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Examination No. _____

504 CRIMINAL LAW
Semester I, 2005-2006

UNM School of Law
Final Examination
Three Credits

Professors James Ellis, Norman Bay & Elizabeth Rapaport
Wednesday, December 7, 2005
1:30 to 5:00 p.m.

INSTRUCTIONS

This is a 3-½ hour in-class examination. The question is designed to be answered in three hours. There is an additional half hour for reading the question carefully, and for organizing and preparing your answer.

In preparing your answer, you may consult your casebook, class handouts, class notes, and any outlines you have prepared yourself or in collaboration with your classmates. You may not consult commercial outlines or treatises.

This exam contains one question and includes a statutory appendix. Be sure to use the correct statutes, citing to the relevant section where appropriate. Assume that the facts set forth in the question are uncontested.

Check to see that there are five pages in your copy of the exam not including this page.

Please write in ink, legibly, and only on **one side** of each page of the bluebook, leaving a margin at the left side of each page. If you are typing your answer, please identify each page (e.g. "1 of 5," "2 of 5," etc.). If you are handwriting your answer, please identify your bluebooks similarly. Make sure your exam number is on every bluebook or every typed page.

GOOD LUCK!

QUESTION

The city of Laissez, in the State of Bontemps, has encountered more than its share of difficulties recently. And some of them have wound up in criminal courts.

It all began when Nagin, one of its citizens, negligently failed to repair a leak in the sprinkler system in his garden. As a result, a relatively modest amount of water seeped into the soil in his backyard, and thence to the foundation of the levee protecting his neighborhood from the Rouler River, which adjoined his property. The resulting weakening of the levee rendered the Norwegian Quarter, a major portion of Bontemps noted for its aromatic lutefisk restaurants, vulnerable to flood conditions, should a major storm hit the city.

As luck would have it, a major storm hit the city.

Hurricane Kataclysma, a Category 5 storm, scored a direct hit on Bontemps. Experts now agree that none of the levees in the city could have survived a Category 5 storm, but that they would not have failed until 48 hours after the storm arrived. The levee undermined by Nagin's watering error failed in just one hour, submerging the entire Norwegian Quarter under nearly 30 feet of water.

The Norwegian Farmers Nursing Home was located at the lowest point in the Quarter. It was operated by Kowalski and Dubois, and housed nine elderly residents, many of whom were medically fragile. In the somewhat relaxed moral climate of the Quarter, Kowalski and Dubois were engaged in Medicare fraud, in that they were billing the Federal government for the costs of 18 residents, although they only cared for half that number. (In addition, the zoning for the home permitted only six residents, and they bribed the local inspector, Brownie, to report falsely that they were in compliance with all local laws.)

When the levee failed, Kowalski and Dubois quickly realized that they were in an impossible situation. To escape the floodwaters, they had only 15 minutes to evacuate the Home and drive to higher ground. Their only vehicle, a Yugo minivan, could carry only eight people, including the driver, and they knew that there would not be time for more than one trip. They discussed the matter with one another, but did not include any of the residents in their conversation. They quickly decided that both of them should have places in the van, stating that they would both be needed to care for their elderly passengers. This left only six more places. They first decided that the sickest resident, Parker, should not be among those rescued, since he was unlikely to survive even the drive to higher ground. To

pick the six passengers from the remaining eight residents, they drew lots. They then quietly placed the “winning” six they had designated to survive in the van, without telling them anything about their conversation, or indeed about the flood.

Kowalski and Dubois had agreed to leave the remaining three residents (Parker, Eunice, and Stella) to their fates in the Home as the waters rose. But as they were about to drive away, Kowalski told Dubois that he had to go back in the Home to turn out the lights. But when he entered the Home he actually went into the rooms of Parker and Eunice to smother them quietly with a pillow, having concluded that they were already doomed and that it would be merciful to spare them the horrors of drowning. However, he could not find the other resident, Stella, despite attempting to locate her by calling her name, so he just left her behind. So although Kowalski smothered Parker and Eunice, Stella survived, only to drown an hour later when the floodwaters reached the Home.

Although the minivan struggled mightily to ascend the modest hill leading out of the Quarter, Kowalski, Dubois and their passengers managed to escape, only moments ahead of the rising flood.

Meanwhile, three other residents who had just escaped from the flood, Vladimir, Godot, and Estragon, were outraged at the loss of their homes. Sitting around at the makeshift shelter at the Convention Center, they heard the rumor that the flooding of the Quarter was hastened by intentional sabotage committed by Nagin. (They were factually mistaken in this belief, since Nagin’s involvement was, in reality, inadvertent.) They vowed revenge, and collectively decided to kill Nagin. Godot told the others he would acquire a voodoo doll in order to place a spell on Nagin, who they knew shared their superstitious beliefs. (But Godot never intended to do so, since he was an undercover police informant, working on a sting operation to investigate rampant juju fraud in the Quarter.) Vlad said he would provide moral support and help stick in the pins, which he then acquired from FEMA workers (who had just discovered the existence of the Convention Center). Estragon said he would also provide moral support and help with any attendant chanting, but while Godot was purportedly acquiring the doll, Estragon became impatient and worried about possible imprisonment and told Vlad to “count me out.” By contrast, Vlad was eagerly awaiting the arrival of the doll when Godot and his police colleagues came to arrest both him and Estragon.

Elsewhere in the Quarter, another citizen, Connick, was desperately trying to escape the oncoming flood, but discovered that his car battery was dead. Lacking any other means of transportation, Connick knew he had to find a replacement

battery. Then he remembered that his cranky neighbor, Tauzin, kept a substantial cache of auto parts in his house. Connick ran to Tauzin's house, knocking furiously on the door, hoping to be able to borrow a battery. No one answered the door, and Tauzin noticed a sticker below the doorbell; it showed a smoking .44 Magnum handgun above the words, "**We Don't Dial 911.**" Unnerved by the sticker, and uncertain whether Tauzin was actually in the house (since Tauzin was notoriously hard of hearing), Connick quickly ran back to his own house to get his shotgun before entering Tauzin's house to acquire a battery. (Connick suspected that Tauzin might be unwilling to lend him the battery if he was home, but knew that it was his only chance to escape the flood, and reasoned that the battery would be destroyed by the flood within a few minutes anyway.)

Connick pried open a window and warily entered the house. Having laid his shotgun on a nearby table, and as he was removing a DieHard™ battery (there were several in a stack), he suddenly heard Tauzin, who had silently walked up behind him, say "You've made my day!" Without giving Connick a chance to respond, Tauzin fired a pistol at him, narrowly missing his head. Believing that the next shot was unlikely to miss, Connick instantly recognized that he would either have to flee the house immediately (which he could do safely) or return fire. Believing that flight without acquiring the battery would doom him to drowning in the flood, Connick grabbed the shotgun and fired back at Tauzin. The blast killed Tauzin, but one of the pellets went astray, out the window, and hit and killed a passerby, Sister Dominique-Dominique, a saintly woman who had voluntarily chosen to remain in the path of the flood in order to comfort the victims.

Connick installed the battery in his car and escaped the flood, mere moments ahead of the rising waters. But when the police found the bodies of Tauzin and the nun several weeks later, he was arrested and charged with homicide-related crimes, as were Kowalski, Dubois, Brownie, Estragon, Vlad, and Nagin.

You are an assistant to the District Attorney, who has asked you to prepare a memo analyzing the prospects for successful homicide-related prosecution of each defendant. Your primary focus should be on the statutes contained in the Appendix, but you should also know that the courts of Laissez sometimes find the Model Penal Code helpful.

STATUTORY APPENDIX

LAISSEZ CRIMINAL CODE (portions)

Section 3. **MURDER.** Murder is the unlawful killing of a human being with malice aforethought. Such malice may be express or implied. It is express when the defendant deliberately chose unlawfully to end the life of a fellow human being. It is implied, when no extreme emotional disturbance appears, or when the circumstances of the killing show an abandoned and malignant heart. First degree murder consists of premeditated murder. Second degree murder consists of all other murders. First degree murder is punishable by life imprisonment without possibility of parole. Second degree murder is punishable by imprisonment for a period not to exceed thirty years.

Section 4. **MANSLAUGHTER.** Manslaughter is the unlawful killing of a human being without malice aforethought. Voluntary manslaughter is manslaughter under conditions of extreme emotional disturbance. Involuntary manslaughter is a killing without malice aforethought and without lawful justification, when the defendant causes the death by a reckless or negligent act likely to cause death or great bodily harm. Manslaughter is punishable by imprisonment for a period not to exceed twenty years.

Section 6-12/2. **CHOICE OF EVILS.** A defendant shall have a complete defense to a criminal charge if he or she committed the act to prevent a significant evil, there was no practical alternative to defendant's action, and the evil sought to be avoided was greater in magnitude than the crime committed.

Section 615. **SELF-DEFENSE.** A person is justified in using force, except deadly force, against another to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself against the other's imminent use of unlawful force. A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm when using defensive force, including deadly force, if the person who uses defensive force knew or had reason to believe that an unlawful and forcible act was occurring or had occurred. A person who is not engaged in an unlawful activity, and who is attacked in any place where he or she has a right to be, has no duty to retreat and has the right to stand his or her ground and is authorized to meet force with force, including deadly force.

Section 664. AIDING AND ABETTING. A person is an accomplice in the commission of an offense if, with the purpose of aiding or facilitating the commission of the offense, he or she aids, or agrees or attempts to aid the principal actor in planning or committing the offense. An accomplice to a crime is guilty as if he or she were the principal actor in the crime.

Section 665. ATTEMPT. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the crime, he or she does an act or culpable omission constituting a substantial step in the course of conduct planned to culminate in the commission of the crime. It shall be an affirmative defense that a defendant abandoned the effort to commit the crime or otherwise prevented its commission under circumstances manifesting a complete and voluntary renunciation of his or her criminal purpose.

Section 666. CONSPIRACY. Conspiracy is an agreement by two or more persons to commit an unlawful act. Conspiracy to commit a felony is a felony punishable at half the level of the punishment prescribed for the target offense.

Section 711. BURGLARY. Burglary consists of breaking into the dwelling place of another with intent to commit a felony therein. Burglary is a felony, punishable by imprisonment for a maximum of ten years.

Section 967. BRIBERY. Bribery consists of offering or giving a public official something of value, or a public official receiving such item of value, in order to corruptly affect the performance of the official's duties. Bribery is a misdemeanor, punishable by imprisonment of up to three months, or a fine of \$500, or both.

END OF EXAMINATION