

PEARCE MICRO REVIEW
Criminal Law & Procedure

I. Crimes

A. Crimes Against People

1. Homicide

a. common law murder - intended killings with malice aforethought

1. intent to kill – note deadly weapon doctrine

2. intent to inflict great bodily injury

3. reckless indifference – abandoned and malignant heart

4. intent to commit a felony – felony murder

b. common law voluntary manslaughter

1. provocation likely to arouse sudden and intense passion

2. actual provocation

3. no cooling off period

4. no actual cooling off

c. involuntary manslaughter

1. criminal negligence, or

2. death during the commission of a criminal act outside of felony murder rule

d. modern first degree murder

1. deliberate and premeditated

2. felony murder

3. special circumstances

2. Sex Offenses, primarily Rape and Statutory Rape

3. Mayhem
 4. Assault
 - a. attempt to commit a battery, or
 - b. intentional creation of reasonable apprehension of imminent bodily harm
 - c. aggravated assault
 5. Battery
 - a. unlawful application of force
 - b. bodily injury or offensive touching
 - c. aggravated battery
 6. Kidnapping
 - a. movement of the victim
 - b. concealment
 - c. aggravated kidnapping
 7. False Imprisonment
- B. Crimes Against Property
1. Burglary
 - a. breaking
 - b. entry
 - c. protected structure
 - d. intent to commit a crime
 2. Arson
 - a. malicious
 - b. burning

- c. protected structure
- 3. Taking by Trespass
 - a. larceny (theft)
 - 1. taking
 - 2. asportation
 - 3. of another's tangible personal property
 - 4. trespass
 - 5. intent to permanently deprive
 - b. robbery
 - 1. taking
 - 2. of another's personal property
 - 3. from the other's person or presence
 - 4. by force or immediate threat of death or physical injury
 - 5. intent to permanently deprive
 - c. extortion – blackmail
- 4. Taking by Delivery
 - a. larceny (theft without trespass)
 - b. larceny by trick (fraud)
 - c. embezzlement
 - 1. fraudulent
 - 2. conversion
 - 3. of another's personal property

4. by defendant in lawful possession
 - d. false pretenses
 1. obtaining title
 2. to another's personal property
 3. by intentional false statement of fact
 4. intent to defraud
 - e. receiving stolen property
 1. receiving possession and control
 2. of stolen personal property
 3. known to be stolen
 4. by another person
 5. intent to permanently deprive
 - f. forgery
 1. making or altering a writing
 2. so it is false
 3. intent to defraud
 5. malicious mischief
 - a. malicious – intent to damage or destroy
 - b. destruction
 - c. of another's property
- C. Preliminary (Inchoate) offenses – Parties to Crime
 1. Solicitation
 - a. inciting, advising, encouraging or ordering another to commit a crime

- b. intent for the other person to commit the crime
- 2. Conspiracy
 - a. agreement
 - b. specific intent to enter the agreement
 - c. specific intent to achieve the criminal objective
 - d. overt act
 - e. defenses
 - 1. impossibility – no defense
 - 2. withdrawal – may be a defense to crimes committed in furtherance of the conspiracy, including the target offense
- 3. Attempt
 - a. act done with intent to commit a crime
 - b. act falls short of completing the crime
 - c. defenses
 - 1. factual impossibility – no defense
 - 2. legal impossibility – valid defense
 - 3. abandonment
 - 4. merger with target offense
- D. Crimes involving Courts or Government
 - 1. perjury
 - 2. suborning of perjury
 - 3. bribery
 - 4. compounding a crime

5. misprison of felony

E. Defenses

1. Insanity

a. Durham – defendant has a defense if the crime was a product of a mental illness

b. Irresistible Impulse – defendant has a defense if he could not control his actions or conform his conduct to the law

b. M'Naghten

1. defendant either did not know his act would be wrong, or

2. defendant did not understand the nature and quality of his actions

c. ALI Model Penal Code – defendant has a defense if he lacked the substantial capacity to either

1. appreciate the criminality of his act, or

2. conform his conduct to the law

2. Intoxication

a. voluntary – a defense to specific intent crimes

b. involuntary

c. chronic intoxication as a cause of insanity

3. Infancy

4. Justification

a. self defense

1. non deadly force

2. deadly force

3. aggressor's right to use self defense – requires
 - a. withdrawal and communication of withdrawal, or
 - b. sudden escalation of fight by victim
 - b. defense of others
 - c. defense of a dwelling
 - d. defense of other property
 - e. crime prevention
 - f. apprehension of a fleeing felon
5. Duress
 6. Mistake
 - a. mistake or ignorance of fact can show lack of intent
 - b. even reasonable mistake of the law usually is not a defense
 7. Causation
 8. Consent
 - a. voluntarily and freely given
 - b. capacity to consent
 - c. no fraud to obtain consent
 9. Entrapment
 - a. criminal design originated with law enforcement
 - b. defendant not predisposed to commit the crime

II. Criminal Procedure

A. Exclusionary Rule Issues

1. 4th Amendment Protection Against Unreasonable Searches and Seizures
 - a. standing – state action without a warrant
 - b. arrest – seizure of the person
 1. probable cause required
 2. no warrant required before arresting in public
 3. warrant required for non-emergency arrest of a suspect at home
 4. stop and frisk
 5. automobile stops
 - c. search and seizure of evidence
 1. government conduct
 2. reasonable expectation of privacy
 3. search with a warrant
 4. search without a warrant
 - a. search incident to lawful arrest
 - b. automobile exception
 - c. plain view
 - d. consent
 - e. stop and frisk
 5. administrative inspections and searches
 6. border searches

7. wiretapping and eavesdropping
2. 5th Amendment Protection Against Self-Incrimination
 - a. *Miranda* – establishes 5th Amendment right to counsel
 1. warnings: right to remain silent, any statement admissible, right to counsel, indigent right to appointed counsel
 2. required when defendant is in custody and being interrogated
 3. defendant has the right to terminate the interrogation
 4. confessions obtained in violation of *Miranda* are admissible to impeach
 - b. coerced confessions – harmless error
 - c. elimination of privilege – grant of immunity
3. 6th Amendment Right to Counsel
 - a. right to counsel attaches after judicial proceedings begin
 - b. right to confront
 - c. lineups and other forms of identification
 1. right to counsel
 2. due process standard
 3. remedy: exclude the identification
4. Notes on the Exclusionary Rule
 - a. illegally obtained evidence excluded, along with fruit of the poisonous tree
 - b. exceptions to the fruit of the poisonous tree
 1. independent source

2. intervening act of free will by defendant

3. inevitable discovery

c. harmless error

B. Non Exclusionary Rule Issues

1. Pretrial

a. bail – 8th Amendment never directly applied to the states

b. preliminary hearing – establish probable cause to detain

c. grand jury

1. secrecy – defendant has no right to notice

2. no right to counsel or *Miranda*

3. no right to the exclusion of evidence

4. no right to challenge subpoena

d. prosecutor's duty to disclose exculpatory information

e. defendant must be competent to stand trial

f. pretrial publicity and changes in venue

2. Trial

a. public trial – 6th and 14th Amendments

b. right to trial by jury

1. serious offenses only

2. number and unanimity

3. cross-section of the community

4. impartial jury

- a. racial bias
 - b. death penalty

 - c. competent counsel
 - d. speedy trial
 - e. fair and impartial judge – not necessarily a lawyer
 - f. fair prosecutor
 - g. 6th Amendment right to confront adverse witnesses
 - h. prosecution bears the burden of proof
 - i. jury instructions and presumptions
 - j. guilty pleas
3. Post-Trial
- a. double jeopardy
 - 1. the attachment of jeopardy
 - 2. exceptions
 - 3. separate sovereigns
 - 4. collateral estoppel
 - b. 8th Amendment protection from cruel and unusual punishment
 - c. death penalty
 - d. appeal
 - e. collateral attack – habeas corpus
 - f. rights during punishment

Criminal Law & Procedure Hypo #1

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 on 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.

- 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 & Procedure Hypo #2

Art and Bill agreed to kidnap Vickie and to make a ransom demand of her parents. Because he knew that Art had been convicted of a forcible sexual offense in the past, Bill insisted that Art agree that no harm would be inflicted in Vickie. Art assured Bill that he would not harm her.

Art and Bill kidnapped Vickie, locked her in a room in Art's home, and communicated a \$100,000 ransom demand to Vickie's parents. Her parents promptly contacted the police, who were unsuccessful in efforts to locate and rescue Vickie.

Several days after the kidnapping, Art raped Vickie. Despondent over the confinement and mortified by the rape, Vickie killed herself only hours after the rape. Bill was not present and had no knowledge of the rape or suicide until Art told him that Vickie had killed herself shortly after Art had raped her. Art also told Bill that he was going to dispose of Vickie's body. Bill immediately turned himself in to the police. He then told the police: a) about the kidnapping in detail; b) what Art had said about the rape and suicide; and c) that Art had said he was going to dispose of Vickie's body.

Police arrested Bill, went to Art's home where they found Vickie's body, and arrested Art.

Based on the above facts:

1. On what theory or theories of liability might Bill be convicted of rape? Discuss.
2. Are Art and Bill, or either of them, guilty of the murder of Vickie? If so, is the offense first or second degree murder? Discuss.
3. Is Bill's statement to the police, or any part of it, admissible at a joint trial of Bill and Art if neither testifies? Assume all proper objections are made. Discuss.

- I. People v. Bill: Rape
 - A. Conspiracy
 - B. Accomplice Liability
 - C. Bill's defenses will not absolve him of liability.
 - 1. Bill did not rape Vickie.
 - 2. Bill did not want Vickie harmed.
 - 3. Bill went to the police.
 - D. Conclusion

- II. People v. Art and Bill: Murder
 - A. Murder
 - B. Felony Murder
 - 1. Kidnapping
 - 2. Rape
 - C. Conclusion: Both Art and Bill are guilty.

- III. Admissibility of Bill's Statement
 - A. Relevance
 - B. 5th Amendment
 - C. 6th Amendment
 - D. Conclusion

Criminal Law & Procedure Hypo #3

Dan proposed to his friend Paul that the two rob the First National Bank (Bank). Paul, thinking that Dan was joking, replied: "Sure, why not?" Dan then produced three pistols and three stocking masks and said, "Okay, let's go." Paul thought that it would be dangerous to back out at that point. He therefore took a pistol, but he secretly resolved to try to thwart the robbery.

On the way to Bank, Dan announced: "We need someone else." Dan then approached passerby Mike, pointed a pistol at Mike, and said: "We are going to rob Bank, and you are going to help us or we will kill you." Mike gulped, accepted a mask and an unloaded pistol, and proceeded with Dan and Paul to Bank, doing so because he reasonably believed the threat was real.

When the three arrived at Bank, Dan assigned Paul to act as lookout. Dan instructed Mike to approach the teller with the pistol and to demand all the teller's cash. Dan then stood back to cover everyone in Bank, including Mike. Dan whispered to Paul: "We will kill anybody who gives us trouble." Paul said nothing.

Immediately thereafter, Fred, a stranger to Dan, Paul and Mike, entered Bank. Dan thereupon shot and severely wounded Fred. Fred was a federal bank examiner conducting an audit of Bank's accounts.

Based on properly admitted evidence which established the above facts, Dan and Paul were convicted in a federal court of violation of, and conspiracy to violate, a federal statute providing: "Whoever assaults with a deadly weapon any federal officer engaged in the performance of his duties is guilty of a felony." Dan and Paul have appealed, arguing that the evidence does not support the convictions of either for violation of the federal assault statute or conspiracy to violate that statute.

Eight months after the robbery attempt, Fred died of his wounds. Dan, Paul and Mike are on trial in a state court on charges of assault with a deadly weapon on, and murder of, Fred. Dan and Paul filed timely motions to dismiss both the assault and the murder charges on the ground that the prosecution subjects them to double jeopardy. The motions were denied.

Evidence identical to that admitted in the federal court was then received in the the state court trial. Mike filed a timely motion for a directed verdict of acquittal on the ground that the evidence established duress as a matter of law.

1. How should the federal appeal court rule? Discuss.
2. Was the state trial court's denial of the motions to dismiss correct? Discuss.
3. How should the state trial court rule on Mike's motion for a directed verdict? Discuss.

I. The Federal Court's Rulings On Appeal Of Convictions

A. Paul's appeal will fail.

1. Conspiracy:

a. Paul thought Dan was joking.

b. There was an agreement to use force.

2. Violation of the Federal Assault Statute:

a. Paul did not assault Fred.

b. Paul's accomplice liability:

B. Dan's appeal also will fail.

1. Conspiracy:

2. Violation of the Federal Assault Statute:

II. Double Jeopardy: Separate Sovereigns

III. Mike's Motion for a Directed Verdict Should Be Granted.

A. Violation of the Federal Assault Statute:

B. Murder

1. Felony Murder:

2. Accomplice Liability

Criminal Law & Procedure Hypo #4

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.

- 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

Criminal Law & Procedure Hypo #5

Deft, who has a long history of mental illness, became enraged when Vic, his landlord, threatened to evict him for nonpayment of rent. He picked up a baseball bat and hit Vic over the head with sufficient force that Vic was momentarily stunned and suffered a concussion. Deft immediately exclaimed, "I'm sorry, Vic. I didn't mean to hurt you."

Based on those facts, Deft was indicted for attempted murder. Bail was denied. At Deft's first court appearance, Len was appointed to represent him because Deft was indigent. At his arraignment, Deft entered pleas of not guilty and not guilty by reason of insanity. At a hearing at which a magistrate ordered Deft held for trial, Len moved in the trial court for (1) dismissal of the charge on the ground that the evidence before the magistrate did not establish probable cause to believe Deft committed attempted murder; and (2) for appointment of a psychiatrist to assist in the preparation and presentation of the defense. The court denied both motions.

Deft asked Len to seek immediate appellate review of the denial of his motions. Although such review was available under established procedures, Len refused to seek it, telling Deft that he did not believe that a meritorious basis existed for claiming that the court had erred in denying the motions. Deft, discouraged and frustrated by his continued incarceration, then accepted Len's suggestion that he plead guilty. Len assured him that if he entered a guilty plea, the judge would sentence him to "time served" and release him from jail.

When Deft next appeared in court, Len advised the judge that Deft wanted to change his plea to guilty. After asking only, "Is that what you want?" and receiving an affirmative reply from Deft, the judge permitted him to withdraw his not guilty pleas and to enter a plea of guilty. The judge then sentenced him to five years in the state prison.

How should the appellate court rule on claims made in Deft's properly filed petition for post-conviction relief that:

1. Len gave him erroneous advice when he told Deft that there was no meritorious basis on which to seek pretrial review of the denial of his motions? Discuss.
2. He had potentially meritorious defenses of insanity and diminished capacity which Len should have presented? Discuss.
3. His plea of guilty was not: (a) shown on the record to be voluntary and intelligent and, (b) in fact was not voluntary and intelligent? Discuss.
4. Len's conduct of the defense denied Deft constitutionally adequate representation? Discuss.

- I. Pretrial review of the denial of Deft's motions:
 - A. Deft's motion to dismiss the charges:
 - B. Deft's motion for appointment of a psychiatrist:
 - C. Conclusion

- II. Deft's insanity and diminished capacity defenses
 - A. Durham
 - B. M'Naghten
 - C. ALI Model Penal Code
 - D. Irresistible Impulse
 - E. Conclusion

- III. Deft's guilty plea:
 - A. The record of Deft's guilty plea was defective.
 - B. Deft's plea of guilty was not voluntary and intelligent.

- IV. Len's conduct of the defense violated Deft's 6th Amendment rights.
 - A. Len did not appeal the denial of his pretrial motions.
 - B. Len did not present the insanity defense.
 - C. Conclusion

Criminal Law & Procedure Hypo #6

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.

- 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