

ST. MARY'S UNIVERSITY SCHOOL OF LAW

CRIMINAL LAW
Professor Schmolesky

FINAL EXAMINATION
Fall 1987

The following is a three hour open book-exam consisting of 6 pages and an appendix of statutes. Please check to see that you have a complete examination. You may refer to the text, any commercial publication or your own notes or outline in answering these questions. The statutes in the appendix are taken from the Texas Penal Code and are provided for your quick reference. There may be other statutes not contained in the appendix that are relevant to the questions. Only statutes creating offenses which are specifically referred to in the questions are included in the appendix.

Please write your answers in one of the blue books that you will draw from a common pool of bluebooks. Please put your exam number only on the exam book, not your name or social security number. Your grade can be determined before the official notice of grades sent from the University by consulting the list of grades that will be posted for each course by exam numbers for purposes of identification.

I suggest that you read the entire exam before writing and that you think and plan before writing. Some of the questions may overlap somewhat with questions within the same section of the exam. Question I has three questions relating to the same fact situation, Question II has five questions relating to the same fact situation (but different from the facts in Questions). Question III has only one question relating to its own distinct fact situation. It is particularly advisable that you read all of the related questions so that you can plan your answers rather than answering one question without reading the related questions.

Good luck with this exam and your other finals. I look forward to seeing you all in Criminal Procedure next semester. Happy Holidays!

Question I. (30 Points)

The Attorney General of the State of Texas wrote a letter to his long-time army friend, Buckshot Bailey, asking Buckshot if he would teach his son, Matthew Maddox, how to use a rifle. The Attorney General extolled Buckshot's ability with guns in his letter. The AG stated that he wanted his son to be familiar with weapons and to be able to learn to shoot as well as Buckshot. The AG stated that he would give money to his son to cover Buckshot's expenses as well as to pay for his expert instruction. Eager to please his old friend, Buckshot wrote back and suggested that the son be sent to his farm the following weekend. This arrangement was accepted and the following weekend Matthew, age 17, appeared at the farm. Because Matthew had no rifle, Buckshot sold him one for \$100 and began to teach him how to use it at a home-made rifle range that Buckshot had created on his farm. On several consecutive Saturdays the boy appeared and received personal instruction from Buckshot. After a couple of hours of instruction, Buckshot would set up targets for Matthew and allow him to practice alone.

One Saturday, after Buckshot had finished his lesson, he left for town to run errands while leaving Matthew to shoot at targets. The local Sheriff was driving in the vicinity of Buckshot's farm when he heard several rifle shots. The Sheriff investigated and found Matthew shooting the rifle that he had purchased from Buckshot. The Sheriff asked him several questions, including his age and where he had obtained the rifle. Buckshot had never asked Matthew his age but he assumed that he was the son of the Attorney General who was a sophomore at the University of Texas. In fact, the Attorney General had a 19 year old son who was a Sophomore at the University, but whose name is Michael. The Sheriff confiscated the rifle and sent Matthew home. When Buckshot returned home, he was arrested for Unlawful Transfer of a Weapon contrary to Section 46.07 (2) of the Texas Penal Code.

Your law partner has interviewed Buckshot and has discovered the facts related above. However, because of your superior expertise in the field of criminal law, your partner has asked you to prepare a brief memo concerning three issues that Buckshot has raised that he feels should result in an acquittal of the charges.

Part A (10 points). Buckshot states that he reasonably believed that the boy was age 19 and not 17 and that therefore he did not knowingly sell a gun to a child younger than 18.

Part B (10 points). Buckshot says that he relied on the fact that Matthew's father was the Attorney General and that he reasonably believed that the Attorney General would not ask him to do something that was illegal.

Part C (10 points). Having read 46.07, Buckshot believes that he has a defense under subsection (c) of the statute because he had received the written letter from Matthew's father. (Note that this question focuses on the letter from Matthew's father, as distinct from Matthew's father's status as the State Attorney General, an issue that you should address in question 2). Your law partner has requested your opinion about the validity of the possible defense and she also wants your opinion as to who will bear the burden of proof on the issue raised by 46.07 (c) of the Texas Penal Code and whether the allocation of the burden presents a constitutional issue under In Re Winship, Mullaney v. Wilbur, and Patterson v. New York.

Question II. (50 Points).

Adam Avenger came home one day to find that his 80 year old mother with whom he lives had been beaten and robbed. She told Adam that Sammy Slime had come asking for a loan, and when she refused, he hit her and took her life savings from her hiding place under the mattress. In a rage, Adam rushed from the house and drove to the apartment of his friend, Billy Bob. He told Billy what had happened and asked to borrow Billy's sawed-off shotgun, stating: "I'm going cripple Slime like he did to Mom". Billy Bob told Adam not to do it, but Adam grabbed the shotgun and ran from the apartment.

After looking for Slime unsuccessfully for several hours, Adam went to the sporting goods store of Sid Sport, hoping to find some information about Slime. Adam told Sport what had happened and stated that he had a gun and he wanted "to get even". Sid Sport stated that Slime had been at the Sleazeball Lounge on the other side of town for the last two hours. Adam thanked Sid, bought a box of shotgun shells from him and asked him if he would call a cab so that he could go to the Sleazeball Lounge. Sid said that it wasn't necessary to call a cab because his delivery boy, Dan, could give him a ride. Dan, who had heard everything that Adam had said stated that he would drive Adam and wait for him until he was done.

When they arrived at the bar, Dan waited in the car and Adam went to look for Slime. Adam spotted Slime at the bar buying drinks for everyone with money he was taking from Adam's mother's money bag.

Adam took the gun from inside his coat where he had concealed it and fired a single shot. Adam missed Sline, but the shot hit the bar and passed through it, hitting the bartender who was under the bar hooking up a new keg of beer. The bartender was seriously wounded and later died in the hospital after clinging to life for more than a year. The owner of the Sleazeball Lounge, Suds Seller, rushed from the back room with a gun in his hand and fired a shot at Adam, missing him and hitting a customer who was killed.

All of the above incidents occurred in San Antonio, Texas. Assume that you are an Assistant District Attorney in Bexar County, Texas and that you have been asked to write a memo addressing the following five areas:

Part A. (10 points). What homicide offenses, if any, could Adam be convicted of for the death of the bartender and the death of the customer? Be sure to discuss any problems for the prosecution in obtaining any homicide convictions, including anticipated defense arguments and lesser included offenses.

Part B. (10 points). What homicide offenses, if any, could the owner of the tavern, Suds Seller, be convicted of for the death of the customer? Be sure to discuss any problems for the prosecution in obtaining any homicide conviction, including anticipated defense arguments and lesser included offenses.

Part C. (10 points). Discuss the relative merits of the following attempt charges for Adam Avenger based upon his attack on Sammy Slime: attempted murder [19.02 (2) and 15.01]; attempted voluntary manslaughter [19.04 and 15.01]; attempted felony murder [19.02 (3) and 15.01]; attempted involuntary manslaughter [19.05 and 15.01]; attempted conspiracy to murder, relating to Adam's efforts to seek a weapon from Billy Bob [19.02 (2) and 15.01 and 15.02]. Which of these charges would you recommend be filed? Which are possible offenses? Why?

Part D. (10 points). Discuss the possible criminal liability, if any, of Billy Bob, Sid Sport, and Dan the delivery boy. If Adam had been arrested for carrying an illegal weapon in the parking lot of the Sleazeball lounge (and thus no shooting occurred) could he still be found guilty of an attempted crime? What impact would Adam's arrest in the parking lot have had on the criminal liability, if any, of Billy Bob, Sid Sport, and Dan the delivery boy.

Part E. (10 points). Assume that the following charges are brought against Adam Avenger:

Conspiracy to murder Slime [19.02 (2) and 15.02]
Attempted murder of Slime [19.02 (2) and 15.01]
Murder of the bartender [19.02 (3)].
Voluntary manslaughter of the bartender [19.04]
Felony murder of the customer [19.02 (3)]
Unlawful carrying of weapon [46.02]
Prohibited weapon [46.06]

Can Adam be convicted and consecutively punished for each of the above charges? Why or why not?

Question III (20 points).

Bobby Buyer purchased a home from Sammy Seller. Buyer purchased a number of pieces of furniture and appliances from Seller as part of the purchase, including three televisions which were located in different rooms in the house. Bobby called Rogers Cable TV and said that all future bills should be sent in his name but that he would like to have the same service that Sammy had ordered continued. Bobby paid for several bills from Rogers without paying attention to the itemized statement that was sent each month. Bobby merely wrote a check for the total. Bobby was delighted with all of the television stations that he could watch because he had never had cable television before.

One day when Bobby was absorbed watching the Playboy channel, a storm developed and the cable outside of Bobby's new home was damaged. Bobby was extremely frustrated when the Playmate Review disappeared from his screen and he called the Rogers Cable T.V. Company immediately. A repairman came quite promptly and fixed the cable. In making the service call, the repairman noticed that several devices had been attached to the cable system in Bobby's home. Sammy Seller had attached descrambling devices that allowed him to receive the Playboy Channel, the Sports Channel, the Disney Channel, HBO, Showtime, and the Movie Channel while only paying for basic cable service that did not include any of these additional channels for which an additional fee was required. In addition, Sammy had paid for only one television outlet for cable and all three of the sets purchased by Bobby, had been set up by Sammy, without authorization from Roger's, to receive cable service.

The unauthorized service was reported by the repairman and led to Bobby's indictment under 31.12 of the Texas Penal Code for Unauthorized Use of a Cable Descrambling and Intercepting Device. At trial, the court instructed the jury of the instructions contained in subsection (d) of 31.12 but also instructed the jury consistent with subsection (e) of 31.12 that the presumption does not apply if the defendant shows by a preponderance of the evidence that the unauthorized device was attributable to the conduct of another. As a judge on the Fourth Court of Appeals in San Antonio, write a brief opinion addressing Bobby's appellate claim that the presumption created by the statute is unconstitutional because it violates Sandstrom v Montana and because it fails the "rational connection test".

TITLE 4. INCHOATE OFFENSES

CHAPTER 15. PREPARATORY OFFENSES

Sec. 15.01. Criminal Attempt. (a) A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.

(b) If a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense if an element that aggravates the offense accompanies the attempt.

(c) It is no defense to prosecution for criminal attempt that the offense attempted was actually committed.

(d) An offense under this section is one category lower than the offense attempted, and if the offense attempted is a felony of the third degree, the offense is a Class A misdemeanor.

Sec. 15.02. Criminal Conspiracy. (a) A person commits criminal conspiracy if, with intent that a felony be committed:

(1) he agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense; and

(2) he or one or more of them performs an overt act in pursuance of the agreement.

(b) An agreement constituting a conspiracy may be inferred from acts of the parties.

(c) It is no defense to prosecution for criminal conspiracy that:

(1) one or more of the coconspirators is not criminally responsible for the object offense;

(2) one or more of the coconspirators has been acquitted, so long as two or more coconspirators have not been acquitted;

(3) one or more of the coconspirators has not been prosecuted or convicted, has been convicted of a different offense, or is immune from prosecution;

(4) the actor belongs to a class of persons that by definition of the object offense is legally incapable of committing the object offense in individual capacity; or

(5) the object offense was actually committed.

(d) An offense under this section is one category lower than the most serious felony that is the object of the conspiracy, and if the most serious felony that is the object of the conspiracy is a felony of the third degree, the offense is a Class A misdemeanor.

Sec. 15.03. Criminal Solicitation. (a) A person commits an offense if, with intent that a capital felony or felony of the first degree be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission.

(b) A person may not be convicted under this section on the uncorroborated testimony of the person allegedly solicited and unless the solicitation is made under circumstances strongly corroborative of both the solicitation itself and the actor's intent that the other person act on the solicitation.

(c) It is no defense to prosecution under this section that:

(1) the person solicited is not criminally responsible for the felony solicited;

(2) the person solicited has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution;

(3) the actor belongs to a class of persons that by definition of the felony solicited is legally incapable of committing the offense in an individual capacity; or

(4) the felony solicited was actually committed.

(d) An offense under this section is:

(1) a felony of the first degree if the offense solicited is a capital offense; or

(2) a felony of the second degree if the offense solicited is a felony of the first degree.

CHAPTER 19. CRIMINAL HOMICIDE

Sec. 19.01. Types of Criminal Homicide. (a) A person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of an individual.

(b) Criminal homicide is murder, capital murder, voluntary manslaughter, involuntary manslaughter, or criminally negligent homicide.

Sec. 19.02. Murder. (a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(b) An offense under this section is a felony of the first degree.

Sec. 19.03. Capital Murder. (a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, or arson;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from the penal institution;

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution; or

(6) the person murders more than one person:

(A) during the same criminal transaction; or

(B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct.

(b) An offense under this section is a capital felony.

(c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

Sec. 19.04. Voluntary Manslaughter. (a) A person commits an offense if he causes the death of an individual under circumstances that would constitute murder under Section 19.02 of this code, except that he caused the death under the immediate influence of sudden passion arising from an adequate cause.

(b) "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.

(c) "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

(d) An offense under this section is a felony of the second degree.

Sec. 19.05. Involuntary Manslaughter. (a) A person commits an offense if he:

(1) recklessly causes the death of an individual; or

(2) by accident or mistake when operating a motor vehicle while intoxicated and, by reason of such intoxication, causes the death of an individual.

(b) For purposes of this section, "intoxication" means that the actor does not have the normal use of his mental or physical faculties by reason of the voluntary introduction of any substance into his body.

(c) An offense under this section is a felony of the third degree.

Sec. 19.07. Criminally Negligent Homicide. (a) A person commits an offense if he causes the death of an individual by criminal negligence.

(b) An offense under this section is a Class A misdemeanor.

Sec. 31.12. Unauthorized Use of Television Decoding and Intercept Device or Cable Descrambling, Decoding, or Interception Device.

A person commits an offense if, with the intent to intercept and decode a transmission by a subscription television service without the authorization of the provider of the service, the person intentionally or knowingly attaches to, causes to be attached to, or incorporates in a television set, video tape recorder, or other equipment designed to receive a television transmission a device that intercepts and decodes the transmission.

(b) A person commits an offense if, with the intent to intercept, descramble, or decode a cable television service and without the authorization of the provider of the service, the person intentionally or knowingly:

(1) physically, electrically, electronically, acoustically, or inductively makes or maintains an unauthorized cable connection or otherwise intercepts cable television service;

(2) attaches to, causes to be attached to, maintains an attachment to, or incorporates in a television set, video tape recorder, other equipment designed to receive a television transmission, or equipment of a cable television company a device that intercepts, descrambles, or decodes the service; or

(3) tampers with, changes, or modifies the equipment of a cable television company.

(c) In this section:

(1) "Cable television service" means a service provided by or through a facility of a cable television system, closed circuit coaxial cable communication system, or microwave or similar transmission service used in connection with a cable television system.

(2) "Device" means a device other than a nondecoding or nondescrambling channel frequency converter or television receiver type-accepted by the Federal Communications Commission.

(3) "Subscription television service" means service whereby television broadcast programs intended to be received in an intelligible form by members of the public only for a fee or charge are transmitted pursuant to the grant of subscription television authority by the Federal Communications Commission. The term shall not include cable television service or community antenna television service.

(d) If an unauthorized device designed to intercept, descramble, or decode a subscription television transmission or if an unauthorized device designed to intercept, descramble, or decode a cable television service is present on the premises or property occupied and used by a person, it is presumed that the person intentionally or knowingly used the device to intercept, descramble, or decode a transmission or a service. If an unauthorized cable connection is present on the premises or property occupied and used by a person, it is presumed that the person intentionally or knowingly used the connection to intercept cable television service. If equipment of a cable television company that has been tampered with, changed, or modified is present on the premises or property occupied and used by a person, it is presumed that the person intentionally or knowingly used the equipment to intercept, descramble, or decode a cable television service.

(e) The presumptions created by Subsection (d) of this section do not apply if the person accused shows by a preponderance of the evidence that the presence of the unauthorized device or connection, or the tampering, change, or modification of the equipment of the cable television company, may be attributed to the conduct of another.

(f) The presumptions created by Subsection (d) of this section do not apply to a telecommunications company that provides local or long distance communications services and uses equipment described by that subsection in the normal course of its business.

(g) This section does not prohibit the manufacture, distribution, sale, or use of satellite receiving antennas that are otherwise permitted by state or federal law.

(h) An offense under this section is a Class B misdemeanor unless the actor committed the offense for remuneration, in which event it is a Class A misdemeanor.

Sec. 46.02. Unlawful Carrying Weapons. (a) A person commits an offense if he intentionally, knowingly, or recklessly carries on or about his person a handgun, illegal knife, or club.

(b) Except as provided in Subsection (c), an offense under this section is a Class A misdemeanor.

(c) An offense under this section is a felony of the third degree if it occurs on any premises licensed or issued a permit by this state for the sale or service of alcoholic beverages.

Sec. 46.06. Prohibited Weapons. (a) A person commits an offense if he intentionally or knowingly possesses, manufactures, transports, repairs, or sells:

(1) an explosive weapon;

(2) a machine gun;

(3) a short-barrel firearm;

(4) a firearm silencer;

(5) a switchblade knife;

(6) knuckles; or

* (7) armor-piercing ammunition.

** (7) a chemical dispensing device.

(b) It is a defense to prosecution under this section that the actor's conduct was incidental to the performance of official duty by the armed forces or national guard, a governmental law enforcement agency, or a penal institution.

(c) It is a defense to prosecution under this section that the actor's possession was pursuant to registration pursuant to the National Firearms Act, as amended.

(d) It is an affirmative defense to prosecution under this section that the actor's conduct:

(1) was incidental to dealing with a switchblade knife, springblade knife, or short-barrel firearm solely as an antique or curio; or

(2) was incidental to dealing with armor-piercing ammunition solely for the purpose of making the ammunition available to an organization, agency, or institution listed in Subsection (b) of this section.

(e) An offense under this section is a felony of the second degree unless it is committed under Subsection (a)(5) or (a)(6) of this section, in which event, it is a Class A misdemeanor.

Sec. 46.07. Unlawful Transfer of Certain Weapons. (a) A person commits an offense if he:

(1) sells, rents, leases, loans, or gives a handgun to any person knowing that the person to whom the handgun is to be delivered intends to use it unlawfully or in the commission of an unlawful act;

(2) intentionally or knowingly sells, rents, leases, or gives or offers to sell, rent, lease, or give to any child younger than 18 years any firearm, club, or illegal knife or any martial arts throwing stars; or

(3) intentionally, knowingly, or recklessly sells a firearm or ammunition for a firearm to any person who is intoxicated.

(b) For purposes of this section, "intoxicated" means substantial impairment of mental or physical capacity resulting from introduction of any substance into the body.

(c) It is an affirmative defense to prosecution under Subsection (a)(2) of this section that the transfer was to a minor whose parent or the person having legal custody of the minor had given written permission for the sale or, if the transfer was other than a sale, the parent or person having legal custody had given effective consent.

(d) An offense under this section is a Class A misdemeanor.