

February 2022
MPT-2
Drafters' Point Sheet

State of Franklin v. Ford

The MPT point sheet addresses the factual and legal points encompassed within this MPT. It presents the expected issues that might be addressed by an examinee in a thorough answer to the problem, but it should not be construed as a model answer.

State of Franklin v. Ford
DRAFTERS' POINT SHEET

Examinees work in the Franklin Public Defender's Office, which is representing Sylvia Ford. Ford has been charged in a three-count indictment with sale of cocaine, possession of marijuana with intent to sell, and being a felon in possession of a firearm. Examinees are asked to prepare the argument section of the brief in support of a motion to sever the three charges for trial.

The File contains the instructional memorandum from the supervising attorney, the office guidelines for drafting persuasive briefs, a file memorandum summarizing the client interview, the indictment, two affidavits in support of the arrests, and the motion to sever. The Library contains excerpts from the Franklin Rules of Criminal Procedure and the Franklin Rules of Evidence as well as three cases: *State v. Saylers* (Fr. Ct. App. 2013), *State v. Ritter* (Fr. Ct. App. 2005), and *State v. Pierce* (Fr. Ct. App. 2011).

The following discussion covers all the points the drafters intended to raise in the problem.

I. OVERVIEW

The examinee's task is to draft the argument section of a persuasive trial brief in support of the defendant's motion to sever the charges. The File includes a format memorandum containing guidelines for persuasive briefs in trial courts. Examinees are instructed to write only the legal argument section. In doing so, they should integrate the facts into the legal argument to make the strongest case for the client. Examinees should break the argument into its major components, introducing the separate sections with carefully written subject headings. Supporting authority should be emphasized, but contrary authority should also be addressed and explained or distinguished. Arguments should not be reserved for reply or supplemental briefing. Examinees are expected to follow the guidelines and make the most persuasive case possible under the rules and caselaw.

A. FACTS

This section briefly summarizes those facts most relevant to drafting a persuasive argument for Ford. Note that examinees not expected to prepare a statement of facts.

According to the summary of the client interview, Ford has been charged with the sale of cocaine on April 17, 2021, and with possession of marijuana with the intent to sell on October 24, 2021. On October 24, 2021, she is also alleged to have been a felon in possession of a firearm. Ford is a felon because she has a 2015 conviction for assault with intent to commit murder. All three charges are in one indictment. The defense will move to sever all charges for trial.

Regarding the cocaine charge, Count 1, Ford states that she was visiting her brother at his apartment when she answered a knock at the door. She didn't know the visitor, but her brother handed him a baggie containing powder. The visitor then gave Ford \$100 as he was leaving. Ford immediately handed the money to her brother. She knew nothing more about the incident until she was arrested six months later.

The second and third counts arise from events on October 24, 2021. On that day, Ford was driving her boyfriend's car when a police officer pulled her over for driving erratically. Ford was arrested for driving under the influence (DUI), handcuffed, and placed in the backseat of the police car. The officer then searched the car Ford had been driving and found marijuana in the backseat, along with a scale and plastic baggies. A handgun was found in the car's trunk. Ford claims to have had no knowledge that any of these items were in the car.

Ford wants to testify on her own behalf at trial.

Ford was previously convicted of assault with intent to commit murder, a felony. Because the underlying felony is an element of the charged offense, the prior felony would likely be admissible in a trial of the charge of being a felon in possession of a firearm. The public defender told Ford that, assuming the cases were severed, he would do whatever he could to prevent her prior conviction from being introduced in either of the drug cases. If Ford is tried on the drug charges separately from the firearm charge, the only avenue of admissibility of the prior assault with intent to commit murder would be to impeach Ford if she chose to testify.

The prosecutor has refused the defense's request to stipulate, for purposes of trial, that Ford was guilty of a qualifying felony without identifying the felony. In fact, the prosecutor told the defense that he intends to introduce Ford's prior conviction for assault with intent to commit

murder as part of his case-in-chief on the firearm charge. The prosecutor also intends to argue that the presence of the gun in the car proves intent to sell the marijuana found in the car.

The indictment alleges the charges against Ford in broad terms: she is alleged to have committed the stated offenses on the stated dates. There is no further specificity in the indictment.

The officer who investigated the April 17, 2021 charge filed an affidavit in support of Ford's arrest for her alleged sale of cocaine. A confidential informant (CI) had advised the officer of ongoing drug activity at 224 Primrose Lane, Apt. 5, in Franklin City. The officer arranged for the CI to attempt to buy \$100 of cocaine at the Primrose Lane apartment. The CI went directly to the apartment, knocked, and went inside. While in the apartment, the CI spoke with an unidentified man and a woman later identified as Sylvia Ford. Ford opened the door to the apartment, and in her presence, the unidentified man gave the CI a baggie containing a powdered substance. The CI gave Ford \$100. The powder in the baggie was later determined to be cocaine.

There is also an affidavit in support of Ford's DUI arrest on October 24, 2021. In that affidavit, the officer stated that she pulled over a car that had been swerving in and out of traffic. The driver provided a driver's license identifying her as Sylvia Ford. After Ford failed a field sobriety test, the officer arrested her for driving under the influence, handcuffed her, and placed her in the police car. The officer then searched Ford's car. In the backseat were four kilograms of marijuana, baggies, and a small scale. In the car's trunk, the officer found a handgun registered to James Litton, Ford's boyfriend. The car was also registered to Litton.

B. THE LAW

Both the Franklin Rules of Criminal Procedure and the Franklin Rules of Evidence are identical to the respective federal rules. Rule 8(a) of the Rules of Criminal Procedure allows prosecutors to join charges in a single indictment if all the charges are of the same or similar character, are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan. Rule 14 allows charges so joined to be severed for trial if the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government.

Rule 404(b) of the Franklin Rules of Evidence prohibits the introduction of prior acts for the purpose of showing action in conformity with character or a trait of character. It allows admission of those prior acts if relevant to any other issue. Under Rule 403, a trial court may exclude evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

State v. Saylers (Fr. Ct. App. 2013) involves the propriety of joinder under Franklin Rule of Criminal Procedure 8(a). Saylers had been charged with robbing a convenience store and, two years earlier, attempting to rob a hiker at a state park. The trial court considered only the indictment, decided that joinder was appropriate, and denied Sayler's motion to sever the charges. The appellate court reversed, finding that allegations of dissimilar crimes, occurring two years apart, were inappropriate for joinder. The fact that the two crimes were both robberies was not a sufficient reason to join the charges. The court noted that, in addition to the indictment, the trial court could have considered affidavits in support of arrests in making decisions on joinder.

State v. Ritter (Fr. Ct. App. 2005) illustrates analysis of a motion to sever pursuant to Rule 14 of the Franklin Rules of Criminal Procedure. Ritter was charged in a two-count indictment with two counts of selling heroin, about four months apart. Ritter did not claim that the counts were inappropriately joined; rather, he claimed that severance was required because he was prejudiced by the joinder. The court discussed the three bases for finding prejudice under Rule 14: (1) the jury might be prejudiced against a defendant simply because the defendant had been charged with multiple offenses; (2) the evidence of one crime would not be admissible in the trial of the other crime were the cases to be tried separately; and (3) the defendant had good reason to want to testify in regard to one charge but not in regard to the other. Ritter alleged prejudice based on the second ground—that evidence of each of the charges would be inadmissible in the trial of the other charge. The court disagreed, finding that both counts alleged sale of heroin in the same neighborhood, while using the same car, and within a four-month period. Under FRE 404(b), each act would be admissible in the trial of the other charge because they were both part of the same scheme or plan.

Even if allowed by FRE 404(b), evidence of other acts may still be excluded if the prejudicial effects of admission substantially outweigh the probative value of the evidence under

Rule 403. In *Ritter*, the probative value of the two heroin sales was relatively high, precisely because they would permit an inference of a single plan to sell drugs. While telling the jury about one drug offense in a case involving a similar offense would prejudice Ritter's case, that was not the kind of "unfair prejudice" covered by Rule 403, nor would it substantially outweigh the probative value of evidence of a common plan.

Ritter also claimed that the trial court erred in admitting proof that he possessed a gun at the time of the second incident. The court held that evidence of Ritter's possession of a weapon was not introduced to show his propensity to carry a weapon. Ritter was charged with possession of heroin with intent to sell. Evidence of Ritter's possession of a gun was relevant to an issue other than propensity. Carrying a weapon is highly correlated with the intent to sell drugs, similar to possession of baggies or scales. The evidence was thus admissible under Rule 404(b).

The *Ritter* court also considered the impact of Rule 403: Was the probative value of evidence of possession of a weapon, in this case to show that Ritter had the intent to sell heroin, substantially outweighed by the danger of the unfair prejudices listed in Rule 403? The trial judge had given a limiting instruction that the jury could consider the gun only for the purpose of determining Ritter's intent to sell heroin. Therefore, the appellate court held that the probative value of evidence of Ritter's possession of a weapon was not substantially outweighed by the danger of unfair prejudice.

State v. Pierce (Fr. Ct. App. 2011) is another example of a motion to sever based on prejudicial joinder under Franklin Rule of Criminal Procedure 14. In the defendant's two-count indictment, the first count charged violation of an order of protection that had been issued on behalf of Pierce's former girlfriend (the Lynn Order). The second count alleged that Pierce was, approximately one year later, in possession of a firearm. He was prohibited from possession of a firearm by virtue of a different order of protection issued on behalf of his ex-wife (the Stein Order). The appellate court held that the trial court should have severed the counts for trial. The joinder was the only reason why the Stein Order would be admitted in the trial on the Lynn Order. But for the joinder of the offenses into one indictment, the jury charged with determining whether Pierce had violated the Lynn Order would have had no reason to know about the Stein Order. In sum, the

Stein Order was not relevant to any issue in the trial of the violation of the Lynn Order, and the jury's learning of this other offense was extremely prejudicial to Pierce's defense.

II. LEGAL ISSUES

The draft motion to sever simply states that all three charges against Ford should be severed and tried separately. The motion is based on Rules 8(a) and 14 of the Franklin Rules of Criminal Procedure. The examinee should argue in favor of severance of all three charges, requiring three separate trials for the three separate charges. First, the examinee should argue that Rule 8(a) requires severance on the basis that Count 1 is not related to Counts 2 and 3, and thus those charges are inappropriately joined. Second, the examinee should argue that the three charges should be severed under Rule 14.

Joinder under Franklin Rule of Criminal Procedure 8(a)

Rule 8(a) allows joinder only when the charges are of the same or similar character, are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan. In deciding whether counts are improperly joined under 8(a), courts can look at the facts alleged in the indictment but can also look at other documentary evidence such as affidavits in support of arrests. *Saylers*. Examinees should argue that sale of cocaine and possession of marijuana with intent to sell are not of the same or similar character.

- Examinees should refer to *Saylers*, in which it was improper to join two cases that were related only because they were “types” of robbery. By analogy, drug transactions involving different drugs (cocaine and marijuana), taking place in different contexts (a home and a car), and one involving sale while the other involved possession, are likewise not properly joined.
- Examinees should further argue that sale of cocaine and possession of marijuana with intent to sell were not part of the same transaction, as they occurred many months apart and in different parts of the city.
- Likewise, examinees should argue that sale of cocaine and possession of a firearm occurring on different dates are not properly joined. Sale of cocaine and possession of a

firearm are not similar or related offenses, are not part of the same transaction, and are not part of the same scheme or plan.

Examinees should likely concede that possession of marijuana with intent to sell and possession of a firearm, where the materials were found in the same car on the same day, are part of the same transaction and thus are properly joined.

Severance under Franklin Rule of Criminal Procedure 14

Examinees should argue in the alternative that regardless of whether the counts are properly joined under Rule 8(a), the trial court should sever the counts under Rule 14 if the defendant is prejudiced by the joint trials of the charges.

In *Ritter*, the court identified three bases for finding prejudice:

(1) Admission of evidence of other crimes creates an impression in the jury that the defendant has the propensity to commit crimes.

(2) One of the acts would not be admissible in the trial of the other acts were the crimes not joined for trial. In other words, the court must determine whether one act would be admissible in the trial of the other acts under Rule 404(b) of the Franklin Rules of Evidence.

(3) A defendant may wish to testify in his or her own defense on one charge but not the others.

Prong #1

As to the first prong—that Ford will be prejudiced solely because she is charged with multiple crimes—examinees may concede that this generally does not merit severance. *See Ritter*. That being said, an examinee could point out that there is more risk of such prejudice in this case than in *Ritter*, though *Ritter* does not specifically analyze this issue. If the possession of a handgun charge is tried with either of the two drug charges, the jury may find that Ford is a violent person and therefore should be convicted regardless of her guilt of either of the drug charges. Similarly, the examinee may argue that if the two drug charges are tried together, a jury will likely find Ford guilty of both just because the jury may think that she must be a drug “kingpin.”

Prong #2

As to the second prong—whether one of the other illegal acts would not otherwise be admissible under Rule 404(b)—the prosecution would have to demonstrate that the other acts were relevant for a purpose other than to show Ford’s propensity to commit crimes. Other permissible purposes include “proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” FRE 404(b)(2).

Examinees should argue that if Ford were tried separately on the cocaine charge, evidence of the act of possessing marijuana with the intent to sell would not be admissible: her intent or knowledge are not at issue, there is no common scheme or plan as the acts are vastly different, and the two acts do not indicate a shared motive. This case is distinguishable from *Ritter*, in which one heroin sale would be admissible in a trial of the other because the two illegal acts were evidence of a single plan to sell drugs. By contrast, Ford is not charged with selling the same drug in the same part of town. There is no evident common scheme or plan in the case against Ford.

Similarly, if Ford were tried separately on the cocaine charge, the act of possessing the firearm over six months later should not be admissible under Rule 404(b). The possession of the firearm has no bearing on the charge of selling cocaine. There is no question of identity, motive, modus operandi, common plan or scheme, or any other nonpropensity reason for admitting the possession of a firearm that occurred on a different date and in a different location.

It is likely that the state will argue that Ford’s possession of a firearm should be admissible for the purpose of showing that she intended the sale of cocaine and marijuana. *See Ritter* (“Carrying a weapon is highly correlated with the intent to sell drugs . . .”). Examinees should argue that the firearm charge is not evidence of intent for the cocaine charge because of the length of time between them, the difference in setting, and the fact that the cocaine sale occurred *before* the firearm offense. Examinees may also make this argument when addressing prejudice under Rule 403. Regardless, examinees should minimize any possible link between the firearm and the marijuana offense and focus on the prejudice to Ford caused by trying these charges together.

Even if Rule 404(b) does not bar evidence related to one charge from being admissible in the trial of the other charges, examinees should argue that Rule 403 (unfair prejudice, etc.) would

prohibit admitting such evidence. Here, Rule 403 would prohibit the introduction of the firearm charge in the trial for the cocaine charge. The unfair prejudice to Ford in a joined trial for the cocaine and firearm charges would be enhanced because the firearm charge would require that the jury know that Ford was previously convicted of assault with intent to commit murder. This felony conviction is the reason that Ford is prohibited from carrying a firearm and thus is relevant to the firearm charge. But this 2015 assault conviction has no bearing on, and is highly prejudicial to, the cocaine charge. The jury could hold it against Ford that she was convicted of a serious violent offense in the past. Therefore, the probative value of the possession of a firearm would be substantially outweighed by the prejudice to Ford of having the jury hear that she possessed a firearm and learn why it was illegal for her to do so.

Prong #3

The third basis for prejudice under Rule 14 concerns the extent to which joined charges may impinge on a defendant's decision to testify in her own defense. Examinees should recognize that a single trial for all three counts will affect Ford's right to testify regarding the charges against her. At this time, Ford has indicated that she wishes to testify regarding all three charges, but she has not committed to doing so. Therefore, examinees should limit the argument to showing how a joined trial would impact her ability to testify on her own behalf and not specifically state that Ford will or will not testify regarding any charge.

Relying on *Pierce*, examinees should argue that, in the event Ford chooses to testify regarding the drug charges but not the firearm charge, evidence of her prior felony conviction would be prejudicial. The circumstances surrounding the drug counts provide Ford with important reasons to testify on her own behalf.