July 1979

QUESTION NO. **1 1**

Vicki, who rode her bicycle to work daily, carried her purse in a basket attached to a carrier over the rear wheel. Dean, knowing of her routine, waited behind a car one morning until she rode by. Dean ran out intending only to snatch her purse from the basket. As he lifted the purse out his foot hit the spokes of the wheel, causing Vicki to lose control of the bicycle and fall. Vicki died within minutes of injuries suffered when her head hit the curb. Ida, the only eyewitness, gave a general description of the purse snatcher as a "white male, dark hair, about 6 feet tall, weighing 180 pounds."

Later that day in the same general area. police officers Marc and Stan attempted to arrest Dean, with probable cause, for an unrelated crime. Dean shouted profanities, stated that he had just been released from jail, didn't intend to return, and that if they wanted to arrest him lie was "going the hard way." Dean thereupon struck Marc in the face. As the two officers struggled with Dean, Dean's brother John approached and yelled "you are not going to arrest him." John grabbed officer Stan and succeeded in taking Stan's nightstick with which he repeatedly struck Stan, causing the latter to fall, rendering him momentarily unconscious. When Stan regained consciousness lie saw Dean and John, each with a nightstick, beating officer Marc. Officer Stan drew his gun, ordered the two men to stop, and directed them to drop their nightsticks. Neither obeyed. On Officer Stan's second command to stop both Dean and John responded with profane and abusive language. Stan thereupon fired. The bullet struck John in the chest, killing him instantly.

Because Dean matched the general description of the purse snatcher. Ida was brought to the jail where she viewed Dean through a one-way mirror as Dean sat in an interrogation room surrounded by several uniformed officers. Ida stated that Dean "looked like the man."

Dean was thereafter charged with robbery and murder of Vicki and with murder of his brother John.

I. Is Dean guilty of robbery" Discuss.

2. Is Dean criminally responsible for Vicki's death" Discuss.

3. Is Dean criminally responsible for John's death" Discuss

4. At his trial Dean moved to exclude Ida's identification testimony on federal constitutional grounds. How should the Court rule'.' Discuss.

Answer A to Question

11 1. Dean; Robbery

Robbery is defined as larceny from the person by use of force or threats of immediate physical injury. Larceny is further defined as the trespassory taking and carrying away of the personal property of another.

The elements of larceny are clearly made out: Dean lifted the purse from Vicki's basket. This is a trespassory taking from Vicki's constructive possession. Even a slight asportation suffices; here, mere lifting fulfills the requirement. A purse is personal property of another (Vicki).

The problem presented in respect to finding this act of Dean to be a Robbery involves the element of force. The force required for a robbery is considered to be more force than would be used to commit a larceny. On the facts, Dean did nothing more than lift the purse; he applied no force to Vicki's person nor was there force exerted to stop the bide. The Dean's foot hitting the spokes of the wheel was not done to commit the larceny and in fact occurred as he was already lifting the purse and not merely to effect the removal of
the purse.

I would conclude that because Dean's acts were without sufficient force so as to constitute a Robbery that he would not be guilty of Robbery. In those states which have made Larceny from the Person a crime, he would he most likely found guilty of this crime.

2. Dean: Vicki's death

Homicide is a neutral term which is defined as the killing of one person by another human being. It is criminal if it constitute either murder, voluntary or involuntary manslaughter.

On our facts, Dean is the actual cause of Vicki's death. But for his foot hitting the spokes of her bike, she would not have fallen, hit her head, and died. Is he the proximate cause? It is foreseeable that his interfering with her passage by bicycle might cause her to fall. That she should hit her head and die is not too remote nor unforeseeable a result to warrant cutting off liability of Dean for his act. I conclude Dean is the legal cause of death.

Is Dean criminally liable?

Dean may be held criminally responsible on several theories: Felony-murder theory and/or an involuntary manslaughter theory.

Felony-Murder: Even an unintentional accidental death which results from the commission of an independent felony is murder under the felony-murder rule. Dean is guilty of at least larceny, see (1) supra. For the majority of states which would apply this rule to both dangerous felonies and felonies committed in an inherently dangerous manner, then Vicki's death resulted from Dean's commission of larceny. If those states would call causing a bile to fall "inherently dangerous manner of committing the larceny, then the Felony Murder would apply. His state of mind during the commission of the felony is held to be "malicious", hence, he has the requisite mens rea of murder, that is, malice aforethought. The felony must be independent of the death; larceny is independent of the murder. (Compare assault with a deadly weapon.) There appears to be no justification, excuse, or mitigation and Dean is guilty of murder on a felony murder theory.

In those states which would call larceny a non-inherently dangerous felony

or if, the felony was not committed with in an inherently dangerous way (as here, by causing her bike to fall) then the larceny would be used as a basis for holding Dean guilty of Misdemeanor-Manslaughter. Under this theory, any death resulting from a misdemeanor which is malum in se, or from larceny, is considered manslaughter. It is an unintentional killing without malice aforethought but punishable because resulting from the commission of another criminal act. The criminal act need not be independent of the death. Again, no excuse, justification or mitigation.

Finally, Dean may be held criminally responsible for Vicki's death on a straight Involuntary Manslaughter theory. Involuntary manslaughter is the unintentional killing of a human by another without malice. Where conduct is grossly negligent (criminally negligent) than there may be liability. If accidentally knocking a bike to the ground is held to be grossly reckless conduct, then Dean may be guilty of Involuntary Manslaughter. Otherwise, his conduct is not criminally punishable if he is found to be merely civilly negligent.

3. Dean: John's death

As a general rule and under the modern trend, where death results from the act of one felon during the commission of a felony that criminal liability is imputed to co-felons. But the modern cases indicate that where death is caused by a non-party to the crime (as here, the officer) then the criminal liability for the death will not be imputed to the co-felons. There is one recognized exception, that is, the Gun Battle exception. Where the felony is committed in a wanton manner, then criminal liability may be imputed to the surviving felon (Dean) even if the bullet causing the death of the co-felon (John) was fired by a non-party (the police officer).

The rubs as applied to the facts:

Dean was the aggressor in this case, as he struck Marc. John therefore had no privilege to defend his brother since Dean himself had no privilege to defend himself from the officers. Furthermore, when Dean and John were striking Mark with nightsticks, this would constitute the crime of assault with intent to kill or with intent to inflect serious bodily injury, a felony.

The failure to drop the sticks upon the officers' command warranted Stan's firing his gun; this result because of the policy privilege to prevent dangerous crimes committed in their presence by use of deadly force, if necessary. The force seemed necessary, given two men with clubs and only one policeman on the scene.

The death of John occurred during the perpetration of the felony. Under the majority view, Dean would not be liable under the felony murder rule because he didn't fire the shot; a third party did. But his conduct in beating Marc was wanton and reckless. His "reckless and abandoned heart" might make him guilty of murdering his brother since his acts were the actual and proximate cause of Stan's firing the bullet (not at all unforeseeable).

4. Dean's move to exclude Ida's ID.:

Dean may very well succeed in excluding Ida's identification on a 14th Amendment due process theory.

The line-up was impermissibly suggestive in that Dean was the only suspect surrounded by police officers. The overly suggestive setting would deny Dean his constitutional guarantee of due process, made applicable to the states through the 14th Amendment. Unless the Prosecution could prove with clear and convincing evidence that this identification was no so tainted it must be excluded.

There would be no right to counsel (6th Amendment) if this was a pre-indictment identification and otherwise admissible and hence no constitutional ground to exclude the identification for lack of counsel. No facts indicate whether this was a pre- or post-indictment. If post-indictment, then Dean has a right to counsel at the identification. Denial of counsel at this stage would be grounds for reversal, subject however to the harmless error rule.

Answer B to Question 11

1. Is Dean Guilty of Robbery?

Robbery is defined as the trespassory taking and carrying away of the personal property of another, from his person or presence, by force or threat of force, with the intent to permanently deprive him of the possession of said property. Dean is not guilty of robbery because his conduct fails to fulfill all of the requisite elements of the crime.

As a threshold matter, Dean probably did intend to deprive Vicki of her personal property (i.e., purse) permanently. In addition, his purse-snatching would be trespassory, and would be from the "presence" of Vicki.

However, there was no asportation on these facts (assuming that Dean was unable to take the purse -- or left without it -- once his plan went awry). Although the carrying away need not be successful, there must be some moving of the property away from the possession of the victim.

Of more significance is that Dean used neither force nor threat of force in undertaking the purse-snatching. Although Vicki was killed by the ensuing accident, the purse-snatching was not effected by force.

2. s Dean Criminally Responsible for Vicki's Death?

Dean is probably guilty of involuntary manslaughter as a result of Vicki's death. Each of the possible criminal homicides is discussed separately below:

(a) Murder

Murder is the homicide of another with malice aforethought. All of the elements of homicide are easily met here: Dean's foot movement was the actual, direct, and hence proximate cause of Vicki's death. However, Dean probably did not have malice.

Malice is the presence of one of the following four states of mind (without any exculpating or mitigating circumstances): (i) actual intent to kill, (ii) actual intent to inflict serious bodily injury, (iii) willful and wanton conduct, i.e., an intentional act which has an extremely high probability of resulting in death or serious bodily injury, and (iv) the state of mind one has while committing an independent felony. On the facts, Dean had no actual intent to harm Vicki's person. Nor was his scheme likely to result in serious injury (although it did so). Thus, the only basis for malice is the felonymurder rule. The only common law felony Dean might have been committing was larceny (not robbery because no force or threat of force). Most jurisdictions by statute separate larceny into misdemeanor and felony, based on the value of the item taken; however, some jurisdictions classify all larceny from the person as a felony. Even if Dean was committing a felony, many jurisdictions will only apply the felony-murder rule

if the felony was inherently dangerous or was conducted in a dangerous fashion. If this type of larceny is not classed as inherently dangerous, Dean will not be guilty of murder; if it is, he will. There are no exculpating or mitigating factors on these facts. If Dean is guilty of murder, whether it is first degree murder depends on the statutory "list" of those felonies, a homicide during the perpetration of which is defined as a murder in the first degree.

(b) Manslaughter (involuntary)

The same homicide elements apply to manslaughter as to murder. However, the mens rea for manslaughter is general; i.e. recklessness is sufficient. Dean was probably not reckless here, since any injury to Vicki was fortuitous, rather than the foreseeable result of Dean's actions. A person acts recklessly only where there is a strong probability that his conduct will result in death or serious bodily injury, Recklessness requires more than tort negligence, but less than the wantonness which characterizes "malice." However, even if Dean was not reckless, he will be guilty of manslaughter under the misdemeanor-manslaughter rule. Whatever his purse-snatching is called in the jurisdiction, it is most likely a misdemeanor; and any homicide proximately resulting during the commission of a misdemeanor is chargeable as a manslaughter.

3. Is Dean Criminally Responsible for John's Death?

Dean is probably guilty of murder or involuntary manslaughter as a result of John's death. Each of the possible criminal homicides is discussed separately below:

(a) Murder:

It is not clear on these facts that Dean has committed any homicide with respect to John. That is, Dean may not have performed the actus reus of any criminal homicide. Nothing that Dean did was a direct cause of John's death, since it was Stan's bullet which "intervened" and killed John. Here, an argument could be made that Stan's shot was a responsive, or dependent act, the reasonably foreseeable result of John and Den's fighting with the officers and Dean's resisting arrest. An intervening cause of this type will not relieve Dean of liability, since he would be viewed as setting up the entire chain of events leading to John's death. The argument could also be made that Stan's shooting will be imputed to Dean under the felony-murder rule. The argument is that any death resulting during the commission of a felony (here, resisting arrest? battery of a police officer? attempted murder of police officer?) will be chargeable to each person committing the felony. However, it has been held that the felony murder rule will not create liability on the part of one felon for the death of another where the fatal shot was fired by someone else (e.g., police officer, bystander, or victim of the felony). Nevertheless, the felony murder rule has been extended to such situations where the defendant perpetrated the felony in an outrageously wanton fashion, as may he the case here with Dean beating Marc with the nightstick.

If the actus reus of a homicide is present here, the mens rea requirement may still pose a problem. Since Dean did not intent to harm John, **intent** malice must be shown either as Dean's willful and wanton state of mind, or by the felony murder rule. Whether initiating a hand-to-hand fight is substantially certain to lead to death or serious bodily harm, and is hence wanton, is at least arguable. If not, the felony murder rule may "supply" the malice, but only if there was an underlying felony, that felony was independent of the killing, and the felony was inherently dangerous or dangerous as conducted.

Manslaughter (involuntary)

If the murder conviction fails because malice cannot he shown, there will

still be liability for manslaughter under the misdemeanor-manslaughter rule, because the fight was at least a battery, and there is no requirement that the misdemeanor be independent of the homicide. (However, this theory of liability still requires the imputation of Stan's shooting to Dean).

4. Should Ida's Identification Testimony Be Excluded?

(a) For Violation of Sixth Amendment Right to Counsel?

There is no right to counsel in a pre-indictment "lineup."

(b) For Violation of Due Process?

The Fourteenth Amendment prohibits the states from denying life, liberty or property without due process of law. Any criminal procedure which is unfair to the defendant, i.e., deprives him of a fair trial, is a violation of the 14th amendment.

On the facts here, Ida's identification was made in an unduly suggestive setting. Since there was no particular urgency (e.g., the witness (lying), the identification should have been postponed until a proper lineup could he arranged. Although a witness might be able to identify a hunchback or a movie star without making comparisons, Ida only remembered that Dean was white, had dark hair, 6 feet tall, and about 180 pounds. Her statement that Dean "looked like the man" is unsatisfactory considering her lack of detailed memory, the absence of distinguishing physical characteristics, and the inherent suggestiveness presented by a solitary prisoner surrounded by officers.

Unless Ida can make an in-court identification which the prosecutor can prove was not based on the inadequate jail identification, then Ida's identification will be inadmissible.

(c) For Deprivation of Fifth Amendment?

The Fifth Amendment's right against self-incrimination extends only to testimonial acts, and does not cover line-ups and other identification procedures.

February 2004
Question 1

Bank was robbed at 1 p.m. by a man who brandished a shotgun and spoke with a distinctive accent. The teller gave the robber packets of marked currency, which the robber put into a briefcase. At 3:30 p.m., the police received a telephone call from an anonymous caller who described a man standing at a particular corner in the downtown business district and said the man was carrying a sawed-off shotgun in a briefcase. Within minutes, a police officer who had been informed about the robbery and the telephone call observed Dave holding a briefcase at that location. Dave fit the description given by the anonymous caller.

The officer approached Dave with his service revolver drawn but pointed at the ground. He explained the reason for his approach, handcuffed Dave, and opened the briefcase. The briefcase contained only the marked currency taken in the bank robbery. The officer said to Dave: "I know you're the one who robbed the bank. Where's the shotgun?" Dave then pointed to a nearby trash container in which he had concealed the shotgun, saying: "I knew all along that I'd be

caught."

Dave was charged with robbery. He has chosen not to testify at trial. He has, however, moved to be allowed to read aloud a newspaper article, to be selected by the judge, without being sworn as a witness or subjected to cross-examination, in order to demonstrate that he has no accent. He has also moved to exclude from evidence the money found in the briefcase, his statement to the officer, and the shotgun.

How should the court rule on Dave's motions regarding the following items, and on what theory or theories should it rest:

1. Dave's reading aloud of a newspaper article? Discuss. 2. The

currency? Discuss.

3. Dave's statement to the officer? Discuss. 4. The

shotgun? Discuss.

Answer A to Question 1

1)

This question raises issues involving Dave's rights under the 4th Amendment and 5`h Amendment.

Dave's Reading Aloud of a Newspaper Article

A criminal defendant may be required to give a voice sample. This does not violate a defendant's right against self-incrimination.

A criminal defendant is allowed to submit evidence that will prove that he could not or did not commit the crime. Here, the alleged robber spoke with a distinctive accent. Dave seeks to read a newspaper article to the jury in order to show that he was not the robber because he does not have an accent. The key issue, however, is whether Dave may do this given that he does not want to be sworn in as a witness or subjected to crossexamination. By doing so, Dave is denying the

prosecution the right to cross-examine him and to test whether he is being truthful. It is possible for Dave to fake an accent or to have taken voice lessons to change this previous accent. All of these are factors that the prosecution should be permitted to test on cross-examination. Because the prosecution will not be given the right to cross-examine Dave, Dave's request to read to the jury should be denied.

THE CURRENCY

The 4t^{h} Amendment prohibits warrantless searches and seizures by a police officer in an area where a person has a reasonable expectation of privacy. The 4th Amendment applies to the states via incorporation into the 14`^{h} Amendment. Warrantless searches are permitted under certain circumstances.

State Action:

The 4th Amendment prohibits warrantless searches and seizures by a state actor. Here, the officer was conducting the search and seizure as a police officer and therefore state action is involved. In addition, the officer was searching Dave's briefcase - - an area where Dave had a reasonable expectation of privacy.

Search Incident to a Lawful Arrest

An officer does not need a search warrant if the search is done pursuant to a lawful arrest. Underthis exception to the warrant requirement, an officer may search the person arrested and search the area within the person's immediate control if the officer suspects that the area would contain contraband or a weapon. In order for this exception to apply, the arrest must have been lawful.

The officer arrested Dave after receiving a phone call from an anonymous caller stating that a man fitting Dave's description was carrying a sawed-off shotgun in a briefcase. An officer may arrest a person in public without a warrant if the officer has probable cause to believe that the person has committed a crime. A tip from an anonymous informant can be used as a basis for establishing probable cause if the officer reasonably believes that the tip is reliable. Here, the officer knew that a Bank was robbed at 1 p.m. by a man who had a shotgun. The officer received a tip at 3:30 saying that a man was standing at a corner with a sawed-off shotgun in a briefcase. The combination of the call, with the circumstances surrounding the Bank robbery are sufficient to give the officer probable cause to arrest Dave in public without a warrant.

Because the arrest was lawful, the officer could search Dave and the area within his immediate control if the officer suspects that the area would contain contraband or [a] weapon. Here, the officer suspected that the briefcase would have a sawed-off shotgun and it was within Dave's immediate control. Thus, the officer could search the briefcase. Any evidence found during this valid search could be admitted.

Plain View

Any evidence seen by an officer when the officer has a lawful right to search the area may be admitted. Here, the officer had a right to search Dave's briefcase under the exception to the warrant requirement for searches incident to a lawful arrest. Because the marked currency was in the officer's plain view during this search, the currency can be admitted as evidence against Dave.

Stop & Frisk

An officer who has reasonable suspicion to believe that a person is engaged in criminal activity may stop the suspect and conduct a warrantless frisk for weapons. An officer may not look inside containers during a stop & frisk. Thus, this exception to the warrant requirement will not be a basis for admitting the currency.

DAVE'S STATEMENT TO THE OFFICER

The 5th Amendment privilege against self-incrimination applies when there is state action and a custodial interrogation of a person. It gives a defendant a right to refuse to give testimonial evidence that would result in self-incrimination.

State Action

As discussed above, the action of the police officer involves state action.

Custodial Interrogation

Under the 5th Amendment, an officer must read a suspect his Miranda rights before conducting a custodial interrogation. A person is in custody if he believes that he is not free to leave the officer's control. Here, the officer approached Dave with his service revolver drawn and handcuffed Dave. Under these circumstances, Dave was in custody because he was not free to leave the officer's control.

An interrogation is any communication by the police to the suspect that is likely to elicit a response. Before engaging in a custodial interrogation, the officer must read the suspect his Miranda rights, which involves the suspect's right to remain silent and the right to ask for counsel.

Here, the officer would argue that his statement to Dave "I know you're the one who robbed the bank. Where's the shotgun?" was not an interrogation and that Dave's response to this statement was a voluntary statement. A statement by a suspect that is blurted out is admissible. Dave, however, would argue that the officer's statement "I know you're the one who robbed the bank" is a statement likely to elicit a response and that Dave would not have said anything had he not been prompted by the officer's accusation. Dave would probably win on this argument because accusing a suspect who is in handcuffs of committing a crime is the type of statement likely to elicit a response.

As a result, Dave's statement to the officer cannot be admitted because Dave was not read his Miranda warnings prior to the interrogation. Dave's statement could be admitted for impeachment purposes if Dave takes the stand and could be admitted in a grand jury proceeding.

THE SHOTGUN

The admissibility of the shotgun also depends on an analysis of whether Dave's 5`n Amendment privilege against self-incrimination was violated when the officer asked Dave where the shotgun was without reading Dave his Miranda rights.

As discussed above, state action was involved and Dave was in custody when the officer asked him where the shotgun was. If the question to Dave was improper, the shotgun cannot be

admitted because it is the fruit of a poisonous tree.

Dave will argue that he pointed to the trash container as a result of the officer's interrogation and that he wouldn't have done so but for the officer's interrogation. The officer will argue that Dave's "pointing" to the trash is not testimonial and therefore the 5th *Amendment does not apply. The 5th Amendment does not typically apply to conduct but* it may apply if the conduct is testimonial in nature. Here, Dave's pointing to the shotgun could be considered testimonial in nature because Dave was telling the police the location of his weapon.

Courts, however, allow an officer to question a suspect about the location of the weapon without giving Miranda warnings if it is necessary because of exigent circumstances. In other words, if the officer thinks that there might be a weapon laying around that might pose an immediate danger to the public the officer can question the suspect immediately following the arrest and pre-Miranda as a means of securing the premises and protecting the public.

Here, the shotgun is probably admissible under this exception because the officer knew that there was a shotgun used in connection with the robbery and has reason to believe that Dave was connected with this robbery given the discovery of the marked bills. Thus, the officer could ask about the location of the gun to secure the premises.

Answer B to Question 1

1)

Dave's Reading Aloud the Newspaper Article

The Fifth Amendment protects against self-incrimination. Therefore, the prosecution cannot compel D to testify against his will. Furthermore, the Sixth Amendment allows an accused to confront his accusers. Here, D wants to read aloud a newspaper article of the judge's cho[o]sing to demonstrate that he does not have a distinctive accent, which is something that was described by the bank teller. D would like to do this without being sworn in or subject to cross-examination by the prosecution. The issues hinges [sic] on whether reading the statement aloud is testimonial in nature. If it is testimonial in nature than [sic] the judge will not allow Defendant to do this without being sworn in because he will be a witness.

Non-Testimonial

Here, Defendant wishes to demonstrate that he does not have an accent. The content of his speech is not testimonial in nature because he is not asserting this own thoughts, opinions, observations, or knowledge, which are things that a witness would do. Here, D is not making any statements of fact. The evidence is relevant to demonstrate that D doesn't have an accent, but it is only the sounds of his speech that matters [sic] and not the content. It is akin to showing tattoos, needle marks, or hair color. Therefore, reading a newspaper is sufficiently nontestimonial and D will be allowed to do this.

The prosecution may argue that this is testimonial because D can alter the way that he is speaking and if they were allowed to cross-examine him this would come to light in front of a jury that he

was faking. This argument would fail because there is no content for the prosecution to cross-examine him on and they can sufficiently argue in closing that he may be faking or offer a witness to counter his assertion that he does not have an accent.

Dave will succeed because his reading the newspaper aloud is sufficiently nontestimonial and will[,] therefore, be admitted at trial.

The Currency

The Fourth Amendment, incorporated to the states via the Fourteenth Amendment, protects against unreasonable searches and seizures. In order to bring an action under the Fourth Amendment, the defendant must have standing and the action must be done by a government actor.

Standing

In order to have standing one must have a reasonable expectation of privacy in the items seized or search[ed]. Here, Defendant was seized and his briefcase searched. Therefore, since D had a reasonable expectation of privacy in himself and his briefcase he has standing.

Government Actor
A police officer is [a] government actor for the purposes of the Fourth Amendment. Seizure

of D

In order to arrest a person an officer must have a warrant based on probable cause signed by a neutral magistrate. Absent a warrant a search or seizure is per se invalid absent an exception. Here, there was no warrant for D's arrest.

Dave would argue that this was an illegal arrest and that the officer did not have probable cause based on this information first and foremost because of the amount of time passed between the robbery of the bank and the time that the officer contacted defendant two and half hours later. D would argue that it is unreasonable to think that a bank robber is going to just stand out in the middle of public [sic] with a gun two and a half hours later. Furthermore, D will argue that he was a man with a briefcase downtown, which is hardly a novel notion. Moreover, D will argue that the anonymous caller lacked any indicia of reliability and was not corroborated by anything other than the fact that D just happened to match the description of a man with a briefcase, but with no sawed-off shotgun. D will also point out that the bank teller described a shotgun whereas the anonymous calle[r] described a sawed-off shotgun, which are noticeably different. Therefore, D will argue that the officer had no probable cause to arrest D based on this information and therefore, the arrest was illegal.

The prosecution would like[ly] respond that the initial contact with D by the police officer was a detention based on reasonable articulable facts or if it rose to the level of an arrest that there was probable cause.

Detention based on Reasonable suspicion

The prosecution may argue that D was not arrested by [sic] merely stopped in order to investigate

whether criminal activity was afoot. During a detention, an officer must have reasonable suspicion that criminal activity is afoot. Here, the officer had two basis [sic] as will be described in more detail below. The officer had the matching description of the bank robber with the briefcase and he had an anonymous caller who described D with a gun at the corner. Therefore, the officer had sufficient probable cause to contact D. The officer may detain a suspect long enough to investigate and determine if there is criminal behavior or not. Here, the officer drew his weapon and handcuffed D because he believed that D had a gun based on the anonymous tip and the bank robbery information.

D will argue that this was an arrest and not merely a stop. D will argue that the officer approached him with a weapon drawn and handcuffed him and[,] therefore, it was an arrest because D was not free to leave.

The court will hold that this was a detention based on reasonable suspicion and was, therefore, not in violation of the Fourth Amendment.

Probable Cause

Moreover, the officer had probable cause to arrest D based on the information that he had. If an officer has probable cause to believe that someone has committed a felony they may arrest that person without a warrant as long as within 48 hours a magistrate makes a determination that there was probable cause for the arrest. If a person commits a misdemeanor it must be committed in the officer's presence for an arrest.

Here, the officer had reason to believe that D robbed a bank. Robbery is a felony under the law. The information that the officer had at the time that he contacted the defendant was that a bank was robbed at 1 pm, by a man with a shotgun who spoke with a distinctive accent. The robber had in his possession marked currency given to him by the teller which he put into a briefcase. The officer received a tip from an anonymous caller who described a man standing at a corner with a sawed-off shotgun in a briefcase. The officer arrived to [sic] the corner within minutes of the call, saw Dave there holding a briefcase and matching the description given by the anonymous caller.

The prosecution will argue that under the "totality of the circumstances" the officer's arrest was based on probable cause. Not only did the officer have reasonably articulable facts to contact D and investigate him to see if he had a weapon but also to arrest him in connection with the bank robbery. As the facts described above detail the officer had description of Defendant and just because minutes after the phone call he no longer had the weapon does not mean that the officer should just walk away without any investigation. The officer has a duty to investigate and determine if there is a safety issue and what is going on.

Therefore, based on the totality of the circumstances the officer has probable cause to arrest Dave and the seizure of D was not unlawful.

Search of Briefcase

Here, the search of the briefcase also requires and [sic] warrant exception because there was no additional warrant to search the briefcase. D had a reasonable expectation of privacy in his briefcase because it was something that was closed and not open to public view or scrutiny.

Probable Cause

As stated above the officer had probable cause to believe that Defendant was armed with a shotgun and therefore had sufficient probable cause to search the bag to ensure for his own safety and the safety of others where the gun was. During a detention an officer may "pat down" an individual if they believe the person may have a weapon. Here, the officer did believe that D had a weapon which was something that could have easily fit in the briefcase. Therefore, the search of the briefcase was lawful.

Search incident to Arrest

Furthermore, as stated earlier there was sufficient probable cause for a lawful arrest. In a search incident to a lawful arrest, the arrest must be lawful, and the officer can search the Defendant and anything within the "wingspan" of the suspect under Chimel. Here, D was holding the briefcase which was sufficiently in his wingspan. Therefore, the search of the briefcase was a lawful search incident to arrest.

Finding the Currency

Although the officer had probable cause to search the briefcase for a weapon, he saw the currency in plain view when he opened the briefcase. Something is in plain view in a place the officer may lawfully be and without the officer touching or moving it around.

Conclusion: The currency found in the briefcase will not be suppressed. **Dave's**

Statements to the Officer

Miranda

Miranda protects against coerced confessions. It is a prophylactic measure designed to provide additional protection for the 5th Amendment, incorporated to the states through the 14th Amendment, against self-incrimination. According to Miranda, if a suspect is interrogated and in custody, he is to be warned of his right to remain silent, that anything that he says can be used against him, that he has a right to an attorney and if he can't afford an attorney one will be appointed for him.

Here, Dave made two statements to the police officer and each needs to be analyzed separately to determine the admissibility. The first statement was when Dave pointed to the nearby trash can and the second is when he said "I knew all along that I'd be caught."

Pointing to the trash can

Statements can be express or implied. An express statement is an oral statement. An implied statement is one made with assertive conduct or by silence. Here, Dave pointed to the trash can in response to the Officer's question "Where's the shotgun?" In custody

Custody occurs where the suspect is not free to leave. At this point Dave was handcuffed standing on a street corner. This is sufficiently in custody for Miranda.

Interrogation

Interrogation occurs where the officer asks questions in order to elicit a response. Here, the officer asked where the gun was and D pointed to the trash can. Therefore, this was interrogation.

Dave's argument will succeed because the conduct of pointing to the gun should be suppressed and inadmissible at trial.

"I knew all along that I'd be caught"

This was an express statement made by Dave after he pointed to the gun. As stated above Dave was in custody, but the difference with this statement is that it was a spontaneous statement. The officer did not ask D if he knew that he would be caught. He asked him where the gun was. The prosecution would argue that the [sic] D's statement was spontaneous and therefore, not a violation of Miranda and should be admissible. D would argue that this was a result of a custodial interrogation and the statement should not come in.

Dave's argument will fail because this was a spontaneous statement and is, therefore, admissible.

Shotgun

The shotgun was found as a result of D's pointing to where it was located and therefore D will argue that it is inadmissible as the result of a Miranda violation.

Fruit of the poisonous Tree

When there are violations of the Fourth Amendment the exclusionary rule helps to protect against unreasonable officer conduct by excluding the evidence. D would likely argue that as a result of his unmirandized statement the gun should be supressed. This argument would likely fail because courts have not readily applied the fruits of the poisonous tree doctrine to evidence resulting from Miranda violations. Furthermore, under the doctrine of inevitable discovery the officers would have likely found the shotgun independent of D's pointing to it. Generally, when officers find the suspect of a crime who had only minutes before been seen with a weapon and now has no weapon to [sic] search the area around where the defendant was found to see if he dumped the weapon.

Furthermore, D abandoned the gun before the officer even approached him so he had no expectation of privacy in the trash can.

Dave's argument will fail and the gun will be admissible.

July 2004
Question 1

On August 1, 2002, Dan, Art, and Bert entered Vince's Convenience Store. Dan and Art pointed guns at Vince as Bert removed $750 from the cash register. As Dan, Art, and Bert were running toward Bert's car, Vince came out of the store with a gun, called to them to stop, and when they did not do so, fired one shot at them. The shot hit and killed Art. Dan and Bert got into Bert's car and fled.

Dan and Bert drove to Chuck's house where they decided to divide the $750. When Chuck said he would tell the police about the robbery if they did not give him part of the money, Bert gave him $150. Dan asked Bert for $300 of the remaining $600, but Bert claimed he, Bert, should get $500 because his car had been used in the robbery. Dan became enraged and shot and killed Bert. He then decided to take all of the remaining $600 for himself and removed the money from Bert's pocket.

On August 2, 2002, Dan was arrested, formally charged with murder and robbery, arraigned, and denied bail. Subsequently, the court denied Dan's request that trial be set for October 15, 2002, and scheduled the trial to begin on January 5, 2003. On January 3, 2003, the court granted, over Dan's objection, the prosecutor's request to continue the trial to September 1, 2003, because the prosecutor had scheduled a vacation cruise, a statewide meeting of prosecuting attorneys, and several legal education courses. On September 2, 2003, Dan moved to dismiss the charges for violation of his right to a speedy trial under the United States Constitution.

1. May Dan properly be convicted of either first degree or second degree murder, and, if so, on what theory or theories, for:
    a. The death of Art? Discuss.
    b. The death of Bert? Discuss.

2. May Chuck properly be convicted of any crimes, and, if so, of what crime or crimes? Discuss.

3. How should the court rule on Dan's motion to dismiss? Discuss.

Answer A to Question **I**

1)

1. A. Dan - Liability for Art's Death Murder

Murder is the unlawful killing of a human being with malice aforethought. Malice can be shown by either intent to kill, intent to cause grevious bodily harm, or reckless indifference to human life. Here, Dan is probably not liable under any of these theories. Because Vince, the shopkeeper, shot Art, causing his death, Dan did not exhibit intent to kill or cause grevious bodily harm. Likewise, fleeing probably does not constitute reckless indifference to human life.

Felony Murder Rule

However, Dan might be convicted under the felony murder rule. The felony murder rule holds defendants liable for foreseeable killings committed during the commission of inherently dangerous felonies. Here, Dan, Art, and Bert were engaged in a robbery. A robbery is the taking and carrying away of the personal property of another by force with the intent to permanently deprive the victim of the property. Dan, Art and Bert robbed Vince because they took $750 from him at gunpoint, with the intent to keep the money. A robbery - especially an armed robbery of a convenience store - is likely an inherently dangerous felony. Art's death was the kind of death that frequently results from armed robberies, and thus was foreseeable.

Limitation of Felony Murder Rule - Fleeing

Liability for felony murder generally ends when the felons reach a place of safety after the felony. Here, because Art was killed while fleeing - before the felons reached a place of safety - this limitation will not apply.

Limitation on Felony Murder Rule - Death of a Co-Felon

However, most states have enacted limitations on the felony murder rule when the death of a co-felon is at issue. Under states that follow the agency rationale, a defendant can be found guilty if the killing was done by a felon or his agent. Under this view, Dan is likely not liable for felony murder because it was Vince rather than Dan or Bert who shot Art.

Under the proximate cause view of the felony murder rule, any killing proximately caused by the felony can make a defendant liable for felony murder. Under this rule, it is arguable that Dan should be liable for Art's death. Being shot while fleeing from a convenience store robbery is foreseeable. Thus, if the jurisdiction follows this view, Dan might be liable for Art's death under a felony murder theory.

First Degree Murder

In most states, first degree murder requires premeditation or deliberation. Many states also include murders that fall under the felony murder rule in the definition of first degree murder. Thus, if this jurisdiction adheres to that view, Dan may be liable for first degree murder for Art's death.

Second Degree Murder

Second degree murder generally is murder that does not involve premeditation and deliberation, but also does not amount to any form of manslaughter. If the applicable statute defines felony

murder as second degree murder, Dan may be liable for that crime instead.

Conspiracy

Conspiracy requires an agreement to commit a crime between two or more people, an intent to agree, an intent to commit a crime, and an overt act. A conspirator is liable for all reasonably foreseeable crimes committed in furtherance of the conspiracy. Here, Art, Dan, and Bert clearly agreed to rob Vince's store with the intent to commit the crime. Conspiracy does not merge with the completed crime. Thus, if Dan was liable for conspiracy, and a court found that Art's death was foreseeable, Dan could potentially be liable on these grounds as well. However, this is a stretch, especially since Vince killed Art.

B. Dan's Liability for the Death of Bert Murder

As mentioned, one potential grounds of liability for murder is intentional killing or killing with an intent to cause great bodily harm. Here, Dan probably intended to kill Bert or at least intended to cause him great bodily harm. Dan simply shot Bert - there is no indication that he was merely trying to scare him.

First Degree Murder

Dan may be liable for first degree murder. Although premeditation and deliberation are generally prerequisites to a charge of first degree murder, some courts have held that one can premeditate or deliberate in *very* short periods of time. However, Dan will argue that he was "enraged" and had no time to deliberate or premeditate. Due to the spontaneous nature of the crime, Dan will likely not be found guilty of first degree murder. In addition, as discussed below, he is likely not guilty of felony murder. Thus, even if the state murder statute includes felony murder as first degree murder, Dan will likely not be liable for this crime.

Second Degree Murder

Dan is much more likely to be guilty of second degree murder. As discussed above, he intended to kill Bert, but likely did not premeditate or deliberate. As discussed below, he is unlikely to be guilty of voluntary manslaughter or felony murder.

Felony Murder

A felony murder charge against Dan would be problematic. For one, liability for felony murder generally ends when the perpetrators have reached a place of safety. Dan and Bert had reached Chuck's house when Dan killed Bert. Indeed, they had begun to divide up the money. This would likely cut off any liability for felony murder based on the robbery of Vince's store.

In addition, the prosecution might argue that Dan is liable for felony murder because he took $600 from Bert's pocket. The prosecution might argue that this is a robbery, and that Dan's killing was a foreseeable result of the robbery. However, this is a weak argument. Dan only decided to take the money from Bert after he shot him. In addition, Dan might also be able to argue that since Bert did not

have lawful title to the money, no robbery took place. This is because one element of a robbery is that the money be "property of another." Thus, Dan is likely not liable for felony murder for Bert's death.

Voluntary Manslaughter

Dan may argue that he is only liable for voluntary manslaughter. Voluntary manslaughter is a killing that would be murder, but was conducted while the perpetrator was highly upset. The upsetting incident must be the sort that would upset a reasonable person, the defendant must have been upset, a reasonable person would not have had time to cool off, and the defendant must not have cooled off. Dan will argue that he was "enraged" by Bert's demand of extra money. However, this argument is unlikely to succeed. For one, Bert's actions do not rise to the type of extremely upsetting provocation that generally suffices to reduce a murder charge to voluntary manslaughter. Moreover, there is no indication that a reasonable person would have had such a violent reaction to Bert's demand for money. Thus, Dan is likely not liable for voluntary manslaughter.

Conspiracy

As discussed above, any underlying conspiracy to rob Vince's store had likely ended by the time that the robbers reached Chuck's house.

2. Chuck's Liability

Accessory After the Fact

Chuck is likely guilty of being an accessory after the fact. An accessory after the fact is one who shields, shelters, or assists criminals after a crime. Chuck is clearly aware that Dan and Bert have committed a robbery. He threatens to tell the police about the crime unless he receives some of the money. He provides his house as a safe haven for Dan and Bert. If found guilty of this charge, Chuck would not be guilty as an accomplice - he would simply be guilty of an independent, lesser offense.

Accomplice

Chuck is probably not an accomplice to either Dan's killing of Bert or the robbery of Vince. To be an accomplice, one must assist a crime with the intent that the crime be committed. Here, there is no indication that Chuck had any idea that Dan, Art and Bert were going to rob Vince's store. In addition, given the spontaneous nature of Dan shooting Bert, there is no indication that Chuck intended that crime either. Mere presence at a crime scene does not necessarily result in accomplice liability.

Extortion

Chuck perhaps is guilty of extortion. Extortion involves the obtaining of property through threats. Here, Chuck threatened to tell the police about the robbery. As a result, he obtained $150 from Dan and Bert. Thus, because he obtained property through the use of threats, he might be guilty of extortion.

Conspiracy

There is no indication that Chuck was involved in any agreement - or even knew about - the convenience store robbery. Also, Dan seems to have acted alone when he shot Bert. Accordingly,

Chuck is likely not be [sic] guilty of conspiracy.

Misprison of Felony

If the jurisdiction recognizes this crime, Chuck may be guilty because he aided and assisted Dan and Bert to cover up their crime.

3. Dan's Motion to Dismiss

The Sixth Amendment to the United States Constitution protects an accused's right to a speedy trial. When evaluating whether such a right has been violated, courts consider several factors. Among them are the reason for the delay, whether the defendant has objected to the delay, and the length of the delay.

Here, Dan's strongest argument is that the prosecutor's reasons for delaying the trial are simply not compelling enough to warrant impinging upon his constitutional rights. The prosecutor's desire to go on vacation and attend meetings and legal education classes seems more like a personal pred[i]lection than a good reason to delay Dan's trial. Dan will languish in jail during this time - nearly thirteen months after he was arrested and arraigned. Moreover, with the exception of the vacation, it is not at all clear why the prosecutor cannot attend the meeting or legal education courses on his own time. Finally, in any event, it is not clear why those events warrant delaying the trial from January 3 to September 1 - a delay of nine months. Dan will also note that he initially moved to have trial set in October, 2002. Finally, Dan will point out that the prosecutor's motion was granted on Jan. 3, which was essentially the eve of trial. Waiting until the last minute to continue a trial so long seems unfair and may have prejudiced his ability to mount an effective defense.

However, the prosecution will counter that Dan should have moved to have his charge dismissed on Jan. 3. Indeed, Dan waited until September 2 to move to dismiss. Although he "objected" on Jan. 3, he should have moved to dismiss then. By waiting to move to dismiss until after the trial began, Dan likely waived his rights. Accordingly, Dan's motion should be denied.

Answer B to Question 1

1)

May Dan ("D") be convicted of murder.

The first question is whether Dan may be convicted of murder in the 1" or 2nd degree. At common law, murder was the unlawful killing of a human being with malice aforethought. Malice aforethought was committing murder with any of the following mental states (1) intent to kill, (2) intent to do serious bodily harm, (3) reckless indifference to the unjustifiably high cost to human life and (4) intent to commit a felony. The types of felonies included in felony murder were inherently dangerous felonies.

Murder in the first degree is a statutory creation that involves the unlawful killing of another human being with premeditation and deliberation. In addition, many state statues have also included in the definition of murder in the first degree murders committed while committing a felony -- also enumerating inherently dangerous felonies.

Voluntary manslaughter is the unlawful killing of a human being which would be murder but for the existence of adequate provocation, and involuntary manslaughter is the killing of another human being with criminal negligence or during the commission of an unenumerated felony or misdemeanor.

2d Degree murder is a residual murder category that covers the unlawful killing of another human being that does not fall within the Murder in the 1" Degree or Voluntary or Involuntary Manslaughter categories. With this in mind, we can investigate whether Dan is liable for murder in the first or second degree.

All homicide crimes also require actual and proximate causation as well as the result of death.

KILLING OF ART.

Here, Dan did kill Art. Vince killed Art. Thus, the only theory that could convict Dan of the murder of Art would be the felony murder. Here, Art and Dan and Bert were committing robbery, an inherently dangerous felony.

Robbery is the taking of personal property of another from their person or presence by force or threats of force with the intent to permanently deprive.

Here, Dan, Bert and Art entered the convenience story and pointed guns at Vince (the requisite threat of force) and took $750 (personal property) from Vince's person. This, especially because of the existence of guns, qualifies as an inherently dangerous felony that should rise to the level of a felony that would qualify for Felony murder. Thus,

because the killing of Art took place while] Dan was committing an inherently Dangerous felony, if this occurred in a jurisdiction where felony murder is included in the definition of first degree murder, Dan could be guilty of first degree murder.

There are however some limiting doctrines to felony murder. Notably in this instance, the killing must be a foreseeable result of the felonious conduct, and the redline view of felony murder provides that defendants cannot be guilty of felony murder for the murder of one of their co-felons by the police or by third parties. Thus, although the killing of Art certainly is a foreseeable result of committing a robbery, if this is a jurisdiction that follows the redline view, Dan will not be guilty of felony murder for Art, and will not be guilty of either first or second degree murder for Art.

It is noteworthy that Vince's killing of Art was not lawful because one may never use deadly force in defense of property, and here, Vince chased Art out of the store (after the physical danger to him passed) and killed Art, when Art failed to stop.

FOR DEATH OF BERT

The next question is whether Dan can be guilty of murder in the first or second degree of Bert.

The standards for murder in the first and second degree are set forth above. Here, the question will revolve around whether (1) Dan possessed the requisite premeditation and deliberation to kill Bill, (2) whether Dan could be guilty of felony murder, since this happened right after the robbery, or (3) whether adequate provocation existed to reduce the killing to a charge of involuntary manslaughter.

Premeditation.

Dan can be guilty of first degree murder of Bert if he committed the murder with premeditation and deliberation. Here, the facts do not indicate that he possessed that premeditation. Dan and Bert just committed a robbery together and were returning to divide the money. There is nothing to suggest that he had a prior plan to kill Bert. In fact, he only became enraged when Bert insisted on taking the entire share for himself. Thus, on these facts, he cannot be convicted of first degree murder on a premeditation and deliberation theory.

Felony Murder

The next question is whether he could be convicted of felony murder for the murder of Bert. Dan did just commit a felony (robbery) as discussed above. He had the requisite intent to commit that felony and it was an inherently dangerous felony. Thus, could his killing of Bert qualify for felony murder?

The felony murder rule also has the limited doctrine that the killing must occur during the commission of the felony. Once the felons reach a point of temporary safety, they are no longer considered as carrying out the felony for purposes of the felony murder rule.

Here, Dan and Bert had reached the safety of Chuck's house and[,] therefore, were no longer in the commission of a felony and[,] therefore, Dan cannot be guilty of felony murder.

2d Degree Murder and Voluntary Manslaughter

The next question is whether adequate provocation existed to make the killing a voluntary manslaughter. If not, the murder will fall into the residual category of Murder in the 2d degree. Here, since Dan acted with intent to do serious bodily damage to Bert (he shot and killed him), or at a minimum proceeded with reckless disregard for the unjustifiably high risk to human life, he will be guilty of second degree murder if the charge isn't reduced to voluntary manslaughter.

Voluntary manslaughter requires (1) provocation aro[u]sing extreme and sudden passion in the ordinary person such that he would not be able to control his actions, (2) the provocation did in fact result in such passion and lack of control, (3) not enough time to cool off between the provocation and the killing and (4) the defendant did not in fact cool off.

Here, Bert refused to give Dan his $300. While it is understandable that the failure to give such money would aro[u]se anger in an ordinary person that had just put their freedom and life on the line in a robbery attempt, we are only talking about $300. While understandably angry, it is hard to imagine that an average person would lose control over $300 to the point of taking another person's life. Thus, Dan will not qualify for the reduction to voluntary manslaughter and will be convicted of 2d degree murder.

MAY CHUCK BE CONVICTED OF ANY CRIMES

The possible crimes Chuck could be convicted of is [sic] either all of the crimes that the principals committed (under an accomplice liability theory), or at a minimum an Accessory After the Fact.

ACCOMPLICE LIABILITY

If one aids, abets or facilitates the commission of a crime with the intent that the crime be committed, one can be found guilty on accomplice liability theories. The scope of liability includes liability for the crimes committed by the principals and all other foreseeable crimes. The common law used to distinguish between principals in the first and second degrees and accessories before and after the fact. Largely those distinctions have been discarded, although, most jurisdictions still do recognize the lesser charge of accessory after the fact.

Here, there is no evidence that Chuck aided, abetted or facilitated the crime until after it was committed. He provided a safehouse and subsequently demanded money. But mere presence or knowledge is not enough to ground accomplice liability.

ACCESSORY AFTER THE FACT

However, Chuck did assist after the crime happened (he provided a safehouse, and agreed not to tell the authorities in exchange for money), so at a minimum he will be guilty of accessory after the fact.

Extortion

Chuck may also be liable for extortion. Extortion is the illegally obtaining property through threats of force or threats to expose information. Here, he threatened to expose the criminals to the police if he didn't get paid, and so he will be liable.

Receiving Stolen Property

Chuck also will be liable for receiving stolen property. The requirement for this crime are [sic] that you know the circumstances around the property (ie, that it is stolen) and that you willing [sic] receive it. Chuck knew this money was the fruit of a robbery and received it in exchange for his providing a safehouse. Thus he will be liable of receipt of stolen property.

CONSPIRACY

Chuck also could be guilty of conspiracy. Conspiracy is (1) an agreement between two or more people, (2) the intent to agree, (3) the intent to pursue an unlawful objective and (4) in some jurisdictions, some overt act. Conspiracy does not merge into the completed crime.

HOW SHOULD COURT RULE ON DAN'S MOTION TO DISMISS.

The 6th amendment provides each defendant the right to a speedy trial. The 6th amendment is applied to the states through its incorporation into the due process clause of the 14th amendment. The right to a speedy trial attaches post charge. Whether the defendant has been given a speedy trial depends on an analysis of the totality of the circumstances.

Here, Dan was arrested on August 2, and immediately charged. Thus his right to a speedy trial attached sometime in early August. The initial trial date was set for January 5, 2003. It is not likely that the denial of Dan's request for a trial 2 months after his charge is a violation of his constitutional rights since the court set a date very closely thereafter in January. However, the prosecutor's delay subsequent to that date does not rise to the level of providing adequate excuse for moving Dan's date (coupled with the fact that the request was made only days before the January trial was to commence). Here, the

prosecutor wanted to take a vacation cruise and take some legal education classes, and meet for a statewide meeting of prosecutors. First, none of these seem to rise to the level of an adequate excuse to delay a trial 9 months. Particularly since the defendant was denied bail and was sitting in jail. While the court could have granted a continuance for a short period of time for the meeting or to accommodate the prosecutor, given the defendant's status (sitting in jail), it was improper for the court to grant this motion, and the court may dismiss Dan's case.

It should be noted, however, that Dan should have moved earlier than September 2, as this would have permitted the court to fashion relief without having to dismiss the charge altogether. Accordingly, a court could find that he was not entitled to dismissal because of his delay.