

UNIVERSITY OF MISSOURI
SCHOOL OF LAW
CRIMINAL JUSTICE ADMINISTRATION
MITCHELL
Final Examination
Spring 2011
First Week of Exam Period Only

I. Instructions

- A. You have **SIX (6) HOURS** to complete the examination.
- B. The final exam is an **OPEN-BOOK EXAM**. You may use an outline that you prepared in whole or in part and the casebook. The use of commercial outlines, hornbooks, and any other material is prohibited. You may not consult anyone during the exam.
- C. **Format.** There is one long fact pattern. Credit will be given for recognizing issues raised by the facts and law and correctly analyzing the legal and factual factors relevant to resolving these issues. **Note that even if you believe that the resolution of one issue would dictate a particular outcome, you should still discuss all of the issues and factors raised by the facts.**
- D. **Cites.** Relevant U.S. Supreme Court case names (not citations) should be cited in your answers. Citation to lower federal courts or state courts is permitted if directly on point but not required. Careful but concise analysis of the relevant rules, cases, and doctrine will be rewarded more than mere issue spotting. No points will be awarded for listing legal principles, case law, or issues unrelated to these facts.
- E. **Jurisdiction.** Assume that the jurisdiction follows the **majority**. Where this is a split, you are expected to discuss how different jurisdictions would resolve the issue.
- F. You should not need to assume any facts not given in the questions, but if you believe that you do, please state the facts you assume.

II. Hand Written Exams

Please write legibly and on only one side of a bluebook page. You may use abbreviations but identify what they stand for the first time that you use them. On the front of each blue book write your exam number, course name, and number your blue books in the sequence that you use them. Do not write your name on any blue book or on the exam. Please number your pages and, if you use more than one blue book, please number your bluebooks. If you forget something, you can insert it on the opposing blank page. If your writing is illegible, it may affect your grade. Write in full sentences. Little to no credit will be given for fragmentary outlining. You may use abbreviations but identify what they stand for the first time you use them. Good luck.

PART A

Luke was a well-known, long-time resident of the State of Pandora. Specifically, he lived in Endor County and was a prominent businessman and community leader in Los Also City. He met Ben on vacation in South America and they became close friends. Several years ago, Ben, who had come to the United States on a work visa, moved to Los Also and became the manager of Luke's construction business. For awhile, the business was even more successful and Luke contributed a great deal of money to various charities including a new art museum in Los Also City which was named after him. However, a short-time later, Luke Construction experienced a severe cash crunch. To save the company, Luke called another friend, Javier, whom he had also met on his trip and asked him if he could purchase two kilos from him. Javier agreed selling two kilos of cocaine to Luke for \$20,000 per kilo. Javier was a middle-man for a ruthless and violent drug cartel.

When the cocaine arrived, Luke took a kilo and gave the other to Ben, telling him "You know what to do with it." Luke also knew a local, well-known drug dealer, Hans who used to be an employee with his construction company. Unbeknownst to Luke and Ben, Hans was also a sometime informer for the police. He showed the kilo to Hans in the hope that Hans would retail it for him. Hans tipped off the police who in turn notified the local district attorney for advice. The DA, who had ambitions for higher public office, convened a grand jury to investigate Luke. Luke was invited to appear before the grand jury and told to bring several financial documents related to his construction business. He was told that the DA was investigating corruption in the local government. He readily complied. When he arrived and was called into the grand jury room, he asked the DA what the case was about. The DA refused to answer any of Luke's questions. When the day's proceeding began, Luke got up and walked out. The DA turned to the thirteen members of the grand jury who were assembled that day and said, "Silence speaks volumes. Luke could have stayed but he decided to leave. You know the innocent have nothing to hide." Several weeks later, the grand jury returned an indictment against Luke for violating Pandora's drug trafficking laws.

When the local police received word of the indictment, they entered Luke's home and found a kilo of powder cocaine, a loaded AK-47 with "cop killer" bullets in a storage closet in the basement. After being mirandized, Luke gave a statement to the police at the time of his arrest in which he denied any knowledge of the drugs and blamed it all, even the gun charge, on Ben and other unknown employees.

During the investigation of Luke, which had lasted for several months, Ben was doing what he had been told to do. He began cutting the powder cocaine with baking soda to make crack. Ben had split up his operation into four houses that he owned and purchased following their foreclosure. After Luke's arrest, the police discovered only three of these houses where they seized several hundred vials of crack which was about three-fourths of the kilo (or 750 grams). Ben gave a statement admitting that he owned the three houses but he denied conspiring to distribute cocaine with Luke and stated emphatically that he did not own a gun of any kind. Instead, all he admitted was that he had sold some crack. Without naming anyone, he said that

he had been told that they could corner the market by selling powder cocaine in the suburbs and crack in the inner city. Ben was held in the county jail for five days before he was brought before a judicial officer. He had been arrested late on a Saturday and the following Monday was a state holiday, and then his paperwork had been lost. He met briefly with his appointed counsel who was a tax lawyer that wanted some criminal litigation experience, was denied bail and promptly returned to jail.

Twenty days after their arrests, Luke and Ben were jointly indicted in federal court in Los Also in a two count indictment.

Count One: Conspiracy to distribute narcotics (i.e. cocaine found in Luke's house and the crack in Ben's three houses).

Count Two: Use of a firearm in connection with a drug trafficking offense (the AK-47 in the basement closet).

Their arrests and indictment was closely followed in the *Los Also Times*, the only paper in this city of 50,000 (the county, including the city has 100,000 residents). The paper gave details of Luke's and Ben's written statements to the police and the crime was front page news for several weeks. A few other state papers picked up the story but not with anywhere near the same intensity. Two months after the indictment, Luke Construction went into bankruptcy causing several hundred Endor County and Los Also City residents to lose their jobs in a tough local economy. It is now six months after the arrests.

Question:

1. On what plausible grounds can Luke's attorney challenge the Pandora indictment? Will he prevail?
2. On what grounds can Ben attack his arrest and detention? Will he prevail?
3. Discuss whether either Ben should move for severance and the chances of success for his motion. Assume at a joint trial that Luke would not testify.

PART B

In Ben's fourth house, the renter Leia, a one-time girlfriend of Ben's and mother to his son, sold crack for him. Leia's operation survived undetected for another few months after Ben's arrest, until the police received an anonymous tip and Leia was busted. The police report maintained that she had 10 grams in her possession at the time of the arrest. Leia only had 5 grams of crack remaining and \$20,000 in cash. Leia was separately indicted in federal court in Los Also for possession with intent to distribute. Leia was appointed a federal public defender, U.R. Dun, Esq. who explained to Leia that she was facing a mandatory minimum of 5 years for the 5 grams, but the judge might agree to depart downward because of the recently passed Fair Sentencing

Act. Also, if Leia accepted responsibility and provided the government with substantial assistance, it could only help. Unprompted by the government and without any deal place in place, Leia told them everything she knew: names and dates of street corner dealers, where money was hidden, and when the next kilo was to arrive.

The government's only concession in the plea offer was to remain silent at sentencing except the government reserved the right to correct any factual inaccuracies by the defense or in the presentence report. Dun advised Leia to take the offer and to plead as soon as possible to ensure that she received full credit for "Acceptance of Responsibility." Leia said she wanted to plead but she told Dun that the police had the wrong amount. There was only 5 grams of crack in the house. Dun told Leia not to bring this up at the plea or at sentencing because it would require a quantity hearing which would make the prosecutor mad and thus could screw up the advantageous plea offer. Leia wasn't happy but agreed. At the plea hearing, Leia stated when asked by the judge to allocate, "Yes, I plead guilty to distributing crack cocaine, but I did not possess the amount that they said I did and I am not a member of a drug conspiracy. I am innocent of those charges, your honor."

At sentencing, Dun, who did not contest the government's proffer of the evidence of 10 grams, argued that Leia met the criteria for the "safety-valve." The prosecutor, however, who had recently learned of the Leia-Ben connection, interrupted Dun and told the Court that contrary to Dun's assertions, Leia had not fully divulged her involvement with Ben. The prosecutor then stated that while the information that Leia provided was useful, the government did not consider it substantial assistance. Dun asked for a brief recess and in a hurried conversation in the hallway, Leia conceded that she was an employee of Ben's cocaine operation. Dun asked why she had not told him and Leia said, "You never asked." Upon returning to Court, Dun decided not to ask for a downward departure. The judge accepted Leia's plea and sentenced her to the mandatory minimum of five years. The judge also decided to enhance her sentence, adding another ten years, for being part of an ongoing criminal conspiracy, and denied recognition of her assistance.

Question:

1. Leia is dissatisfied with her sentence. Discuss whether Leia can challenge her sentence and the process necessary for doing so.
2. Discuss whether Leia can pursue an ineffective assistance claim against her public defender.
3. Discuss whether the Fair Sentencing Act is applicable to Leia

PART C

Luke ultimately decided to accept the government's offer to plead guilty to "using a firearm" charge, which carried a mandatory minimum of five years. In exchange, the government

dismissed the drug count. Soon thereafter, the U.S. Supreme Court held in another case that “use” of a firearm under this statute requires “active use” and therefore vacated a conviction under facts similar to Luke’s. Luke wants to file a post-conviction motion to vacate his sentence and for immediate release from prison as the firearm charge was the only sentence he was serving. You have spoken to the government attorney who concedes that the other case covers the facts of this case but argues that a motion to vacate the conviction would constitute a breach of the plea agreement. In that event, the government would seek to reinstate the drug charge which carries a mandatory minimum ten year sentence. The plea agreement was silent on Luke’s right to seek post-conviction relief and the statute of limitations on the drug charge has not run.

Question:

1. Luke wants to know whether if he files the motion, the court will consider this a breach of the plea agreement which would allow the government to proceed on the drug count.
2. Assume Luke prevails in federal court. The State of Pandora brings the exact same charges. Discuss whether Luke can challenge this prosecution and whether he will prevail.

PART D

Ben ultimately decided to go to trial. The evidence against him on the cocaine in his three houses included fingerprints and documents that tied him to the houses. The evidence on the cocaine found in Luke’s house included his close relationship with Luke and Luke’s testimony about their conspiracy to distribute cocaine and corner the market. However, Luke also testified that he did not know if Ben was aware of the AK-47 in the house. Luke also insisted that the gun was a war trophy from Vietnam and that he never intended to use it on anyone although he did plead guilty to the charge as explained to him by his lawyer. Ben is white and was tried before an all white jury.

Hans was aware of whom Luke and Ben were working and he feared for his safety. On his behalf, the prosecutor moved that the judge close the court. The court agreed and barred everyone from the courtroom during Hans’ testimony, except for the jury, the defendant and counsel. In his testimony, Ben confirmed much of the government’s evidence on the cocaine possession. On cross-examination, Hans said for the first time ever that Ben had bragged to him about Luke’s AK-47 and how anyone who messed with their coke would end up taking a dirt nap. During a break, the prosecutor asked Hans why he had never mentioned this statement of Ben’s during their ten debriefing sessions before trial. Hans said nothing but winked and then said he hoped the prosecutor would speak well of him at his sentencing. The prosecutor thought Hans was lying about Ben making this statement about the AK-47 but did nothing because he had no direct proof one way or the other. The judge submitted both counts to the jury. On the drug count, the Court instructed the jury that they only had to find that Ben and Luke agreed to distribute cocaine but need not be concerned with the quantity because that was a sentencing issue. On the gun count, the Court instructed the jury that Ben had to have actual knowledge or

that it was foreseeable that Luke would use a firearm to protect the drugs for the jury to convict Ben as aider and abettor for “using a firearm in connection with a drug trafficking offense.” The jury convicted Ben on both counts.

Question: Ben wants a motion for a new trial in district court. If all the facts in this Part are available to Ben and the prosecutor would testify truthfully as to what Hans said and did when he got off the witness stand, what grounds might Ben assert and what are Ben’s chances on this motion?

PART E

Meanwhile, Hans’ cooperation with the government led to a plea bargain to minor aiding and abetting drug charges for which he received probation. He then moved to Utopia with his brother, Frans. However, before leaving Los Also, Hans and Frans had engaged in securities fraud by using their knowledge that Luke was about to be arrested to “short sell” stock in the Luke Construction Company netting them over \$650,000 in illegal profits. In Utopia, Frans had second thoughts about the crime and was going to confess so Hans murdered him with a German semiautomatic pistol. Hans then assumed Frans’ identity and pretended to be the innocent grief-stricken brother with no idea who killed his rotten brother, Hans. However, the police soon figured out that Hans had murdered his brother, but they did not realize the identity switch. Therefore, they indicted him as Frans and only until after a jury trial for murder was well underway did the authorities discover their mistake. The state then moved to amend the indictment to change the name of the defendant from Frans to Hans. The judge refused so the government asked for a mistrial. The defendant objected and moved for dismissal with prejudice on the grounds that the defendant was not the person named in the indictment and thus could not be convicted. The judge denied the defense motion to dismiss and granted the government’s mistrial motion. The government then re-indicted Hans for murder under his true name. The defendant moved for dismissal on the grounds of double jeopardy and the judge granted that motion. The prosecutor has now appealed to the Utopia Supreme Court for reinstatement of the murder charge.

Question: Assuming Utopia follows U.S. Supreme Court precedent on this issue; lay out the arguments for and against reinstatement of the murder charge and the likely outcome on this appeal?