

## 8.4: End-of-Chapter Material

### 8.4.1 Summary

An inchoate crime might never be completed. The rationale of punishing a defendant for an inchoate crime is prevention and deterrence. The three inchoate crimes are attempt, conspiracy, and solicitation.

The criminal act element required for attempt must be more than thoughts or mere preparation. Modern jurisdictions use four tests to ascertain attempt. The proximity test analyzes how close the defendant is to completing the offense by examining how much is left to be done. The defendant may have to come dangerously close to completion but generally does not have to reach the last act before completion. The *res ipsa loquitur* test looks at the moment in time when the defendant stopped progressing toward completion to see if the defendant's acts indicate that the defendant has no other purpose than commission of the offense. The probable desistance test focuses on how far the defendant has progressed to see if it is probable that the defendant won't desist until the crime is complete. The Model Penal Code substantial steps test has two parts. First, the defendant must take substantial steps toward completion of the crime. Second, the defendant's actions must strongly corroborate the defendant's criminal purpose.

Some jurisdictions also criminalize preparatory crimes such as the manufacture or possession of burglar's tools. Preparatory crimes can be combined with attempt under the appropriate circumstances.

The criminal intent element required for attempt is the specific intent or purposely to commit the crime attempted. Legal impossibility can be a defense to attempt if the defendant mistakenly believes that a legal act attempted is illegal. Factual impossibility is not a defense to attempt if the crime cannot be completed because the facts are not as the defendant believes them to be. Voluntary abandonment is also a defense to attempt in some jurisdictions if the defendant voluntarily and completely renounces the attempted crime.

If a jurisdiction recognizes transferred intent, a defendant can be criminally responsible for attempt against the intended victim and the completed offense against the actual victim. In many jurisdictions, attempt merges into the crime if the crime is completed. Jurisdictions vary as to how they grade attempt; either attempt is graded the same or lower than the completed offense.

The criminal act element required for conspiracy is an agreement to commit any crime, commit a felony, falsely indict another for a crime, or falsely maintain any lawsuit, depending on the jurisdiction. Some jurisdictions also require an overt act in furtherance of the conspiracy that could be a legal or preparatory act.

The criminal intent element required for conspiracy in many jurisdictions is the specific intent or purposely to agree and to commit the crime at issue. In some states, a coconspirator can be prosecuted even if another coconspirator is not prosecuted or acquitted. Coconspirators do not need to know every other coconspirator, as long as they are aware that other coconspirators exist. A wheel conspiracy connects all members to one central member. A chain conspiracy connects members to each other in a linear fashion.

The Pinkerton rule holds coconspirators criminally responsible for every foreseeable crime committed in furtherance of the conspiracy. Wharton's rule creates a judicial presumption that a crime requiring two parties merges into a conspiracy made up of two parties.

Renunciation can be a defense to conspiracy if a coconspirator voluntarily and completely abandons the conspiracy and thwarts the crime that is its object. Conspiracy generally does not merge into the conspired offense. Jurisdictions vary as to how they grade conspiracy. Usually it is graded the same or lower than the crime that is the conspiracy's object, but it is not unconstitutional to punish conspiracy more severely than the conspired offense. The federal RICO statute is targeted at organized crime, including conspiracy.

Solicitation is the instigation of an agreement to commit any crime or, in some jurisdictions, a capital or first-degree felony. The criminal act element required for solicitation is words or conduct of inducement. The criminal intent element required for solicitation is specific intent or purposely to promote the crime solicited.

Renunciation is a defense to solicitation if it is voluntary and complete and thwarts the solicited offense. Jurisdictions vary as to how they grade solicitation. Some grade solicitation the same as the crime solicited, others vary the grading depending on the crime solicited, and still others grade solicitation as a misdemeanor.

## 8.4.2 YOU BE THE PROSECUTOR

You are a prosecutor seeking a promotion. You want to win your next case so that you can make a good impression on your superior. Read the prompt, review the case, and then decide whether you would **accept** or **reject** it from a pool of cases available to junior prosecutors. Check your answers using the answer key at the end of the chapter.

1. The defendant is charged with witness tampering by **attempting** to kill the witness. A witness identified the defendant, a police officer, as someone who sexually assaulted her at gunpoint. The defendant met with two individuals, one of them an FBI informant, and told them that he wanted to kill the witness before trial. He was thereafter apprehended with a gun he had recently test-fired in the vicinity of the witness's house, which he had located with the FBI informant on a previous occasion. The jurisdiction in which you prosecute cases follows the "substantial steps" test for the attempt act element. Will you **accept** or **reject** the case? Read *U.S. v. Contreras*, 950 F.2d 232 (1991). The case is available at this link: <ftp.resource.org/courts.gov/c/F2/950/950.F2d.232.91-2021.html>.
2. The defendant, a substitute teacher, is charged with two counts of **attempted** child sexual abuse for blocking the door of his residence and refusing to allow his thirteen-year-old student to leave. The defendant also asked the student for a kiss, was told "no," and moved his face in the proximity of the student's face. Will you **accept** or **reject** the case? Read *People v. Miller*, 856 N.Y.S. 2d 443 (2008). The case is available at this link: [http://scholar.google.com/scholar\\_case?case=13341924462190148625&q=%22Stan+Miller%22+%22People+v+Miller%22&hl=en&as\\_sdt=2,5&as\\_ylo=2007&as\\_vis=1](http://scholar.google.com/scholar_case?case=13341924462190148625&q=%22Stan+Miller%22+%22People+v+Miller%22&hl=en&as_sdt=2,5&as_ylo=2007&as_vis=1).
3. The defendant is charged with **conspiracy** to commit manslaughter and various other crimes (including manslaughter). The defendant and an acquaintance agreed to shoot at some individuals near a housing project and walked over carrying guns. The defendant fired shots at a dumpster with people standing nearby, and one of the people was hit and killed. In your state, the criminal intent required for conspiracy is the specific intent or purposely to agree, and the specific intent or purposely to commit the crime that is the conspiracy's object. Will you **accept** or **reject** the case? Read *State v. Montgomery*, 22 Conn. App. 340 (1990). The case is available at this link: [http://scholar.google.com/scholar\\_case?case=355479416909506104&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=355479416909506104&hl=en&as_sdt=2&as_vis=1&oi=scholar).
4. The defendant is charged with **solicitation** to traffic narcotics. The defendant was in a vehicle with other individuals, and a drug dealer approached them. The defendant gave the drug dealer twenty dollars to examine the drugs, gave the drugs back, and got his twenty dollars back. Thereafter, a police officer who had witnessed the transaction arrested everyone in the car. Will you **accept** or **reject** the case? Read *State v. Pinson*, 895 P.2d 274 (1995). The case is available at this link: [http://scholar.google.com/scholar\\_case?case=1966550891971070482&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=1966550891971070482&hl=en&as_sdt=2&as_vis=1&oi=scholar).

## 8.4.3 Cases of Interest

- *People v. Hart*, 176 Cal. App. 4th 662 (2009), discusses attempt and the natural and probable consequences doctrine: [http://scholar.google.com/scholar\\_case?case=9438325952737556456&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=9438325952737556456&hl=en&as_sdt=2&as_vis=1&oi=scholar).
- *U.S. v. Guest*, 383 U.S. 745 (1966), discusses conspiracy and the US Constitution: [http://www.oyez.org/cases/1960-1969/1965/1965\\_65](http://www.oyez.org/cases/1960-1969/1965/1965_65).
- *Reynolds v. State*, 2007 Tex. App. LEXIS 6139 (2007), discusses solicitation to commit capital murder: [www.lexisone.com/lx1/caselaw/freecaselaw?action=OCLGetCaseDetail&format=FULL&sourceID=bcd&searchTerm=eQCD.UaXa.UYGX.YcEZ&searchFlag=y&l1loc=FCLOW](http://www.lexisone.com/lx1/caselaw/freecaselaw?action=OCLGetCaseDetail&format=FULL&sourceID=bcd&searchTerm=eQCD.UaXa.UYGX.YcEZ&searchFlag=y&l1loc=FCLOW).

## 8.4.4 Articles of Interest

- Criminal attempt: [www.highbeam.com/doc/1G2-3403000027.html](http://www.highbeam.com/doc/1G2-3403000027.html)
- José Padilla's conspiracy conviction: [www.nytimes.com/2008/01/23/us/23padilla.html](http://www.nytimes.com/2008/01/23/us/23padilla.html)
- Criminal solicitation and entrapment: [http://digitalcommons.uconn.edu/cgi/viewcontent.cgi?article=1071&context=econ\\_wpapers](http://digitalcommons.uconn.edu/cgi/viewcontent.cgi?article=1071&context=econ_wpapers)

## 8.4.5 Websites of Interest

- Discussion on various crimes, including inchoate crimes: <http://criminal.laws.com/conspiracy>
- Information about the RICO Act: <http://www.ricoact.com>

### 8.4.6 Answers to Exercises

From Section 8.1

1. Carol can be charged with **murder** because her father died within the jurisdiction's requisite time limit. If her father did not die within one year and a day, Carol could only be charged with **attempted** murder. Carol *cannot* be charged with attempted murder and murder because attempt **merges** into the offense if it is completed in Carol's jurisdiction.
2. The Supreme Court of Missouri reversed the defendant's conviction. Following a substantial steps analysis, the court determined that in the absence of evidence that the defendant placed the pills inside the jar, the defendant must be in **possession** of the jar to be guilty of attempted methamphetamine production, and the facts did *not indicate* that possession.
3. The Michigan Court of Appeals reversed the defendant's conviction, reasoning that assault with intent to commit attempted kidnapping is a nonexistent offense because it would require the **specific intent** to commit an *uncompleted* crime.

### 8.4.7 Answers to Exercises

From Section 8.2

1. Gail and Roger can be convicted of **felony** conspiracy to commit a **misdemeanor** because it is not unconstitutional to punish conspiracy more severely than the crime that is its object.
2. The New Hampshire Supreme Court upheld the defendant's conviction because under New Hampshire law it is not necessary for *both* parties to the conspiracy to possess conspiracy criminal intent.
3. The Supreme Court of Pennsylvania upheld the defendant's convictions, determining that it was *too late* for him to abandon the conspiracy, and also that the evidence indicated he was holding the knife "at the ready" for the criminal actor to grab and use.

### 8.4.8 Answers to Exercises

From Section 8.3

1. Nancy has committed **solicitation** to commit counterfeiting, which is criminal if Nancy's jurisdiction criminalizes the solicitation to commit this type of offense. It is of no import that Jennifer refuses Nancy's request because the criminal act element of solicitation is requesting another to commit a crime, not a mutual understanding or agreement (like conspiracy).
2. The Court of Criminal Appeals of Texas reversed the defendant's conviction, agreeing with the defendant that he solicited a *payment*, not a *murder*.
3. The Michigan Court of Appeals upheld the defendant's conviction, based on the plain meaning of the statute that does not require the individual solicited to have the intent to commit the crime solicited.

### 8.4.9 Answer to Law and Ethics Question

1. One of the biggest concerns about the crime of conspiracy is that it is easier to prove than many substantive crimes. In Chapter 7, an example is given in Section 7.1 where an alleged terrorist was acquitted of over two hundred counts of accomplice to murder, but he was convicted of one count of conspiracy. The *Han* case also illustrates this principle. The circumstantial evidence presented at trial may not have been enough to prove **attempted** murder, but it was clearly enough to convince the jury that there was a **conspiracy** to murder. However, the rationale supporting conspiracy—that it is more likely that a crime will be completed if it is a group effort—is also illustrated by the *Han* case. A thorough review of the facts as detailed in that case reveals that Jeen Han approached more than one individual about attacking and killing her sister. She seemed unwilling or possibly incapable of committing this crime *alone*. Once she had the support of the other two codefendants, she was able to move forward with the offense. The circumstantial evidence presented at trial was not overwhelming. However, appellate courts give the trier of fact the benefit of the doubt because the judge or jury views the evidence *firsthand*—rather than simply reading it in a court transcript. Also, the right to a jury trial must be preserved, regardless of whether the jury follows the law or acts ethically.

### 8.4.10 Answers to You Be the Defense Prosecutor

1. In this case, the US Court of Appeals for the Fifth Circuit upheld the defendant's conviction for witness tampering by attempting to kill a witness. The court specifically held that the defendant's expressed intent to kill, combined with his efforts to find the witness's house, and his possession of a gun that had recently been test-fired in the vicinity of the witness' house was enough to constitute a "substantial step" toward completion of the offense of killing the witness. Thus you would be successful on the witness tampering charge and you should **accept** the case.

2. The Criminal Court, City of New York held that the criminal complaint for attempted child sexual abuse was sufficient on its face. The court stated that evidence indicating the defendant blocked the door and tried to kiss the student, coupled with physical and verbal coercive conduct, could constitute the criminal act element of attempted child sexual abuse. Thus the attempted child sexual abuse charges are sufficient and you should **accept** the case.
3. In this case, the Appellate Court of Connecticut held that manslaughter is a reckless intent crime, so there could be no conspiracy to commit it. A defendant cannot have the specific intent to commit a reckless intent crime. Thus you would lose on the conspiracy to commit manslaughter charge and you should **reject** the case.
4. The Court of Appeals of New Mexico held that solicitation cannot be charged when it is incidental to the crime solicited. The court reasoned that trafficking narcotics criminalizes only the sale (not the purchase) of narcotics, and narcotics cannot be sold without a buyer. Thus you would lose on the solicitation charge and should **reject** the case.

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