PROFESSOR GOULD's
California First-Year Law Students’ Exam
FYLSE SUPREME PREPARATION COURSE
CRIMINAL LAW
PROFESSOR GOULD's

California First-Year Law Students’ Exam
Essay Preparation Course
INTRODUCTION

California’s First-Year Law Students’ Essay Examination consists of four very difficult essay questions, which you must fully complete in only four hours.

The Law Professor™ has compiled the prior FIFTY-SIX EXAMINATION QUESTIONS into this publication. The questions are categorized into Contract Law, Torts and Criminal Law Section. Contract Law is commonly the most difficult area for students, so that area will be covered first in class. Then, Torts and Criminal Law.

Over the past fourteen test administrations of the FYLSE, there have been:

21 CONTRACTS ESSAYS

19 TORTS ESSAYS

and

16 CRIMINAL LAW ESSAYS

Thus, using basic statistics, it is clear that Contract Law is slightly more tested than Torts, and Torts is slightly more tested Criminal Law.
INSTRUCTIONS

In order to do well on the FYLSE Essay Examination, it is necessary that you practice. The best practice for approaching the FYLSE Essay Examination, is to completely write out essay responses each day as you approach the examination.
CRIMINAL LAW ESSAY SERIES
Bill and Tom worked together as drivers for Ajax Armored Car Co. After Bill reported Tom to the company’s management for violating a company policy, the company fired Tom. Angered that Bill had “snitched” on him, Tom decided to get even with Bill.

Tom bought a pistol, some ammunition, and a rubber mask to use as a disguise. Expecting that Bill would follow the same route and schedule that had been in effect before Tom was fired, Tom hid behind a newsstand near a bank where the armored car ordinarily picked up the bank’s daily receipts. He intended to put on the mask and rob Bill at gunpoint as he emerged from the bank with the bags of money. As it turned out, the company had altered the pick-up schedule so that the armored car had come and gone by the time Tom arrived at the location.

Even more irate that he had missed this opportunity, Tom decided he would make a bomb, follow Bill’s armored car, plant the bomb under the car at a time when Bill was inside the bank picking up money, and detonate the bomb from a remote location as soon as Bill reentered the car. Tom bought a book that contained instructions for making a bomb that would be powerful enough to completely destroy an armored car, purchased the necessary explosives and detonation materials, and began to assemble the bomb in the garage attached to the house where he rented a room from the owner, who also resided there. While he was assembling the bomb, Tom inadvertently ignited the materials, causing an explosion and fire that resulted in burning down the house and garage.

What crimes, if any, did Tom commit? Explain fully.
MODEL ANSWER

TOM’S CRIMES AND DEFENSES.

ATTEMPTED LARCENY / ROBBERY. Where defendant intends to commit a specific intent crime, but does not actually complete the crime. Attempt will be present if defendant enacts an act in furtherance of that specific intent which goes beyond mere preparation.

SPECIFIC INTENT TO PERMANENTLY DEPRIVE. The required mental state will exist where defendant intended to do acts which would have resulted in the commission of the crime if they had actually been carried out. The specific intent for larceny and robbery, is the intent to permanently deprive an owner of their personal property. Robbery has the added component that the taking occurs through force, or the threat of force.

Here, Tom intended to take bags of money owned by a bank, by taking the money from Bill at gunpoint. This indicates that Tom specifically intended to deprive the rightful owner of the bags of money, and that he intended to permanently keep the money. Therefore, Tom had the requisite intent necessary for attempted larceny or robbery.

ACT V. PREPARATION. There must be some overt act in furtherance of the criminal objective, that goes beyond mere preparation, and there are a number of tests to determine if defendant entered the zone of perpetration through completion of an act in furtherance of the crime that is beyond mere preparation.

Proximity Test. Based on how close defendant came to completing the crime, there must be at least a substantial step taken by defendant towards completion of the crime, and attempt will normally be found where defendant has taken the last proximate act to bring about the criminal result. Tom went to the site where he thought a scheduled money drop was to occur, and hid behind a newsstand. While there, he had ammunition, a rubber mask to use as a disguise, along with a gun. If Bill had showed up as scheduled, it is likely that Tom would have enacted his criminal plan, because he had all of the elements of his plan in place to scare Bill into giving him the money. Therefore, under the proximity test, he would have taken a sufficient act for attempted robbery.

Equivocality Test. The equivocality test is based on whether defendant’s conduct unequivocally manifested a criminal intent, and if it did, criminal intent will be found even if the actual completion of the crime is many steps away. Supra discussion. There would be no other reason why Tom would have a mask and gun / ammo, while hiding near a scheduled money pick-up, except to commit a robbery.

MPC Substantial Step Test. Based on whether there is an act or omission which constitutes a substantial step towards completion of the crime, and which is strongly corroborative of defendant’s criminal intent. Tom took many steps, including consultation of the former
schedule, bringing a mask, bring a gun and ammo, hiding nearby, which all together constitute a substantial step towards commission of a robbery.

**DEFENSES.** Bill took a different route and did not show up at Tom had thought Bill would.

**Renunciation.** Where defendant voluntarily abandons their attempted crime before completion of the substantive crime, this may be a viable defense to attempt. However, it will not be deemed a viable defense if defendant merely abandoned the criminal activity because of a threat of imminent apprehension, where defendant postpones their criminal plan until a more advantageous time, or where defendant is dissuaded from completion of the crime by the victim.

Here, Tom’s best argument is that he walked away from his criminal plan of his own volition. However, he was upset that Bill did not show up, and Tom left with the intent that he was merely postponing his criminal plan to a later date. Renunciation would not be an effective defense.

**Impossibility.** Factual impossibility is where defendant asserts they made a mistake of fact regarding the situation. Here, it would have been impossible for Tom to rob money bags that never showed up. However, factual impossibility is never a viable defense to a charge of attempt.

**ATTEMPTED MURDER.**

**SPECIFIC INTENT.** *Supra.* The only malice state that will support a charge of attempted murder is intent to kill.

**ATTEMPTED MURDER in the ROBBERY SITUATION.**

**INTENT.** *Supra.* We are not told that Tom wanted to kill Bill, only that Tom wanted to rob Bill at gunpoint. A robbery may be effectuated through a threat of force. Here, Tom could have pointed the gun at Bill, which probably would have been sufficient enough to scare Bill into giving Tom the money. However, we are also told that Tom had ammunition which he took to the crime scene. This additional fact leans towards a presumption that Tom may have been intending to use the ammunition, and to shoot Bill during the robbery. At this point, there is insufficient evidence to assert that Tom’s intent was to kill Bill.

**SUFFICIENT ACT.** *Supra.*

**Proximity Test.** *Supra.* Tom did not draw the gun, and we are not told if he put bullets into the gun. Also, Bill was never in the area. Therefore, under the proximity test, Tom did not exact a last proximate act for attempted murder.

**Equivocality Test.** *Supra.* Many people purchase guns and ammo, with no intent to shoot others with the ammo. Additionally, Tom wanted to effectuate a robbery, which can be done through threat of force, and without actual force. Therefore, Tom did not evince an unequivocal intent to kill Bill during the first robbery attempt.

**MPC Substantial Step Test.** *Supra.* Tom brought a gun and ammo to a potential robbery scene, intending to use a gun to effectuate the robbery of Bill. It is possible that Tom had ammo with him, with the intent to use the ammo and to kill Bill. Under the substantial step test, we
have evidence, the ammo, that Tom was going to do more than merely scare Bill with an empty gun. Therefore, we have a substantial step for an attempted murder under this test.

ATTEMPTED MURDER for the BOMB SITUATION. *Supra.*

**INTENT.** *Supra.* Tom was in the process of building a bomb powerful enough to blow up an armored car. Additionally, Tom planned to wait until Bill entered the armored car, before detonating the explosives to blow up the armored car. A bomb powerful enough to entirely blow up an armored car, would also kill anyone present in the armored car. Therefore, even though we are not given a direct statement that Tom wanted Bill killed, we have a valid presumption of intent to kill because Bill would have died had Tom enacted this plan.

**SUFFICIENT ACT.**

Proximity Test. *Supra.* It appears as though Tom needed to still complete building the bomb, and place the bomb near the armored car, before we can say that he had completed enough acts to meet the requirements of the proximity test.

Equivocality Test. *Supra.* Tom purchased a book, along with explosives and detonation materials. Additionally, he furtively began to assemble a bomb. His intent in assembling the bomb was to blow up the armored car and Bill. Therefore, all of the facts indicate that Tom evinced an unequivocal intent to kill Bill.

MPC Substantial Step Test. *Supra.* Tom was new to bomb making, and thus his unique acts to buy a book, and explosive materials, and to begin bomb assembly, indicate acts that are corroborative of his intent, and would be sufficient to establish a sufficient act under this test.

DEGREES OF MURDER. First-degree attempted murder requires both premeditation and deliberation. There are no facts to indicate that Tom had a mind clouded, perhaps with alcohol or drugs. Additionally, he was methodically following a plan. Therefore, we have both premeditation and deliberation, and Tom could reasonably be charged with attempted first-degree murder.

**ARSON.** Arson is the burning of the dwelling place of another with malice.

**COMMON LAW V. MODERN.** Arson, at common law, required a malicious burning of the dwelling of another. Modernly, there need only be a malicious burning of a protected structure of another.

**MALICE.** Arson malice may be established either through intent to burn, or through wanton and reckless behavior.

**INTENT TO BURN.** Intent to burn exists where defendant has an intent to actually burn the protected structure of another. Tom did not want the house and garage to burn. In fact, he wanted to use the materials that caused the burning to blow up the armored car. He will not be found to have a sufficient intent to burn.
WANTON / RECKLESS BEHAVIOR. Arson malice may also be found where defendant acted with willful and wanton misconduct, creating a plain and substantial likelihood that a protected structure will be burn. Here, Tom had no prior knowledge, or experience with, bomb-making. Further, he was not adequately supervised in the handing of explosive materials, and he was trying to make a bomb in a residential structure. If he wanted to be safe, he should have sought the advice of an expert in bomb-making, proceeded under guided supervision, and built the bomb in a safe structure. Of course, the foregoing is all impracticable for Tom, because he was in the process of committing a felony when making the bomb, to further a criminal objective. Therefore, his actions constitute willful and wanton behavior. Since explosive material is flammable, his willful and wanton behavior also created a substantial likelihood that a burning would occur, and there is sufficient malice for arson, here.

BURNING. The burning element requires that some amount of charring be done to the physical structure of the structure, and must be more than smoke and slight damage. Here, we are told that the house and garage burned down to the ground.

DWELLING OF ANOTHER. Tom rented part of the house, but the house itself was owned by another person. Additionally, the dwelling house requirement of the common law, has been relaxed to include protected structures. Therefore, when the house and garage were burned, they both constituted protected structures owned by another person, therefore the dwelling place of another element of arson is met.

BURGLARY.

Burglary is a specific intent crime. Common law burglary is the breaking and entering of the dwelling of another at night with the intent to commit a felony therein. Modernly, most states have relaxed the common law requirements, and the most important elements now include breaking and entering with the intent to commit a crime therein.

BREAKING AND ENTERING / CONSTRUCTIVE ENTRY. Tom entered the garage of his landlord. We are not told if he open a door or window to gain entry. If he did open a door or window, such opening would constitute a breaking, and his subsequent crossing of the threshold would constitute an entry, and there would be a sufficient breaking and entering for burglary. Absent, a traditional breaking and entering, Tom’s entry was fraudulent because he was entering to commit a crime of bomb-making, and therefore Tom’s entry into the garage of his landlord was beyond the consent given to enter, and would constitute a constructive breaking and entering.

INTENT TO COMMIT A FELONY THEREIN. Modernly, misdemeanors and felonies meet this requirement. The intent to commit a crime must be formulated before defendant enters the structure. Tom entered the garage with bomb materials, and then proceeded to try and put together a bomb. Therefore, Tom evinced a prior intent to enter the structure in order to commit the crime of bomb-making, and we have all of the elements necessary for burglary.
DWELLING OF ANOTHER. Tom rented part of the house, but the house itself was owned by another person. Additionally, the dwelling house requirement of the common law, has been relaxed to include protected structures. Therefore, when Tom entered the garage unlawfully to commit a crime, he would not have been guilty of burglary at common law, but he could be reasonably charged with burglary, modernly.

DEFENSES.

FINANCIAL NECESSITY. Where defendant committed crime because of non-human circumstances, and the harm avoided is greater than the harm committed by defendant. Here, Tom had lost his job and probably needed money, however, the necessity to have money would not justify committing violent acts against another.

ADEQUATE PROVOCATION. Tom may assert that he was provoked to commit the crimes. A provocation must be sufficiently strong that a reasonable person would have lost their self-control or temper, and the defendant themselves must have actually lost their self-control or temper. Additionally, the time period between defendant’s discovery of the provoking information and the act of killing victim must be short enough that a reasonable person would not have had enough time to cool off, and defendant must not personally have cooled off.

Here, Tom believes that Bill snitched on Tom, and that Tom lost his job because of Bill’s bad behavior. However, Bill was enacting his job duties, to make sure that all company procedures were followed. It was Tom who acted badly, because Tom broke company rules. Therefore, even though Tom was angered by Bill’s actions, a reasonable person would have realized that they were in the wrong, not Bill.

REKINDLING OF THE PASSION. Where there is a long period of time between defendant’s initial discovery of the provoking information, if a new provocation takes place which rekindles the initial provocation, then defendant will be considered to have not actually and personally cooled off. Here, Tom became enraged after Tom realized that Bill was not going to arrive so that Tom could rob him, due to a changed route schedule. At that point, a reasonable person would not only have cooled from any original provocation, they also would not have become enraged at such an event. Inasmuch as Tom’s anger was not reasonable, he will not be able to assert the defense of adequate provocation.
As Dan walked down a busy city street one afternoon, Vic, a scruffy, long-haired young man, approached him. For some time, Dan had been plagued by a pathological fear that long-haired transients were trying to kill him. Mistakenly believing that his life was about to be taken, Dan pulled out a handgun and fired the gun, intending only to wound Vic in the legs to prevent the anticipated attack. Rather than inflicting the intended leg wound, the bullet ricocheted off the sidewalk and hit Vic in the heart, killing him instantly.

1. With what crime or crimes should Dan be charged? Discuss.

2. What defense or defenses might Dan assert? Discuss.
MODEL ANSWER

CRIMES AND DEFENSES OF DAN.

ASSAULT. Assault is normally a specific intent crime when there is an attempted battery. The defendant must engage in some overt act that is intended to arouse a reasonable apprehension of bodily harm in another. However, a mere creation of imminent apprehension of bodily harm is only general intent, and threatening words only are not enough, as there need be some form of overt physical gesturing. Here, if Vic saw Dan wielding a gun in Vic’s direction, and was caused to have fear of an imminent battery, then aggravated assault with a deadly weapon is a viable charge.

BATTERY. Battery is a general intent crime. A battery occurs where defendant causes an offensive touching or bodily injury to victim, with the intent to cause a harmful or offensive touching. A battery can also be considered a completed assault. An aggravated battery occurs where a deadly weapon is used or defendant acts with intent to cause grievous bodily harm. Here, Vic intentionally acted to cause a bullet to slam into Vic’s chest, causing Vic’s heart to explode. Dan would reasonably be charged with aggravated battery with a deadly weapon.

MURDER. Murder is the unlawful Killing of Another with Malice Aforethought.

HOMICIDE. A homicide occurs where the victim is killed in an unlawful manner. A dead person is determined either through lack of brain activity or lack of a heart beat. Here, we find that Vic died instantly after being shot by a bullet in his heart. Therefore, we have a homicide.

ACTUAL CAUSE.

But For Test. But for defendant’s actions to harm victim, victim would not have died. Here, but for Dan shooting Vic with a bullet, Vic would still be alive.

Substantial Factor. Where two or more causes interact together and cause the death of victim by shortening the life of victim, defendant will still be the actual cause of the event if their acts were a substantial factor in causing the harm. While we do have a ricochet, Dan actions would still be seen as a substantial factor.

PROXIMATE CAUSE.

Foreseeability. Defendant Dan could have foreseen that wielding a gun on a crowded public street, and pulling the trigger of the loaded gun, could lead to another person suffering a gunshot wound, severe enough to cause serious injury or death. Here, Vic, another person walking on the
street, was a foreseeable victim, and his serious gashing chest wound was a foreseeable consequence of Dan shooting a loaded gun.

Interfering Causes. Unforeseeable independent intervening events could possibly be considered superseding and thereby break the chain of causation for defendant. However, dependent intervening events must be both unforeseeable and abnormal, in order to be considered superseding. Here, the ricochet may be considered an intervening event, however, there would have been no ricochet without Dan’s actions, thus, the ricochet was dependent on Dan’s actions. While a ricochet by its very definition, may deflect an object in an infinite number of directions, any one direction could not be seen as unforeseeable or abnormal, and thus there are no superseding intervening events, here.

MALICE AFORETHOUGHT. Defendant must have the appropriate mental state for murder to establish malice aforethought.

INTENT TO KILL. Where defendant evinces an intent to kill victim, through their conduct, including circumstantial evidence. May also include actions which are substantially certain to cause the death of victim. Under the deadly weapon doctrine, intent to kill may be established through defendant’s use of a weapon that is used by defendant in a manner consistent with its causing the death of another. Here, Dan walked around on a crowded street with a loaded gun. He then pulled out the gun, pointed the gun in the direction of Vic, and pulled the trigger of the gun. Dan thus used the gun in a manner consistent with the manner in which guns are used to cause the death of another, and intent to kill malice is established.

FELONY MURDER. Felony murder is applicable where a killing occurs during the perpetration of an independent felony. Here, we may have a felony battery, however, the battery is the direct cause of the homicide, not an independent felony, such as burglary or larceny. Therefore, felony murder malice is not applicable in this instance.

INTENT TO CAUSE SERIOUS BODILY HARM. Where defendant acts with knowledge their actions pose a significant threat to victim, yet defendant continues with their life-threatening actions. Dan knew that shooting Vic in Vic’s legs would cause substantial injury to Vic, and Dan continued with his actions to try to inflict said harm.

DEPRAVED HEART / RECKLESS INDIFFERENCE. A conscious disregard by defendant that their actions of extreme recklessness pose a substantial risk of harm or death to another. Dan’s actions to wield a loaded gun on a crowded street, is alone, enough to evince a reckless disregard for the lives of others, because the gun could easily discharge and kill another person. Here, the added element of pulling the trigger of a loaded gun, solidifies that Dan acted with a reckless indifference to the value of human life.

DEGREES OF MURDER. First-degree murder is applicable only to intent to kill murder and to felony murder. Second-degree murder is applicable to all of the malice states.
1st DEGREE INTENT TO KILL. Both premeditation and deliberation are required to support a first-degree intent to kill murder charge. Premeditation requires some kind of thought or planning activity prior to the action which killed victim, and which relates to the killing of the victim. Deliberation requires a cool mind capable of deliberate thought. While Dan did think about defending himself against potential threats, his thoughts were clouded with pathology. Therefore, it is doubtful that both premeditation and deliberation exist, here.

2nd DEGREE. Dan could reasonably be charge with second degree intent to kill, intent to cause serious bodily injury, or depraved heart murder.

DEFENSES.

SELF-DEFENSE.

REASONABLE NEED FOR FORCE. Self-defense is applicable as a defense where defendant uses reasonable force to defend themselves from application of unlawful force of another. Here, Vic was walking down the street. Dan though that Vic was about to aggress against Dan, but there are no facts to indicate that Vic was going to violently attack Dan. Therefore, there was no reasonable need for force.

REASONABLE AMOUNT OF FORCE. Defendant may only apply force which they need to defend themselves, but need not retreat. Deadly force can only be used when force used by another is imminent and intended or likely to cause the death of defendant. If defendant was mistaken about a deadly attack, and used excessive force, the force will still be justified if it was held in good faith and was objectively reasonable. However, there was no objectively reasonable need for force. Further, assuming arguendo, there was a need for force, Dan may have used a lesser degree of force to repel any attack by Vic. Dan could have tripped Vic, pushed Vic away, or a number of other self-protective strategies, using reasonable force to repel an attack by Vic. Here, Dan used deadly force when Vic had not shown any degree of aggression towards Dan. Therefore, Dan used excessive force.

MISTAKE. Where defendant is lacking the mental state necessary for a crime, and is honest in their perspective. Most applicable to specific intent crimes. Dan would do better to assert insanity or diminished responsibility, because any mistake he made was not reasonable.

THE INSANITY DEFENSE. Defendant may be found not guilty of an offense through insanity, if they were insane at the time of the commission of the criminal act. Tests which are used to determine insanity include the M’Naghten Rule, the irresistible impulse test, and the MPC standard, and the Durham test.

M’NAGHTN RULE. The M’Naghten Rule is also called the right from wrong rule, and is used by about half of the states. Defendant must show that they had a mental defect or disease, which caused a defect in their reasoning powers. They must either not understand the nature and quality of their act, or be unaware that their act is wrong. Here, Dan had what we are told is a
pathological fear that long-haired transients were endeavoring to kill him. We are told that Dan had such fear for a long time, indicating that he may have become accustomed to thinking outside of the scope of reality, and that he could not appreciate the difference between right and wrong.

IRRESTIBLE IMPULSE TEST. Many states allow a second test for insanity, where defendant was unable to control their conduct at the time of the crime. Dan may have trouble asserting he acting out of an irresistible impulse, because of his forethought in carrying a loaded gun, methodically pulling out a loaded handgun and pointing it, and firing the gun in the direction of Vic. These actions all call for some type of direct thought, which could not be said to be a product of an irresistible impulse.

MPC STANDARD. The MPC allows an insanity defense where the result of a mental disease or defect, results in the fact that defendant lacks a substantial capacity to either appreciate the criminality of their conduct, or the ability to conform their conduct to the requirements of the law. It appears as though Dan suffered intense fear of people with long hair, and that the fear induced him to disregard the requirements of the law and to carry a gun in a continual position of self-defense. His fear continued for some time, and may have disabled his capacity to understand the criminal nature of his actions.

DURHAM TEST. The Durham test is used where the conduct of defendant is the product of a mental illness. Here, it appears from the wording of the fact pattern, that Dan had a pathological fear, that he may have suffered from a recognized medical illness, that would be applicable under the Durham test.

DIMINISHED RESPONSIBILITY. Where a non-insane defendant suffers a mental impairment, such that they were unable to form the requisite intent for a crime. It is often used to reduce first-degree murder to second-degree murder, through a lack of premeditation. Dan will successfully assert diminished responsibility, in that his pathological fear of people with long hair, induced his actions in this situation.

VOLUNTARY MANSLAUGHTER. Voluntary manslaughter is a mitigation defense to murder.

HEAT OF PASSION DEFENSE. Where defendant uses force to kill another, they may mitigate the charge to voluntary manslaughter, where they were provoked by the victim. The provocation must be sufficiently strong that a reasonable person would have lost their self-control or temper, the defendant must have actually lost their self-control or temper, the time period between defendant’s discovery of the provoking information and the act of killing the victim must be short enough that a reasonable person would not have had enough time to cool off, and defendant must not personally have cooled off.
Here, Dan believed that he was provoked through the action of Vic walking in Dan’s direction. However, a reasonable person would not have viewed such a situation as even slightly provocative. Dan will not succeed with the heat of passion defense.

**IMPERFECT SELF-DEFENSE.** Where defendant did not fully succeed with their defense of self-defense, because defendant was unreasonably mistaken about the existence of danger or the need to use deadly force, or because defendant was the initial aggressor. Here, Dan’s actions were in no way reasonable. He did not have a reasonable need for force, in fact, Vic was just walking innocently down the street. Assuming *arguendo*, that Dan did have a need for some kind of force, he could have used different levels of force, such as pushing Vic away, rather than shooting him in the heart. Imperfect self-defense will fail.

**INVOLUNTARY / GROSS MANSLAUGHTER.** Involuntary manslaughter occurs when defendant’s grossly negligent actions result in the accidental death of victim. Defendant must have disregarded a very substantial danger of serious bodily harm or death, and use of objects such as firearms, which are inherently dangerous, will tend to support gross negligence. Here, Dan’s wielded a loaded gun on a busy city street, and pulled the trigger of said gun, apparently with knowledge that the gun was loaded with a bullet. Dan thus disregarded a very substantial likelihood that another person could get seriously hurt through his actions.

**Misdemeanor-Manslaughter Rule.** Where a death occurs by accident during the commission of a misdemeanor, during a non-inherently dangerous felony, or during the commission of some other unlawful act which may relate to a local ordinance or an administrative regulation, the unlawful act itself is treated as a substitute for gross negligence, and defendant may be tried for involuntary manslaughter. Here, Dan’s actions constituted an aggravated battery, and the misdemeanor-manslaughter rule may be applied.

**Malum in se.** Where the requirement of proximate cause is suspended, because the violation is dangerous in itself, and thus a causal relationship is inherent in the act. *Malum in se* is applicable, because a battery through the agency of a bullet shot through a gun, is a dangerous event.
After drinking heavily, Art and Ben decided that they would rob the local all-night convenience store. They drove Art’s truck to the store, entered, and yelled, “This is a stickup,” while brandishing their unloaded pistols. They discovered that the only persons in the store were Mark, who worked at the store, and Fran, a customer. Art became enraged, since he regarded Fran as his steady girlfriend and was jealous that she had been spending time with Mark. Art announced, “We’ll chill these lovers out,” and loaded them into the truck. Art drove a very short distance down the dirt road behind the store to a large refrigerator. Art locked Fran and Mark in the refrigerator. Art then returned to the store to pick up Ben, who took $250 from the cash register on his way out of the store.

The next day, the store manager saw that things were amiss and called police, who rescued Fran and Mark from the refrigerator. Fran suffered no significant injury, but Mark soon developed pneumonia and died as a result of it several weeks later. The coroner’s report showed that Mark had an extraordinary susceptibility to pneumonia and that it was triggered by exposure to the combination of viruses and the intense cold of the refrigerator.

1. What criminal charges, if any, should be brought against Art and Ben? Discuss.

2. What defenses, if any, do Art and Ben have to the criminal charges? Discuss.
I. CRIMES AND DEFENSES OF ART.

MURDER. Murder is the unlawful killing of another with appropriate causation and malice.

HOMICIDE. A homicide occurs where a victim is killed in unlawful manner. A dead person is determined either through lack of brain activity or lack of a heart beat. Here, Mark lived for several weeks, before he died of complications from pneumonia. Therefore, we must apply the year and a day rule, and where victim dies within a year and a day of getting hurt by defendant, defendant may be liable for murder. Here, a few weeks falls within the year and a day rule, and Art will be found guilty of murder if causation and malice exist.

ACTUAL CAUSE.

BUT FOR TEST. But for defendant’s actions to harm victim, victim would not have died. Here, but for Art’s action to lock Mark in a refrigerator, Mark would be alive.

SUBSTANTIAL FACTOR TEST. Where two or more causes interact together and cause the death of victim by shortening the life of victim, defendant will be the actual cause if their actions were a substantial factor in causing the death of victim. Mark died several weeks after the incident, and there thus was a significant time frame for other events to occur. However, we are not told there was abnormally bad medical care, thus, Art’s actions were a substantial factor in causing Mark’s injury.

PROXIMATE CAUSE.

FORESEEABILITY. Pre-existing conditions of victim which lead to increased harm leading to death, extreme fright or stress leading to death, and slight deviations in the types or modalities used which result in death, will all still indicate that defendant is the proximate cause of death to victim. Here, Mark was apparently thin-skinned, and had an extraordinary susceptibility to pneumonia. However, a defendant takes their victim as they find them under the eggshell skull rule, and Art is responsibility for the death of Mark. Additionally, Mark died of pneumonia, not from intense cold as one might expect, however, slight deviations in mode of expected harm will not change the foreseeability discussion.

INTERVENING EVENTS. Unforeseeable independent intervening events could possibly be considered superseding and thereby break the chain of causation for defendant. However, dependent intervening events must be both unforeseeable and abnormal, in order to be considered Superseding, and thus break the chain of defendant’s causation. Bad / medical treatment is not enough to be superseding, rather, it must be grossly abnormal medical treatment.

We are told that Mark received medical treatment, but there are no indications of grossly negligent medical treatment. The refrigerator had viruses which interacted with Mark’s
extraordinary susceptibility to pneumonia, which could be seen as intervening events, breaking Art’s causal chain. However, Art is the selfsame person who directly caused Mark to be exposed to the viruses. Absent an unforeseen third-party crime, unforeseen third-party tort, or an unforeseen act of God, there are no superseding intervening acts to break Art’s causal chain.

**MALICE.** Defendant must have the appropriate mental state for murder to establish malice aforethought.

**INTENT TO KILL.** Where defendant evinces an intent to kill victim, through their conduct, including circumstantial evidence. May also include actions which are substantially certain to cause the death of victim. Art used a pistol burglarize the store, but there is no indication that he used such deadly weapon to kill Mark. Nevertheless, by locking Mark in a refrigerator, with no means of escape, his actions would be seen to be substantially certain to cause death. Further, he stated that he wanted to chill the lovers, Mark and Fran, out, indicating a more conscious intent to kill, because Mark did die.

**FELONY MURDER.** Where victim is killed while defendant is in the commission of an independent felony, and the death is a natural and foreseeable result of the felony. Here, the predicate felony could be burglary, robbery, or kidnapping. However, the death took place not during the perpetration of the felony, but several weeks later. Alternatively, the actions that took Mark’s life through the kidnapping, took place during the perpetration of the crime.

**INTENT TO CAUSE SERIOUS BODILY HARM.** Defendant acts with knowledge their actions pose a significant threat to victim, yet defendant continues with their life-threatening actions. Mark was locked in a refrigerator, with no means of escape. There are many possible negative side-effects that may occur to a person in such a situation, and which Art disregarded when he left Mark in the refrigerator.

**DEPRAVED HEART.** A conscious disregard by defendant that their actions of extreme recklessness pose a substantial risk of harm or death to another. Art acted with a reckless disregard for the value of human life by committing a number of felonies, and by locking Mark in a cold refrigerator for an extended period of time.

**DEGREES OF MURDER.**

1ST DEGREE. Both premeditation and deliberation are required to support a first-degree intent to kill murder charge. Premeditation requires some kind of thought or planning activity prior to the action which killed victim, which relates to the killing of the victim. Deliberation requires a cool mind capable of deliberate thought. Here, Art was drinking heavily, which would negate deliberation, because Art would not have had a clear mind capable of deliberate thought. If charged with felony murder, first-degree would be appropriate, because burglary and robbery are inherently dangerous felonies by statute, and the defendants committed their crimes in a violent fashion.

2ND DEGREE. All malice states are amenable to second-degree murder.

**DEFENSES.**
NECESSITY. Where defendant committed crime because of non-human circumstances, and the harm avoided is greater than the harm committed by defendant. Here, Art will claim financial necessity, and that he needed money, but the harm avoided would not be greater than the harm committed.

VOLUNTARY INTOXICATION. Art’s drank heavily before formulating his intent, therefore, as regards the specific intent crimes of burglary, robbery, and intent to kill, his charges may be reduced likewise due to lack of sufficient intent.

DIMINISHED CAPACITY. Where a non-insane defendant suffers a mental impairment, such that they were unable to form the requisite intent for a crime. Art may assert a type of temporary insanity due to his angered state of mind at seeing Fran with Mark.

VOLUNTARY MANSLAUGHTER. HEAT OF PASSION DEFENSE. Defendant may have a murder charge reduced to a voluntary manslaughter charge, if they acted in the heat of passion while killing victim. The provocation must be sufficiently strong that a reasonable person would have lost their self-control or temper. Here, we have Art believing that Fran was his girlfriend, but no facts indicating that she was his girlfriend. Additionally, Fran was talking with the store employee, Mark, and was not engaged in an intimate embrace with Mark. A reasonable person would not have become inflamed in this situation, and Art will not be able to mitigate his charge.

INNOCENT MANSLAUGHTER. Involuntary manslaughter occurs when defendant’s grossly negligent actions result in the accidental death of victim. Defendant must have disregarded a very substantial danger of serious bodily harm or death, and use of objects such as firearms, which are inherently dangerous, will tend to support gross negligence. Under the misdemeanor-manslaughter rule, a presumption of gross negligence will exist where defendant commits a crime, as Art did. Further, proximate cause will be suspended under malum in se, where a criminal violation is dangerous in itself. Here, kidnapping is inherently dangerous, and the malum in se doctrine will establish proximate cause.

ATTEMPTED MURDER OF FRAN.

SPECIFIC INTENT TO KILL. Supra Intent to Kill.

ACT V. MERE PREPARATION. Art came very close to effectuating his criminal goal, under the proximity test, the equivocality test, and the MPC substantial step test, because the same actions taken against Fran resulted in the death of Mark, and he could have renounced by unlocking the refrigerator, but did not.

AGGRATVATED ASSAULT. Of Fran and Mark. Assault is normally a specific intent crime when there is an attempted battery. The defendant must engage in some overt act that is intended to arouse a reasonable apprehension of bodily harm in another. Art charged into the store brandishing a gun, which would make a reasonable person fearful.
**BATTERY.** Of Fran and Mark. Battery is a general intent crime. A battery occurs where defendant causes an offensive touching or bodily injury to victim, with the intent to cause a harmful or offensive touching. When Art gathered up Fran and Mark, and transported them to the refrigerator, any touching involved in this activity would be considered a battery.

**FALSE IMPRISONMENT.** False imprisonment is a general intent crime, and is the intentional unlawful confinement of a person. Fran and Mark were locked in a refrigerator. A walk-in refrigerator, inasmuch as it is meant to keep the cold inside of it, does not have any other means of escape except through the door. They were aware of their confinement, and Art will be charged with false imprisonment.

**KIDNAPPING.** Kidnapping is a general intent crime, and is the unlawful confinement of another accompanied by either a moving of victim, or a secreting away of victim. Here, while only moved a short distance, the victims were nevertheless asported to the refrigerator while they were unlawfully confined, thus, kidnapping.

**SOLICITATION.** Solicitation occurs where one requests or encourages another to commit a crime, and here it is difficult to determine which defendant solicited the other.

**MERGER.** Solicitation merges with conspiracy.

**CONSPIRACY.** A conspiracy is an agreement between two or more defendants, to do either an unlawful act or a lawful act by unlawful means. Art and Ben evinced their agreement to commit a target crime of robbery, and committed an act in furtherance of the target crime, when they entered the store with guns drawn in order to effectuate a robbery.

**ATTEMPTED ROBBERY.** Robbery is a specific intent crime which includes the elements of larceny, with the addition that the taking is from the person or presence of the victim using force or threat of force. Art did not have bullets in his gun, indicating that he did not want to hurt anyone. However, the threat of force would be present inasmuch as he was brandishing a gun in a menacing fashion. We are told that his intent was to rob the store, and he came very close to effectuating his criminal goal, under the proximity test, the equivocality test, and the MPC substantial step test. It is of no consequence that he abandoned his criminal objective, because he did not withdraw, rather, he decided to commit alternative crimes.

**BURGLARY.** Burglary is a specific intent crime. Common law burglary is the breaking and entering of the dwelling of another at night with the intent to commit a felony therein. Modernly, most states have relaxed a lot of the common law requirements, and the most important elements now include breaking and entering with the intent to commit a crime therein. We are told that Art went to the store with the intent to commit a robbery, therefore, we have the requisite prior intent to commit a felony. Art did not have consent to enter the store to commit a felony, therefore, when he entered the store it would be an unlawful entry. Finally, we have a protected structure, therefore, all of the components of modern burglary are present.
II. CRIMES AND DEFENSES OF BEN.

LARCENY. Larceny is a specific intent crime and is the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive them thereof. Ben took and carried away $250 from the case register of the store, and kept the money. All of the elements are present for a viable charge of larceny.

ATTEMPTED ROBBERY or ROBBERY. Supra. Ben entered the store with Art, while both brandished pistols, while yelling that they were committing a stickup. See discussion above, regarding attempted robbery. However, at the time that Ben took the money, we can relate his actions back to the robbery, and he could reasonably be charged with robbery.

CONSPIRACY. Supra. Ben agreed with Art to burglarize the store and commit the target crime of robbery. He took a substantial step towards effectuation of the target by going with Art to the store.

PINKERTON RULE LIABILITY FOR ACTS IN FURTHERANCE. Where additional crimes are committed in addition to the original criminal target crimes of a conspiracy, but which are still in furtherance of the criminal plan and which are foreseeable crimes, courts are split about the liability of co-conspirators, and about half will attach liability for the additional foreseeable crimes in furtherance of the criminal objective.

Here, Art committed assault, battery, false imprisonment, kidnapping and murder, in addition to the original attempted robbery as the target crime of the conspiracy. Art and Ben brandished guns and threatened force, after they burglarized the store. In such a violent scenario, many things may occur through which the victims may be harmed. Here, the kidnapping of the victims, later assisted Ben in committing a larceny without resistance from anyone in the store. Therefore, Art’s acts to commit further crimes was foreseeable, and Ben will be held liable for those additional crimes in jurisdictions which employ use of the Pinkerton rule.

ACCOMPlice LIABILITY. One who generally agrees and cooperates to aid, abet, assist or encourage another in the carrying out of a crime, and who has the mental state necessary for the specific crime, because they intend or desire the criminal result, will be seen as an accomplice that is liable for the criminal act. Ben aided the criminal activity by helping Art at the outset, and remaining as lookout at the store, when Art committed the other crimes of assault, battery, false imprisonment, kidnapping and murder.

ACCESSORY AFTER THE FACT. One who knowingly gives assistance to defendant personally after defendant has committed a felony, by taking affirmative steps to help defendant avoid apprehension following the crime. Here, Ben left the store with Art, after Art had committed many other crimes, and apparently helped Art to flee the crime scene.

MISPRISON. Misprison is the failure to report the known felonious conduct of another. The store owner and the police had to find the victims, because Ben did not report the crimes of Ben.

CO-FELON LIABILITY. For Murder.
Co-Felon Accomplice Liability. Co-felon liability will attach under felony murder for any killings done by other co-felons, if the killing was a natural and probable consequence of the felony. Burglary and robbery are considered inherently dangerous, and therefore Ben will be held liable to the same extent as Art for felony murder.
Dan intensely disliked his co-worker, Mona, with whom he was in direct competition for an important promotion at work. He knew that Mona and her husband, Otto, had a troubled marriage and that Otto suspected Mona of infidelity. He also knew that Otto had a very bad temper when provoked.

Hoping secretly that it would provoke Otto to kill Mona, Dan told Otto that he had seen Mona and another co-worker in a compromising position in the storeroom on several occasions. Believing what Dan told him, Otto went to Mona’s workplace and hid in the storeroom. As he waited, he became angrier and angrier with each passing moment. When Mona entered to get some supplies, Otto jumped out from behind a cabinet, flew into an uncontrollable rage, yelled “Dan has told me what you do when you come in here. I’m going to kill you,” and began to strangle her. Mona’s screams attracted a security guard, who subdued Otto and freed Mona.

Dan and Otto have each been charged with solicitation of murder, conspiracy to commit murder, and attempted murder.

Do the facts support each of the charges against Dan and Otto, and what, if any, defenses might they each assert? Discuss.
MODEL ANSWER

I. DAN’S CRIMES AND DEFENSES.

SOLICITATION OF MURDER.

Solicitation occurs where one requests or encourages another to commit a crime, whether or not the other person agrees to commit the crime, and even if the other person refuses to commit a crime. No overt act is needed, and the crime is complete upon asking another to commit a crime. If a person agrees to commit a crime, the solicitation then merges with conspiracy. Courts are split about situations in which the communication is never received by another person, however, the MPC imposes liability in such a situation. The refusal or incapacity of the person solicited is not a defense.

The crime that Dan wanted to encourage was the murder of Mona by Otto. Dan directly spoke with Otto, with the intent that Otto would kill Mona, thus establishing his intent. Further, Dan was aware that Otto had a bad temper, and that Otto already suspected Mona of infidelity. Dan talked with Otto while holding a secret intention of inducing Otto to kill Mona. With the above context in mind, Dan endeavored to encourage Otto to kill Mona by feeding Otto false information that Mona may have been cheating with a co-worker in a storeroom, in order to enrage Otto. At that moment, the solicitation was complete. It is of no import if the solicitee fails to agree to commit the crime, and Otto need not have responded in the affirmative.

MERGER.

The crime of solicitation merges into conspiracy, but conspiracy does not merge with the completed crime. Here, if we find a conspiracy, solicitation will merge with conspiracy.

CONSPIRACY TO COMMIT MURDER.

A conspiracy is an agreement between two or more defendants, to do either an unlawful act or a lawful act by unlawful means.

CRIMINAL AGREEMENT. There must be a joint agreement for the pursuit of unlawful ends. However, a strict meeting of the minds is not necessary, just a communication to each defendant in some manner that communicates an intention to pursue a joint crime. An agreement may be found impliedly, and words are not necessary to establish an agreement, because each party may show by their actions alone that they have agreed to the criminal purpose. Circumstantial evidence, which strongly suggests a criminal plan, may be used. However, under the MPC unilateral view, only one guilty mind is needed to establish intent.

Here, we are told that Otto believed the lies that Dan had told him about Mona cheating with a co-worker in a storeroom. Dan then proceeded directly to Mona’s workplace storeroom, and then spied on Mona, while becoming progressively enraged. These circumstantial facts indicate an implied agreement between Dan and Otto to effectuate the death of Mona.
SPECIFIC INTENT TO COMMIT A TARGET CRIME. The defendant must have the mental state of agreeing to commit a crime, and their intent must be to bring about a specific harmful result. We are told that Dan specifically intended the death of Mona.

OVERT ACT IN FURTHERANCE OF CRIMINAL OBJECTIVE. The common law states that a conspiracy is complete at the time of an agreement. However, about half of the states now require that there be an act in furtherance of the conspiracy in addition to the agreement. It need not be a major act, and a minor act of mere preparation will suffice. However, once an act is taken, it may be attributable to all in the conspiracy.

Here, Otto proceeded directly to Mona’s workplace, which would be considered an act in furtherance of the criminal objective.

PINKERTON RULE. For jurisdictions that employ use of the Pinkerton rule, a co-conspirator will be responsible for reasonably foreseeable acts by a co-conspirator in furtherance of the criminal objective. Here, Otto told Mona he was going to kill her, constituting an assault. Otto grabbed Mona by the throat and strangled her, which would constitute a battery. Otto unlawfully entered the protected structure of another with an intent to commit a felony, thus constituting burglary.

Therefore, Dan will be responsible for the assault, battery and burglary enacted by Otto, because those crimes were reasonably foreseeable in order for Otto to complete the target crime of the murder of Mona.

DEFENSE OF WITHDRAWAL. Dan did not go to the target crime site, and he will assert that he thereby withdrew from the conspiracy. However, Dan did not communicate his withdrawal from the conspiracy clearly to Otto, nor did Dan take actions intended to thwart the criminal objective of killing Mona. There, Dan does not have a viable defense of withdrawal.

ATTEMPTED MURDER. Where defendant intends to commit a specific intent crime, but does not actually complete the crime. Attempt will be present if defendant enacts an act in furtherance of that specific intent which goes beyond mere preparation.

SPECIFIC INTENT TO KILL. The required mental state will exist where defendant intended to do acts which would have resulted in the commission of the crime if they had actually been carried out. Attempted murder is a specific intent crime, therefore, the only of the four malice states which will support a charge of attempted murder, is intent to kill murder. Here, we are told that Dan wanted Mona killed so that he could be assured of a promotion at work.

SUFFICIENT ACT. There must be some overt act in furtherance of the criminal objective, that goes beyond mere preparation, and there are a number of tests to determine if defendant entered the zone of perpetration through completion of an act in furtherance of the crime that is beyond mere preparation, which include the proximity test, the equivocality test and the MPC substantial step test.
PROXIMITY APPROACH. Based on how close defendant came to completing the crime, there must be at least a substantial step taken by defendant towards completion of the crime, and attempt will normally be found where defendant has taken the last proximate act to bring about the criminal result. Here, Dan’s actions to incite Otto took place at a site different than where Mona was assaulted. Therefore, under the proximity test, Dan did not have a sufficient act.

EQUIVOCALITY APPROACH. Based on where defendant’s conduct unequivocally manifested a criminal intent, and if it did, criminal intent will be found even if the actual completion of the crime is many steps away. Here, Dan used Otto as an instrumentality of a crime. Dan knew of Otto’s extreme anger management problem, and actively worked to incite Otto. In other words, Otto can be seen as an instrument, such as a gun, that Dan used to try and effectuate the death of Mona. Therefore, Dan’s actions evinced an unequivocal intent to kill Mona.

MPC SUBSTANTIAL STEP TEST. Based on whether there is an act or omission which constitutes a substantial step towards completion of the crime, and which is strongly corroborative of defendant’s criminal intent. Dan’s inciting conversation with Otto is strongly corroborative of Dan’s intent to kill Mona. Further, Dan’s omission to restrain Otto from going over the Mona’s workplace in a rage, is strongly corroborative of Dan’s intent to kill Mona.

FACTUAL IMPOSSIBILITY. Factual impossibility is where defendant asserts they made a mistake of fact regarding the situation. Here, Dan will assert that he was not at the worksite and could not have killed Mona. However, factual impossibility is not a viable defense.

RENUNCIATION. Where defendant voluntarily abandons their attempted crime before completion of the substantive crime, this may be a viable defense to attempt. However, it will not be deemed a viable defense if defendant merely abandoned the criminal activity because of a threat of imminent apprehension, where defendant postpones their criminal plan until a more advantageous time, or where defendant is dissuaded from completion of the crime by the victim. Here, Dan did not go with Otto to the storage room, indicating to some extent that Dan had renounced his intent to kill Mona. However, Dan did not show any indication that he renounced the possible crime of attempted murder, by acting to thwart the actions of Otto to strangle Mona. Therefore, Dan does not have a viable defense of renunciation.

FINANCIAL NECESSITY. Where defendant committed crime because of non-human circumstances, and the harm avoided is greater than the harm committed by defendant. Here, the harm to be avoided is that Dan might not be promoted at work. The harm committed was attempted murder. Trying to win a promotion at work would not be considered a viable necessity defense.

FIRST or SECOND DEGREE. Attempted first degree murder, must be attended by the premeditation and deliberation of the defendant. Without both premeditation and deliberation, the correct charge would be attempted second degree attempted murder. Here, we have Dan acting with a plan, and with a cool mind capable of deliberate thought, to entangle and incite Otto with lies, that Otto knew would likely incite Otto to kill Mona. Dan will likely be charged with first-degree attempted murder.
II. OTTO’S CRIMES AND DEFENSES.

SOLICITATION OF MURDER. Supra. Dan solicited Otto. Otto did not request or encourage another to commit a crime. Otto was the solicitee and not the solicitor in this situation. The person who receives a solicitation and acts upon the invitation to commit a criminal act, cannot be charged with solicitation.

MERGER. There is nothing here for solicitation to merge with, because Otto did not solicit a crime.

CONSPIRACY TO COMMIT MURDER. Supra.

AGREEMENT TO DO A CRIMINAL ACT. We do not find an explicit agreement between Dan and Otto to try to kill Mona. However, an agreement may be found implicitly in the fact that immediately following Otto’s conversation with Dan, Otto proceeded to Mona’s workplace, and tried to strangle her while stating that his intent was to kill her. Circumstances thus strongly suggest that both Dan and Otto had the intent to kill Mona under an implied agreement.

Further, under the MPC, only one guilty mind is needed to establish a criminal agreement. Here, we have Otto trying to effectuate the death of Mona, and Dan silently staying behind with the secret hope that Otto would succeed in their scheme. Therefore, it appears that both parties had a guilty mind, in order to effectuate the criminal objective of killing Mona.

OVERT ACT IN FURTHERANCE. We have an act in furtherance of the criminal objective, when Otto proceeded directly to Mona’s workplace.

ATTEMPTED MURDER.

SPECIFIC INTENT TO KILL. Supra. Otto yelled at Mona that he was going to kill her, and then he began to strangle her. This would establish a specific intent to kill.

ACT V. MERE PREPARATION. Supra.

PROXIMITY TEST. Supra. Otto was in the process of physically strangling Mona, before a security guard pulled Otto off of Mona. This test is satisfied.

EQUIVOCALITY TEST. Supra. Otto evinced an unequivocal intent to effectuate the death of Mona, through his words suggesting that he was going to kill her, and through his immediate actions to strangle Mona.

MPC SUBSTANTIAL STEP TEST. Supra. Dan’s actions to strangle Mona were directly collaborative of his criminal intent to kill her.
IMPOSSIBILITY. *Supra.* Dan will assert that it was impossible to complete the crime of attempted murder, because he was restrained by the security guard. This will not be an effective defenses.

WITHDRAWAL / RENUNCIATION. *Supra.* Dan will assert that he voluntarily gave up his criminal objective, and decided not to continue trying to kill Mona. However, we are told that the security guard acted to subdue Otto, and to free Mona. The actions to free Mona were unilaterally effectuated by the security guard, and had nothing to do with Otto’s intent to renounce his participation in the crime.

ADEQUATE PROVOCATION. PROVOKED. Otto was apparently provoked by Dan’s gossip, when Otto learned that Mona may have been cheating. However, he did not see her engaged in an intimate embrace with another, which may have provoked a reasonable person. Rather, a reasonable person might have been severely upset at a rumor of infidelity, but they would not have been enraged to kill their spouse. A reasonable spouse would need a more directly inciting provocative incident, before they would be aroused to kill.

COOLING OFF PERIOD. Otto had the time it took him to travel from the meeting with Dan to Mona’s worksite. A reasonable person would have used this time period to cool off.

RE-IGNITING OF PROVOCATION. Dan will try to assert that his original provocation was re-ignited when he hid in the storeroom and heard Mona nearby. However, there are no facts indicating that Mona was engaged in an intimate embrace when she neared the storeroom, rather, she was enacting her job duties. In other words, Dan re-ignited himself with his jealous, and there was no outside provoking event. Dan would not be able to use the defense of adequate provocation.

REKINDLING OF THE PASSION. Two situations, conversation with Otto, and then at worksite. Even if there is a long period of time between defendant’s initial discovery of the provoking information, if a new provocation takes place which rekindles the initial provocation, then defendant will be considered to have not actually and personally cooled off.

FIRST or SECOND DEGREE. *Supra.* Dan acted without being intoxicated, to place himself in a storeroom at Mona’s worksite. He was near enough to effectuate the death of Mona, and he put his plan into motion by trying to strangle Mona. Therefore, he will be said to have deliberated and premeditated, and will be charged with first-degree attempted murder.
Al went to Dan’s gun shop to purchase a handgun and ammunition. Dan showed Al several pistols. Al selected the one he wanted and handed Dan five $100 bills to pay for it. Dan put the unloaded pistol and a box of ammunition in a bag and placed it on the counter.

While Al was filling out the necessary registration papers, Dan went to the cash register to make change. As he was doing so, Dan noticed that the bills Al had handed him were counterfeit, and he exclaimed, “You rotten bum! You’ve given me phony money.”

At that moment, Al grabbed the bag that had the gun and ammunition in it and fled from the gun shop. Dan grabbed a loaded pistol he kept under the counter and ran after Al, yelling at him to stop. As Dan pursued Al down the street, he fired a shot into the air, and yelled, “If you don’t stop, the next shot will stop you.” Al kept running, and, as he did so, he loaded a cartridge into the pistol he had fled the gun shop with, turned, and shot toward Dan. The bullet struck and killed Dan.

1. What legal justification, if any, did Dan have (a) pursuing Al, and (b) threatening Al with deadly force? Discuss.
2. With what crimes can Al be charged, and what defenses, if any, can he assert? Discuss
I. DEFENSES FOR DAN.

HOT PURSUIT / RETAKING OWN PROPERTY / SHOPKEEPER’S PRIVILEGE.
There is a limited right for defendant to use force to defend their property against a wrongful taking. There is a privilege to use reasonable force to re-take personal or real property. The privilege to re-take chattels must normally take place immediately after a taking. Deadly force may normally only be used where defendant initially used non-deadly force which was met with deadly force, or where there is a violent felony intrusion into defendant’s dwelling.

Here, we have Dan running after Al, in order to retrieve a gun and ammunition that Al took from Dan’s gun shop without paying for the items. Dan was within his rights in immediately pursuing Al, under hot pursuit. Dan was carrying a loaded pistol as he pursued Al, and shot a bullet into the air, yelling that the next bullet would stop Al. If Dan were a police officer, and had witnessed a dangerous felony by Al, then Dan may have been justified in the use of such violent tactics to try to subdue Al. However, Al had not showed aggression in taking the gun, and Dan could not be said to have used reasonable force, by shooting a gun into the air, and essentially yelling a death threat to Al. Dan could have run after Al and requested his personal property be given to him. But he exceeded the scope of reasonableness when he chased Al with a loaded gun, fired the gun, and issued a death threat to Al.

APPREHENSION OF A FLEEING FELON / LAW ENFORCEMENT.
A citizen may use reasonable non-deadly force to stop a fleeing felon, and may also use reasonable non-deadly force to prevent a felony or a breach of the peace. However, if no dangerous felony was in fact committed, or the suspect is found to be the wrong person, a citizen will normally be liable for the death or injury to the suspect, and will not be allowed law enforcement as a defense.

Here, as stated above, Dan was actively using lethal force in attempting to apprehend Al, which he had no legal right to employ. Once Al left Dan’s store, Dan could use reasonable force to try and recover his goods. Additionally, if Al were still in Dan’s store, Dan could have used reasonable force to restrain Al under a type of shopkeeper’s privilege, in order to briefly conduct an investigation into whether or not Al knew the bills were counterfeit bills. However, once Al left the store, Dan’s options were more limited, and he would bear the risk of mistake for any injury or death to Al. In other words, Dan should have not used his gun, in any way, to try and effectuate Al’s apprehension. Rather, he could run after Al, and try to contract the police, both which would have been reasonable actions.

DEFENSE OF OTHERS.
A defendant may use reasonable force to defend another from imminent unlawful force, and here Dan may have been trying to protect the public from potential harm of a felon at large in the community. A reasonable mistake is allowed. However, here, the excessive use of force by
Dan would not be considered reasonable force. Sure, Al did take a gun and ammo, but there are no facts indicating that Al was currently using deadly force, or that Al was going to use deadly force against others. It appears as though Dan over-reacted, and he would not be able to employ effective use of defense of others.

II. CRIMES AND DEFENSES OF AL.

BURGLARY.
Burglary is a specific intent crime. Common law burglary is the breaking and entering of the dwelling of another at night with the intent to commit a felony therein. Modernly, most states have relaxed the common law requirements, and the most important elements now include breaking and entering with the intent to commit a crime therein.

COMMON LAW BURGLARY.
We are not told that the crime took place at night, or that it was the dwelling house of another, therefore, we do not have a common law burglary, here.

MODERN BURGLARY.
A modern burglary may be present, if we can show a breaking and entering, with intent to commit a crime in the protected structure. Dan’s store is a protected structure. We are not told if Al opened a door to enter Dan’s store, but if Al did open a door, that would be considered a breaking, which is where defendant creates an opening where none existed. We know that Al entered the threshold of the store, and therefore the entering element is present. Additionally, under the constructive entry doctrine, where a defendant uses fraud to effectuate what would have otherwise been a lawful entry, that fraud will turn the entry into a constructive breaking and entry. Ostensibly, Al was at the store to shop. However, he really wanted to use counterfeit bills to deprive Dan of his rightful property. Therefore, we have a constructive breaking and entry.

INTENT TO COMMIT A FELONY THEREIN. The intent to commit a felony must be formulated before entry. Here, we are told that Al had counterfeit bills totaling at least $500 before he entered the store. It is likely that Al was aware that the bills were counterfeit, as can be supported by the fact that he ran out of the store when confronted by Dan that the bills were counterfeit. Al proceeded to try and effectuate a crime of larceny or false pretenses. Thus, we can say that he had the prior intent to commit a felony in Dan’s store. Therefore, burglary.

LARCENY.
Larceny is the trespassory taking and carrying away of the personal property of another, with the intent to permanently deprive them thereof. Larceny by trick is where defendant gains possession through fraud or deceit, it is one way that larceny may be committed but it is not a separate crime from larceny. Here, we have Al taking the gun and ammo from Dan’s store, without paying real money for the items. As soon as Al started to leave the store, with intent to keep the items, the larceny was complete, because defendant need only take a step with the items, to meet the asportation element of larceny.
The most salient aspect about the larceny, is whether the correct charge should be false pretenses instead of larceny. The counterfeit money acted as a decoy, to assist Al in taking the items. This false presentation money is called larceny by trick. However, if Al completely filled out the registration forms, then the correct charge might be false pretenses.

FALSE PRETENSES.
False pretenses concerns the false representation of a material present or past fact by defendant which causes victim to pass title of their property to defendant. Defendant takes this action while aware that the representation is false and intends to defraud the victim. Here, Al used counterfeit bills to try and trick Dan into giving the gun and ammo to Al. It is possible that Al was unaware that the bills were counterfeit, however, if he was unaware that the bills were counterfeit he should have told Dan of this fact when Dan confronted Al.

PASSING OF TITLE. We are not told if Al completed the registration paperwork. If Al completed the registration paperwork, the correct charge would be false pretenses. However, it is likely that the registration paperwork for the gun would not be filed without a sufficient payment. Inasmuch as Dan did not complete the transaction, the registration would not pass between the parties, and there could be no false pretenses.

Therefore, the correct charge would be larceny.

MISTAKE. Al may have a defense of mistake, where defendant is lacking the mental state necessary for a crime, and is honest in their perspective. If Al did not have knowledge that the bills were counterfeit, a defense of mistake would be applicable.

MURDER.
HOMICIDE. We are told that Dan died directly.

ACTUAL CAUSE. But for Al shooting Dan with a pistol, Dan would still be alive.

PROXIMATE CAUSE. Al shot the pistol toward Dan. Therefore, Al knew where Dan was located, and directed the bullet in Dan’s direction. Therefore, it was foreseeable to Al that Dan would be hit by a bullet, and perhaps suffer grievous injury. Additionally, there are no events that took place after Al shot the gun, and before the death of Dan, therefore, there are no intervening events. Since we have foreseeability with no intervening events, we have viable proximate cause.

MALICE.
INTENT TO KILL. Where defendant evinces an intent to kill victim, through their conduct, including circumstantial evidence. The deadly weapon doctrine helps establish intent to kill through use of a weapon used by defendant in a manner consistent with its causing the death of another. Here, Al used the pistol after he put ammo in it, and fired it at another. This is use of gun in a manner consistent with how it is normally used to cause the death of another. Therefore, intent to kill malice is applicable.
**FELONY MURDER.** Where victim is killed while defendant is in the commission of a felony, and the death is a natural and foreseeable result of the felony. The predicate felony for felony murder must be independent of the killing. Here, we have larceny and burglary as predicate felonies.

The killing by defendant must take place when defendant is said to be still in the commission or perpetration of the crime. A defendant who is in the process of escaping the scene of the crime, is still said to be in the perpetration of the crime. However, a defendant who has escaped and has reached a safe harbor, will not be liable for killings which occur at that point. Here, Al left the scene of the larceny, so it may appear that Dan’s death did not occur during the perpetration of a crime. However, since Al was still in the process of fleeing, and had not reached a safe harbor, he was still in the commission of the crime when Dan’s death took place.

**INTENT TO CAUSE SERIOUS BODILY.** Defendant acts with knowledge their actions pose a significant threat to victim, yet defendant continues with their life-threatening actions. Not applicable here.

**DEPRAVED HEART.** A conscious disregard by defendant that their actions of extreme recklessness pose a substantial risk of harm or death to another. Al both committed a felony crime situation, and fled the scene with a gun in tow. Further, he loaded the gun and shot it. The aforementioned actions evince a reckless disregard for the lives of others.

**DEGREES OF MURDER.**

1st INTENT. First degree intent to kill murder requires premeditation and deliberation. Al did not have an elaborate plan for the killing, but he did think briefly about it, as shown through his actions to load the pistol with ammo, therefore, we have premeditation. There are no indications that he lacked a cool mind capable of deliberate thought through excessive alcohol, medications, or the like. Therefore, both premeditation and deliberation are present, and first-degree intent to kill murder is a valid charge.

1st FELONY. Burglary is an inherent dangerous felony my statute, and the crime was committed in a dangerous manner with a loaded pistol. Therefore, first-degree felony murder is a valid charge.

2nd DEGREE. All Other Malice States.

**DEFENSES.**

**SELF-DEFENSE.** Defendant uses reasonable force to defend themselves from application of unlawful force of another. Not applicable if defendant is intoxicated. Defendant may only apply force which they need to defend themselves, but need not retreat. Deadly force can only be used when force used by another is imminent and intended or likely to cause the death of defendant. As stated above, Dan yelled at Al after firing a shot into the air, stating that the next bullet would be meant for Al. There would be a reasonable need for force in such a situation. However, Al knew that Dan was in hot pursuit, and could have averted a continuation of this drama, had he
stopped, and let Dan retrieve his goods. Even if Al did not know the bills were counterfeit, Al knew he did not pay for them, and the Dan would want the goods returned.

**VOLUNTARY MANSLAUGHTER**

**HEAT OF PASSION DEFENSE.**

**REASONABLE PROVOCATION BY SHOP OWNER.** This might exist if Al did not know the money was counterfeit. Dan yelled at Al in the gun shop, and called Al a rotten bum. Dan then chased after Al, fired a shot into the air, and threatened Al with bodily harm. A reasonable person who had not known that the money was counterfeit, would have been scared in such a situation, and may have been provoked to lose their temper. Here, however, it does not appear that Al lost his temper, rather, he appeared to be acting deliberately in loading his gun, and firing it at Dan.

**DID NOT HAVE TIME TO COOL.** Al did not have time to cool, because immediately after the provoking event, he was charged after by Dan.

**IMPERFECT SELF-DEFENSE.** Imperfect self-defense will be a better defense than heat of passion, for Al. Al did not meet all of the requirements of self-defense, but a reasonable person being shot at by a civilian may have returned fire, and he may be able to use imperfect self-defense in order to mitigate his murder charge.

**IN VOLUNTARY MANSLAUGHTER.**

Involuntary manslaughter occurs when defendant’s grossly negligent actions result in the accidental death of victim. Defendant must have disregarded a very substantial danger of serious bodily harm or death, and use of objects such as firearms, which are inherently dangerous, will tend to support gross negligence. Under the misdemeanor-manslaughter rule, a presumption of gross negligence will exist where defendant commits a crime, as Al did. Further, proximate cause will be suspended under *malum in se*, where a criminal violation is dangerous in itself. Here, burglary is inherently dangerous, and the *malum in se* doctrine will establish proximate cause.
Bill and his wife, Alice, fought constantly. On occasion Alice had to miss work when Bill physically beat her up during quarrels. Alice is Chuck’s supervisor at Acme Bank. Chuck would like to take over Alice’s job at the bank. Knowing of Bill’s violent temper, Chuck devised a scheme that he hoped would induce Bill to murder Alice, so that Chuck would be promoted to Alice’s position at the bank.

One evening, Chuck followed Bill to his favorite bar. When Bill had become very drunk, Chuck told him that Alice was having an affair with the bank president and that Chuck had found them locked in an embrace in the president’s office that very afternoon. Chuck’s story was completely fabricated. As Chuck expected, Bill became furious and ran out of the bar in a rage, shouting, “This time I’m going to kill her.”

On the way home, Bill, who was still obviously drunk and in a state of severe agitation, stopped at a sporting goods store and bought a shotgun. The store owner, Dave, sold him the gun, even though Bill stated to Dave that he was going to use it to kill his wife. Bill rushed to his house with the gun, looked through a window, and saw Alice sitting at the dining room table playing cards with a neighbor, Emily. He stood outside the window and took aim at Alice. Meanwhile, Emily’s husband Fred was coming to pick up his wife. Fred saw Bill and tackled him, hoping to disarm Bill before he fired the gun. Unfortunately, Bill pulled the trigger just as he was tackled by Fred, and the deflected shot hit and killed Emily.

With what crime or crimes, if any, should Chuck, Bill, Dave and Fred be charged and what, if any, defenses should each assert? Discuss.
MODEL ANSWER

I. CRIMES AND DEFENSES OF CHUCK.

SOLICITATION. Solicitation occurs where one requests or encourages another to commit a crime, whether or not the other person agrees to commit the crime, and even if the other person refuses to commit a crime. No overt act is needed, and the crime is complete upon asking another to commit a crime. Chuck, knowing of Bill’s violent temper, and that Bill had beaten his wife, induced Bill to get drunk, and then lied to Bill by telling Bill that his wife was having an affair. Chuck’s criminal goal in fabricating such a story, was to have Bill kill his wife in a fit of rage, so that Chuck could get Alice’s job. Chuck thus encouraged Bill to act in a murderous way, and Chuck solicited Bill.

MERGER. The crime of solicitation merges into conspiracy, but conspiracy does not merge with the completed crime. Here, if we find a conspiracy, solicitation will merge with conspiracy.

CONSPIRACY. A conspiracy is an agreement between two or more defendants, to do either an unlawful act or a lawful act by unlawful means.

CRIMINAL AGREEMENT. There must be a joint agreement for the pursuit of unlawful ends. However, a strict meeting of the minds is not necessary, just a communication to each defendant in some manner that communicates an intention to pursue a joint crime. An agreement may be found impliedly, and words are not necessary to establish an agreement, because each party may show by their actions alone that they have agreed to the criminal purpose. Circumstantial evidence, which strongly suggests a criminal plan, may be used. However, under the MPC unilateral view, only one guilty mind is needed to establish intent.

Here, Chuck had a criminal intent to have Alice killed, therefore, under the MPC we have an agreement. An agreement may also be established impliedly, and after the conversation between Chuck and Bill, Bill immediately went out and purchased a gun, then went home and aimed at Alice with the gun while pulling the trigger. Thus, circumstantially, we can establish that both men had a criminal understanding to commit the target crime of murder. The act to purchase the gun would be an act in furtherance. Therefore, we have a conspiracy. Chuck might assert that he did not participate in the shooting, however, one who is part of the conspiracy need not be directly involved in the target crime. Since Chuck did not withdraw through a viable communication, and did not thwart the criminal objective, he will be charged with conspiracy.

MURDER. Murder is the unlawful killing of another with appropriate causation and malice.

HOMICIDE. A homicide occurs where a victim is killed in unlawful manner. A dead person is determined either through lack of brain activity or lack of a heart beat. Emily died immediately upon being struck with a bullet from Bill’s gun.
**ACTUAL CAUSE.** But for Chuck giving false and inflammatory information to Bill, there would have been no death of Emily. Further, under substantial factor, where two or more causes interact together and cause the death of victim by shortening the life of victim, defendant will be the actual cause if their actions were a substantial factor in causing the death of victim. There were many other factors involved in the killing of Emily, however, Chuck’s actions were of such import that they would be considered a substantial factor in causing the death of Emily.

**PROXIMATE CAUSE.** Pre-existing conditions of victim which lead to increased harm leading to death, extreme fright or stress leading to death, and slight deviations in the types or modalities used which result in death, will all still indicate that defendant is the proximate cause of death to victim. Here, it is foreseeable that a drunk person who has a history of violence, would act violently. There were a number of intervening events here, however, none of them were unforeseen criminal acts of another, torts, or acts of God, therefore there are no superseding intervening events, and the causal chain would not be broken.

**MALICE.**

**INTENT TO KILL.** Where defendant evinces an intent to kill victim, through their conduct, including circumstantial evidence. May also include actions which are substantially certain to cause the death of victim. Under the deadly weapon doctrine, intent to kill may be established through use of a weapon used by defendant in a manner consistent with its causing the death of another. Here, we are given that Chuck desired the death of Alice in order to take the supervisory position at work.

**FELONY MURDER.** Where victim is killed while defendant is in the commission of a felony, and the death is a natural and foreseeable result of the felony. Not applicable.

**INTENT TO CAUSE SERIOUS BODILY HARM.** Defendant acts with knowledge their actions pose a significant threat to victim, yet defendant continues with their life-threatening actions. Not applicable.

**DEPRAVED HEART / RECKLESS INDIFFERENCE.** A conscious disregard by defendant that their actions of extreme recklessness pose a substantial risk of harm or death to another. Chuck evinced a reckless disregard for the lives of others when he intentionally inflamed Bill to violent action.

**DEGREES OF MURDER.**

**FIRST DEGREE.** First-degree intent to kill requires both premeditation and deliberation. Chuck calmly thought out a strategy to incite Bill, and enacted his plan. Therefore, we have both premeditation and deliberation, and first-degree murder will be a viable claim.

**SECOND DEGREE.** Al Malice States.

**DEFENSES.**

**NECESSITY.** Where defendant committed crime because of non-human circumstances, and the harm avoided is greater than the harm committed by defendant. Chuck wanted to increase his position at work, but this will not be a viable defense.
**IN VOLUNTARY MANSLAUGHTER.** Involuntary manslaughter occurs when defendant’s grossly negligent actions result in the accidental death of victim. Chuck acted in a grossly negligent fashion when he incited Bill to act in a violent manner.

**ATTEMPTED MURDER.**

**SPECIFIC INTENT TO KILL.** *Supra* Intent to Kill.

**ACT V. MERE PREPARATION.** Chuck came very close to effectuating his criminal goal, under the proximity test, the equivocality test, and the MPC substantial step test, because the same actions taken against Alice resulted in the death of Emily. Further, Chuck could have renounced by thwarting the crime, but he did not.

II. **CRIMES AND DEFENSES OF BILL.**

**ASSAULT AND BATTERY.** We are told that Bill abused his wife, Alice, and that he beat her up. To the extent that Alice was fearful of being beaten up by Bill due to his threats, he would be charged with assault. Additionally, the beatings themselves would constitute a separate battery charge for each beating, which is a harmful or offensive touching of another.

**MURDER.** *Supra.*

**HOMICIDE.** Bill killed Emily.

**ACTUAL CAUSE.** *Supra.* But for Bill shooting his gun in through the window, Emily would not have died.

**PROXIMATE CAUSE.** *Supra.* Bill did not want to kill Emily, and in fact, he aimed at Alice. However, under transferred intent, Bill’s intent to kill Alice will be transferred to Emily, and Emily will be seen to be a foreseeable victim. Further, Fred jumped into Bill as Bill was pulling the trigger of the gun. Fred’s actions could be seen as a superseding intervening event, breaking in the causal chain. However, Fred’s action was not abnormal. It was a foreseeable attempt to protect others from Bill’s actions, and since danger invites rescue, we have proximate cause.

**MALICE.**

**INTENT TO KILL.** *Supra.* Chuck stated a verbal intent to kill Alice, and under the deadly weapon doctrine, he used a gun in a manner consistent with its causing the death of another, therefore, we have intent to kill, here.

**DEPRAVED HEART / RECKLESS INDIFFERENCE.** *Supra.* Bill’s wielding of a loaded gun with people nearby, would be considered a reckless disregard for the lives of others.

**DEGREES OF MURDER.**

**FIRST DEGREE.** Here, Bill was intoxicated before he developed his intent to kill Alice, therefore, we do not have premeditation and deliberation, and the highest charge will be second degree intent to kill malice.
SECOND DEGREE. All Other Malice States.

DEFENSES.
VOLUNTARY INTOXICATION. Voluntary intoxication negates intent for specific intent crimes, and Bill’s intoxication would reduce his murder charge from first-degree to second-degree.

VOLUNTARY MANSLAUGHTER.

HEAT OF PASSION DEFENSE.
REASONABLE PROVOCATION. Bill was apparently provoked by Chuck’s false information regarding Alice’s infidelity. To some extent, a reasonable person would have been provoked to take some action. However, a reasonable person would have taken actions other than buying a gun. Further, a reasonable person is seen to be sober, therefore, Bill will not be able to mitigate his charge under the heat of passion defense.
COOLING. Even if Bill could show he was provoked, a reasonable person would have cooled between the time they were provoked at a bar, and the time they arrived home.

IN VOLUNTARY MANSLAUGHTER.
Supra. Bill’s action to buy a gun, and wield it while in a public space, and then pull the trigger while the gun was loaded, would be considered grossly negligent action.

ATTEMPTED MURDER.
SPECIFIC INTENT TO KILL. Supra Intent to Kill.
ACT V. MERE PREPARATION. Bill came very close to effectuating his criminal goal, under the proximity test, the equivocality test, and the MPC substantial step test, because the same actions taken against Alice resulted in the death of Emily. Further, Bill could have renounced by not shooting the gun, but he did not.

III. CRIMES AND DEFENSES OF DAVE.

MURDER.
HOMICIDE. Supra.

ACTUAL CAUSE. But for Dave selling a gun to Bill, Emily would still be alive. Additionally, the gun was a substantial factor in the death of Emily.

PROXIMATE CAUSE. Dan was aware that Bill was wildly drunk, and Bill told Dave that Bill was on his way to kill his wife. Under these circumstances, it is directly foreseeable that a death would occur. There were other events that took place after Dave sold the gun to Bill, however, none of them were unforeseen criminal acts of another, torts, or acts of God, therefore there are no superseding intervening events, and the causal chain would not be broken.

MALICE.
**DEPRAVED HEART / RECKLESS INDIFFERENCE.** Dave should not have sold a dangerous weapon to a drunken person, who was stating that he was going to kill his wife. Dave’s actions clearly evinced a reckless disregard to the lives of others.

**DEGREES OF MURDER.**

SECOND DEGREE. Depraved Heart.

**DEFENSES.**

NECESSITY. Dave wanted to make money from the gun sale, but this defense is not viable, but it is not more important to make money, here.

**IN VOLUNTARY MANSLAUGHTER.** By selling a deadly weapon to a crazed, drunken person.

**ACCOMPLICE.** One who generally agrees and cooperates to aid, abet, assist or encourage another in the carrying out of a crime, and who has the mental state necessary for the specific crime, because they intend or desire the criminal result. Here, Dave aided and abetted in the commission of the murder, by selling a deadly weapon to Bill.

**IV. CRIMES AND DEFENSES OF FRED.**

**MURDER.**

ACTUAL CAUSE. But for Fred tackling Bill, the bullet may not have hit Emily.

PROXIMATE CAUSE. It is foreseeable that a gun will fire if one tackles another person who is holding a loaded gun.

DUTY TO AID OR RESCUE. SPECIAL RELATIONSHIP. Fred had an affirmative duty to his wife to aid or rescue her in an emergency situation. Fred acted appropriately by trying to disarm Bill.

MALICE.

DEPRAVED HEART. If Fred had not acted to try and save his wife in an emergency situation, he may have been seen to have had a reckless disregard for the lives of others. However, since he did act to try and save her, he did not act with malice.

BATTERY. When Fred jumped onto Bill, with intent, he enacted a harmful or offensive touching to Bill, which would constitute a battery.

DEFENSE OF OTHERS. Fred was acting to protect the women in the house. He is allowed a reasonable mistake in the use of force. The force that Bill was using was deadly force through use of a loaded gun, so Fred could use a significant amount of force in order to subdue Bill. Fred would therefore have a viable defense of defense of others.
Michael and his girlfriend Betty were going to an expensive nightclub. On their way to the club Betty asked Michael to stop by the store where she worked as a checker. Michael knew the store was closed but didn’t question why she wanted to stop. When they arrived at the store they both got out of the car. Betty used her key to open the store’s door. They both went in. Betty went to the cash register and took $200, intending to return it before the store opened the next day. Michael saw her take the money. They then left the store.

When they got outside Michael asked Betty why she took the $200 from the cash register. Betty told him that her employer owed her money and that she was taking it so that they could have fun that evening. Michael did not believe that Betty was entitled to take the money. Betty gave Michael the $200 and he put it in his pocket.

In fact, Betty was not entitled to take money from the cash register and she did not return the $200 the next day. The store’s security system had filmed Betty’s and Michael’s actions and both Betty and Michael were arrested.

1. With what crime or crimes can Betty be reasonably charged and what defenses, if any, does Betty have available to her? Discuss.

2. With what crime or crimes can Michael be reasonably charged and what defenses, if any, does Michael have available to him? Discuss.
MODEL ANSWER

I. CRIMES AND DEFENSES OF BETTY.

SOLICITATION. Solicitation occurs where one requests or encourages another to commit a crime, whether or not the other person agrees to commit the crime, and even if the other person refuses to commit a crime. No overt act is needed, and the crime is complete upon asking another to commit a crime. Here, Betty and Michael did not have enough money to have fun at an expensive nightclub, yet, they had decided to attend the nightclub, and were on their way to the nightclub, when Betty asked Michael to go with her to her worksite. Betty knew she was not entitled to receive money from work at that time, yes she asked Michael to help her out. It is clear that Betty wanted help to commit the crime of larceny or embezzlement, and whether or not Michael agreed to assist in the crime, the crime was complete as soon as Betty encouraged Michael to assist her in her criminal endeavor.

MERGER. The crime of solicitation merges into conspiracy. If Betty is part of a conspiracy with Michael, the solicitation charge will merge into the conspiracy charge.

CONSPIRACY. A conspiracy is an agreement between two or more defendants, to do either an unlawful act or a lawful act by unlawful means.

CRIMINAL AGREEMENT. There must be a joint agreement for the pursuit of unlawful ends. However, a strict meeting of the minds is not necessary, just a communication to each defendant in some manner that communicates an intention to pursue a joint crime. An agreement may be found impliedly, and words are not necessary to establish an agreement, because each party may show by their actions alone that they have agreed to the criminal purpose. Circumstantial evidence, which strongly suggests a criminal plan, may be used. However, under the MPC unilateral view, only one guilty mind is needed to establish intent.

Here, we are told that Betty is Michael’s girlfriend. People in such a close relationship, will understand the nuances and secret glances of each other. Michael knew that Betty was not entitled to money, but that they needed a significant amount of money in order to attend the expensive nightclub they were on their way to enjoy. Michael went into the store with Betty, and later pocketed the money. Apparently, they went to the nightclub and spent the $200 in an enjoyable night at the nightclub. These actions took place while both parties knew, or had a strong reason to know, that Betty was not entitled to the $200. Therefore, we can say that the circumstances strongly indicate, that the boyfriend / girlfriend of Michael and Betty, impliedly agreed to unlawfully take $200 from the store, as can be surmised from the aforementioned circumstantial evidence. Inasmuch as both defendants entered the store, they both took an act in furtherance of the criminal objective.

BURGLARY.
COMMON LAW. Common law burglary is the breaking and entering, of the dwelling place of another, at night, with the intent to commit a felony therein. Here, we have a store, and not a dwelling place of another. Therefore, it is unlikely that Betty could reasonably be charged with common law burglary.

MODERNLY. Modernly, burglary is the unlawful entry of the protected structure of another, with the intent to commit a crime therein.

BREAKING. Any opening to a structure which is created by defendant will suffice to meet the breaking requirement, but no force is needed. Here, the door of the store was closed. Betty unlocked the door, and entered the store. Even though Betty used a key to unlock the door, the door was nevertheless closed when she arrived, and she thus created an opening where none had existed, and this would suffice to meet the breaking requirement of burglary.

ENTERING. The entering element will be satisfied if any part of defendant’s anatomy enters the structure, even for a moment. Betty entered the store and she unlocked the door.

PROTECTED STRUCTURE. A dwelling may be a home, business or a vehicle, including boats, trailers, hotel rooms, and all places where people sleep, including places of business if the business owner often sleeps at their business. Modern rules expand the dwelling requirement to include buildings such as warehouses, that are not dwellings. Here, the store is the protected structure of the store owner, and modernly this element of burglary would be met.

INTENT TO COMMIT A FELONY THEREIN. Modernly, misdemeanors and felonies meet this requirement. The intent to commit a crime must be formulated before defendant enters the structure. Betty knew she was not entitled to the $200. Yet, the only action she took while in the store, was to confiscate the $200, which she then used to have a good time at the expensive nightclub. We can say then, with a reasonable level of certainty, that her intent before entering the store was to perpetrate the crime of larceny or embezzlement.

CONSENT OF EMPLOYER. Betty was carrying a key to the store, which may indicate that Betty had the consent of the store owner to enter the store. However, it is likely that the scope of the consent given by store owner, was for Betty to open the store early, or to close the store late, or to enact clearly established employment-related duties during store hours. Inasmuch as Betty did not enact any job-related duties during the time she was in the store, she would have exceeded the scope of the consent given by store owner, and consent of her employer will not be a viable defense.

LARCENY. Larceny is a specific intent crime, and it is the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive them thereof.

INTENT TO PERMANENTLY DEPRIVE. Defendant must have the intent to permanently deprive the rightful owner of the property at the time of the taking of the property, and this intent will exist if defendant intends to use the property in such a manner or for such a duration that the owner would be deprived of a significant portion of the chattel’s economic value. If defendant
intends to return the item in a short period of time, they must have the substantial capacity to do so, otherwise they will be seen to have intended to permanently deprive the owner of the owner’s property. Here, Betty indicated that she would return the $200 the next day. However, there are a couple of problems with her statement. First, at the time of the taking, she must have had the substantial capacity to return the money, yet, she needed the money because neither her or her boyfriend had enough money for a night on the town. It is likely that she would not have any money to replenish the $200 for some amount of time. And second, the fact that she did not return the money, indicates a continuing trespass on her part, and would indicate an intent to permanently deprive the store owner of the money.

TAKING AND CARRYING AWAY PERSONAL PROPERTY OF ANOTHER. Betty took $200 from the store owner’s cash register, and walked away with the money, establishing the asportation element of larceny.

TRESPASSORY TAKING. It is possible that Betty could be considered a high level employment, and be said to be in rightful possession of the $200 as a high level employee with broader authority to act than a low level employer. After all, Betty had a key to the store, and apparently a key to the cash register. However, we are told that her job position is not that of a manager, but that she is a cashier. It is therefore more likely that she is a low level employee, and her taking would be considered a trespassory taking.

CLAIM OF RIGHT. Defendant may take another’s property under a claim of right, in order to collect a debt or to satisfy some other claim, and defendant may do this even if they are unreasonably mistaken. We are told that Betty did not have a right to the money, and this defense would fail.

EMBEZZLEMENT. Embezzlement is a specific intent crime. It is the fraudulent conversion of the property of another by one already in lawful possession of the property.

CONVERSION. Defendant must not simply take the property of another, but they must deprive the owner of a significant part of the property’s usefulness. If defendant uses the property only for a short time, then the conversion element will normally not be met, and defendant will not be found guilty of embezzlement. Here, Betty has not returned the money after a short period of time, and thus we have a conversion of the $200.

LAWFUL POSSESSION. For embezzlement, defendant must first have lawful possession of the property, while for larceny defendant need only have mere custody but not rightful possession of the property. High-level employees often are said to be in lawful possession of company property, so their taking of company property would be considered embezzlement. As stated above, the Betty’s job title is cashier, not manager. Additionally, she did not take solid property, such as a company car, rather, she took disposable property via money, and likewise disposed of the money. A high level employee would be more likely to take a car home overnight, than to take cash. In toto, it appears that larceny is the correct charge.

DEFENSES.
**FINANCIAL NECESSITY.** Where defendant committed crime because of non-human circumstances, and the harm avoided is greater than the harm committed by defendant. The harm avoided would be that the criminal pair of Michal and Betty would stay home for the night. This is not a harm which they could avoid through criminal activity.

**MISTAKE OF FACT.** Where defendant is lacking the mental state necessary for a crime, and is honest in their perspective. Most applicable to specific intent crimes. We are told that Betty was not entitled to the money, and mistake of fact is therefore not a viable defense.

**II. CRIMES AND DEFENSES OF MICHAEL.**

**CONSPIRACY.** *Supra.* Michael did not believe Betty’s false explanation about her being entitled to the $200, yet, he engaged in all of the criminal activity with Betty, including attending the expensive nightclub with the $200 in tow. Michael could therefore be reasonably charged with conspiracy.

**CO-CONSPIRATORIAL LIABILITY FOR TARGET CRIME.** As a co-conspirator, Michael will be liable for the target crime intended as part of the conspiracy, here, larceny / embezzlement.

**PINKERTON RULE.** In some jurisdictions, a co-conspirator will be liable for the acts of other conspirators that are reasonably foreseeable crimes in furtherance of the target crime. Here, Betty committed a burglary, which is a crime that was reasonably foreseeable to enable her access to the store’s money. In a Pinkerton jurisdiction, Michael will be liable for the burglary.

**WITHDRAWAL.** Michael could have withdrawn from the conspiracy, if he had communicated his intent to withdraw to Betty, and acted to thwart her criminal activity. He did neither, and thus he did not withdraw from the conspiracy.

**ACCOMPlice.** One who generally agrees and cooperates to aid, abet, assist or encourage another in the carrying out of a crime, and who has the mental state necessary for the specific crime, because they intend or desire the criminal result. An accomplice does not actually commit the *actus reus* / criminal act, but will be liable for that criminal act. An accomplice will be guilty of the substantive crimes they assisted or encouraged. Mere presence at the scene is not enough for culpability, unless defendant is at the scene for the purpose of approving and encouraging the crime. Here, Michael was at the scene of Betty’s criminal activity, and pocketed the loot with the knowledge that Betty had taken the money unlawfully. He could be seen as a lookout for Betty’s criminal activity, and he will be liable for her crimes as an accomplice.

**ACCESSORY AFTER THE FACT.** One who knowingly gives assistance to defendant personally after defendant has committed a felony, by taking affirmative steps to help defendant avoid apprehension following the crime. Here, Michael took the money from the crime and put
it in his pocket. It is likely he also spent the money later at the expensive nightclub. He was thus an accessory after the fact.

**RECEIPT OF STOLEN PROPERTY.** Where defendant receives stolen property with the knowledge that it has been stolen and with the intent to deprive the owner of the property. However, it is not enough if defendant merely suspects that the property is stolen. Here, if Michael were unsure as to the rightful owner of the $200, he should either not have received it and put it in his pocket, or he should have clarified the legality of the situation. He did neither, and thus receipt of stolen property is a viable charge.

**MISPRISON.** Misprision exists where a person conceals, or fails to disclose, the known felonious conduct of another. We are told that Michael knew that Betty had absconded with money that did not belong to her, yet he did nothing to alert the authorities of her criminal conduct.

**MISTAKE OF FACT.** Where defendant is lacking the mental state necessary for a crime, and is honest in their perspective. Michael correctly surmised that Betty did not have a lawful right to the money, therefore, mistake of fact is not a viable defense.
Dan separated from his wife, Bess, and moved out of the house they own together. About one week later, on his way to work the night shift, Dan passed by the house and saw a light on. He stopped and rang the bell. Bess answered the door. She was polite, but told him she was getting ready to go out with her girlfriends. As Dan left, he saw a pair of men’s shoes in the entryway.

Later that night, Dan told his friend, Fred, about the shoes. Fred said: “Let’s go over there and check it out. We’ll use my car so Bess won’t recognize it.” Dan and Fred drove over to the house, and parked a block away, so the car would not be seen by Bess. Fred waited in the car while Dan went around the side of the house, turned over a garbage can and climbed on top to look through the open bedroom window. Dan saw a man, Chris, on the bed with Bess. Dan jumped through the open window and started yelling at Bess, “How could you do this?”

Dan then went to the closet and grabbed his shotgun, which was locked in a plastic case. He turned to Chris, and chased him down the stairs and out of the house, yelling deadly threats. Chris tripped, fell, and hit his head on the front steps. The fall knocked him unconscious.

Bess called the police. When the police arrived, Dan was sitting outside on the front porch holding the shotgun, still in the locked case. Dan told the police that he had chased Chris out because he feared his wife had been in danger.

Fred got out of the car and came over to the scene. The police placed Dan in custody and asked Fred to meet them at the station for further questioning.

1. With what crime or crimes, if any, can Dan reasonably be charged and what defenses, if any, can he reasonably assert? Discuss.

2. With what crime or crimes, if any, can Fred reasonably be charged and what defenses, if any, can he reasonably assert? Discuss.
I. CRIMES AND DEFENSES OF DAN.

CONSPIRACY. A conspiracy is an agreement between two or more defendants, to do either an unlawful act or a lawful act by unlawful means.

CRIMINAL AGREEMENT. There must be a joint agreement for the pursuit of unlawful ends. However, a strict meeting of the minds is not necessary, just a communication to each defendant in some manner that communicates an intention to pursue a joint crime. An agreement may be found impliedly, and words are not necessary to establish an agreement, because each party may show by their actions alone that they have agreed to the criminal purpose. Circumstantial evidence, which strongly suggests a criminal plan, may be used. However, under the MPC unilateral view, only one guilty mind is needed to establish intent.

Here, we have two friends, Dan and Fred. Friends tend to understand the nuances, habits and secret thoughts of each other. They also tend to talk in code language, through winks and nods, known only to each other. Therefore, when Dan informed Fred that men’s shoes were in the entryway of the house of Bess, it is clear that they both surmised that Bess was seeing another man. They proceeded to park a block away from the house, so that Bess would not know they were around. Why? Because they had a criminal motive, to physically harass, and perhaps, beat, any man that Bess was entertaining, here, Chris. A criminal agreement may be implied, and shown through circumstantial evidence, and the language of agreement stating that they were going to ‘check it out,’ followed closely by an assault of Chris, indicates circumstantially that an implied agreement for a criminal purpose existed between Dan and Fred. Therefore,

BURGLARY.

COMMON LAW. Common law burglary is the breaking and entering, of the dwelling place of another, at night, with the intent to commit a felony therein. Here, we are told that the intrusion by Dan took place at night, at the dwelling of Bess, and that Dan entered the house. However, since he did not break, or create an opening where none existed, we have no common law burglary.

MODERNLY. Modernly, burglary is the unlawful entry of the protected structure of another, with the intent to commit a crime therein.

BREAKING AND ENTERING. Dan entered the house, but it appears that the window was wide open. Therefore, while there was an entry, there was no breaking. However, inasmuch as Dan stated the false assertion that he wanted to protect Bess, he may be said to have gained access to the house though a false impression, and thus he constructively entered. The problem here, is that Bess did not open a door and let him in due to his false reason, therefore, it is doubtful that there was a breaking, here. However, if Dan opened a screen to gain entry, that would be sufficient to establish the breaking element of burglary.
**DWELLING OF ANOTHER.** Dan separated from his wife, Bess, and moved out of the house they own together. We are not sure of his status, because they were not divorced, and title to the house had not passed fully to Bess. However, to the extent that he was not allowed access to the house, Dan did enter the dwelling place of another, Bess.

**INTENT TO COMMIT CRIME.** Dan first looked in the window, and he saw Chris sitting on the bed with Bess. Immediately upon jumping through the window, Dan starting yelling and chasing Chris. Therefore, it is clear that Dan’s prior intent before entry was to assault and batter Chris.

**LARCENY.** Larceny is the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive them thereof. Here, Dan was obviously still storing personal items at the house. The fact that the gun was merely at the house occupied by Bess, would not make the gun her property. Further, Dan used the gun to threaten Chris, there are no indications that he was going to permanently take the gun. Therefore, no larceny.

**ASSAULT of CHRIS.** Assault, an attempted battery, occurs where defendant engages in some overt act that is intended to arouse a reasonable apprehension of bodily harm in another. Upon entering the house by wildly jumping through a window, he yelled at Bess and admonished her for seeing another man. Then, he grabbed a shotgun case, and chased Chris while yelling deadly threats. Chris was probably not just afraid, he was most likely petrified with fear. Dan was acting as a crazy man, while wielding a shotgun, and screaming at Chris. Chris fled only because he was afraid of being beaten or killed by Dan, thus assault is a viable charge.

**ASSAULT of BESS.** *Supra.* Dan yelled at Bess for seeing another man. Dan was in a rage, and could easily have directed his rage at Bess, in addition to Chris. Bess called the police, in an effort not only to protect Chris, but also to protect herself. Therefore, assault.

**BATTERY.** Battery is a general intent crime, and it occurs where defendant causes an offensive touching or bodily injury to victim, with the intent to cause a harmful or offensive touching. We are told that Dan never touched Chris. However, Dan’s actions in chasing Chris, as described above, directly caused Chris to flee in extreme fear. It was nighttime, and Chris did not have time to stop and turn the lights on. Chris ended up falling headfirst on hard front steps, causing him physical injury, rendering him unconscious.

**DEFENSE OF OTHERS.** Use of reasonable force to defend another from imminent unlawful force. The *alter ego* rule at common law did not allow unnecessary force, but modernly reasonable unnecessary force is allowed. Dan’s intent can be ascertained through his admonition to Bess upon entering the house, regarding Dan’s anger at her having a new boyfriend. This defense will fail.

**MURDER.** Murder is the unlawful killing of another with appropriate causation and malice.

**HOMICIDE.** Under the year and a day rule, where victim dies within a year and a day of getting hurt by defendant, defendant may be liable for murder. Here, Chris violently slammed his head onto the hard front steps of the house, and went unconscious. We are not told that he ever
regained consciousness, and it is very possible that Chris passed away from his severe injury, within a year and a day. If he did pass away within a year and a day, we would have a homicide.

**ACTUAL CAUSE.** But for Dan’s action to chase Chris down the steps, Chris would not have hit his head, and he would still be alive.

**PROXIMATE CAUSE.** It is foreseeable to Dan that if he chases Chris down stairs at night, that Chris could easily fall headfirst, as happened here. The fact that Chris tripped and fell is an intervening event, but his falling is dependent on the fact that Dan chased him down the steps. Therefore, there are no superseding intervening events, and we have proximate cause.

**MALICE.**

**INTENT TO KILL.** Where defendant evinces an intent to kill victim, through their conduct, including circumstantial evidence. May also include actions which are substantially certain to cause the death of victim. Upon entering the house, Dan went directly to the closet and grabbed his shotgun, in a case. He then yelled deadly threats at Chris. These actions indicate that Dan had a specific plan to effectuate the death of Chris, once Dan could take the shotgun out of its case.

**DEPRAVED HEART.** A conscious disregard by defendant that their actions of extreme recklessness pose a substantial risk of harm or death to another. Dan wielded a shotgun, at night, yelling threats at a stranger, while chasing them. Dan’s actions evinced a reckless disregard for the life of Chris.

**DEGREES OF MURDER.**

**1st DEGREE INTENT TO KILL.** Dan went directly to secure his shotgun, thus indicating some kind of thought or planning activity prior to the action which killed victim, and which relates to the killing of the victim. We are not told that he had been drinking, or that he otherwise did not have cool mind capable of deliberate thought. Therefore, both premeditation and deliberation exist, and he could be charged with first-degree intent to kill murder.

**2nd DEGREE MURDER.** Second-degree murder consists of all malice states.

**DEFENSES.**

**DEFENSE OF OTHERS.** Supra. This was a ruse.

**VOLUNTARY MANSLAUGHTER.**

**HEAT OF PASSION DEFENSE.** Here, at first glance it appears as though we have a classic cheating spouse situation, and that Dan may mitigate his charge to voluntary manslaughter. However, Dan was physically separated from Bess, and Bess / Chris did not overtly to provoke Dan. A reasonable person would not have been inflamed to kill upon seeing shoes. Nor can Dan say he his passion was re-ignited once he saw Chris in the bedroom, because Dan essentially self-provoked himself by sneaking up on Bess. A reasonable person would have let Bess have her privacy, and, in any event, a reasonable person would have cooled and not visited the house.

**IMPERFECT DEFENSE OF OTHERS.** The defense of others was a ruse, so imperfect self-defense will also fail.
INVOLUNTARY MANSLAUGHTER. Involuntary manslaughter occurs when defendant’s grossly negligent actions result in the accidental death of victim. Defendant must have disregarded a very substantial danger of serious bodily harm or death, and use of objects such as firearms, which are inherently dangerous, will tend to support gross negligence. Dan exhibited grossly negligent action when he chased Chris at night, while carrying a shotgun, yelling deadly threats.

ATTEMPTED MURDER. Where defendant intends to commit a specific intent crime, but does not actually complete the crime. Attempt will be present if defendant enacts an act in furtherance of that specific intent which goes beyond mere preparation.

SPECIFIC INTENT TO KILL. Supra. Attempted murder is a specific intent crime, therefore, the only of the four malice states which will support a charge of attempted murder, is intent to kill murder. Here, we have Dan, wielding a shotgun, chasing Chris, and yelling deadly threats. Therefore, Dan has a specific intent to kill Chris.

ACT V. PREPARATION. There must be some overt act in furtherance of the criminal objective, that goes beyond mere preparation. Here, Dan yelled deadly threats at Chris, while chasing him down the stairs at night. Chris slammed his head hard into the stairs, headfirst, and immediately went unconscious. Therefore, under the proximity test, the equivocality test and the MPC substantial step test, we have a sufficient act for attempted murder.

DEFENSES.
IMPOSSIBILITY. Where defendant asserts that it was factually impossible to complete the crime. Dan may assert he could not complete the crime because the police were present, but factual impossibility is never a viable defense.

RENUNCIATION. Where defendant voluntarily abandons their attempted crime before completion of the substantive crime. Dan did not renounce, rather, Bess called the police.

II. CRIMES AND DEFENSES OF FRED.

SOLICITATION. Solicitation occurs where one requests or encourages another to commit a crime, whether or not the other person agrees to commit the crime, and even if the other person refuses to commit a crime. No overt act is needed, and the crime is complete upon asking another to commit a crime. Upon hearing that men’s shoes were at Dan’s house, Fred encouraged Dan to go back to the house, surreptitiously, without Bess knowing, in order to ‘check it out.’ Immediately upon entering the house, Dan assaulted both victims. It is clear that Fred solicited such criminal action.

MERGER. The crime of solicitation merges into conspiracy.

CONSPIRACY. Supra.
CO-CONSPIRATORIAL LIABILITY FOR TARGET CRIME. As a co-conspirator, Fred will be liable for the target crime intended as part of the conspiracy, here, assault and battery.
PINKERTON RULE. In some jurisdictions, a co-conspirator will be liable for the acts of other co-conspirators that are reasonably foreseeable crimes in furtherance of the target crime. Here, Dan may have committed a burglary.

WITHDRAWAL. Fred could have withdrawn from the conspiracy, if he had communicated his intent to withdraw to Dan, and acted to thwart his criminal activity. He did neither, and thus he did not withdraw from the conspiracy.

ACCOMPlice. One who generally agrees and cooperates to aid, abet, assist or encourage another in the carrying out of a crime, and who has the mental state necessary for the specific crime, because they intend or desire the criminal result, will be seen as an accomplice that is liable for the criminal act. Fred drove Dan over to the house, and helped develop a plan whereby Dan could approach the house, burglarize it, and commit an assault and battery.

ACCESSORY. A defendant who provides assistance before the crime but is not present during the crime, will be liable for the crime itself. Fred assisted Dan before the crime, and drove Dan to the crime scene.

MISPRISON. Misprison is the failure to report the known felonious conduct of another. Fred apparently did not report the crimes of Dan. Bess is the person who called the police.

CO-FELON. If Chris dies, Dan may be charged with felony murder as a co-felon.

MISTAKE OF FACT. Where defendant is lacking the mental state necessary for a crime. Here, Fred solicited Dan to go over and batter the man who was with Bess, and this defense will fail.
Pete is a salesperson at XYZ Real Estate Company (“XYZ”). Vic owned a parcel of industrial real estate that he wanted to sell. Vic retained Pete as his agent to sell the parcel for him, and they agreed to list the parcel for a price of $100,000. Developer contacted Pete and expressed interest in buying Vic’s property.

Pete falsely told Vic that a soils test report revealed serious toxic contamination on the parcel and that, because of high cleanup costs, the most Vic could hope to get for the parcel was $15,000 to $17,000. Vic said, “OK. Do your best.”

About a week later, Pete persuaded his friend, Frank, to sign an offer to Vic, offering to pay $17,000 for the parcel. When Frank asked why Pete wanted him to do this, Pete told him, “The actual buyer is traveling in Europe and can’t get back in time to sign the papers, so he authorized me to find someone to sign for him. I’m designating you as that person, but, don’t worry, you won’t be liable for anything.” Believing Pete’s explanation, Frank agreed to sign out of his friendship with Pete. Pete presented the offer signed by Frank, and Vic accepted it.

Pete, figuring he would temporarily “borrow” $17,000 from XYZ, wrote a check on the XYZ bank account for $17,000 and gave it to Frank to deposit into Frank’s account. Frank attended the real estate closing, obtained the deed, and gave Vic his personal check for $17,000. Two days later, Pete sold the property to Developer for $100,000. From the proceeds of that sale, Pete returned the $17,000 to XYZ’s account and kept the balance for himself.

1. Of what crimes, if any, can Pete be convicted? Discuss.

2. With what crime might Frank be charged, and is it likely he would be convicted? Discuss.
MODEL ANSWER

I. CRIMES AND DEFENSE OF PETE.

SOLICITATION. Solicitation occurs where one requests or encourages another to commit a crime, whether or not the other person agrees to commit the crime, and even if the other person refuses to commit a crime. No overt act is needed, and the crime is complete upon asking another to commit a crime. Here, Pete urged Frank to make an offer to Vic, which Pete knew was part of a fraudulent scheme. At the time that Pete asked Frank to do something which was unlawful, the crime of solicitation was complete.

MERGER. The crime of solicitation merges into conspiracy. The crime of attempt merges with the completed crime. Conspiracy does not merge with the completed crime. Here, if there is a conspiracy, the solicitation charge will merge into the conspiracy charge.

CONSPIRACY. A conspiracy is an agreement between two or more defendants, to do either an unlawful act or a lawful act by unlawful means.

CRIMINAL AGREEMENT. There must be a joint agreement for the pursuit of unlawful ends. However, a strict meeting of the minds is not necessary, just a communication to each defendant in some manner that communicates an intention to pursue a joint crime.

IMPLIED AGREEMENT. Words are not necessary to establish an agreement, and each party may show by their actions alone that they have agreed to the criminal purpose. Circumstantial evidence, which strongly suggest a criminal plan, may be used. Here, we have two friends, who, while acting in concert, succeed in defrauding Vic of valuable land. While we are told that Frank had no knowledge of a criminal plan, Frank attended a closing, was given a deed to Vic’s property, and gave a check at the closing for $17K which was not his own money. Circumstantially, we can show that Frank had some knowledge of criminal activity, because one does not attend a closing of land that they are not personally purchasing. Also, the fact that Frank and Pete are friends, indicates that they know of past criminal conduct of each other. We are told that Pete persuaded Frank, and that Pete told Frank not to worry as there would be no liability. These facts indicate that Frank had some level of distrust about the legality of Pete’s request, and that Frank proceeded anyway. Further, Vic would have appointed his own personal representative to represent Vic in the closing, if the supposed facts given by Pete had been true. On balance, one would conclude that the circumstantial facts indicate an implied agreement for a criminal objective between Pete and Frank.

MPC UNILATERAL AGREEMENT. Requires only one guilty mind, and there may be a conspiracy even if the other parties have a lack of intent. Here, Pete clearly had a criminal objective, and this requirement would be met under the MPC unilateral agreement rule.

ACT IN FURTHERANCE. The common law states that a conspiracy is complete at the time of an agreement. However, about half of the states now require that there be an act in furtherance of the conspiracy in addition to the agreement. It need not be a major act, and a minor act of mere preparation will suffice. Not every co-conspirator need agree to commit the substantive object crime, and a defendant may be convicted of conspiracy even if they agreed to
help only in the initial planning stages of the conspiracy. Here, the act of taking the $17K out of the XYZ bank account in order to perpetrate a fraud, would constitute a sufficient act in furtherance of the conspiracy.

**Larceny.** Larceny is a specific intent crime and is the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive them thereof.

**Trespassory Taking.** Here, it is doubtful that there is a sufficient trespassory taking by Pete. Pete was a high level employee with the ability to write checks against the XYZ bank account, and thus he had some level of possession over the bank account.

**With Intent to Deprive.** Larceny is a specific intent crime, and defendant must have the intent to permanently deprive the rightful owner of the property at the time of the taking of the property, and this intent will exist if defendant intends to use the property in such a manner or for such a duration that the owner would be deprived of a significant portion of the chattel’s economic value. If defendant intends to return the item in a short period of time, they must have the substantial capacity to do so, otherwise they will be seen to have intended to permanently deprive the owner of the owner’s property. However, Pete did not return the exact thing he took, and, he needed to use the $17K to effectuate a land sale transaction, therefore, he had the intent to deprive necessary for a larceny.

**Embezzlement.** It is the fraudulent conversion of the property of another by one already in lawful possession of the property, and there is no overlap with the crime of larceny, because larceny can only occur when there is no lawful possession of another’s property.

**Fraudulent Conversion.** Defendant must not simply take the property of another, but they must deprive the owner of a significant part of the property’s usefulness. Here, Pete converted $17K and gave the money to Frank to deposit into Frank’s account, therefore a substantial influence over the property of XYZ has taken place, tantamount to a conversion, which was enacted in a fraudulent manner. It is of no consequence that the money was later returned, because the crime was completed when Frank deposited the money in his personal account.

**By One in Rightful Possession.** Pete was a high level employee because he wrote checks on the XYZ bank account, and thus was entrusted with a high level of trust in the organization. The rightful charge here will be embezzlement, and not larceny, because Pete fraudulently converted property he was in right possession of at the time of the conversion.

**False Pretenses.** False pretenses concerns the false representation of a material present or past fact by defendant which causes victim to pass title of their property to defendant. Defendant takes this action while aware that the representation is false and intends to defraud victim.

**Misrepresentation of Material Fact.** The fact may be a past or present material fact. A fact will be material if it plays an important part in a reasonable person’s decision to enter into a transaction. Here, Pete falsely told Vic that a soil test report revealed toxic contamination, and that the most Vic would receive from a land sale would be $15K to $17K, partially due to high cleanup costs. In reality, there was no toxic soil, and Pete later sold the land for $100K,
pocketing $83K in profits. Therefore, Pete made a false representation of a material fact related to the actual value of the property.

**INTENT TO INDUCE RELIANCE.** Intent to defraud will exist, where defendant knows the representation is false, where defendant believes but is not totally sure that the representation is false, or where defendant is unsure either way. Here, the facts indicate that Pete knew the facts were made up, and that he fabricated false false with the intent to defraud Vic, so that Pete could proceed with his criminal plan.

**VICTIM RELIES ON FALSE INFORMATION.** Victim must believe and rely upon the false misrepresentation of a material fact. Almost immediately, instead of pushing Pete to try to sell the property for $100K, Vic was happy with a sale for $17K, which is the upper level of what Pete misrepresented that Vic would likely receive on a sale. Therefore, Vic relied on Pete’s false material statements.

**DEFENDANT GAINS TITLE THROUGH FRAUD.** Here, Pete, through Frank, received the title to the property, and then sold the property for $100K. When Pete received the title to Vic’s property, the crime of false pretenses was complete.

**UTTERING and FORGERY.** Uttering is the offering as genuine an instrument known to be false with the specific intent to deceive. Forgery is a specific intent crime that relates to a material alteration constituting a lie, in a writing, with the purpose to defraud. If the defendant receives property or money for the forged document, then defendant will be liable for the additional crime of false pretenses. Here, Pete concocted a scheme to defraud Vic out of $83, while characterizing a fraudulently obtained deed as authentic and legal, knowing them to be false, and with an intent to defraud Vic out of the rightful value of his land. Therefore, Pete may be charge with uttering and forgery.

**II. CRIMES AND DEFENSES OF FRANK.**
If it is true that Frank had no reasonable inkling or idea that Pete had formulated a criminal scheme, and was using Frank as a pawn to help enact the criminal plan, then Frank would lack the necessary *mens rea* to be held criminally accountable for his actions. However, friends often know of the criminal propensities of each other, and if additional facts indicate that Frank was aware the Pete was a crook, then Frank could reasonably be charged with the crimes below stated.

**CONSPIRACY.** Supra.

**CRIMINAL AGREEMENT.** Supra. The criminal agreement between the parties may be implied through circumstantial evidence, as discussed above.

**CO-CONSPIRATORIAL LIABILITY.** As a co-conspirator, Frank will be liable for the target crime of false pretenses.
PINKERTON RULE. As a co-conspirator, Frank will also be liable for other crimes which were enacted in reasonable furtherance of the target crime. Here, the crime of embezzlement would be considered reasonably foreseeable, in assisting Pete to enact the crime of false pretenses.

ACCOMPlice. One who generally agrees and cooperates to aid, abet, assist or encourage another in the carrying out of a crime, and who has the mental state necessary for the specific crime, because they intend or desire the criminal result. An accomplice does not actually commit the *actus reus* / criminal act, but will be liable for that criminal act. An accomplice will be guilty of the substantive crimes they assisted or encouraged. Here, without the actions of Frank to fraudulently purchase Vic’s property with embezzled money, and then to fraudulently receive title to property, the crimes listed above would not have taken place. Therefore, Frank acted as an accomplice to Pete’s crimes.

FALSE PRETENSES and FORGERY. Forgery is a specific intent crime that relates to a material alteration constituting a lie, in a writing, with the purpose to defraud. If the defendant receives property or money for the forged document, then defendant will be liable for the additional crime of false pretenses. Here, Frank used an embezzled check to fraudulently obtain property he had no intent to keep.

RECEIPT OF STOLEN PROPERTY. Where defendant receives stolen property with the knowledge that it has been stolen and with the intent to deprive the owner of the property. If defendant believes that the property is stolen, then that will normally suffice to satisfy the intent element. To the extent that Frank was aware that the $17K check was part of a criminal scheme, he received stolen property from Pete by taking the check.
Victor and Debra were dealers of cocaine, which they brought into the United States from South America in Debra’s private plane. On a trip from South America, while Debra was flying her plane, it crashed in a snowy mountainous area in California. Victor was rendered unconscious in the crash. The cocaine they had obtained in South America was hidden inside Victor’s coat. Debra, who was uninjured, put on Victor’s coat and left to seek help.

Eventually, Debra came to a farmhouse with a truck parked outside. She decided to steal the truck. When she opened its door, however, she found an anti-theft device locked onto the steering wheel. Since this would make it difficult to steal the truck, she decided not to steal the truck after all and called a taxi cab from a roadside telephone a short distance from the farmhouse.

Carl, the cab driver, turned out to be a local drug dealer whom Debra knew. Debra agreed to sell Carl the cocaine she had brought from South America so that he could distribute it. He drove her to his house, where they discussed and finalized the deal. Debra then remembered about Victor, and notified the authorities of the plane crash. By the time the plane wreckage was reached, Victor had died. The authorities concluded that if help had arrived earlier, Victor likely could have been saved.

Carl sold all the cocaine he had obtained from Debra. Unbeknownst to either of them, in South America a strong chemical had been sprayed on the plants that were used to produce the cocaine. As a result, after using the cocaine twenty of the people who purchased the cocaine became seriously ill and all died. Carl has fled the jurisdiction.

What crimes, if any, has Debra committed, and what defenses might she assert? Discuss fully.
MODEL ANSWER

CRIMES AND DEFENSES OF DEBRA.

SOLICITATION. Solicitation occurs where one requests or encourages another to commit a crime, whether or not the other person agrees to commit the crime, and even if the other person refuses to commit a crime. Here, either Debra or Victor asked the other to commit a crime.

MERGER. The crime of solicitation merges into conspiracy. The crime of attempt merges with the completed crime. Conspiracy does not merge with the completed crime.

CONSPIRACY I with Victor and Debra. A conspiracy is an agreement between two or more defendants, to do either an unlawful act or a lawful act by unlawful means. Debra and Victor flew Debra’s private plane, picked up illicit drugs, and transported the illegal drugs back to the US.

CRIMINAL AGREEMENT. Import Illegal Drugs and Sell Them. There must be a joint agreement for the pursuit of unlawful ends. However, a strict meeting of the minds is not necessary, just a communication to each defendant in some manner that communicates an intention to pursue a joint crime. Circumstantial evidence, which strongly suggest a criminal plan, may be used. The fact that Victor had drugs with him, which were later sold by Debra for money, strongly indicates that their ultimate goal was to sell illicit drugs in the US.

ACT IN FURTHERANCE. The common law states that a conspiracy is complete at the time of an agreement. However, about half of the states now require that there be an act in furtherance of the conspiracy in addition to the agreement. There were a number of acts in furtherance of the conspiracy here, including transportation of the illicit drugs into the US.

IMPORTATION OF ILLEGAL DRUGS. A crime will normally require a mens rea and an actus reus. We are not told what the specific requirements are of drug importation with the intent to distribute. However, it is likely that Debra had a sufficient intent, mens rea, because she later sold the drugs. Additionally, it was her plane that took the drugs into the US, therefore, she would have the requisite criminal act, actus reus.

LARCENY OF COAT AND COCAINE. Larceny is a specific intent crime and is the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive them thereof. The cocaine they had obtained in South America was hidden inside Victor’s coat. Debra, who was uninjured, put on Victor’s coat and left to seek help.

SPECIFIC INTENT TO DEPRIVE. Larceny is a specific intent crime, and defendant must have the intent to permanently deprive the rightful owner of the property at the time of the taking of the property, and this intent will exist if defendant intends to use the property in such a manner or for such a duration that the owner would be deprived of a significant portion of the
chattel’s economic value. There is no indication that Debra intended to permanently deprive Victor of his coat.

CONTINUING TRESPASS. Where defendant takes someone’s property without permission but intending to return it, but then changes their mind and keeps the property, intent for larceny will exist. Here, Debra sold the cocaine, and never returned the coat. Therefore, here intent to deprive Victor may be shown through a continuing trespass.

ATTEMPTED LARCENY OF TRUCK. We are told that Debra intended to steal the truck, therefore she would have the specific intent necessary of attempted larceny. When she opened its door, however, she found an anti-theft device locked onto the steering wheel. Since this would make it difficult to steal the truck, she decided not to steal the truck after all and called a taxi cab from a roadside telephone a short distance from the farmhouse. However, if the anti-theft device had not been on the steering wheel, it is likely that she would have taken the truck. Therefore, under the proximity approach, the equivocality test, and the MPC substantial step test, she would have taken a sufficient act to constitute an attempted larceny.

DEFENSES.

IMPOSSIBILITY. The ant-theft device made it impossible for Debra to steal the truck. However, factual impossibility is never a viable defense.

RENUNCIATION. Here, she walked away of her own volition, and called a cab. However, she only walked away when she found the anti-theft device, thus her withdrawal was not voluntary.

MURDER.

HOMICIDE. Victor died after the plane crash.

ACTUAL CAUSE. But for Debra’s failure to provide assistance, Victor would still be alive.

PROXIMATE CAUSE. Proximate cause looks at whether the death of victim was reasonably foreseeable to defendant. Here, Victor was rendered unconscious as a result of the plane crash, and the authorities concluded that if help had arrived earlier, Victor likely could have been saved. Therefore, Debra’s inaction is the proximate cause of Victor’s death.

DUTY TO AID OR RESCUE. There normally is not a duty to aid or rescue one in peril, unless there is a special relationship, defendant created the peril, or defendant sought to assist victim and left them in a worse condition. Here, Debra had a special relationship with Victor, because she was the pilot of her plane and Victor was a passenger. Also, since it was Debra’s plane which crashed, she created the peril that led to Victor’s death.

MALICE.

1. INTENT TO KILL. Debra did not have a specific intent to kill Victor.
2. FELONY MURDER. A felony murder occurs when a death takes place during the perpetration of an independent felony. The independent felony, here, would be importation of cocaine. It is unclear when the felony ended. Debra continued to have the cocaine on her person right up until the time that Victor died, so she had apparently not reached a safe harbor until after his death.
3. **INTENT TO CAUSE SERIOUS BODILY HARM.** Debra did not have an intent to cause bodily harm to Victor.

4. **DEPRAVED HEART.** Where defendant evinces a reckless disregard for the life of another. Here, Debra left Victor in the plane for a significant period of time, on a snow-covered mountain, and without his coat. It is likely that the cold weather held expedite the demise of Victor. Debra could have called an ambulance when she called for a cab, but she left Victor alone to die. Therefore, she acted with a depraved heart / reckless disregard for the life of Victor.

**DEGREES OF MURDER.**
To the extent that drug importation is statutorily listed as a dangerous felony, Debra could be convicted of first-degree felony murder. Also, the drug importation was enacted in a dangerous way, by flying secretly over snow-covered mountains. If Debra is not convicted of first-degree murder, she may be convicted of second-degree felony murder or second-degree depraved heart murder.

**DEFENSES.**
- **NECESSITY.** Debra was importing drugs for money, and she apparently left the plane to seek help. However, financial necessity is not a viable defense, and she did not immediately seek help for Victor.

- **INVOLUNTARY / GROSS MANSLAUGHTER.** Involuntary manslaughter occurs when defendant’s grossly negligent actions result in the accidental death of victim.

- **MISDEMEANOR-MANSLAUGHTER RULE.** Where a death occurs by accident during the commission of a misdemeanor, during a non-inherently dangerous felony, or during the commission of some other unlawful act which may relate to a local ordinance or an administrative regulation, the unlawful act itself is treated as a substitute for gross negligence, and defendant may be tried for involuntary manslaughter. Here, Debra was in the process of importing illegal drugs. Therefore, the fact that Victor’s death took place during the importation of the drugs, indicates that Debra was grossly negligent under the misdemeanor-manslaughter rule.

  *Malum in se.* Where the requirement of proximate cause is suspended, because the violation is dangerous in itself, and thus a causal relationship is inherent in the act. Here, proximate cause would exist, because the violation of drug importation is inherently dangerous.

**SOLICITATION OF CARL.** *Supra.* The facts state that Debra agreed to sell cocaine to Carl, therefore, it appears as if Carl solicited Debra.

**MERGER.** Solicitation merges with conspiracy.

**CONSPIRACY II with Carl and Debra.** *Supra.*

**AGREEMENT.** Debra went over to Carl’s house to finalize the criminal deal.
SCOPE OF CONSPIRACY. Under a Chain conspiracy, there is a distribution chain, whereby those who join the conspiracy at a later date will be responsible for the earlier actions. Here, the illegal distributive chain of cocaine distribution was continued through the new agreement with Carl and Debra.

PINKERTON RULE. Under Pinkerton Rule jurisdictions, Debra would be liable for any criminal acts in furtherance of the original target crime. Therefore, she may be liable for the deaths of the twenty people who died because of the drug deals.

ACCOMPlice LIABILITY. One who generally agrees and cooperates to aid, abet, assist or encourage another in the carrying out of a crime, and who has the mental state necessary for the specific crime, because they intend or desire the criminal result. Here, Debra aided and abetted Carl by selling the poisonous cocaine to Carl.

MURDER. Supra.

HOMICIDE. Twenty people who purchased the cocaine became seriously ill and died. As long as the deaths took place within a year and a day after using the drugs, Debra may be held liable for the deaths.

ACTUAL CAUSE. But for Debra selling the drugs to Carl, the twenty people would still be alive. Carl sold the drugs to the drug users, however, Debra will be seen to be a substantial factor in actual causation.

PROXIMATE CAUSE. Supra. Debra apparently did not know that a dangerous pesticide had been used on the cocaine. However, it is likely that a drug grower will do a number of illegal things to increase their profit. Also, all of the people who took the drugs, were engaged in criminal activity by taking cocaine. However, the third party criminality was foreseeable, because the intent of Debra in selling the drugs to Carl was for Carl to illegally distribute the drugs. Therefore, Debra’s actions would be the proximate cause of death.

MALICE. FELONY MURDER. Supra. Here, the independent felony is distribution of cocaine. It is unclear whether any, or all, of the deaths took place during the perpetration of the felony.

DEPRAVED HEART. Supra. Anyone who sells a potentially dangerous illicit drug in order to make money, can be seen to have acted with a reckless disregard for the lives of others.

DEGREES OF MURDER. To the extent that Debra is held liable under felony murder, a first-degree murder charge is possible, and a second-degree murder charge is possible under deprave heart malice.

INVOLUNTARY / GROSS MANSLAUGHTER. Supra. Here, the act of selling illicit drugs to another with the intent to distribute the drugs, would be seen as grossly negligent.
MISDEMEANOR-MANSLAUGHTER RULE. Supra. Selling illicit drugs is at least a misdemeanor, which would help establish Debra’s gross negligence.

Malum in se. Selling drugs is a dangerous activity, and causation would exist, here.

DEFENSES.
MISTAKE. Debra did not know about the dangerous pesticide, however, she did know she was engaged in criminal activity.
NECESSITY. To take truck to rescue Victor.
Angela, Brian and Carter were at Angela’s house, drinking beer. They wanted to order a pizza and have it delivered, but they did not have enough money to pay for it. Carter suggested they order the pizza and grab it from the pizza delivery person without paying. Brian told Angela to call the pizza parlor. She did so and ordered a pizza, knowing she could not pay for it. Brian and Carter waited outside the house.

When the delivery person arrived with the pizza, Carter pulled a gun out of his jacket pocket. Brian had no idea Carter was carrying a gun. Carter fired the weapon into the delivery person’s vehicle but did not hit anyone. Carter told Brian to grab the pizza and run. Brian was shocked by Carter’s actions and did not move. Carter turned the gun on Brian and told him, again, to grab the pizza and run. Brian then grabbed the pizza, and Carter and Brian fled the scene. Brian and Carter returned to Angela’s house through the back door and all of them ate the pizza. Later, the police arrested Angela, Brian and Carter.

With what crimes, if any, can Angela, Brian and Carter reasonably be charged and what defense(s), if any, can each of them reasonably assert? Discuss.
I. CRIMES AND DEFENSES OF ANGELA.

CONSPIRACY. A conspiracy is an agreement between two or more defendants, to do either an unlawful act or a lawful act by unlawful means. Here, Angela, Brian and Carter had no money for pizza, yet desired to get some pizza through unlawful means.

CRIMINAL AGREEMENT. There must be a joint agreement for the pursuit of unlawful ends. However, a strict meeting of the minds is not necessary. Here, the three friends gathered together, and decided to order a pizza, and grab it from the pizza delivery driver. Therefore, we have a criminal agreement.

ACT IN FURTHERANCE. About half of the states now require that there be an act in furtherance of the conspiracy in addition to the agreement. When Angela called for the pizza, she enacted an act in furtherance.

CO-CONSPIRATORIAL LIABILITY. As a co-conspirator, Angela will be liable for all target crimes, even if she is not the principal. Here, she will be liable for the larceny of the pizza.

PINKERTON RULE. In some jurisdictions Angela will be liable for additional crimes that are committed in addition to the original criminal objective, but which are still in furtherance of the criminal plan and which are foreseeable crimes. Angela wanted some pizza, and concocted a plan with her friends to take a pizza from a pizza delivery driver. Such a taking with force is a robbery. A robbery is a dangerous event, and a number of other crimes are often attendant to such a crime, such as assault and battery, which Angela will be liable for.

ACCOMPlice. One who generally agrees and cooperates to aid, abet, assist or encourage another in the carrying out of a crime, and who has the mental state necessary for the specific crime, because they intend or desire the criminal result. An accomplice will be guilty of the substantive crimes they assisted or encouraged. Angela aided and abetted Brian and Carter, by making a phone call for the pizza, and by letting them back in her house after they had robbed the pizza.

RECEIPT OF STOLEN PROPERTY. Where defendant receives stolen property with the knowledge that it has been stolen and with the intent to deprive the owner of the property. Knowing the pizza was stolen, Angela nevertheless received the pizza, and ate it.

VOLUNTARY INTOXICATION. We are told that the defendants were drinking beer when they formulated their specific criminal intent. To the extent that Angela was intoxicated before she formulated her criminal intent for any specific intent crime, her liability will be obviated due to lack of specific intent.

II. CRIMES AND DEFENSES OF BRIAN.
**CONSPIRACY.**

**CRIMINAL AGREEMENT.** *Supra.*

**ACT IN FURTHERANCE.** Brian told Angela to call the pizza parlor, therefore, there was an act in furtherance.

**CO-CONSPIRATORIAL LIABILITY.** Brian will be held co-conspiratorially liable for the robbery, in which Carter was the principal.

**PINKERTON RULE.** Brian will be held liable in some jurisdictions for the other crimes which were reasonably foreseeable in enacting the robbery, such as assault and battery.

**WITHDRAWAL.** Brian stood aghast as Carter wielded a gun, because Brian did not know that Carter had brought a gun to the criminal scene. However, Brian did not communicate his desire to withdraw from the conspiracy to Carter, and Brian did nothing to thwart the criminal objective. Therefore, no withdrawal.

**ACCOMPlice.** *Supra.*

**Larceny v. Robbery.** *Infra.* Brian acted to take and carry away the personal property of the another, the pizza from the pizza delivery man. He physically snatched the pizza, which would have indicate that the larceny took place through force. Additionally, since Brian ate the pizza, we have an indication that he had the requisite intent to permanently deprive the rightful owner of the pizza. Further, he had not paid for the pizza, so he did not have the right to take the pizza, and it was a trespassory taking.

**Battery.** A battery occurs where defendant causes an offensive touching or bodily injury to victim, with the intent to cause a harmful or offensive touching. Here, Brian snatched the pizza from the pizza delivery man, and therefore, intentionally caused the pizza delivery man to experience a harmful or offensive contact, to something connected to his person, the pizza.

**DureSS.** Defendant acted because of significant threats or force of another person, such that defendant feared imminent death or harm to themselves or family members. Here, it is apparent that Brian objected to Carter’s use of a gun in enacting the robbery. However, upon the sight of Brian standing still, Carter pointed a gun at Brian, and told Brian to take the pizza and run. Carter had just pointed the gun into the car, and shot a gun into the delivery man’s car. The force of a loaded gun pointed at someone, would be likely to overcome the free will of most people. Duress will be a viable defense for Brian.

**VOLUNTARY INTOXICATION.** *Supra.*

**III. CRIMES AND DEFENSES OF CARTER.**

**Solicitation.** Solicitation occurs where one requests or encourages another to commit a crime, whether or not the other person agrees to commit the crime, and even if the other person refuses to commit a crime. Carter suggested to Brian that they should take the pizza without paying for it, therefore, Carter could reasonably be charged with solicitation.
**MERGER.** The crime of solicitation merges into conspiracy.

**CONSPIRACY.**

**CRIMINAL AGREEMENT.** Supra.

**ACT IN FURTHERANCE.** Angela’s telephone call is an act in furtherance of the conspiracy that is attributable to all in the conspiracy.

**AGGRAVATED ASSAULT.** Assault is normally a specific intent crime when there is an attempted battery. The defendant must engage in some overt act that is intended to arouse a reasonable apprehension of bodily harm in another. Here, Carter brandished a gun at the delivery man, and at Brian, and also fired a shot into the car. Both the delivery man and Brian would have been fearful of an imminent battery.

**BATTERY.** Supra. When Carter shot a gun into the taxi, the taxi would be considered an extension of the

**LARCENY V. ROBBERY.** Larceny is a specific intent crime and is the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive them thereof. Robbery is a specific intent crime which includes the elements of larceny, but with the addition that the taking is from the person or presence of the victim using force or threat of force.

**INTENT TO PERMANENTLY DEPRIVE.** Larceny is a specific intent crime, and defendant must have the intent to permanently deprive the rightful owner of the property at the time of the taking of the property. Here, Carter and the others ate the pizza, thus indicating an intent to permanently deprive the pizza delivery man of his pizza.

**TRESPASSORY TAKING AND CARRYING AWAY.** In conjunction with Brian, Carter carried away the pizza, without paying for it.

**THROUGH FORCE OR THREAT OF FORCE.** The taking must be committed through force or threat of force. A threat of harm will suffice if victim was placed in apprehension of harm. This will take place even if victim is easily frightened or intimidated. Here, Carter had Brian take the pizza, after Carter had fired a shot into the car. The gunshot would indicate that force was used when unlawfully taking the pizza, and therefore we have a robbery.

**ATTEMPTED MURDER of Pizza Delivery Driver.** Where defendant intends to commit a specific intent crime, but does not actually complete the crime. Attempt will be present if defendant enacts an act in furtherance of that specific intent which goes beyond mere preparation.

**SPECIFIC INTENT TO KILL.** Attempted murder is a specific intent crime, therefore, the only of the four malice states which will support a charge of attempted murder, is intent to kill murder. Here, a deadly weapon, a gun, was used in a manner consistent with its causing the death of another. Therefore, we can support intent to kill under the deadly weapon doctrine.

**ACT V. MERE PREPARATION.**
PROXIMITY TEST. Based on how close defendant came to completing the crime, there must be at least a substantial step taken by defendant towards completion of the crime, and attempt will normally be found where defendant has taken the last proximate act to bring about the criminal result. Here, if Carter had aimed in a slightly different direction, the bullet would have hit the pizza delivery man.

EQUIVOCALITY TEST. Based on where defendant’s conduct unequivocally manifested a criminal intent, and if it did, criminal intent will be found even if the actual completion of the crime is many steps away. Here, Carter enacted the crime of robbery with a deadly weapon, indicating that he would have continued in his criminal objective until he succeeded.

MPC SUBSTANTIAL STEP TEST. Based on whether there is an act or omission which constitutes a substantial step towards completion of the crime, and which is strongly corroborative of defendant’s criminal intent. Here, Carter took a substantial step when he shot the gun into the car.

DEFENSE.
WITHDRAWAL. Where defendant voluntarily abandons their attempted crime before completion of the substantive crime, this may be a viable defense to attempt. Carter left the scene without shooting the pizza delivery man, however, he had already completed the robbery, therefore, his withdrawal was not voluntary.

ATTEMPTED MURDER of Brian.

SPECIFIC INTENT TO KILL. Carter did not fire the gun at Brian, he only pointed the gun at Brian.

ACT V. MERE PREPARATION.
PROXIMITY TEST. Carter was very close to completing the crime.
EQUIVOCALITY TEST. Since Carter did not pull the trigger of the gun, he did not evince an intent to kill.
MPC SUBSTANTIAL STEP TEST. Carter may have taken a substantial step when he pointed the gun at Brian.

RECEIPT OF STOLEN PROPERTY. Supra.

VOLUNTARY INTOXICATION. Supra.
Deanna, a single mother of ten-year old Vickie, worked as a cashier at the local grocery store. Deanna had recently broken off her relationship with Randy, a drug addict who had been violent toward her on several occasions. One morning Randy was in the parking lot outside the grocery store and telephoned Deanna at work. Randy told Deanna that a friend of his was outside Vickie’s school. Randy said that if Deanna did not immediately bring $1,000 to Randy in the parking lot, he would call and direct his friend to harm Vickie.

Over the next several minutes, Deanna put in her pants pocket $400 from her cash register at the grocery store. She then went to the manager’s office, where she had heard there was a safe containing a large amount of cash. No one else was in the manager’s office.

Alma, an assistant manager who works at the cash register next to Deanna’s, saw how upset Deanna was after the phone call. Alma followed Deanna to the manager’s office, where she found Deanna looking through desk drawers. Deanna told Alma that she was looking for the keys to the safe because she “needed some papers” from it. Alma smiled, told Deanna where the keys were, and then said, “You don’t have to lie to me, Deanna. I’ll be outside keeping watch for you.” Deanna replied, “Thank you so much, Alma, I am in a desperate situation right now and will return the money to the safe as soon as I can.”

As Alma stood in the hallway outside the manager’s office, Deanna opened the safe, removed $600, relocked the safe, and returned the key to its location. Deanna then brought $1,000 to Randy in the grocery store parking lot.

What crimes, if any, can Deanna and Alma reasonably be charged with, and what defenses might each assert? Discuss.
MODEL ANSWER

I. CRIMES AND DEFENSES OF DEANNA.

LARCENY V. EMBEZZLEMENT of $400. Larceny is the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive them thereof. Embezzlement is the fraudulent conversion of the property of another by one in rightful possession of the property.

LOW LEVEL EMPLOYEE V. HIGH LEVEL EMPLOYEE. Here, Deanna was working her cash register at the time that she took $400. Inasmuch as she had possession of the cash register and the contents thereof, at the time of her taking, the taking would most likely be characterized as an embezzlement, rather than a larceny.

CONVERSION. She took the money for her own use, and not for the use of the owner of the store, and she took it while operating within a fiduciary capacity as an employee working a cash register.

INTENT TO DEPRIVE. Here, Deanna had use of the cash register, and may have taken money out of the register for different reasons, such as to get change. Here, however, Deanna took the money from the cash register, because she intended to use the money to give to Randy. Therefore, her intent was not consistent with her work obligations to her employer, and even though Deanna was in rightful possession at the time of the possession, her intent was to wrongfully deprive the owner of the owner’s personal property.

SOLICITATION. Solicitation occurs where one requests or encourages another to commit a crime, whether or not the other person agrees to commit the crime, and even if the other person refuses to commit a crime. Here, when Deanna asked Alma for the keys to the safe, while knowing that Deanna wished to wrongfully take money from the safe, Deanna was asking Alma to commit an unlawful act.

MERGER. The crime of solicitation merges into conspiracy.

CONSPIRACY. A conspiracy is an agreement between two or more defendants, to do either an unlawful act or a lawful act by unlawful means.

IMPLIED AGREEMENT. There must be a joint agreement for the pursuit of unlawful ends. However, a strict meeting of the minds is not necessary, just a communication to each defendant in some manner that communicates an intention to pursue a joint crime. Here, Alma smiled when Deanna asked Alma for the keys, and Alma replied that Alma knew what Deanna was doing, and further, that Alma would serve as a lookout. Therefore, we have an implied agreement.

CRIMINAL ACT IN FURTHERANCE. The criminal act was to take money from the safe.
ACT IN FURTHERANCE. The act in furtherance of the conspiracy took place when Deanna found the key to the safe after the conspiratorial agreement, and which would also be attributable to Deanna.

COMMON LAW BURGLARY. Common law burglary is the breaking and entering of the dwelling house of another, at night, with the intent to commit a felony therein. Here, we have a store and not a house, and therefore there would be no common law burglary.

MODERN STATUTORY BURGLARY. Modernly, burglary is defined as the unauthorized entry of the protected structure of another.

INTENT TO COMMIT CRIME. Here, we are told that Deanna left her work station needing an extra $600, and thus before she entered the room where the safe was located, she had an intent to commit a larceny.

INNER DOOR DOCTRINE. The inner door doctrine applies where a room or a part of a larger protected structure is broken into and entered. Here, we have both an inner office, and a safe, either of which may have been broken into.

LARCENY. Keys and the $600 from safe.

INTENT TO DEPRIVE.

KEYS. Deanna returned the keys immediately, and therefore she did not have the intent to keep the keys.

$600. Deanna said that she wanted to return the $600 from the safe, however, she almost immediately gave the money to Randy.

TRESPASSORY TAKING. While Deanna had rightful possession of the cash register at the time of the earlier taking, the taking of $600 occurred from the safe, which Deanna did not have rightful possession to. Therefore, when she took the $600 from the safe, the taking would be characterized as a trespassory taking, and she would be charged with larceny.

DEFENSES.

CONSENT / CONDONATION. Alma, a supervisor, appeared to condone the criminal activity of Deanna, thus providing tacit consent to Deanna’s activity. However, Alma was not the owner of the store, Alma was just a supervisor. Alma’s actions could more reasonably be characterized as part of a criminal plan with Deanna. Therefore, Alma did not consent to the criminal activity, rather, Alma was a co-conspirator in the activity.

DURESS. Duress is where the defendant acted criminally due to threatened serious harm or death to himself, his family, or another person, and the defendant reasonably believed the crime needed to be committed due to the immediate threat in order to avoid the harm. Here, Deanna was threatened with immediate harm to her child, by Randy, a person Deanna knew to be dangerous. Surely, Deanna could have informed the police or school officials, but Randy also said he had a friend outside of the school where Deanna’s child was attending, indicating that
Randy could take immediate action to harm Deanna’s child. A drug addict is often capable of violent activity, and therefore Deanna would have a viable defense of duress.

DEFENSE OF OTHERS. To some extent, Deanna was acting to defend her child.

II. CRIMES AND DEFENSES OF ALMA.

CONSPIRACY. Supra. Here, Alma may state that Alma had no criminal intention to be part of a conspiracy. However, Alma stood watch as Deanna entered the safe and took $600, which is a larceny, then failed to report the taking of the money. Additionally, both parties discussed their criminal objective before Deanna took the money from the safe. A precise agreement is not needed for a conspiracy, just an acknowledgment that the parties intent to do a criminal act, which is present, here. Finally, if this is a jurisdiction which follows the MPC unilateral agreement rule, then only one guilty mind is necessary for a conspiracy, which we have.

PINKERTON RULE and SCOPE OF CONSPIRACY. Once the conspiracy was formulated, in some jurisdictions Alma will be liable for any acts that took place which were reasonably foreseeable to further the conspiracy. Here, the original embezzlement would be outside of the scope of the conspiracy, because the embezzlement took place before the criminal agreement. However, the burglary may have taken place after the criminal agreement, and Alma would be liable for the burglary in Pinkerton rule jurisdictions.

ACCOMPlice. Alma aided and abetted Deanna in the commission of a crime, when Alma looked the other way when Deanna wrongfully took money from the safe, and when Deanna lied about her real intent for getting into the safe. Alma knew that Deanna had a criminal motive and did nothing to stop Deanna, rather, Alma, served as a lookout in order to further Deanna’s criminal objective, therefore Alma was an accomplice.

ACCESSORY and MISPRISON. Alma helped Deanna, and did not report the crime, thus Alma acted as an accessory to the crime, and may also be charged with misprision for failure to report the crime.
Anna owned a business and stored insured business inventory at a warehouse owned by Bob. Anna was experiencing financial problems and needed funds to pay her creditors. Bob, after hearing of Anna’s money problems, suggested that they hire someone to burn down the warehouse since he was planning to build condominiums on the warehouse property and could use the insurance proceeds for the construction of the condominiums. Bob told Anna that he knew someone who would handle burning the warehouse in return for a percentage of the insurance proceeds. Anna agreed and Bob contacted Cindy to burn down the warehouse. Cindy obtained the location of the warehouse from Bob and proceeded to set fire to the warehouse. Unbeknownst to Anna, Bob or Cindy, a homeless person, Daryll, was living in the warehouse. Daryll died as a result of the fire.

After hearing about Daryll’s death, Anna and Bob decided not to make any insurance claims. After an investigation Anna, Bob and Cindy were arrested.

With what crimes, if any, might Anna, Bob and Cindy be charged and what defenses, if any, could each assert? Discuss.
MODEL ANSWER

I. CRIMES AND DEFENSES OF ANNA

CONSPIRACY. A conspiracy is an agreement between two or more defendants, to do either an unlawful act or a lawful act by unlawful means. There is no merger with the target crime, but solicitation does merge with conspiracy.

CRIMINAL AGREEMENT. There must be a joint agreement for the pursuit of unlawful ends. However, a strict meeting of the minds is not necessary, just a communication to each defendant in some manner that communicates an intention to pursue a joint crime.

Here, the criminal plan between Anna and Bob was that they would hire someone to burn down the warehouse, since Bob was planning to build condominiums, on the warehouse property and could use the insurance proceeds for the construction of the condominiums.

Therefore, there is a criminal agreement.

ACT IN FURTHERANCE. The common law states that a conspiracy is complete at the time of an agreement. However, about half of the states now require that there be an act in furtherance of the conspiracy in addition to the agreement. It need not be a major act, and a minor act of mere preparation will suffice. However, once an act is taken, it may be attributable to all in the conspiracy.

When Bob contacted Cindy to burn down the warehouse, this would be an act in furtherance of the conspiracy, which would also be attributable to Anna.

PINKERTON RULE LIABILITY. Where additional crimes are committed in addition to the original criminal objective, but which are still in furtherance of the criminal plan and which are foreseeable crimes, courts are split about the liability of co-conspirators, and about half will attach liability for the additional foreseeable crimes in furtherance of the criminal objective.

Here, it is reasonably foreseeable that other crimes would occur during an arson, such as a murder, or a burglary. Therefore, Anna will be held liable for the additional crimes of Cindy.

ATTEMPTED FALSE PRETENSES / INSURANCE FRAUD. At attempted crime occurs where a defendant intends to commit a specific intent crime, but does not actually complete the crime. Attempt will be present if defendant enacts an act in furtherance of that specific intent which goes beyond mere preparation.
SPECIFIC INTENT TO TAKE MONEY. False pretenses concerns the false representation of a material present or past fact by defendant which causes victim to pass title of their property to defendant. Defendant takes this action while aware that the representation is false and intends to defraud victim. Here, Anna and Bob were planning on mischaracterizing the arson as an accidental burning, so that they could unlawfully receive insurance proceeds on the warehouse. Their specific intent, then, was to deprive another of their property.

ACT V. PREPARATION. When Cindy burned the warehouse at Bob’s direction, a sufficient act had taken place, such that under the proximity test, the equivocality test, or the MPC substantial step test, Anna had moved past the planning stages into the perpetration stage of attempted false pretenses. All Anna and Bob had to do was to submit the fraudulent paperwork, thus, they had taken a sufficient act for attempt to apply.

WITHDRAWAL / RENUNCIATION. As stated above, Anna and Bob did not follow through with the insurance fraud paperwork. However, they only decided not to follow through with the paperwork, after they had found out that Daryl had died as a result of the arson. It is possible that they thought an investigation would reveal their criminal plan, and so they backed out of their conspiracy with the intent not to get caught.

Therefore, Anna’s withdrawal was not voluntary.

FELONY MURDER.

CO-FELON LIABILITY. If two or more felons work together to try to commit a felony, and only one is directly responsible for a killing which occurs during the commission of the felony, most courts will hold all other felons liable for the killing as long as it was a natural and probable result of the felony. Anna was not directly involved in the death of Darryl. Therefore, she could most likely only be held liable for the murder of Darryl as a co-felon under the felony murder rule. Here, we have three defendants, Anna, Bob and Cindy, involved in potential criminal activity. Since Cindy was more directly involved in the homicide of Darryl, the full murder issue is discussed infra.

FINANCIAL NECESSITY. Where defendant committed crime because of non-human circumstances, and the harm avoided is greater than the harm committed by defendant. Anna was in dire need of money, however, financial necessity is never a viable defense.

MISTAKE OF FACT. Where defendant is lacking the mental state necessary for a crime, and is honest in their perspective. Most applicable to specific intent crimes. Anna was not aware of Daryl’s presence in the warehouse. However, the malice state of felony murder is not predicated on the knowledge of a specific victim, and this defense would not be applicable.
**INVOLUNTARY / NEGLIGENT MANSLAUGHTER.** Involuntary manslaughter occurs where a defendant’s grossly negligent actions result in the accidental death of a victim. Defendant must have disregarded a very substantial danger of serious bodily harm or death to another. Defendant's use of objects such as firearms, which are inherently dangerous, will tend to support gross negligence.

Here, being part of a conspiracy to burn a warehouse, is a grossly negligent activity, because any manner of people could be hurt, including those potentially in the building, and firemen arriving at the scene in an effort to put the fire out.

**ACCOMPlice.** A defendant will be an accomplice to a crime where the defendant agrees and cooperates to aid, abet, assist or encourage another in the carrying out of a crime, and who has the mental state necessary for the specific crime because they intend or desire the criminal result. An accomplice does not actually commit the *actus reus /* criminal act, but will be liable for that criminal act. Words alone may be enough to constitute accomplice liability, if the words constitute encouragement and approval of the crime. Anna aided and abetted in the commission of crimes but putting the criminal objectives and acts of the conspiracy into motion.

**CONCLUSION.** Anna is likely to be charged with conspiracy, attempted false pretenses / insurance fraud, co-felon felony murder liability, and accomplice liability for crimes in furtherance of the target crime of false pretenses.

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**II. CRIMES AND DEFENSES OF BOB.**

**SOLICITATION 1.** Solicitation occurs where one requests or encourages another to commit a crime, whether or not the other person agrees to commit the crime, and even if the other person refuses to commit a crime. Here, Bob asked Anna to commit the crime of insurance fraud. Therefore, this was a solicitation.

**SOLICITATION 2.** Bob also asked Cindy to help burn the warehouse.

**MERGER.** The crime of solicitation merges into conspiracy.

**CONSPIRACY.** *Supra.*

**ACCOMPlice.** Bob aided and abetted Cindy by telling her which warehouse to burn, and, giving her money to enact the arson.

**ATTEMPTED FALSE PRETENCES / INSURANCE FRAUD.** *Supra.*
ARSON. *Infra.*

MURDER. *Supra.*

**CONCLUSION.** Bob is likely to be charged with conspiracy, attempted false pretenses / insurance fraud, co-felon felony murder liability, and accomplice liability for crimes in furtherance of the target crime of false pretenses.

**III. CRIMES AND DEFENSES OF CINDY.**

**BURGLARY.** Burglary is a specific intent crime. Common law burglary is the breaking and entering of the dwelling of another, at night, with the intent to commit a felony therein. Modernly, most states have relaxed the common law requirements, and the most important elements now include breaking and entering with the intent to commit a crime therein.

- **COMMON LAW.** At common law, the warehouse would not have been considered a dwelling house of another, and there would be no burglary.

- **MODERNLY.** Modernly, any protected structure will be considered a sufficient structure. Here, we are told that Cindy went to the warehouse with the intent to commit an arson, a felony. If Cindy made an opening where none existed, and entered the warehouse, she would have had the requisite prior intent for burglary, and she could reasonably be charged with burglary.

**ARSON.** Arson is the burning of the dwelling house of another with malice.

- **MALICE.** Defendant must have an intent to actually burn the dwelling house of another, or defendant have acted with willful and wanton misconduct creating a plain and substantial likelihood that a protected structure would be burned. Here, Cindy had the intent to burn the structure, therefore, we have the requisite malice.

- **BURNING.** The burning element requires that some amount of charring be done to the physical structure, and must be more than smoke and slight damage. Modernly, the dwelling house requirement has been expanded to include other structures such as warehouses. We are told that the warehouse was set on fire, and continued to such an extent that Darryl was killed as a result of the fire. Therefore, Cindy could reasonably be charged with arson.

**MURDER.** Murder is the unlawful killing of another with malice.

- **HOMICIDE.** A homicide is an unlawful death, and here we are told that Daryl is dead.
ACTUAL CAUSE. But for starting the fire, Daryl would still be alive.

PROXIMATE CAUSE. Proximate causation considers whether the defendant could foresee that their actions would result in a foreseeable death to the victim. Unforeseeable, independent intervening events could be considered superseding events, and thereby break the chain of causation for defendant. However, dependent intervening events must be both unforeseeable and abnormal, in order to be considered superseding.

It is foreseeable that when one starts a fire in a warehouse, any number of people may be hurt as a result. Here, we are only told that Daryl died as a result of the fire, thus, he would be considered a foreseeable victim, because fires are dangerous events that may hurt many people, that may not be known to the defendant.

MALICE.

INTENT TO KILL. Intent to kill malice exists where the defendant evinces an intent to kill the victim through their conduct, including circumstantial evidence. Intent to kill may also include actions which are substantially certain to cause the death of the victim.

Not applicable.

FELONY MURDER. Where a homicide occurs during the commission of an independent felony. Here, the independent felony is arson. We are told that Daryl died as a result of the fire. If the jurisdiction indicates that a crime of arson is not complete until the fire is completed, then Daryl will have died during the commission of a felony.

INTENT TO CAUSE GRIEVOUS BODILY HARM. Intent to cause grievous or serious bodily injury, will be an applicable malice state where the defendant acts with knowledge that their actions pose a significant threat to the victim, yet the defendant continues with their life-threatening actions.

Not applicable.

DEPRAVED HEART RECKLESS INDIFFERENCE. A defendant may act with a depraved heart / reckless indifference to the value of human life, when such a defendant consciously disregards the fact that their actions of extreme recklessness pose a substantial risk of harm or death to another person.

Cindy started a fire, which indicates that she had a reckless disregard for the lives of others, because a fire may potentially harm many people.

DEGREES OF MURDER. An arson is an inherently dangerous felony, and capable of a first degree murder charge. Alternately, if Cindy is charge with depraved heart murder, the highest murder charge is second degree murder.
**IN VOLUNTARY / NEGLIGENT MANSLAUGHTER.** Involuntary manslaughter occurs when defendant’s grossly negligent actions result in the accidental death of victim. Here, it is grossly negligent to commit arson.

**CONSPIRACY.** *Supra.*

**ACCOMPLICE LIABILITY.** *Supra.*

**CONCLUSION.** Cindy is likely to be charged with arson, burglary, murder and conspiracy.
Debbie and Jon met in college and dated each other for two years. Debbie loved Jon very much and wanted to marry him. Jon always told her that he loved only her, but he told her he thought they were too young and should not rush into marriage.

One day as Debbie was putting gasoline into her car at the gasoline station, she looked into the car parked next to hers. She was enraged to see her best friend Vickie passionately kissing Jon. Debbie walked over to the car, with the fuel dispenser in her hand, and started yelling at Vickie and Jon. Vickie said, “I’m sorry you had to find out this way. Jon and I love each other and are going to get married.”

Debbie was enraged and shouted, “You’re not going to marry anyone, you slime!” She then pointed the gasoline dispenser at Vickie and sprayed her with gasoline, soaking her hair and clothes. Jon reached over to try to help Vickie. Unfortunately, he was smoking a cigarette. The cigarette ignited the gasoline and Vickie burned to death.

What offense or offenses has Debbie committed and what defenses, if any, would she assert? Discuss.
CRIMES AND DEFENSES OF DEBBIE.

ASSAULT. Assault is normally a specific intent crime, when there is an attempted battery. The defendant must engage in some overt act that is intended to arouse a reasonable apprehension of bodily harm in another. However, the mere creation of an imminent apprehension of bodily harm, will be considered only a general intent crime. The use of threatening words by the defendant, without more, will not constitute an assault. Rather, assault requires some form of overt physical gesturing. There is no merger between assault and battery.

Here, Debbie was enraged at the pending marriage between Jon and Vickie, and Debbie shouted at Vicki, “You’re not going to marry anyone, you slime!” Debbie then pointed the gasoline dispenser directly at Vickie and sprayed her with gasoline, soaking her hair and clothes. The fact that Debbie was enraged is of no import, because assault is not predicated on the anger of a defendant. However, Vickie was aware of the above-stated words and actions of Debbie, and would have been reasonably afraid that Debbie would carry forth the action to spray Vickie with gasoline, given their close proximity to each other.

Therefore, Debbie could reasonably be charged with assault.

BATTERY. Battery is a general intent crime. A battery occurs where the defendant causes an offensive touching or bodily injury to the victim, with the intent to cause a harmful or offensive touching. A battery can also be considered a completed assault.

Here, as stated above, Debbie sprayed Vickie with gasoline, soaking Vickie's hair and clothes. Gasoline is a flammable liquid, and is therefore very dangerous. It also smells bad, and would have likely ruined Vickie's clothes. Therefore, Vickie suffered a harmful or offensive touching, that was intended by Debbie, and Debbie could reasonably be charged with battery.

MURDER.

HOMICIDE. A homicide occurs when a human victim is killed by another human being. A dead person is determined either through lack of brain activity or lack of a heart beat. Here, we are told that Vickie died as a result of burning.

ACTUAL CAUSE. BUT FOR TEST. Under the but for test, but for the actions of the defendant to harm the victim, the victim would not have died. Here, but for Debbie dousing Vickie with gasoline, Vickie would not have caught fire and died.
SUBSTANTIAL FACTOR TEST. Under the substantial factor test for actual cause, where two or more causes interact together and cause the death of the victim by shortening the life of victim, actual cause will exist. Here, Jon reached over to try to help Vickie after Vickie had been doused with gasoline, but while he was still holding a lighted cigarette, thus directly igniting the gasoline. Thus, Jon helped to create the conditions of Vickie's death, but Vickie's death could also not have taken place without the actions of Debbie to douse Vickie with gasoline.

PROXIMATE CAUSE. Proximate causation considers whether the defendant could foresee that their actions would result in a foreseeable death to the victim.

FORESEEABILITY. Pre-existing conditions of victim which lead to increased harm leading to death, extreme fright or stress leading to death, an unintended victim who is killed under transferred intent, and slight deviations in the types or modalities used which result in death, will all still indicate that the defendant is the proximate cause of death to the victim.

Here, the use of gasoline was directed at Vickie, as a foreseeable victim. The likely mode and extent of harm, would likely be a severe battery and ruined clothes, through dousing with gasoline. However, Debbie was apparently Jon's girlfriend, and she would have known that Jon smoked, and it is common knowledge that gasoline is flammable. Therefore, given the circumstances, the severe resulting injury to Vickie was foreseeable.

INTERVENING EVENTS. Unforeseeable, independent intervening events could be considered superseding events, and thereby break the chain of causation for defendant. However, dependent intervening events must be both unforeseeable and abnormal, in order to be considered superseding, and thus break the chain of the defendant's causation. Bad medical treatment is not enough to be superseding, rather, it must be grossly abnormal medical treatment.

Here, as stated above, Debbie was aware that Jon was a smoker, and she could have seen that he was in the process of lighting up a cigarette, since Debbie was close enough to the car to douse Vickie with gasoline from a gasoline dispenser. Therefore, even though Jon's action to try to save Vickie could be seen as an intervening event, it would not be considered a superseding intervening event, and it would not break Debbie's causal chain.

MALICE.

INTENT TO KILL. Intent to kill malice exists where the defendant evinces an intent to kill the victim through their conduct, including circumstantial evidence. Intent to kill may also include actions which are substantially certain to cause the death of the victim.

Here, Debbie was enraged and shouted, “You're not going to marry anyone, you slime!” She then directly doused Vickie with the gasoline dispenser, while knowing that Jon was a smoker, and being in the vicinity of Jon lighting a cigarette. While dousing with gasoline may not evince a clear intent to kill, the words Debbie spoke, could be construed such that her real motive was to end the life of Vickie, such that Vickie could not marry Jon, or anyone. Therefore, intent to kill malice may be a viable malice state.
FELONY MURDER. A defendant may be charged with felony murder where the victim is killed during the commission of an independent felony by the defendant, and the death was a natural and foreseeable result of the felony. The predicate felony for felony murder must be independent of the killing, otherwise an aggravated battery leading to a death, could result in a felony murder charge. The killing of the victim must take place while the defendant is still in the commission or perpetration of the crime. A defendant who is in the process of escaping the scene of the crime, is still said to still be in the perpetration of the crime.

Here, an aggravated battery could be considered a felony. However, it was the battery itself that caused the death, and there is no independent felony that took place. For instance, if Debbie had been in the process of robbing Vickie, then robbery would have been an independent predicate felony. However, since there is no independent predicate felony, there is no felony murder, here.

INTENT TO CAUSE SERIOUS BODILY INJURY. Intent to cause grievous or serious bodily injury, will be an applicable malice state where the defendant acts with knowledge that their actions pose a significant threat to the victim, yet the defendant continues with their life-threatening actions.

Gasoline is an extremely flammable fluid, and may ignite easily. Debbie did not lightly spray Vickie with gasoline, rather, Debbie thoroughly doused Vickie with gasoline. The thorough dousing indicates an intent to cause serious bodily injury.

DEPRAVED HEART. A defendant may act with a depraved heart / reckless indifference to the value of human life, when such a defendant consciously disregards the fact that their actions of extreme recklessness pose a substantial risk of harm or death to another person.

As stated above, dousing someone with gasoline is an extremely dangerous activity, and evinces a depraved heart, reckless indifference to the life of the person doused with gasoline.

Therefore, Debbie may reasonably be charged with intent to kill malice, intent to cause serious bodily harm malice, or deprived heart malice.

DEGREES OF MURDER.
FIRST DEGREE INTENT TO KILL. Both premeditation and deliberation are required to support a first-degree intent to kill murder charge.

Premeditation. Premeditation consists of some kind of thought or planning activity prior to the action which killed the victim, and which relates to the killing of the victim.

Deliberation. Deliberation requires a cool mind capable of deliberate thought.

Here, Debbie did not go through a long planning stage leading up to her actions in this situation. However, not a lot of time need be taken in the premeditation stage, as long as there was some
kind of planned activity. Here, Debbie specifically pointed the gasoline dispenser at Vickie, and then proceeded to douse Vickie with gasoline, which helped lead to Vickie's death. Also, Debbie was not drunk, and thus possibly had a cool mind capable of deliberate thought.

Therefore, first-degree intent to kill murder is a viable malice state.

SECOND DEGREE MURDER. If a lack of premeditation or deliberation is present, then Debbie may reasonably be charged with second-degree intent to kill murder, intent to cause serious bodily harm murder, or deprived heart murder.

DEFENSES.

INSANITY. The defendant may be found not guilty of an offense through insanity, if they were insane at the time of the commission of the criminal act. Tests which are used to determine insanity include the M’Naghten Rule, the irresistible impulse test, the MPC standard, and the Durham test.

Here, while Debbie apparently acted in an apparently insane manner, there are no facts indicating that she lacked the current ability to understand the nature of her actions.

DIMINISHED CAPACITY. Diminished capacity is a defense where a non-insane defendant suffers a mental impairment, such that they were unable to form the requisite intent for a crime. It is often used to reduce first-degree murder to second-degree murder, through a lack of premeditation.

Here, Debbie thought that she and Jon would going to be married. Suddenly, she found not only that he was cheating on her with Vickie, her best friend, but Debbie also found out that Jon and Vickie planned to get married. This sudden, untoward news, would likely cause many reasonable people to lose control, and thereby temporarily act in a manner that they would not normally act. Diminished capacity is likely a viable defense for Debbie.

VOLUNTARY MANSLAUGHTER. Where mitigating circumstances are present, a defendant may have a murder charge reduced to a voluntary manslaughter charge, which can occur either through the heat of passion defense, or through an imperfect defense.

The Heat of Passion Defense. The defendant may have a murder charge reduced to a voluntary manslaughter charge, if they acted in the heat of passion when taking actions to kill the victim. The requirements for the heat of passion defense are that the defendant must have are:

1. Reasonable Provocation. The provocation must be sufficiently strong that a reasonable person would have lost their self-control or temper. As stated above, Debbie thought that she and Jon would going to be married. Suddenly, she found not only that he was cheating on her with Vickie, her best friend, but Debbie also found out that Jon and Vickie planned to get
married. This sudden, untoward news, would likely cause many reasonable people to lose control, and thereby temporarily act in a manner that they would not normally act.

2. Actual Provocation. The defendant must have actually lost their self-control or temper. Debbie did lose control of herself, and proceeded to douse Vickie with gasoline.

3. Cooling Off Period. The time period between defendant’s discovery of the provoking information and the act of killing the victim must be short enough that a reasonable person would not have had enough time to cool off. Here, the events stated in the fact pattern took place, apparently, in a manner of seconds. Thus, there was no cooling off period

4. No Actual Cooling. The defendant must not personally have cooled off. Debbie did not cool.

IN Voluntary Manslaughter. Involuntary manslaughter occurs where a defendant’s grossly negligent actions result in the accidental death of a victim. Defendant must have disregarded a very substantial danger of serious bodily harm or death to another. Defendant's use of objects such as firearms, which are inherently dangerous, will tend to support gross negligence.

Here, it is grossly negligent to douse someone with a flammable liquid.

ATTEMPTED MURDER of JON. Attempt is a crime where a defendant intends to commit a specific intent crime, and takes some actions to commit the crime, but does not complete the crime. Attempt will be present if the defendant enacts an act in furtherance of the specific intent to commit a crime, that goes beyond mere preparation to commit a crime. The crime of attempt merges with the completed crime.

SPECIFIC INTENT TO KILL. Attempted murder is a specific intent crime, therefore, the only malice state that will support a charge of attempted murder, is intent to kill murder. Here, Vickie could have doused Jon in addition to Vickie, since they were sitting next to each other, yet Debbie did not douse Jon. Therefore, there is no specific intent to kill Jon.

ACT V. PREPARATION. There must be some overt act in furtherance of the criminal objective, that goes beyond mere preparation. There are a number of tests to determine if defendant entered the zone of perpetration through completion of an act in furtherance of the crime that is beyond mere preparation, including the proximity approach, the equivocality approach and the MPC substantial step test.

Here, as stated above, Vickie could have doused Jon in addition to Vickie, since they were sitting next to each other, yet Debbie did not douse Jon, and thus there were no sufficient acts in furtherance of a criminal objective.
CONCLUSION. Debbie will likely be charged with either first-degree intent to kill murder, or second-degree intent to kill murder, intent to cause serious bodily harm murder, or depraved heart murder, along with assault and battery.
Able was low on money and short on credit, so he borrowed money from a loan shark who was associated with organized crime. When Able failed to meet the repayment deadline, the loan shark told Able he had one more day to come up with the money or Able would find it “very, very painful.”

Frightened and desperate, Able decided to break into the home of Rich and steal a collection of valuable antique coins. (Able had done some carpentry jobs for Rich on occasion, so he was familiar with his home.) Able knew that the coin collection was kept in a safe in a small room in Rich’s home, so he asked Baker to help him with the heist. Baker was a master welder and Able knew Baker’s skills would come in handy if they were to steal the coins. Baker agreed and brought a blowtorch with him that night. Able and Baker easily gained entry to the house by cutting a hole in the back door and entered through the hole. They quickly disabled the alarm system and then Baker went to work on the safe with his blowtorch. They had nearly gotten the safe open when Able knocked over the blowtorch. It ignited some curtains nearby and the fire quickly spread. Soon the whole structure was ablaze. Able and Baker fled without having taken anything.

Sam and Carol lived next door to Rich and the fire soon jumped from Rich’s home to their residence. Carol woke up, smelled the smoke, and ran into the living room. Her husband, Sam, was sleeping on the couch. Carol was very angry with Sam. He had told her earlier that evening that he wanted a divorce and Carol now saw a chance for revenge. Carol ran from the burning house, leaving him asleep on the couch. By the time Sam awoke, the house was full of flames and heavy dark smoke. He tried to exit the house, but was quickly overcome by the fire and died.

What crimes, if any, have been committed by Able, Baker, and Carol, and what defenses should each assert? Discuss.
I. CRIMES AND DEFENSES OF ABLE.

SOLICITATION. Solicitation occurs where a defendant requests or encourages another to commit a crime, whether or not the other person agrees to commit the crime, and even if the other person refuses to commit a crime. No overt act is needed, and the crime is complete upon the request of another to commit a crime. Here, Able asked Baker to help with the heist.

MERGER. The crime of solicitation merges into conspiracy. Conspiracy does not merge with the completed crime. If a conspiracy is established, Able's solicitation of Baker will merge with conspiracy.

CONSPIRACY. A conspiracy is an agreement between two or more defendants, to do either an unlawful act or a lawful act by unlawful means. There is no merger with the target crime, but solicitation does merge with conspiracy.

CRIMINAL AGREEMENT. Words are not necessary to establish an agreement, and each party may show by their actions alone that they have agreed to the criminal purpose. Circumstantial evidence, which strongly suggests a criminal plan, may be used to establish the existence of a conspiratorial agreement.

Here, Baker was told of the criminal plan by Able, and Baker agreed to the criminal plan to steal the valuable antique coins.

ACT IN FURTHERANCE. The common law states that a conspiracy is complete at the time of an agreement. However, about half of the states now require that there be an act in furtherance of the conspiracy in addition to the agreement. It need not be a major act, and a minor act of mere preparation will suffice. Once an act is taken, it may be attributable to all in the conspiracy.

Baker brought his blowtorch to the crime scene with Able, establishing an act in furtherance of the criminal objective.

PINKERTON RULE. Where additional crimes are committed in addition to the original criminal target crime, but which are still in furtherance of the criminal plan, and which are foreseeable crimes, courts are split about the liability of co-conspirators. About half of the jurisdictions will attach liability for the additional foreseeable crimes in furtherance of the criminal objective.

Therefore, to the extent that Baker committed crimes in reasonable furtherance of the criminal objective of larceny, Baker would also be liable. Therefore, Able may be vicariously liable for burglary, murder and arson, if Baker is also charged with those crimes.
BURGLARY. Burglary is a specific intent crime. Common law burglary is the breaking and entering of the dwelling of another, at night, with the intent to commit a felony therein. Modernly, most states have relaxed the common law requirements, and the most important elements now include breaking and entering with the intent to commit a crime therein.

BREAKING AND ENTERING. A breaking will exist where any opening to a structure is created by the defendant. No force is needed, and nothing need be broken, for the breaking element to occur. The entering element will be satisfied if any part of the defendant’s anatomy crosses the threshold of a structure, even for a moment.

Here, a hole was made in the door, indicating that an opening was made where none existed before. Additionally, both men entered through the hole, indicating an entry. The dwelling here, was the dwelling of Rich, and Able and Baker both had the intent to commit the felony of larceny, by taking the valuable coins of Rich. Apparently, the events took place at night. Therefore, under the definitions of both common law burglary, and modern burglary, a burglary charge would be effective, here.

ATTEMPTED LARCENY. Larceny is a specific intent crime, and consists of the trespassory taking and carrying away of the personal property of another, with the intent to permanently deprive them thereof.

SPECIFIC INTENT TO DEPRIVE. Attempt is a crime where a defendant intends to commit a specific intent crime, and takes some actions to commit the crime, but does not complete the crime. Attempt will be present if the defendant enacts an act in furtherance of the specific intent to commit a crime, that goes beyond mere preparation to commit a crime.

Here, both men had the specific intent to take Rich's valuable coins.

ACT V. PREPARATION.
The proximity approach looks at how close the defendant came to completing the crime. The equivocality approach considers whether the defendant’s conduct unequivocally manifested a criminal intent. The MPC substantial step test is based on whether there was an act or omission by the defendant that would constitute a substantial step towards completion of the crime that is strongly corroborative of defendant’s criminal intent. Here, the men entered the structure with criminal tools, went to the safe, and began to try and open the safe. They were very close to completing their crime, before a fire started. Therefore, attempted larceny is a viable charge.

DEFENSE.

RENUNCIATION / WITHDRAWAL. Renunciation is a defense where the defendant voluntarily abandons their attempted crime before completion of the substantive crime. However, renunciation / withdrawal will not be deemed a viable defense if the defendant merely abandoned their criminal activity for the following reasons: due to a threat of imminent apprehension; in order to perpetrate the crime at a more advantageous time; or because the
defendant was dissuaded from completion of the crime by the victim. Here, the men left the crime scene due to a fire, and thus their apparent renunciation of the crime was not voluntary in nature.

**DEFENSES.**

**DURESS.** Duress is a defense where the defendant acted because of significant force or threats of force from another person, such that the defendant feared imminent death or harm to themselves or to family members.

Here, Able was conducting the felony in pursuit of coins, due to a threat by a loan shark. However, Able had put himself in that position of harm, and, the force threatened by the loan shark was not imminent, therefore, duress is not a viable defense.

**ACCOMPlice LIABILITY.** A defendant will be an accomplice to a crime where the defendant agrees and cooperates to aid, abet, assist or encourage another in the carrying out of a crime, and who has the mental state necessary for the specific crime because they intend or desire the criminal result. Able will be liable for the additional crimes of Baker, because Able was both on the scene of the crime, and encouraged Baker to commit larceny.

**II. CRIMES AND DEFENSES OF BAKER.**

**ARSON.** Arson is the burning of the dwelling place of another with malice.

**MALICE.** Arson malice, as opposed to the malice which supports a murder charge, will be present if either the defendant had the intent to actually burn the dwelling house of another, or the defendant acted with willful and wanton misconduct that created a plain and substantial likelihood that a protected structure would be burned.

Here, Baker used a blowtorch to try and commit a crime. A blowtorch is normally used in construction of metal items, not to commit crimes. Baker used the blowtorch, therefore, in a willful and wanton manner, and it created a substantial likelihood of burning, because the house was a wood structure.

**BURNING.** The burning element requires that the structure suffer some amount of charring. Damage to things other than structural elements, such as damage due to smoke or water, will not satisfy the burning element of arson.

Facts indicate that the whole structure caught fire.

**DWELLING OF ANOTHER.** Modernly, the dwelling house of another requirement has been expanded to include other structures, such as warehouses. Here, there was a dwelling home of Rich.

Therefore, arson is a viable charge.

**MURDER.** Murder is an unlawful killing of another with appropriate causation and malice.
HOMICIDE. A homicide occurs when a human victim is killed by another human being. A dead person is determined either through lack of brain activity or lack of a heart beat. Here, Sam died due to the fire.

ACTUAL CAUSE. Under the but for test, but for the actions of the defendant to harm the victim, the victim would not have died. Here, but for the actions of Baker to start a fire, Sam would not have died.

PROXIMATE CAUSE. Proximate causation considers whether the defendant could foresee that their actions would result in a foreseeable death to the victim.

Foreseeability. Pre-existing conditions of victim which lead to increased harm leading to death, extreme fright or stress leading to death, an unintended victim who is killed under transferred intent, and slight deviations in the types or modalities used which result in death, will all still indicate that the defendant is the proximate cause of death to the victim. Here, it is foreseeable that if one starts a fire, that other people might get injured.

Intervening Acts or Events. Unforeseeable, independent intervening events could be considered superseding events, and thereby break the chain of causation for defendant. A number of events took place after Baker started the fire, but not would rise to the level of superseding intervening events.

MALICE. INTENT TO KILL. Intent to kill malice exists where the defendant evinces an intent to kill the victim through their conduct, including circumstantial evidence. Intent to kill may also include actions which are substantially certain to cause the death of the victim. Baker did not intend to start a fire, and he did not intend to kill anyone.

FELONY MURDER. A defendant may be charged with felony murder where the victim is killed during the commission of an independent felony by the defendant, and the death was a natural and foreseeable result of the felony.

Independent Felony. The predicate felony for felony murder must be independent of the killing, otherwise an aggravated battery leading to a death, could result in a felony murder charge. Here, the predicate felony would be larceny, or burglary or arson.

During the Commission / Perpetration of the Crime. The killing of the victim must take place while the defendant is still in the commission or perpetration of the crime.

It is not clear how fast the fire spread, or if the defendants had reached a safe harbor at the time of the death of the victim.

INTENT TO CAUSE SERIOUS BODILY INJURY. Intent to cause grievous or serious bodily injury, will be an applicable malice state where the defendant acts with knowledge that their actions pose a significant threat to the victim, yet the defendant continues with their life-threatening actions. Baker did not want to harm anyone.
DEPRAVED HEART. A defendant may act with a depraved heart / reckless indifference to the value of human life, when such a defendant consciously disregards the fact that their actions of extreme recklessness pose a substantial risk of harm or death to another person. Here, Baker committed a felony in a dangerous way, thus evincing a reckless disregard for the lives of others.

DEGREES OF MURDER. 
FIRST DEGREE FELONY MURDER. First-degree felony murder is an applicable charge where a death occurs due to an inherently dangerous felony. If it is determined that the killing took place during the perpetration of the felony, then the burglary and arson would qualify as an inherently dangerous felony.

Second-Degree Murder. Second-degree felony murder is applicable to an intent to kill situation that lacks premeditation or deliberation, to a non-inherently dangerous felony murder situation, to intent to cause grievous bodily harm malice, and to depraved heart malice. Here, second-degree murder would be the appropriate charge for deprived heart malice.

IN Voluntary Manslaughter. Involuntary manslaughter occurs where a defendant’s grossly negligent actions result in the accidental death of a victim.

GROSS NEGLIGENCE. Defendant must have disregarded a very substantial danger of serious bodily harm or death to another. Defendant's use of objects such as firearms, which are inherently dangerous, will tend to support gross negligence.

Here, the use of a blowtorch to commit a felony, would be considered grossly negligent.

III. CRIMES AND DEFENSES OF CAROL.

MURDER. Supra.

HOMICIDE. Supra.

ACTUAL CAUSE. Supra. But for Carol refusing to wake her husband, he would not have died.

PROXIMATE CAUSE. Supra. It is foreseeable that if someone leaves another in a burning house, that the person left in the house may die.

DUTY TO AID OR RESCUE. Normally, there is no duty to aid or rescue another in peril. SPECIAL RELATIONSHIP. However, here we have a marriage relationship between Carol and Sam, and thus Carol would be called upon to render some type of aid to try and alert Sam of the fire.

MALICE.
1. INTENT TO KILL. Carol did not intend to kill Sam.
2. FELONY MURDER. Carol did not commit a felony.
3. INTENT TO CAUSE SERIOUS BODILY HARM. Carol did not batter Sam.
4. DEPRAVED HEART. Carol acted with a depraved heart reckless disregard for Sam, when all she had to do was yell loudly to wake him up, so that he could flee the fire, and she refused to do so.

**DEGREES OF MURDER.** *Supra.* Second-degree murder depraved heart malice is applicable to this situation.

**DEFENSES.**

**SELF-DEFENSE.** A defendant may use reasonable force to defend themselves from application of the unlawful force of another. Here, Carol was trying to save her own life, but there is no reason why she could not help Sam.

**VOLUNTARY MANSLAUGHTER.** Where mitigating circumstances are present, a defendant may have a murder charge reduced to a voluntary manslaughter charge, which can occur either through the heat of passion defense, or through an imperfect defense.

**The Heat of Passion Defense.** The defendant may have a murder charge reduced to a voluntary manslaughter charge, if they acted in the heat of passion when taking actions to kill the victim. The requirements for the heat of passion defense are that the defendant must have:

1. **Reasonable Provocation.** The provocation must be sufficiently strong that a reasonable person would have lost their self-control or temper. Here, Carol had earlier learned that Sam wanted a divorce. While this information is potentially upsetting, it would not lead a reasonable person to commit a homicide.

2. **Actual Provocation.** The defendant must have actually lost their self-control or temper. Carol was angry, but her anger was that of revenge, not of losing control.

3. **Cooling Off Period.** The time period between defendant’s discovery of the provoking information and the act of killing the victim must be short enough that a reasonable person would not have had enough time to cool off. Apparently, there was some time between when Carol learned of the divorce, and when the fire took place.

4. **No Actual Cooling.** The defendant must not personally have cooled off. Here, while Carol was still angry, her anger was not of the sort of losing control. Rather, her anger could be characterized as that of seeking revenge. Therefore, she was not acting out of red-hot anger, but cool revenge, and the heat of passion defense is not applicable.

**IN VOLUNTARY MANSLAUGHTER.** Involuntary manslaughter occurs where a defendant’s grossly negligent actions result in the accidental death of a victim. Carol performed a grossly negligent action by refusing to wake Sam.
Twelve-year-old Al was throwing rocks against a tree alongside the road to amuse himself while waiting for his school bus. One of the rocks thrown by Al missed the tree and shattered the windshield of an approaching car driven by Bill.

Bill, who had just left a bank he had robbed, was driving carefully and below the speed limit to avoid attracting the attention of the police. When the windshield shattered, Bill swerved, causing the car to run off the road. The car struck and killed Vic, a boy who had also been waiting for the school bus.

Chuck and Dave, Vic’s brothers, decided that the accident had been Al’s fault and, together, carefully planned to avenge Vic’s death. They pooled their money and bought a shotgun, planning to use it to shoot Al. When the time came to go looking for Al, however, Chuck told Dave, “I’m not going. If you want to do it, you’re on your own.” Dave carried out the plan, shooting and killing Al. After killing Al, Dave removed Al’s watch and kept it for himself.

1. Did Al commit any crime relating to the death of Vic? Discuss.

2. Could Bill be found guilty of any crime relating to the death of Vic? Discuss.

3. Did either Chuck or Dave, or both, commit:
   b. Murder of Al? Discuss.
   c. Theft of Al’s watch? Discuss.
MODEL ANSWER

I. CRIMES AND DEFENSES OF AL RELATED TO VIC.

BATTERY. A battery is a general intent crime. A battery occurs where defendant causes an offensive touching or bodily injury to victim, with the intent to cause a harmful or offensive touching. A battery can also be considered a completed assault.

Here, Al was throwing rocks near a roadside, when one of the rocks missed a tree and shattered Bill's windshield. The car was being driven by Bill at the time, and Al had knowledge to a substantial certainty that if he missed the tree he might hit a car, therefore, we have a battery, here.

MURDER.

HOMICIDE. A homicide occurs where a victim is killed in unlawful manner. A dead person is determined either through lack of brain activity or lack of a heart beat. Here, we are told that the car struck and killed, Vic, and therefore there is a homicide.

ACTUAL CAUSE. But for defendant’s actions to harm victim, victim would not have died. Here, but for Al throwing rocks, Vic would still be alive. There were other events that took place, but Al would be seen as enacting a substantial factor in the death of Vic.

PROXIMATE CAUSE. Pre-existing conditions of victim which lead to increased harm leading to death, extreme fright or stress leading to death, an unintended victim who is killed under transferred intent, and slight deviations in the types or modalities used which result in death, will all still indicate that the defendant is the proximate cause of death to the victim.

It is foreseeable that if one throws rocks near a street, that they may cause a car accident, which is what took place when Al’s rock hit Bill’s windshield. There are no intervening events.

MALICE.

INTENT TO KILL. Intent to kill malice exists where the defendant evinces an intent to kill the victim through their conduct, including circumstantial evidence. Intent to kill may also include actions which are substantially certain to cause the death of the victim.

Where defendant evinces an intent to kill victim, through their conduct, including circumstantial evidence. It is not applicable in this instance, because Al did not intend to kill Vic, Al only wanted to throw rocks.

FELONY MURDER. A defendant may be charged with felony murder where the victim is killed during the commission of an independent felony by the defendant, and the death was a natural and foreseeable result of the felony. Here, Al was not committing a felony at the time of the death.
INTENT TO CAUSE SERIOUS BODILY HARM. Defendant acts with knowledge their actions pose a significant threat to victim, yet defendant continues with their life-threatening actions. Here, Al was not battering the victim at the time of the death.

DEPRAVED HEART. A defendant may act with a depraved heart / reckless indifference to the value of human life, when such a defendant consciously disregards the fact that their actions of extreme recklessness pose a substantial risk of harm or death to another person. Here, Al was throwing rocks near a street, could easily end up causing a deadly car accident. Therefore, Al acted with a reckless disregard for the lives of others.

DEGREES OF MURDER. The highest degree of murder for depraved heart reckless indifference, is second-degree murder.

DEFENSES.
INFANCY. Applies to children under seven years of age, where there is no criminal liability. For children under fourteen years of age, there is a rebuttable presumption of no liability. Here, Al is twelve years old, and will try to assert that his age will obviate his ability to formulate intent, but his is a rebuttable presumption, which would probably be successfully rebutted, because it is clear that rocks that hit a windshield could cause a serious accident.

INVOLUNTARY MANSLAUGHTER. Involuntary manslaughter occurs when defendant’s grossly negligent actions result in the accidental death of victim. Defendant must have disregarded a very substantial danger of serious bodily harm or death, and use of objects such as firearms, which are inherently dangerous, will tend to support gross negligence. Here, Al should have known that throwing rocks near a street was a highly unsafe activity. Therefore, he could likely be charged with involuntary manslaughter.

II. CRIMES AND DEFENSES OF BILL RELATED TO VIC.

MURDER.
HOMICIDE. Supra.

ACTUAL CAUSE. Supra. But for Bill driving his car into Vic, Vic would still be alive.

PROXIMATE CAUSE. Supra. It is foreseeable that people may get hurt during the commission of a felony, such as a bank robbery, in this instance.

MALICE.

INTENT TO KILL. Supra. Not applicable.

FELONY MURDER. Supra. Felony murder is applicable where a victim is killed while defendant is in the commission of an independent felony, and the death is a natural and foreseeable result of the felony.
Here, it is unclear whether Bill had reached a safe harbor, however, he was driving slowly and carefully in order to escape detection, and thus apparently had not reached a safe harbor. However, he was not obviously being chased, and therefore he may have reached a safe harbor, and felony murder would not apply.

**INTENT TO CAUSE SERIOUS BODILY HARM.** *Supra.* Not applicable.

**DEPRAVED HEART.** *Supra.* At the time of the death, Bill was apparently driving safely.

**DEGREES OF MURDER.**

*Inherently Dangerous Statutory Felony.* The inherently dangerous felony may be one enumerated through statute, such as robbery, burglary, rape, arson, kidnapping or other serious crimes. To the extent that felony murder may be applicable, Bill committed an inherently dangerous felony when he committed a robbery.

**IN VOLUNTARY MANSLAUGHTER.** *Supra.* Bill was apparently driving safely at the time of the accident.

**III. CRIMES AND DEFENSES OF CHUCK OR DAVE.**

**CONSPIRACY TO MURDER AL.**

A conspiracy is an agreement between two or more defendants, to do either an unlawful act or a lawful act by unlawful means. There is no merger with the target crime, but solicitation does merge with conspiracy. Chuck and Dave, Vic’s brothers, decided that the accident had been Al’s fault and, together, carefully planned to avenge Vic’s death. Therefore, we have a clear criminal plan to murder Al, in revenge for Vic's death.

**ACT IN FURTHERANCE.** The common law states that a conspiracy is complete at the time of an agreement. However, about half of the states now require that there be an act in furtherance of the conspiracy in addition to the agreement. It need not be a major act, and a minor act of mere preparation will suffice. However, once an act is taken, it may be attributable to all in the conspiracy. Here, Dave followed through and murdered Al, which would constitute an act in furtherance of the criminal plan.

**WITHDRAWAL.** Withdrawal pertains not to the conspiracy charge itself, but to the future crimes of co-conspirators. To effectively withdraw from a conspiracy, a defendant must normally try to undo the effects of their assistance or encouragement, by making an affirmative act to notify any co-conspirators of their intention to withdraw, or though notification of the police of the conspiracy. However, the MPC only recognizes renunciation / withdrawal if it was voluntary, and if the defendant thwarted the enactment of the criminal objectives of the conspiracy. Here, Chuck told Dave, “I’m not going. If you want to do it, you’re on your own.” While this is a start of a withdrawal by Chuck, Chuck should have tried to undo the effects of the
conspiracy, by trying to thwart the conspiracy, or by telling the authorities of the future crime. Chuck did neither, and thus his withdrawal would not be effective.

**PINKERTON RULE LIABILITY.** Where additional crimes are committed in addition to the original criminal target crime, but which are still in furtherance of the criminal plan, and which are foreseeable crimes, courts are split about the liability of co-conspirators. About half of the jurisdictions will attach liability for the additional foreseeable crimes in furtherance of the criminal objective.

Here, Chuck would be liable for the foreseeable crimes of Dave in commission of the conspiratorial target crime of murder, including larceny.

**MURDER OF AL.** *Supra.* Here, when the time came to go to looking for Al, Chuck told Dave, “I’m not going. If you want to do it, you’re on your own.” Dave carried out the plan, shooting and killing Al.

**HOMICIDE.** *Supra.* Al is dead.

**ACTUAL CAUSE.** *Supra.* But for shooting of the victim by Dave, Al would still be alive.

**PROXIMATE CAUSE.** *Supra.* The actions by Dave were clearly foreseeable, and there are not facts indicating a superseding intervening event.

**MALICE.** *Supra.*
1. **INTENT TO KILL.** Yes, the parties clearly wanted Al to die, and Dave took actions to kill Al.
2. **FELONY MURDER.** The larceny of the watch could constitute an independent predicate felony for felony murder to apply. However, the larceny seems more like an after-thought, rather than a predicate felony, because the overall objective was the murder of Al.
3. **INTENT TO CAUSE SERIOUS BATTERY.** Not applicable.
4. **DEPRAVED HEART.** The parties here planned on taking action to kill another, which evinces a reckless disregard for the life of another.

**DEGREES OF MURDER.** There was clear planning / premeditation in forming the conspiracy to murder Al, and both defendants had a clear mind capable of deliberate thought. Therefore, a first-degree intent to kill murder charge would be appropriate, in this instance.

**VOLUNTARY MANSLAUGHTER.**

**Voluntary Manslaughter / Mitigation of Murder.** Where mitigating circumstances are present, a defendant may have a murder charge reduced to a voluntary manslaughter charge, which can occur either through the heat of passion defense, or through an imperfect defense.
**The Heat of Passion Defense.** The defendant may have a murder charge reduced to a voluntary manslaughter charge, if they acted in the heat of passion when taking actions to kill the victim.

1. **Reasonable Provocation.** The provocation must be sufficiently strong that a reasonable person would have lost their self-control or temper. Here, Al was not driving the car that killed Vic, rather, he merely through rocks. A reasonable person would have been upset over the death of Al, but would not have provoked to kill Al, in this instance.

2. **Actual Provocation.** The defendant must have actually lost their self-control or temper. There is nothing to indicate a loss of control, rather, the defendants seemed to have acted in a cool manner, seeking revenge.

3. **Cooling Off Period.** The time period between defendant’s discovery of the provoking information and the act of killing the victim must be short enough that a reasonable person would not have had enough time to cool off. There was a sufficient cooling off period, here.

4. **No Actual Cooling.** The defendant must not personally have cooled off. The defendants seemed to be cool in their deliberative processes.

The heat of passion defense will not apply in this instance.

**IN VoluntARY MAN S LAUGHT ER.** Involuntary manslaughter occurs where a defendant’s grossly negligent actions result in the accidental death of a victim.

- **GROSS NEGLIGENCE.** Defendant must have disregarded a very substantial danger of serious bodily harm or death to another. Defendant's use of objects such as firearms, which are inherently dangerous, will tend to support gross negligence. Here, if the prosecution has a problem asserting intent to kill, they may easily support a charge of gross negligence.

**THEFT OF AL’S WATCH.**

**LARCENY or ROBBERY.** Larceny is a specific intent crime, and consists of the trespassory taking and carrying away of the personal property of another, with the intent to permanently deprive them thereof. Robbery consists of larceny, through force or threat of force. Inasmuch as the victim was already dead when Dave apparently formulated his plan to take Al's watch, larceny will be discussed, here.

- **Intent to Permanently Deprive -- Steal.** Larceny is a specific intent crime, and the defendant must have the intent to permanently deprive the rightful owner of the property at the time of the taking of the property. Specific intent will exist if the defendant intended to use the property of the victim in such a manner, or for such a duration, that the owner would be deprived
of a significant portion of the chattel’s economic value. Here, Dave apparently took Al's watch with an intent to keep the watch.

**Trespassory Taking.** Where a defendant merely has custody of an item, and does not have rightful possession of the item, defendant's subsequent taking of the property will be considered as a trespassory taking. Dave did not have rightful possession at the time of the taking of the watch.

**Carrying Away / Asportation.** As long as the entire entity of the property is moved, even a slight movement is enough to satisfy the carrying away / asportation element of larceny. Dave took the entire watch.

**Personal Property of Another.** At common law, the personal property element of larceny consisted of only tangible personal property. Modernly, personal property has been expanded to include such intangible items as stocks, utility services and trade secrets. The watch was Al's.

**Claim of Right.** A defendant may take another’s property under a claim of right, in order to collect on a debt or to satisfy some other claim. There was no claim of right, or re-taking of the defendants' own property, in this situation.

**CHUCK and ACCOMPlice LIABILITY.**
A defendant will be an accomplice to a crime where the defendant agrees and cooperates to aid, abet, assist or encourage another in the carrying out of a crime, and who has the mental state necessary for the specific crime because they intend or desire the criminal result. An accomplice does not actually commit the *actus reus* / criminal act, but will be liable for that criminal act.

Here, by encouraging criminal activity against Al, Chuck would be liable for the murder. He may also be liable for the murder under a co-felon theory. Under Pinkerton liability, Chuck may be liable for larceny, as a reasonably foreseeable crime in furtherance of a murder. However, Chuck apparently did not aid and abet the larceny, and so he would not be liable as an accomplice for the larceny.
At 3 a.m. the City Police Department received a call that there was an unauthorized entry into Walt’s Gun Emporium (“Walt’s”), a store that sells firearms.

As the police officers drove around a corner behind Walt’s to investigate the incident, they observed a man placing something into the trunk of a red car parked across the street from Walt’s. The red car’s engine was running. When the officers turned the police car’s siren and lights on, the red car immediately sped away. One officer exited the police car and arrested Albert, the person who had been standing behind the red car, while the other officer followed the fleeing red car.

The police officer who arrested Albert then saw Burt slide a sealed box labeled “Walt’s Gun Emporium” and crawl out of a store window. The officer then arrested Burt. It was later determined that the box contained six rifles. While being chased by the police, the red car crashed into another car, killing its driver Vic. Chuck, the driver of the red car, was arrested. A sealed box stamped with the words “Walt’s Gun Emporium” containing twelve pistols was found in the trunk of the red car.

Albert, Burt, and Chuck were each charged with larceny and murder. At trial, Walt, the owner of Walt’s, testified for the prosecution that Burt was employed by Walt’s as a salesperson. Walt also testified that he was the only person working at Walt’s authorized to open sealed boxes containing firearms or to remove the boxes from the gun vault where they were stored.

Albert testified that he was given $10 by Chuck to help carry boxes to the red car, and that he had never seen Chuck or Burt before. Burt testified that he was authorized by Walt’s to possess the firearms located at the store in order to fulfill his duties as a salesperson. Chuck testified that Burt convinced him that Burt owned the guns and that Burt had agreed to sell them to Chuck for $400.

Do the facts support each of the charges against Albert, Burt, and Chuck and what defenses, if any, might they each reasonably assert? Discuss.
I. CRIMES AND DEFENSES OF ALBERT.

FELONY MURDER. Albert was not directly involved in the death of Vic. Therefore, he could most likely only be held liable for the murder of Vic as a co-felon under the felony murder rule. If two or more felons work together to try to commit a felony, and only one is directly responsible for a killing which occurs during the commission of the felony, most courts will hold all other felons liable for the killing as long as it was a natural and probable result of the felony.

Here, we have three defendants, Albert, Burt and Chuck, involved in potential criminal activity. Since Chuck was more directly involved in the homicide of Vic, the full murder issue is discussed infra. However, to the extent that Albert was involved in an inherently dangerous criminal activity, here, a burglary and of Walt’s Gun Emporium at 3 AM, with an attendant larceny of weapons, Albert could have reasonably foreseen that such criminal activity might result in severe harm, or perhaps death, to someone else. Thus, under a co-felon liability theory of liability for murder, Burt could be held liable for murder to the same extent that Albert may be held liable under felony murder.

LARCENY. Larceny is the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive them of their property.

INTENT TO PERMANENTLY DEPRIVE. Larceny is a specific intent crime, and defendant must have the intent to permanently deprive the rightful owner of the property at the time of the taking of the property, and this intent will exist if defendant intends to use the property in such a manner or for such a duration that the owner would be deprived of a significant portion of the chattel’s economic value. Here, we are told that Albert testified that he was given ten dollars to carry boxes to the red car, and that he had never seen Burt or Chuck before. If this statement is true, then Albert did not have the requisite intent to deprive anyone of their property. Since larceny is a specific intent crime, Albert will be found not guilty without such an intent. However, Albert may by lying, especially when one considers that he was loading boxes at 3 AM, which were taken out of a storefront window.

TAKING AND CARRYING AWAY. The asportation element will be met if the item is moved a short distance, as Albert did by carrying the box from the store to the car.

PERSONAL PROPERTY OF ANOTHER. The guns were not owned by Albert, and he was not collecting on a previous debt under a claim of right, therefore, the guns were the personal property of another. Therefore, if Albert had the intent to keep the guns along with the other two defendants, he will be seen to be liable under larceny. However, if as he testified, he had no intent to deprive anyone of their rightful property, he will not be liable for larceny.

MISTAKE. To the extent that Al did not have the intent to commit a crime, due to mischaracterization of the criminal activity by Chuck, Al will have a viable defense.

CONSPIRACY / CO-CONSPIRATORIAL LIABILITY. It could also be asserted that Albert is responsible for larceny under a vicarious theory of liability. A conspiracy is an...
agreement between two or more people to do a criminal act. The agreement may be implied, and
can be shown through circumstantial evidence. Here, circumstantially, we have Albert assisting
Burt as Burt climbs through a window, not a door, at 3 AM in the morning. Albert proceeds to
put a sealed box labeled as belonging to Walt’s into the trunk of the red car, while the car is
running, and while Chuck sits in the driver’s seat. A reasonable person looking at this situation,
would conclude that people do not climb through windows at 3 AM in the morning, with engines
running, unless they are engaged in some sort of criminally-related activity. A co-conspirator
will be liable for the target crimes committed during the conspiracy, here, larceny, burglary and
murder.

STAKE IN THE CONSPIRACY. Especially since it is clear that the box contains guns, and
Albert is receiving some kind of payment, it can be asserted that he has a stake in the conspiracy,
even if he does not understand all elements of the conspiracy. Further, under the MPC one guilty
mind approach, only one co-conspirator need have a criminal intent. Therefore, since Albert was
getting paid to load potential dangerous weapons, he will be seen to have been a co-conspirator.
Thus, he may be charged with LARCENY as a co-conspirator.

ACCOMPlice LIABILITY. Albert may also have accomplice liability for aiding and
abetting in the commission of the larceny, by loading the boxes.

DEFENSE.

FINANCIAL NECESSITY. Albert may assert he had a necessity to receive money, but this
will not obviate his potential criminal liability.

WITHDRAWAL. A defendant that withdraws from a conspiracy, communicates their
intent to withdraw to the other co-conspirators, and informs the police or otherwise thwarts the
conspiracy, will be said to have a viable defense of withdrawal. Here, Albert was involved in the
criminal activity until police arrived, therefore, this defense is not viable.

II. CRIMES AND DEFENSES OF BURT.

MURDER.
CO-FELON LIABILITY. Supra. Here, Burt was involved in an inherently dangerous
criminal activity, here, a burglary and of Walt’s Gun Emporium at 3 AM, with an attendant
larceny of weapons. Burt could have reasonably foreseen that such criminal activity might result
in severe harm, or perhaps death, to someone else. Thus, under a co-felon liability theory of
liability for murder, Burt could be held liable for murder to the same extent that Chuck may be
held liable under felony murder.

LARCENY V. EMBEZZLEMENT. Supra.
Here, we have Burt as a salesman at Walt’s, who was the only other person besides Walt who
was authorized to open sealed boxes containing firearms or to remove the boxes from the gun
vault where they were stored. Burt further testified that he was authorized by Walt to possess the
firearms located at the store in order to fulfill his duties as a salesperson. Burt has been charged with Larceny, and if he can show that the correct charge is not larceny but embezzlement, he may be able to escape the larceny charge.

**TRESPASSORY TAKING or RIGHTFUL POSSESSION.** Low level employees are generally seen to have only temporary custody and not true possession of company property, so if they take company property, their taking would be trespassory, and therefore they would rightfully be charged with larceny. However, where there is broad authority to act within a company, such a high-level employee will generally be seen to have possession, and not mere custody, of company property, and any taking of property would constitute embezzlement.

Burt is trying to characterize his employment relationship as a high-level employee, who has possession of the guns as part of his job duties. If he can successfully assert this issue, the charge of larceny will be averted, because one who has rightful possession of an item cannot be charged with larceny. However, Walt has asserted that Burt is only a salesman, who can open the stock. There is no indication that Burt has anything but mere custody of the stock. Therefore, the true characterization of Burt is as a low-level employee with mere custody of the stock, and any taking of items in the store will be considered to be a trespassory taking, thus larceny.

**INTENT TO PERMANENTLY DEPRIVE.** *Supra.* Burt was taking Walt’s property out of the store, through a window, at 3 AM. If he were enacting his job duties, he would most likely have been moving items during the day, through the door, and into a company van. Therefore, it is likely that he had an intent to steal the items from Walt’s.

**TAKING AND CARRYING AWAY.** *Supra.* Burt moved the boxes a short distance, thus, the asportation element is met.

**DEFENSE.**
- **FINANCIAL NECESSITY.** *Supra.*
- **WITHDRAWAL.** *Supra.*

**III. CRIMES AND DEFENSES OF CHUCK.**

**MURDER.** A murder is an unlawful killing of another with appropriate causation and malice.

**HOMICIDE.** A homicide occurs where a victim is killed in unlawful manner. A dead person is determined either through lack of brain activity or lack of a heart beat. Here, we are told that victim is dead.

**ACTUAL CAUSE.** Where but for defendant’s actions to harm victim, victim would not have died. Vic would still be alive if Chuck would not have got into an accident with Vic.

**PROXIMATE CAUSE.** Proximate cause considers whether defendant’s actions would result in a foreseeable death to victim.
Foreseeability. Here, while Chuck apparently did not know Vic, it is foreseeable that a defendant that flees the scene of a dangerous crime in a car, while being chased by the police, may cause serious injury or death to anyone along the escape route of the defendant.

Intervening Acts or Events. We are not told the specific aspects of the accident, however, because Chuck was fleeing the scene of a crime, it is likely that intervening events would be dependant to some degree on Chuck, and thus, since there were no abnormal events mentioned, there are no suitable intervening events.

MALICE. Defendant must have the appropriate mental state for murder to establish malice aforethought

INTENT TO KILL. Where defendant evinces an intent to kill victim, through their conduct, including circumstantial evidence. Not applicable, here.

FELONY MURDER. Where victim is killed while defendant is in the commission of a felony, and the death is a natural and foreseeable result of the felony.

Independent Felony. The predicate felony for Felony Murder must be Independent of the killing. Here, the predicate felonies are Burglary of Walt’s, and Larceny of the guns.

During the Commission / Perpetration of the Crime. A killing by defendant must take place when defendant is said to be still in the Commission or Perpetration of the crime. A defendant who is in the process of escaping the scene of the crime, is still said to be In the Perpetration of the Crime. However, a defendant who has escaped and has reached a Safe Harbor, will not be liable for killings which occur at that point. Here, Chuck is no longer at the scene of the crime when he killed Vic. However, he had reached a place of safe harbor, as the police were in hot pursuit. Therefore, since Chuck had not reached a safe harbor, the death will be seen to have taken place during the perpetration of the crime.

INTENT TO CAUSE SERIOUS BODILY HARM. Defendant acts with knowledge their actions pose a significant threat to victim, yet defendant continues with their life-threatening actions. Not applicable here.

DEPRAVED HEART / RECKLESS INDIFFERENCE. Where defendant evinces a conscious disregard that their actions of extreme recklessness pose a substantial risk of harm or death to another. Here, Chuck was involved in a dangerous felony at 3 AM, and was being pursued by the police while he was driving a car. Such a situation involves extreme and inherent danger, to anyone that might be within the flight of defendant’s car. Therefore, Chuck acted with extreme recklessness.

DEGREES OF MURDER.

FIRST DEGREE FELONY MURDER. Some courts hold that the felony upon which the murder charge is predicated, must be a felony which is dangerous to human life, such as robbery, burglary, rape, arson, kidnapping and other serious crimes. Other courts will consider whether the crime was committed in a dangerous fashion. Under either view, Chuck’s actions will be considered inherently dangerous, and thus a first-degree murder charge is warranted.
SECOND DEGREE MURDER. All other malice states may be considered as second degree murder, and thus Chuck may be charged with second degree depraved heart murder.

INvoluntary / NEgligent / GROSS MANslaughter. Involuntary manslaughter occurs when defendant’s grossly negligent actions result in the accidental death of victim.

GROSS NEgligence. Defendant must have disregarded a very substantial danger of serious bodily harm or death, and use of objects such as firearms, which are inherently dangerous, will tend to support gross negligence. Here, we have Chuck leaving the scene of a violent crime, with police in hot pursuit. Therefore, gross negligence will be inferred because he was involved in the commission of a felony at the time of the accident.

Proximate Cause. Malum in se. Where the requirement of proximate cause is suspended, because the violation is dangerous in itself, and thus a causal relationship is inherent in the act. As stated above, Chuck was involved in a dangerous felony at the time of the accident, thus showing a causal relationship inherently from the nature of the act.

Larceny. Supra. Chuck testified that Burt convinced him that Burt owned the guns and that Burt had agreed to sell them to Chuck for $400. However, facts indicate otherwise. If Chuck believed Burt’s explanation, he would have not driven away from the police. He thus trespassorily took and carried away Walt’s property, without a viable defense.

Conspiracy. Supra. Chuck was involved in a conspiracy to commit burglary and larceny. A co-conspirator will be liable for the target crimes committed during the conspiracy, here, larceny, burglary and murder.

ACCOMPlice LIABILITY. Chuck may also have accomplice liability for aiding and abetting in the commission of the larceny.

DEFENSES. Supra.