



# **California First-Year Law Students' Examination**

**Essay Questions  
and  
Selected Answers**

**October 2019**



The State Bar of California  
Committee of Bar Examiners / Office of Admissions

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## **ESSAY QUESTIONS AND SELECTED ANSWERS**

**OCTOBER 2019**

### **CALIFORNIA FIRST-YEAR LAW STUDENTS' EXAMINATION**

This publication contains the four essay questions from the October 2019 California First-Year Law Students' Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Criminal Law
2.	Contracts
3.	Torts
4.	Criminal Law

# October 2019

## ESSAY QUESTIONS



# California First-Year Law Students' Examination

**Answer all 4 questions.**

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

You should answer according to legal theories and principles of general application.

## QUESTION 1

Julie Smith hired Debra Daniels to take care of her grandmother, Nan. Smith informed Daniels that during her daily visits to Nan, she was to prepare Nan's prescription medications by placing the correct number of pills in a dispenser. With the pills placed in the dispenser, Nan could take the correct dosage of evening medications after Daniels left for the day. Smith told Daniels that this task was very important because Nan had previously gotten confused, taken the wrong number of pills, and almost died.

After several months, Nan told Daniels that she enjoyed her company and was relieved that everything was working out because she feared that if it didn't, her granddaughter would place her in a nursing home.

Neither Smith nor Nan knew that Daniels was a drug addict who regularly needed money to buy drugs. One day, Daniels went to work at Nan's after ingesting a large quantity of narcotics. Nan did not notice that Daniels was under the influence of drugs and, during the day, Daniels secretly removed jewelry from the home and sold it for drugs.

On another day, Daniels told Nan that she had to quit and find another job because she had to make money quickly to pay past due bills for a previous lifesaving medical treatment. Unaware that the story was not true, Nan gave Daniels \$1,000.

Daniels used the \$1,000 and went on a three-day drug binge. During those three days, she did not go to work, nor did she inform Nan or Smith that she would not be at work. When Daniels failed to go to work and place the correct dosage of Nan's medications into the dispenser, Nan took too many pills, overdosed on her medication and died.

With what crimes, if any, may Daniels be charged; what defenses, if any, could she raise; and what is the likely result? Discuss.

## QUESTION 1: SELECTED ANSWER A

State v. Daniels (D)

### Larceny: Jewelry

The trespassory taking and moving the personal property of another with the intent to permanently deprive.

Here, D took jewelry from Nan secretly. She did not have a right to it and therefore it was a trespassory taking. She sold it for drugs and therefore had no intent on returning it so as to permanently deprive her of her jewelry.

Therefore, D can be charged with larceny.

### Embezzlement: Jewelry:

Wrongful conversion of rightfully entrusted personal property.

D was a hired staff who worked closely with Nan, providing daily visits and preparation of Nan's prescriptions.

No facts suggest that Nan had given D entrustment of her jewelry, and further the jewelry was not in any way a part of her job or duties. Therefore, D will not be charged with embezzlement.

### Larceny of Trick: \$1,000

Obtaining possession of another's personal property with the intent to permanently deprive

by means of fraud or trick. D told Nan that she had to quit and find another job because she had to make enough money quickly to pay past due bills. Nan gave \$1,000. Nan was unaware the story was not true. D did not intend to return and therefore permanently deprive.

Although, D induced the relinquishment of Nan's personal property by trick she obtained more than mere possession. She obtained title which is more than larceny by trick which is used only to obtain title. Therefore, D will not be charged with larceny by trick for the \$1,000.

#### False Pretenses: \$1,000

Obtaining title of the personal property of another with consent by the use of fraud knowing the victim would rely on the statement.

Here, D told Nan she had to quit as discussed supra under larceny by trick. This was a fraudulent statement.

Nan's reliance came in the form of not wanting to go to the nursing home. This is something D knew and used to make her rely on D's continued stay as her worker. Nan consented to the relinquishment of \$1,000 not knowing the story to be false.

Further, when Nan gave the \$1,000 she passed title of the money to D. Therefore, D can be charged with false pretenses.

#### Homicide:

The killing of a human being by another human being. Nan died of an overdose of pills that

was supposed to be administered by D and therefore, due to her failure, Nan died.

Therefore, a homicide.

### Causation: Actual

But for, D going on a 3-day drug binge and not being there to administer Nan's medication properly, Nan would not have died. Therefore, D is the actual cause of his death.

### Proximate Causation:

It is foreseeable that when medication is not administered for an elderly patient who has previously taken the wrong amount of pills, if she is left alone, she could take the wrong amount again and die.

D will argue that Nan taking the wrong amount of pills was an independent act which was the superseding cause of her death and D will argue that she did not directly kill Nan breaking the chain of liability.

However, the court will find that it was foreseeable Nan would take the wrong amount of pills, that D was hired specifically to prevent her overdosing and therefore the result was foreseeable and D will be liable.

Therefore, D was the proximate cause of Nan's death.

### Murder: Malice Aforethought:

An unlawful killing with malice aforethought. Malice can be found with the intent to kill or

cause great bodily harm or reckless and wanton conduct. D will assert that she had no intent to kill Nan or cause great bodily harm and that her intent was solely to use drugs with the money.

However, the State will assert her behavior was reckless and wanton as she knew expressly that Nan was completely dependent on D's daily care and further the care was specific to keep Nan from administering her own medication as it almost killed her previously. The conduct was wanton as it displayed a depraved heart with sheer disregard for Nan's life. Therefore, malice.

Therefore, D will be charged with the murder of Nan.

### First Degree Murder

The intent to kill with premeditation and deliberation.

D will assert that she had no intent to kill Nan. Her acts were negligent but not premeditated or cold-blooded. Therefore, D will not be charged with first degree murder.

### Second Degree Murder

All murder which is not in the first degree.

D was not charged with first degree murder and will therefore be charged with second degree murder absent any defenses or mitigation.

### Excuse: Voluntary Intoxication

Voluntary intoxication is never an excuse for a crime; however it will mitigate a specific intent crime. Here, D was found guilty of murder through malicious behavior that was reckless and wanton, but lacked specific intent to kill.

D will argue that her addiction to drugs and her 3-day binge made it impossible to care for Nan. However, since D could have alerted Julie Smith of her absence and the fact that the intoxication was voluntary, this defense will fail.

### Involuntary Manslaughter: Criminal Negligence

Involuntary Manslaughter is reckless behavior that is more than ordinary but less than wanton. D will assert that her behavior lacked the depraved heart as she was suffering drug addiction and she was negligent but not wanton.

The State will counter that her recklessness did amount to wanton disregard for life as she knew Nan's life literally depended on D's daily services. Therefore, D will not be charged with criminal negligence.

### Defense: Intoxication

D will argue that the defense of intoxication should relieve her of the specific intent crimes of larceny and false pretenses. Voluntary intoxication can only be used to mitigate specific intent crimes. However, D knew she was a drug addict and the State will assert that she did both crimes with the specific intent to acquire drugs. Therefore, she cannot use this defense and will be charged accordingly.

## QUESTION 1: SELECTED ANSWER B

### Daniels

#### Burglary

*Common law burglary is the breaking and entering of the dwelling of another at night with specific intent to commit a felony therein.*

*Modern law burglary is the trespassory entering of any structure with specific intent to commit a crime therein.*

Debra would have opened a door to enter Nan's dwelling, which is a breaking and entering. However, Debra had permission to enter the dwelling because she was required to care for Nan, therefore, there is no breaking.

Nan's home was not Debra's, it is the dwelling of another.

Debra probably entered during the day.

Debra entered Nan's dwelling with intent to commit the crime of larceny as evidenced by the fact she did commit larceny (infra) against Nan.

Because Debra's entry was not trespassory, she did not commit a burglary at common law or at modern law.

#### Larceny

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

When Debra went to care for Nan one day and took jewelry from Nan's house, she committed a taking and carrying away of Nan's property.

The fact that Debra took the jewelry to earn drug money and did in fact sell the property for drug money evidences that fact that Debra intended to permanently deprive Nan of her property.

Debra did not commit a robbery because she did not intimidate or use violence against Nan.

### **Voluntary Intoxication**

*Voluntary intoxication is only a defense to a crime insofar as it negates the specific intent to commit a crime.*

Debra may argue that she was under the influence of drugs and was unable to form the specific intent to permanently deprive Nan of her property. However, Debra was not so intoxicated that Nan became aware of her drug addled state. Despite the fact that Nan is elderly and is easily confused probably will not convince a jury in this case because the facts indicate that Debra was otherwise able to attend to her duties towards Nan with competence. Further, even if Debra was severely intoxicated, the fact that she was able to remove the jewelry without Nan noticing indicates that Debra knew what she was doing and maintained the ability to form the specific intent to deprive Nan of her property.

Further, even if Debra was unable to form the specific intent at the time of the taking, she formed the specific intent at the time of the sale of Nan's jewelry. Because her taking was trespassory, any formation of specific intent after the taking is sufficiently associated

with the taking via the continuing trespass doctrine.

Debra is guilty of Larceny.

### **False Pretenses - Sale of the property**

*False pretenses are the procurement of title to property by means of a false representation of past or present fact with intent to defraud.*

Debra sold the jewelry to honest people, and she impliedly warranted that she had good title to the jewelry she was selling. If she affirmatively represented good title to buyers, she committed false pretenses because she obtained title to the buyer's property (their money) by representing an exchange of good title.

Debra is guilty of false pretenses.

### **False Pretenses - \$1000**

*Defined supra.*

When Nan gave Debra \$1000, she gave Debra title to that money because Nan did not evidence any desire to have the property returned in the future. Because the giving took place under circumstances which indicated that Debra would use the money, it is safe to conclude that Nan intended to pass Debra title at the time of the giving.

Debra made a false representation to Nan that her bills were past due and that she would have to find another job because the facts indicate that Debra's story was not true. The fact that Nan was in fact deceived is relevant to the false representation.

Debra may argue that she did not intend to defraud Nan and induce Nan's gift with her statement but for what other reason would she make it? The fact is that Debra previously demonstrated (infra under larceny) that she was willing to commit grossly immoral acts against the elderly. This fact helps create a reasonable inference by a jury that Debra was attempting to manipulate Nan into giving her money. Debra knew that Nan enjoyed her company and would be sad to see her go and was hoping that Nan would offer extra money to help her with her bills.

Debra is guilty of false pretenses.

### **HOMICIDE - of Nan**

*A homicide is the killing of a human being by another human being.*

### **Nonfeasance - Duty to Act**

Normally a party is not required to act and prevent harm to another. However, the facts indicate that Jenn contracted with Debra to care for Nan. Because Debra entered into contract to care for Nan, she had a duty to act for Nan's care.

Actual Cause: The facts indicate that Debra went on a three day drug binge and did not care for Nan at time that she had a duty to do so. Because Debra failed to place the correct dosage of Nan's medications into the dispenser, Nan took too many pills and died. But for Debra's failure to meter Nan's dosage, Nan would not have died.

### Proximate Cause:

At the time of contracting, Debra was specifically informed that Nan had previously almost died because she was confused by her medication and took too much. Therefore, a reasonable person in Debra's shoes would foresee Nan's death by drug overdose. Debra's failure to meter Nan's drugs is a foreseeable dependent intervening cause.

There is proximate cause

### **Murder**

*Murder is a homicide committed with malice aforethought.*

Debra can successfully argue that she did not intend to kill nor did she intend to cause serious bodily injury to Nan because Debra took no affirmative action that would indicate such an intent. She merely did not show up to work for three days because of drug binging.

### **Depraved Heart Act**

Because Debra did not inform Nan or Smith that she would not be at work for three days and because Debra knew that Nan had previously almost died because she was confused about her pills, the state may argue that Debra acted with reckless disregard for Nan's life.

There is malice under this theory.

## **Felony Murder Rule**

Felony murder is shown when a death occurs during the commission of an inherently dangerous felony or an enumerated felony.

An argument is possible showing that Debra was still in the res gestae of false pretenses because she used the \$1000 and was in the midst of a three-day drug binge at the time Nan died.

However, false pretenses to obtain \$1000 is not an enumerated felony and is probably only a misdemeanor in the jurisdiction where Nan lived.

There is no felony murder.

## **Murder in the first degree**

*Murder in the first degree is murder committed with intent to kill by premeditation, or by felony murder, or by poison, bomb, torture, lying in wait.*

As discussed supra, Debra did not intend to kill or hurt Nan.

A court is unlikely to consider Debra to have poisoned Nan by drug overdose.

There is no murder in the first degree.

## **Murder in the second degree**

*Murder in the second degree is any murder not raised to the first degree.*

Here, as discussed supra, Debra may be guilty of murder in the second degree via a depraved heart act.

## **Involuntary Manslaughter**

*Involuntary manslaughter is an involuntary homicide without malice, which can arise in three ways: commission of an unlawful act, intent to inflict non-serious bodily harm, or by criminal negligence.*

Because Debra's death occurred while in the res gestae of false pretenses and during the illegal act of consuming illicit drugs, Debra may be guilty of involuntary manslaughter via the misdemeanor manslaughter rule.

At the very least, Debra is guilty of criminal negligence in failing to properly meter Nan's drugs.

Debra is guilty of manslaughter if not a higher degree of criminal homicide.

## **Voluntary Intoxication**

Debra cannot argue voluntary manslaughter for criminal homicide because none of the theories above described are specific intent.

## QUESTION 2

Ella has owned and operated Ella's Garden, a successful landscaping service and nursery, for several years. One day Louis called Ella's Garden, wanting to buy some exotic ferns and unusual ornamental trees for his backyard. Ella took the call, checked her price list, and informed Louis that she would sell him the ferns and trees for \$5,000. Louis excitedly agreed and said he would drive right over in his truck.

An hour later, Louis pulled up to Ella's Garden in his truck. He identified himself to Ella, gave her \$1,000 in cash, and told her that he would give her a check for the rest. As Louis loaded his truck, Ella realized that she had inadvertently referred to an outdated price list when she quoted the \$5,000 price to Louis; the actual price should have been \$6,000. Ella told Louis that she could not sell him the ferns and trees for anything less than \$6,000.

At that moment, Sarah, another customer, approached Ella. A week earlier, Sarah had hired Ella's Garden to redo Sarah's landscaping specifically in preparation for the wedding of Sarah's daughter. The comprehensive written contract, which does not mention the wedding, specified a \$7,700 price for extensive work including weeding and trimming, walkway placement, and the purchase and installation of numerous plantings. Subsequently, Sarah's daughter cancelled the wedding, and Sarah no longer wants Ella's Garden to do the work. Sarah told Ella that she would go forward with the contract, though, if Ella would do the work for significantly less money, that is \$5,500, and Ella very reluctantly agreed.

1. What contract rights and defenses, if any, do Louis and Ella have against one another, and who is likely to prevail? Discuss.
2. What contract rights and defenses, if any, do Ella and Sarah have against one another regarding the \$7,700 and \$5,500 prices, and who is likely to prevail? Discuss.

## QUESTION 2: SELECTED ANSWER A

### I. Louis v. Ella

#### A. Controlling Law

The UCC controls for contracts involving goods, whereas the common law controls for all other contracts, such as services and real property. In this case, Louis is buying plants (goods), so the UCC controls.

#### B. Enforceable contract?

An enforceable contract requires mutual assent (offer and acceptance), consideration, and an absence of defenses.

##### B1. Mutual assent

The offer and acceptance are pretty clear. Ella offered to sell Louis ferns and trees for \$5,000, and Louis agreed to that offer.

##### B2. Consideration

Consideration is also clear, as the bargained for exchange was a promise to sell ferns and trees in exchange for a promise to pay \$5,000.

##### B3. Defenses - Statute of Frauds

A defense can render a contract unenforceable. In this case, Ella could potentially assert the Statute of Frauds (SOF). While the SOF applies to many types of contracts, under the UCC, the SOF applies to any contracts for goods of \$500 or more. Such contracts must be recorded in a sufficient writing that identifies the subject matter, the parties, and the quantity. Since the entire contract was orally offered and accepted, and

since the value of the goods in question is \$5000 (or possibly \$6000) the SOF applies. Ella could argue that there is no enforceable contract because it is not in writing.

However, there are some exceptions to the SOF for UCC contracts, such as when there is partial or full performance. When Ella decided to change or get out of her original agreement with Louis, Louis had already paid Ella \$1,000 and apparently stood ready to give her a check for the rest, so this is at least partial performance, if not full performance. For her part, Ella had apparently supplied Louis with the goods because he was already loading them in his truck, so this is at least partial performance by Ella, if not full performance if all of the ferns and trees were there (as they presumably were since it was at her business). Louis could therefore easily argue that the SOF does not apply because both parties had fully performed. Based on the facts, Louis seems to be correct.

Louis therefore would likely prevail with respect to the SOF.

#### B4. Defenses - Unilateral mistake

Mistake can be a defense to enforceability when one party makes a mistake to a material term of the contract, and the other party knows or has reason to know of the mistake. In this case, Ella certainly does not know she made a mistake when she made the \$5000 offer to Louis. The key is whether or not Louis knew she made a mistake. Ella could argue that, as a business person in operation for several years, her prices and costs were well known to the community. Further, Louis was buying some very specific "exotic" ferns and "unusual" trees. As such, Louis is probably a relatively sophisticated consumer of plants. In addition, the facts state that Louis "excitedly" agreed. Now, either Louis is just an excitable person who loves plants, OR he knew he

was getting a fantastic bargain that was a whopping \$1,000 less than he expected. If that is the case, then Ella might have a basis for arguing unilateral mistake under the assumption that Louis knew Ella had made the mistake. However, this would take some pretty good convincing from Ella, as there is not any clear evidence from the facts that Louis definitely knew. He could just have possibly thought Ella's prices were very good, or maybe she was having a sale, or maybe this fit in his budget. If the jury believes Ella, she will prevail, but if they believe Louis, he will prevail.

In view of the above, it seems likely that Ella's defenses may fail, and she will be obligated to perform under the contract as agreed to over the phone. Failure to sell the ferns and trees for the agreed price will result in a breach, and Louis will be able to recover for his losses.

## **II. Ella v. Sarah**

### **A. Controlling law**

Controlling law is discussed above. Since Ella is providing BOTH goods (plants) AND services (weeding, trimming, walkway placement), either the UCC or common law could apply. Usually, this is determined by the predominant factor test, that is, what is the main purpose of the contract. Unfortunately, this is very unclear, as there are no prices and Ella provides both goods and services equally. It would seem that the majority of the contract relates to services, since there are four services (weeding, trimming, walkway placement, installation) listed, as opposed to one good (plantings), and thus the common law controls. However, since it is unclear, the issues will be discussed with respect to both the common law and UCC, where applicable.

### B. Enforceable contract

Enforceable contracts are discussed above. Since the facts specifically state there was a written contract for Ella to provide goods and services for \$7700, the contract is definitely enforceable.

### C. Contract modification (common law)

Ella and Sarah reached an agreement to modify the contract. Under the common law, contract modification requires new consideration OR unanticipated difficulties. Under the pre-existing duty rule, agreeing to perform the same service for a different price is not consideration. There is no new consideration because Ella was going to perform these duties anyway. Sarah could argue that the calling off of the wedding was unanticipated, and thus the modification was needed, though Ella could easily counter that people calling off weddings is not that uncommon and thus is foreseeable. If Sarah prevails, then the contract modification to \$5500 is valid. However, if Ella prevails (which seems more likely), then the modification is NOT valid under the common law (assuming it controls).

### D. Contract modification (UCC)

Contracts can be modified under the UCC when there is a good faith negotiation based on commercial exigencies. Sarah appears to be acting in good faith, since she doesn't seem to need the landscaping anymore due to the wedding cancellation, but she is willing to deal. Ella though seems to be reluctant to make the modification, and thus may feel she is being compelled to perform under duress. If that is the case, the modification is not valid as it is not in good faith. However, it appears both parties are acting in good faith, even though Ella is reluctant, and thus the modification is valid under the UCC.

#### E. Accord and satisfaction

An accord and satisfaction is when both parties agree to settle a contract when there is a dispute as to a term of the contract. The agreement to accept less by Ella could be considered an accord and satisfaction, wherein the consideration is both parties giving up their right to assert a particular price and settle the contract.

#### F. Frustration of purpose

Assuming the contract modification is NOT valid and the original contract for \$7700 applies, Sarah has an obligation to perform, but could request discharge based on frustration of purpose. Frustration of purpose occurs when one party's purpose for entering a contract no longer exists for reasons outside of the party's control, and the contract will be discharged. In this case, Sarah could argue that the ONLY reason for entering into a contract with Ella was because she needed the renovations for her daughter's wedding. Since the daughter's wedding was called off, Sarah could argue that the purpose for entering the contract no longer exists. However, frustration of purpose is a very specific and narrow basis for discharge. The party must establish that the purpose was the only reason for continuing with the contract. In this case, Sarah could certainly still use the renovated landscaping to generally beautify her home and increase her property value. Further, Sarah's daughter might yet change her mind and decide to get married. It is therefore unlikely that Sarah would be able to assert that a successful frustration of purpose defense for discharge of the \$7700 contract.

In view of the above, if the UCC controls Sarah is likely to prevail on the contract modification to \$5500. However, if the common law controls, it is quite likely that the modification is not valid, and Sarah can successfully enforce the contract for \$7700.

## QUESTION 2: SELECTED ANSWER B

### 1. Louis and Ella

#### **Governing Law**

The UCC governs all contracts for goods (which are tangible moveable objects). Here the contract is for various trees and plants, which are tangible and moveable.

Uniform Commercial Code governs.

#### **FORMATION**

##### **Offer**

*An offer is an outward manifestation of present contractual intent, clear and definite in its terms, and communicated in such a way as to create in the offeree a reasonable expectation that the offeror is willing to enter into a contract.*

The common law requires an offer to contain quantity, time of performance, identity of the parties, and the subject matter. Whereas the UCC only requires a quantity term as long as the parties manifest by their conduct that a contract was made.

When Louis calls Ella wanting to buy some plants he gives Ella an invitation to deal rather than an offer because there are no clear and definite terms whereby to create in Ella a power of acceptance. Louis, while discussing specific plants, has not offered to purchase them for a certain price. In addition, the reasonable person would not perceive Louis to have created a binding power of acceptance at this time.

Ella took the call, checked her price list, and informed Louis that she would sell him the

ferns and trees for \$5,000. Because she agreed to sell for so much, she evidences to Louis that she is presently willing to enter into contract with him.

Ella's verbal communication is an offer because she specified the number of plants, a court will infer the time of performance to be a reasonable time, the parties are identified as Louis and Ella, the price is \$5,000, and the subject matter was specifically enumerated because Ella checked her price list in response to Louis' inquiry.

Thus, Ella made an offer to Louis.

### **Acceptance**

*An acceptance is an outward manifestation of unequivocal assent to the terms of an offer.*

*Under UCC an acceptance in any definite and seasonable manner is sufficient even if it contains terms additional to or different from the offer.*

When Louis excitedly agreed to Ella's offer he manifested unequivocal assent to the terms of Ella's offer. There is an acceptance.

### **Consideration**

*Consideration is a bargained-for-exchange from which both parties incur a legal detriment.*

Louis' detriment is \$5,000.

Ella's detriment is losing various plants.

These detriments were given in exchange for one another as discussed under offer and acceptance. There is consideration.

## **Defenses**

### **Statute of Frauds**

The Statute of Frauds requires that a contract for goods over \$500 be in writing. Here the parties made an oral agreement and there is no writing to support their agreement.

However, the statute has various exceptions. Firstly, where a buyer accepts goods from a seller in partial performance the statute is satisfied. Here, Louis had accepted the goods and was loading them in his truck and had already given her the \$1,000 in cash and probably had given her the check.

Secondly, where the seller has a specially designed or unique product, an argument can be made to take the contract out of the statute. However, the special goods exception is designed to protect the seller where the goods are otherwise unsaleable because they are unique to the contract. Here, the "exotic ferns and unusual ornamental trees" are still saleable and for this reason, may not satisfy the statute.

The contract satisfies the statute.

### **Unilateral Mistake**

A unilateral mistake by one of the parties in a mechanical calculation of value is **not** generally a defense to a contract except where the error is so egregious as to be palpable to the other party.

Here, Ella inadvertently referred to an outdated price list when she quoted the \$5,000. Her updated price list indicated the sale should conclude for \$6,000. The difference between five and six thousand is not so great as to render an unilateral mistake palpable. Ella

argues that Louis' excitement over the contract should have been a red flag to him that Ella made a mistake in calculation, but simply obtaining a good deal does not automatically rise to the level of creating a suspicion of mistake. If Ella had quoted Louis for \$500, she may have an argument.

The unilateral mistake is not a valid defense in this instance.

There is an enforceable contract.

### **Modification**

*Under common law, a modification to a contract must be supported by new consideration.*

*Under UCC, a modification is binding if made in good faith.*

Here, Ella attempted to modify the contract price to \$6,000 because this is a goods contract, no additional consideration required. Ella appears to request the modification in good faith because she made a mistake.

Louis may accept or reject the modification.

### **RIGHTS**

Louis may enforce the contract because he has already accepted and paid for the goods.

He is not required to agree to the proposed modification, but if he does, he is bound by it.

## 2. Ella and Sarah

### **Governing Law**

This contract primarily deals with the service of landscaping. Even though the contract also contains the purchase of various plants, the sale of the plants is secondary because the purchase of plants simply accommodates the landscaping service.

Even though the UCC is liberally construed.

The common law governs.

### **FORMATION**

*See supra for definitions.*

The facts indicate that there is a comprehensive written document which evidences a contract between Ella and Sarah.

The consideration is \$7,500 in exchange for landscaping services and plants.

There is a valid written contract which evidences consideration between the two parties.

There are no defenses to formation.

### **PERFORMANCE**

*A condition is an act or event not certain to occur, which if excused or satisfied, gives rise to or extinguishes a duty to tender performance under the terms of a contract.*

Here the courts find an implied condition on the part of Sarah to allow Ella to landscape

her lawn so that her duty to pay may arise.

The courts find a constructive condition where the longer performance comes before the shorter performance. Thus, Ella's duty to perform the landscaping precedes Sarah's duty to pay for the landscaping.

### **Impossibility/Impracticability**

Sarah cannot discharge her duty via impossibility nor impracticability because it is still possible and practicable to perform the contract because there is no sudden tenfold price change nor supervening illegality or other such recognized argument.

### **Frustration of Purpose**

*Where a supervening event occurs which destroys the purpose of the contract, where both parties are aware of the purpose at the time of contracting, and where the risk of that event is not on the aggrieved party, a discharge of performance arises.*

Here, Sarah argues that because her daughter's wedding is canceled, and because the purpose of contracting Ella was in preparation of her daughter's wedding, her duty to perform the contract is discharged. This view is faulty because the facts indicate that Ella was unaware of the purpose of the contract at the time of contracting.

Thus, Sarah has no valid discharge of duty.

## **Attempted Modification**

*Performance of a preexisting legal duty is not sufficient consideration to modify a contract.*

Sarah attempts to modify the contract by modifying the price from \$7,500 down to \$5,500.

Under common law, a modification must be supported by new consideration. Therefore, even though Ella reluctantly agreed to the modification, her agreement is unenforceable.

## **Anticipatory Repudiation/Breach**

*Where a party repudiates a contract where performance of the non-repudiating party still remains, the non-repudiating party may cancel the contract and bring immediate suit for total breach of the contract.*

A party may treat as anticipatory repudiation any attempt to change the terms of a contract which is accompanied by an indication of refusal to perform on the previously agreed upon terms.

Here, Sarah indicates that she will not perform unless there is a change of price, therefore, Sarah has made an anticipatory breach of the contract.

There is anticipatory repudiation/breach.

## **REMEDIES**

### **General Damages**

*General damages cover the loss of expectancy under a contract. It attempts to put the parties in the position they would have been had the contract been fully performed.*

Here, Ella may cancel the contract and sue for the difference between the contract price and her cost of performance: i.e. her profit.

Further, even though Ella has a duty to mitigate her damages, construction contracts do not mitigate damages merely because a new contract is found to cover the difference because the courts assume that Ella could have hired additional workers and completed both of the contracts.

### **QUESTION 3**

Ken was determined to establish the best dog breeding facility in the country. He searched for an appropriate spot to locate such a major facility, and found a large tract of land far beyond the reaches of the city. He hired the best veterinarians to staff the facility, and it soon became known for producing the most desirable puppies in the country. The dogs do make a lot of noise and create a certain amount of stench, particularly due to their excrement that litters the land. Ken's business now employs 100 people full time, although no one is assigned to remove the dog waste.

Marilyn owns ten Norwegian Forest cats. Since the city restricts the number of pets that residents can own, she decided to build a home outside city limits. In the time since Ken built his facility, the suburbs expanded out towards his property. Marilyn found a perfect lot next to Ken's property, large enough for her cats to roam, and built her house there. The house contains special features for cats, such as cat walks near the ceilings.

Shortly after moving in, Marilyn began having problems. Her cats developed nervous disorders due to the constant barking of Ken's dogs. In addition, Marilyn found the noxious smell from the accumulated dog droppings, and associated swarms of flies, hard to tolerate. When Marilyn's complaints to Ken failed to resolve matters, she independently tried several measures to create a buffer zone at the edge of Ken's property that abuts her land. Whenever one of Ken's dogs gets close to Ken's wire fence, Marilyn sprays it with water from her hose to get it to back up and be quiet. She also uses the water stream to move the piles of excrement away from the fence. One time, she also sprayed air freshener on the dogs through the fence and unfortunately, two of the dogs died as a result.

1. What tort claims, if any, can Marilyn reasonably assert against Ken; what defenses, if any, can Ken reasonably assert; and what is the likely result? Discuss.
2. What tort claims, if any, can Ken reasonably assert against Marilyn; what defenses, if any, can Marilyn reasonably assert; and what is the likely result? Discuss.

## QUESTION 3: SELECTED ANSWER A

### 1. Marilyn v. Ken

#### Private/Public Nuisance

*A private nuisance is a substantial and unreasonable interference with plaintiff's possessory interest in the use and enjoyment of her land.*

*A public nuisance is an unreasonable interference with a right common to the general public.*

When a noxious smell from the accumulated dog droppings and swarms of flies wafted over to Marilyn's property and her cats developed nervous disorders because of the dog's barking, Ken created a nuisance on Marilyn's property which interfered with the use and enjoyment of her property.

The facts indicate that the suburbs expanded out towards Ken's property over time but the facts do not indicate whether the rest of the general public were suffering because of Ken's business. Even if they were, it is reasonable to assume that Marilyn was suffering peculiar in kind with respect to the nuisance because her cats developed nervous disorders which is probably unlike what other neighbors might suffer. Thus, Marilyn is able to bring suit.

Nuisance claim turns on the utility of the nuisance as compared to the harm incurred.

The fact that Ken originally located his facility in a highly suitable location and the fact that Marilyn moved to the nuisance is **not** a defense to a nuisance but the courts do take such circumstances into consideration because a

Here, Ken's business gives significant utility in the fact that he breeds top quality dogs and

is able to hire over 100 people full time including high-end veterinarians.

The problem is that Ken could take reasonable steps to mitigate the smell, odor, and flies which are generated by his business because the facts indicate that not one of his employees is tasked with removal of the dog's excrement. Ken could also put up sound barriers which would help reduce the noise as well as perhaps mitigate the problems with Marilyn's cats developing nervous disorders.

There is a nuisance against Marilyn.

## **Defenses**

### **Negligence**

Before she made Ken aware of the nuisance, Marilyn could have brought a nuisance suit under a negligence theory, asserting that Ken has a duty to take reasonable steps to mitigate the filth generated by his business, that he breached this duty when he failed to do so, and that her damages are actually and proximately caused by Ken's breach.

Ken may defend asserting that Marilyn contributed to her own injuries when she moved to the nuisance. She must have known the nature of Ken's business and voluntarily assumed the risk of building a house for herself and her cats right beside a dog breeding facility.

### **Intentional**

However, Marilyn has informed Ken of his nuisance against her. He has refused to remedy the nuisance in a satisfying manner. Marilyn may sue under an intentional theory where the aforementioned defenses are invalid.

Marilyn may request general damages to recover for the interference with her use and enjoyment of her land and Marilyn may request special damages to cover actual costs incurred against her. She may request a lump sum or sue every so often from Ken. She may also request an injunction against Ken's dog business.

## **2. Ken v. Marilyn**

### **Trespass to Chattel - sprays dogs**

*Trespass to chattel is the intentional interference with the chattel in possession of another, without consent or privilege.*

The dogs are Ken's and are in his possession.

When Marilyn sprayed Ken's dogs with a stream of water, she effected an interference against Ken's chattel because she applied force to them using an instrumentality.

Marilyn's interference was intentional because she volitionally directed a spray of water against the dogs.

However, in the case of mere intermeddling, as opposed to a taking, Ken must show that his chattel was damaged when Marilyn sprayed them. It is unlikely that the dogs were damaged when Marilyn effected this force against them.

There is no evidence that she had consent; see infra for discussion of privilege.

Marilyn is not liable for trespass in this instance because there is no damage.

### **Trespass to Land - sprays onto the land, sprays excrement**

*Trespass to land is the intentional entry upon land in possession of another without consent or privilege.*

An entry is effected when a defendant enters the land by an instrumentality or initiates a force which causes some item or substance to enter the land. When Marilyn sprayed a stream of water onto Ken's land to move piles of excrement, she intentionally directed the water to enter Ken's land.

The fact that she knew it was Ken's land is irrelevant.

Even without actual damages, Marilyn may seek nominal damages.

Ken did not give her permission; see infra for privilege.

### **Trespass to Chattel - sprays dogs with air freshener**

*See supra for definition.*

When Marilyn sprayed the dogs with air freshener, she indicated her intent to interfere with Ken's chattel.

When Marilyn sprayed the dogs with air freshener, she intermeddled with Ken's chattel.

Where a mere intermeddling occurs Ken must show that his chattel was damaged in order to recover.

Because the dogs died, he can show damage.

## **Conversion - sprays dogs with air freshener**

*Conversion is the intentional exercise of wrongful dominion and control over the chattel of another without consent or privilege.*

See above for discussion of Marilyn's intentionality.

When the dogs died as a result of Marilyn's spraying, she evidenced wrongful dominion and control over Ken's chattel because no one but the owner has the right to destroy the chattel.

Replevin and detinue are unavailable where the chattel has been destroyed, but Ken may sue for the remedy of forced sale of his chattel.

## **Punitive Damages**

Ken may seek punitive damages against Marilyn because she committed the above intentional torts against him, however, this is unlikely because she did not act in a particularly reprehensible manner.

## **Entry to Abate a Nuisance**

Marilyn may assert a defense against trespass to land and trespass to chattel because she entered to abate a nuisance which is one of the remedies which the law recognizes as a defense to the above torts. Marilyn has an absolute privilege as long as she took reasonable steps to abate the nuisance.

Here, Ken may argue that spraying dogs with air freshener was unreasonable.

## QUESTION 3: SELECTED ANSWER B

MARILYN V. KEN

PRIVATE NUISANCE

A private nuisance is where there is unreasonable and substantial interference with the use and enjoyment of a person's land due to another person's ongoing activity. The complainant must demonstrate a possessory interest in the land.

Here, Marilyn would argue that Ken's dog breeding facility is a private nuisance. As a homeowner abutting Ken's property, she has a proper possessory interest in the land to file a nuisance complaint.

### Substantial Interference

In order to establish a claim of nuisance, P must show that the activity by D was a substantial interference with P's use and enjoyment of her land.

Substantial interference with regard to nuisance indicates an activity that is annoying or offensive to a reasonable person in the community. It is an objective standard, and P's hyper sensitivities will not be taken into account.

Here, P would argue that Ken's facility is extremely offensive to a reasonable person because of the "noxious smell" from the dog droppings and the "swarm of flies" near her property. Ken would argue that by choosing to leave the city limits, P was entering a less populated, rural area of farmland. The smell of droppings and flies may be uncommon in an urban area, but aren't a substantial interference out in the country. D may also argue that P's excessive cat ownership makes her hyper sensitive to his particular business, and

thus negates her complaint of substantial interference.

P would likely point out that the amount of excrement and flies is the issue, and by any objective standard, a person would find the smells and bugs to be offensive regardless of the location or type of pet ownership. Because P purchased the home specifically for the enjoyment of her cats to roam, she is unable to enjoy her home for the purpose, and Ken's activities are a substantial aspect of that loss of enjoyment.

It's likely that Ken's breeding facility was a substantial interference with P's enjoyment of her home.

### Unreasonable Interference

When determining whether conduct is an unreasonable interference with P's use and enjoyment of her land, a court may apply a risk utility analysis to determine whether D's conduct qualifies as a nuisance.

### Risk/Utility Analysis

Here, D would argue that by placing his dog facility "far beyond the reaches" of the city, long before any residents moved nearby, he was acting reasonably given the scope of his business. Ken should not be punished for wanting to "establish the best dog breeding facility" in the area, and in fact has produced the "most desirable puppies in the country," a feat which is no doubt a boon to the local economy. While the dogs create noise and stench, that is simply the required cost of doing Ken's type of work, which should be offset by the 100 full time people Ken employs. Given that the area is rural, or at the very least suburban, this number of jobs cannot be discounted in evaluating the utility of Ken's conduct and contribution to the area.

Marilyn would argue that while Ken's desire to stay outside the city limits may have been a reasonable assumption when he first opened this business, it no longer applies as a justification for his facility's more noxious aspects. Urban sprawl and suburban expansion are a part of any growing area, and were likely foreseeable to Ken as future issues. While Ken does employ many people, it should not be an excuse to pollute the air with fumes and bugs and destroy Marilyn's use and enjoyment of her home with her cats. This argument may be enhanced by the assertion that hiring someone to remove the dog waste is available to Ken as a remedy that would go a long way to perhaps reducing the noxious fume and fly issues. Additionally, Ken could erect sound barriers to prevent the many barking dogs from being heard by the neighbors.

A court would likely find that Ken's facility is an unreasonable interference with P's use of her land because of Ken's failure to hire someone to pick up the droppings or to secure the dogs in a more sound-proof enclosure.

## PUBLIC NUISANCE

Public nuisance is the unreasonable interference with a person's use of public resources.

A P must show a type of harm unique from that suffered by the public.

Here, P may alternatively file a claim for public nuisance. D would argue that P cannot claim public nuisance since she has no unique injury due to the smell and sounds coming from the facility. P may argue that she could prevail in a public nuisance because of the unique harm to her cats because of the barking. While other people in the area may be disturbed by the smell or the flies or the barking, Marilyn has suffered unique harm with the nervous disorders of her cats.

P may be able to claim public nuisance.

P may succeed in her nuisance claim.

## DEFENSES

### COMING TO THE NUISANCE

Ken may argue that Marilyn, by moving outside the city limits, voluntarily and knowingly came to the nuisance of Ken's dog breeding facility. Ken's business has seemingly been in business for many years, and Marilyn was aware of it when she purchased her property. By choosing to locate ten cats near a dog facility, Marilyn knowingly came to the nuisance and should not be granted relief.

A court may consider this argument when determining P's damages or action to be taken in regards to the nuisance, though it may not be conclusive as to negating the claim entirely.

### INJUNCTION

P may argue for an injunction, or a court order to cease engaging in the activity, in this case an injunction to prevent Ken from operating his breeding facility. A court may look at the benefits to plaintiff versus risks to defendant in weighing an injunction.

Here, given D's utility and economic influence in the community and the fact that P came to the nuisance knowingly with animals that would be sensitive to the dog breeding facility, a court may find that an injunction detrimentally damages D more than benefits P.

Instead, if P prevails on her nuisance claim, a court may order Ken to increase his sound proofing and hire someone to properly dispose of the droppings, but not entirely cease operations.

## NEGLIGENCE

Negligence is the failure to act as a reasonably prudent person under the circumstances. A P must prove that D owed her a duty, breached that duty, causation and damages to person or property.

Here, Marilyn may assert that Ken owed her a duty as a reasonable breeding facility owner to manage the excrement and sound of his dogs, since she was his neighbor.

However, given that Marilyn suffered no personal injury or property damage, it's unlikely that this claim would succeed.

## KEN V. MARILYN

### TRESPASS TO LAND

Trespass to land is the intentional entry onto P's land without permission. The entry is the trespass.

Here, Marilyn used a water hose to enter Ken's land without permission, to both spray Ken's dogs and to move excrement away from her land. A trespass may be with a tool controlled by D, and need not just be her physical body. Because P acted purposefully and sprayed D's land and his dogs in order to move both away from her property, D acted intentionally to invade P's land.

D is liable for trespass to land.

### TRESPASS TO CHATTELS

Trespass to chattels is the intentional and unauthorized interference with the personal property of another, causing damage.

Here, Marilyn sprayed Ken's dogs with water and air freshener. Because the dogs were Ken's property, they can be considered his chattel. By spraying the dogs with water purposefully, Marilyn interfered with the dogs in order to quiet them.

While it's not clear that there was damage to the dogs due to the water, if they suffered any ill effects due to the water, Marilyn will be liable for injury to the dogs which impairs their value as property (for instance, if they became ill and fetched a lower price in sale).

The air freshener killed two dogs, which could be considered serious damage to Ken's chattel.

If M is not found liable for conversion, *infra*, she may be liable for trespass to chattels for the two deceased dogs.

## CONVERSION

Conversion is an intentional, substantial interference with the chattel of another, causing deprivation of ownership. The proper measure of damages for conversion is forced sale for fair market value.

Here, P would argue that D's use of air freshener was a substantial interference that caused him to be deprived of two dogs, since it killed the animals.

M will be liable for the fair market value of the two dogs, barring defenses.

## DEFENSES: DEFENSE OF PROPERTY

A person has the right to use reasonable force to protect her property, but deadly force is never permissible.

Here, M would argue that she had the right to use the water to keep the dogs away from her property, given that they gave her cats a nervous disorder.

A court may find that the use of the water hose, provided that it did not harm the dogs in anyway, may have been reasonable force. However, the use of the air freshener, because it is a substance known to be toxic to animals, was not reasonable.

Marilyn's defense of property would fail for the death of the dogs.

#### SELF-HELP ABATEMENT OF NUISANCE

Marilyn may also argue that she was privileged to use self-help abatement given Ken's nuisance and lack of response to her complaints, and thus was privileged to use the hose and air freshener to keep the dogs away from her home.

However, it's likely that, as with the defense of property, the water hose may be considered self-help for the nuisance, but this would fail as a defense to the intentional torts.

#### NEGLIGENCE

Rule supra. Here, Ken may assert that Marilyn owed him a duty and breached that duty by killing his dogs, but since he suffered no personal injury or property damage (but rather pure economic loss in the value of the dogs), this claim would fail.

## QUESTION 4

Ned learned from news reports that several homes in his neighborhood had recently been broken into at night. The reports said that the break-ins had occurred when the homeowners were not present, and that no one had been injured; however, thousands of dollars' worth of electronics had been taken. The break-ins were being perpetrated by Dara and Don. Dara would wait in the getaway car while Don broke in and stole electronics. Neither was armed during the break-ins.

Ned became obsessed with preventing his home from being broken into. He installed exterior cameras with night vision that would set off alarms inside his home if anyone approached. He also placed loaded guns that he lawfully possessed in every room. In fact, Ned began looking forward to the prospect of shooting an intruder.

One night Dara and Don chose to break into Ned's home. Dara parked outside and Don crept toward the house. Inside, Ned's alarm activated. On the video feeds, Ned saw that Don was right outside his dining room window. Ned entered the dining room, picked up a shotgun, and shot Don through the window, killing him. Don had not yet touched Ned's house when Ned shot him.

1. With what crimes, if any, can Dara reasonably be charged for the events that took place at Ned's home; what defenses, if any, can she reasonably raise; and what is the likely result? Discuss.
2. With what crimes, if any, can Ned reasonably be charged; what defenses, if any, can he reasonably raise; and what is the likely result? Discuss.

## QUESTION 4: SELECTED ANSWER A

### **State v. Dara**

#### Conspiracy

An agreement between two or more persons to commit an unlawful act.

Here the facts indicate that "one night Dara and Don chose to break into Ned's home."

This would show that both Dara and Don agreed to commit the unlawful act of burglary.

#### Overt Act

Some jurisdictions require that an overt act be committed in order to solidify the conspiracy.

Here the facts indicate that Dara parked outside and Don crept towards the house. This constituted an overt act to solidify their intent to commit the crime of burglary.

Therefore, Dara will be guilty of conspiracy.

#### Pinkerton's Rule

All co-conspirators are guilty for the foreseeable crimes that the other co-conspirators commit in furtherance of the target crime.

Here, Dara will be guilty of any crimes that Don committed in furtherance of the burglary.

#### Accomplice Liability

One who aids and abets in furtherance of the crime.

Here the facts indicate that Dara is helping Don commit the crime of burglary because she waits in the getaway car while Don breaks into the houses.

### Accessory before the fact.

One who has knowledge, intent and actively assists in the target crime.

Here the facts indicate that "Dara parked outside." Since she was aware that Don was committing a burglary and usually drove the getaway car, she had the knowledge of the crime. Further, she had the intent for Don to commit the burglary because she actively assisted by waiting outside in the getaway car.

Therefore, she will be guilty of accomplice liability as an accessory after the fact.

### Attempted Burglary

In order to approve an attempt, the state will need to show that there was a specific intent, a factual impossibility occurred, that Dara had the apparent ability to commit the crime and that she entered the zone of perpetration.

### Specific Intent

Dara had the specific intent to commit a burglary because she and Don have already committed several in the neighborhood. Further she would wait in the getaway car so that Don could perpetrate the crime.

Therefore, there was specific intent.

### Legal v. Factual Impossibility

Here the facts indicate that Don was killed before he could even enter the home. This constituted a factual impossibility to commit the crime in which a factual impossibility is no defense.

Further, the fact that the alarms inside Ned's home went off giving Ned notice of Don's

presence also helped prevented the crime from happening.

Therefore, there was legal impossibility.

### Apparent Ability

Dara had the apparent ability to commit a burglary because "Don was right outside [Ned's] dining room window."

Therefore, there was an apparent ability to commit a burglary.

### Preparation v. Perpetration

Dara will argue that she was in the mere preparation stages of committing the act. She will try to contend that the reason Don was outside of the window was because he was merely looking in Ned's home to see what there was to steal and if there was nothing interesting then there would be no burglary.

However, the State will argue that Dara was in the getaway vehicle, and Don was right outside of Ned's window ready to break in.

Therefore, Dara will be guilty of attempted burglary.

### Felony Murder Rule

A death that occurs during the commission of an inherently dangerous felony (in this case, burglary), that happens during the res gestae of the crime, which is causally related and the natural and probable consequence.

Here the State will try to argue that Dara should be guilty of Felony Murder because her Don died during the attempted burglary.

Further, because of the *Redline* case, a co-felon is not responsible for the death of other

co-felons that are committed by a victim or innocent person.

Here, the facts indicate that Don (a co-felon) was killed by Ned (the victim).

Therefore, Ned's death won't be imputed to Dara and Dara will not be found guilty of Felony Murder.

Therefore, Dara won't be found guilty of Felony Murder but she will still be guilty of conspiracy and the attempted burglary.

### **State v. Ned**

#### Homicide

A killing of another human being.

Here the facts indicate that "Ned picked up a shot gun, and shot Don through the window, killing him."

Therefore, we have a homicide.

#### Actual Cause

But for Ned shooting Don through the window, Don would not be dead.

Therefore, Ned is the actual cause.

#### Proximate Cause

It is foreseeable that when someone aims a gun to shoot a perpetrator; that the perpetrator may die.

Therefore, Ned is the proximate cause.

#### Murder

Murder can be established by malice aforethought. Malice is a killing of a human being by

intent to kill; intent to cause serious bodily injury, wanton and reckless conduct, or Felony Murder Rule.

#### Intent to kill

Here, the facts indicate that Ned "saw that Don was right outside his dining room window." Further, "Ned entered the dining room, picked up a shotgun, and shot Don through the window." Ned's conduct indicates that he had the intent to kill Don or that Ned knew with substantial certainty that Don would be shot and die.

Therefore, Ned had a specific intent to kill.

#### Intent to cause serious bodily injury

Here, the facts indicate that Ned "saw that Don was right outside his dining room window." Further, "Ned entered the dining room, picked up a shotgun, and shot Don through the window." Ned's conduct indicates that he had the intent to cause serious bodily injury to Don if Don didn't die.

Therefore, Ned had an intent to cause serious bodily injury.

#### Wanton and Reckless Conduct

A killing that occurs with a "depraved heart" or an indifference to the value of human life.

Ned did not show any value towards Don's life when Ned grabbed a shotgun, aimed it directly at Ned and shot him through the window.

Therefore, Ned's conduct will be deemed wanton and reckless.

## First Degree Murder

First degree murder is established by specific intent to kill plus premeditation and deliberation; specific intent to cause great bodily injury, torture, bomb, ambush or poison and the Felony Murder Rule.

### Specific intent to kill plus premeditation and deliberation

Here, the facts indicate that Ned "saw that Don was right outside his dining room window." Further, "Ned entered the dining room, picked up a shotgun, and shot Don through the window." Ned's conduct indicates that he had the specific intent to kill Don.

The State will further assert that Ned premeditated the killing because Ned had cameras outside of his house with night vision that would set off alarms if anyone approached. This showed that Ned had time to think about killing Don or not.

Further, the State will argue that the killing was deliberate because Ned killed Don without passion. Ned knew where Don was and Ned approached Don.

Malice will be established under this theory.

### Specific intent to cause great bodily injury

Here, the facts indicate that Ned "saw that Don was right outside his dining room window." Further, "Ned entered the dining room, picked up a shotgun, and shot Don through the window." Ned's conduct indicates that he had the specific intent to cause great bodily injury to Don. If the shotgun did not kill him then it would have definitely caused severe bodily damage.

Therefore, malice will be established under this theory.

### Ambush

The State may try to argue that Ned ambushed Don because Ned had cameras with live video feed. Further, Ned knew exactly where Don was and went to that exact location to shoot him dead.

This will be the State's weakest argument.

### Second Degree Murder

All murder that is not first degree.

The State will be able to successfully argue that Ned's conduct was wanton and reckless as discussed supra.

Ned will be charged with second degree murder.

### Justification

A criminal act that is justified, but which would otherwise be deemed a criminal offense.

### Defense of Property

Reasonable force used to protect one's property (deadly force prohibited).

Ned will try to argue that he was defending his property because he "learned from news reports that several homes in his neighborhood had recently been broken into at night and that thousands of dollars' worth of electronics had been taken."

He will further contend that in order to defend his property, he "placed loaded guns in every room."

This argument will fail because one cannot use deadly force to protect their property.

Further, one cannot use mechanical instruments to protect their property.

### Self Defense

Reasonable force used to protect one's self. Deadly force may be used in this instance if the non-perpetrator is met with imminent harmful contact or deadly force.

Ned will argue that he was using self-defense; however, there are no facts to support that Ned was in imminent harm or that Don was going to attack him.

This defense will fail.

### Defense of Others

Reasonable force used to protect others.

If there were others in Ned's home; Ned will try to use this defense; however, there are no facts to support that Ned was in imminent harm or that Don was going to attack him.

This defense will fail.

### Crime Prevention

Reasonable force used to prevent the perpetration of a crime.

Ned may try to assert that he was trying to prevent Ned from breaking into his home and committing a crime.

However, deadly force is not prohibited.

Therefore this defense will fail.

### Voluntary Manslaughter (murder mitigated)

Intentional killing with malice (mitigated).

Ned will try to contend that he experienced a "heat of passion." However, in order to prove heat of passion, Ned would need to show that he was adequately provoked, that his

provocation caused his act, that he had no time to cool down and that a reasonable person would act similarly in the same circumstances.

Ned will try to claim that he was adequately provoked when he learned of the several break ins in his neighborhood. He will further contend that this provocation prompted him to install exterior cameras with night vision around his property. Moreover, that he had no time to cool down when he seen Don approaching his house and was outside of his window. However, he will not be able to prove that a reasonable person would act the same under these circumstances. A reasonable person may call law enforcement.

Therefore, his murder charge will not be mitigated.

## QUESTION 4: SELECTED ANSWER B

### 1. Dara

#### Conspiracy to Commit Burglary and Larceny

*Conspiracy is an agreement between two or more persons to commit an illegal act.*

The facts indicate that Dara and Don chose or conspired to commit burglary against Ned's property. This and the fact that they acted in concert strongly suggested that they had a preexisting agreement to commit the act of burglary.

Dara specifically intends that the crimes of burglary and larceny be committed as evidenced by her agreement and participation. The previously committed crimes help strengthen this inference.

When Dara parked outside Ned's house, she committed an overt act in furtherance of the conspiracy.

Dara is guilty of conspiracy.

#### **Pinkerton's Rule**

*Each member of a conspiracy is liable for those crimes of any other member which are a reasonably foreseeable result of the conspiracy and are done in furtherance of it.*

Here, Dara is liable for those crimes committed by Don in furtherance of the conspiracy; attempted burglary and attempted larceny discussed infra.

## **Accomplice Liability**

*An accessory before the fact or a principal in the second degree who encourages or aids and abets the principal in the first degree is liable for those crimes committed by the principal in the first degree which are reasonably foreseeable.*

Here, Dara is constructively present with Don in the commission of his crimes because she is waiting in the getaway car.

Dara's waiting in the getaway car aids and abets Don in the commission of his crimes because she drove him to the crime scene and waits to take him away.

Dara's specifically intends that Don commit the crimes because she has agreed with him that the crimes be committed and she has aided him according to her own will.

In most jurisdictions, Dara is guilty of all crimes committed by Don which are foreseeable in the commission of the target crimes of Larceny and Burglary.

## **Attempted Burglary**

*An attempt is a substantial step towards perpetration of an intended crime.*

*Common law burglary is the breaking and entering of the dwelling of another, at night, with specific intent to commit a felony therein.*

*Modern law burglary is the trespassory entering of any structure with intent to commit a crime therein.*

As discussed above, Don specifically intended to break into and enter Ned's house at night with the intent to commit a larceny as describe above. Larceny is often sufficient to support

the specific intent requirement of a "felony therein."

The fact that Don never touched the house is irrelevant. Don took a substantial step towards the commission of the burglary when he had Dara drive him to Ned's house, entered Ned's property, and was right outside Ned's window at the time Ned shot him. Further, it can be argued, over and above the requirements for attempt, that Don had committed the last proximate act before the commission of his intended crime.

Dara, as accomplice and conspirator to Don, is guilty of attempted burglary.

### **Attempted Larceny**

*Attempt defined supra.*

*Larceny is the trespassory taking and carrying away of another's personal property with specific intent to permanently deprive.*

As described above, Don specifically intended to take and carry away Ned's electronic equipment. Don had the intent to permanently deprive Ned thereof as inferred by the fact that he was entering Ned's property at night and that no other victim of Don's predations had their property returned to them.

The State argues that when Don entered Ned's property, at night, he took a substantial step towards the perpetration of the larceny. Don had no other reason to be outside Ned's dining room window. The fact that Don actually got out of the car and stood outside Ned's window indicates that Ned had gone from preparation and entered the zone of perpetration.

Dara, as accomplice and conspirator to Don, is guilty of attempted larceny.

## **HOMICIDE**

*Homicide is the killing of a human being by another human being.*

But for Dara's aiding and abetting Don in the perpetration of attempted burglary, Don would not have died. There is actual cause.

Proximate Cause: It is foreseeable that a co-conspirator could die during the commission of a burglary. The fact that Dara and Don previously took precautions to avoid houses where the occupants were home is irrelevant because it is foreseeable they could be mistaken pursuant to their attempted burglary.

## **Murder**

*Murder is an unlawful homicide committed with malice aforethought.*

Dara did not intend for Don to die nor did she intend for Don to be seriously injured as evidenced by the fact that he was her co-conspirator. However, the fact that Dara agreed to help Don commit highly dangerous and morally reprehensible acts indicates that Dara acted with a reckless disregard for Don's life. There is malice under a depraved heart act.

## **Felony Murder Rule**

Felony murder is shown when a death occurs during the commission of an enumerated felony or a felony committed in a highly dangerous manner. Attempted felonies are sufficient to support felony murder. Authorities are split when special felony murder occurs, which is to say, a killing is committed by a victim or police during the felony.

Here, Don died during the commission of an attempted burglary which is an enumerated felony.

Authorities which follow the proximate theory of felony murder will find Don's death felony

murder against Dara because his death was foreseeable. Authorities which follow the agency theory of felony murder will not apply felony murder to Dara because Ned did not act as her agent.

There is probably malice under this theory.

### **Murder in the First Degree**

*Any murder with intent to kill and premeditation, or by felony murder, or by poison, bomb, lying in wait, or torture.*

Here because Dara is guilty of felony murder and thus is probably guilty of murder in the first degree.

### **Murder in the Second Degree**

*Murder in the second degree is any murder not raised to the first degree.*

If Dara is within a jurisdiction which does not support this type of felony murder, she is guilty in murder in the second degree because she acted with a reckless disregard for Don's life, as discussed supra.

### **Involuntary Manslaughter**

*Involuntary manslaughter is an involuntary homicide without malice which can arise in three ways: commission of an unlawful act, intent to inflict non-serious bodily harm, or criminal negligence.*

Here, at the very least, Don was killed during the commission of the several unlawful acts: burglary and larceny. Thus, Dara is guilty of misdemeanor manslaughter if not a higher degree of criminal homicide.

## 2. Ned

### HOMICIDE

*Defined supra.*

But for Ned shooting Don with a shotgun, Don would not have died. There is actual cause.

Proximate Cause: It is foreseeable that shooting someone with a shotgun would cause their death. The shooting is the direct foreseeable cause of Don's death. There is legal cause.

### Murder

*Defined supra.*

#### **Intent to Kill**

The facts indicate that when Ned heard about the break-ins, installed night-vision cameras, and placed loaded guns in every room of the house, that he was intending to kill whomever attempted to break into his house. The facts indicate that Ned actually looked forward to shooting an intruder. Accordingly in conjunction with the deadly weapons doctrine, a jury will find that Ned intended to kill Don. Malice is demonstrated using this theory.

### **Intent to Cause Serious Bodily Harm**

Ned intended to cause serious bodily harm to Don because he used a deadly weapon upon him. Malice is demonstrated using this theory.

### **Depraved Heart Act**

At the very least, Ned showed a reckless disregard for Don's life when he shot him. There is malice under this theory.

### **Felony Murder Rule**

The felony rule is not supported by lesser included felonies such as the aggravated assault and battery which took place as a result of shooting Don.

### **Murder in the First Degree**

*Defined supra.*

The facts indicate that Ned premeditated the death of Don because of his extensive preparations to shoot intruders and because the facts indicate that he looked forward to the thought of shooting an intruder.

Ned's preparations also show that he was cool and calm in his contemplation of an intended homicide.

There is premeditation and intent to kill. Ned is guilty of first degree murder unless he can mitigate or defend, discussed infra.

## **Murder in the Second Degree**

*Defined supra.*

Ned is guilty of second degree murder if the court does not find mitigation supra malice.

## **Voluntary Manslaughter**

*Voluntary manslaughter is an intentional homicide with malice but with mitigation.*

Ned is acting under a good faith belief that he has a defense to murder as evidenced by the protection of his person and property. If he is mistaken, he can mitigate down to manslaughter.

The facts do not indicate that Ned was furious or otherwise acting under extreme emotional distress and cannot mitigate by provocation.

## **Defenses**

### **Public Authority**

Ned argues that he has a defense where he attempts to arrest Don in the midst of a dangerous felony. As discussed above, burglary is a dangerous felony as a matter of law in many jurisdictions. Ned made no attempt to arrest at all and may not defend under this theory.

### **Crime Prevention**

Ned argues that he has a right to use deadly force where a perpetrator is in the midst of a

dangerous felony. Ned may defend under this theory.

### **Self-Defense**

The facts do not indicate that Don was armed or otherwise putting Ned in reasonable fear of imminent serious bodily harm.

### **Defense of Habitation**

In many jurisdictions, Ned has a right to defend his habitation with deadly force. In a minority of jurisdictions, Ned must show that he gave Don a chance to retreat. He did not give Don a chance to retreat.

Ned can probably defend against criminal homicide under this defense.