

## **QUESTION 4**

Needing money and willing to do anything to get it, Don, who is tall, and Al, who is short, set out for Vic's house around midnight to steal from him. On the way, Al said that he did not want to get involved, but Don slapped Al's face and responded: "If you don't come along now, I will break your legs tomorrow." At Vic's house, Don opened the unlocked front door and he and Al went inside. Don took a wallet on a table in the foyer, and he and Al ran away.

Wanda, who happened to be walking in front of Vic's house at the time, caught sight of both men running out of the house. That night, Wanda described the taller man to police as clean-shaven with short hair, but couldn't describe the shorter man.

Don and Al were soon arrested. The next day, a newspaper printed a recent photo of Don, showing him with a large beard and long hair. When Wanda saw the photo in the newspaper, she immediately went to the police station and told Officer Oliver that she was concerned that Don might be the wrong man. Officer Oliver told Wanda that Don had Vic's wallet in his pocket when he was arrested. Before Don was arraigned, Officer Oliver arranged for Wanda to view a lineup of six bearded men with long hair, including Don. After viewing the lineup for 20 minutes, Wanda identified Don as one of the men she saw running out of the house. At trial, Al stipulated that he had run out of Vic's house with Don.

1. With what crime or crimes, if any, may Al reasonably be charged; what defenses, if any, may he reasonably assert; and what is the likely outcome? Discuss.
2. Under the Fifth and Fourteenth Amendments of the United States Constitution, on what basis, if any, may Don move to suppress evidence of Wanda's identification at the lineup, and what is the likely outcome? Discuss.

## QUESTION 4: SELECTED ANSWER A

Al's (A) crimes

Conspiracy

There is a conspiracy when two or more people agree to commit a crime with the specific intent to commit the crime. Under the common law, there must be bilateral conspiracy, whereby both parties to the agreement specifically intend to commit the crime. There is also no overt act requirement under the common law. However, more recently, the MPC, federal law and majority of jurisdictions all require that there be an overt act in addition to the agreement for a conspiracy to be found. The MPC also allows for there to be unilateral conspiracy, when a party can be guilty of conspiracy for a crime even though the other party did not actually want to commit the act (i.e. in the case of an agreement with an undercover police officer.) Conspiracy does not merge with the actual crime committed -- and thus, even if the substantial crime is performed, a person could also be guilty of conspiracy of that crime.

Here, the facts indicate that D and A intended to commit the crime of stealing from V. D and A agreed to steal from V and "set out for V's house" together at midnight to steal from him. Thus, under the common law, A was guilty of conspiracy for larceny and burglary (the substantive crimes will be analyzed in more detail below), when A agreed with D to steal from V.

Then under the majority/federal/MPC rule, there was also arguably an overt act performed when D and A set out for V's house. A could argue that simply going towards V's house was insufficient to constitute an overt act. A could argue that they didn't have

special equipment or tools on them with the intent to break in. However, here, D and A set out towards V's house around "midnight." Heading to someone's home at midnight (well passed reasonable hours) would probably be sufficient to show that there has been an overt act sufficient to find conspiracy.

### Pinkerton

Under the Pinkerton Rule, all co-conspirators are responsible for all substantive crimes that are committed by co-conspirators that are foreseeable and are in furtherance of the crime.

So, here, A would also be liable for all substantive crimes that D committed in the process of committing the theft crime that they intended to commit together. Therefore, even though it was D who opened the unlocked door and then took the wallet on the table in the foyer, A would also be liable for those crimes, even if A argued that he himself did not commit those crimes. Opening a door and taking a wallet are all foreseeable crimes in furtherance of the crime of stealing from someone's home.

### Accomplice Liability

Accomplice liability will attach when an accomplice aids a principal in performing a crime with the specific intent that the crime be performed. (Note: under the common law, the accomplice needs to only aid intentionally and knowingly.) An accomplice will also be liable for all the substantive crimes that the principal has done.

Here, A may try to argue that he wasn't a principal in the crime because he didn't commit the actus reus for the crimes. However, based on the facts, the court would likely find that he was very much a principal to these crimes -- given that he went to V's

house and also entered the property.

### Larceny

Larceny is the taking and moving of another person's property without their consent with the intent to deprive them of it permanently.

Here, D took and moved the wallet from the table on the foyer, with the intent to deprive V of the wallet permanently. After D took the wallet, both D and A ran from the home.

And there is no indication that D or A intended to return the property. In fact, quite to the contrary, at least D intended to keep the money given that he was in need of money and "willing to do anything to get it."

As such, absent any defenses (discussed below) D and W would both be guilty of larceny here.

### Robbery (no threat of force)

Robbery is larceny from another person's presence or person through threat or intimidation. Though the taking of the wallet happened in the person's home (and maybe arguably in the person's presence if V were there) -- there was no threat or intimidation and thus, there was no robbery here.

### Burglary

Burglary is the breaking and entering into a dwelling at nighttime with the intent to commit a felony inside. The requirements for dwelling and nighttime have been relaxed in many jurisdictions.

Here, D broke and entered into V's home at nighttime with the intent to steal from V. All the elements are met. They "broke" into the house when they unlocked the door. Even

though the door was unlocked, this was not a place open for the public (but someone's home) and thus the court would find that there was a breaking. Then, they entered into the place of the home ("entering"). The building they broke into was indeed V's home (and thus a dwelling). And then broke in with the intent to steal from V (and thus commit a felony inside).

As such, there was burglary here. And thus, A could be charged with burglary.

A's defenses

Withdrawal

A co-conspirator could withdraw from a conspiracy depending on the jurisdiction. Under the common law, a co-conspirator cannot withdraw from a conspiracy because the conspiracy occurs when the agreement is made. However, even under the common law, a co-conspirator could withdraw from the conspiracy even after the agreement is made so as to not be held responsible for future crimes. However, such withdrawal must be made clearly to the other co-conspirator or also typically requires informing the police.

Under the majority rules, a co-conspirator can withdraw from a conspiracy provided that it is before an overt act has taken place -- and the co-conspirator either makes an affirmative declaration of intent to withdraw to the co-conspirator or alternatively, informs the police. Under the MPC/minority rule, a co-conspirator could withdraw even after the overt act, provided that they take actions to thwart the crime.

Here, A would argue that he properly withdrew from the conspiracy. He would argue that he withdrew from the conspiracy when he told D that he did not want to get

involved. However, the court is unlikely to be receptive to his argument in any jurisdiction. Under the common law, he could not withdraw at that point because he had already agreed to the crime with D. And under the majority rule, he had already committed to the overt act of walking to V's home at midnight D and thus could not withdraw at that point. Even under the minority rule, A could not have effectively withdrawn because he did nothing to thwart the crime. Instead, he actually "went inside" the home after D had unlocked the front door.

### Duress

Duress is a defense whereby the defendant argues that they had to commit a crime because they or a third party were under an imminent threat that threatened serious bodily harm or death.

Here, A would argue that he was forced to commit these crimes because of duress. He would argue that D slapped him on the face and told him that he would "break [his] legs" if he didn't come along. However, A is unlikely to win on this defense. For a defense of duress, the threat must be imminent. In this case, D did threaten A but said that D would break his legs tomorrow. Also, there is no indication that A, if he wanted to, couldn't have run away or left the scene after he decided that he did not want to get involved. As a result, the court is unlikely to find for A on his defense for duress.

**For these reasons, A could reasonably be charged with the substantive crimes of larceny and burglary and with conspiracy to commit those crimes. His defenses for duress and withdrawal are unlikely to be successful in any jurisdiction.**

## **Question 2**

### State Action

The 5th and 14th Amendment of the US Constitution protects people against state action. In this case, there is clear state action. The issue here involves police action and thus there is state action.

### Exclusionary Rule

Under the exclusionary rule, all evidence that is obtained in violation of the 4th, 5th, or 6th amendments must be excluded from evidence. There are a few exceptions to the exclusionary rule (i.e. knock and announce, attenuation and the causal chain, etc.) but they are not relevant here.

### Lineup

D's strongest argument would be to move to suppress the evidence of Wanda's (W) identification on the basis that it was impermissibly suggestive. Under the rules concerning lineups, police cannot use lineups that are impermissibly suggestive that have a substantial likelihood of resulting in misidentification.

### Impermissibly Suggestive

D could present a strong argument that the lineup was impermissibly suggestive. He would argue that by the time the W was shown the lineup, she had already seen his picture in the newspaper. Moreover, he would argue the lineup was impermissibly suggestive because when W went to the police after seeing his picture in the newspaper, the police confirmed that they had the correct person because they had found V's wallet on D. As a result, not only had W seen his picture in the newspaper, but

also had confirmation from the police that the person in the picture was the person who had committed the crime.

#### Substantial likelihood of resulting in misidentification

D would then argue that the above caused a substantial likelihood of resulting in misidentification. He would argue that, in fact, had W not seen the picture (and had the picture not been confirmed by Officer Oliver) she would still be looking for a taller man that was "clean-shaven with short hair." He would argue that it was only because she had seen the picture and heard the police officer's statement that she identified him.

In response, the police would argue that they ensured that the lineup was not impermissibly suggestive. They would argue that they purposefully only chose six bearded men with long hair (presumably, all tall too) -- and that they provided W a lot of time to inspect each. Indeed, they would argue that W only identified D after 20 minutes.

Despite the police's efforts, D could probably successfully move to suppress evidence of W's identification at the lineup on the basis that it was impermissibly suggestive. Even though the police had chosen other tall, bearded men -- the police had already prejudiced W by confirming that the person in the newspaper picture was the person who had committed the crime.



## QUESTION 4: SELECTED ANSWER B

### 1. Al's Crimes

#### Crimes

##### *Principal and Accomplice*

Al may be liable for Don's crime as an accomplice to his crimes as the principal. The principal of a crime is the one who performs the actus reus of the crime, the perpetrator of the crime in other words. Here, Don is the one who actually opened the front door and picked up the wallet and took it with him. Therefore, Don is the principal of the crime. An accomplice is one who aids or abets the principal in the completion or cover-up of a crime. An accomplice is liable for all crimes he aided and abetted the principal in. Here Al went along with Don, entered Vic's house, watched Don take the wallet, and ran away with Don. Presumably, Al was serving as a lookout for Don and not merely tagging along. Therefore, to the extent any of Don's actions while Al was there are crimes, as discussed above, Al will be liable for them, unless he can claim withdrawal as discussed below.

##### *Conspiracy*

A conspiracy is an agreement between two or more persons to commit an unlawful act. Although at common law, an overt act was not required for the agreement to be a conspiracy, the modern law also requires an overt act. The agreement for a conspiracy may be written or oral and may be assumed from circumstantial evidence if there is a common plot or scheme among the potential co-conspirators. Here, although the facts are silent as to any written or oral agreement between Al and Don, the evidence

suggests there was a common scheme. Al and Don were both desperate for money and willing to do anything to get it and they set out together to enter Vic's house and steal from him. Therefore, unless Al can argue that he withdrew from the conspiracy, as discussed below, Al will be liable for conspiracy. He will also be liable for the substantive crimes committed in furtherance of the conspiracy and any additional crimes if they were the foreseeable result of the conspiracy under the majority Pinkerton rule.

### *Larceny*

Larceny is the trespassory taking and carrying away of another's personal property with the intent to permanently deprive them of it at the time of the taking. Don likely committed larceny and therefore under accomplice and conspiracy liability, Al will also be guilty of larceny, subject to the defenses below.

### Trespassory

In order to be trespassory, the taking must have been without the owner's permission. Here, Al and Don took Vic's wallet from his house without his knowledge at night. Therefore, it seems very unlikely that they had Vic's permission to take the wallet and no facts suggest that they did. Therefore, this element is met.

### Taking

The taking is any action that removes the personal property from the possession of the owner. Here, the wallet was in Vic's house and therefore in his possession before the time of the taking. When Don picked it up, he satisfied the taking requirement by removing it from the possession of the owner into his own possession. Therefore, this

element is satisfied.

### Carrying

Carrying away is any movement even slight movement away from where the property was taken. Here, this element was clearly met because Don took the wallet and ran out of the house and away from the house.

### Another's Personal Property

The property must also be in the possession of another. Here, the wallet was in Vic's possession before the taking and therefore this element is met.

### Intent to Permanently Deprive

The person committing larceny must have the specific intent at the time of the taking to permanently deprive the owner of the property. Here, Don and Al were desperate for money. Therefore, it is unlikely that Don took the wallet with the intent to give it back to Vic and therefore likely intended to permanently deprive Vic of the property. Therefore, this element and all elements required for larceny have been met.

### *Robbery*

Robbery is larceny from the person of another by force or intimidation. Here Don's actions did not amount to robbery and therefore Al will not be liable for robbery even through accomplice and co-conspirator liability.

### Larceny

As discussed above, larceny has been committed by Don.

From the Person of Another

Here, the wallet was taken off a table in the foyer not off of Vic's person. There is no evidence that Vic was even aware or present when the wallet was taken and therefore this element is not met.

By Force or Intimidation

To be a robbery, more force than is necessary to effect the taking is necessary or there must be intimidation through threat of imminent bodily harm. Here, neither of these is met. Don took the wallet off the table with only the force necessary to take the wallet and Vic was nowhere to be found so there was no intimidation through threat.

Therefore, because the taking was not from the person of another or by force or intimidation, Don did not commit robbery and therefore Al cannot be liable for it as an accomplice or co-conspirator.

*Burglary*

Burglary is the breaking and entering into a dwelling at night with the intent to commit a felony at the time of the entering.

Breaking

Breaking is use of force, for example breaking a window or kicking down a door. The force used must be more than required to enter. Here, Don opened an unlocked front door. This is sufficient to be considered a breaking because there was more force than necessary to enter, ie the door was not wide open and force was used to open it, however slight.

## Entering

Entering is physically crossing the plane into the dwelling. Here, Don and Al both entered the house by going inside.

## Dwelling

A dwelling is a structure regularly used for habitation. It does not have to be currently inhabited, but it cannot be abandoned. All states have statutes now that expand the common law definition to other structures and buildings and some to cars. Here, this was a dwelling because it was Vic's house. It is unclear whether Vic was home at the time, but he is not required to be at home if it is a place he regularly inhabits. Thus, this element is satisfied.

## Night

Night is the time between sunset and sunrise. Modern statutes eliminate the need for a burglary to be at night but may impose higher penalties when it is at night. Here, Al and Don went at midnight to steal from Vic's house so the nighttime element is clearly met.

## Intent to Commit a Felony

At the time of the breaking and entering, the person must have had the specific intent to commit a felony inside to be a burglary. Here, Al and Don went to Vic's house with the clear purpose of stealing from him. This is a felony and therefore at the time of the entry, they had the requisite intent. Therefore, Don is guilty of burglary and Vic is guilty as his accomplice or co-conspirator unless one of the defenses below applies.

## Defenses

### *Duress*

Duress is an improper threat that meaningfully deprives a person of actual choice. In the criminal context, the threat must be of imminent serious bodily injury or death to the person asserting duress or to another person that the person knows. Here, Al will argue that when Don slapped his face and said "If you don't come along now, I will break your legs tomorrow" that he was deprived of any meaningful choice and can assert the defense of duress. However, the threat to Al was that Don would break his legs *tomorrow* not at the time. Therefore, the threat was not imminent and Al cannot assert duress as a defense. Al will also argue that the fact that Don slapped him was an imminent threat; however, Don slapped him before he made the threat and a slap is not imminent serious bodily injury or death and it was done before the threat so it was not a threat of serious bodily injury or death.

### *Withdrawal as Accomplice*

The common law did not allow any withdrawal when a person had already aided and abetted a principal. The modern law allows withdrawal and therefore relief from liability only when the accomplice clearly states that he does not want to help anymore and attempts to thwart the principal in the commission of the crime. Here, Al will argue that he withdrew from the accomplice liability when he said he did not want to get involved anymore. However, Al still went along with Don and served as a lookout and therefore he cannot escape accomplice liability.

### *Withdrawal from Conspiracy*

Al will also try to argue that he withdrew from the conspiracy. At common law the conspiracy was achieved when there was an agreement to commit a crime without an overt act. Under this standard there is no withdrawal from the conspiracy once the agreement has been made. Here, Al has already set out with Don to steal from Vic so the agreement has already been made. Under the modern law an overt act is required before there is conspiracy liability. An overt act may be lawful or unlawful. Setting out at midnight to go somewhere may be lawful, but in this case it was an overt act in furtherance of the conspiracy to steal from Vic. Therefore, Al had already committed conspiracy before he said he did not want to get involved. In addition, he continued aiding Don and finished carrying out the crime so he will still be liable for conspiracy. A conspirator may be able to escape liability for substantive crimes, but only if he attempts to thwart the success of the conspiracy. Here, Al did not do that so he will also still be liable for the underlying crimes.

### **2. Don's Motion to Suppress**

Under the Due Process Clauses of the Fifth and Fourteenth Amendments, a court will take two steps in deciding whether a police lineup violates the defendant's rights. First, the court will decide whether the lineup was impermissibly suggestive. Second, the court will decide whether even if the lineup was impermissibly suggestive if the identification is still nonetheless reliable.

### Impermissibly Suggestive

A lineup is impermissibly suggestive if the form or substance of the lineup unduly biases the person making the identification. Here, Wanda described to the police that the taller man, presumably Don, was clean-shaven with short hair, but could not describe the shorter man. When Don was arrested with a large beard and long hair, Wanda thought Don might be the wrong man. Officer Oliver told Wanda that Don had Vic's wallet in his pocket when he was arrested. Officer Oliver then arranged for a lineup of six bearded men with long hair including Don. After 20 minutes, Wanda identified Don as the man.

Four aspects of this lineup are impermissibly suggestive. First, Wanda saw Don's picture in the newspaper before the lineup. Thus, she already knew that he was the man that the officers thought was the one who came out of the house. Second, Officer Oliver told Wanda that the man they had arrested, Don, had Vic's wallet in his pocket. In addition to having seen the picture in the newspaper, now Wanda has been told Don had the wallet on him. These facts would make Wanda seriously doubt her description the night of the crime that the taller man was clean-shaven and had short hair. Third, the police lineup only included long haired and bearded men. Wanda believed the man she was looking for had short hair and was clean shaven, but Officer Oliver only provided her options with long hair and beards to choose from. As such, Wanda may have felt limited to those choices that were impermissibly suggestive.

### Still Reliable

If it nonetheless is still reliable, then it can be used still. Here, it is likely not reliable because it is inconsistent with what Wanda said when the identification was fresh the night of and because it took her 20 minutes to identify Don.