

1991

New York Law School — FINAL EXAMINATIONS

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FINAL EXAMINATION

Advanced Topics in Criminal Law & Procedure:

Federal Courts & Federal Crimes

CRI501-D1

Judge Miner/Professor Roffer

Fall Semester 1991

Thursday, December 12, 1991, 9:00 A.M.

Two hours. Closed book. Students may not keep copy of exam.

1. Herbert W. Tush, President of the Village Board of Easthampton, never has been engaged in any gainful employment. He lives with his wife on an oceanfront estate known as "Sitter's Point" in Easthampton. The family fortune was made 200 years ago by an ancestor who smuggled opium into the United States from the Orient. The fortune dwindling, taxes on the estate increasing and polo becoming more expensive daily, Tush decides to return to the family business. Through contact with some of his Yale classmates, Tush arranges to meet the freighter "China Star," out of Hong Kong, at a point in the ocean three miles off Sitter's Point. The freighter is to have aboard a large quantity of heroin that the ship's Captain has agreed to sell to Tush for \$1 million dollars in cash. Tush can triple his money by reselling the heroin and in fact has arranged to make the sale to one Wickersham, a fellow member of his college fraternity, "Ball and Scones." Delivery of the imported product is to be made to Wickersham at the Nottingham Club in Manhattan in return for a payment of \$3 million dollars in negotiable bonds.

Tush and his wife, Penelope, known in society circles as "Puffin," take their family launch, "The Rumrunner," and head out to sea to meet the "China Star." As additional crew they take their trusted family retainer, Claude the Butler. Claude is aware of the entire transaction but believes, as do his employers, that the ends justify the means in all things. Eventually, "The Rumrunner" comes alongside the "China Star" and the deal is consummated. Tush, his wife and Claude are aided in transferring the heroin from the freighter to the launch by T. Texas Tyler, a member of the freighter's crew. After the transfer, payment is made to the Captain, and Tush heads back to shore. On his arrival at Sitter's Point, he is met by agents of the Drug Enforcement Administration, who advise Tush that they were tipped off by Wickersham in return for a large informer's fee. The agents confiscate the heroin and arrest Tush, who says only: "Wickersham is not a gentleman." The agents also arrest Puffin, but Claude immediately agrees to testify for the government in return for immunity from prosecution and is released.

You are an associate in the law firm of Smythe, Blythe and Scythe, which has represented the Tush family interests for two centuries. Senior Partner G. Reaper Scythe calls you to his office, describes the foregoing events and says: "Our clients, Mr. and Mrs. Tush, have been indicted for violations of the Continuing Criminal Enterprise statute (21 U.S.C. § 848), the

Hobbs Act (18 U.S.C. § 1951) and the Travel Act (18 U.S.C. § 1952) in the United States District Court for the Eastern District of New York. Bad business, that. As you know, my specialty is the drafting of codicils, so I shall require from you a memorandum describing the elements of the crimes with which our clients have been charged and proposing a well-reasoned strategy to defeat the indictment." Write the memorandum, referring to appropriate precedents.

2. Mary Ludlo is Chief Economist for the stockbrokerage firm of Stare, Burns & Co. She is the author of a weekly newsletter that the firm publishes and sends to its retail customers by mail and fax. The newsletter analyzes selected stocks as well as the general state of the nation's economy. A list of stocks is included in each issue, with a recommendation to "buy," "sell," or "hold" for each stock on the list. Mary's predictions, both as to individual stocks and the direction of the economy, are unswervingly accurate. The partners at the firm think that Mary has developed a secret computer program that enables her to make such accurate forecasts. In truth, most of Mary's information comes from a bartender named Grace Beanburgh, who works at the Bull & Bear Bar on Wall Street. Grace receives a crisp one hundred dollar bill from Mary every week in return for the non-public information she extracts from Wall Street stock traders whose tongues are loosened by the Absolut vodka they consume at the end of each day's trading. The ability of the traders to spot trends as they engage in their daily work of buying and selling enables them to form accurate opinions as to the future of the economy and of individual stocks. Grace takes a weekly consensus of opinion among the traders and passes it on to Mary, whose legendary newsletter has caused many of her firm's clients to make millions. Mary is suitably rewarded by ever-increasing salaries and bonuses.

The arrangement described above comes to the attention of the United States Attorney for the Southern District of New York by way of a confidential informant, code named "Louie the Lip." Louie actually is the jealous Chief Economist at Kidman, Nobody & Co., a rival brokerage house. He actually has overheard the traders impart their opinions to Grace and has observed Grace receiving payoffs from Mary on several occasions.

You are an Assistant United States Attorney in the Southern District. The Chief of the Criminal Division calls you to her office and outlines the foregoing scenario. She tells you that this looks like a good case for the prosecution of Mary Ludlo on charges of securities fraud (§ 10(b) of the 1934 Securities Exchange Act and SEC Rule 10b-5), mail fraud (18 U.S.C. § 1341), and wire fraud (18 U.S.C. § 1343). She asks you to write a memorandum outlining the elements of those offenses and giving your recommendations, with reasons, as to whether the prosecution should go forward. Write the memorandum, referring to appropriate precedents.

3. Jon Dough spends the first twenty years of his adult life as a common criminal, engaging in nearly every course of illegal conduct known to law enforcement authorities. In the later years, Dough became particularly fond of bank fraud. Typically, he would mail a false loan application to a target bank, obtain a loan in excess of what he was legitimately entitled to, and pocket the excess amount. Frequently, it was necessary to engage the assistance of a bank employee in order to consummate the fraud; in such situations, Dough would offer a bribe to a willing bank officer to help him with his crime. Dough continued with this scheme for years, using new loans to pay off earlier ones. In 1985, Dough decides to abandon his criminal ways in order to concentrate on a literary career. By December 1, 1985, Dough has committed his last serious crime.

Early in 1986, Dough completes work on an autobiography detailing his life of crime. Convinced that it will become a big bestseller, the publishing house of Shyman & Suester offers Dough a lucrative contract and advances him \$1 million against royalties for the published book. Dough signs the contract and takes the advance check straight to his bank, where he deposits it.

Later in the year, Dough's book is published and, as predicted, becomes a runaway bestseller. Unfortunately for Dough, the book attracts the attention of the local federal prosecutor, I.A. Reign who had never been able successfully to prosecute Dough for his many crimes. Although Dough had three times been tried in the state courts on felony charges relating to his fraud and bribery offenses -- and acquitted each time -- the federal authorities had never even managed to obtain an indictment against Dough. Dough's autobiography serves as an embarrassing reminder to Reign of his failures as a prosecutor. Reign is now more determined than ever to see Dough behind bars.

In 1989, an Internal Revenue Service agent contacts Reign and advises him that Dough had filed false tax returns and had failed to pay require income taxes for the years 1980 through 1985. During each of those years, Dough had earned approximately \$200,000, half of which derived from the fraudulent loans and the other half from legitimate investments. Dough did not disclose the income from the bank loans, although he did fully report his investment income. The agent also advises Reign that for the years 1986 through 1988, a period during which Dough's sole income came from royalties on his book (including the \$1 million advance), Dough failed to file a tax return at all. Dough did not file returns in these years because, according to his calculations and those of his accountant, no taxes were owing due to sizeable, offsetting investment losses Dough had sustained.

Reign is convinced that he will be able to make a case against Dough based on these tax offenses and believes he can also obtain a RICO indictment. Today, December 12, 1991, Reign asks for your help in outlining the precise charges that may -- or may not -- be brought and evaluating the likelihood of their

success. Be sure to provide detailed reasoning and to state clearly any facts or assumptions necessary for your advice.

4. Assume that based upon your answer to question No. 3 Reign elects to proceed with a prosecution against Dough. A grand jury is impaneled on January 2, 1992. When Dough is called to testify before the grand jury, he invokes the fifth amendment and refuses to testify. Reign berates Dough throughout the questioning and repeatedly threatens to obtain an order holding him in contempt. After Dough is excused from the grand jury room, Reign explains to the grand jurors that "Dough's failure to answer the questions put to him is conclusive evidence of his guilt and you therefore are required to hand up an indictment. I will personally see to it that any grand juror who does not vote to indict will be charged with -- and convicted of -- obstruction of justice." Reign presents some other evidence to the grand jury, including testimony from an IRS agent, from Dough's accountant and from employees of the banks where Dough either kept his money or obtained the loans. Dough's tax returns for the years 1980-1985 as well as his banking records and the subject loan documentation are also introduced.

On January 3, 1992, the grand jury hands up an indictment charging Dough with a variety of tax offenses; Dough is arraigned that same day and pleads not guilty to all charges. The judge schedules Dough's trial to begin on March 5, 1992. On February 1, 1992, after learning from a grand juror what transpired in the grand jury room after Dough was excused, Dough's attorney files a motion to dismiss the indictment. The judge adjourns the trial sine die (without date) and holds a hearing on the motion on February 29, 1992. A decision denying the motion is rendered on March 4, 1992. Dough's attorney files an appeal from that decision. What is the result on appeal?

Assume that Dough's attorney had not filed an immediate appeal from the denial of the motion to dismiss and that in the court's March 4th decision and order trial is rescheduled for April 1, 1992. On April 1st, Dough, who has been free on bail, fails to show up for trial and a bench warrant is issued. On May 1, 1992, Dough is located and arrested. Reign requests that trial be scheduled for May 15, 1992. However, because the judge had planned a vacation for May 15th through May 31st, trial is now set for June 1, 1992. Dough's attorney again moves to dismiss the indictment. That motion is denied, and the case proceeds to trial and conviction. Another appeal follows. Discuss the basis or bases for this appeal and evaluate the likelihood of its success. Be sure to provide detailed reasoning and to state clearly any facts or assumptions necessary for your conclusions. Your discussion should not deal with any issues addressed in your answer to question 3.

FINAL EXAMINATION

Advanced Topics in Criminal Law & Procedure:

Federal Courts & Federal Crimes

CRI501-D1

Judge Miner/Professor Roffer

Fall Semester 1990

Tuesday, December 11, 1990, 9:00 A.M.

Two hours. Closed book. Students may keep copy of exam.

1. Rupert Peacock is an amateur polo player, gourmet, raconteur and bon-vivant who never did a day's work in his life. An inveterate gambler as well, he receives what he considers to be an inadequate living allowance from his wife, Sylvia. She is the vice-president and general counsel of Worldwide Widgets, Ltd. Her father, Arnold Arbuthnot, is Chairman of the Board, President and the major stockholder of Worldwide. Sylvia never speaks to her husband about business matters, fearing that he may be confused by the complicated details involved in manufacturing, marketing and distributing widgets worldwide. Arnold, who cannot abide Rupert, has not spoken to his son-in-law since the day Sylvia and Rupert were married. Although they do not speak, Arnold and Rupert share the same barber, Harry Hacker, who often acts as a go-between to carry the nasty messages they send to each other. Arnold frequently conducts business from the barber's chair through use of his mobile telephone. On one such occasion, Hacker overhears what he takes to be a deal in the making for Worldwide to acquire a revolutionary manufacturing technology that will allow it to secure the lion's share of the world widget market.

Hacker passes the overheard information to Rupert the very next day. Rupert, not quite as dumb as his wife might believe, immediately calls his broker and Harvard classmate, "Fastbuck" Forsythe. He does not reveal the source of his information but tells Forsythe that he has some "definite" and "accurate" information on Worldwide stock and asks what he should do about it. "Fastbuck," who knows all about Rupert's family relationships, refuses to give a definite answer but later buys large blocks of Worldwide for himself, his customers and Rupert's discretionary account. All concerned double their money when the price of Worldwide stock rises on the public announcement of the new technology acquisition. Its attention drawn to the situation by the unusual volume of trading in the stock, the SEC begins an investigation that leads to Rupert. Shaking in his white-buck shoes, Rupert consults Porter Herbert Ashley Cortland IV, Esq., who was his tennis partner at Exeter. Cortland, known as "Skip" since his prep school days, is a partner in the prestigious Wall Street firm, Dewey, Cheatham & Howe. After giving the deep thought of six senior associates to various phases of the problem

presented, Skip announces to Rupert: "In my professional opinion, you are in deep do-do. You must go to the United States Attorney, Meister Oberdorfer, and spill your guts in the hope of saving your hide." Rupert accepts the advice.

You are the Assistant United States Attorney to whom the foregoing information has been presented for review. Your supervisor asks you to write a memorandum on whether the broker, Forsythe, can be prosecuted for securities fraud under the provisions of § 10(b) of the 1934 Securities Act and SEC Rule 10b-5 and for mail fraud under the provisions of 18 U.S.C. § 1341. Write the memorandum, giving reasons for your conclusions and touching on the holdings in U.S. v. Carpenter, Chiarella v. United States and U.S. v. Newman.

2. Discuss the double jeopardy rule announced in Grady v. Corbin in terms of:

- (a) the factual background and holding of the case;
- (b) whether the subsequent prosecution of Corbin for homicide and assault could have been accomplished without running afoul of the Double Jeopardy Clause;
- (c) its relation to the traditional Blockburger test;
- (d) the application of the "same evidence" or "actual evidence" test;
- (e) the prosecution of continuing offenses such as RICO and CCE.

3. I.E. Vade, an Executive Board member of the Gotham Chapter of the Karl Marx Society (an organization devoted to, among other things, the principle that wages do not constitute income), has recently been the subject of an investigation by the Internal Revenue Service concerning his compliance with the federal tax laws. It seems that Vade has failed to pay any income tax for the past two years. On each line of the tax return containing the word "income," Vade crossed out "income" and inserted the word "wages." At the bottom of the returns, Vade added the following explanatory note: "The U.S. Supreme Court is wrong; Karl Marx has established, and I fervently believe, that my wages do not constitute income and the government may not tax them. Accordingly, I owe no taxes."

The IRS agent assigned to conduct the investigation of Vade, Dan T. Mann ("T. Mann"), decides it would be useful if he could review Vade's banking records. T. Mann thinks that if he can gather enough information about Vade, a criminal investigation and indictment may result, increasing his (T. Mann's) chances of promotion within the IRS. T. Mann obtains an administrative summons directed to the LaSalle National Bank (Gotham branch) for

all records concerning Vade. The bank requests your advice concerning the administrative summons. What is that advice? May Vade take any action with respect to the summons?

After the summons issue is resolved, T. Mann is convinced there is a basis for a criminal investigation; he sends the Vade file to his cousin, George G. Mann ("G. Mann"), the U.S. Attorney for Gotham, along with a note recommending prosecution. On January 1, 1988, G. Mann decides to empanel a grand jury to investigate Vade's activities. The first witness called to appear before the grand jury is Vade himself. Vade, however, is unwilling to provide the grand jury with any information. What courses are open to G. Mann? Assume that Vade remains recalcitrant and refuses to answer any questions. As Vade's attorney, you are asked to advise him in detail as to the potential consequences of his conduct. What advice do you give?

The government continues its case against Vade with the testimony of Vade's accountant as well as other members of the Karl Marx Society. T. Mann (along with G. Mann) is present for the testimony of each witness; prior to each one's testimony, he advises them what the previous witness has testified to and reminds each what the penalties for perjury are.

Will the grand jury indict Vade? For what crime(s)? May Vade be prosecuted without an indictment? Assume an indictment does issue. What courses of action are open to Vade, and what is your assessment as to their likely success?

4. [Refer to the previous question.] During the course of the grand jury's investigation, G. Mann discovers that Vade and other Karl Marx Society Executive Board members had occasionally exploited weekly society meetings as a marketplace for the sale of cocaine. Vade, who had been charged with a variety of drug offenses no fewer than 12 times between 1965 and 1975, used certain society meetings to bring together cocaine buyers and sellers. Sellers were required to pay Vade a percentage on their sales. Vade had recently been prosecuted for this conduct by state officials in Gotham but was acquitted.

G. Mann would like to know whether he may seek a RICO indictment against Vade and has asked you to provide him with a memorandum detailing the bases for such an indictment as well as any possible defenses and their likely success. He would also like to know the latest date by which any indictment must be obtained and handed up. Write the memorandum, making sure to set forth any assumptions upon which you rely.

FINAL EXAMINATION

Advanced Topics in Criminal Law & Procedure:

Federal Courts & Federal Crimes

828D1

Judge Miner/Professor Roffer

Fall Semester 1989

December 15, 1989, 1:00 P.M.

Two hours. Closed book. Students may keep copy of exam.

1. On December 1, 1989, Tom and Kitty Katt drive from their home on Park Avenue in New York City to the docks in Bayonne, New Jersey. There they meet Captain Manfred Batt, skipper of the "West Wind," an ocean freighter newly arrived from ports in the Far East. As he has done on the first of December in each year for the past five years, Batt delivers to the Katts a large container of heroin and receives in return a small suitcase containing \$1,000,000 in U.S. Currency. The Katts have no idea where Batt obtains the heroin but assume that it originates within the "golden triangle" and is smuggled into the United States aboard the "West Wind." Tom and Kitty proceed directly from the Bayonne docks to Scarsdale, N.Y. There, they turn over the merchandise to Simon Pure III and, in accordance with the procedure they have followed for the past five years, receive from him a steamer trunk containing \$2,000,000 in small bills. The Katts do not know, and have no desire to know, what Pure does with the heroin. In fact, Pure is the head of a national network of 200 heroin dealers, who sell the nefarious narcotic under the brand name of "Simon Pure Heroin." The deal completed, Tom and Kitty return to their jobs at the U.R. Glutton Investment Company to await another profitable December.

You are an Assistant United States Attorney in the Southern District of New York. Your supervisor, Oscar Underwasser, calls you to his office and says: "I think we have enough evidence to nail the Katts for a CCE violation. We have been aware of their activities for a long time, and now we have direct proof that they buy from Batt and sell to Pure. In fact, we can verify all aspects of their transactions. What do you think?" Write a Memorandum to Underwasser, giving a reasoned opinion as to whether a prosecution under the Continuing Criminal Enterprise statute, 21 U.S.C. § 848, would be successful under the foregoing facts. The memorandum should include a review of all the elements that must be proved to establish a CCE violation.

2. I.M. Trubble is a part-time dealer in pornography. He offers to sell some of his wares by mail through a classified advertisement in a local newspaper. A Postal Inspector answers the advertisement and Trubble is arrested and indicted for

violation of 18 U.S.C. § 2252, sending and receiving child pornography via the mails. You are appointed to represent Trubble, whose assets total \$414.34. It is uncontested that Trubble has resided in the same house for 20 years and has worked as a clerk for the Ajax Co. for 15 years. He has no previous record. The case is assigned to United States District Judge Luther A. Wilgarten, Jr. On your first appearance before Judge Wilgarten, you move for an order fixing conditions of release and the prosecutor moves for an order of detention pending trial. The prosecutor outlines the government's case and Judge Wilgarten thereupon addresses you as follows: "Your client is a serious danger to the community. If he is released, he will peddle his smut all over the place. The only purpose of bail is to assure the presence of the defendant. In any event, I fix bail in the sum of \$5,000,000, to be furnished in the form of a bond or by cash deposit." Judge Wilgarten refuses to hear any further application in the matter. What steps do you take, and what arguments do you make, to secure the release of your client?

3. Wally Worker, a vocal leader of an organization known as Pay No Taxes! ("PANT"), is the subject of a grand jury investigation being handled by the United States Attorney for the Northern District of Somewhere. It seems that Worker, who is self-employed on a full-time basis as a drug czar in Somewhere, has neither filed a return nor paid income taxes for the past five years. As a PANT leader, Worker has been at the forefront of a nationwide movement aimed at overturning the nation's tax laws. In particular, Worker has frequently criticized the system as one "which exacts from laborers [and drug dealers] a payment for their very efforts," a system that Worker finds "utterly unacceptable" and with which he disagrees on a moral and philosophical basis.

In the course of presenting the case to the grand jury, the U.S. Attorney determines that he needs to obtain additional information about Worker's assets. Accordingly, he requests that the IRS agent assigned to the case issue an administrative summons to the LaSalle National Bank, where Worker has a checking account, in order to determine the amount of money Worker kept there as well as to review the movement of money in the account over the past five years.

While waiting for the summons to issue, the U.S. Attorney calls the IRS agent as a witness before the grand jury; the agent asks for his assistant to be at his side during his testimony in order to help him respond to questions.

After the grand jury returns an indictment against him, Worker retains you to represent him. In order to determine how

he should plead, Worker asks you to advise him on what, if any, grounds the indictment may be dismissed. He also wants to know of what non-drug related crimes he stands to be convicted (and why) and how likely such a conviction would be if you were to fail in having the indictment dismissed. Finally, he would like to know if, in light of the issuance of the administrative summons to the LaSalle National Bank, he has reason to question the competence of his previous attorney, who made no effort to quash or otherwise oppose the subpoena. In advising Worker, be sure to inform him of any factual assumptions you may make.

4. [Refer to previous question] Assuming that you are unsuccessful in the district court with your motion to dismiss the indictment against Worker, what procedural options are available to you other than proceeding to trial? Assume that you do proceed to trial to defend Worker against the charges lodged against him. Worker tells you that he can "take care" of the two key witnesses the government intends to have testify at his trial and asks whether there are any risks associated with such activity. How do you advise him?

As Workers's trial progresses, he becomes increasingly agitated and disruptive. On numerous occasions, the trial judge orders Worker to restrain himself or be found in contempt. When it becomes apparent that Worker is refusing to heed the judge's warning, you are asked to explain to him what the judge is empowered to do and what it is that Worker should expect. What do you tell Worker?

FINAL EXAMINATION

Advanced Topics in Criminal Law & Procedure:

Federal Courts & Federal Crimes

828D1

Judge Miner/Professor Roffer

Fall semester 1988

December 16, 1988, 1:00 P.M.

Two hours. Closed book. Students may keep copy of exam.

I. The U.S. Attorney for the Middle District of Nowhere is investigating the activities of three suspected drug dealers, Collin, Theodore and Buck. The three long have been involved in an ongoing criminal conspiracy aimed at developing the largest drug distribution network in Nowhere. On the side, Theodore and Buck have found time for public service and have been vocal leaders of a tax protest movement intent on reforming the federal tax laws.

The U.S. Attorney has grown impatient awaiting the results of the drug conspiracy investigation and decides to go ahead with tax-related charges against the three. The evidence he has gathered suggests the following: (i) for the 1986 tax year, Collin has understated his tax liability by failing to report over \$1 million in income received from his drug-related activities. All of that money was received as cash and no records of its receipt or disbursement were kept. As far as Collin was concerned, it was a particularly bad year, since his \$1 million in gains were more than offset by various expenses he had incurred, e.g., payoffs to law enforcement personnel and the costs of protection. For the 1987 tax year, when Collin had prospered, he sought to atone for his transgressions by declaring more income than he had actually received and paying the proper amount of tax on that figure; (ii) for the 1987 tax year, Theodore decides to culminate his tax protest activities by filing an income tax return containing zeros in each blank for which information had been requested; (iii) for the 1987 tax year, Buck too opts to display his displeasure with the tax system by filing an insufficient return. He, however, elects to mail the return completely blank except for his name, address and signature.

The U.S. Attorney is satisfied that he can obtain convictions against all three for various offenses. Because he would like to streamline the prosecution process, he has asked you to provide him with advice on whether he may proceed with an information or whether he must secure a grand jury indictment. He also would like the added comfort in knowing what claims or defenses Collin, Theodore and Buck may raise and their likely success. Be sure to state any facts you assume to be true in providing your analysis.

II. While the tax charges are pending against Collin, Theodore and Buck, the U.S. Attorney finally obtains what he believes to be evidence sufficient to support a RICO prosecution against all three stemming from their drug-related activities. You should assume that that evidence provides probable cause to believe that the defendants comprised an "association in fact" (the enterprise) engaged in interstate commerce and that they conducted the affairs of that enterprise through a pattern of racketeering activity (the predicate acts described below). However, the only predicate acts (the racketeering activity) the evidence points to are six episodes of bribery, one of which occurred in 1980 and five of which occurred in December of 1985. Each defendant previously had been tried and acquitted in Nowhere state court on all six bribery charges.

The evidence is presented to the grand jury through the testimony of two federal agents, each of whom was present during the other's testimony. In addition, the U.S. Attorney has subpoenaed Fawn, Buck's wife, to give testimony under a court-ordered grant of complete immunity. When Fawn refuses to cooperate, the district court adjudges her in contempt and orders that she be imprisoned pending the final disposition of all charges against Buck.

On January 1, 1989, the grand jury hands up a RICO indictment against Buck and Collin, and a separate indictment for the same offenses against Theodore. Since Theodore's whereabouts are unknown, the U.S. Attorney requests that the indictment be sealed. The court grants that request.

Based on their indictment, trial against Buck and Collin commences on January 15, 1991. (Assume there were no speedy trial violations). On February 1, 1991, after Theodore has been apprehended, the court unseals his indictment and schedules a trial to begin in April.

The U.S. Attorney has asked you whether, and on what grounds, Buck, Collin and Theodore may move to dismiss their indictments and the likely success of any such motion. He also has asked you whether he can expect Fawn's attorney to seek relief from the contempt order, and if so, to analyze the merits of such a request.

III. The national road company of "Oh! Calcutta!" travels from New York City to Bismarck, North Dakota, where a performance of the show has been scheduled for the first two weeks of December, 1988. The company includes five musicians, members of New York City Local #1, United Federation of Musicians, who provide all the musical accompaniment necessary for the show. Upon arrival, the show's director proceeds to the office of the manager of the Bismarck Roxy, the theatre where the performance is to be given, to make final arrangements. Outside the manager's office, the director is confronted by Caesar C. Caesar, president of Bismarck

Local #007, United Federation of Musicians. Caesar tells the director that the Bismarck Roxy is a "union house" and that a written agreement between his union and the theatre management requires that fifteen local union musicians be hired for each performance of any show requiring music. After learning that the show's musical requirements were met by the five musicians in the road company, Caesar graciously agrees that the five may be used, provided fifteen local union members are paid to "stand-by" for each performance. When the director asks what would happen if he does not accede to the demand, Caesar replies: "You want the show to go on, don't you?" The director reluctantly agrees to hire the "stand-by" musicians as demanded, and Caesar is one of those hired. After a triumphal two-week run, the company heads for Peoria, Illinois and the irate director heads for the office of Juliana Ruloff, United States Attorney for the District of North Dakota.

You are the Assistant United States Attorney with whom Ms. Ruloff reviews the foregoing information after her meeting with the director. Ms. Ruloff is of the opinion that Caesar has violated the Hobbs Act and the Mail Fraud Statute, but solicits your advice before proceeding further with the matter. Write a memorandum to the U.S. Attorney, advising whether or not her opinion is correct. Give detailed reasons for your conclusions. Your memorandum should discuss the elements of the two crimes and identify what elements are present or absent in the fact pattern presented.

IV. Magnus Peekskill, raconteur, gourmet, bon vivant and private investigator decides to undertake a "one-shot" venture in the marijuana importation and distribution business. He arranges to purchase six tons of "merchandise" from the Captain of a freighter ship in Honolulu, Hawaii. He also arranges to sell the marijuana in two-ton lots to three purchasers in Brooklyn, New York over a three-month period. The purchase and sales go off without a hitch and Peekskill makes a profit of one million dollars, which he invests promptly in a pineapple plantation in Maui. He returns to his work as a private eye in Honolulu, and all is tranquil until he is indicted for engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848. Immediately following the indictment, the government secures an ex parte order pursuant to the provisions of the Comprehensive Forfeiture Act of 1984 (21 U.S.C. §853(e)(1)(A)) to prohibit transfer of the pineapple plantation pending possible post-trial forfeiture. Peekskill has no assets, other than the plantation, with which to pay attorney's fees. As his defense counsel, you move to dismiss the indictment and to vacate the restraining order. What arguments do you make in support of each application?

FINAL EXAMINATION

Advanced Topics in Criminal Law & Procedure:
Federal Courts & Federal Crimes

828D1

Judge Miner/Professor Roffer

Fall semester 1987

December 14, 1987, 1:00 P.M.

Two hours. Closed book. Students may keep copy of exam.

I. R. U. Reddy is the owner, publisher, sole employee and author of "The Potato Times," a weekly newsletter published in Boise, Idaho and distributed by messenger service to potato farmers throughout the state of Idaho. The sole purpose of the newsletter is to advise subscribers of the condition of the market for Idaho potatoes in the United States. The subscription price is \$500.00 per year, and most subscribers pay by check mailed to the publisher's office in Boise. Many of the subscribers have a blind faith in the accuracy of "The Potato Times" and base the prices they charge to wholesale produce dealers on the information furnished in the newsletter. Reddy has written and published "The Potato Times" for twenty years and is proud of its excellent reputation. The masthead of the newsletter bears the motto: "Dedicated to the Integrity of the Potato Market."

In order to prepare his weekly report, Reddy makes frequent telephone calls to produce dealers in various parts of the nation. These dealers enable Reddy to get a "feel" for the national Idaho potato market by furnishing him with the latest wholesale and retail prices and the latest information on supply and demand in the localities where they conduct business. Reddy is able to forecast potato prices by collecting and analyzing the data supplied by the dealers.

In October, 1987, I. M. Ruff, an unemployed New York investment banker, settles in Boise. He soon develops an interest in the potato market and learns of the importance of "The Potato Times" to Idaho farmers. He maneuvers himself into a meeting with Ruff and soon gains his confidence. In short order, he persuades Ruff that they can make a "killing" in potatoes without compromising the honesty of the newsletter. To effectuate the scheme, Ruff and Reddy pool their resources and buy potatoes just before the publication of a truthful and accurate newsletter forecasting a rise in prices. Predictably, prices rise following publication and the "partners" are able to sell at a great profit. They do not consider that their

activities were unlawful, but they do not publicize what they have done either.

Polly Tishan, United States Attorney for the District of Idaho, gets wind of the Ruff and Reddy potato deal. Her investigations develop the foregoing facts and she decides to pursue the matter further. You are one of her assistants and she calls you in to discuss the situation. She says: "These fellows have breached a fiduciary duty to deal honestly in the potato market. I think that the mail fraud statute applies. It is our Colt .45, our Cuisinart, our Louisville Slugger, our strongest weapon in the fight against potato market manipulation. Maybe the wire fraud statute applies. What do you think?"

Write a memo to U.S. Attorney Tishan, telling her whether Ruff and Reddy can be prosecuted for mail or wire fraud. The memo should discuss the elements of the crimes and identify what elements are present or absent in the fact pattern presented. The memo should demonstrate familiarity with the Supreme Court decisions in McNally and Carpenter (Winans).

II. Write a brief essay on the Assimilative Crimes Act answering the following questions: What is its purpose? What is the constitutional authority for its enactment? In what places does it apply? What challenge was made to its constitutionality and how was that challenge resolved? What is the most difficult issue federal courts face in determining whether it applies? What is and what is not assimilated when the Act applies?

III. Judge Sam Smith, a highly regarded jurist, has just been nominated by the President to fill a recent vacancy on the Supreme Court of the United States. Immediately, the FBI commences an extensive background investigation of Judge Smith and asks that he complete a personal history form. Judge Smith answers each question on the form truthfully and completely -- with one exception: In response to the question "Have you ever been convicted of any violation of law?," Judge Smith answers "no," even though he had been convicted of marijuana possession in his less judicious law school years.

After submitting the completed form, Judge Smith is personally interviewed by an FBI agent. The agent asks Judge Smith a number of questions about the dating service Judge Smith operated during his college years, and questions whether the service was legitimate or merely a disguised prostitution ring. Although Judge Smith knew the services his company supplied constituted prostitution, he responds "No, it was legitimate."

Meanwhile, another FBI agent has been interviewing Judge Smith's wife, Dr. Jane Jones. Dr. Jones, who is pursuing a prestigious fellowship at a state hospital, helps in the administration of a federally-funded local family-planning clinic. Knowing that controversy over the topic of abortion will impact on her husband's judicial aspirations, Dr. Jones omits mention from her fellowship application of the fact that she regularly performs abortions. Similarly, on a quarterly family-planning clinic report prepared by her and submitted to the State Public Health Commission, she falsely states that the clinic no longer performs non-therapeutic abortions.

At the conclusion of its investigation, the FBI submits its report to the Department of Justice. Soon thereafter, amid public clamor, Judge Smith withdraws his name from consideration. The Department of Justice, however, is outraged and asks you to prepare a memorandum detailing any possible bases for seeking indictments against Judge Smith and Dr. Jones, and the likelihood of any ultimate convictions.

IV. As a result of its investigation of Judge Smith, supra, the Department of Justice discovers that the dating service the judge operated was in fact a cover for an illegal prostitution operation. Until 1975, the enterprise functioned as a typical prostitution organization, offering sex for money. Customers from all neighboring states were frequently solicited by enticing brochures mailed to their homes, and those who used the service but refused to pay were threatened both with exposure to their families and physical harm. Occasionally, the threats were carried out; the homes of at least three separate customers were found to have been firebombed by dating service employees.

In 1975, the dating service changed direction. No longer concerned with profits, its management had developed a new moral vision calling for the legalization of prostitution. All of their efforts were now devoted to persuading the legislature, many members of which were former customers, to enact appropriate legislation. When the legislators were not moved, the dating service turned to some of the same tactics that had brought it success in previous endeavors -- threatening legislators with exposure and physical harm.

By 1980, the "lobbying" had worked; prostitution was now legal. Ecstatic in having achieved its goal of social enlightenment, the dating service's management closed up shop and went on to serve the public in other capacities.

Based on these facts, the Department of Justice obtains a two-count RICO indictment against the management of the dating service for both its pre- and post-1975 activities. When the

defendants' motion to dismiss the indictment is denied, they enter a conditional plea of guilty to both charges reserving their right to appeal the denial of that motion. Their plea, however, is given in exchange for the government's promise to recommend a sentence of "probation." At sentencing, the government adheres generally to its promise and recommends "probation, but with the special conditions of probation that the defendants (i) make full restitution to those victims who suffered the destruction of their property, and (ii) be prohibited from participating in any efforts to lobby the legislature." The judge adopts that recommendation entirely and so sentences defendants.

On appeal, defendants now challenge not only the decision denying their motion to dismiss, but their sentence as well. What result?

FINAL EXAMINATION

Advanced Topics in Criminal Law & Procedure: Federal Courts & Federal Crimes

828D1

Judge Miner/Professor Roffer

Fall Semester 1986

December 22, 1986, 1:00 P.M.

Two hours. Closed book. Students may keep copy of exam.

1. I.M. Straight, Esq., Chairman of the Whig political party in the City of Gotham, exercises tight control over the activities of his party. Without his approval, no Whig can be nominated for any city office. Because of his (legitimate) fund-raising activities, large sums of money are available for Whig campaigns. All committee members and all precinct captains are loyal to the Chairman. Straight has built the strongest political organization in the state. As a result, all elected city officers in Gotham, including all members of the City Council, are members of the Whig party. Straight receives no salary or remuneration of any kind for his efforts as party chairman. His only sources of income are his investments and fees derived from his law firm, Straight, Straight and Straight, specialists in appellate advocacy.

In June, 1986, the Whig party of the City of Gotham, in accordance with its rules, schedules a nominating convention to nominate a candidate for the office of Mayor. The Whig nomination is tantamount to election in the city. An informal survey shows that the delegates who will attend the convention are split evenly between two candidates -- Boris Norris, president of the Elite Airline & Storm Door Company and Betty Cagney Lacey, former Chief of Police. Lacey solicits convention votes on a platform calling for modernization of city government. She supports the computerization of City Hall, a step expected to save the City millions of dollars and to eliminate dozens of jobs. She also supports the hiring of qualified personnel, without regard to political affiliation, for all city jobs. Norris merely promises to do "business as usual" if nominated and elected. It is generally accepted that Lacey is more qualified to serve as Mayor.

Alarmed by the prospect of losing political patronage and by Lacey's increasing popularity, Straight sends confidential letters and telegrams to each convention delegate, setting forth his preference for Norris in the strongest terms. When the delegates meet in convention, they obligingly choose Norris as their party's candidate by unanimous vote. Norris beats his Anti-Federalist party opponent by a landslide at the general

election and begins to serve in the fine tradition of Gotham Mayors. As promised in his platform, he conducts "business as usual," consulting Straight on all patronage appointments.

Outraged by the failure of the city government to modernize its archaic structure and by the continuation of the local patronage system, the United States Attorney, Richard Reindeer, decides to proceed against Straight. Reindeer presents the foregoing facts to the grand jury, and an indictment is returned charging Straight with mail and wire fraud in that he "did defraud the City of Gotham and its citizens of the right to have their affairs conducted honestly and impartially, free from fraud, dishonesty, bias and deceit" and "did defraud said City and citizens of his honest and faithful participation in their affairs."

You are an Assistant United States Attorney. Your boss, Mr. Reindeer, a member of the Anti-Federalist party, has begun to worry about the strength of his case. He asks you to write a memo giving your opinion as to whether mail and wire fraud convictions can be sustained on the available evidence. Write the memo, giving detailed reasons for your opinion.

2. In federal criminal cases, appeals generally can be taken only from final judgments. There are exceptions to this rule. Discuss the exceptions as applied to appeals by the government as well as appeals by defendants. The discussion should include a statement of the rule established in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), as applied to criminal cases by Flanagan v. United States, 465 U.S. 259 (1984).