JULY 2024
ESSAY QUESTIONS 1, 2 AND 3

California Bar Examination

Answer all 3 questions; each question is designed to be answered in one (1) hour.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the situation turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them to the facts.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the resolution of the issues raised by the call of the question.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 1

PickWinners Inc. (Pick) is a corporation that markets to wealthy investors who want to trade stocks online. The shareholders of Pick elected Alex, Baker and Cate as the sole members of the Board of Directors.

Cate believed that Alex and Baker caused a decline in Pick's market share and stock price by focusing exclusively on wealthy investors, thereby ignoring average consumers and losing the low-priced end of the trading market to other companies.

At a Board meeting, Cate told Alex and Baker that she planned to start a competing company called E-Save, Inc. (E-Save) unless Alex and Baker agree that Pick will form a subsidiary to focus on the low-priced end of the trading market. Cate stated, "Pick can capture the low-priced end of the market with a subsidiary that advertises on social media platforms. Otherwise, Pick risks continually losing market share and value." Alex and Baker disagreed with the proposal and responded, "Pick's decline just mirrors the overall recent decline of the stock market." They also reminded Cate that, "We hired an analyst two months ago who looked at the low-priced end of the market and concluded that there was no money in it." Cate replied, "If Pick won't do it, I will form such a company myself."

Cate subsequently formed E-Save on her own. E-Save soon began generating large profits. Meanwhile, Pick's market share and stock price continued to decline.

Several of Pick's shareholders learned of the Board's actions and Cate's operation of E-Save. Their written demand that the Board take remedial action was denied and the shareholders now plan to file suit on behalf of Pick.

1. Upon what theory or theories may the Pick shareholders bring claims against Alex and Baker and what is the likely result? Discuss.

2. Upon what theory or theories may the Pick shareholders bring claims against Cate and what is the likely result? Discuss.

QUESTION 2

Olivia owned Greenacre in fee simple. Greenacre consisted of two unimproved adjoining lots, Lot A and Lot B. A dirt road led from Lot A across Lot B to a public highway.

Sixty years ago, Olivia conveyed Lot B to Barry as a gift, subject to the following clause:

> "If at any time, Barry, his heirs, successors or assigns shall use the premises for any purpose other than as a personal residence, said Lot B shall immediately vest in fee simple in Zach or his surviving descendants."

Shortly after receiving title, Barry began living in a cottage he built on Lot B.

At the time of the conveyance of Lot B, Zach had not yet had any children. Zach has since died, and his granddaughter, Darla, is now his only surviving descendant.

Thirty years ago, Olivia died. Her son, Simon, inherited Lot A. He built a house on Lot A one year later. Through the years, Simon regularly used the dirt road across Barry's adjacent Lot B to get to and from his house and the public highway because there was no other access.

Four months ago, Barry sold Lot B to Developer for $1,000,000. Developer demolished the cottage, began constructing an office building on the lot, and began closing off access to the dirt road from Simon's house.

All conveyances were properly recorded immediately after execution and delivery.

1. What property interest, if any, does Darla have in Lot B? Discuss.

2. What claim(s) may Simon make to maintain a right of way over Lot B to the public highway? Discuss.

QUESTION 3

August is an attorney who represents Paul in a lawsuit against Paul's former real estate broker, Dani. August and Paul have a valid, written contingency fee agreement. Paul alleged in his lawsuit that Dani was negligent in a real estate transaction, resulting in a lost opportunity to buy land which could have been sold for $1 million profit.

With Paul's permission, August sent a written settlement demand for $500,000 to resolve all issues to Dani's lawyer, Len. Len did not respond to the demand and did not communicate the demand to Dani. One evening, Paul saw Dani and asked her about the settlement demand. Dani told Paul that she had no knowledge of the settlement demand. Paul told August about his conversation with Dani. August did nothing with the information.

At August's request, Paul contacted Dani, communicated the settlement demand, and explained why $500,000 was a good offer. Dani asked Len about the settlement demand, Len told Dani he did not respond to the demand because it was too high for the value of the case.

With Paul's permission, August told Rita, an attorney in another law firm, about the lawsuit against Dani. Rita said she knew Dani and could work with her. August asked Rita to assume joint responsibility for Paul's lawsuit in return for 50% of August's contingent fee. Rita agreed and August wrote to Paul explaining the new arrangement. Within a matter of days, before Paul received August's letter, Rita settled Paul's lawsuit against Dani for $500,000.

1. What ethical violations, if any, did August commit? Discuss.

2. What ethical violations, if any, exist in August and Rita's arrangement? Discuss.

3. What ethical violations, if any, did Len commit? Discuss.

Answer according to California and ABA authorities.

JULY 2024
ESSAY QUESTIONS 4 AND 5

California Bar Examination

Answer both questions; each question is designed to be answered in one (1) hour. Also included in this session is a Performance Test question, comprised of two separate booklets, which is designed to be answered in 90 minutes.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the situation turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them to the facts.

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Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the resolution of the issues raised by the call of the question.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 4

A car manufactured by Motor was in an accident. Palma was in the front passenger seat during the accident when her seat collapsed, resulting in serious injuries. Palma properly filed and served a complaint in California Superior Court against the manufacturer, Motor, asserting defective seat design.

During jury selection, Juror #5 revealed that she had worked as a Motor engineer before retiring five years ago. Juror #5 also disclosed that she still owned 50 shares of Motor stock, which amounts to 2% of her total financial assets. Palma challenged the seating of Juror #5 for cause. The court denied Palma's challenge because Juror #5 said she could be fair and impartial.

During trial, Motor presented evidence that the seat was not defective and that any injuries Palma suffered were due to reclining the seat to an unsafe angle. Palma submitted evidence that at the time of the accident, a bookshelf was in the backseat, which prevented excessive reclining. At the close of evidence, Palma moved for directed verdict, arguing that misusing a product is not a defense to defective design when that misuse is foreseeable. The court denied Palma's motion and a jury verdict was issued in favor of Motor.

Two weeks after the jury verdict and judgment, Palma received anonymous reports ("Reports") of Motor safety tests conducted three years earlier. The Reports showed that severe injuries were likely regardless of the angle of the seats. One week after receiving the Reports, Palma filed a motion for a new trial, arguing that the verdict was flawed, and provided evidence that Motor had intentionally hidden the Reports.

1. Did the court err in seating Juror #5? Discuss.

2. Did the court correctly deny Palma's motion for directed verdict? Discuss.

3. How should the court rule on Palma's motion for a new trial? Discuss.

QUESTION 5

Years ago, Perry purchased two baseballs that he understood were autographed by members of championship teams. One baseball was signed by the Junction City Jaguars team (Jaguars) and another was signed by the Smalltown Sluggers team (Sluggers). Because Perry knew nothing about the value of these baseballs, he entered into separate contracts with his niece, Denise, a sports memorabilia expert, to sell each of them.

Aware of Perry's ignorance of the value of his baseballs, Denise told Perry that the Jaguars baseball was a counterfeit worth only $20. As a result, Perry sold the Jaguars ball to Denise for $20. In fact, the Jaguars ball was worth $5,000 on the open market.

Denise told Perry that the Sluggers baseball had a fluctuating value and that it could sell for at least $1,000 and likely more. Denise sold the Sluggers baseball to Bob for $10,000 but told Perry that it had only sold for the $2,000 she gave him. With the remaining $8,000 that Denise received from Bob, she purchased a used Voy car. Ironically, since Denise purchased the Voy, interest by collectors in Voy cars has vastly increased and her Voy is now worth $20,000.

Denise still has the Jaguars baseball and the Voy car. After learning of Denise's deception concerning the baseballs, Perry filed suit against her for fraud. The court has ruled in Perry's favor.

1. What damages can Perry recover? Discuss.

2. What equitable remedy or remedies can Perry obtain? Discuss.

July 2024

California Bar Examination

Performance Test

INSTRUCTIONS AND FILE

STATE v. DALTON

Instructions .....

FILE

Memorandum to Applicant .....

Trial Transcript .....

PERFORMANCE TEST INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem.

2. The problem is set in the fictional State of Columbia, one of the United States. In Columbia, the intermediate appellate court is the Court of Appeal and the highest court is the Supreme Court.

3. You will have two sets of materials with which to work: a File and a Library.

4. The File consists of source documents containing all the facts of the case. The first document in the File is a memorandum containing the directions for the task you are to complete. The other documents in the File contain information about your case and may include some facts that are not relevant. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.

5. The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant to the assigned lawyering task. The cases, statutes, regulations, or rules may be real, modified, or written solely for the purpose of this performance test. If any of them appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references. Applicants are expected to extract from the Library the legal principles necessary to analyze the problem and perform the task.

6. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

7. This performance test is designed to be completed in 90 minutes. Although there are no restrictions or parameters on how you apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response before you begin writing it. Since the time allotted for this session of the examination includes two (2) essay questions in addition to this performance test, time management is essential.

8. Do not include your actual name or any other identifying information anywhere in the work product required by the task memorandum.

9. Your performance test answer will be graded on its responsiveness to and compliance with directions regarding the task you are to complete, as well as on its content, thoroughness, and organization.

Liam Paul

State's Attorney

Coronado Hills, Columbia

TO: Applicant

FROM: Liam Paul

RE: State v. Dalton

DATE: July 30, 2024

The parties just finished presenting evidence in the non-jury trial of State v. Dalton. Adam Dalton is charged with second degree murder and the lesser included offense of involuntary manslaughter for killing Laura Vons. Because it was late, the judge has scheduled closing arguments for tomorrow. I will present the closing argument, but I want you to prepare a draft of that closing argument for my review. I have attached relevant portions of the trial transcript.

I want to argue that the state has proved the elements of second degree murder or in the alternative at least involuntary manslaughter.

While in a jury trial you do not ordinarily discuss or make reference to the legal authorities, in a bench trial you have more latitude in referring to the legal authority. Indeed, legal authorities provide the framework for arguing that the facts prove the elements. But you must not lose sight of the fact that a closing argument is not a legal memo or an essay. The argument is based on the evidence presented, not histrionics or personal opinion.

Your job is to persuade the judge that the evidence presented by the state and the defendant, and reasonable inferences from that evidence, establish that the state has proven each of the required elements beyond a reasonable doubt. Address each of the two offenses separately. Within each offense address each element separately. Do not hold back any argument assuming you will have a second opportunity to make it in rebuttal.

TRIAL TRANSCRIPT
STATE v. DALTON

EXAMINATION OF ERIC HOBBS

Eric Hobbs, a witness called by the state, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY STATE'S ATTORNEY LIAM PAUL

QUESTION: Would you tell us your name?

ANSWER: Eric Hobbs.

Q: Where do you work?

A: I am a Police Officer with the Coronado Hills Police Department.

Q: Did you have occasion to respond to an incident at the defendant's home?

A: Yes. On November 30, 2023, at approximately 7:05 a.m., I responded along with my partner, Officer Carlos Hernandez, to a report of a shooting at the defendant's house.

Q: What did you observe when you got to defendant's house?

A: When we arrived, we saw the defendant's roommate, Brett Reed, leaning against the fender of a white Cadillac holding Laura Vons in his arms. Vons had been shot in the face. Shortly, after I placed Vons on the ground, defendant came running out of the house with blood on his clothes and face, screaming for someone to call an ambulance for his girlfriend. Officer Hernandez called for an ambulance, but was told one was already on its way because of the earlier 911 call by Brett. We restrained both defendant and his roommate and then we conducted a safety sweep of the house.

Q: What did you find?

A: Upon entering the bedroom where Vons was shot, we saw bloodstains on the bed and pillow. We also saw some marijuana and marijuana paraphernalia in the room. I followed a trail of blood that led from the bedroom to the kitchen. I saw water on the

kitchen floor. In front of a kitchen cabinet, the water was a pale red, so I opened the cabinet door. In the cabinet I found a revolver that appeared to be wet with water. The revolver contained five live .38–caliber rounds, as well as one fired round.

Q: Did you find anything else?

A: We went back to the room where Vons was shot and found a box containing a semiautomatic handgun, a box of .38–caliber bullets, a duffel bag containing a sawed-off shotgun and a box of shotgun shells.

Q: Then what happened?

A: By then, detectives had arrived and I transported the defendant by car to the police station.

Q: Did defendant say anything while in the car going to the station?

A: He expressed regret that he shot Vons and asked if Vons was okay.

CROSS-EXAMINATION BY DEFENSE ATTORNEY LUCIA WREN

Q: Now, Officer Hobbs, you testified on direct that Mr. Dalton expressed regret that he shot Vons and asked if Vons was okay. Is that correct?

A: Yes.

Q: Isn't it true that he also said, "I can't lose her. I would do anything for her. How is someone supposed to go on with their life when they see something like that?"

A: Yes.

Q: Isn't it true that Mr. Dalton was crying for most of the trip.

A: Yes.

EXAMINATION OF HAL AMES

Hal Ames, a witness called by the state, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY STATE'S ATTORNEY LIAM PAUL

Q: Would you tell us your name?

A: Hal Ames.

Q: Where do you work?

A: I am a Detective with the Coronado Hills Police Department.

Q: Did you have occasion to question the defendant in this case?

A: Yes. I was assigned to lead the investigation of Ms. Vons death. At approximately 3:00 p.m. on the day the incident, I gave him his *Miranda* rights and he waived them. I then interviewed the defendant.

Q: What did he say happened?

A: He said he shot Vons, but claimed the shooting was accidental. He said they were sitting on the couch in the bedroom when Vons pointed the gun at him. He said he pushed the gun away, and she pointed it at him again. He then took the gun, pointed it at her, and accidentally shot her.

Q: Did he say whether he knew the gun was loaded?

A: He said he knew the gun was loaded. It had to be loaded, he said, because he hadn't taken the bullets out from when he bought it.

Q: How would you describe the defendant's demeanor during your questioning?

A: Calm, collected.

CROSS-EXAMINATION BY DEFENSE ATTORNEY LUCIA WREN

Q: As part of your investigation, you reviewed the recording of the 911 call. Correct?

A: Yes.

Q: So, you heard Adam Dalton in the background of the telephone call crying and repeatedly saying things like, “Noooo, baby,” and “Baby, are you alive, baby?”

A: Yes.

EXAMINATION OF TALIA TAMS

Talia Tams, a witness called by the state, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY STATE’S ATTORNEY LIAM PAUL

Q: Please tell us your name.

A: Talia Tams.

Q: What was your relationship to Laura Vons?

A: Laura was my best friend.

Q: Did the two of you text the night before and the morning of her death?

A: Yes.

Q: Please tell us what the texts contained.

A: At 4:24 a.m., Laura texted me that, “Adam’s out.” Two minutes later she sent, “I already wish he was locked back up. OMG, you have no clue.” At 7:02 a.m., Laura wrote: “Just was fighting with him right now.”

CROSS-EXAMINATION BY DEFENSE ATTORNEY LUCIA WREN

BY MS. WREN: No questions, Your Honor.

BY MR. PAUL: The State rests its case-in-chief, Your Honor.

EXAMINATION OF ADAM DALTON

Adam Dalton, a witness called by the Defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY DEFENSE ATTORNEY LUCIA WREN

Q: Please tell us your name.

A: Adam Dalton.

….

Q: So, after you were released from jail on the day Ms. Vons was shot, what did you do?

A: I was released on bail around 3:30 a.m. and walked home. Along the way, I sent a text message to Laura to tell her to meet at the house. I told her that Brett, my roommate, would be there and we could party.

Q: What did you do when you got home?

A: After showering, I drank a few beers.

Q: Did Laura come to the house?

A: Laura arrived around 5:30 that morning

Q: What happened then?

A: After a bit, Laura and I went to my bedroom.

Q: Then what happened?

A: I went to my safe, which contained marijuana and money, and began weighing the marijuana and counting the money.

Q: And, then?

A: Laura said, “Hey, baby,” and I saw Laura pointing a gun at me. She had found my gun from underneath my pillow.

Q: Did that worry you?

A: No, I trusted Laura. I just brushed the gun away and continued to weigh the marijuana.

Q: Then what happened?

A: A spider landed on Laura and she screamed a little bit. She jumped up, started waving her hands. In order to tease her, I grabbed the spider, and brought it closer to her, and she got even more upset. I felt bad about teasing her so I gave her a hug and a kiss, then went back to weighing my marijuana.

Q: Did Laura do anything?

A: I turned around and Laura was sitting on the edge of the bed pointing the gun at me again. I took the gun away from her and pointed it at her.

Q: Did you know the gun was loaded?

A: No.

Q: After you took the gun from her, what happened?

A: She slapped the gun and I cocked back the hammer, just jokingly, and the hammer slipped and like, pow, the gun went off. I mean I pulled the hammer on the gun back, but it slipped. Like I didn't get to pull it all the way back. I did not intend to threaten or shoot her. I was just kind of being stupid.

Q: What were you thinking when you were doing all this?

A: It just happened so quick. It just happened. I didn't think about it at all.

Q: What did you do then?

A: Immediately after the shot, I told Brett to call 911, which he did. I tried to give Laura mouth-to-mouth resuscitation. When she told me she could not breathe, Brett and I took her outside to the driveway in front of the house to get her help.

Q: Then what did you do?

A: I went back into the house to get my keys. From inside the house, I heard sirens and panicked. I grabbed the gun and rinsed it off in an attempt to wash off the fingerprints. I tossed the gun into the bottom of a kitchen cabinet. Then I ran outside.

CROSS-EXAMINATION BY STATE'S ATTORNEY LIAM PAUL

Q: You've told two versions of what happened in the bedroom, haven't you?

A: No.

Q: You heard Detective Ames testimony about what you told him on the day of the shooting?

A: Yes.

Q: That story was different from your testimony today, right?

A: Not really.

Q: Didn't you tell him, for example, that you knew the gun was loaded?

A: No, I never said that.

EXAMINATION OF BRETT REED

Brett Reed, a witness called by the Defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY DEFENSE ATTORNEY LUCIA WREN

Q: Tell us your name, please.

A: Brett Reed.

Q: Where do you live?

A: With my roommate, Adam Dalton. We share the house.

Q: How long had Adam been dating Laura Vons?

A: About one year.

Q: How would you describe their relationship?

A: They were great. They looked to be in love. He told me he was in love with her.

Q: Where were you at the time of the shooting?

A: I was in my room sleeping. My room shares a wall with the room where Laura was shot.

Q: Did you hear anything?

A: I was awakened by loud talking in the room where Laura was. A couple of minutes after hearing the loud talking, I heard a gunshot. Immediately afterward, I heard a commotion and screaming. It seemed like someone was panicking like yelling or screaming out of fear or grief.

CROSS-EXAMINATION BY STATE'S ATTORNEY LIAM PAUL

Q: You said the defendant and Vons were in love, right?

A: Yes.

Q: However, you have also previously stated that Adam had an ex-fiancée and was conflicted about whom he wanted to be with. Correct?

A: Yes, but that doesn't mean he didn't love Laura.

Q: Isn't it true you previously told Detective Ames, quote, "I was awakened by a loud screaming argument between a guy and a girl for at least three minutes"?

A: I do not remember describing the sounds as loud screaming.

Q: Isn't it also true you told Detective Ames that you did not know where the yelling was coming from and that you could not tell what the loud screaming was about?

A: No.

BY MS. WREN: We have no further witnesses, Your Honor.

BY MR. PAUL: The State calls one witness in rebuttal, Your Honor.

EXAMINATION OF ELLEN DONATO

Ellen Donato, a witness called by the state, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY STATE'S ATTORNEY LIAM PAUL

Q: Would you tell us your name?

A: Ellen Donato.

Q: Where do you work?

A: I am a Criminalist with the Columbia State Police Department.

Q: Do you have a particular expertise?

A: Yes, I am a criminalist with an expertise in firearms.

Q: Now, by stipulation of the parties, you were in the courtroom and heard Detective Ames testify that the defendant said, "I cocked back the hammer, just jokingly, and the hammer slipped." Defendant added, "I pulled the hammer on the gun back, but it slipped. Like I didn't get to pull it all the way back." What is your professional opinion as to the likelihood that this occurred?

A: It simply could not happen. Because of the multiple safeties on this particular gun, the gun cannot be fired by pulling the hammer back and releasing it before it is fully cocked.

BY MS. WREN: No cross-examination, Your Honor.

BY JUDGE JOHNSON: Okay, as I understand where we are, defendant is not presenting evidence and will not be arguing an affirmative defense of justification or excuse.

Correct?

BY MR. PAUL: That is correct, Your Honor. The defense rests.

BY JUDGE JOHNSON: Given the time, we will proceed with closing arguments tomorrow at 9:00 a.m. Court is adjourned.

July 2024

California Bar Examination

Performance Test

LIBRARY

STATE v. DALTON

LIBRARY

State v. McNally

Columbia District Ct. of Appeal, 4th District (2015) .....

State v. Freud

Columbia District Ct. of Appeal, 3rd District (2014) .....

State v. McNally

District Court of Appeal, Fourth District, Columbia (2015)

Defendant, a federal correctional officer, was convicted of second degree murder in the death of a fellow correctional officer, Gary Bent. The trial court sentenced defendant to prison for 15 years to life. Defendant contends the conviction is not supported by the evidence. We affirm defendant's conviction.

On the evening of March 8, 2012, defendant and his friend, Gary Bent, drank beer and ingested drugs in a hotel room. Bent felt sick, sat on the edge of the bathtub, and said he was about to throw up. Defendant called Bent a "sissy" and decided to play a joke. He took his loaded pistol out of its holster and waved it at Bent. The pistol had a live round in the chamber. The pistol had several safety features. All safeties had to be released to fire the pistol. Holding the pistol like a TV gangster, defendant ordered Bent to "Hurry up and puke." Bent told him to "bug off" just before defendant shot him. The bullet struck Bent in the neck, severing his jugular vein.

Rather than administer CPR or call for help, defendant smoked a cigarette, paced around the room, and tossed the spent shell casing in the bathtub where Bent lay. Defendant sent Sonia Reynolds the following text message: "Damn. I just shot my friend in the damn neck. He's dead. Whoops." Reynolds asked if defendant had called an ambulance. Defendant texted: "No. He's dead. Why? Little late for that, don't you think?" Reynolds reported the matter to the police department.

Defendant had served seven years in the United States Army, knew about firearms, and was aware of all firearm safety rules. As a corrections officer at the federal prison, defendant received monthly training in firearm use and safety.

Elpidio Garcia, a firearms instructor at the federal prison, testified that he trained defendant in firearm use and safety. Defendant took an advanced shooting course that

included firearm safety and live firearms training. Garcia stated that defendant was trained to obey the following firearm safety rules on and off duty: “All guns are always loaded. Never let your muzzle cover anything you don't want to destroy. Keep your finger off the trigger until your sights are on the target.

Defendant defended on the theory that the shooting was accidental. As a corrections officer, defendant carried a firearm for protection and usually had a round chambered in the pistol when “out and about.” Defendant's ex-girlfriend stated that he carried a loaded pistol at all times.

Second degree murder is the unlawful killing of a human being with malice aforethought, but without the premeditation, deliberation and willfulness necessary to elevate the offense to first degree murder. Columbia Penal Code (CPC) §§187, 189.

An unlawful killing is one that is not justified or excused. Under Columbia law, defendant must raise the issue of justification or excuse but does not bear any burden of proof or persuasion in a murder prosecution. *State v. Frye* (Col. Sup. Ct. 1990). If it is not raised, it is waived. The defendant does not contest that there was an unlawful killing, nor does he contest that his actions caused the death of Officer Bent.

Defendant contends, however, that the evidence does not support the finding that he acted with malice aforethought. Malice, for the purpose of constituting murder of either degree, may be express or implied. (CPC §188). It is express “when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.” CPC §188. There is no evidence of express malice on these facts.

Implied malice is present “when the circumstances attending the killing show an abandoned and malignant heart.” CPC §188. Whether circumstances attending the killing show an abandoned and malignant heart (implied malice) is a subjective test. If defendant realized the risk and acted in total disregard of the danger, he is guilty of murder based on implied malice. In other words, the mental component is established where the

defendant knows that his conduct endangers the life of another and acts with conscious disregard for life. *State v. Olivas* (Col. App. 1985) ("state of mind of a person who acts with conscious disregard for life--*i.e.,* implied malice--is, 'I know my conduct is dangerous to others, but I don't care if someone is hurt or killed'.").

It is settled that brandishing a loaded firearm at a person is an act dangerous to human life. For example, one who playfully fires a gun that he knows is loaded in the direction of another person may be convicted of murder. If the same person performs the same act incorrectly convinced that the gun is not loaded, he is guilty of manslaughter. *In re M.,* (Col. Sup. Ct. 1969). Here, defendant pointed the loaded pistol at Bent. He "overrode" the safeties, and pulled the trigger. He has his extensive training in firearm safety. Considering all the facts, the jury reasonably inferred that defendant knew it was a highly dangerous act and acted in conscious disregard for life.

Defendant's behavior following the shooting is also probative of implied malice. Subsequent behavior such as hiding a weapon or even denying the shooting may by themselves not show implied malice at the time of the shooting. In this case, however, defendant's continuing behavior, including a clear lack of remorse, is so closely related to the event that it is probative. We also reject defendant's argument that a person does not act with implied malice when he is under the influence of alcohol and/or drugs, engages in joking or horseplay with a firearm, and causes the discharge of the firearm killing another person.

Based on defendant's training and experience with firearms, the reckless manner in which he pointed the pistol at Bent, his text messages, behavior following the shooting, and his statement to the police, the jury could rationally find that he acted with implied malice.

Affirmed.

State v. Freud

District Court of Appeal, Third District, Columbia (2014)

Defendant, Herman Freud, was convicted of involuntary manslaughter of his wife, Betty Freud. Defendant was sentenced to three years in prison.

Following an afternoon of drinking, defendant and his wife met another couple for dinner. During dinner all parties continued to drink and defendant and Betty began arguing about domestic matters. Later, at home, defendant and Betty resumed their quarrel, and Betty stated to defendant, “Well, why don’t you pack your bags and leave?”, to which defendant replied, “Okay, I will.” Defendant then put on his shirt, tie and coat and went to the kitchen to mix himself a drink. He found his wife already there having a drink. Defendant testified that they then discussed how silly it was to quarrel over such trivial matters, reviewed their happy married life together, conversed about matters in general, and embraced and kissed each other several times. Betty stated to defendant, “Herman, sometimes you make me so mad I could kill you.”

Defendant replied to the effect that, “Well, I could make it easy for you” or “I can help that.” He then went to their bedroom, opened the bureau drawer and took out his .45 caliber army type semi-automatic pistol that he had retained from his military service. The gun was not loaded, so defendant took out a loaded clip, which was also in the drawer, and put it in the gun. He then placed a shell in the chamber and cocked the gun. Upon entering the kitchen, defendant went up to Betty and said, “Here is the gun.” Defendant handed it to her muzzle first. Defendant testified that, “I told her there was a safety catch there on the grip handle. I showed her that and she took the gun with her left hand, and about that time it went off.” Mrs. Freud died.

Defendant argues on appeal that his conviction must be reversed because: (1) there is insufficient evidence to support causation and (2) there was insufficient evidence of mens rea to support the conviction.

To resolve these claims, we must determine whether the state provided sufficient evidence for the jury to find that each of the elements of involuntary manslaughter was proved beyond a reasonable doubt.

Actus Reus

The evidence is clear that the deceased died as a result of a bullet wound from the pistol in evidence that belonged to the defendant.

Mens Rea

The theory of the prosecution was that defendant handled a dangerous weapon without due caution and circumspection and the case was presented to the jury on that basis. Defendant argues that he was charged with no other criminal act and must be presumed to have been engaged in a lawful act and there was merely an unfortunate accident for which no liability should attach because of his lack of intent. Defendant is wrong.

Involuntary manslaughter is a lesser offense of murder, distinguished by its mens rea. The mens rea for murder is specific intent to kill or conscious disregard for life. Absent either of these states of mind, the defendant may incur homicide culpability for involuntary manslaughter.

Involuntary manslaughter is statutorily defined as a killing “in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.” Columbia Penal Code (CPC) §192. This language, in turn, has been defined as criminal negligence.

In *State v. Penny* (2005), the Columbia Supreme Court explained that criminal negligence exists when the defendant engages in conduct that is “aggravated, culpable, gross, or reckless. It is conduct that is such a departure from what would be the conduct of an ordinarily prudent or careful person under the same circumstances as to be incompatible with a proper regard for human life or, in other words, a disregard of human life or an

indifference to consequences." Courts have consistently stated that this is an objective test.

Firearms have been recognized as a dangerous instrumentality because of their great potential harm and, in the interest of the preservation of human life and safety, a high degree of care was demanded of those who use them. Defendant procured and loaded the weapon as well as brought it back to the room where his wife was seated. It is fairly inferable that the obtaining and handling of a loaded gun, as he admitted he had, showed a lack of due caution and circumspection. Thus, even if the defendant had a subjective, good faith belief that his or her actions posed no risk, his belief was objectively unreasonable.

Causation

Defendant contends that the cause of death was his wife's intervening and superseding actions of her heavy drinking and taking the gun.

Involuntary manslaughter, like other forms of homicide, also requires a showing that the defendant's conduct proximately caused the victim's death. When there are concurrent causes of death, the defendant is criminally responsible if his or her conduct was a substantial factor contributing to the result. As explained in *State v. Sanchez* (Col. S. Ct. 1999), there may be more than one proximate cause of the death. When the conduct of two or more persons contributes concurrently as the proximate cause of the death, the conduct of each is a proximate cause of the death if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the time of the death and acted with another cause to produce the death.

When there are multiple concurrent causes of death, the jury need not decide whether the defendant's conduct was the primary cause of death, but need only decide whether the defendant's conduct was a substantial factor in causing the death, which reaches beyond the "but for" test. *State v. Jennings* (Col. S. Ct. 2010).

Further, proximate causation requires that the death was a reasonably foreseeable, natural and probable consequence of the defendant's act, rather than a remote consequence that is so insignificant or theoretical that it cannot properly be regarded as a substantial factor in bringing about the death. The death of the deceased could not be attributed to any supervening or intervening cause, such as the victim's taking hold of the gun or being intoxicated, but was a proximate result of the negligence of the defendant.

Judgement affirmed.