

Syracuse University

College of Law

Final Examination, Law 735

Federal Criminal Law

Spring, 2010

Visiting Assistant Professor William C. Snyder

This is a 3-hour, in-class, closed-book examination.

Instructions:

Answer the exam questions and give reasons for your answers. In some instances in Parts A, B and C, there is no one right answer, so your explanations are very important for determining your grade. The questions in Part D have specific answers that do not require much explanation. But, because I give partial credit, feel free to provide explanations in Part D if you have time and are not sure of your answer. Part D requires only short answers and not necessarily complete sentences.

For essay questions: If you believe that any one issue is outcome determinative, you should still discuss the remaining issues. If you feel that you need more facts to resolve an issue, explain what facts you would want to know in order to resolve it.

A statutory supplement is provided and should be in your examination packet. Advise the proctor(s) immediately if you do not have a statutory supplement.

Of course, the Code of Student Conduct is in effect.

Grading is anonymous. Do not include your name in your answers.

If a proctor, the Registrar or a Dean needs to contact me during the examination, please tell them that I can be reached at (518) 257-2435. You are not permitted to contact me directly.

- William Snyder

The Examination Questions

Part A

(45% of total examination – recommend 60 minutes on question 1 and 20 minutes on question 2.)

Bruce Dern was charged in the Alaska federal district court in part with a "scheme and artifice to defraud and deprive the State of Alaska of its intangible right to [his] honest services." Mr. Dern was a member of the Alaska House of Representatives and allegedly took actions favorable to an Alaska oil company, VECO Corp., in return for future employment. At trial, Mr. Dern moved to exclude evidence related to the honest services charge. The district court excluded the evidence because it would merely have shown that Alaska could have imposed a duty upon Mr. Dern to disclose the conflict of interest, and thus did not prove he had violated any duty imposed by state law.

On appeal, the U.S. Court of Appeals for the Fictitious Circuit reversed. It held that 18 U.S.C. Section 1346 established a uniform standard for "honest services" that governs every public official and that the government did not need to prove an independent violation of state law to sustain an honest services fraud conviction. Therefore, the court reasoned that because the district court excluded the evidence needed to prove that state law imposed an affirmative duty on Mr. Dern to disclose the conflict of interest, the evidence was admissible.

The Courts of Appeals have offered three views of the significance of state law in federal prosecutions for honest-services mail fraud: (1) a violation of state law is necessary to establish a federal violation; (2) although a violation of state law can establish the central element of honest-services fraud (breach of fiduciary duty or misuse of office), the Government may also establish this element without proving any state law violation; and (3) state law violations are immaterial, as the term "honest services" must have a uniform national meaning. The three positions thus treat state law violations as (1) indispensable, (2) unnecessary but sufficient,¹ and (3) irrelevant.

The Supreme Court has granted *certiorari* on the following question: "Whether, to convict a state official for depriving the public of its right to honest services through the nondisclosure of material information, in violation of the mail-fraud statute (18 U.S.C. Sec. 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law."

1. The justices of the Supreme Court decided in conference that, in addition to deciding the question presented, it is time to decide just what the government must prove to convict a state official for depriving the public of its right to honest services, in violation of the mail-fraud statute (18 U.S.C. Sec. 1341 and 1346). Extra briefs and argument on the larger issue were ordered and received. **Write the opinion for the Supreme Court.** (one third of total examination, recommend 60 minutes)

¹ At least when accompanied by proof of the other elements of an honest-services violation, which vary from circuit to circuit. They include some combination of mailing, fraudulent intent, materiality, risk of economic harm, and anticipated personal gain, among other things.

2. **As a matter of policy and good government, regardless of any existing law except the Constitution, under what circumstances should the United States Government prosecute state and local corruption, and when should it decline to do so?**
(Question 2 is just 12 % of the total exam – recommend 20 minutes)

Part B

Part B is worth 20 % of the total exam. I recommend you commit 35 minutes to answering Part B (question 3).

Lawyer worked for a personal injury law firm, and conducted a federal jury trial in January, 2000. Concerned that the trial had gone poorly, lawyer spoke with Partner at the law firm about paying a juror \$10,000. Partner approved, and Private Investigator made the payment on January 30, 2000. This payment constituted an illegal bribe. In addition, without Lawyer's knowledge, partner approved a separate \$20,000 bribe to another juror in the same case the following week.

In July, 2000, Partner asked Private Investigator to pay \$5,000 to bribe a witness in a trial that Partner would be conducting the following October. In September, 2000, Lawyer left the law firm to take another job. Other than social engagements with friends at the law firm, Lawyer had no further dealings with law firm after that time. Private Investigator paid the bribe on October 1, 2000.

Nearly five years later, on August 15, 2005, Lawyer, Partner, and Private Investigator were each indicted on charges of (1) conspiring to commit bribery under 18 U.S.C. § 371, (2) bribery for the \$10,000 payment, (3) bribery for the \$20,000 payment, and (4) bribery for the \$5,000 payment. Private Investigator and Partner pleaded guilty and agreed to cooperate with the government. At Lawyer's trial, the government introduced the July, 2000, conversation between Partner and Private Investigator. Lawyer was convicted of all charges.

3. Lawyer has appealed the four convictions. **Assuming that the substance of the bribery charges was proven beyond a reasonable doubt, should the defendant prevail as to any or all of the charges? Why or why not?**

Part C

(20 points – recommend 35 minutes)

The United States Department of Justice was investigating insider trading of Clone Inc.'s stock. The Government believed that a number of Clone's stockholders traded in Clone stock based upon secret information that Clone was engaged in merger negotiations. In addition, the Securities and Exchange Commission (SEC) was investigating the same matter. Lawyer represented Client, a former Clone investor. An Assistant United States Attorney called Lawyer to see if Client would submit to an informal interview at the AUSA's office. After consulting with Client, Lawyer informed the AUSA that Client had agreed to be interviewed.

Client and Lawyer subsequently appeared for the interview in the AUSA's office. Also present was another person whom the AUSA introduced as "an SEC staff member." The press had widely reported that the SEC was investigating trading in Clone stock. Although the SEC representative was present for the entire interview, only the AUSA asked questions of Client. During the meeting, the following exchange took place:

AUSA: As you know, we are investigating trading of Clone stock prior to the announcement of the merger negotiations. Prior to the time you traded in Clone stock, were you aware that the company was engaged in merger talks?

Client: No one told me that specifically.

AUSA: So, when you bought the stock, you did not know that a merger announcement might be forthcoming?

Client: No.

Two weeks later, a federal grand jury was convened to investigate the alleged insider trading, and the SEC launched a formal investigation into the same matter. The grand jury obtained substantial evidence that Client in fact had been aware of the merger negotiations prior to the trade. Based on the above exchange, the grand jury subsequently issued a two count indictment. Count I alleged that Client had violated 18 U.S.C. § 1503, and Count II alleged that Client had violated 18 U.S.C. §1512(c).

- 4. Client has filed a motion to dismiss both counts of the indictment. Will Client succeed? Why or why not?**

Part D

Part D, then, must be worth 15 % of the exam. I recommend you commit 25 minutes *or less* to Part D.

5. Today, post *Booker*, what are the steps for imposing a sentence in federal district court? This question does not ask what are the steps for determining the applicable Sentencing Guidelines range. Rather, now that the Guidelines are “advisory,” what are the steps for actually imposing the sentence?
6. What is the statutory mandatory minimum sentence for possession with intent to distribute 100 grams of a mixture containing a detectable amount of cocaine base (“crack” cocaine), assuming one prior, final conviction for a felony drug offense?
7. What is the statutory maximum sentence for possession with intent to distribute 1000 grams (1 kilogram) of a mixture or substance containing a detectable amount of cocaine hydrochloride (powdered cocaine), assuming no prior criminal history?
8. Under United States law, what is the sole test for determining whether a federal criminal statute has extraterritorial effect?
9. Which of the following are false?
 - a. Both laundered funds and any property that facilitates the laundering are forfeitable.
 - b. Willful blindness can satisfy the knowledge requirements of Section 1956.
 - c. Willful blindness can satisfy the knowledge requirements of Section 1957.
 - d. A prosecution under Title 18, U.S.C. § 1956 may not be based upon funds drawn from a commingled account unless those funds can be traced and shown to be the proceeds of unlawful activity. (Majority rule agreed upon in class.)
 - e. A prosecution under Title 18, U.S.C. § 1957 may not be based upon funds drawn from a commingled account unless those funds can be traced and shown to be the proceeds of unlawful activity. (Majority rule agreed upon in class.)

10. Which of the following are false?
- The two-witness rule continues to be applicable to Title 18, United States Code, Section 1621 but not 1623.
 - Under Title 18, United States Code, Section 1001, “willfully” requires that the prosecution show that the defendant acted with a purpose to do something the law forbids and with an awareness of the generally unlawful nature of his actions, not that he knew he was breaking a particular law.
 - Under Title 18, United States Code, Section 1001, the defendant must know that he is lying to some federal agency, but the prosecution does not need to show that he knew he was lying to a particular federal agency.
11. Define “materiality” as it applies to Title 18, United States Code, Section 1001. That is, in *United States v. Whab* (the guy who lied to the federal agent saying that he was born in Brooklyn), the Court stated that: “A false statement is material if it has a _____.” (No, you don’t need the exact words, just the concept.)
12. Sentencing Guidelines §3A1.4 adds 12 levels to the applicable base offense level if the crime “involved” terrorism. On average, how long a period of incarceration does this Guideline add to the statutory maximum for the underlying offense?
13. After the *Apprendi* decision, are the enhancement provisions of Title 18, U.S.C. §924(c) – such as brandishing or discharging the weapon – elements of the crime to be proven to the jury or sentencing factors to be found by the judge?
14. What is the legal test for determining whether a defendant has “used” a firearm in violation of Section 924(c). [Hint: think of *Bailey v. United States.*]

END OF EXAMINATION