F "Armed themselves" with guns and drove to the store. This act of supplying a dangerous weapon, coupled with driving to the store is circumstantial evidence of J and F's intent to enter into an agreement to rob the store. Thus, they intended to enter into an agreement to commit a crime. 2) They both armed themselves and endeavored on this venture **together**. This further indicates that they intended to agree with one another to fulfill their intent. 3) Finally, the fact that they grabbed weapons and drove to the store evidences an intent to commit the underlying offense of robbery (there is no other logical reason for driving to store with likely illegal weapons other than for the purpose of committing some crime). Further, the act of driving to the store will amount to an **overt act** which set this conspiracy in motion.

Therefore, J will likely be charged with conspiracy and will be culpable not only for the underlying offense, but for all crimes which were the reasonable and foreseeable

consequences of committing a robbery.

### **Assault**

Assault is either 1) a failed battery (a non-consensual offensive touching), or 2) an intent to cause imminent apprehension in another of an imminent battery.

In this case, J will also likely be guilty of assault because by drawing his gun and pointing it at Salma (S) and demanding that she give him the money, he intended to put S in apprehension that if she did not comply, she might be shot (which would certainly amount to an offensive, non-consensual touching).

Therefore, J committed an assault.

### **Larceny**

Larceny is the 1) trespassory (without consent), 2) taking, and 3) carrying away (the slightest movement is sufficient) of 4) the personal property or 5) another with 6) the intent to permanently deprive that person of their property.

Here, J also committed a larceny because 1) S did not give voluntary consent when she gave J the money (rather, she was under threat of possible death if she did not), therefore making it trespassory, 2) he took the money when S handed it to him, 3) J carried it away when he "ran out of the store," 4) the property was cash (and therefore personal property), which 5) belonged to the store, not Jim, and 6) J intended to permanently deprive the store of this money because he obtained it by force and ran away. Clearly, he had no intention of returning it.

Therefore, J committed a larceny.

### **Robbery**

Robbery is essentially an assault plus larceny. It is the 1) taking of 2) the personal

property 3) from a person's presence, 4) by force or threat of force, 5) with the intent to permanently deprive that person of their property.

Here, J committed an assault and a larceny and thus also committed a robbery. He 1) took 2) the cash 3) from S, who was in charge of safeguarding it, 4) by threat of force by drawing his handgun and making S believe that she may be shot if she did not comply, and 5) intended to permanently deprive the store of its property because he had no intention of returning it.

Therefore, J also committed a robbery.

### **Burglary**

At common law, burglary was the 1) breaking and 2) entering of 3) the dwelling house 4) of another 5) in the nighttime 6) with the intent to commit a felony therein. However, many jurisdictions have eliminated the breaking and nighttime requirements and expanded "dwelling house" to include a multitude of enclosed structures.

Here, J and F did go into the store with the intent to commit a crime. However, there was no "breaking" because they went during store hours and thus had permission to be on the premises.

Thus, there was no burglary.

### **Murder (Chris)**

#### **Common Law Murder**

At common law, murder was the killing of one human being by another human being with malice aforethought. The intent to kill--malice--can take several forms: 1) the intent to kill (express malice), 2) killing with reckless indifference to human life (depraved heart murder), 3) intent to cause great bodily injury (GBI), or 4) felony murder.

### 1. Express Malice

Express malice requires the intent to kill.

Here, J "nervously dropped his gun" and it accidentally discharged. Therefore, J did not intend to kill Chris.

### 2. Depraved Heart

Depraved heart murder is a killing with a reckless indifference to an unjustifiably high risk to human life.

Here, J did not kill Chris with indifference to a high risk to human life because he dropped his gun. He did not know the gun was discharge and it was completely accidental. Therefore, he probably cannot be convicted of depraved heart murder.

### 3. Intent to Cause GBI

Malice can be inferred from the intent to cause GBI.

Again, J accidentally dropped his gun and did not intent to harm Chris and thus did not intent to commit GBI. This type of malice thus does not apply.

### 4. Felony Murder

Under the felony murder doctrine, malice is implied from the intent to kill the underlying felony. However, many jurisdictions have adopted the Redline theory, which states that a co-felon **cannot be guilty of felony murder for the killing of another co-felon during the commission of the felony by a third party.**

Here, J intended to commit a robbery, as discussed above. In all jurisdictions, a robbery is a felony. Therefore, J can be found guilty of felony murder for any killing that occurs during the commission of the robbery. Chris was a store customer, not a co-felon, so the Redline theory would not bar J from being convicted.

Therefore, J can be found guilty of felony murder of Chris.

### First Degree Murder

First degree murder is statutory in nature and most jurisdictions have held that it encompasses 1) premeditated and deliberate murder or 2) felony murder during certain inherently dangerous enumerated felonies (including burglary, rape, arson, robbery, and kidnapping).

#### 1. Premeditation and deliberation

As stated above, the killing of Chris was accidental, so it was not premeditated or deliberate.

#### 2. Felony Murder

Here, the killing occurred during the commission of a robbery--a first degree felony murder offense.

Therefore, J will likely be found guilty of first-degree murder.

### Second Degree Murder

Second degree murder includes all murders not in the first degree.

Here, J will not be guilty of second-degree murder because he can be found guilty of first-degree murder.

### **Murder (Fred)**

See rule above.

#### 1. Express Malice

Here, S shot F. Therefore, J did not have intent to kill F.

#### 2. Depraved Heart

Again, because S is the one who shot F, J would not have killed F with a depraved

heart.

### 3. Intent to Cause GBI

J did not intent to cause F GBI because he is not the one who shot him.

### 4. Felony Murder

Here, the state will argue that J is guilty of felony murder to F because it was a killing during the commission of a felony. However, if this jurisdiction has adopted the **Redline theory**, then J cannot be found guilty of murder of F because a third party---S--killed a co-felon.

Therefore, assuming the jurisdiction has adopted the Redline theory, J will not be guilty of murder of F.

### First Degree Murder

See rule above.

#### 1. Premeditation and deliberation

This was not a premeditated or deliberate murder because J did not plan to kill F.

#### 2. Felony Murder

This was a killing during the commission of an inherently dangerous felony. However, assuming this jurisdiction has adopted the Redline theory, J cannot be found guilty of murder of F.

### Second Degree Murder

See rule above.

This is inapplicable because J did not intent to kill F.

## **2. Jim's crimes on Park Street**

### **Attempted Murder (Salma)**

Attempt is a specific intent crime which requires 1) the specific intent to commit the underlying offense and 2) a substantial step toward the commission of that offense (the substantial step element requires that the crime come dangerous close to commission). Here, J will likely be found guilty of attempted murder of S because 1) he thought he could "eliminate her as a witness" and drew his gun at her, thereby evidencing his intent to kill S so that she could not testify against him. 2) There was a substantial step toward the crime because J actually "shot" and fired his gun at S.

Therefore, J will be guilty of attempted murder of S.

### **Assault**

See rule above.

J will also be guilty of assault because he attempted to shoot S (which would be a harmful or offensive touching, i.e., a batter), but he missed her.

Therefore, this was a failed battery and thus an assault.

### **3. 4th Amendment Claim**

#### **4th Amendment**

The 4th Amendment protects against unreasonable searches and seizures. A search without a warrant is per se unreasonable unless there is an exception to the warrant requirement.

Here, J was subject to a stop by the police when he was pulled over and this he was searched without a warrant. Therefore, this stop and seizure is per se unreasonable, and thus a violation of J's 4th Amendment rights, unless there is an exception.

#### **Government Conduct**

The 4th Amendment only protects individuals from governmental conduct--it does not



govern purely private behavior.

Here, J was pulled over by a police officer--a government employee. Therefore, this element is met.

### **Search/Reasonable Expectation of Privacy**

A search is a governmental intrusion into an area where a person has a subjective expectation of privacy that society is willing to regard as reasonable, or a search into a constitutionally protected area. In order to assert a reasonable expectation of privacy, and thus have **standing** to make a 4th Amendment claim, the person must have had an ownership or possessory interest in the place searched or item seized.

Here, J has standing to object to the search because he was pulled over in his car which he presumably owned, and thus had a reasonable expectation of privacy in his vehicle (although the courts have held that there is a diminished expectation of privacy in one's vehicle, there is nonetheless some expectation of privacy). Furthermore, J's person was searched during a pat-down and the police officer took an item of personal property from him.

Thus, J has standing.

### **Warrantless Search**

As stated above, warrantless searches and seizures are per se unreasonable without a warrant expectation.

Here, the stop and seizure were without a warrant and is per se unreasonable unless there is an exception.

### **Vehicle Stops: Reasonable Suspicion**

A police officer may pull over a vehicle if they have reasonable suspicion, supported by

articulable facts, that criminal activity is afoot. Whether an officer has reasonable suspicion will be determined based on the totality of the circumstances, although the courts have held that it requires more than a mere hunch.

Here, the officer stopped J because he "looked nervous." The officer had no knowledge of any of the preceding events and thus no basis to believe that criminal activity was afoot. A person "looking nervous" is not enough for reasonable suspicion. There must be **facts** which support the officer's basis for concluding that some criminal activity is happening.

In this case, J's mere "nervousness" likely did not amount to reasonable suspicion such that the stop was unreasonable and thus a violation of J's 4th Amendment rights.

However, assuming the stop was not unreasonable, the state must further prove that the officer had grounds to search J.

### **Warrant Exception: Terry Stop and Frisk**

A stop and frisk, or *Terry* stop, permits an officer to stop a person whenever they have reasonable suspicion, based on articulable facts, that criminal activity is afoot. If the officer also believes that the person is armed and dangerous, then the officer can conduct a pat-down of their outer clothing in order to search for weapons.

Here, if the officer had reasonable suspicion for the stop, then the frisk was likely a permissible *Terry* frisk because the officer noticed a bulge under J's search. Based on his experience, the officer likely had justifiable grounds for believing that "bulge" could be a weapon, thereby supporting his basis for patting J down.

So long as the court finds that the stop was supported by reasonable suspicion, then the pat-down and seizure of the gun will also be permissible.

### **Exclusionary Rule/Fruit of the Poisonous Tree**

The exclusionary rule is a judge-made doctrine that states that any evidence obtained in violation of a person's 4th, 5th, or 6th Amendment rights is inadmissible (subject to a few exceptions not applicable here). Under the fruit of the poisonous tree doctrine, all secondary evidence obtained as a result of an unlawful search will also be excluded. Here, it is more than likely that the stop of J when the officer pulled him over was unreasonable because it was not supported by reasonable suspicion. Therefore, any evidence obtained as a result of the unlawful search, such as the gun, will also be inadmissible as fruit of the poisonous tree.

### **Conclusion**

Because J was stopped in violation of his 4th Amendment rights, J can successfully move to suppress the gun from being introduced at trial.

## **QUESTION 1: SELECTED ANSWER B**

### **(I) Events at the Store**

Jim could be charged with first- or second-degree murder depending on how a jurisdiction codifies those crimes. He can also be charged with robbery and conspiracy to commit robbery.

#### Robbery

J committed the crime of robbery. A robbery is the taking of property of another with force. Here, J took property of another, i.e., the cash of the store from the store whose property it was. J also used force to take that property. Specifically, he brandished his firearm, threatening the use of force if Salma the store employee did not comply. Thus, J committed the offense of robbery.

#### Murder

J committed the crime of murder. He could be found guilty of felony murder (which could be first- or second-degree murder depending on the jurisdiction) or involuntary manslaughter.

A. First degree murder is generally codified as one of two things (a) premeditated, calculated murder that occurs in a calm, dispassionate manner or (b) felony murder.

(a) Premeditated murder. Here, Jim (J) and Fred (F) armed themselves with handguns and drove to a store on Avon Street. They both went into the store with their guns drawn and demanded that the store employee Salma (S) give them money. It does not appear that J and F's intent was to murder anyone, nor did they premeditate committing a murder; rather, they were only interested in obtaining the money from the store. J only killed C when he nervously dropped his gun, and the gun fired a bullet. And F was killed

only when S shot him. Thus, J cannot be convicted of first-degree premeditated murder as he did not premeditate either of those deaths.

(b) Felony murder. Some jurisdictions codify felony murders as first-degree murder. If the state where J and F committed this offense is one of those states, then J could be found guilty of first-degree murder. Felony murder is found when a murder occurs during the commission of certain violent felonies, including burglary, kidnapping, robbery, assault, and rape. This is because the commission of these felonies is dangerous on their own, and it is foreseeable that a death could occur in their commission. To find felony murder, it must be first established that one of these underlying crimes occurred. Here, as discussed above, J intended to commit a robbery and did do so. Thus, the deaths that occurred can be considered under the felony murder rule.

Here, two deaths occurred--those of C and F--which we will discuss in turn. First, as to C's death, C was killed when J nervously dropped his gun and when S was handing J the money he demanded. C's death was not really in furtherance of the commission of the crime--J was already getting the money handed to him and probably would have left after that. And J and F did not point the gun at C or ask C for his money or expect C to hand them over the store's money. Nonetheless, it was a reasonably foreseeable consequence of the robbery, given how J and F chose to commit the robbery. J and F both brandished firearms at S. Because they have it pointed at someone and clearly there is no safety on, it is reasonably foreseeable that they would use the firearms in the commission of the offense or even that a firearm may accidentally discharge, harming someone. Thus, J could be found guilty of C's death under the felony murder rule.

As to F's death, there are two theories as to whether J would be liable for it. Under the majority theory, a defendant is not liable of a co-conspirator's death by a third party (such as a victim of the offense, here S). This theory believes that F's death is not foreseeable, since a third party took independent action and caused the death.

However, under the minority theory, such an action is foreseeable since the defendant was already involved in such a dangerous offense and any resulting death is foreseeable. Thus, under the minority theory, J would be held liable, but J would not be held liable under the majority view. Accordingly, depending on whether the jurisdiction follows the majority or minority rule, J could also be found liable for F's death.

B. Second degree murder is the codification of common law murder. Common law murder has four variations: (a) a malicious intent to murder another (b) a malicious intent to cause substantial bodily harm (c) a disregard for human life, and (d) murder while committing a dangerous offense (i.e., felony murder).

(a) malicious intent to murder another. It does not appear that J had any intent to murder C. J dropped his firearm and it accidentally discharged. The firearm was not even pointed towards C when he did have it brandished. Thus, J would not be found guilty of second-degree murder under this theory.

(b) malicious intent to cause substantial bodily harm. Again, it does not appear that J had any intent to murder C. J dropped his firearm and it accidentally discharged. The firearm was not even pointed towards C when he did have it brandished. Thus, J would not be found guilty of second-degree murder under this theory.

(c) disregard for human life. Again, it does not appear that J had any intent to murder C. J dropped his firearm and it accidentally discharged. The firearm was not even pointed

towards C when he did have it brandished. Thus, J would not be found guilty of second-degree murder under this theory.

(d) felony murder. As noted above, J could be found guilty of felony murder of C. And depending on the rules of the jurisdiction, he could also be found guilty of murder of F under this theory.

C. Voluntary Manslaughter. Voluntary manslaughter is the codification of murders committed while the defendant is still under the stress of an event. These murders are often described as heat of the passion murders. The prototypical example is when a husband walks in on his cheating spouse and immediately murders the spouse and/or spouse's lover. Here, the murder of F and C did not occur while J was under the stress of any event--the robbery was a pre-planned event between J and F. Thus, J could not be charged with voluntary manslaughter.

D. Involuntary Manslaughter. Involuntary manslaughter can be thought of as criminal negligence. This charge is generally used to charge drunk drivers when they murder someone. Here, it is possible that J could be convicted of involuntary manslaughter. Here, J, in holding the firearm, had a duty to take the precautions that someone holding a firearm should, i.e., hold it steady, don't drop it, keep the safety on until you are ready to discharge. J did none of those things. He did not have the safety on, he did not hold the firearm steadily, thus breaching his duty of care when he dropped it and it discharged. And his dropping of the firearm caused the death of C--but for him dropping it, C would still be alive. Thus, J could be charged under this theory as well for the death of C.

## Conspiracy

Also, J could be charged with a conspiracy. A conspiracy is an agreement between 2 or more persons for a criminal purpose to act in furtherance of that criminal purpose. The modern jurisprudence also requires the commission of an overt act in furtherance of a conspiracy. Under the modern jurisprudence, the crime is committed once an overt act has occurred, and the defendants can no longer withdraw from the conspiracy at that point. Here, although there is no written agreement between the J and F (and a written agreement is not required but would help if you're prosecuting these types of crimes), J and F are clearly in agreement that they were going to rob the store. J and F, prepared with guns, armed themselves with firearms and both drew their guns at the store clerk and demanded money. Here, their actions clearly demonstrate they were acting in concert with one another towards to the same agreed upon goal--the commission of a robbery. They have also clearly committed an overt act, in furtherance of their criminal purpose--they drew their guns and demanded money from the store employee S. Upon completion of the overt act, the crime of conspiracy is completed, and neither could withdraw from the conspiracy.

### **2. Incident at Park Street.**

Here, J could be charged for attempt 1st degree or 2nd degree murder. To be convicted of an attempt, a defendant must have the intent to commit a specific offense and take a substantial step in furtherance of that crime. The substantial step need not be criminal in nature, but it must be in furtherance of the offense (i.e., it takes defendant one step closer) and cannot simply be planning or preparation.

Here, J had the intent to commit 1st or 2nd degree murder. Specifically, he had the



intent to commit a premeditated murder (1st degree) or intent to maliciously murder another or cause substantial bodily injury (2nd degree). As to the premeditated murder, premeditation does not need to be a long-drawn out plan. Premeditation can occur instantly so long as defendant has sufficient time to intend to murder before attempting to do so. Here, upon seeing S, J believed that he should murder her to eliminate her as a witness to his robbery and other offenses. J had enough time to come to a decision to murder S in a cool, dispassionate matter. Alternatively, if J did not form the requisite intent and did not have time to premeditate, he could alternatively be charged with murder in the 2nd degree. As discussed above, murder in the second degree includes a malicious intent to kill or to cause substantial bodily harm. J clearly had both of those intents as he hoped to eliminate S as a witness by killing her. Thus, alternatively, if he did not have time to come to a cool dispassionate decision to murder S while he was driving past her, he did have the requisite intent to commit a second-degree murder. In addition, Jim took a substantial step towards his offense--he actually fired his gun at S hoping to kill her. Even though the bullet missed her and the substantive, underlying crime (murder) was not completed, J completed the crime of attempt when he took this substantial step.

Accordingly, J can be found guilty of attempt murder.

### **3. Suppression of the Gun**

The Fourth Amendment protects against unreasonable searches and seizures. To trigger the protections of the Fourth Amendment, the search/seizure must have been done by a government actor. Here, the search and seizure were done by Officer Bakari (Off B), who works for some type of government entity (either local, state, or federal

police department). And the search that was done was of Jim's person, thus Jim has standing to challenge the seizure of the firearm.

An unreasonable search/seizure is one that is done where an individual has a reasonable expectation of privacy. Those areas include an individual's person and their home. An individual has a lesser privacy interest in their vehicle.

Here, Off B pulled over J because J looked nervous. Off J had no knowledge of the events at the store or on Park Street. Off B just stopped J because J looked nervous.

An officer can stop an individual for a reasonable period based on reasonable suspicion that that individual committed a crime. The officer must be able to point to specific articulable facts justifying the reasonable suspicion/stop. Notably, a stop can be pretextual (*see Whren*), but there still must be reasonable suspicion for the stop. Here, at a suppression hearing, Off B would testify simply that J looked nervous. That is not sufficient to justify the stop, because nervousness, on its own, does not suggest any evidence of criminal activity. It is totally possible that J is simply a nervous driver.

Accordingly, the stop was in violation of the 4th Amendment. Any evidence that is found in violation of an illegal stop must be suppressed in accordance with the fruit of the poisonous tree doctrine. And accordingly, the firearm would be suppressed. (Also, note that there are no facts that would suggest that the firearm would be found in the normal course in the investigation, negating any exception such as inevitable discovery or collateral source doctrine).

Assuming *arguendo* that the stop was legal, Off B then did a pat down search of J. It should be first noted that an officer may ask an individual to exit their car during a lawful search. Searches generally need to be done in accordance with a search warrant;

however, there are exceptions to the warrant requirement, including but not limited to a search incident to arrest, exigent circumstances, Terry search, automobile exception, and administrative searches. Here, J was not under arrest at this time, there were no exigent circumstances justifying the search, and there was no administrative search. Off B could try to justify his search under the automobile exception. An individual has a lesser privacy interest in his/her vehicle because vehicles are so regulated. However, to search a vehicle after a lawful traffic stop, an officer must have probable cause that he will find evidence of an offense. (This most commonly occurs when the officer, after a stop, smells drug use or sees drugs/alcohol in plain view). Because Off B did not know of the previous crimes and was only stopping J because he looked nervous, Off B did not have PC that a crime had occurred and could not justify his search. Off B then could alternatively try to justify his search as a Terry frisk. A Terry frisk is not a search for evidence of a crime, but a safety pat down to ensure that an individual is not dangerous. TO justify a Terry frisk, the officer must have reasonable suspicion that a defendant is dangerous or trying to flee. Here, Off B would testify that J looked nervous and that he had a visible bulge. There are no facts to suggest that the bulge was in the shape of a firearm or other weapon, however. Also, J looked nervous prior to the stop. Thus, a likely result is that the Terry frisk will be deemed a search without reasonable suspicion and thus found in violation of the 4th Amendment. Thus, the search of J's person was in violation of the 4th Amendment as no exceptions to the warrant requirement apply. Accordingly, because the stop and the search were both in violation of the 4th Amendment, the firearm will likely be suppressed.