CRIMINAL LAW MNEMONICS

1) **CRIM K** is a criminal’s state of mind:
   - C – CRIMINALLY negligently
   - R – RECKLESSLY (a.k.a. wantonly)
   - I – INTENTIONALLY
   - M – MALICIOUSLY
   - K – KNOWINGLY

2) **FIGS MAN** kills:
   - F – FELONY murder
   - I – INTENTIONAL murder
   - G – Defendant’s conduct created a GRAVE risk of death. Defendant was aware of the risk and consciously disregarded it displaying a depraved indifference to the victim’s life
   - S – Intent to cause SERIOUS bodily harm that results in death (in NY, this is voluntary manslaughter)
   - MAN – MANSLAUGHTER (voluntary or involuntary)

3) **BRAKERS** can commit felony murder, but not in a **LAB**:
   - B – BURGLARY
   - R – ROBBERY
   - A – ARSON
   - K – KIDNAPPING
   - E – ESCAPE from police custody after arrest
   - R – RAPE
   - S – Criminal SEXUAL act
   - L – LARCENY
   - A – ASSAULT
   - B – BATTERY

4) **A CUB** can’t be sentenced to death for felony murder:
   - C – D didn’t COMMIT, command, or request the homicide
   - U – D was UNARMED with a deadly instrument or substance readily capable of causing death or serious physical injury AND
   - B – D had no reason to BELIEVE another co-conspirator was armed or intended to engage in conduct likely to result in death
5) **HIS** negates a murderous intent:
   - **H** – Committed in the **HEAT** of passion (**HOP**) or under extreme emotional disturbance
   - **I** – **INSANITY** or infancy of killer
   - **S** – **SELF-DEFENSE** or defense of others/justification (*if established it’s a complete defense)

6) **DAMS** gives you robbery and burglary 1st degree:
   - **D** – **DISPLAYED** what appeared to be a firearm w/ the intent of forcibly taking property
   - **A** – D was **ARMED** w/ a deadly weapon
   - **M** – D **MENACED** the victim using a dangerous instrument
   - **S** – D or accomplice caused **SERIOUS** physical injury to a non-participant during the robbery or in immediate flight from the crime scene. Burglary only requires a physical injury (**DAMP**)

7) Common law larceny requires a **TIP**:
   - **T** – Wrongful **TAKING** of property
   - **I** – Specific **INTENT** to permanently deprive the owner of that property
   - **P** – **PERSONAL** property of another is taken

8) There are 5 types of **FLEET** larceny:
   - **F** – **FALSE** pretenses
   - **L** – Common law **LARCENY** (**TIP**)  
   - **E** – **EMBEZZLEMENT**
   - **E** – **EXTORTION**
   - **T** – Larceny by **TRICK**

9) A **DA** gives you burglary in the 1st degree:
   - **D** – The structure is a **DWELLING** used for overnight lodging, and
   - **A** - There exist **AGGRAVATED** circumstances (**DAMP**)

10) **NICE MICE EVADE WASPS** raise criminal defenses:
    - **N** – **NECESSITY** a.k.a. Choice of Evils Defense
    - **I** – **INOPERABLE** or unloaded gun (in NY, for burglary and robbery)
    - **C** – **CLAIM** of title or claim of right
    - **E** – **EXCESSIVELY** broad penal statute
    - **M** – Legal or factual **MISTAKE**
    - **I** – **INSANITY**, infancy, or intoxication
    - **C** – **CUB** status as a defense to felony murder
    - **E** – **EXTREME** emotional disturbance
    - **E** – **ENTRAPMENT**
    - **V** – **VAGUE** criminal statute
    - **A** – Bill of **ATTAINDER**
    - **D** – **DURESS**
    - **E** – **EX POST FACTO** criminal law
    - **W** – **WITHDRAWAL** from the crime (a.k.a. renunciation)
    - **A** – **ALIBI** or Agency Defense
    - **S** – **SELF-DEFENSE**/justification (ordinary defense in NY, affirmative defense in MBE)
    - **P** – Heat of **PASSION**
    - **S** – **STATUTE** of limitations
11) Retroactive criminal laws are prohibited by a PIED piper:
    P – The law made PAST conduct a crime, which, at the time it occurred, was not a crime
    I – The law INCREASED the punishment for a past crime
    E – The law altered the rules of EVIDENCE after the crime was committed by requiring less evidence for a conviction
    D – The law eliminated DEFENSES that were available on the date the crime was committed

12) HOP allows no reflection, but EED does: HEAT OF PASSION; EXTREME EMOTIONAL DISTURBANCE

13) Most of NICE MICE EVADE WASPS are “affirmative defenses” except for IRACS:
    I – INFANCY defense (the defendant is under 7 or under 16)
    R – Claim of RIGHT defense
    A – ALIBI defense or the AGENCY Defense to a drug sale indictment
    C – CHOICE of evils defense which New York calls Justification.
    S – SELF DEFENSE (New York)

14) In asserting justification, D can RAT on the violent victim by presenting evidence of the victim’s violent:
    R – REPUTATION
    A – Violent ACTS
    T – THREATS of violence against D

CRIMINAL PROCEDURE MNEMONICS

CRIM PRO (4th Amendment)

1) To challenge a search, the D must have a good REP: REASONABLE EXPECTATION of PRIVACY

2) BACH’S PIES allow warrantless searches:
    B – BORDER searches
    A – AUTOMOBILE searches
    C – CONSENT searches
    H – HOT pursuit
    S – SCHOOL searches
    P – PLAIN view searches
    I – Searches INCIDENT to arrest
    E – EMERGENCY searches
    S – Proper STOP and/or seizure

3) Consider the PAGE factors for a hot pursuit search:
    P – Clear showing of PC
    A – Whether the suspect was ARMED
    G – GRAVITY of the offense
    E – Likelihood that the suspect will ESCAPE
4) A **FAIR** seizure is constitutional:
   - **F** – Stop & **FRISK** requiring reasonable suspicion (level 3)
   - **A** – Stop & **ARREST** requiring probable cause (level 4)
   - **I** – Stop & **INQUIRE (NY)** requiring founded suspicion (level 2)
   - **R** – Stop & **REQUEST** info requiring articulable basis (level 1)

**CRIM PRO (5th & 6th Amendments)**

5) When deciding whether to grant D’s motion to dismiss for violating D’s right to a speedy trial, the court will consider the **PRICE** D paid:
   - **P** – **PREJUDICE** in the form of loss of witnesses
   - **R** – **REASON** for the delay
   - **I** – Whether D is **INCARCERATED** during delay
   - **C** – Severity of the **CHARGE**
   - **E** – **EXTENT** of the delay
In-Class Multistate Questions:
Criminal Law

Homicide, Other Crimes, Inchoate Crimes/Parties, and General Principles (50%)
What Concepts Do They Expect You to Know?

I. Homicide
   A. Intended killings
      1. Premeditation, deliberation
      2. Provocation
   B. Unintended killings
      1. Intent to injure
      2. Reckless and negligent killings
      3. Felony murder
      4. Misdemeanor manslaughter

II. Other Crimes
   A. Theft & receiving stolen goods
   B. Robbery
   C. Burglary
   D. Assault and Battery

   E. Rape; statutory rape
   F. Kidnapping
   G. Arson
   H. Possession offenses

III. Inchoate Crimes/Parties
   A. Inchoate offenses
      1. Attempts
      2. Conspiracy
      3. Solicitation
   B. Parties to crime
IV. General Principles

A. Acts and omissions
B. State of mind
   1. Required mental state
   2. Strict liability
   3. Mistake of fact or law
C. Responsibility
   1. Mental disorder
   2. Intoxication
D. Causation
E. Justification and excuse
F. Jurisdiction

Constitutional Protections of Accused Persons (50%)

What Concepts Do They Expect You to Know?

Constitutional Protection of Accused Persons

A. Arrest, search and seizure
B. Confessions and privilege against self-incrimination
C. Lineups and other forms of identification
D. Right to counsel
E. Fair trial and guilty pleas
F. Double jeopardy
G. Cruel and unusual punishment
H. Burdens of proof and persuasion
1. A husband and wife were married in a state where, under that state’s penal code, the crime of kidnapping a child was defined as “knowingly taking a child without authority.” The wife, still living in that state, filed for divorce. Shortly thereafter, the husband obtained a judgment in different state granting him custody over the couple’s minor child. The husband’s lawyer informed the husband that, in light of the judgment, it was proper for the husband to go back into the state where his wife still lived and take the child. The husband’s attorney’s advice turned out to be incorrect, and the husband was indicted for kidnapping. At trial, the husband testified to the foregoing facts.

If the jury believes the husband’s testimony, should the jury convict the husband of kidnapping?

(A) No, because his reliance on the legal advice was reasonable.
(B) No, because his mistake negated the required mental element.
(C) Yes, because relying on a lawyer’s advice is not a defense to criminal conduct.
(D) Yes, because kidnapping is a strict liability crime.

1. The mental element of “knowingly” requires proof that the defendant was aware that his asportation of the child was without authority. Thus, the wrongful act of taking without authority is not a crime unless the accused knew that the “taking” was without authority; he must be aware that his conduct was without authority. Here, the husband’s mistaken belief negated the requisite mental element. If the jury believes the husband’s story, he cannot be punished for his act, since the mental element could not be proven beyond a reasonable doubt. Thus, choice (B) is correct.

Choice (A) is incorrect because whether the husband’s mistaken belief was reasonable is irrelevant. The husband’s mistake does not have to be reasonable; as long as the jury believes that the husband’s mistaken belief negated his knowledge that taking the child was without authority, the jury may acquit, even if the husband’s belief was unreasonable.

It is not choice (C), which many bar candidates choose; this choice is correct when the defendant attempts to assert the defense of “mistake of law.” Here, however, Harry asserts that his mistake negated the mental element required to convict him of the crime charged. While relying on a lawyer’s advice is generally no defense to criminal conduct, the husband here would not be convicted for the reasons explained above, making choice (C) incorrect.

Choice (D) is not correct because the statute requires a mental element (“knowingly”). Thus, it is clearly not a strict liability crime.
2. A bachelor, a man, and a woman, all strangers to one another, were dancing at a club on St. Patrick’s Day. The bachelor insulted the woman by making fun of her dance style. The woman then pushed the bachelor as hard as she could, and the bachelor fell down on the dance floor. While the bachelor was on the ground, the man recognized the bachelor as the person who drunkenly kissed his wife at the disco the week before, and, before the bachelor could get up, the man proceeded to repeatedly kick him in the head. The bachelor died of a fractured skull, and the man has been convicted of manslaughter.

Of which crime(s) will the woman most likely be convicted?

(A) Voluntary manslaughter as a principal first degree.
(B) Assault and battery only.
(C) Voluntary manslaughter as an accessory.
(D) No crime.

2. This question requires knowledge of the elements of manslaughter and accessory to manslaughter.

Choice (A) is incorrect. While the woman’s action put the bachelor in a position where he could be kicked by the man, the woman did not intend to have the bachelor kicked when she pushed him. Therefore, common motivation and concert of action were absent, and the woman cannot be considered a principal to the man’s criminal conduct.

Choice (B) is correct. The elements of assault and battery are clearly present, but the woman is not guilty of any other crime.

Choice (C) is incorrect. There was no concert of plan or action between the man and the woman. The woman had neither knowledge nor intent that the man would kick the bachelor when she pushed him, so she is not an accessory to the man’s crime.

Choice (D) is incorrect. The woman is guilty of assault and battery, and does not have any viable defense to her conduct. The bachelor merely insulted the woman, which would not support a self-defense theory, and the facts do not support any other defense.
3. Two men planned an armed robbery of a liquor store, yet neither of them had a gun. One of the men approached a woman whose father owned a German pistol from World War II. He asked the woman if he could borrow her father’s gun because he planned to commit robbery, and promised to share the rewards of the job with her. The woman acquiesced, and the two men used the gun in a liquor store holdup.

Could the woman properly be convicted of conspiracy to rob the store?

(A) Yes, because she provided the gun and was to share in the rewards.

(B) Yes, because she made no attempt to dissuade either man from executing the plan.

(C) No, because she neither helped with nor participated in the robbery.

(D) No, because she did not speak with or know of the existence of one of the men.

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3. A supplier of goods is guilty of conspiracy to commit the crime if the weight of various factors establishes the supplier’s constructive knowledge of the crime. Here, the woman (the supplier of the gun) was informed that the man who approached her needed the gun to do a “job,” which is commonly understood to mean criminal activity - obviously dangerous and serious criminal activity, since he needed a gun. The decisive consideration is that the woman was not just lending out the gun gratuitously or renting it out at ordinary commercial rates; rather, the woman understood she would be compensated in proportion to the “rewards” of the job. Taken together, these facts establish her intent to participate in the conspiracy.  

LaFave, Criminal Law § 12.2(c)(3) at 667-68 (5th ed. 2010). Therefore, choice (A) is correct.

The essence of the crime of conspiracy is an agreement to violate the law. The evidence need only establish the existence of a crime and that the defendant knowingly contributed his efforts in some way in furtherance thereof.  

U.S. v. Savaiano, 843 F.2d 1280, 1293-94 (10th Cir. 1988). Conspiracy convictions have been upheld, for example, where the defendant knew the buyer’s illegal purpose and supplied sophisticated glassware necessary to illegally manufacture methamphetamine.  

U.S. v. Montanye, 962 F.2d 1343 (8th Cir. 1990).

As another example, where a defendant loaned money to an associate to finance a heroin purchase and agreed to be repaid with drugs, his conspiracy conviction was upheld.  “The ‘gist’ of conspiracy is the seller’s intent ... ‘to further, promote and cooperate’ in the conspiracy.... [The defendant] played an active, interested, and informed role in the conspiracy, and thereby crossed the ‘shadowy border between lawful cooperation and criminal association.’”  


New York has held that someone “who procured the guns for the defendant and codefendant with knowledge that the guns would be used for a robbery was an accomplice as a matter of law.”  

People v. Montanez, 57 A.D.3d 1366, 1367 (4th Dep’t 2008).

Choice (B) is incorrect because it erroneously implies that someone who suspects a crime is in the works is guilty of that crime unless he undertakes affirmative action to prevent it.

Choice (C) is incorrect since, as discussed above, the facts show that the woman knew of the men’s criminal purpose and understood that she would be compensated in proportion to the “rewards” of the job. The woman would be guilty of conspiracy even if the intended crime was never attempted or committed at all. Also note that the woman need not know the precise details of the crime to be convicted of conspiracy to commit it.

Choice (D) is incorrect because the woman can be held liable for conspiracy by agreeing to aid just one of the men in committing the crime. The woman’s knowledge of the other man’s participation in the crime is immaterial.
4. A married man agreed to have sexual intercourse with a single woman who knew that the man was married. They even reserved a room for the upcoming event. Adultery is a crime in the jurisdiction, defined as “voluntary sexual intercourse between a married person and someone other than his or her lawful spouse.” Unbeknownst to the man and woman, just before they actually engaged in intercourse, the man’s divorce was finalized (a week ahead of schedule).

Could the man and the woman properly be convicted of conspiracy to commit adultery?

(A) No, because only the man was married.
(B) No, because, by definition, the crime of adultery takes two people to commit.
(C) No, because the man was not married when the parties engaged in intercourse.
(D) Yes, because both parties knew they were entering an agreement to commit a crime.

4. Choice (B) is correct because, under the Wharton Rule, there is no liability for conspiracy to commit a crime that necessarily requires a plurality of actors and only those absolutely necessary to commit the substantive crime are parties to the agreement. Since it is impossible for one person, alone, to commit adultery, the crime requires two people by definition. Thus, it would only be possible to convict any of the parties of conspiracy to commit adultery if there were a third person helping to accomplish the crime.

Choice (A) is incorrect because the crime of adultery does not require both parties be married. Only one of the parties need be married.

Choice (C) is incorrect because, despite that the man was not actually married when the sexual intercourse occurred, the parties agreed to engage in an illegal activity and took steps to engage in it (that is, they reserved the room).

Choice (D), while tempting, is incorrect, because under the Wharton Rule, neither party can be convicted of conspiracy to commit a crime that, by definition, takes two people to commit.
5. The defendant was convicted of a felony and sentenced to a long prison term. He escaped and wanted to kill the witness who testified against him. The defendant contacted a gunman and said, “I will give you $5,000 after you have killed the witness.” The gunman accepted the offer.

If the defendant is then immediately charged with attempted murder, can he properly be found guilty?

(A) Yes, because he has done everything that he plans to do to bring about the witness’s death.

(B) No, because the crime is not close to actual accomplishment.

(C) Yes, because of his deliberate premeditation of the murder and the malice he possesses against the witness.

(D) No, because the attempt merges into the conspiracy.

5. The solicitation of another human being to commit a crime is a crime itself: the crime of solicitation. However, under the majority position, it is not the crime of attempt even though the solicitor has accomplished all that he intends to in order to have the crime (the killing) committed. Therefore, choice (A) is incorrect.

In order for a solicitation to rise to the level of the crime of attempt, the subsequent overt acts in preparation for the crime must proceed to what would constitute attempt if the solicitor himself were actually committing the underlying crime. LaFave, Criminal Law §11.1(f) at 611 (5th ed. 2010); Model Penal Code §5.02, Comment at 369; Dressler, Understanding Criminal Law §28.02(B) at 455 (4th ed. 2006).

The acceptance by the person solicited (here the gunman) is remote enough from the actual commission to negate the attempt crime. Therefore, (B) is correct. Clark & Marshall, A Treatise on the Law of Crimes at 226-28 (7th ed. 1967).

(C) is incorrect because the malice and premeditation of the crime are not sufficient to constitute an attempt.

(D) is incorrect because an attempt crime and a conspiracy crime do not merge into each other.

Note that, if you’re also taking the New Jersey bar exam, New Jersey adopts the minority position that a “mere solicitation of criminal conduct, unaccompanied by an overt act in furtherance, rises to the level of an attempt by the solicitor.” State v. Sunzar, 751 A.2d 627 (N.J. Super. 1999). Thus, in New Jersey, choice (A) would be correct.

Some courts hold that a solicitation can be an attempt where the solicitor urges the immediate commission (not in the future) of the crime and the cooperation or submission of the person solicited is an essential part of the crime (e.g., attempted child abuse or soliciting a nine-year-old to engage in fellatio). Ward v. State, 528 N.E.2d 52 (Ind. 1988).
6. A husband confronted his wife about her adulterous relationship with the mailman. The wife just laughed and said she would not stop seeing the mailman. She then went to work.

The husband took his loaded gun, went to his wife’s office, pointed the gun at her head and pulled the trigger. Nothing happened because the gun was broken.

What is the most serious crime for which the husband can be properly convicted?

(A) Aggravated assault.
(B) Attempted murder.
(C) No crime, because no injury was inflicted.
(D) No crime, because of the husband’s extreme emotional disturbance.

6. Mistake of fact (i.e., thinking that the gun was loaded and functional) is not a defense to the crime of attempt. Thus, choice (B) is the best choice, and (C) is incorrect.

The husband could not successfully assert the defense of extreme emotional disturbance or heat of passion, because, while this defense is available to a murder charge, there was no murder (just attempted murder). Moreover, there was a substantial attenuation and no facts to indicate he was acting under a sustained emotion disturbance. Hence, choice (D) is incorrect.

Choice (A) is incorrect because even though the elements of assault may be satisfied here, attempted murder is a more serious crime (of which the husband can properly be convicted).

Note that, in New York, the courts have extended the extreme emotional disturbance defense to attempted murder. People v. Charles, 13 Misc. 3d 985, 986 (Sup. Ct. Kings Co. 2006).
7. After consuming three beers at a party, a man engaged in consensual sex with his 17 year-old girlfriend. The man thought that the statutory age of consent was 18, but it was really 16.

What is the adult’s best defense to the crime of attempted statutory rape?

(A) Consent.
(B) Factual impossibility.
(C) Legal impossibility.
(D) Intoxication.

7. Statutory rape is a strict liability crime, so the minor’s consent is no defense (neither to the crime, nor the attempt of the crime). Thus, choice (A) is incorrect.

Choice (D) is incorrect. Voluntary intoxication would not be a defense to the crime of statutory rape, which is a strict liability crime. It could be a defense to the crime of attempted statutory rape (which requires the defendant to intend to commit the crime), but only if the defendant’s voluntary intoxication was to such a degree that he could not form the requisite intent to attempt the crime. That is clearly not the case here, where the defendant only had a few drinks. Thus, choice (D) is not a good answer.

Choice (C) is the correct answer. The best defense to the crime of attempted statutory rape is legal impossibility, because what the defendant set out to do (intended) is not against any law. It is distinguishable from factual impossibility where the defendant intends to commit an actual crime, but it is impossible only because of some physical (factual) impossibility unknown to the defendant. See Pieper, NYAA, p. 312 (2014). Therefore, choice (B) is incorrect, and (C) is the correct answer.
8. In efforts to prevent the extinction of its long haired moose, a state enacted a law making it a strict liability crime to kill a long haired moose under 500 pounds. One day, a hunter went hunting in the state and shot a moose he estimated to be 514 pounds. The hunter was correct in estimating the weight of the moose, but at the time he shot the moose, he thought the state statute made it a crime to shoot a moose under 600 pounds, not 500 pounds.

Can the hunter properly be convicted of attempt to violate the statute?

(A) No, because what the hunter was attempting to do was not a crime.
(B) Yes, because, had the circumstances been as the hunter believed them to be, the hunter would have violated the statute.
(C) Yes, because factual impossibility is no defense to the crime of attempt.
(D) Yes, because legal impossibility is no defense to the crime of attempt.

Class discussion:

1. What if the hunter thought the moose was 400 pounds, but when it was weighed by the police, it was 550 pounds?

2. What if the hunter correctly guessed the weight of the moose at 400 pounds, but when the hunter went to shoot it, the gun jammed?

3. What if the hunter correctly guessed the animal’s weight at 400 pounds, but after it was killed, the hunter discovered it was a caribou?

8. Choice (A) is the correct answer. The hunter intended to shoot a 514 pound moose and did so, which is not a crime. Legal impossibility is a defense to the crime of attempt, and, since the hunter was attempting to do something that actually wasn’t a crime, he cannot properly be found guilty of attempt to violate the statute.

Choices (B) and (C) are both incorrect, and are essentially the same answer. Both answers focus on the fact that if the statute did make it a crime to shoot a moose under 600 pounds, the hunter would be guilty of a crime, so he should be convicted of attempt. However, the hunter would have the defense of legal impossibility here, because the statute does not make it a crime to shoot a moose under 600 pounds, and the hunter was actually attempting to shoot a 514 pound moose.

Choice (D) is incorrect because it is an incorrect statement of the law - legal impossibility is a defense to the crime of attempt (as attempting to do something that is not actually illegal is not a crime).
9. A hunter was out in the woods hunting deer. Thinking that a rustling in the bushes to his right was a deer, the hunter fired his gun into the bushes. The bullet struck a victim, who was using the bushes as a bathroom. The victim would have died within four hours from the wound.

Several minutes later, the victim staggered out of the bushes and collapsed on the path leading back to his home. The victim’s ex-fiancé discovered the victim bleeding and disoriented. Furious at the victim for having weeks earlier broken their engagement, she stabbed him in the neck with a hunting knife. The stab wound would have caused the victim’s death in three hours, but, because of the combined injuries (the knife wound and gunshot wound), the victim died in one hour.

Can the hunter and the ex-fiancé properly be found guilty of the victim’s homicide?

(A) No, because the hunter’s wound was inflicted first and would have caused the victim’s death in any event.
(B) No, because the ex-fiancé deliberately hastened the victim’s death.
(C) No, because it is impossible to determine which of the two injuries was the proximate cause of the victim’s death.
(D) Yes, because they each inflicted injuries that either caused or accelerated the victim’s death.

9. The correct answer is choice (D) because, where two defendants inflict separate lethal wounds and the victim dies, both are guilty of homicide if each lethally inflicted injury was a substantial factor in causing or accelerating the victim’s death. Since both the hunter and ex-fiancé can properly be convicted of homicide, choices (A), (B), and (C) are incorrect.

If the ex-fiancé’s stab wound cut the victim’s carotid artery instantly causing the victim’s death, then the hunter’s gunshot wound would not have been a substantial factor in bringing about the victim’s death, and the hunter would not have been liable for the victim’s homicide.

If the hunter’s gun shot wound would not have caused the victim’s death, but, because of the knife wound that the ex-fiancé inflicted, the victim died, the hunter would not be guilty of homicide.

Query: under this scenario, would the hunter be guilty of attempted murder?
No, because the mental element of “intent” is required for the crime of attempt, and the hunter never intended to kill the victim.
10. One night, a student was waiting for his least favorite professor to come along a wooded path that led from the university to the professor’s home. The student was armed with a baseball bat; he intended to break both of the professor’s kneecaps for giving him a failing grade.

At 2:00 a.m., the student saw a figure approaching and thought it was the professor. The student hit the figure several times, breaking both of his kneecaps. In fact, the figure was not the professor but an elderly passerby, who had a weak heart and died of a heart attack a few hours after the student’s attack.

First-degree murder is defined in the jurisdiction as an intentional killing or a homicide that occurs during a felony. Second-degree murder is defined as all other common law murders. Manslaughter’s definition is the same as the common law definition in the jurisdiction.

What is the most serious crime for which the student can be properly convicted?

(A) First-degree murder.
(B) Second-degree murder.
(C) Voluntary manslaughter.
(D) Attempted murder.

10. There was no intent to cause death so there could be no intentional murder. At common law, the crimes of larceny, assault, and battery were not predicate felonies for a felony murder (they are not predicate felonies in New York, either). Thus, choice (A) is incorrect.

There was no crime of attempt to commit murder because the student was not trying to kill the professor (or the passerby). Thus, choice (D) is incorrect.

This was not voluntary manslaughter since there was no intentional killing in the heat of passion or by an imperfect defense. Likewise, it was not involuntary manslaughter because the student was not aware of the substantial risk of the passerby’s weak heart, i.e., a substantial risk of death. Thus, choice (C) is incorrect.

Second-degree murder, choice (B), is the correct answer because the student intended to cause serious injury and death resulted. Note that, under New York law, the correct answer would be (C).
11. A man and a woman were fooling around with a Colt .45 caliber pistol in the woman’s basement. The man aimed the pistol in the woman’s direction and intentionally fired two shots slightly to the woman’s right. One shot ricocheted off the wall and struck the woman in the back, killing her instantly.

What is the most serious crime for which the man can be properly convicted?

(A) Murder.
(B) Voluntary manslaughter.
(C) Involuntary manslaughter.
(D) Assault with a dangerous weapon.

11. The man’s conduct carries with it a high likelihood of death and has no social justification. Intent can be inferred from such conduct. Under the “deadly weapon doctrine,” “one who intentionally uses a deadly weapon on another human being and thereby kills him presumably (inference) intends to kill him.” LaFave, Criminal Law §14.2(B) at 775 (5th ed. 2010). The intentional use of a deadly weapon authorizes the jury’s instruction on this inference. Here, the man used a deadly weapon and death resulted, so the crime is “depraved mind” or “depraved heart” murder. Therefore, choice (A) is the correct answer.

The man cannot be convicted of voluntary manslaughter because the facts do not evidence an intentional killing committed in the heat of passion or by an imperfect self-defense. Choice (B) is therefore incorrect.

Choice (C) is a justifiable answer if you believe that the conduct was merely reckless and not outrageous enough to qualify for the “depraved heart” doctrine. This is a judgment call, but the better argument is that this highly-dangerous use of a weapon in an enclosed room pushes the crime over the line into murder. It was clearly foreseeable that the bullet the man fired into the wall might ricochet and strike the woman, and the man’s grossly reckless conduct evinces his depraved indifference to the value of human life. Moreover, the question asks for “the most serious crime.”

Choice (D) is incorrect because the woman died and the man may properly be convicted of murder.
12. A woman borrowed $500 dollars from a man and promised to pay it back within ten days, together with interest at the highest rate permitted by law. The woman figured she’d pay the man back in a few days, when her next paycheck came. However, the following weekend, the woman took the $500 to the race track and lost all of the money on horse wagering. She panicked and immediately left town.

Can the woman properly be convicted of a crime?

(A) Yes, she is guilty of larceny by trick.
(B) Yes, she is guilty of larceny by false pretenses.
(C) Yes, she is guilty of common law larceny.
(D) No, she is not guilty of a crime.

12. Choice (D) is the correct answer. At the time the woman borrowed the $500, she did not have the larcenous intent to deprive the man of the property. What we have here is simply someone who intended to pay back $500, but who is not in a financial position to do so. Her unwillingness or inability to pay back the $500 is a basis for a civil breach of contract claim, but not for any form of criminal larceny. A breach of contract is not usually a larceny. See Pieper, NYAA, p. 345-46 (2014).
13. While walking along the street in the downtown section of a large city, a man found a plain white envelope, opened it, and found $750 inside. He put the $750 from the envelope in his wallet. He then went to a used car lot and bought a car for $500. He handed the lot owner 11 fifty dollar bills for the car, thinking he was handing over only 10. Later that day, the lot owner counted the bills a second time and discovered the error, but did not return the $50 to the man.

By keeping the extra $50 paid to him, of which crime could the lot owner properly be convicted?

(A) Receiving stolen property.
(B) Embezzlement, because he obtained lawful possession of the money.
(C) Larceny.
(D) Obtaining property by false pretenses, because title to the cash passed to him.

13. Usually the transfer of possession of money involves passing title, but here there was no intent to pass title to the extra 50 dollar bill. However, the lot owner’s initial possession of the extra bill was not wrongful. It became wrongful once the lot owner discovered the error and decided not to return the overpayment. By converting a bill of which he had rightful possession, but not title, the lot owner committed embezzlement, as stated in choice (B).

Choice (A) is incorrect because the facts do not indicate that the money was stolen. Rather, it was abandoned, and the man took possession of it. Furthermore, even if the money had been stolen, the lot owner wouldn’t have been guilty of receiving stolen property because he did not know it was stolen, and did not have the specific intent to receive stolen property.

Choice (C) is incorrect. There was no larceny because the crime was against title, not possession. The lot owner did not have the specific intent to deprive the man of the money when he received it.

Choice (D) is incorrect because the lot owner did not obtain the money through fraudulent misrepresentations.
14. A sales clerk worked as an employee in a ladies’ dress shop. While she was alone in the store one day, she placed an expensive evening gown in a box and placed it on the shipping dock. She intended to come back that evening to pick the box up and take it home so that she could give it to her sister, who was queen of the senior prom. However, the sales clerk had to work late, and when she finally went to pick up the box, it was no longer there. A stranger who had seen the sales clerk place the box on the dock took it as soon as the clerk left.

Of which crime could the sales clerk properly be convicted?

(A) Larceny.
(B) Embezzlement.
(C) Attempted larceny.
(D) Criminal facilitation.

14. As an ordinary employee, the sales clerk had only custody, not possession, of the goods which were for sale in her employer’s store. She committed a trespassory taking from the possession of the employer and carried away the good (the evening gown) when she moved it from the store to the shipping dock. All the while, she had the intent to permanently deprive her employer of the gown. She is therefore guilty of larceny and choice (A) is correct.

Choice (B) is incorrect because the clerk had only custody of the gown, not possession, so she did not commit the crime of embezzlement.

Choice (C) is incorrect because the clerk had performed all of the elements of larceny when she moved the box to the loading dock. She did not need to move the box from the employer’s property to complete the crime, nor did she actually have to maintain possession of the gown to complete the crime.

Choice (D) is incorrect. A facilitator is someone who believes she is rendering aid to a person who is committing a crime, but who does not share intent and does not participate in the crime. The sales clerk did not even know the stranger who took the dress, and obviously did not believe she was assisting the stranger in taking the gown. In fact, the stranger was interfering with her own attempt to steal the gown, and (D) is clearly incorrect.
15. While visiting a wax museum, a teenager removed the valuable diamond necklace from around the neck of a wax figure. After hastily leaving the wax museum, worried that she might be caught, she threw the necklace in some bushes as she walked along a public street. She intended to come back that night and retrieve the necklace.

However, an hour later, a jogger was jogging along the same sidewalk and happened to spot the necklace in the bushes. It had no identifying features on it. Before deciding whether to keep it or try to find the owner, the jogger decided to have it cleaned and appraised. Accordingly, she left the necklace with a jeweler. The following day, while cleaning the necklace, the jeweler immediately realized its value, and switched the necklace with a much less valuable necklace. He gave the less valuable necklace to the jogger, who did not notice the switch.

That evening, the jeweler’s cleaning lady noticed the necklace lying in an open drawer in the jewelry store. She took the necklace to let her mother wear it to a Rotary Club dance that evening, intending to return it the next day. After her mother wore it to the dance, she mentioned that she was the center of attention and that she really adored the necklace. The cleaning lady told her mother to keep it as a birthday present.

The following week, when the press broke the story of the necklace stolen from the wax museum, the cleaning lady’s mother recognized that she now possessed the necklace that was stolen. She went to the wax museum proprietor, who was offering a $100,000 reward for its return, and told him that if the reward offer would be increased to $250,000, she might be able to have the necklace returned. The museum declined her offer.

Who is guilty of common law larceny?

(A) The jogger.
(B) The jeweler.
(C) The cleaning lady.
(D) The cleaning lady’s mother.

15. The finder of lost or mislaid property is not guilty of larceny unless, at the moment of finding the property, she (1) intends to steal it, and (2) either knows who the owner is or has reason to know (from the circumstances or from earmarking on the property) that she can locate the owner. Thus, the jogger (choice (A)) is not guilty of common law larceny.

The jeweler (choice (B)) is not guilty of common law larceny since there was no wrongful taking. The necklace was given to the jeweler. The jeweler would be guilty of embezzlement, but not common law larceny.

Initially, the cleaning lady did not intend to permanently deprive the jeweler of the necklace; she intended to return it the next day after her mother wore it to the dance. However, while it was in her bailment, she formed the intent to permanently deprive the owner, which amounts to a common law larceny (choice (C)). Note that a thief (the cleaning lady) need not take the property from the true owner (the wax museum) to be guilty of larceny. A second thief is guilty of larceny even though she steals the property from the first thief.

The cleaning lady’s mother is not guilty of common law larceny (choice (D)) because when she received the gift, she committed no “wrongful taking.” She is not even guilty of the crime of receiving stolen property because at the moment she received the necklace to wear to the ball, she did not know the necklace was stolen property.

Thus, choice (C) is the correct answer, and choices (A), (B), and (D) are incorrect.
16. A homeless man broke the lock on his estranged brother’s back door, intending to sneak in the next night and steal anything of value in the house. The next night, the man entered the home, but without the intent to steal anything - he simply wanted to keep warm. The man was hungry, so before he went to bed, he broke the lock on his brother’s pantry, and grabbed some cans of food, which he ate.

Could the man properly be convicted of common law burglary?

(A) No, because he did not simultaneously “break and enter” into his brother’s home.
(B) No, because, as the man’s brother, he had implied permission to enter.
(C) Yes, as soon as he broke and entered into his brother’s home with the intent to steal.
(D) Yes, as soon as he broke and entered into his brother’s pantry with the intent to steal.

16. This is a tricky question.

At common law, burglary was defined as breaking and entering into the dwelling of another, at night, with the intent to commit a felony therein. Note that at common law, larceny was a felony. To constitute burglary, the breaking and entering did not have to occur simultaneously. “If a man cause[d] a breaking on one night and return[ed] the next and entere[d] through the breach he previously created, then there would be a sufficient breaking and entering to sustain the offense.” LaFave, Criminal Law § 21.1(b) at 1073 (5th ed. 2010). For this reason, choice (A) is incorrect.

The man here did “break” and “enter” his brother’s home (a dwelling) at night, but did not have the intent to commit larceny when he entered. Thus, choice (C), while tempting, is also incorrect.

Choice (B) is incorrect, because it erroneously implies that the man was entitled to enter his brother’s home by virtue of their familial relationship (an incorrect statement of law). Furthermore, nothing in the facts indicates that the man had implied permission to enter his brother’s home and, in fact, one can infer that he did not have permission, based on the assertion in the facts that the brothers were “estranged.”

Choice (D) is the correct answer. At common law, if a person gained even lawful entry into the home of another, that person’s lawful access to places in the home was limited. “When the authority granted was restricted ... there was a breaking when the structure was opened in violation of these restrictions. ... A breaking occur[ed] if a part of the house was opened even though the original entry into the structure was gained without a breaking.” Id. at 1071. Accordingly, when the brother broke and entered into his brother’s pantry at night with the intent to steal food, he committed burglary.

*Note that if the brother had opened “an article which was not a part of the structure” of the house (e.g., a jewelry box), this would not suffice as a breaking if the brother had permission to be in the house. Id. at 1071.
17. A man lived next door to an elderly woman who lived alone. The woman usually greeted him every morning as he was leaving for work. Concerned because he had not seen her in three days, the man called the woman’s home that night. When she did not answer, the man worried that something may have happened to her, and entered the woman’s home with a key she had given him to use in the event of an emergency. The man discovered the woman lying on the kitchen floor, unconscious, and called an ambulance. Before the ambulance arrived, the man noticed a watch on the woman’s kitchen table and took it because he thought it was the one he had misplaced the previous year. The watch actually belonged to the woman’s nephew.

If the man is charged with common law burglary, which of the following is NOT a viable defense?

(A) He had the woman’s permission to enter in case of emergency.
(B) He did not intend to take the watch when he entered.
(C) Larceny is not a felony.
(D) He thought the watch belonged to him.

17. At common law, burglary was breaking and entering the dwelling of another in the nighttime with the intent to commit a felony therein.

“The law was not ready to punish one who had been ‘invited’ in any way to enter the dwelling. The law sought only to keep out intruders, and thus anyone given authority to come into the house could not be committing a breaking when he so entered.” LaFave, Criminal Law § 21.1(a) at 1070 (5th ed. 2010). Here, the man’s entry was privileged and not unlawful. The woman had given him permission to enter in just the kind of emergency situation that occurred. Thus, the man can successfully assert choice (A) as a defense to the burglary charge, and so choice (A) is incorrect.

To support a burglary charge, the defendant must have the specific intent to commit a crime at the time of the breaking and entering. Accordingly, choice (B) is a good defense to the burglary charge, and so choice (B) is incorrect.

Choice (C) is the correct answer because larceny was a felony at common law.

Choice (D) is incorrect because a claim of right or claim of title defense was, at common law, a valid defense to the crime of burglary. Since the man here honestly believed that the watch was his, he did not have the specific intent required for larceny, which is the only crime he committed that might have supported a burglary charge under these facts. Note that in New York, claim of title is not a defense to a burglary charge.
18. A man was angry at his neighbor with whom he had quarreled earlier in the week. For revenge, the man removed the neighbor’s beloved stone statue from the neighbor’s garden and concealed it in his garage. He discreetly replaced it the next day, after giving the neighbor a chance to feel bad over its being stolen. The next night, to torment his neighbor one last time, the man called the neighbor’s house and, in a phony accent, said “I can see you walking around in your blue robe, and I’ll be in shortly to kill you.” He then hung up the phone, fired a shotgun up into the sky just outside his neighbor’s window, and went to sleep. The neighbor, scared senseless, called the police.

What is the most serious crime for which the man may be properly convicted?

(A) Larceny.
(B) Attempted larceny.
(C) Attempted murder.
(D) Criminal assault.

18. Choice (A) is incorrect because the man did not intend to permanently deprive the man of the statue - he merely took it and replaced it the next day, without damaging it.

Choice (B) is clearly incorrect because the man actually succeeded in taking the statute, so, if anything, this would be larceny (but it isn’t larceny for the reasons stated above).

Choice (C) is incorrect because the man did not intend to murder his neighbor, but, rather, to badly scare the neighbor. The facts clearly state that the gun was fired into the air, and that the man intended to scare (not kill) his neighbor, so there is not enough here to sustain a conviction of attempted murder.

Choice (D) is the correct answer. An MBE criminal assault (which NY refers to as “menacing”) occurs when a person has the present immediate ability to do so and intends to cause immediate apprehension of serious harm or death. The person must also have the specific intent to create apprehension, the acts must actually cause apprehension, and there must be an overt act. The defendant’s conduct here clearly fulfills all of these criteria, making (D) the correct answer.
19. Late one evening, a bartender about to drive the bar manager and a waitress home from work, mentioned to them that she wanted to stop by the house of her friend “Rob” on the way. The bartender simply wanted to retrieve five compact disks that her friend had borrowed a week earlier. The friend had given the bartender permission to enter the house with her colleagues if he was not home.

Because of the loud music in the bar, the manager thought the bartender said she was going to “rob” the discs from her friend’s house. He agreed to go with her anyway. The waitress knew that the bartender’s friend had given them permission to enter his house, but she entered with the intent to steal any valuable item if she thought she would not get caught. When the trio got to the friend’s house, no one was home, but the front door was unlocked. All three entered. During the brief visit, the waitress stole a valuable diamond ring and the bartender took the five compact discs.

Is the waitress guilty of common law conspiracy?

(A) No, because no one else agreed to commit the crime of larceny with her.
(B) No, under the Wharton Rule.
(C) Yes, because there was no plurality requirement for conspiracy at common law.
(D) Yes, because she took the ring with the intent to permanently deprive the owner of it, and the bartender drove the getaway car.

19. The correct answer here is choice (A). In this problem, no two people ever agreed to commit any single crime. The bartender never had any intent to commit a crime. Clearly, she never intended to permanently deprive her friend of his property. The waitress, while she certainly committed larceny, never agreed with anyone to commit her intended crime. While the bar manager may have thought he was assisting the bartender in a crime, he was mistaken, since the bartender had no intent to steal. Thus, since common law does not recognize the doctrine of unilateral conspiracy, choice (A) is correct.

Choice (B) is incorrect because the Wharton Rule prohibits the conviction of two people of conspiracy when the crime itself takes two people to commit. The Wharton Rule is not at issue here because there was no agreement between any two people to commit any crime, and because the Wharton Rule would not apply to larceny, anyway (because larceny does not, by definition, take two people to commit).

Choice (C) is incorrect because it is an incorrect statement of law (i.e., there was a plurality requirement at common law), and the waitress is not guilty of conspiracy.

Choice (D) is also incorrect because there was no illegal agreement to commit the crime.
20. A teenage girl (15 years old) appeared and acted older than her age. When asked, she always said she was 22, and she carried false identification saying she was that old. The girl frequented taverns and drank heavily. One evening in a bar she became acquainted with a senior in college. The college student believed her when she told him that she was 22 years old. They had several drinks and became inebriated. Later, they drove to a secluded spot. After they had been kissing for a while, the college student sexually propositioned the girl, and she consented. However, before the college student achieved penetration, the girl changed her mind. She started crying and told the college student she was only 15 years old. He immediately jumped from the car and ran away. Later, he was indicted for attempted statutory rape. The age of consent in the jurisdiction is 17.

What is the college student’s best defense to the attempted statutory rape charge?

(A) The girl consented before he attempted intercourse.

(B) His acts did not go beyond mere preparation.

(C) He did not intend to commit statutory rape.

(D) His reasonable mistake of fact would prevent him from being guilty of the substantive crime, even if he had completed the actus reus.

20. Choice (A) is incorrect because lack of consent is not an element of statutory rape and, thus, is not an element of attempted statutory rape.

Choice (B) is incorrect because, before desisting, the college student had already gone far enough toward committing the substantive offense to have committed an attempt. Moreover, he only desisted after the girl told him her age.

Choice (D) is incorrect. A reasonable mistake of fact as to the minor’s age is not a defense in most states to the crime of statutory rape.

Choice (C) is correct because, in order to be guilty of an attempt, there must be an intent to commit the substantive crime, even if the substantive crime itself does not require mens rea. The mistake about the girl’s true age prevented that intent from forming.

See Pieper NYAA at 313 (2014).
21. A drunken bar patron believed that the bar’s bouncer had intentionally elbowed him, and he became irate. In fact, the bouncer had not touched him at all. The patron began to berate the bouncer, commenting on his weight and calling him an idiot. While the patron was ranting, he slapped a drink out of a woman’s hand. In response, the bouncer took the patron by the arm, and informed the patron that he was being escorted out of the bar. The bar patron immediately threw a punch at the bouncer, but missed. The bouncer then threw his own punch, which broke the patron’s nose.

Does the bouncer have a viable defense to the crime of battery?

(A) Yes, because the bouncer engaged in justified self-defense.

(B) No, because the bouncer had the duty to retreat.

(C) No, because the bouncer assumed the risk of injury in accepting his position.

(D) No, because the bouncer was the first one to lay hands on the bar patron, rendering the defense of self-defense unavailable.

21. In MBE, justification is an affirmative defense, which entirely relieves a defendant from criminal culpability when his otherwise criminal conduct was permissible under the circumstances to prevent immediate, unlawful force or conduct by another. The defendant’s conduct is judged based upon a reasonable person standard (i.e., a reasonable person would have used a similar amount of force under the circumstances). “One who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (A) that he is in immediate danger of unlawful bodily harm ... and (B) that the use of such force is necessary to avoid this danger.” LaFave, Criminal Law § 10.4 at 569 (5th ed. 2010). As to the amount of force, “[o]ne may justifiably use nondeadly force against another in self-defense if he reasonably believes that the other is about to inflict unlawful bodily harm ... upon him ....” Id.

In this fact pattern, it was the bar patron who initiated the conflict, and the bouncer’s conduct was reasonable under the circumstances. The patron was causing a scene and threw a punch at the bouncer, and the bouncer was entitled to use non-deadly force to defend himself from the patron’s attack. Accordingly, choice (A) is the correct answer.

Choice (B) is incorrect because there is no duty to retreat when using non-deadly force in response to the unlawful use of force by another.

Choice (C) is incorrect because the assumption of the risk doctrine does not apply to intentional harm to a person.

Choice (D) is incorrect because it erroneously implies that the first person to make any physical contact with another waives his right to a self-defense claim, which is an incorrect statement of the law.
22. A Yankee fan was standing next to a Red Sox fan at a hotdog stand at a baseball game. The Yankee fan made some insulting remarks about the Red Sox fan and the Red Sox. The Red Sox fan was insulted and approached the Yankee fan with a clenched fist, ready to swing at him. The proprietor of the hotdog stand, wishing to avoid an incident, opened the door so that the Yankee fan could easily retreat behind the counter. The Yankee fan declined to do so and, instead, punched the Red Sox fan in the face.

Can the Yankee fan be properly convicted of assault and battery?

(A) No, because he acted in the heat of passion.
(B) No, because he used less than deadly force and had no obligation to retreat.
(C) Yes, because he failed to retreat.
(D) Yes, because he provoked the fight.

22. In this question, the defendant used non-deadly force and failed to retreat.

Choice (A) is incorrect. The defense that a defendant acted in the heat of passion is not relevant to a charge of assault and battery. It might be relevant to a charge of murder or manslaughter, but not here.

Choice (B) is correct. There is no duty to retreat from an assault when using non-deadly force in self-defense. In some jurisdictions, like New York, there is a duty to retreat before using deadly force.

Choice (C) is incorrect. The Yankee fan had no duty to retreat, because he used non-deadly force.

Choice (D) is incorrect. The Yankee fan did not provoke the fistfight. The Yankee fan may have insulted the Red Sox fan, but the insult did not give the Red Sox fan the right to use physical violence against him. The physical violence was initiated by the Red Sox fan, and, therefore, the Yankee fan had a right to use reasonable force in self-defense.
23. A taxicab driver had been the victim of numerous armed robberies while driving his cab in high-crime areas. The driver consulted with his attorney about his legal rights to defend himself. The attorney advised the driver that he could legally carry a loaded pistol for his protection. The state penal law, however, prohibited “the knowing possession of a firearm in a private or public vehicle.” The taxicab driver was arrested for possession of a firearm a few days after speaking to his attorney.

Can the driver properly be convicted of possession of a firearm?

(A) No, because the attorney’s mistaken advice negated the mens rea necessary for the driver’s conviction.
(B) No, because reasonable reliance on the advice of an attorney is a complete defense.
(C) Yes, because mistake of law is not a defense to the underlying crime.
(D) Yes, because the attorney’s legal advice is hearsay and inadmissible as such if the driver testifies.

23. The attorney’s mistaken advice is not a defense since a defendant’s mistake of law is not a defense to a crime. Thus, choice (C) is correct, and choice (B) is incorrect.

Choice (A) is incorrect because the driver’s mistake of law did not negate the mens rea of knowingly possessing a pistol. The driver knew he was possessing the gun, thus satisfying the statute, and his lack of knowledge or erroneous understanding of the law is not a defense.

Likewise, choice (D) is incorrect because the driver’s testimony about what his attorney told him would not be offered for the truth of what was said but, rather, to show the driver’s innocent state of mind. Thus, it is not hearsay, and would not be inadmissible on that ground if offered into evidence at trial.
24. A husband and wife were the stars of a Shakespearean tragedy being played in an off-Broadway stage production. In the final scene of the play, the boy who played the couple’s ten-year-old son in the production was supposed to stab his character’s father (played by the husband) to death. Two weeks before the play opened, the wife discovered that the husband was having an affair with another actress in the play (his mistress). In a fit of passion, the wife convinced the boy that he should play a supposed joke on the audience on opening night by shooting her husband instead of stabbing him. She gave the boy a gun, telling him it would only shoot blanks. She then loaded the gun with real bullets. During the final scene of the play, the boy shot at the husband, but the bullet missed and killed the husband’s mistress instead.

In a heat of passion jurisdiction, can the woman properly be convicted of murdering the mistress?

(A) No, because she lacked the intent to kill the mistress.
(B) No, because her crime was a heat of passion crime, so she can only be convicted of manslaughter.
(C) No, because she did not actually fire the bullet that killed the mistress.
(D) Yes, because of her premeditated plan to murder her husband.

24. Since the wife used the boy as her unwitting agent, she is as guilty as if she had pulled the trigger herself. She intended to kill her husband and came close to accomplishing her goal. Under the doctrine of transferred intent, the malice in attempting to kill her husband is carried over to the substantive crime of killing his mistress. Since the wife was engaged in an intentional killing, the crime is murder and choice (D) is the correct answer. Note that the woman would also be liable for the attempted murder of her husband, though this is not asked.

As stated above, under the doctrine of transferred intent, the wife’s intent to kill her husband is transferred to the mistress, so choice (A) is incorrect.

Choice (B) is incorrect because the wife’s mens rea is sufficient for murder. Even though the wife was in a heat of passion jurisdiction, that passion should have cooled during the two weeks prior to the time the gun was used. This murder was premeditated, and there was a sufficient period of reflection during which the wife could have changed her mind and did not, which makes her guilty of murder.

Choice (C) is incorrect because it erroneously implies that a person (here, the wife) must be in control of the weapon that resulted in the death to be guilty of murder, which is not the case.
25. Two police officers stopped an automobile driven by the defendant for improperly proceeding through a red light. When one officer ran the driver’s license, he discovered that the defendant was driving with a suspended license. He ordered the defendant out of the car, arrested the defendant for illegally driving with a suspended license, and placed him in the back seat of the police cruiser. The other officer then searched the entire car, including the trunk, and found a pistol, for which the defendant did not have a permit.

The defendant was charged with illegal possession of a firearm. The defendant brought a motion to suppress the introduction of the pistol into evidence.

Should the defendant’s motion to suppress be granted?

(A) No, because the officer conducted a lawful search incident to an arrest.
(B) No, because the officer conducted a lawful inventory search.
(C) No, because the officer conducted a lawful automobile search.
(D) Yes, because the officer’s search of the vehicle was unlawful.

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25. In a search incident to an arrest, the police may make a warrantless search of a passenger compartment of an automobile incident to the arrest of an occupant or recent occupant ONLY IF: (1) the passenger cannot be safely secured and is within reaching distance of the passenger compartment of the vehicle at the time of the search; or (2) there is reason to believe that evidence of the offense of arrest exists in the vehicle. Arizona v. Gant, 556 U.S. 332 (2009). Note that where a search incident to a lawful arrest is permitted under Gant, the search is only proper if conducted in the area within the defendant’s control at the time of the search, a precedent set forth in New York v. Belton, 453 U.S. 454 (1981). If a search is permitted under Gant, then anything that the officers find in the passenger compartment of the car (including the glove compartment, consoles or closed containers, but not the trunk), falls into the search incident to arrest exception, and can be admitted against the defendant at trial. Belton, 453 U.S. at 460 n.4. In this case, Gant did not authorize a search incident to arrest, because: (1) the defendant was arrested for driving with a suspended license, and there is no reason to believe that evidence of the offense of driving with a suspended license would exist in the vehicle, and (2) the defendant was secured in the back of the police car at the time of the search. Thus, choice (A) is incorrect.

An inventory search occurs when police properly impound a car and search it while it is in their control to make sure that assets of the owner of the car are fully accounted for. For a warrantless inventory search to be proper, the police must conduct it according to the police department’s articulated, standard criteria or an established routine designed to limit what can be arbitrarily searched and seized. The facts here say said nothing about such a standard, so (B) is incorrect.

Because of a lessened expectation of privacy in a car as compared to a home, and because of the inherent mobility of a car, which can prevent the police from easily obtaining a search warrant and searching it, the police are permitted to make a complete search of an automobile, including the trunk, if there is probable cause to believe the car contains the fruits, evidence or instrumentality of a crime. Here, no such probable cause existed. As such, it was improper for the officer to search the vehicle, and (C) is incorrect.

For the above stated reasons, there was no legal basis for the officer to conduct a warrantless search of the defendant’s automobile, and (D) is correct.
26. A police detective received information from an informant, who had given reliable information many times in the past, that the defendant was a narcotics dealer. Specifically, the informant said that, two months before, while visiting the defendant’s apartment, he saw the defendant sell heroin to a mutual acquaintance. The detective knew that the informant, defendant, and acquaintance were friends. Thereafter, the detective put all this information into affidavit form, appeared before a magistrate, and secured a search warrant for the defendant’s apartment. The search turned up a supply of heroin. The defendant moved to suppress the introduction of the heroin into evidence at trial.

Should the defendant’s motion be granted?

(A) Yes, because a search warrant cannot validly be issued solely on the basis of an informant’s information.
(B) Yes, because the information supplied to the detective concerned an occurrence too remote in time to justify a finding of probable cause at the time of the search.
(C) No, because a detached magistrate issued the search warrant.
(D) No, because the informant had proven himself reliable in the past and the information he gave turned out to be correct.

26. This is an example of the good faith exception in search and seizure. In this case, the police detective prepared affidavits, went before a magistrate, received a search warrant and executed it. The magistrate was probably incorrect in issuing the warrant because the information was stale (2 months old). Nevertheless, her issuance of the warrant makes the search valid unless the detective acted in bad faith, which he did not here. Therefore, choice (C) is the correct answer. See United States v. Leon, 468 U.S. 897 (1984).

Choice (D) is incorrect. Although the informant has proven to be reliable in the past, his information is stale on this occasion. A heroin sale two months earlier does not establish probable cause that there is now heroin at the location, and so the warrant was improperly issued. However, that does not affect its validity when the police detective relied on it in good faith. Furthermore, whether the information an informant gives later turns out to be correct has nothing to do with whether there was probable cause at the time the warrant was issued.

Choice (A) is incorrect because in some circumstances a tip from an informant who has previously proven to be reliable can furnish probable cause, even without additional corroborating evidence.

Choice (B) is incorrect. Even though it correctly states that the warrant was wrongfully issued, suppression of the evidence is not justified here because of the “good faith” exception to the probable cause requirement.
27. A police detective received reliable information from a reliable informant that, on three occasions last week, the defendant had sold drugs to the informant at the defendant’s house. On each occasion, the defendant took the informant’s money, walked out to the defendant’s garage, and reached under the front seat of the defendant’s red car where the drugs were stored. The substance that the informant purchased from the defendant tested positive as cocaine.

Based upon this information, the court issued an arrest warrant for the defendant and a search warrant for the defendant’s house and garage. When the police arrived to execute the warrants, the defendant was standing on the lawn in front of the defendant’s house. The police arrested the defendant. After a search of the defendant’s house and garage, no drugs were discovered.

The defendant’s red car was parked out on the street. On the kitchen table, the police found a set of keys. The police asked the defendant if the keys were to his red car and the defendant told them yes. When they asked if they could search the car, he said nothing. The police then unlocked the car door, reached under the front seat of the defendant’s red car and found cocaine.

Can the drugs properly be admitted against the defendant at trial?

(A) Yes, because the police had implied authorization to search the red car under the search warrant of the house.
(B) Yes, because the defendant consented to the search by remaining silent.
(C) Yes, because there was probable cause to search the red car.
(D) Yes, because the drugs were obtained as the result of a search incident to the defendant’s lawful arrest.

27. A search warrant must describe with particularity the person or place to be searched and the items to be seized. The warrant to search a home does not constitutionally imply a search of a vehicle out on the street. Thus, choice (A) is incorrect.

Voluntary consent to a search is a substitute both for a warrant and for probable cause. However, silence is not consent. Thus, choice (B) is not correct.

A warrantless search of a vehicle is permitted if probable cause exists to believe it contains contraband, under the automobile exception to the warrant requirement. Thus, choice (C) is the best choice.

A warrantless search incident to an arrest is permissible to protect the police from harm’s way and to prevent the destruction of destructible evidence. However, the scope of the search is limited to areas where the defendant might reach to conceal evidence or reach for a weapon. The interior of the locked red car out on the street was not within the reachable area of the defendant, who was arrested on the front lawn. Furthermore, under these facts, the officers could have safely secured the defendant, and once a defendant is secured, it is no longer constitutionally permissible to search his automobile (or “grab area”) incident to his arrest. See Arizona v. Gant, 556 U.S. 332 (2009).
28. Two agents of the Federal Drug Enforcement Agency (DEA) were stationed at an airport observing the passengers who arrived from southern Florida. It was well known that southern Florida drug wholesalers typically ship their cocaine to the northeastern states via couriers who travel by plane. A man and a woman, dressed in flashy, casual clothes, disembarked from the plane carrying hand luggage and quickly made their way from the gate to a nearby telephone. When the telephone conversation was completed, the DEA agents asked the pair if they would consent to a search of their hand luggage in a nearby DEA office. Both consented. After a search of the luggage produced no narcotics, the agents patted down the woman and felt some bulk around her abdomen. The police then carefully searched her person and found a packet containing a kilo of cocaine taped to her abdomen. Both the man and the woman were charged with possession of a controlled substance with intent to distribute. Both of their attorneys made pretrial motions to suppress the drugs. At the pretrial hearing, the man admitted that he was the owner of the kilo of cocaine. The court ultimately denied both defendants’ motions to suppress.

Can the man’s statement be used against him at trial?

(A) No, because the search of the woman infringed upon the man’s right to privacy.

(B) No, because an admission made to obtain standing at a preliminary hearing for the suppression of evidence is not admissible at a subsequent trial if the motion is denied.

(C) No, because the police did not have probable cause to search the woman.

(D) Yes, because his statement was voluntary, knowing, and intelligent.

28. Choice A is incorrect. The search of the woman’s person is not a violation of the man’s right of privacy because the man has no reasonable expectation of privacy in the woman’s person. Thus, the man would have no standing to object to the search, and his right to privacy was not infringed.

Choice (B) is the correct answer, because an admission made to obtain standing at a preliminary hearing for the suppression of evidence is not admissible at a subsequent trial if the motion to suppress is denied.

Choice (C) is incorrect. If the police did not have probable cause to search the woman, and the woman confessed to owning the drugs, her statement could have been suppressed because the statement was the fruit of her poisonous tree. However, here, the man confessed to owning the drugs, but this confession was not the fruit of his own poisonous tree. Thus, the man has no standing to object to the unlawful search of the woman, and he also has no standing to object to the introduction of evidence derived from the woman’s unlawful search.

Choice (D) is incorrect for the reasons explained above in choice (B).
A woman was convicted in federal court of possession of ten kilos of cocaine with intent to distribute. She was sentenced to a prison term. Subsequently, she was indicted by a federal grand jury for conspiracy to distribute the same ten kilos of cocaine. She moved to dismiss the indictment.

Should her motion be granted?

(A) Yes, because the Double Jeopardy Clause protects her against a second prosecution for the same criminal conduct.

(B) Yes, because the Due Process Clause protects her against double punishment for the same criminal conduct.

(C) No, because the Double Jeopardy Clause does not apply when the second prosecution is for violation of a separate statute.

(D) No, because each prosecution is for a different offense.

The U.S. Supreme Court has stated that a substantive crime and a conspiracy to commit that crime are not the same offense for double jeopardy purposes, even though they are based on the same underlying incidents. United States v. Felix, 503 U.S. 378 (1992). Therefore, choice (D) is the correct answer.

Choice (C) is incorrect because it is too broad. If a lesser included offense to the first crime were contained in a separate statute, the defense of double jeopardy would still apply.

Choice (B) is incorrect because the Double Jeopardy Clause of the Bill of Rights (and not the Due Process Clause) affords protection against a subsequent prosecution for a federal crime.

Choice (A) refers to the appropriate clause of the Constitution, but it is nevertheless incorrect because, under the circumstances described above, it is possible to commit (and be punished for) two separate crimes by the same criminal conduct.
30. At defendant’s trial for a murder that occurred in New Town, the prosecution called a witness who testified that she saw the defendant kill the victim. The defendant believed that the witness was 600 miles away in Old Town, engaged in the illegal sale of narcotics, on the day in question. On cross-examination, the defense asked the witness whether she had in fact sold narcotics in Old Town on that date. The witness refused to answer on the ground of self-incrimination.

The judge, over the prosecutor’s objection, ordered that if the witness did not answer the question, her direct testimony should be stricken.

What is the best argument in support of the judge’s order?

(A) The witness had not been charged with any crime and, thus, could claim no privilege against self-incrimination.

(B) The witness’s proper invocation of the privilege against self-incrimination prevented adequate cross-examination.

(C) The public interest in allowing the accused to defend himself outweighs the interest of the non-party witness in raising the privilege against self-incrimination.

(D) The trial record, independent of testimony, does not establish that the witness’s answer could incriminate her.

30. The fact that a witness has not been charged with a crime does not negate the witness’s privilege against self-incrimination. The privilege applies whenever a witness’s answer could possibly subject her to criminal liability in the future. Thus, choice (A) is incorrect.

The witness’s refusal to testify effectively denies the defense the opportunity to question whether the witness actually witnessed the events she claims to have witnessed. Allowing the witness to testify without permitting the defendant to adequately cross-examine the witness endangers the defendant’s constitutional rights; it deprives the defendant the opportunity to effectively defend himself. Thus, the witness should not be allowed to testify or, if already allowed to testify, her testimony should be stricken. Accordingly, choice (B) is the correct answer.

Choice (C) may be a correct statement, but does not effectively rationalize striking the witness’s testimony. Rather, it seems to argue that the witness should not be allowed to claim the privilege. The law does not provide for such a result. Thus, choice (C) is an incorrect answer.

The witness has the right to claim the privilege if there is any possibility that her answer could tend to incriminate her, even if that possibility is not apparent on the record. Since it appears from the facts that there is a possibility that the witness’s testimony could incriminate her, the privilege is available to her, and, thus, choice (D) is incorrect.
31. The defendant failed to apply his brakes in time to avoid a rear-end collision with the victim’s car while driving on a highway. The victim hit his head on the windshield but was not badly hurt. The victim immediately drove his car into a turn-off reserved for disabled vehicles. The defendant failed to stop after the accident. While victim’s car was parked in the turnoff, a truck traveling on the highway veered out of control and crashed into the victim’s car, killing him. The defendant was charged with vehicular homicide and with violating a statute in the jurisdiction that requires all parties involved in a car accident to remain at the scene of the accident and to give their names and addresses to law enforcement authorities. The defendant asserted that the statute violated his right against self-incrimination.

Should the defendant prevail in his defense?

(A) Yes, because the statute does not provide for a right to be warned of the right to remain silent.

(B) No, because the statute is not aimed at an inherently suspect group with regard to the disclosure, and the disclosures are not testimonial in nature.

(C) Yes, because the information required to be disclosed can be an essential link in the evidence necessary to convict him of criminal activity with respect to the accident.

(D) No, even though the answer by itself implicates the defendant in criminal conduct.

31. Choice (B) is essentially the holding of the controlling U.S. Supreme Court decision of California v. Byers, 402 U.S. 424 (1971). The statute is not aimed at an inherently suspect group (in regard to probable criminality) and the required disclosures are non-testimonial in nature and did not entail a substantial risk of self-incrimination. In Byers, the U.S. Supreme Court found that the purpose of the statute was primarily for civil and not criminal prosecution. LaFave, Criminal Procedure § 6.7 at 382 (5th ed. 2009).

Choice (A) is incorrect. Statutes rarely, if ever, decree that arrestees be notified of their right to remain silent; the source of that right is Miranda v. Arizona. Byers, discussed above, rejected the claim that a statute which fails to mention the arrestee’s right to remain silent violates a defendant’s right against self-incrimination.

Choice (C) is incorrect. The Byers decision employed a different rationale, as stated in connection with choice (B).

Choice (D) is incorrect because the Byers decision held that the right against self-incrimination is not implicated by this kind of identity providing statute. Clearly, his answer identifies the defendant, but provide identification does not, by itself, implicate one in criminal conduct.
32. On January 2, a liquor store was robbed by two armed men. The police immediately suspected the defendant and secured evidence sufficient to indict him by January 15.

In June, the defendant sensed that the police suspected him. He went to police headquarters demanding that they indict him if they thought they could convict him because his alibi witness was dying and would not be available to testify much longer. The police did not seek an indictment at that time because they were seeking additional evidence necessary to indict a suspect they believed to be the second armed robber. The defendant’s alibi witness died September 1.

On the first anniversary date of the crime, the police obtained the evidence they needed concerning the second armed robber and immediately brought the evidence concerning the defendant and the second armed robber before the grand jury, which returned an indictment against both.

Four months later, the case was brought to trial and the defendant made a motion to dismiss for failure to give him a speedy trial. Should the defendant’s motion be granted?

(A) No, because the time for speedy trial starts to run from indictment.
(B) No, because the police had good cause for the delay in obtaining an indictment.
(C) Yes, because the defendant was prejudiced when his alibi witness died.
(D) Yes, because the sixteen-month delay between the commission of the crime and the time of trial was unreasonable.

32. The rule with respect to the constitutional right to speedy trial is that the time begins to run from the indictment, not from the time the crime is committed. Therefore, choice (A) is correct.

In a speedy trial motion, the prosecution does not have to show good cause for the delay in seeking an indictment and, therefore, choice (B) is incorrect.

Choice (C) is incorrect because the prejudice did not occur between the indictment and the trial.

Choice (D) is incorrect because the time between the date of the crime and the indictment is irrelevant with respect to determining whether a defendant’s right to a speedy trial has been violated (as explained above). That time frame governs whether the criminal action was brought within the criminal statute of limitations, not whether the defendant’s right to a speedy trial was infringed upon.

Note that there is a distinction between post-indictment delay (governed by the 6th Amendment right to speedy trial) and pre-indictment delay (governed by the 5th Amendment’s due process clause). An unreasonable delay in bringing the indictment without good cause, resulting in actual prejudice to a defendant, requires a dismissal of the indictment (N.Y. even allows dismissal without a showing of actual prejudice to the defendant). It is permissible to delay the indictment, for example, while attempting to find or gather evidence against the defendant’s accomplice or where an undercover agent continued to work under cover. Indeed, one New York court found good cause (witness fear) for a fourteen-year delay in bringing charges against a defendant. “[A] determination made in good faith to delay prosecution for sufficient reasons will not deprive defendant of due process even though there may be some prejudice to defendant.” People v. Vernace, 96 N.Y.2d 886, 888 (2001).
33. An indigent defendant was charged with a misdemeanor carrying a penalty of six months in jail, a $500 fine, or both. The defendant asked for a lawyer, but none was furnished.

At the trial, what is the maximum penalty that the defendant may constitutionally receive if convicted of the crime charged?

(A) Six months in jail, but the sentence should be immediately suspended and two years of unsupervised probation imposed.
(B) Six months in jail and a $500 fine.
(C) A $500 fine.
(D) No penalty, because he cannot be constitutionally tried if a lawyer is not provided.

33. A defendant who has been denied the right to counsel may be tried and convicted, but may not be incarcerated or sentenced to jail. In Alabama v. Shelton, 535 U.S. 654 (2002), the United States Supreme Court said that even a suspended sentence triggers the right to counsel. A suspended sentence may “end up in the actual deprivation of a person’s liberty,” and, thus, may not be imposed where the right to counsel was denied.

In Scott v. Illinois, 440 U.S. 367 (1979), the U.S. Supreme Court held that a defendant had no right to state-appointed counsel if the sole sentence imposed was a $50 fine, even though the penal law authorized a jail sentence up to one year. Therefore, choice (C), where the only penalty is a fine, is correct.

Choice (B) is incorrect because it includes incarceration as part of the penalty, which is improper, as discussed above.

Choice (D) is incorrect because, as noted, a defendant may be tried even though he or she is denied the right to counsel, provided the penalty is restricted to a fine.

Note that the six-month jail sentence is not, as the question might have you believe, a cutoff point which is relevant to the Sixth Amendment right to counsel. The six-month figure is relevant to the Sixth Amendment right to a jury trial.
34. A defendant was arrested for holding up a gas station. He was taken to police headquarters and placed in a room for interrogation. As a police officer started to give him his Miranda warnings prior to questioning, the man confessed that he committed the crime, but refused to discuss the details without an attorney present.

If the defendant is brought to trial and the prosecution, through the police officer who heard it, offers testimony about the defendant’s statement, can the trial judge properly admit the testimony?

(A) No, because it was obtained in violation of the defendant’s Miranda rights.
(B) No, because it was obtained in violation of the defendant’s Fifth Amendment rights.
(C) No, because it is inadmissible hearsay.
(D) Yes, because the defendant’s statement was not the product of interrogation.

34. The issue is whether the Miranda rule will make the defendant’s statement inadmissible against him. Since the statement was made before there was any questioning, it was not the product of custodial interrogation, and therefore did not violate the defendant’s Miranda rights. Therefore choice (A) is an incorrect answer.

Choice (D) is correct because the statement was volunteered, and was not the product of interrogation.

Choice (B) is incorrect because the Fifth Amendment does not serve as grounds to suppress the defendant’s statement in this case.

Choice (C) is incorrect because, while the statement may be hearsay (a statement offered by one party against another to prove the truth of the matter asserted), it falls into the admissions exception to the general rule excluding hearsay testimony. Furthermore, the defense will have the opportunity to cross-examine the police officer. As such, the statement may properly be admitted into evidence.
35. A husband and wife were arrested for robbing their elderly neighbor’s home. The two were taken to police headquarters and placed in an interrogation room. Prior to any interrogation, just as one of the police officers began to administer their Miranda warnings, the husband blurted out that it was all his wife’s idea, and he was a fool to have gone along with it. The wife said nothing.

The husband and wife were to be tried jointly. The husband planned not to take the witness stand, and the wife moved for severance of the trial on the basis that her husband’s statement is inadmissible against her and extremely prejudicial to her.

Should the wife’s motion to sever the trial be granted?

(A) No, because the husband’s statement is a vicarious admission against the wife.
(B) No, because the husband’s statement is admissible as a declaration against penal interest.
(C) Yes, as a matter of discretion.
(D) Yes, as a matter of law.

35. If two defendants are to be tried jointly, Bruton v. U.S., 391 U.S. 123 (1968), requires a mandatory severance of the trial if a confession implicating both defendants is only admissible against one, and neither intends to take the stand. The husband’s statement is admissible against the husband as an admission, but not against the wife, because it is not a vicarious admission (the conspiracy was over when the statement was made). Gray v. Maryland, 523 U.S. 185 (1998). Thus, choice (A) is incorrect.

Nor is the statement admissible as a declaration against interest because only statements inculpatory against the speaker are admissible under this exception, not statements implicating others. Williams v. United States, 512 U.S. 594 (1994). A declaration against penal interest is offered into evidence as a voluntary admission against the declarant. Statements that shift or spread the blame to another fall outside the realm of firmly rooted exceptions to the hearsay rule. Lilly v. Virginia, 527 U.S. 116 (1999); People v. Blades, 93 N.Y.2d 166 (1999). Thus, choice (B) is also incorrect.

If the Bruton rule applies, as it does in this case, the defendant against whom the statement is inadmissible has the right to require a severance as a matter of law. To hold otherwise would deny the wife the right to cross-examine (confront) her husband, who has implicated her in the crime. Therefore, choice (D) is the correct answer, and choice (C) is incorrect.

Note, however, that if the statement can be redacted to not refer to the co-defendant or allude to any other participant in the crime, then the co-defendant is not entitled to a severance because the co-defendant’s confrontation rights have not been violated. People v. Black, 185 A.D.2d 609 (4th Dep’t 1992).
36. The police had probable cause to believe that the defendant killed a victim with a blunt object. The police arrested the defendant as he was walking down the street. At the police station, the police questioned the defendant without first administering Miranda warnings. During his interrogation, the defendant confessed to the killing and told the police that he used a golf club that was in his locker at his country club to kill the victim.

The defendant later made a motion to suppress the confession and the golf club on the basis that his Miranda warnings were not properly administered. The defendant plans to testify at his trial that he did not kill the victim and did not own the golf club.

At the trial, what evidence may the prosecutor introduce on its direct case?

(A) The golf club and the confession.
(B) Only the confession.
(C) Only the golf club.
(D) Neither the confession nor the golf club.

36. If the Miranda rule is violated during police custodial questioning, the appropriate sanction is that any incriminating statements made by the suspect will be suppressed.

Although the derivative evidence rule ("fruit of the poisonous tree" doctrine) applies to Fourth Amendment violations and to violations of the right to counsel (Brewer v. Williams, 430 U.S. 387 (1977) (where a suspect requests counsel, but the police continue custodial questioning), the fruit of the poisonous tree doctrine does not apply to Miranda violations. United States v. Pantane, 542 U.S. 630 (2004). An un-Mirandized statement is a Fifth Amendment, self-incrimination violation. However, the core protection afforded by this right is the prohibition on compelling criminal defendants to testify against themselves at trial. Thus, the clause “cannot be violated by the introduction of non-testimonial evidence obtained as a result of voluntary statements.” Id. at 637. Thus, the golf club could be introduced against the defendant.

Under the Harris impeachment rule (Harris v. New York, 401 U.S. 222 (1971)), the Court held that the voluntary (not coerced) confession could be used against the defendant for impeachment purposes because the privilege cannot be construed to include the right to commit perjury. Thus, the correct choice is (C). Note that the prosecution may also properly introduce the confession on cross-examination to impeach the defendant, if the defendant actually testifies (but may not use the defendant’s confession in its case-in-chief).
# CRIMINAL MENTAL ELEMENTS (MENS REA)

The five major Criminal Mental Elements (MENS REA) are “Crim K”:

<table>
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<tr>
<th>C – CRIMINAL NEGLIGENCE</th>
<th>The MENS REA for Criminal Negligence exceeds that for mere Tort Negligence. It requires a failure by the defendant to perceive a risk so substantial and unjustifiable that it constitutes a gross deviation from the standard of care that a reasonable person would observe in the same situation. Criminal negligence usually requires that the defendant engage in conduct creating or contributing to the substantial risk, which is more than speeding alone (e.g., speeding plus running a red light, speeding plus drag racing, or speeding plus intoxication). <em>People v Cabera</em>, 10 N.Y. 3d 370 (2008).</th>
<th>EXAMPLE: A defendant’s car overturned while traveling at 80 m.p.h. on a dark rural road, killing two passengers. The defendant’s actions did not constitute criminal negligence. <em>People v Perry</em> 123 A.D.2d 492 (4th Dep’t 1986).</th>
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<tr>
<td>R – CRIMINAL RECKLESSNESS (a/k/a Wanton Conduct)</td>
<td>Criminal Recklessness exists when the defendant perceives a substantial and unjustifiable risk, but consciously disregards it and his conduct constitutes a gross deviation from the behavior expected of a reasonable person.</td>
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<td>I – INTENT (called “Purposely” in the Model Penal Code)</td>
<td>Intent exists when the defendant consciously desires to bring about a result or is aware that his conduct is substantially certain to bring it about. <strong>General Intent</strong> just requires that the defendant intend (desire) to perform the physical act prohibited by the penal law. For example, battery, rape, and criminal trespass are general intent crimes. Here, the People do not have to prove specific intent, but merely have to prove that the defendant intended to commit the act. For example, for the crime of rape, the prosecutor need only prove that the defendant intended to engage in nonconsensual intercourse. <strong>Specific Intent</strong> crimes require more than mere intentional doing of a prohibited act (general intent). They require both a prohibited act plus proof of intent to cause some additional specific results or further consequences. They involve a general intent, coupled with the defendant’s subjective purpose of yielding some additional prohibited consequence. For example, the crime of larceny is not just taking the property of another (this alone would be general intent) but requires proof of an additional specific intent to permanently deprive the owner thereof.</td>
<td>EXAMPLE: Burglary is to unlawfully enter a dwelling (general intent) with a specific intent to commit a crime therein. Most intent crimes require a specific intent. The defense of mistake of fact for a general intent crime must be an objective reasonable mistake, whereas with a specific intent crime or for a crime requiring “knowingly” the defendant’s mistake can be objectively unreasonable, provided the jury believes the defendant’s subjective honest belief of the mistaken facts. Proving the criminal defendant’s earlier state of mind is a daunting task. In a criminal case, a jury may be instructed that it may infer that a person intended the natural and probable consequences of his acts, but the jury may not be required to draw that conclusion.</td>
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<tr>
<td>TRANSFERRED INTENT</td>
<td>This tort law doctrine is equally applicable in criminal law. It arises when the defendant’s intentional conduct causes harm to an unintended victim. The transferred intent doctrine is limited to results that cause the same type of harm intended by the defendant. If D intended to throw a bottle and hit X, but he missed X and smashed a store window, there would be no crime of criminal mischief because D did not have the specific intent to commit criminal mischief. His intent was to cause a battery, and his intent cannot be transferred to a different type of crime. Naturally, he would still be liable in tort for the damage to the window and would also be guilty of the crime of attempted criminal battery of X.</td>
<td>EXAMPLE: If D intends to shoot or punch X, but misses and hits Y, the law transfers D’s intent to Y, the unintended victim. Here, D would be guilty of the completed crime as to Y and would also be guilty of an attempt to commit the crime against X.</td>
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<tr>
<td>M - MALICIOUSNESS</td>
<td>Maliciousness exists when the defendant acts either intentionally or recklessly. It does not refer to criminally negligent conduct.</td>
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| **K – KNOWINGLY** | **EXAMPLE:** In the crime of endangering the welfare of a minor, a defendant acts in a manner that the defendant knew was likely to injure the physical, mental, or moral welfare of a minor. The “knowingly” MENS REA here simply requires that the defendant be aware that his conduct would likely result in harm to a child. |
| **Knowingly** exists when the defendant acts with an awareness that certain facts or circumstances exist. A defendant cannot be charged with a crime of knowledge if he acts mistakenly. The MENS REA of knowingly exists when a defendant acts with an awareness that certain facts or circumstances exist which constitute a crime. A person who knowingly causes a particular result or knowingly engages in specific conduct is commonly said to have “intended” the harmful result or conduct. A defendant’s “willful blindness” can be invoked by prosecutors where a defendant took deliberate steps to avoid learning incriminating facts in order to assert a lack of knowledge of the criminal conduct, e.g., Bernard Madoff’s account. Under the doctrine of “conscious avoidance,” the jury will be instructed that they can find a defendant acted “knowingly,” if he acted with willful blindness of particular facts. |
| **EXAMPLE:** In the crime of endangering the welfare of a minor, a defendant acts in a manner that the defendant knew was likely to injure the physical, mental, or moral welfare of a minor. The “knowingly” MENS REA here simply requires that the defendant be aware that his conduct would likely result in harm to a child. |
| **EXAMPLE:** Wesley Snipes was found guilty of willfully violating the tax code by not paying taxes. |
| **EXAMPLE:** D purchased a firearm by providing a false address and falsely stating that she presently was not under indictment for a felony. D was charged with 2 criminal counts: (1) willfully receiving a firearm while under indictment, and (2) knowingly making a false statement to purchase a gun. The mental elements were slightly different for each crime. The false statement crime required a MENS REA of “knowingly” and the other crime required a MENS REA of “willfully.” The false statement crime merely required proof beyond a reasonable doubt that the defendant had acted “knowingly” (i.e., that the defendant had knowledge of the facts constituting the crime). When the defendant testified at trial that she knew she was making a false statement in acquiring the gun, the mental element of “knowingly” was satisfied. The defendant also testified at trial that she knew she was breaking the law when she acquired the gun while under indictment. Accordingly, she acted “willfully.” U.S. v. Dixon, 548 U.S.1 (2006). |
| **WILLFULNESS** | **EXAMPLE:** Wesley Snipes was found guilty of willfully violating the tax code by not paying taxes. |
| Occasionally, MBE will pose a criminal statute requiring a defendant to act Willfully. Willfulness simply means that the defendant acted with knowledge that his conduct was unlawful (i.e., he knew he was breaking the law when he acted). Here, the prosecutor simply proves that the law posed a legal duty, the defendant knew of that duty, and the defendant voluntarily and intentionally violated the duty. Such a statute requires that the defendant act with knowledge that his or her conduct is unlawful. If a person, honestly and in good faith, seeks the advice of a lawyer, and fully and honestly lays out all of the facts before the lawyer, and then in good faith follows the lawyer’s advice believing it to be correct, then the defendant cannot be convicted of a crime which involved a willful and unlawful intent. |
| **EXAMPLE:** Wesley Snipes was found guilty of willfully violating the tax code by not paying taxes. |
| **EXAMPLE:** D purchased a firearm by providing a false address and falsely stating that she presently was not under indictment for a felony. D was charged with 2 criminal counts: (1) willfully receiving a firearm while under indictment, and (2) knowingly making a false statement to purchase a gun. The mental elements were slightly different for each crime. The false statement crime required a MENS REA of “knowingly” and the other crime required a MENS REA of “willfully.” The false statement crime merely required proof beyond a reasonable doubt that the defendant had acted “knowingly” (i.e., that the defendant had knowledge of the facts constituting the crime). When the defendant testified at trial that she knew she was making a false statement in acquiring the gun, the mental element of “knowingly” was satisfied. The defendant also testified at trial that she knew she was breaking the law when she acquired the gun while under indictment. Accordingly, she acted “willfully.” U.S. v. Dixon, 548 U.S.1 (2006). |
| **STRICT LIABILITY CRIMES** | **EXAMPLE:** Violating traffic laws (speeding or DWI), shipping mislabeled drugs or impure food, assaulting a federal officer, selling liquor to minors, bigamy, or having consensual sex with an underage child. Also, recently, a sentence-enhancer was strictly imposed on parties found guilty of possessing large quantities of drugs within 1000 feet of a school. U.S. v. Martin, 544 F.3d 456 (2d Cir. 2008). |
| Strict Criminal Liability is imposed for the welfare of the public to discourage certain conduct. Only proof of the Actus Reus is required, without regard to the defendant’s state of mind. Strict liability crimes are governed by a “tough luck” principle and mistake is not a defense. |
**CRIMINAL ACTORS**

There are for common law categories of criminal actors.

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<thead>
<tr>
<th>PRINCIPAL IN THE FIRST DEGREE</th>
<th>Is the person who actually commits the crime.</th>
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<tbody>
<tr>
<td>PRINCIPAL IN THE SECOND DEGREE, a/k/a the aider or abettor</td>
<td>Is present at the crime and either: (1) intentionally renders some assistance; or (2) stands by with an intent that the crime be committed, and with an intent to render aid if needed. This is someone who is present and encourages or urges the commission of the crime with the same MENS REA as the Principal in the First Degree. The accomplice’s presence must assist, even in a trivial way, the Principal in the First Degree. Where someone “knowingly” provides assistance by providing the means or opportunity to commit a felony, but is indifferent to its success, then some states (New York) have statutes for the lesser crime of Criminal Facilitation. A Facilitator’s MENS REA is “scienter” as opposed to intent. Think of a facilitator as a friend and not an accomplice.</td>
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<tr>
<td>ACCESSORY BEFORE THE FACT</td>
<td>Is the criminal who is not present at the crime scene but who intentionally assisted, encouraged, solicited, commanded, or otherwise aided and abetted another to engage in the crime (e.g., the godfather or Tony Soprano). He has the same MENS REA as the Principal in the First Degree except he is not present at the time of the crime. Frequently, the aider and abettor (a/k/a Principal in the Second Degree) and the Accessory Before the Fact are referred to simply as &quot;accomplices.&quot; Example: G, girlfriend, participated with X and Y in several prior burglaries. At an earlier time, G also accompanied X and Y when they initially scoped out a K-Mart that X and Y eventually burglarized. Despite this, G was not deemed an accomplice because she took no part in the preparation for or perpetration of the crime, did not intend to assist X and Y, and did not counsel, induce, or encourage the crime. She was at home when the crime took place. People v. Weaver, 52 A.D.3d 138, 140 (3d Dep't 2008).</td>
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<tr>
<td>ACCESSORY AFTER THE FACT</td>
<td>Is a person who renders assistance after the crime is completed. Such a person will be charged with the crime of hindering prosecution, a/k/a obstruction of justice, if the People can prove beyond a reasonable doubt that the defendant knew that he was assisting someone who had committed a felony. Here, the defendant must act with a specific intent to prevent, impede, or delay discovery of evidence, or the discovery and apprehension of a felon. This can consist of concealing instrumentalities of a crime, providing money, weapons, or a disguise, or by destroying evidence (e.g., Martha Stewart). Other examples include cleaning up after a murder, helping to dispose of a body, or shredding documents to conceal a felony. The Accessory After the Fact cannot be convicted either as an accomplice or for the crime of conspiracy because his intent was formed and his criminal acts were performed only after the felony had been completed or unsuccessfully attempted. With the exception of the Accessory After the Fact, the 3 other criminal actors are equally punishable for the crimes committed.</td>
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## HOMICIDE

<table>
<thead>
<tr>
<th>Cl Homicides</th>
<th>NY Homicides</th>
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</thead>
<tbody>
<tr>
<td><strong>Felony Murder</strong></td>
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</tr>
<tr>
<td><strong>1stº M</strong></td>
<td><strong>2d º M</strong></td>
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<tr>
<td><strong>Intentional Murder</strong></td>
<td><strong>Intentional Murder</strong></td>
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<tr>
<td><strong>1stº M</strong></td>
<td><strong>2d º M</strong></td>
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<tr>
<td><strong>Gross Reckless Murder (DMM or DIM)</strong></td>
<td><strong>Gross Reckless Murder (DMM/DIM)</strong></td>
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<tr>
<td><strong>2d º M</strong></td>
<td><strong>2d º M</strong></td>
</tr>
<tr>
<td><strong>Serious Bodily Injury Murder</strong></td>
<td><strong>2d º M</strong></td>
</tr>
<tr>
<td><strong>Manslaughter</strong></td>
<td><strong>First Degree Manslaughter</strong></td>
</tr>
<tr>
<td>Two varieties –</td>
<td>Two varieties –</td>
</tr>
<tr>
<td>1. Voluntary (HOP/EED)</td>
<td>1. § from Common Law murder, and</td>
</tr>
<tr>
<td>2. Involuntary (reckless, but not as</td>
<td>2. HOP/EED</td>
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<tr>
<td>egregious as DMM/DIM)</td>
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<td><strong>Mansl</strong></td>
<td><strong>1st º Mansl</strong></td>
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<td></td>
<td><strong>Second Degree Manslaughter</strong></td>
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<td></td>
<td>(Reckless, but not as egregious as DMM/DIM)</td>
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<td></td>
<td><strong>2d º Mansl</strong></td>
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</table>

* While there are four (FIGS) murders at Common Law, there are only three (FIG) murders in NY. All three NY murders are 2dº, except that an intentional murder may be elevated to 1stº if aggravated by particular circumstances: type of killing (e.g., torture, intentional killing during a violent felony), type of victim (e.g., judge or peace officer), or type of killer (e.g., serial killer or prison escapee serving 15 years plus).
DOUBLE JEOPARDY

Double Jeopardy prohibits a second prosecution for the same offense by the same sovereign after an acquittal or a conviction. Also prohibited are consecutive sentences for any lesser included offenses of the crime for which the defendant was convicted. Under the test of Blockburger v. United States, 284 U.S. 299 (1932), in order for separate offenses to exist, each offense must include an element that is not required in the other. For example, double jeopardy would prohibit a consecutive sentence for manslaughter first degree (intent to cause serious injury resulting in death) where the jury also found the defendant guilty of intentional murder. It is impossible to intend to kill someone without also intending to seriously injure that person. Because manslaughter does not require proof of any element beyond the proof offered for the greater offense of intentional murder, it would violate double jeopardy to convict the defendant of both. People v. Biggs, 1 N.Y.3d 225 (2003). Jeopardy attaches when the jury is sworn or, in a bench trial, when the first witness is sworn.

Under the dual sovereignty system, the federal government may try the defendant for the same crime after defendant’s acquittal or conviction in a state court since it is deemed a different sovereign than the state. New York's CPL § 40.20 puts limitations on the dual sovereignty system by preventing New York from trying the defendant for the same offense after a prior trial in another state or federal court.

<table>
<thead>
<tr>
<th>First Prosecution</th>
<th>Second Prosecution</th>
<th>Outcome</th>
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<tbody>
<tr>
<td>Conviction of possession of cocaine.</td>
<td>Conspiracy to distribute cocaine.</td>
<td>The second trial and conviction is allowed since the crimes of drug “possession” and “conspiracy” are different offenses. United States v. Felix, 503 U.S. 378 (1992). New York would not permit the retrial in the above Felix case since CPL § 40.20(2) requires the prosecutor to try all crimes arising out of a criminal transaction in one trial. People v. Biggs, 1 N.Y.3d 225, 231 (2003).</td>
</tr>
<tr>
<td>Defendant appeals guilty verdict.</td>
<td>New trial ordered by appellate court.</td>
<td>New trial is not considered a new jeopardy, but a continuation of the first jeopardy; no violation of the Double Jeopardy Clause.</td>
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<tr>
<td>Defendant is acquitted or a court incorrectly dismisses the People’s case at the close of the People’s case.</td>
<td>Prosecution appeals.</td>
<td>Since a successful appeal would require the defendant to be tried a second time, double jeopardy prohibits this appeal.</td>
</tr>
<tr>
<td>The court sets the defendant’s conviction aside as a matter of law after the jury returns a guilty verdict.</td>
<td>Prosecution appeals.</td>
<td>Appeal does not offend double jeopardy because if the appellate court reverses the trial court, it would simply reinstate the jury’s guilty verdict. The defendant need not be retried. Note that if the court incorrectly dismissed the People’s case on the basis that no case had been established, then a second trial would violate double jeopardy. People v. Brown, 40 N.Y.2d 381 (1976).</td>
</tr>
<tr>
<td>At a suppression hearing, the judge suppresses critical evidence based on a 4th, 5th, or 6th Amendment error.</td>
<td>Prosecution appeals.</td>
<td>Appeal allowed since jeopardy had not yet attached. New York only allows such an appeal if the suppression order completely destroys the People’s case. People v. McIntosh, 80 N.Y.2d 87 (1992).</td>
</tr>
<tr>
<td>Defendant is found guilty.</td>
<td>Defendant successfully appeals and after the second trial defendant is given a longer sentence than was given at the first trial.</td>
<td>This raises a rebuttable presumption of vindictiveness unless the second sentence was a) handled by a different judge or b) based on new evidence that warranted a harsher sentence and was not presented at the first trial.</td>
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<tr>
<td>Judge, without a compelling reason, sua sponte declares a mistrial without defendant's consent.</td>
<td>D.A. commences a second trial. Judge starts a CPLR Article 78 to prohibit the judge from proceeding.</td>
<td>Double jeopardy prohibits the retrial since the defendant is entitled to have the trial completed by the jury that was originally impaneled. See Matter of Robar v. LaBuda, 84 A.D.3d 129 (3d Dep’t 2011). A judge may declare a mistrial without the defendant's consent, but only for the most compelling reasons: illness of a necessary juror, bribery of a juror, or a jury deadlock. In such instances, a retrial is not considered a new “jeopardy” but rather a continuation of the first jeopardy.</td>
</tr>
<tr>
<td>Judge declares a mistrial at the defendant's request.</td>
<td>D.A. commences a second trial.</td>
<td>No double jeopardy violation since it was at the defendant's request, unless the prosecution intentionally introduced unfair prejudicial evidence thus “goading” the defendant into requesting the mistrial.</td>
</tr>
<tr>
<td>Defendant requests a mistrial because the D.A. deliberately introduced unfair prejudicial evidence and the judge denies the motion, but after trial the judge sets the guilty verdict aside.</td>
<td>D.A. commences a second trial.</td>
<td>No double jeopardy violation, since it is the same as if the defendant appealed the verdict and was granted a new trial from the appellate court; this is not a second jeopardy but rather a continuation of the first jeopardy. Oregon v. Kennedy, 465 U.S. 667, 673-74 (1982); DeFilippo v. Rooney, 11 N.Y.3d 775 (2008).</td>
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</tbody>
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