

Scott Pearce's
Master Essay Method

Criminal Law & Procedure

CRIMINAL LAW AND PROCEDURE APPROACH

Minimalist Approach

- I. Criminal Procedure is more important and more complicated than Criminal Law.

- II. Criminal Procedure is the other way the Examiners test Constitutional Law:
 - A. 4th Amendment: unreasonable searches or seizures
 - B. 5th Amendment: self incrimination (Miranda) and double jeopardy
 - C. 6th Amendment: right to counsel; right to confront; jury trials; speedy trials
 - D. 8th Amendment: death penalty; cruel and unusual punishment

- III. Criminal law is similar to Torts: Break the charges into elements, and apply defenses.
 - A. Identify the crime the defendant is to be charged with.
 1. Crimes against people - Homicide is by far the most tested crime.
 2. Crimes against property
 3. Preliminary (Inchoate) Offenses
 - a. Attempt
 - b. Conspiracy
 - c. Solicitation
 - B. Identify Defendant's Defenses
 1. Self Defense
 2. Insanity

Elaborate Approach

Criminal Procedure

Criminal Procedure issues can be said to fall into two broad categories: those that involve the Exclusionary Rule, and those that do not.

- I. The Exclusionary Rule (And Fruit of the Poisonous Tree)
 - A. The 4th Amendment protection against unreasonable searches and seizures
 - 1. Standing: state action without a warrant
 - 2. Consent to a warrantless search
 - 3. Exigent Circumstances
 - 4. The Automobile Exception
 - 5. Search pursuant to a lawful arrest.
 - B. 5th Amendment: Miranda and coerced confessions
 - C. 6th Amendment: Counsel and Confrontation (professional responsibility)
- II. Non-Exclusionary Rule Issues
 - A. Pretrial
 - 1. Bail
 - 2. Preliminary Hearings
 - 3. Grand Jury
 - B. Trial
 - 1. Competent Counsel
 - 2. Fair and Impartial Judge
 - 3. Fair Prosecutor
 - 4. Presumptions and Jury Instructions
 - C. Post-Trial
 - 1. Double Jeopardy
 - 2. Cruel and Unusual Punishment and the Death Penalty
Criminal Law

Criminal Law

I. The Basic Crimes

A. Crimes Against People

1. Homicide - by far the most heavily tested crime
2. Rape
3. Mayhem
4. Robbery
5. Battery
6. Assault
7. Kidnaping
8. False Imprisonment

B. Crimes Against Property

1. Burglary
2. Arson
3. Taking By Trespass
 - a. Larceny (theft)
 - b. Robbery
 - c. Extortion
4. Taking By Delivery
 - a. Larceny (Theft without trespass)
 - b. Larceny by Trick (Fraud)
 - c. Embezzlement
 - d. False Pretenses
 - e. Receiving Stolen Property
 - f. Forgery

C. Preliminary (Inchoate) Offenses

1. Solicitation
2. Conspiracy
3. Attempt

- D. Defenses
 - 1. Insanity
 - a. Durham
 - b. M'Naghten
 - c. ALI Model Penal Code
 - 2. Intoxication
 - a. Voluntary
 - b. Involuntary
 - 3. Infancy
 - 4. Justification
 - a. Self Defense
 - b. Defense of Others
 - c. Crime Prevention
 - d. Apprehension of a Fleeing Felon
 - 5. Duress
 - 6. Mistake
 - 7. Consent
 - 8. Entrapment

CRIMINAL LAW & PROCEDURE

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Dan has been in and out of mental institutions most of his life. While working in a grocery store stocking shelves, he got into an argument with Vic, a customer who complained that Dan was blocking the aisle. When Dan swore at Vic and threatened to kick him out of the store, Vic told Dan that he was crazy and should be locked up. Dan exploded in anger, shouted he would kill Vic, and struck Vic with his fist, knocking Vic down. As Vic fell, he hit his head on the tile floor, suffered a skull fracture, and died.

Dan was charged with murder. He pleaded not guilty and not guilty by reason of insanity. At the ensuing jury trial, Dan took the stand and testified that he had been provoked to violence by Vic's crude remarks and could not stop himself from striking Vic. Several witnesses, including a psychiatrist, testified about Dan's history of mental illness and his continued erratic behavior despite treatment.

1. Can the jury properly find Dan guilty of first degree murder? Discuss.
2. Can the jury properly find Dan guilty of second degree murder? Discuss.
3. Can the jury properly find Dan guilty of voluntary manslaughter? Discuss.
4. Can the jury properly find Dan not guilty by reason of insanity? Discuss.

Criminal Law & Procedure – Outline of Issues
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- I. Can the jury convict Dan of First Degree Murder?
 - A. Dan did not intend to kill Vic.
 - B. Dan did not premeditate or deliberate.
 - C. Dan did not commit an underlying felony.
 - D. Dan's provocation defense
 - E. Conclusion: the jury cannot convict Dan of First Degree Murder

- II. Can the jury convict Dan of Second Degree Murder?
 - A. Dan did not intend to kill Vic.
 - B. Malice - fist as a deadly weapon?
 - C. Provocation defense
 - D. Conclusion: the jury is unlikely to convict Dan of Second Degree Murder

- III. Can the jury convict Dan of Voluntary Manslaughter?
 - A. Vic's Provocation
 - B. Actual Provocation
 - C. No Time to Calm Down
 - D. Conclusion

- IV. Can the jury find Dan not guilty by reason of insanity?
 - A. Irresistible Impulse
 - B. ALI
 - C. M'Naughten
 - D. Conclusion: the jury could find Dan not guilty by reason of insanity.

Criminal Law & Procedure – Model Answer
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I. Can the jury convict Dan of First Degree Murder?

Vic was a customer in a store in which Dan was working. A minor dispute escalated into violence. Dan struck Vic with one punch, and Vic died after hitting his head on the tile floor. Now Dan faces a jury trial, where he is charged with murder.

First degree murder is the most serious homicide charge. It is a product of statute, as opposed to common law tradition. To convict Dan, the prosecution will have to prove beyond a reasonable doubt that Dan killed Vic intentionally, with malice, and with premeditation and deliberation. First degree murder charges also are appropriate where the death has occurred during the commission of inherently dangerous felony crimes.

There are a number of compelling reasons why the jury cannot properly find Dan guilty of first degree murder, including Dan's insanity defense, discussed below.

A. Dan did not intend to kill Vic.

The dispute started when Vic complained that Dan was blocking the aisle. Dan swore at Vic and threatened to throw him out of the store. Vic said Dan was crazy and should be locked up. This statement caused Dan to explode in anger. It is true that Dan shouted he would kill Vic just before he struck Vic with his fist, but the level of force used by Dan was far below what one would ordinarily expect to result in death. It does not show a reckless disregard for human life, or even an attempt by Dan to cause great bodily harm to Vic. Vic died from hitting his head on the tile floor, not directly from the punch thrown by Dan.

Dan's lack of homicidal intent also is supported by Dan's compelling insanity defense, discussed below.

B. Dan did not premeditate or deliberate.

This deadly confrontation appears to have occurred over the course of seconds. Dan and Vic did not know one another before they met in the grocery store. It is evident that Dan did not think about what he was doing before he shouted his threat and struck Vic. Many first degree murder statutes include language that indicates that the defendant must act with cool calculation. Nothing about Dan's conduct in this case suggests he acted with anything other than angry passion.

Again, Dan's insanity defense supports his contention that he was unable to premeditate and deliberate.

C. Dan did not commit an underlying felony.

For the felony murder rule to apply, the prosecution would have to prove that Dan was engaged in an inherently dangerous felony, such as robbery, kidnapping or rape, at the time of Vic's killing. In this

case, Dan's shouts might have disturbed the peace, a violation or perhaps a misdemeanor. Dan's assault and battery of Vic would merge into the murder charges. Since Dan was not engaged in a felony at the time of Vic's death, he cannot be convicted of first degree felony murder.

D. Dan's provocation defense

As mentioned above, Vic told Dan that he was crazy and should be locked up. This statement triggered Dan's reaction. Dan has, in fact, been locked up many times during his life for mental illness. Dan's reaction to the statement was unreasonably angry and violent. He cannot claim to have been reasonably provoked to violence. At the same time, these facts support a finding that Dan did not premeditate or deliberate before striking Vic.

E. Conclusion

The jury cannot properly convict Dan of First Degree Murder.

II. Can the jury convict Dan of Second Degree Murder?

Second degree murder is defined as the intentional killing of a human being with malice. The prosecution has a somewhat stronger case for second degree murder than for first degree murder, but the facts probably support the defense.

A. Dan did not intend to kill Vic.

As discussed above, it is unlikely that the prosecution will be able to prove beyond a reasonable doubt that Dan intended to kill Vic. Dan's shouted threat to kill certainly could be used to show homicidal intent, but taken as a whole the facts do not give the prosecution a strong case.

B. Malice

A jury could find that Dan's shouted threat, combined with his use of a weapon - his fist - could be enough to establish malice. This is not a great argument when one examines the facts as a whole. For one thing, a fist typically is not considered a deadly weapon in the same way a knife is, unless the suspect is a trained fighter. Plus, the prosecution will have trouble convincing a jury that one punch thrown in a heated argument could have been reasonably foreseen by Dan to kill Vic.

C. Provocation defense

As discussed above, Dan will not be able to show that he was reasonably provoked to violence by Vic's mean (but accurate) comment. At the same time, these facts do support Dan's arguments that he lacked homicidal intent and malice.

D. Conclusion

Although it is conceivable that the jury could convict Dan of Second Degree Murder, it seems an unlikely result, particularly in light of Dan's strong insanity defense, discussed below.

III. Can the jury convict Dan of Voluntary Manslaughter?

To prove voluntary manslaughter charges, the prosecution would have to show that Dan killed Vic in the heat of passion. The elements of voluntary manslaughter include: actions by the victim that would be considered provocative by a reasonable person, actual provocation, no time for the defendant to calm down, and no actual "cooling" of the defendant's passion before the killing.

A. Vic's Provocation

As discussed above, Vic's provocative statement, though unkind, would not provoke a reasonable person to violence. The fact that Dan reacted so disproportionately to the provocation supports Dan's insanity defense, discussed below.

B. Actual Provocation

This element is established. There is no disputing the fact that Dan exploded in anger in response to Vic's provocative statement that Dan was crazy and should be locked up.

C. No Time to Calm Down

This element also is established. Dan's shouted threat and his deadly punch happened almost instantaneously in response to Vic's statement.

D. Conclusion

It is possible that a jury could convict Dan of voluntary manslaughter, perhaps as a compromise verdict if they could not reach an agreement about conviction on more serious charges or finding Dan not guilty by reason of insanity.

IV. Can the jury find Dan not guilty by reason of insanity?

Insanity is an affirmative defense to the charges Dan faces. That means Dan must show, by a preponderance of the evidence, that he was too crazy to be held criminally liable for killing Vic. There are four types of insanity defenses in use throughout the country. Each of them offers Dan strong defenses to the charges he is on trial for.

A. Irresistible Impulse

To establish this defense, Dan would have to show that he was incapable of exercising self-control or free will. The facts of this case appear to be a textbook case of this insanity defense. When Vic complained that Dan's shelf-restocking efforts were blocking the aisle, Dan swore at Vic and threatened to kick him out of the store. When Vic replied that Dan was crazy and should be locked up, Dan exploded in anger, shouted that he would kill Vic and immediately struck him with his fist.

Dan will be able to show that he has a long history of mental illness. Several witnesses, including a psychiatrist, testified about this history, and about Dan's continued erratic behavior despite treatment.

Taken as a whole, these facts all suggest that Dan will be able to meet his burden of proof and establish an irresistible impulse insanity defense.

B. Model Penal Code

The Model Penal Code insanity defense requires that the Defendant prove that he was unable to conform his conduct to what the law requires. This appears to be a somewhat more difficult standard for Dan to meet than the irresistible impulse standard, but again the facts of this incident, combined with Dan's history of mental illness and erratic behavior could likely give the jury a good reason to find him not guilty by reason of insanity.

C. M'Naughten

This insanity defense requires Dan to prove that he was unable to understand that his conduct was wrongful, and that he was unable to understand the nature and quality of his acts. Once again, the basic facts of the case give Dan some strong arguments. It is evident that he didn't know what he was doing at the time he struck Vic.

D. Durham

To establish an insanity defense under this standard, Dan would have to prove that his mental illness caused him to commit the acts for which he is being prosecuted. Essentially, this defense requires the defendant to prove that his allegedly criminal conduct is the product of a mental illness. It seems quite likely that Dan would be able to meet his burden of proof for this defense as well.

E. Conclusion

The jury could properly find Dan not guilty by reason of insanity. This is the likely result.

CRIMINAL LAW & PROCEDURE
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Deft saw Oscar, a uniformed police officer, attempting to arrest Friend, who was resisting arrest. Believing that Oscar was arresting Friend unlawfully, Deft struck Oscar in an effort to aid Friend. Both Friend and Deft fled.

The next day, as a result of Oscar's precise description of Deft, Paula, another police officer, found Deft on the street, arrested him for assault and battery and searched him, finding cocaine in his pocket. After Paula gave proper Miranda warnings, Deft said he wanted to talk to a lawyer before answering any questions. Paula did not interrogate him. However, before an attorney could be appointed to represent Deft, Paula placed him in a lineup. Oscar identified Deft as his assailant. Deft was then charged with assault and battery of a police officer and possession of cocaine. Thereafter, he was arraigned.

The next day Paula gave Deft, who was without counsel, proper Miranda warnings, obtained a waiver, and interrogated him. He admitted striking Oscar.

How should the judge rule on the following motions made by Deft at trial:

1. To suppress the cocaine? Discuss.
2. To suppress Oscar's identification during the lineup? Discuss.
3. To suppress Deft's admission that he struck Oscar? Discuss.
4. For an instruction to the jury that Deft's assault was justified on the basis of defense of another? Discuss.

Criminal Law & Procedure – Outline of Issues
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- I. The judge should deny Deft's motion to suppress the cocaine.
 - A. 4th Amendment
 - B. Paula searched Deft without a warrant
 - C. Search incident to a lawful arrest
 - D. Conclusion

- II. The judge should grant Deft's motion to suppress Oscar's identification.
 - A. 5th Amendment right to counsel
 - B. 6th Amendment right to counsel
 - C. Conclusion

- III. The judge should grant Deft's motion to suppress Deft's admission that he struck Oscar.
 - A. 5th Amendment right against self-incrimination
 - B. 6th Amendment right to counsel
 - C. Conclusion

- IV. The judge should deny Deft's motion for the jury instruction.
 - A. The Proposed Instruction
 - B. Defense of Another
 - C. Conclusion

CRIMINAL LAW & PROCEDURE

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On August 1, 2002, Dan, Art and Bert entered Vince's Convenience Store. Dan and Art pointed guns at Vince as Bert removed \$750 from the cash register. As Dan, Art and Bert were running towards Bert's car, Vince came out of the store with a gun, called to them to stop, and when they did not do so, fired one shot at them. The shot hit and killed Art. Dan and Bert got into Bert's car and fled.

Dan and Bert drove to Chuck's house where they decided to divide the \$750. When Chuck said he would tell the police about the robbery if they did not give him part of the money, Bert gave him \$150. Dan asked Bert for \$300 of the remaining \$600, but Bert claimed he, Bert, should get \$500 because his car had been used in the robbery. Dan became enraged and shot and killed Bert. He then decided to take all of the remaining \$600 for himself and removed the money from Bert's pocket.

On August 2, 2002, Dan was arrested, formally charged with murder and robbery, arraigned and denied bail. Subsequently, the court denied Dan's request that trial be set for October 15, 2002, and scheduled the trial to begin on January 5, 2003. On January 3, 2003, the court granted, over Dan's objection, the prosecutor's request to continue the trial to September 1, 2003, because the prosecutor had scheduled a vacation cruise, a statewide meeting of prosecuting attorneys, and several legal education courses. On September 2, 2003, Dan moved to dismiss the charges for violation of his right to a speedy trial under the United States Constitution.

1. May Dan properly be convicted of either first degree or second degree murder, and, if so, on what theory or theories, for:
 - a. The death of Art? Discuss.
 - b. The death of Bert? Discuss.
2. May Chuck properly be convicted of any crimes, and, if so, what crime or crimes? Discuss.
3. How should the court rule on Dan's motion to dismiss? Discuss.

Criminal Law & Procedure – Outline of Issues
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- I. Dan's Liability for Murder
 - A. The Death of Art
 - 1. First Degree Murder
 - 2. Second Degree Murder
 - 3. Felony Murder Rule
 - 4. Defense: Dan did not shoot Art
 - 5. Conclusion: Dan is liable for the First Degree Murder of Art
 - B. The Death of Bert
 - 1. Dan shot Bert.
 - 2. Felony Murder Rule
 - a. Robbery of Store
 - b. Robbery of Bert - Intent formed after shooting
 - 3. Defense: Provocation
 - 4. Conclusion: Dan is liable for at least the Second Degree Murder of Bert
 - C. Conclusion
- II. Chuck's Criminal Liability
 - A. Accessory After the Fact
 - 1. Robbery
 - 2. Murder
 - B. Extortion
 - C. Receiving Stolen Property
 - D. Conclusion
- III. Dan's motion to dismiss should be granted.
 - A. Dan requested a trial on October 15, 2002
 - B. On January 3, 2003, the court continued the case to September 1, 2003
 - C. Conclusion

CRIMINAL PROCEDURE
Copyright February 2004 State Bar of California

Bank was robbed at 1 p.m. by a man who brandished a shotgun and spoke with a distinctive accent. The teller gave the robber packets of marked currency, which the robber put into a briefcase. At 3:30 p.m., the police received a telephone call from an anonymous caller who described a man standing at a particular corner in the downtown business district and said the man was carrying a sawed-off shotgun in a briefcase. Within minutes, a police officer who had been informed about the robbery and the telephone call observed Dave holding a briefcase at that location. Dave fit the description given by the anonymous caller.

The officer approached Dave with his service revolver drawn but pointed at the ground. He explained the reason for his approach, handcuffed Dave, and opened the briefcase. The briefcase contained only the marked currency taken in the bank robbery. The officer said to Dave: "I know you're the one who robbed the bank. Where's the shotgun?" Dave then pointed to a nearby trash container in which he had concealed the shotgun, saying: "I knew all along I'd be caught."

Dave was charged with robbery. He has chosen not to testify at trial. He has, however, moved to be allowed to read aloud a newspaper article, to be selected by the judge, without being sworn as a witness or subjected to cross-examination, in order to demonstrate that he has no accent. He has also moved to exclude from evidence the money found in the briefcase, his statement to the officer, and the shotgun.

How should the court rule on Dave's motions regarding the following items, and on what theory or theories should it rest:

1. Dave's reading aloud of a newspaper article? Discuss.
2. The currency? Discuss.
3. Dave's statement to the officer? Discuss.
4. The shotgun? Discuss.

CRIMINAL PROCEDURE
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Outline

- I. Dave's reading aloud of a newspaper article
 - A. Non-testimonial Evidence
 - B. No waiver of Dave's 5th Amendment right against self-incrimination
 - 1. Dave will not be sworn in by the court
 - 2. Dave will not be subject to cross-examination
 - C. Conclusion - Dave should be allowed to read the article aloud.
- II. The Currency
 - A. 4th Amendment
 - B. Conclusion - Dave's motion to suppress should be denied.
- III. Dave's Statement
 - A. Hearsay
 - B. 5th Amendment
 - C. 4th Amendment
 - D. Conclusion - Dave's motion to suppress should be granted.
- IV. The Shotgun
 - A. 5th Amendment - Fruit of the poisonous tree
 - B. 4th Amendment - Fruit of the poisonous tree
 - C. Conclusion - Dave's motion to suppress should be granted.

CRIMINAL PROCEDURE
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Duce and Cody were arrested for an armed robbery. Duce was taken to the police station, where she was interrogated without Miranda warnings. After three hours of questioning, a police officer asked Duce if she would consent to a search of her automobile. Duce consented, and a search of her car revealed a handgun and items stolen in the robbery, which were seized by the officers. When told what the officers found, Duce confessed to driving the getaway car in the robbery.

Cody, who did not know that Duce had confessed, then confessed and named Duce as the driver of the getaway car.

At their joint trial on a charge of robbery, Duce moved to exclude her confession from evidence based solely on the failure of the police to give her Miranda warnings. Based only on that violation, the court granted the motion to exclude her confession.

Duce also moved to exclude from evidence the handgun and the stolen items seized from her automobile, claiming that she was not aware that she had a right to refuse consent to search. The prosecutor conceded that the police had no authority to search the car absent consent, but asserted that Duce's consent was obtained without coercion. The court denied the motion, finding that the consent was voluntary.

The handgun and the stolen items seized from Duce's car were admitted into evidence at the joint trial of Duce and Cody over objections by each defendant. Cody's confession, redacted to eliminate any reference to Duce, was admitted into evidence against Cody.

At trial Duce testified, denying that she drove the getaway car and that she knew the handgun or the stolen items were in her car. She testified that she had loaned her car to Cody on the day of the robbery. In rebuttal the prosecutor called a police officer who testified, over objection by Duce, to the contents of Duce's confession and to the contents of Cody's complete unredacted confession implicating Duce as the driver of the getaway car.

Assume that in each instance all appropriate constitutional and evidentiary objections were made.

1. Did the court err in admitting the handgun and the stolen items seized from Duce's car against Duce and Cody? Discuss.
2. Did the court err in admitting the police officer's testimony about Duce's confession? Discuss.
3. Did the court err in admitting the police officer's testimony about Cody's complete unredacted confession? Discuss.

CRIMINAL PROCEDURE
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Outline

- I. The Handgun and the Stolen Items
 - A. Duce
 - 1. 5th Amendment
 - 2. 4th Amendment
 - B. Cody - No Standing
 - C. Conclusion
- II. The Police Officer's testimony re: Duce's confession
 - A. Duce
 - 1. 5th Amendment - *Miranda*
 - 2. Hearsay
 - 3. 6th Amendment
 - B. Cody - Apparently not mentioned by Duce
 - C. Conclusion
- III. The Police Officer's testimony re: Cody's Unredacted Confession
 - A. Duce's 6th Amendment right to confront
 - B. Hearsay
 - C. Conclusion

CRIMINAL LAW
Copyright July 1999 State Bar of California

Al, Bob and Charlie planned to bring 50 cases of whiskey ashore from a ship anchored in the harbor near their town and sell it to a local bar owner. They believed the whiskey had been produced abroad and was subject to a federal import duty. They also knew that smuggling items into this country without paying duty required by the Tariff Act is a crime. In fact, however, the whiskey in this shipment had been produced in the United States.

The three met at Al's house on Monday and agreed to bring the whiskey ashore by rowboat on Friday night. On Wednesday, however, Bob called Al to say that he and his wife were going to visit relatives that weekend and Bob would not be able to help bring the whiskey ashore. Al said that was all right, that he and Charlie could handle the boat and the whiskey, but that Bob would naturally be cut out of the profits on this job.

When Charlie learned from Al that there would be just the two of them he became apprehensive, but he was afraid of what Al might do to him if he tried to back out. Therefore, on Thursday, Charlie informed the police of Al's plan and did not show up on Friday night. Al was arrested on Friday night as he came ashore, alone, with the whiskey and was loading it into a truck he had stolen from a nearby Coast Guard parking lot.

Al, Bob and Charlie have been charged with theft of the truck and conspiracy to import dutiable goods without payment of duty.

Al has also been charged with attempt to import dutiable goods without payment of duty. He has told Len, his lawyer, that he plans to testify that he knew all along that the whiskey was produced in the United States.

Based on the above facts:

1. Should Al, Bob or Charlie be convicted of:
 - a. Conspiracy to violate the Tariff Act?
 - b. Theft of the truck? Discuss.
2. Should Al be convicted of attempt to import dutiable goods without payment of duty in violation of the Tariff Act? Discuss.
3. If Al persists in testifying that he knew the whiskey was produced in the United States, what, if anything, should Len do? Discuss.

CRIMINAL LAW
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Outline

- I. Criminal Liability of Al, Bob and Charlie
 - A. Conspiracy to Violate the Tariff Act
 - 1. Al
 - a. Impossibility
 - b. Mistake
 - 2. Bob - Withdrawal
 - 3. Charlie - Withdrawal plus Thwarting the Crime
 - B. Theft of the Truck
 - 1. Al: Direct Liability
 - 2. Bob: Co-Conspirator
 - 3. Charlie - Withdrawal
- II. Liability of Al for Attempt to Violate the Tariff Act
 - A. Impossibility
 - B. Conclusion
- III. Len's Actions if Al Insists on Testifying Falsely
 - A. Duty of Zealousness
 - B. Attorney / Client Privilege
 - C. Duty of Candor
 - D. Conclusion

CRIMINAL PROCEDURE
Copyright February 1999 State Bar of California

Information gained from a constitutionally proper wiretap gave law enforcement agents a reasonable suspicion that Deft was a cash courier in a money laundering scheme associated with distribution of narcotics. To obtain probable cause to arrest Deft and to build their case against other participants, the agents placed Deft under surveillance. They saw her drive into an office complex and legally park the car. She left a male companion in the car and walked into the complex carrying a soft cloth briefcase. As she walked, Deft engaged in evasive actions the agents recognized as moves designed either to reveal or lose any potential surveillance.

Deft walked into a building where the agents lost sight of her for a few moments. When she emerged and approached the car, it became apparent to the agents that she was aware of the surveillance. The agents approached Deft and asked her questions about the money laundering scheme. During this conversation, agent Able seized and squeezed the briefcase held by Deft. When he felt a lump he could not identify, Able reached into the briefcase and felt a heavily taped bound object about three inches in diameter which he removed from the briefcase. Able will testify that he has seen such objects in the past, and they frequently contained drugs. Able cut the package open and discovered a substance that a field test indicated was cocaine. He arrested Deft.

Without *Miranda* advice and waivers, Able asked Deft if she owned an automobile. She replied that she did and pointed to the car the agents had seen her park. She refused Able's request that she consent to a search of the car. The agents nonetheless searched the car, finding a loaded handgun concealed under the dashboard.

Deft is awaiting trial on charges of possession with intent to distribute cocaine and unlawful possession of a handgun.

On what ground or grounds under the United States Constitution might Deft move to suppress:

1. The narcotics? Discuss.
2. Deft's statement that she owned the car? Discuss.
3. The handgun? Discuss.

CRIMINAL PROCEDURE
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Outline

- I. Motion to suppress the narcotics
 - A. The stop was legal (4th Amendment)
 - B. The search was illegal (4th Amendment)
 - C. Conclusion

- II Motion to suppress the statement that Deft owned the car
 - A. Fruit of the poisonous tree (4th Amendment)
 - B. *Miranda* - custodial interrogation (5th Amendment)
 - C. Right to counsel (6th Amendment)
 - D. Conclusion

- III Motion to suppress the handgun
 - A. Fruit of the poisonous tree (4th, 5th, 6th Amendments)
 - B. Defendant did not consent.
 - C. Automobile Exception
 - D. Conclusion

Don arrived home at night and found Vic assaulting Don's wife. Vic escaped before Don could apprehend him. Convinced that the legal system would never bring Vic to justice, Don spent three months searching for Vic so that he could take care of the matter himself.

Alex, whom Don did not know, had his own reasons for wanting Vic dead. Alex heard of Don's desire to locate and retaliate against Vic. Hoping that Don would kill Vic, Alex sent Don an anonymous note giving Vic's location. Don, taking a pistol with him, found Vic where the note said he would be. After a heated argument in which Don accused Vic of attempting to rape his wife and Vic denied the accusation, Don shot Vic in the head.

Vic was rushed to a hospital where he was preliminarily diagnosed as "brain dead" and placed on life support systems for three days during which follow-up studies confirmed the permanent cessation of all brain function. A hospital physician then disconnected the life support systems which had kept Vic's heart and respiratory systems functioning, and Vic was pronounced dead.

Don and Alex were both charged with murder. Evidence of the above facts was admitted at trial. The prosecutor argued that the murder was willful, deliberate, and premeditated and that it was committed during the commission of felonies of assault with a deadly weapon and burglary. Alex was alleged to have aided and abetted murder, felony murder, burglary, and assault with a deadly weapon, but ruled that there was no evidence to warrant instructions on manslaughter. The jury convicted both Don and Alex of first degree murder. Both have appealed.

1. How should the appellate court rule on Don's arguments that:
 - a. The uncontradicted evidence established that the hospital physician, not Don, killed Vic? Discuss.
 - b. The court erred in instructing on murder in the commission of a felony? Discuss.
 - c. The court should have instructed on manslaughter? Discuss.

2. How should the appellate court rule on Alex's arguments that:
 - a. The evidence is insufficient to support his conviction as an aider and abettor? Discuss.
 - b. The evidence is insufficient to support his conviction of first degree murder even if it does support a finding that he aided and abetted Don? Discuss.

CRIMINAL LAW
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Outline

- I. Don's Arguments
 - A. The court correctly found that Don, not the physician, killed Vic.
 - B. The felony murder instruction was error.
 - C. The court correctly did not instruct on Manslaughter
 - D. Conclusion

- II. Alex's arguments
 - A. There was sufficient evidence to show aiding and abetting
 - B. There was sufficient evidence for First Degree Murder
 - C. Conclusion

CRIMINAL LAW AND PROCEDURE
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Late at night Officer Jones observed a red sports car with one headlight out, a violation of a traffic law. Jones stopped the car, approached the driver to issue a citation and, following standard police procedure, asked the driver for his license and registration. The license identified the driver as Dan Deft. As Deft handed the license and registration to Jones, Deft said that he "could make life very unpleasant" for Jones if she "messed" with him.

As Jones was writing a citation, she heard a police all points bulletin to be on the alert for a red sports car driven by a male, about 5'8" tall, 150 pounds, clean-shaven, with dark hair, and wearing glasses, dark pants with a pink puff-sleeved shirt unbuttoned down to the navel. This person was wanted for robbery of Smith, whose purse had just been taken. Deft was actually 5'9" tall, 160 pounds, with dark hair, and wore glasses, blue trousers and a rose-colored, puff-sleeved shirt buttoned up to the neck.

Jones placed Deft under arrest for robbery and read him Miranda warnings. Deft invoked his rights to remain silent and to counsel. Jones turned Deft over to other police officers who had arrived at the scene. She then searched Deft's car and discovered a purse under the seat.

One hour after Deft was arrested, Smith identified Deft as the robber in a one-on-one confrontation at the police station. She said that she was positive in her identification. She also identified the purse found in Deft's car as hers. Deft was again given Miranda warnings. This time he waived his rights and confessed to the robbery. Deft was then formally charged with robbery and is awaiting trial.

1. How should the court rule on Deft's pretrial motions, all based on the United States Constitution, to exclude the following evidence at trial:
 - a. His statement to Officer Jones at the scene of the arrest, a motion based on asserted violations of his rights under the Fourth, Fifth, and Sixth Amendments? Discuss.
 - b. The purse seized from Deft's car, a motion based upon asserted violations of his rights under the Fourth Amendment? Discuss.
 - c. The identification of Deft by Smith at the police station, a motion based on asserted violations of Deft's rights under the Sixth Amendment and Due Process Clause of the Fourteenth Amendment? Discuss.
 - d. His confession at the police station, a motion based on asserted violations of Deft's rights under the Fifth Amendment? Discuss.

2. If Deft's confession is ruled inadmissible at trial because of a violation of the Fifth Amendment, and he testifies at trial, will the Fifth Amendment violation preclude use of the confession to impeach the testimony that Deft gave on either direct or cross-examination? Discuss.

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Outline

- I. Deft's Motion to Exclude His Statement to Officer Jones
 - A. 4th Amendment
 - B. 5th Amendment
 - C. 6th Amendment
 - D. Conclusion

- II. Deft's Motion to Exclude the Purse: 4th Amendment

- III. Deft's Motion to Exclude Smith's Identification of Deft
 - A. 6th Amendment
 - B. Due Process Clause of the 14th Amendment

- IV. Deft's Motion to Exclude His Confession: 5th Amendment

- V. Use Of Deft's Confession to Impeach Deft

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Jane, a police officer who was not in uniform, attempted to make a lawful arrest of Al for distribution of a controlled substance. Doug, who did not know either Al or Jane, arrived on the scene, a poorly lit alley, and did not realize that Jane was a police officer. Because Jane was wearing civilian clothes and holding a gun on Al, Doug thought Jane was robbing Al.

Doug ran up and shoved Jane away from Al, who fled down the alley. Jane fired a shot at Al, killing Al. Doug then wrestled the gun from Jane and shot Jane, killing Jane.

Doug was indicted for murder of Jane under a statute which mandates imposition of the death penalty for first degree murder of a peace officer who is in the performance of her duties. During jury selection, over Doug's repeated objections, the prosecutor used his peremptory challenges to remove all African-Americans and death penalty opponents from the jury.

1. What factual and legal defenses are available to Doug and, if they are accepted by the jury, of what crime, if any, should Doug be convicted? Discuss.
2. If Doug is convicted, how should the appellate court rule on an argument that the prosecutor's actions during jury selection denied Doug rights under the Sixth and or Fourteenth Amendments to the United States Constitution? Discuss.
3. If Doug is convicted of first degree murder as charged and the jury is instructed that it has no discretion as to penalty, would imposition of the death penalty violate Doug's rights under the Eighth Amendment to the United States Constitution? Discuss.
4. Did Jane act lawfully when she shot Al? Discuss.

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Outline

- I. Doug's defenses to homicide:
 - A. Defense of others:
 - B. Self-defense:
 - C. Doug's criminal liability:
 - 1. First degree murder of a peace officer in the performance of her duties:
 - 2. Homicide liability: common law murder and manslaughter.
- II. The prosecution's conduct during jury selection:
 - A. Removal of African-American jurors violates the 14th Amendment.
 - B. Peremptory challenges may be used to exclude death penalty opponents.
- III. Mandatory death penalty statutes violate the 8th Amendment.
 - A. The 8th Amendment
 - B. Right to Present Exculpatory Evidence
 - C. Conclusion
- IV. Jane did not act lawfully when she shot Al.

CRIMINAL LAW AND PROCEDURE
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Fred, a federal customs inspector, saw Dan speak to Anon as Dan and Anon walked across the international border into the United States. Fred recognized Anon as a person who had been convicted of smuggling narcotics. Over Dan's protest, Fred searched luggage carried by Dan and Anon. Fred found a packet of glassine envelopes and some dextrose powder in Dan's suitcase and a large quantity of heroin in the lining of the suitcase carried by Anon.

Fred knew that dextrose powder is used to dilute heroin, and that heroin is sold in envelopes like those carried by Dan. Fred then ordered that Dan be searched by a physician who found a small quantity of heroin on Dan in a body cavity. Dan was thereupon arrested on a federal charge of importing narcotics without a permit.

Fred notified state narcotics agents of the arrest. Olson, a state agent, located Dan's car parked legally on a street in the United States near the border crossing. Olson impounded the car and during a search of the car on the following day, discovered a large quantity of heroin. Dan was then charged with violation of a state statute prohibiting possession of narcotics for sale.

At a pre-trial hearing, Dan argued that he is entitled to have bail fixed, or, because he is indigent, to be released on his own recognizance. A state statute permits denial of pre-trial bail when a defendant poses too great a risk to society to remain free pending trial.

1. How should the federal court rule on Dan's motion to exclude the heroin found on his person from evidence at the federal trial? Discuss.
2. How should the state court rule on Dan's motion to exclude the heroin found in his car from evidence at the state trial? Discuss.
3. How should the state court rule on Dan's claim that he is entitled to have bail fixed or be released pending trial on the state charge? Discuss.

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Outline

- I. The Federal Court Should Deny Dan's Motion to Exclude the Heroin Found On His Person.
 - A. Dan Had No Reasonable Expectation of Privacy on the International Border.
 - B. The Body Cavity Search Does Not "Shock the Conscience" (5th Amendment Due Process).
 - C. Conclusion

- II. The State Court Should Grant Dan's Motion to Exclude the Heroin Found In His Car. (4th, 14th Amendments)
 - A. Olson Did Not Have Either a Warrant or Probable Cause.
 - B. There Are No Applicable Exceptions to the Warrant Requirement.
 - 1. Dan's Car Was Not a "Moving Auto."
 - 2. Dan's Car Was Not Lawfully Impounded.
 - C. Conclusion

- III. The State Court Should Grant Dan's Request For Fixed Bail, But It Need Not Release Him On His Own Recognizance.
 - A. The 8th Amendment Has Not Been Made Applicable to the States.
 - B. The State Preventive Detention Statute is Probably Valid.
 - C. Should the Statute Be Applied To Dan?
 - D. Conclusion