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The first defendant is Kowalski (K). K's homicide-related offenses began with the conspiracy to kill Parker (P), Eunice (E), and Stella (S). The actus reus of conspiracy is forming an agreement with at least one other person (since the statute requires 2 or more persons, it is likely bilateral, and can only be committed if at least 2 people actually agree). The agreement occurred when K and his partner Dubois (D) discussed the situation privately and decided to leave behind three of the residents of their nursing home, with the practically certain knowledge that those residents (E,P, and S) would die as a result. Intent to cause a result is defined as having the conscious object to bring about that result or have practically certain knowledge that the result will occur. K and D had the requisite dual mens rea: intent to form their agreement, and intent that their agreement result in the commission of an unlawful act.

What unlawful act was being conspired? It could have been Murder 1: they were discussing, therefore premeditating, which residents would die in the flood. They deliberately selected P for death, and by drawing lots for two others, knew with substantially certain knowledge that two others would die (intent doesn't require intent to kill a specific person – any person will do). On the other hand, the storm might be seen to create an extreme emotional disturbance sufficient to mitigate the crime to manslaughter – after all, they were discussing their plans with only 15 minutes before a 30-foot wall of water descended upon them, and such a condition could cause anyone to panic and act out of an extreme emotional state. The terminology of the statute sounds like the MPC's EMED, which is broader than the common law's "heat of passion," and permits the disturbance to be created by something other than the victim himself (as this was), and

judges the reasonableness of the state from the viewpoint of a person in the actor's situation as he believes it to be. An actor facing an impending flood of biblical proportions would not be unreasonable to react irrationally and out of panic. However, the description of the events makes it sound as though K and D discussed the matter rationally, and made a calm decision based on leaving P because he was the sickest and the others based on drawing straws. Subjectively, these men did not act like men under the influence of extreme disturbance. EED requires both that the actors be subjectively overcome by an EED, and that the EED be objectively reasonable. If they were not subjectively in EED, then it doesn't matter whether it would've been reasonable for them to be – the crime will not be mitigated. Finally, it may have been conspiracy to commit Murder 2, intentional but not premeditated. This would occur if the court found no EED, but not enough time for the crime to have been truly premeditated – 15 minutes is hardly enough time to give the decision a "second look" in cool blood, which many jurisdictions require for premeditation. On the other hand, if Bontemps goes with the "twinkling of an eye" interpretation of premeditation, it's conspiracy to commit Murder 1. As soon as the agreement to commit the act was formed, the conspiracy existed; the statute specifies no requirement for an overt act in furtherance of the conspiracy.

K's next crime was the death of S, who was left behind and drowned. K's actus reus was an omission, not an act, and usually omissions are not enough to hold someone criminally liable. However, K had a duty to act on S's behalf, imposed contractually by her presence as a resident in the facility. Therefore his omission, which was the actual cause of her death, satisfies the actus reus. The flood was technically an intervening, coincidental

cause; but it was completely foreseeable, as K knew it was coming, so it does not break the causal chain of his liability. Did K have the mens rea for some sort of criminal homicide in S's death? Yes – his act was knowing. It was not his conscious object that S die, but he knew that that result was the practically certain consequence of his act. He may be charged with Murder 1, if his and D's discussions regarding which residents to save can be interpreted as premeditating the deaths of the others, as discussed above. Also as discussed above, the act could be interpreted as Murder 2, intentional (knowing) but not premeditated murder if the time was too short, or even as Voluntary Manslaughter if the knowledge of the storm created an extreme emotional disturbance in K's mind (although that state was not evidenced by calm demeanor). Due to the short time period, I believe Murder 2 is the most likely charge to be successful - although we should keep in mind that Bontemps, like Maine at the time of the Patterson case, requires the state to affirmatively disprove the existence of EED beyond a reasonable doubt, since lack of EED is part of the definition of murder. This sets the bar higher for the state to get to Murder 2 in a situation like the flood, where EED is a likely consequence of the situation If we can't prove Murder 2, it will be voluntary manslaughter.

The smothering deaths of P and E create the next charge against K. Here again, there are factors tending to indicate premeditation – he lied to his partner about what he was doing, then deliberately went to each victim and smothered them with a pillow. Since he had additionally conspired with D to leave them to drown, premeditation can likely be demonstrated. On the other hand, we again come up against the short time period and the extreme circumstances. His premeditation would have had to occur in those brief

moments in which he and D found out about the flood, made their decision, and he chose to go back in and smother P and E. If that time period is simply too short, then Murder 2, intentional but not premeditated, is a likely charge. EED will again be raised in an effort to mitigate this charge to manslaughter, as K will argue he was overcome by the horrible idea of P and E drowning, and acted in that disturbed state. However, the MPC specifically noted that it didn't want EMED used to excuse "abnormal human frailty," bizarre behavior that, although it was caused by a true mental disturbance, goes beyond the bounds of a reasonable person's reaction to such distress. This seems like it would be one of those cases – having decided these people would die, it seems bizarre that K would feel compelled to go back in and do the deed himself. Therefore, Murder 1 or 2 is more likely than manslaughter here. Like the Forrest case, although we may sympathize with his choice, he deliberately accelerated P and E's deaths, and needs to be held accountable for that.

K is also guilty of an attempt to kill S at the same degree of homicide found to exist for his killings of P and E. His actus reus, a substantial step, was met when he searched for his victim, which the MPC explicitly defines as a substantial step. His intent to smother S can be inferred from the fact that he just smothered P and E. However, since he is already guilty of S's death as discussed above, this attempt merges into the final act and is not a separate charge.

An affirmative defense that may be raised to all of these charges against K (and D as well) is the choice of evils defense. The situation they faced was very much like that of

Dudley and Stephens in the lifeboat: sacrifice one man to save the others. K and D will argue that they committed the act to prevent a significant evil: the death of all 9 patients, plus themselves. They will argue that there was no practical alternative, since they used the only vehicle they had access to, and there was no other way to move the residents. They will argue that avoiding the evil of 6 deaths is of greater magnitude than the evil of three deaths which their choice caused. It's not a bad defense, except for two things: first, traditionally at common law, the defense of necessity/choice of evils was not allowed as a defense to homicide. More importantly, the defense always requires clean hands, and K and D don't have them. They created the situation by their commission of bribery, unlawfully keeping 9 residents in a space designed for 6. When they were then faced with an emergency that required them to sacrifice those three extra residents they unlawfully had on the premises, the necessity defense should not be available. However, it should be noted that the MPC is much more generous in allowing the choice of evils defense. It states that if the crime committed is one that requires a mens rea of purpose or knowing, which these murders or voluntary manslaughters did, then the defense remains available. It also allows choice of evils as a defense to homicide. If Bontemps follows the MPC, then, K and D may get away with their acts of conspiracy and murder/manslaughter.

D's crimes begin with conspiracy, discussed above, and then continue with the deaths of P, E, and S. His liability for the death of S is identical to that of S, an omission that caused her death with a mens rea that may be interpreted as Murder 1, Murder 2, or voluntary manslaughter, as discussed above with K.

D's liability for the deaths of P and E is more interesting. Again, the mens rea depends on interpretation: maybe the discussion about who to leave behind makes it Murder 1, maybe the short time period makes it Murder 2, maybe the distress caused by the approaching flood makes it EED voluntary manslaughter. His act was leaving P and E behind to drown; but there was an intervening act that actually caused their deaths: K's decision to smother them. Although it was responsive, occurring in response to the decision to leave the two behind, it was a bizarre and unforeseeable event; D had no idea it was happening. A bizarre, unforeseeable event, especially caused by free, deliberate, informed human intervention, breaks the causal chain. D is no longer responsible for those deaths.

However, he did intend for them to happen, and he was in the car, ready to drive off and leave P and E to die, so he is guilty of attempted murder of P and E. The actus of a substantial step should be satisfied by his presence at the driver's seat of the van – he was only a press of the gas pedal away from leaving them behind, which should be adequate to "strongly corroborate" his mens rea of intending to cause their deaths. The mens rea, again, has been established by his discussions with K about leaving P, E, and S behind to their all-but-certain deaths.

It should be noted that if Bontemps follows the common law Pinkerton doctrine, rather than the MPC which rejects it, D will be liable for the deaths of P and E at whatever degree K is found to be guilty of for carrying them out. Pinkerton states that co-conspirators are liable for the deaths of all co-conspirators that are within the scope of an

on-going conspiracy. Since the conspiracy was to kill P, E, and S, those deaths are all within the scope. So if D were only going to be liable of voluntary manslaughter for leaving behind P and E, but then K's act of smothering was found to be premeditated Murder 1, D would also be guilty of Murder 1.

Finally, are K and D responsible for each others' acts as accomplices if they are not principals? D did not aid or abet K in the smothering deaths, since he did not know about them, and the mens rea required is intent that the act be carried out. Mere presence is not enough. However, if for some reason K or D is not found to be a principal in the death of S, each could be the accomplice of the other, as they had the actus reus of aiding – agreeing to commit the crime counts as psychological aid – and the mens rea of intending to aid and intending that the crime be committed. However, it makes more sense to go after both K and D as principals, since both were present at the crime.

The next defendant is Estragon (E2). His first crime is conspiracy to commit homicide with Vladimir (V). Conspiracy, under the Bontemps statute, must be bilateral, with 2 or more people actually agreeing. While one person in the discussions, Godot (G), was in fact feigning his agreement, both E2 and V were seriously agreeing, so the condition of "two or more persons" is satisfied. The actus reus of forming an agreement was met: they "collectively decided" to kill Nagin. The mens rea of intent to form an agreement is inferred from the fact that they voluntarily formed one. The mens rea of intent that the objective of the agreement be committed required us to examine what type of homicide

they were plotting – they had the mens rea of desiring to kill Nagin but was it Murder 1, Murder 2, or Voluntary Manslaughter?

The best argument for Murder 1 is the fact that they were plotting in the first place. Their act of discussing the crime should constitute premeditation, since it was clearly occurring well before any attempt on Nagin's life could actually be made – no evidence indicates he was anywhere in the vicinity at the time of the scheming. This gives them plenty of time to take a second look and reconsider, so there is a strong case for conspiracy to commit Murder 1.

On the other hand, both E2 and V were outraged at the loss of their homes. They may be able to argue that they were discussing the killing in a state of EED, caused by extreme grief and devastation about the effects of the storm. Again, since the state must affirmatively disprove the existence of that EED, E2 and V will very likely be able to mitigate their crime to conspiracy to commit voluntary manslaughter, rather than conspiracy to commit murder 1. Murder 2 would be difficult to show here; after all, if there was no EED, how was the advance discussion not premeditation?

Was E2 an accomplice, guilty of aiding and abetting an attempted killing of Nagin? No, because the person he agreed to assist, G, was feigning his participation and was never going to commit the attempt. This situation parallels the case of Genoa, which established the rule that when a principal cannot commit the underlying crime, there is no accomplice liability. All E2 said, beyond the conspiratorial talk, was that he'd provide moral support

but he's also an accomplice to V?

and help with chanting; he agreed to help, which is the actus reus of the crime, with the requisite mens rea of intending to agree and intending that the underlying crime be committed. But since G's trickery meant it never could be, there's no liability for E2 on this count.

Like E2, V is implicated in the conspiracy to kill Nagin, and despite his best efforts, cannot be an accomplice because of G's trickery. However, he is guilty of an attempt to kill Nagin. He had the mens rea, the intent to commit an act that constituted a substantial step toward the crime (in this case, acquiring the pins for the voodoo doll), with the intent that the crime be committed. He committed the actus reus of acquiring the pins from FEMA workers (what a useful item for FEMA to bring! Heckuva job!), which is a substantial step because the MPC considers "possession of materials to be employed in the commission of the crime, specially designed for such unlawful use or which can serve no lawful use under the circumstances" as a substantial step, and possession of the pins, under these circumstances, meets that requirement.

V's attempt is bad news for E2, because it seems that he did not abandon the conspiracy before the attempt happened. As it was an ongoing conspiracy, and the attempt was in the scope of it (or at least very reasonably foreseeable), E2 is liable for the attempt under Pinkerton. It is true that E2 said "count me out," but the defense of abandonment requires a "complete and voluntary" renunciation of the conspiracy (and the MPC adds the additional hurdle of requiring the abandoner to attempt to thwart it, which E2 did not). This renunciation did not appear to be voluntary, because it was done due to worries

about possible imprisonment – abandonment cannot be motivated by circumstances causing an increased apprehension of detection and punishment (MPC 5.01(4)). On the other hand, no new circumstances had appeared that made apprehension more likely than before, so perhaps it was a true change of heart. If that can be demonstrated, and the MPC requirement of attempting to thwart does not apply in Bontemps, then E2 will not be liable in the attempt.

V and E2 have a good defense to attempted murder, however: the inherent factual impossibility defense. All scientific evidence indicates voodoo cannot actually kill people, so this attempt had no possibility of succeeding. It meets the common law requirement of being a method so ridiculous that a reasonable person would find it completely inappropriate to achieve the objective sought. Under the MPC however, this defense is not automatic; it just grants the judge the discretion to reduce or dismiss the charges, which given the extreme situation after the flood, the judge is likely to do in this case.

Finally, V and E2 also have the possible defense of entrapment by the undercover G. Entrapment is tested by the subjective test – whether a government agent induced a person not predisposed to commit crimes to commit one - or by the objective test – when the conduct of the agent was objectively likely to induce a law-abiding person to commit a crime. Here, G suggested the idea of the voodoo doll, which became the basis for the attempt charge. He seemed to be the one leading the effort to off Nagin, with the other two signing on as assistants rather than the primary actors in the crime. We know nothing

of V and E2's potential criminal past, but looked at objectively, G's conduct may have crossed the line here. On the other hand, V and E2 were discussing homicide before G brought up the voodoo doll, so they may have been predisposed to violence. Their defense is tenuous, but under the objective test, G's conduct will probably let them off.

Next we have Connick (C), implicated in 2 deaths. First, there is the shooting of Tauzin (T). He committed the actus reus, shooting T to death with a shotgun, with the mens rea of intending to kill him. However, what was his level of intent? It was probably not premeditated Murder 1. He did not know whether T was home, and did not go there intending to kill him; when the fight ensued, he grabbed the shotgun and fired with barely enough time even for a twinkling of the eye (although if Bontemps goes with the twinkling standard, it was probably met). On the other hand, premeditation could be argued from the fact that he thought T might have been there, and he deliberately went back for his gun. However, this seems like a stretch. Murder 2 is more probable, an intentional but not premeditated shooting, due to the lack of time to premeditate. Another possibility is voluntary manslaughter, due to EED. Like K and D, C was caught in the midst of an impending disaster, knowing that he was likely to die if he didn't get his car going and make it to higher ground. He knocked furiously at T's door; he was "desperate" to escape. These sound like a subjective EED, and as discussed above, it seems perfectly reasonable that anyone would be distraught when his or her life is in jeopardy. The fact that C went back for his gun could be seen as evidence of EED – he wasn't making completely rational decisions – or as evidence of lack of EED – he coolly and calmly went back for his gun rather than breaking a window right there. Considering

that the sate must disprove EED, C's argument for mitigating the killing to voluntary manslaughter is likely to succeed

C will claim that he has a complete defense for the killing: self-defense. The situation does meet the required elements of self-defense: T coming at C posed an imminent threat; T's pistol was deadly force, so deadly force was a proportionate response; and since T had just fired at him, C's fear that T would kill him was reasonable. In fact, the self-defense statute states that a person is presumed to have a reasonable fear if the person knew an unlawful and forcible act was occurring or had occurred. T's shooting at C (attempted murder if T had survived) was certainly an unlawful and forcible act, justifying C to use deadly force in response. C was not the initial aggressor, and so had "clean hands" to that extent.

However, the self-defense statute also has a retreat requirement if the person wanting to use self-defense is engaged in unlawful activity or is attacked in a place where he has no right to be. This could pose a problem for C, since he had entered T's house without permission with the purpose of stealing a car battery – in fact, C was guilty of burglary under the Bontemps statute (actus: breaking and entering dwelling house; mens: intent to commit a felony – like stealing a battery). Since C was doing something unlawful, and since he had no right to be there, C was required to retreat rather than use deadly force if he could do so safely – which, according to the account of fact, he could. Therefore, his self-defense claim should fail.

On the other hand, maybe his burglary wasn't unlawful at all – maybe it was justified by the choice of evils defense. If it was justified, it was lawful, and if it was lawful, then he's entitled to use deadly force in self-defense without retreating. Choice of evils requires that C commit the act to prevent a significant evil – here, C broke in to steal the battery to avoid death, and death is a significant evil. The statute requires no practical alternative – with the flood bearing down, there as no time to seek a battery elsewhere, and this was the only practical alternative. Finally, the statute requires that the evil sought to be avoided be greater than the crime committed. Death is the trump card – it's greater in magnitude than any other crime, even armed burglary. That was the foreseeable harm caused; C did not know that T would be in the house, attack him, and end up dead. This could be argued – for example, knowing that T was cranky and heard of hearing, and having seen the ominous sign on the door, it may have been foreseeable that C would have to shoot T to get the battery. But considering that C put his gun down as soon as he entered, I believe that that argument is weak. In regards to the foreseeable harm, C made the correct decision in the choice of evils, and his burglary was justified. Therefore his self-defense claim may stand and will likely succeed.

If the self-defense claim doesn't succeed, may C argue choice of evils as a defense to the killing? Probably not. First, there is the common law bar to using it for homicide (although the statute seems modeled on the MPC, so maybe Bontemps would allow it as a defense for homicide as the MPC does). If allowed as a defense to homicide, C would have to argue that killing T is a lesser evil than dying himself. The evils are equal, so the defense fails.

Next is C's responsibility in the death of Sister D-D (DD). C committed the actus reus that caused her death when he fired at T and one of the pellets hit DD. He did not intend to kill her, but under the doctrine of transferred intent, the intent "follows the bullet," and his intent to kill T carries to DD. However, so does his justification. If his self-defense claim succeeds, then he was justified in shooting T, and that justification carries over to innocent bystanders injured in the process. The only exception is if C exercised his right to self-defense recklessly or negligently, and recklessly or negligent injured the bystanders. From the description of the situation, there is little evidence of recklessness or negligence. He fired just one shot, directly at T. DD was hit because the pellet went astray, which does not seem to be C's fault – unless the gun was negligently maintained in some way, causing bullets to go astray. However, most likely C will be exonerated in the death of DD because he was justified in killing T.

Now we come to Nagin (N), who may be liable in the deaths of those killed in the flood which occurred due to his negligent maintenance of his sprinkler system. His actus reus, failing to maintain the sprinkler, was done with the mens rea of negligence, ignoring a substantial and unjustifiable risk of which he should have been aware, but wasn't. But an important question here is: what risk was he ignoring? He may have been ignoring the risk that he would lose some water, maybe flood his yard, but was there really a substantial and unjustifiable risk that his sprinkler system would cause a catastrophic flood? Obviously the risk existed, since it occurred. But the likelihood seems so remote, it is a stretch to call it substantial and unjustifiable.

Even if N's actions are seen to have risked the flood, the most he is guilty of is involuntary manslaughter, which is the only level of homicide that requires only negligence. Even involuntary manslaughter generally requires gross negligence, not simple (the Williams case being a rare exception, later changed by the legislature). Here the statute calls for a reckless or negligent act "likely to cause death or great bodily harm." It is unreasonable to think that the negligent maintenance of a sprinkler is likely to cause such results; this was a bizarre occurrence, not a likely one, and N should not be held responsible for the deaths.

Even if the court finds faulty sprinkler maintenance to be dangerous negligence, then N is liable only for the involuntary manslaughter of S and T. There are causation problems with the other victims of the flood, even though all died as a result of the flood. N was the but-for actual cause. However, E, P, T and DD were killed by intervening proximate causes that broke the causal chain. P and E were smothered to death by K. Was it responsive? Yes. But, was it bizarre and unforeseeable? Definitely. Therefore it breaks the causal chain. T's death was caused by C's shooting him while trying to steal a battery. This intervening cause was responsive, and it as also much more foreseeable – it is highly foreseeable that people will get shot and killed during looting that occurs as the result of a natural disaster. It is a frequent occurrence. Therefore, C's shooting of T probably does not break the causal chain. Finally, DD chose to remain in the path of the flood, when she could have left. This was a free, deliberate, human choice, which breaks the causal chain of N's responsibility for her death.

Finally, we come to Brownie (B), who took bribes from K and D to allow 3 extra residents in a home built for 6. Can we hold him liable for those 3 who died as a result, P, E, and S? Unfortunately, bribery is not a felony, so we cannot get him for felony murder. However, we can probably get him for misdemeanor manslaughter. These deaths occurred during the commission of a misdemeanor by B, so his actus reus is commission of bribery and his mens rea is intent to commit bribery. The deaths occurred as a direct result of his misdemeanor; had he held the nursing home to code, there would only have been six people in the home, and all could have escaped the flood to safety. We should be able to get him for three counts of involuntary manslaughter on this theory.

It's a bigger stretch, but we could also try to get B for depraved-heart reckless murder for S, P, and E instead of misdemeanor-manslaughter. This would be the "abandoned and malignant heart" theory. Since the statute uses the terms of common law, it would probably require the common law standard of extreme recklessness, a wanton and willful disregard of the likelihood that his actions would result in death or great bodily harm, and a base, antisocial motive for the killings. (The MPC calls for recklessness with extreme indifference to the value of human life, which is fairly similar to the common law standard.) Did B exhibit this extreme recklessness? I would argue that he did, considering that elderly patients die all the time in sub-par and overcrowded nursing homes. B was the zoning inspector – presumably he knew the risks and reasons behind the laws, and consciously disregarded them. ON the other hand, one could argue that he was risking perhaps illness and sub-par care that didn't rise to the level of great bodily harm. But the

fact that he was being reckless with the base, antisocial motive of raw, selfish greed, I think we could make the case for three counts of depraved heart Murder 2 against B.