

715137



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Institution **Harvard Law School**
Exam Mode **OPEN LAPTOP**
Extegrity Exam4 > 14.10.6.4

Course / Session **F14 Lanni - Criminal Law 2**
NA
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Instructor **NA**

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Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	2205	10431	12595
Section 2	1014	4587	5592
Total	3219	15018	18187



Answer-to-Question-_1_

Alex

Illegal Gaming:

Alex and Barbara can surely be charged with the felony of Illegal gaming as poker very likely falls under the definition of games because it is played with cards, is a percentage game and is played for money, property, etc. They at least knowingly but likely purposefully organized and conducted the game. The mens rea of knowingly for the conduct element translates under the MPC to the attendant circumstance of “without a license.” Under the common law approach we would look to precedent to determine the mens rea. They were aware that they did not have a license to run the games and a knowledge that they needed one is beside the point so they meet both the actus reus and the mens rea for illegal gaming.

Conspiracy to Commit Illegal Gaming:

Alex and Barbara also conspired to commit the crime of illegal gaming. They agreed to run the weekly poker games and then did so (overt act). It is unclear what the mens rea is for attendant circumstances for conspiracy as it depends on the jurisdiction but Alex and Barbara had purpose as to the conduct of organizing or conducting the poker games so they are guilty of conspiracy to commit the crime of illegal gaming.

Necessity Defense:

Alex could claim a necessity defense because he wouldn't have liked working at a big law firm and *needed* another way to pay off his loans. This fails under both the MPC and



Common Law approaches because Alex was at fault for the debt because he purposefully or knowingly took it on (MPC would have let him get away with reckless acquiring of debt but there is no indication that the loans were entered into recklessly). Also, they carried on the poker game way after the necessity would have passed.

Duress Defense:

Alex could claim a duress defense because the amount of debt and the oppressive work environment at big firms stressed him out but this fails because there is no threat of force against him or a family member.

AL for Statutory Rape:

Alex is likely an accomplice for Ed's statutory rape of Fran. His winking at Ed could be construed as encouragement to go have sex with Fran and then he actually aided him by giving him a room and watching his chips. It looks like he had purpose as to the conduct element of rape, he gave them "alone time" and that really only means one thing in college...unless they are having a DTR which they clearly weren't. The mens rea for result is that of the underlying crime which is strict liability for statutory rape. Alex will be on the hook as an accomplice.

Felony Murder:

Alex cannot get felony murder for Greg's homicide because it was not in furtherance of the crime (illegal gaming).

AL for Homicide:



A weak argument could be made that by allowing Greg to continue to play once he knew about his possible mental instability Alex was encouraging him to play or that by giving him a place to play actually aided him in his crime but there was no a mens rea of purpose (was not conscious object of letting him play to aid such conduct) as to the conduct element even if there was recklessness as to the result. No AL here.

AL for Illegal Gaming and Luparello for Greg's Homicide:

A tenuous argument could be made for Luparello liability for Greg's homicide. In addition to being actually liable for illegal gaming, Alex and Barbara could both get AL for illegal gaming as they actually aided and encouraged each other to commit the crime and they had the mens rea of purpose as to the necessary elements. If that is used as the underlying crime then there is the possibility of Luparello for the homicide. Greg killing Harriet could be seen as the natural and probably consequence of running the poker games as they did, namely disregarding the warnings of Greg's roommates about his mental health. From this kind of reckless running of the poker games it is possible that Harriet's death was the "natural, probable and foreseeable consequence" of illegal gaming. This is stretch though and would likely fail.

Pinkerton for Greg's Homicide:

There is no Pinkerton liability for Greg's Homicide because killing Harriet was not in furtherance of the crime even if it was the natural and probable consequence of the illegal gaming conspiracy (which it wasn't). No Pinkerton.

Barbara



Illegal Gaming:

See analysis under Alex's section

Conspiracy to Commit Illegal Gaming:

See generally the analysis for conspiracy under Alex but the difference here is that the conspiracy, which requires at least two people agreeing to commit a crime, possibly ended when Barbara told Alex that she didn't want to continue to participate in running the poker games. She likely did not meet the conditions for abandonment or withdrawal though because, though she communicated her desire to Alex to get out of the conspiracy she did not go to the police to tell them about the conspiracy or her participation. She also does not have an affirmative defense under MPC 5.03(6) because she did not try to thwart the success of the conspiracy, in fact, she told Alex she wouldn't do anything to get in the way. So, the conspiracy never ended and she could be on the hook for any possible Pinkerton liability going forward.

AL for Illegal Gaming and Luparello for Greg's Homicide:

See analysis under Alex's section. While Barbara was not aware of the warning about Greg's mental health Luparello does not require that the perpetrator and the accomplice "share an identical intent to be found criminally responsible for the same crime" (Luparello). She likely still on the hook though this is a pretty good poster child for why the MPC rejects this approach.

Pinkerton for Greg's Homicide:

See analysis under Alex's section



Pinkerton for Ed's Statutory Rape:

Even though the statutory rape happened AFTER Barbara tried to withdraw from the conspiracy she did not do so fully/correctly. Ed's rape could be considered in furtherance of the felony but in the end this fails because it was not committed by a member of the conspiracy. No Pinkerton here.

Dana

AL or Conspiracy under Willful Blindness:

Dana might be the most interesting case in this fact pattern. There will be no conspiracy liability because there was no agreement to commit a crime between Dana and Alex and Barbara, so no actus reus. But there could definitely be accomplice liability because by giving them two extra rooms Dana actually aided them. The question then is, was the mens rea met. The mens rea of purpose for the conduct elements of the illegal gaming or statutory rape (provided rooms remember) is surely not met. Dana didn't even know what was going on but this could be made up for by willful blindness. First Dana must have been subjectively aware of the high probability of illegal conduct going on in the apartments. This is a difficult question because it is subjective but Dana seemed surprised by the request to rent out the other two apartments and commented on the amount of visitors that Alex and Barbara had ever weekend. Then, she was offered TWICE the price for the apartments which should give constructive notice of shenanigans to anyone but the real kicker is the fact that she said "None of my business what goes on here on the weekends." Indicating, at least a jury could find that it indicated, that Dana was aware that something fishy was going on there on the weekends. So, with the first requirement



met we need now determine if she purposefully contrived to avoid learning about the illegal conduct. This is again difficult because it has a high mens rea but the line quoted above, again, indicates that Dana didn't want to know what was going on and that it was in her best interest to avoid knowing what was going on. Further evidence would likely be required to establish this conclusively like, did Dana live on the premises? Was there enough noise going on during the weekends that other tenants complained and thus Dana should have looked into it? If these possibilities are the case then there might be a very strong claim for willful blindness and through willful blindness the meeting of the necessary mens rea for accomplice liability for both illegal gaming and the statutory rape. There could be accomplice liability for the homicide because providing a room to play actually aided the homicide and this would test how far the willful blindness will stretch to make up for absent mens rea. It seems a lot to allow this kind of liability for not checking into how the rooms are being used but there are also powerful policy considerations in favor of holding him liable. Even if direct AL fails, there could be *Luparello* as we see in the Alex analysis above.

Ed

Statutory Rape:

Ed is almost surely liable for statutory rape, a strict liability crime. There is no mistake of fact defense for statutory rape and she cannot consent (in most if not all jurisdictions) to sex at 14 years old so whether we are using the Rusk or the MTS approach and the fact that everything points to affirmative consent doesn't matter, he is still on the hook.

I did not include an analysis of **Fran's liability** because she cannot be an accomplice to statutory rape even if she aided or encouraged because victims cannot be accomplices.



Greg

Homicide:

Greg's killing of Harriet was definitely intentional but first we need to determine if it was premeditated or not. Under Carroll, intent is premeditation so he would get 1st degree.

Under Guthrie, there is a "time to reflect" requirement. It doesn't look like there was any time to reflect unless Greg brought the gun thinking, "if I lose tonight I will shoot whoever beats me." We would need more evidence for that and so given the fact pattern it looks like he would get 2d degree under Guthrie.

There is the possibility of mitigation to manslaughter under provocation or if in a MPC jurisdiction, under EED. Under the Giouard approach he would likely get no provocation mitigation because it requires it to be part of one of the set categories of things that can count as provocation and though poker may seem like mutual combat to some, it does not fit into any of the categories. Under the Maher approach it is possible that he could get provocation if a reasonable jury could find that he was reasonably distressed under the circumstances but this looks like a stretch and would set a terrible precedent for future gamblers. Under the Cassassa approach it looks like there is no question that he was actually distressed as he was seeing a psychiatrist. On the other hand, as under Maher, he probably was not sufficient distressed under the circumstances to warrant the mitigation of his intentional murder. Therefore, likely no mitigation so 1st degree under Carroll, likely 2d degree under Guthrie.

Insanity Defense:

Greg could raise an insanity defense for the homicide because he was seeing a



psychiatrist but we would need to know more in order to determine if he has a real shot of successfully raising this defense. For example, has he actually been diagnosed with anything by the psychiatrist? We need that information because all of the tests require some mental disease or defect. If he was found to have a mental disease then the trend is toward McNaghten and so he would have to show that he didn't know the nature or quality of the act or the he didn't know shooting Harriet was wrong. This seems an uphill battle. He also may not choose to plead insanity because of the current system of civil confinement. Either way, the facts as they stand now do not strongly lend themselves to an insanity defense, we would need to know more.

All Poker Players:*Conspiracy to commit Illegal Gaming or AL:*

The players never agreed so no complicity liability. There is no question that by patronizing the poker games the players aided in fact in the commission of the crime of illegal gaming but the mens rea might be lacking. They had no way of knowing that Alex and Barbara did not have a license to run the games but having a poker game run out of an apartment might have been a good place to start. Did they have purpose as to the conduct/organizing of the game? Very possibly. If it was there conscious object in attending the games for the games to be conducted then they could get accomplice liability for illegal gaming. It will depend on what kind of evidence can be brought to establish their mens rea and how this court handles the mens rea for attendant circumstance (the lack of license). If it requires a high mens rea it might fail but if it requires only requires recklessness or negligence there is a real possibility that every player who had the mens rea necessary for the conduct element will get stuck with a

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charge of illegal gaming.



Answer-to-Question-_2_

This is a tough question because the penalties in the deal are pretty steep but so is the crime. Post-911, bomb threats must be taken extremely seriously because the fear and loss associated with them are no longer something that happens overseas but are part of American culture and societal psyche. Because of that there is a serious interest in deterring such acts. By the same token, there is also an interest in not destroying someone's life because of one error, especially someone with as much promise and was under as much stress as Waldo.

In the end I am leaning away from taking the deal. My first concern is that of general deterrence. There are many Ames University students and students at other universities throughout the country that are sleep-deprived, stressed, overworked and under the gun of finals. If I were to allow a bomb threat to be handled like some kind of juvenile offense we are expressing tacit acceptance of this as tactic to avoid meeting one's obligations. Not only is this back as a policy move for both expressive and general deterrence it is not good for these kids in building life skills.

My second concern is specific deterrence and disparate impact on those from a lower socio-economic stratum. Much of this punishment is monetarily based. The excellent defense attorney is he because the Zims must have money or are well connected. They



are agreeing to pay 250k to defray police response costs and for the monitoring service. Is this punishment really going to affect Waldo? Will he learn and be rehabilitated by it? If he doesn't learn from this process it is all a waste. It will just be another example of mommy and daddy getting him out of a scrape. What if Waldo came from an indigent family? What then? He wouldn't have the option of defraying police costs. By taking this deal I would, in effect, offering a way out for students from rich families but not for those from poor families. There would be unequal administration of the law because the penalty, because money could not buy a better attorney to argue nor buy a better deal, would be steeper for indigent student for the same crime.

While the rest of the deal looks to handle the issues of specific deterrence (750 hours of community service and a public apology for a threat) there is still the expressive concerns. As mentioned above, if the citizens of the US feel like we let bomb threats go with little or no punishment it will damage what faith they have in the system. The won't feel safe and they likely won't feel represented.

On the other hand I am concerned about the justice of sacrificing the life of one to act as a deterrent to others. Is it the place of the government or a system of justice to punish one, not for the crime committed but for the crimes we hope to prevent? A retributivist would say no and on this count I am generally inclined to agree but the law does this all of the time. We punish harshly not because the crime deserved it but because if we didn't then the benefit of committing the crime would far outweigh its costs.

Overall, I feel that, as a prosecutor, I couldn't take this deal as it stands. As a matter of



justice I think that Waldo's family should defray the cost of the police response but I do not think this should be factored into the deal as it cannot be replicated in all cases. I don't want Waldo to carry around the stigma of a felony charge. There is little question, even if he never did any jail time, that charge would keep him from pursuing his career goals and life aspirations. In that sense retributivism must be rejected.

My general sense is that the deal needs to be recalibrated. If Waldo has the proper family support and is of a resilient behavior (which he probably isn't given how the bomb threat came about) a shaming punishment might do just the thing. It would make him experience the displeasure of society but would not actually hurt him. The other side of that is that because of social media that might create and even worst stigma and it would be hard to protect someone with a sandwich board that said "I threatened to bomb Ames and I am sorry."

So, taking all of this into account I think I would offer him another plea deal. I don't have any control over his sentence if he goes to trial but through a plea deal I can control it before trial. I would want him to plead guilty to a misdemeanor (also I would make sure there is no state felony charge that could be brought because of dual sovereignty, I don't want him to do all of this twice). I would reject the pre-trial diversion because of the nature of the crime. This isn't something that comes up every week and so after 18 months he will no longer be tempted to repeat it. This is something that could only happen (at least to someone like Waldo) when he is under extreme pressure. I would ask for the same amount of community service, minimal prison time (less than a month) to be served at a minimum security prison. Then I would have him serve his four months under



house arrest, the public apology, and a court order to get some anxiety/stress management training. With the threat of the maximum sentence of five years for the federal felony hanging over his head he would have to take it.

I feel like this plea accomplishes the goals of specific deterrence, equal administration of the law, and mercy. It is true that general deterrence is still lacking a bit but I think there is enough here to deter others similarly situated. There may be concerns about the expressive element of punishment but I think that there is expressive power in mercy too.