

Question 3

Dan's neighborhood was overrun by two gangs: the Reds and the Blues. Vic, one of the Reds, tried to recruit Dan to join his gang. When Dan refused, Vic said he couldn't be responsible for Dan's safety.

After threatening Dan for several weeks, Vic backed Dan into an alley, showed him a knife, and said: "Think carefully about your decision. Your deadline is coming fast." Dan was terrified. He began carrying a gun for protection. A week later, Dan saw Vic walking with his hand under his jacket. Afraid that Vic might be about to stab him, Dan shot and killed Vic.

Dan was arrested and put in jail. After his arraignment on a charge of murder, an attorney was appointed for him by the court. Dan then received a visitor who identified himself as Sid, a member of the Blues. Sid said the Blues wanted to help Dan and had hired him a better lawyer. Sid said the lawyer wanted Dan to tell Sid exactly how the killing had occurred so the lawyer could help Dan. Dan told Sid that he had shot Vic to end the harassment. Dan later learned that Sid was actually a police informant, who had been instructed beforehand by the police to try to get information from Dan.

1. May Dan successfully move to exclude his statement to Sid under the Fifth and/or Sixth Amendments to the United States Constitution? Discuss.
2. Can Dan be convicted of murder or of any lesser-included offense? Discuss.

Answer A to Question 3

1. Dan's Motion to Exclude his Statement to Sid

5th Amendment

The 5th Amendment protection demands that Miranda warnings be provided to persons that are in the custody of government officials prior to any interrogation. The Miranda rights to remain silent and to counsel must be waived before any statement used against the person in court is obtained. Miranda is not offense-specific.

A person is in custody if they reasonably believe they are not free to leave. Interrogation is defined as conduct or statements likely to elicit an incriminating response.

In this case, Dan was in jail. He had been arraigned for murder and was being held, so he was clearly not free to leave. Thus, custody is satisfied.

As to interrogation, Dan was approached by Sid, and Sid informed Dan that he was a member of the Blues, a rival gang to the gang of Vic, and that the Blues had hired an attorney to assist Dan. He said that the lawyer needed Dan to inform Sid of what happened so that he could represent him. In fact, Sid was a police informant, who had been instructed by the police to try to get information from Dan.

Clearly, Sid was talking to Dan in such a way that was likely to elicit an incriminating response; he was asking him to give the details so that Dan would have better representation. He had lied to Dan and was tricking him into confessing.

However, the problem here is that Dan did not know that Sid was a police informant who was seeking a confession. The court has upheld the admissibility of statements obtained by police informants when the suspect did not know that the informant was working for the government. The rationale is that the coercion

factor is not so high, because the suspect does not know the police are involved. In other words, the suspect is free to not speak to the informant.

In this case, the court will have to weigh the fact that Dan did not know that Sid was a police informant against the devious nature of Sid's behavior in lying to Dan in determining whether the interrogation factor is met. Based on the prior cases admitting police informant confessions, interrogation is probably not satisfied and the confession will probably not be barred by the 5th Amendment.

6th Amendment

The 6th Amendment guarantees every person the right to counsel at all critical post-charge proceedings and events, including questioning. This right is offense-specific and must be waived prior to questioning.

In this case, the time frame for the 6th Amendment protection had been triggered, because Dan had been arrested, put in jail, and arraigned for murder, all before Sid approached Dan. In fact, Dan had been appointed an attorney by the court.

When Sid, a government informant posing to be a member of a rival gang interested in helping Dan, approached Dan and elicited the incriminating response, he violated Dan's 6th Amendment Right to Counsel. Sid initiated the conversation, and lied to Dan, tricking him into giving up the information. All the time, Sid was working as an informant. This equates to questioning by the government.

Because it was post-arraignment and the government sought to initiate questioning of Dan, Dan would have to first waive his right to have counsel present, or have his attorney present. Dan did not waive this right, because he did not even know Sid was a government informant, and his attorney was not present.

Because Dan's 6th Amendment right to counsel was violated, he can successfully move to exclude his statement to Sid from trial.

When he makes this motion, the government will have to prove by a preponderance of the evidence that the statement is admissible, a burden they will not be able to meet on the existing facts. Thus, the statement will be excluded.

2. Can Dan be Convicted of Murder or any Lesser-Included Offense

Murder is the unlawful killing of another human being with malice aforethought.

It requires actus reus, which in this case was Dan's act of shooting Vic.

It also requires causation, both actual and proximate. Actual cause is easily satisfied because "but for" Dan's act of shooting Vic, Vic would not have died. Proximate cause is the philosophical connection which limits liability to persons and consequences who [sic] bear some reasonable relationship to the actor's conduct, so as to not offend notions of common sense, justice, and logic. Proximate cause is also easily satisfied, because Dan shot and killed Vic without any intervening cause or unforeseeable event. If one shoots a human being, death is a logical and foreseeable result.

Malice is satisfied under one of four theories:

1. Intent to kill;
2. Intent to commit great bodily injury;
3. Wanton and Willful disregard of human life ("Depraved Heart Killing"); or
4. Felony Murder Rule.

Intent to Kill

Intent to kill can be satisfied by the deadly weapon doctrine: where the death is caused by the purposeful use of a deadly weapon, intent to kill is implied.

In this case, Dan used a gun, pointed it at Vic, shot Vic, and killed Vic. A gun is a deadly weapon, so intent to kill is satisfied.

Intent to Commit Great Bodily Injury

Even if intent to kill were not satisfied, intent to commit great bodily injury would be apparent because the least that can be expected to occur when one points a gun at a human being and pulls the trigger is great bodily injury.

Wanton and Willful Disregard

In addition, wanton and willful disregard for human life is satisfied because the use of a gun against another human being shows a conscious disregard for human life. Guns can, and frequently do, kill people. In fact, killing things is one of their main purposes. The use of a gun against another human being shows disregard for the human being's life.

Felony Murder Rule

The felony murder rule requires an underlying felony, that is not "bootstrapped" to the murder. In this case, Dan does not appear to have

committed any crime except for killing Vic, so the malice could not be implied under the felony murder rule.

Murder in the First Degree

Murder in the first degree at common law was the intentional and deliberate killing of another human being. It required deliberation, but deliberation can happen in a very short period of time.

In this case, Vic had “terrified” Dan, and Dan began carrying a gun for protection. Dan carried this gun for an entire week before he saw Vic. In obtaining the gun, or taking it from its storage place, putting it on his person, and carrying it around for an entire week, Dan acted intentionally and deliberately. When he saw Vic, he then pulled out the gun and shot and killed Vic.

These facts, especially the elapse of an entire week, are probably sufficient to show that Dan was intentional and deliberate in his use of the gun. It did not arrive there by chance, and once Dan saw Vic, he acted without pause.

Murder in the Second Degree

All murder that is not murder in the first degree is murder in the second degree.

If the prosecution was not able to establish Dan intentionally and deliberately shot Vic, because perhaps the jury believed that Dan did not deliberate before he shot Vic, then he could be convicted of second-degree murder.

Self-Defense

Self-defense is the use of reasonable force to protect oneself at a reasonable time. Deadly force may only be used to protect against the use of deadly force.

Dan will argue that he was engaged in self-defense when he shot Vic. Dan will point out that his neighborhood was run by two gangs, and as such it was very dangerous. He will testify that Vic was a Red, one of the gangs, and that he had tried to recruit Dan to the gang. When Dan refused, Vic said he “couldn’t be responsible for Dan’s safety,” implying that Dan might be injured.

Vic then threatened Dan for several weeks, and finally backed him into an alley, showed him a knife, and told him that “Your deadline is coming fast.” Dan will argue that the statement regarding Dan’s safety, the threats, the knife and the deadline statement cumulate to show that Vic intended to kill Dan if he wouldn’t join the gang, or at least that Dan reasonably believed Vic would do it.

Dan will argue that when he then saw Vic on the street, with his hand under his jacket, he was terrified and afraid that Vic might stab him with the knife he had threatened him with, and therefore he defended himself by shooting Vic.

The primary problem with Dan's defense is that he carried around a gun for a week before seeing Vic, and then when he saw Vic with his hand under his jacket he pulled out the gun and shot Vic, without Vic producing any weapon or making any threat at that time. The state will argue that Dan is not entitled to a self-defense defense because he was under no threat when he shot Vic.

Unreasonable Self-Defense

Unreasonable self-defense is a defense available to one who engages in good faith but unreasonable self-defense. It is a mitigating defense which takes a murder charge down to voluntary manslaughter.

Dan will argue that if self-defense was not appropriate because of the timing of the threats and the shooting, then he is at least entitled to an unreasonable self-defense defense. Dan will argue that he acted in good faith and really believed Vic would stab him.

This is a very colorable defense for Dan, because although the timing of self-defense was inappropriate, Vic had been threatening Dan for several weeks, and had recently shown him a knife and said "Your deadline is coming fast," so Dan's fear was likely reasonable.

Heat of Passion

Heat of passion is a defense when circumstances evoke a sudden and intense heat of passion in a person, as they would affect a reasonable person, without a cooling off period, and the person does not cool off. Heat of passion is a possible defense during a fight.

In this case, however, it is likely not viable because Dan had not seen Vic for an entire week before the shooting, which is sufficient time for a reasonable person to cool off from the last incident with the knife in the alley. For that entire week, Dan carried around a gun, and then when he saw Vic he shot and killed him, without any prior interaction on that occasion. It appears unlikely that Dan's response was "sudden" or "intense".

Involuntary Manslaughter

Involuntary manslaughter is established by a killing with recklessness not so egregious as to satisfy wanton and reckless disregard for human life, but more serious than common negligence.

Involuntary manslaughter could be established by the reckless use of a gun, but because Dan intended to kill Vic, Dan will be convicted of a greater crime, or, if his self-defense defense is effective, of no crime at all.

Conclusion

Dan will likely be tried for first-degree murder under the intent to kill theory, and will allege the defenses of self-defense and imperfect self-defense. Dan is likely to be found guilty of voluntary manslaughter, by use of an imperfect self-defense defense.

Answer B to Question 3

Dan's Motion to Exclude

Exclusionary Rule

The exclusionary rule prohibits the introduction of evidence obtained in violation of defendant's 4th, 5th, and 6th Amendment rights, and under the "fruits of the poisonous tree" doctrine, also prohibits any evidence found as a result of violating defendant's 4th, 5th, and 6th Amendment rights, with limited exceptions. Thus, if Dan's confession violated his 5th or 6th Amendment rights, the statement cannot be admitted.

5th Amendment Right

The 5th Amendment provides that a defendant should be free from self-incrimination. The right applies to testimonial evidence coercively obtained by the police. Under the 5th Amendment, before the police conduct custodial interrogation, the police must give the defendant his Miranda warnings. Miranda warnings inform the defendant of his right to remain silent and the right to an attorney. The 5th Amendment right is non-offense specific, meaning that even if the defendant exercises his rights, the police can question him about an unrelated offense. If the defendant asserts his right to remain silent, the police must abide by defendant's right, although they can later question him after a reasonable amount of time has passed. If the defendant unambiguously asserts his right to an attorney, the police cannot question him without either providing an attorney or obtaining a waiver of the right to counsel.

The 5th Amendment right to remain silent and to counsel only applies in custodial interrogation. A person is in custody if he or she is not objectively free to terminate an encounter with the government. A person is subject to interrogation if the police engage in any conduct that is likely to elicit a response, whether incriminating or exculpatory.

Dan will argue that he was subject to custodial interrogation because (1) he was in prison and not free to leave, and (2) the informant was planted in order to elicit statements from Dan. Clearly, Dan was in custody, as he was in jail. Dan may have a harder time proving he was subject to interrogation. Typically,

interrogation only occurs when the person is aware that he is in contact with a government informant. The prosecution will argue that Dan was not aware that Sid was a government informant, and believed that Sid was a gang member who was trying to help him. Thus, the prosecution will argue, the police were not required to give Dan his Miranda rights before commencing the questioning. The prosecution will argue that if Dan trusted Sid and willingly spoke to him, he cannot now claim that the statement constituted interrogation or was coercively obtained.

As Dan did not know that Sid was a government informant, he will likely fail in arguing that he should have received his Miranda rights before Sid questioned him. Thus, he will not be able to exclude his statement on 5th Amendment rounds.

Impeachment Purposes

Even if Dan's statement violated his 5th Amendment right, the statement may still be used to impeach Dan's testimony if he testifies at trial.

Fruits of Miranda

If the police obtained any evidence as a result of Dan's statement to the informant, these "fruits of Miranda" may be admissible. The Supreme Court has not conclusively determined whether such fruits are admissible, but they likely are.

6th Amendment Right

The 6th Amendment provides the right to counsel at all criminal proceedings. It applies once the defendant has been formally charged with a crime, and prevents the police from obtaining an incriminating statement after formal charges have been filed without first obtaining the defendant's waiver of counsel. The right is offense-specific, meaning it only attaches for the crime(s) for which the defendant has been formally charged. It does not prevent the police from questioning the defendant about unrelated offenses.

Here, Dan had been [under] arraignment on a charge for murder, so formal charges had been filed by the government. Thus, Dan was entitled to counsel at any post-charge police interrogation. Dan will argue that by subjecting him to interrogation by a police informant after formal charges had been filed without obtaining a waiver of his right to counsel, the police violated his 6th Amendment right.

The police will argue that Dan was not aware that Sid was a government informant, but this awareness is not necessary for a 6th Amendment violation. Once Dan's rights to counsel attached at his arraignment, Dan had a right to counsel during police interrogation to prevent the police from deliberately eliciting

an incriminating statement. The police used a government informant who lied to Dan about his identity, made a promise of a better attorney, and asked him about his involvement with the crime, in order to obtain a confession from Dan. The police did all of this without waiving Dan's right to have his attorney present during the interrogation. Dan's right to counsel under the 6th Amendment has been violated, and Dan is entitled to exclusion of the statement at his trial.

Like a violation of Dan's 5th Amendment right, the prosecution may use a coercively obtained confession to impeach Dan's testimony at trial.

Conclusion

Dan's statement to Sid likely violated his 6th Amendment right to counsel at any post-charge interrogation, because he had already been arraigned. The police should have obtained a waiver of Dan's right to counsel before sending Sid in, and it should not matter that Dan did not know that Sid was a police informant. However, because Dan did not know that Sid was working for the government, the questioning and subsequent statement did not likely violate Dan's 5th Amendment rights to Miranda warnings.

Thus, Dan will likely be successful in his motion to exclude his statement under the exclusionary rule as a violation of his 6th Amendment right.

Dan's Conviction for Murder or any Lesser-Included Offense

Murder

Murder is the unlawful killing of another human being with malice aforethought. Malice aforethought exists if there is no excuse justifying the killing and no adequate provocation can be found, and if the killing is committed with one of the following states of mind: intent to kill, intent to inflict great bodily injury, reckless indifference to an unjustifiably high risk to human life, or intent to commit a felony.

The prosecution will argue that Dan is guilty of murder because no excuse existed (duress is not an excuse to homicide), no adequate provocation exists, and he had any one of the three following states of mind: intent to kill, intent to inflict great bodily injury, or a reckless indifference to an unjustifiably high risk to human life.

The prosecution will argue that no excuse existed for Dan to kill Vic. The prosecution will argue that even though Dan may have felt he was under duress imposed by Vic, this does not justify the killing of Vic, for two reasons: (1) the duress was to join the Reds, not to kill Vic, and (2) duress cannot be used as an excuse for homicide. The prosecution will also argue that no excuse existed from Vic's actions toward Dan during the incident where he was killed that would

give Dan the reasonable belief that he was about to be killed or seriously injured. The prosecution will note that there is no evidence that Vic was even aware of Dan's presence, that Vic did not confront Dan with unlawful force, and that it was unreasonable that Dan thought he was about to be stabbed.

The prosecution will be required to show that adequate provocation did not exist for Dan's killing of Vic, and that Dan had one of the required states of mind here. Adequate provocation is discussed in detail below, but the prosecution will argue that even if Dan was subjected to a serious battery, he had a week to cool off from the provocation of that battery, and thus was not still under the direct stress imposed by that battery when he killed Vic.

The prosecution will also argue that Dan had any of the states of mind listed above. By pulling out his gun and pulling the trigger, Dan intended to kill Vic. This intent was evidenced by an awareness that the killing would occur if he pulled the trigger, and a conscious desire for that result to occur. The prosecution can also argue that if he did not intend to kill Vic, he knew or acted recklessly as to whether Vic would suffer great bodily injury as a result of the shooting. Finally, the prosecution can argue that by pulling the trigger, Dan was acting with a reckless disregard to the unjustifiably high risk to Vic's life that would occur from his actions. Dan, the prosecution will argue, clearly did not care whether Vic lived or died as a result of the shooting, and thus Dan had the requisite intent to be convicted of murder.

Because the prosecution can show that no excuse or adequate provocation existed, and that Dan acted with one of the states of mind required for murder, Dan can likely be convicted of murder unless he has a valid defense. In addition, if the prosecution can show that the killing was deliberate and premeditated, Dan may be guilty of first-degree murder. The prosecution will show that the killing was deliberate and premeditated because Dan was carrying a gun and shot Vic almost immediately after seeing him in the street.

Self-Defense

Self-defense is a complete defense to murder. Self-defense is justified when the defendant reasonably believes that the victim is about to kill him or inflict great bodily injury upon him. Deadly force may be used in self-defense if the defendant is not at fault, is confronted with unlawful force, and is subject to the imminent threat of death or great bodily harm.

Dan will argue that the defense of self-defense should completely bar his conviction for murder. Dan will point to the history between the parties as well as Vic's actions at the scene of the crime to establish that he was justified in using deadly force against Vic. Dan will argue that Vic had subjected him to a serious battery when he pushed him into the alley, showed him a knife, and threatened him. Dan will argue that this battery made Dan aware that Vic was a serious

criminal (and that Dan already had knowledge of Vic's criminality because he was involved in a gang), and that Vic would stop at nothing to injure Dan if Dan refused to join his gang.

With this history, Dan will argue that it was reasonable for him to believe that Vic was about to shoot him, because Vic was walking with his hand under his jacket, Dan will argue that the history between the parties and Vic's suspicious behavior made it reasonably likely that he was about to be stabbed, and thus he was justified in using deadly force in self-defense.

The prosecution will argue that even if the history between the parties made Dan afraid of Vic, that Vic had not confronted Dan with any unlawful force before Dan shot him. There is no evidence that Vic even saw Dan walking down the street. In addition, the prosecution will argue that even if Vic had plans to harm Dan, he wanted Dan to join his gang and would have only injured him if Dan refused to join the gang once again. While Dan was obviously not required to join the gang, this evidence will support the prosecution's defense that Dan's belief that he was about to be subject to immediate harm was unreasonable. At the very least, Vic probably wanted to talk to Dan one more time before inflicting harm upon him, so Dan was not subject to an immediate threat of death or bodily harm. The prosecution will argue that Dan should have waited until Vic produced the knife before shooting, or, at the very least, approached Dan in a threatening manner. Because Vic did not do these things, Dan cannot use the defense of self-defense.

Duress

Dan may argue that he was under duress, and this resulted in his killing of Vic. Duress is a good defense when the defendant is coercively forced under threats from another to commit a criminal act. Duress may have been a good defense if Dan was forced to join the gang and commit criminal acts. However, duress cannot be used to defend against homicide. Thus, this defense will fail.

Voluntary Manslaughter

Dan may try to get his charge lessened to voluntary manslaughter. Voluntary manslaughter is a killing that would be murder but for the existence of adequate provocation. Adequate provocation will be found where: the provocation is such that it would provoke a reasonable person, the defendant was in fact provoked, the facts suggest that the defendant did not have adequate time to cool off, and the defendant did not in fact cool off.

Dan will argue that Vic's repeated threats to him constituted adequate provocation. He will argue that being shoved into an alley, being shown a knife, and given basically a death threat is enough to provoke anger in the mind of a reasonable, ordinary person. Courts typically use an aggravated battery, as Vic

has committed here, as existence of adequate provocation. Dan will also argue that he was provoked, evidenced by carrying a gun for protection and living in fear of Vic.

However, Dan will have a harder time showing that a reasonable time to cool off could not be found, and that he did not in fact cool off. A week existed between Vic's aggravated battery of Dan and Dan's killing of Vic. While Dan may have still been frightened of Vic, a week is likely too long to find that Dan was still acting under the provocation supplied by Vic during the aggravated battery. Rather, Dan likely had cooled off, but was still upset by the incident and repeated threats.

It is likely that the prosecution can successfully argue that adequate provocation did not exist here because Dan was not acting under the direct stress imposed by the serious battery committed by Vic when he shot and killed Vic. However, if Dan can show such adequate provocation, his charge should be reduced to voluntary manslaughter.

Manslaughter

Dan may try to get his charge lessened to a manslaughter charge under the "imperfect self-defense" doctrine. Dan will argue that even though he may be ineligible to use the self-defense as a valid defense because Vic had not confronted him with unlawful force, he reasonably believed that it was necessary to shoot Vic to avoid being killed or subject to serious bodily harm. It is more likely that a court will accept Dan's argument for a lesser charge of manslaughter under the imperfect self-defense doctrine, rather than accepting Dan's total defense of self-defense, because Vic did not do anything during the incident where he was shot to suggest that he was about to kill Dan or subject Dan to great bodily harm.

Thus, Dan may likely be convicted of murder, voluntary manslaughter, or manslaughter.

THURSDAY MORNING
FEBRUARY 28, 2008



California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material 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 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 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 which are not pertinent to the solution of the problem. Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.