EXERCISES FOR
CRIMINAL LITIGATION ADVOCACY -- A SEMINAR
FOR LAW STUDENTS AT
NEW YORK UNIVERSITY SCHOOL OF LAW

BY

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CRIMINAL LITIGATION ADVOCACY

Adjunct Professors Siffert and Peerce and Adjunct Assistant Professor Warner

Course Outline and Assignments

SESSIONS 1 and 2
READ CHAPTERS ONE, TWO AND THREE, NITA, MODERN TRIAL ADVOCACY

I. How the case can surface (Socratic)

A. THE PROSECUTION:
   1. Obtaining Information
   2. Prioritizing Objectives
   3. Risk Assessment
   4. Ethical Concerns

B. THE DEFENSE:
   1. Client Relations and Interviews
   2. Evaluation of Alternative Reactions
   3. Ethical concerns in advising client
   4. Dealing with Prosecutor
   5. Obtaining Information
   6. Ephemeral Considerations

II. Pre-Trial Preparation (Socratic, Demonstration, Student Exercise)

A. THE PROSECUTION:
   1. Indictments
   2. Grand Jury Uses
   3. Witness Preparation
   4. Conceptualizing Themes and Theories
   5. Saving for rebuttal

B. THE DEFENSE:
   1. Discovery
   2. Bail Applications
   3. Motion Practice
   4. Developing Themes
   5. Calling Witnesses/Client
   6. Preparing for Cross-Examination
   7. Judge vs. Jury
SESSION 3
READ CHAPTER ELEVEN OF MODERN TRIAL ADVOCACY ON OPENINGS

I. Opening Statements (Student Exercises and Demonstrations)

PROSECUTION AND DEFENSE:

1. United States v. Berbary
2. United States v. Washington
3. United States v. Montalvo
5. United States v. Jones

SESSION 4
READ CHAPTERS FOUR, FIVE, SIX, SEVEN, NINE AND TEN OF MODERN TRIAL ADVOCACY ON DIRECT AND CROSS EXAMINATION, IMPEACHMENT, OBJECTIONS AND ADMISSION OF EXHIBITS

I. Direct Examinations (Student Exercises and Demonstration)

A. NARRATIVE WITNESSES:

1. Dool in United States v. Jones
2. Stocker in United States v. Washington
3. Etzi in United States v. Montalvo
5. Greenan in United States v. Berbary
6. Logan in United States v. Barton
8. Haskins in United States v. Barton

B. Accomplice/Informer Witnesses:

1. Noeman in United States v. Berbary
2. Phelps in United States v. Barton
3. Malbem in United States v. Jones
4. Allen in United States v. Montalvo
5. Cigar in United States v. Barton
C. Defense:

1. Witnesses:
   a. Kies in United States v. Berbary
   b. Fleming in United States v. Washington
   c. Wilson in United States v. Washington

2. Clients:
   a. Montalvo in United States v. Montalvo
   c. Barton in United States v. Barton
   d. Andrews in United States v. Barton
   e. Berbary in United States v. Berbary

D. Real Evidence:

1. Test packages in United States v. Washington
2. Line-up photo in United States v. Montalvo
4. 2 oz. cocaine in United States v. Berbary
5. Bank surveillance photos in United States v. Jones
8. Joyce’s note to Uncle in United States v. Berbary
10. Diagram of bank in United States v. Barton
11. Diagram of bank in United States v. Jones

E. Expert Witness:

1. Fingerprint (Kess) in United States v. Montalvo
2. Handwriting expert in United States v. Berbary (re Joyce’s note)

F. Hostile Witness:

1. Robert Montalvo in United States v. Montalvo

SESSION 5

Cross-Examinations/Voir dire (Student Exercise & Demonstration)

1. Narrative witnesses: listed above
2. Accomplice/Informer witnesses: listed above
3. Expert witnesses: listed above
4. Real evidence witnesses: listed above
SESSION 6
READ CHAPTER TWELVE OF MODERN TRIAL ADVOCACY ON SUMMATION

Summations (Student Exercise and Demonstration)

1. United States v. Barton & Andrews
2. United States v. Montalvo
3. United States v. Berbary
4. United States v. Jones
5. United States v. Washington

SESSION 7
RE-READ CHAPTER TEN OF MODERN TRIAL ADVOCACY

Drills on Exhibits and Objections

SESSION 8

Opening Statements (Student Exercise)

SESSION 9

Direct Examination (Student Exercise)

SESSION 10

Cross-Examination (Student Exercise)
SESSION 11

Summation (Student Exercise)

SESSION 12
PREPARATION FOR MOCK TRIAL

SESSION 13
MOCK TRIAL

SESSION 14
MOCK TRIAL
EXERCISE FOR SESSIONS 1 AND 2: HOW THE CASE CAN SURFACE

Prosecution Counsel: Assuming the following facts, be prepared for classroom exercise regarding what you as the prosecutor should do.

You are an Assistant United States Attorney in the Southern District of New York on call for emergency duty. It is 5:00 p.m. and a U.S. Postal Inspector walks into your office, having just arrested the defendant Sam Smith. The Inspector tells you the following story:

Smith has just been arrested for attempting to cash five stolen Social Security checks from the mail. Smith has on his possession an additional 15 checks. The Postal Inspector has been able to ascertain that all of the checks had been stolen from the same mail box stationed at 23rd Street and Tenth Avenue.

Assume that the Postal Inspector hands you a signed confession which does not contain on the form an advice of rights, but the Postal Inspector tells you he has verbally informed the defendant of all his Miranda rights.

Problem:

1. As a prosecutor, do you interview the defendant again? The issue here is what are the purposes for the interview. Consider, for example, bail, recommendations, desire to convict, saving judicial resources, possible infringement of defendant’s rights and your role as a prosecutor to uncover other criminal conduct.

2. Do you tell the defendant that unless he tells you where he got the stolen checks he faces serious problems: five years and $2,000 for each and every check which he has in his possession totalling 100 years in jail and $400,000 fine. What are the risks that you as prosecutor encounter by making such statements to a defendant who has been arrested? Other than simply risking the suppression of any statement which the defendant might make, should you consider the possible damage to the integrity of the office in which you are serving?

3a. Should you volunteer to the defendant that it is in his best interests to cooperate, even if you do not specify the number of counts and the potential term of imprisonment which he faces?

3b. Assume that the defendant asks you what you recommend he should do, e.g., if you were me, would you cooperate?

* * *

Assume that the Postal Inspector tells you that the mail box from which the checks were stolen was accessed by a key which had been taken from a mailman who had been killed the week before.
4. Does this fact change your answers to any of the foregoing questions. If so, why?

* * *

Assume further that the Postal Inspector advises you that the Inspection Service has just received an anonymous phone call stating that the person who knocked off the mailman is about to hit another mailman in another part of town at midnight tonight.

5. Does this new fact in any way change your answers to the foregoing questions. If so, why?
EXERCISE FOR SESSIONS 1 AND 2: HOW THE CASE CAN SURFACE

Defense Counsel: Assuming the following facts, be prepared for classroom exercise on how to respond to the following questions. You should take into account both ethical and strategical concerns.

United States v. Kleinberg

Maurice Kleinberg is a long-time friend and client of your firm. Kleinberg has been the proprietor of Boyd’s purveyors in Manhattan since 1985. His business consists of purchasing meat wholesale, butchering it, and purveying it to hotels and restaurants in the metropolitan area. He grosses between five and ten thousand dollars a week. Joseph Johnson has worked for Kleinberg since 1992, primarily as a truck driver. Johnson is a Gulf War Veteran whose left hand was blown off during the war. Kleinberg gave Johnson his first steady job, who would do anything for Kleinberg.

On August 19, 2006, Johnson is arrested by the FBI as he emerges from the cooler of White House Beef company, a Manhattan wholesale meat dealer doing about ten million dollars a year gross in business. Seized from Johnson’s person after his arrest among other items is a circular stamp capable of marking meat “USDA Choice,” with the initials “A.D.”

A search of the White House Beef Company reveals some 24,000 pounds of meat marked “USDA Choice A.D.” Johnson drove to White House Beef in a truck registered to Ambassador Hotel Supply Co. at Kleinberg’s home address. After his arrest, Johnson is taken to the FBI office for “processing” which includes photographing and fingerprinting. Johnson is advised of his rights, because, as he puts it, “shouldn’t I have a lawyer first?”, but makes no statements. After being processed, but before being presented before the magistrate, Johnson is taken before an Assistant United States Attorney, again advised of his rights, and told by the prosecutor that the crimes for which he has been arrested are very serious, carrying prison terms of five years for conspiracy and two years for each time Johnson has stamped the meat; that no promises can be made, but usually things go better for people who cooperate with the authorities; that, after all, it’s not really Johnson they are after but the person from whom he got the stamp; finally the prosecutor said, “look, we know you work for Kleinberg, he gave you the stamp, didn’t he?”

Thinking that he was not talking to a lawyer and realizing that he had been caught with the stamp in his pocket, Johnson is about to tell the Assistant United States Attorney everything when the telephone rings. You are on the other end.

The timing of your call is impeccable, not by coincidence, but because you have just gotten off the telephone with Kleinberg. Kleinberg told you that his trusted employee was just arrested by the FBI. Using your working knowledge of the United States Attorney’s office, you know who is on complaint duty, so you place the call to the prosecutor.
Questions: What are you trying to accomplish by making the call? What do you tell the prosecutor? Have you made a decision to represent Johnson? Can you represent both Johnson and Kleinberg? What have you told Kleinberg about the representation issues when he asked you to handle the case for Johnson? What did you say to him when he offered to pay the bill to defend Johnson?

Assume before calling the prosecutor Kleinberg tells you that he suspects that Johnson had been stamping meat for the White House for several months, but that he, Kleinberg, had nothing to do with Johnson’s misguided conduct.

Question: Would this new fact effect any of your answers to the prior questions?

Assume that Kleinberg also told you that the stamp Johnson used had belonged to Kleinberg.

Question: Would this new fact effect your answers to any of the previous questions?

Assume you told the prosecutor not to talk to Johnson and that the prosecutor complied. You have hopped in a cab and you are now at the Courthouse preparing for the arraignment. You meet with Johnson and start to talk.

Questions: What is your purpose in talking to Johnson? What do you tell Johnson about whether you are representing him? What do you ask Johnson? Do you ask Johnson to tell you everything that happened? What considerations come into play in deciding whether to have a prospective client tell you everything? List the reasons why a lawyer might not want a prospective client tell him everything.

Assume Johnson tells you that he had been stamping meat for White House Beef once or twice a week for the past two months; that he would do this either on his way to work for Kleinberg or at lunch time; that he was paid personally by either Squires or Wallenstein, two of the principals of White House Beef, between $24 and $40 each time; and that his boss, Kleinberg, knew nothing about his activity at White House Beef and did not share in the money. Johnson said he found the stamp when a meat truck was in an accident a few years earlier. Assume you believe Johnson is covering up for his boss.

Assume the prosecutor tells you that formal charges will be preferred against Johnson for conspiracy to violate the Federal Meat Inspection Act and for the substantive violation of stamping ungraded meat “USDA Choice.” (18 U.S.C. § 371, 21 U.S.C. §§ 610, 676). The prosecutor also tells you that he would like to make a deal with Johnson if he gives up Kleinberg.

Questions: What are Johnson’s options? What do you tell Johnson about the prosecutor’s offer? What do you tell the prosecutor? Do you have a conflict of interest? Is it permissible to factor in your own interests in giving advice?
Assume Kleinberg asks you to represent him before you attend the arraignment and assume that the foregoing facts were related to you by the prosecutor based on Johnson’s admission to the FBI. In an interview, Kleinberg confirms your suspicion that the stamp Johnson was caught with is Kleinberg’s. He had known Squires and Wallenstein for more than ten years; their plant was around the corner from him. Sometime in June or July of 2006, Squires complained bitterly to Kleinberg about the terrible beating their business was taking. He said that they had had to lay off half their employees and mentioned that his own son might have to quit medical school because lack of funds. Squires asked Kleinberg whether he still had the “Choice” stamp that he had seen before. Kleinberg said he did, but did not want to get involved. Squires begged Kleinberg to help him, “because we are desperate.”

So, Kleinberg, who had been a purchaser of small amounts of meat from White House Beef on occasion in the past, went to their plant and stamped about 100 hind quarters of beef “Choice” (each hind quarter weighs roughly 150-175 pounds). Thereafter, either he or Johnson would stamp the meat for White House and split the money. Kleinberg points out fearfully to you that none of the meat was bad, it was all wholesome and fit for consumption. It was merely as yet ungraded. From his vast experience in the meat business, Kleinberg tells you that the meat would have been graded “Good” -- a category that ranked immediately below “Choice” on the rating scale.

You have also been informed by reading The New York Times a few days before Kleinberg retains you, that the Department of Agriculture has promulgated new regulations reducing the amount of marbled fat necessary before meat may be classified “Choice.” The new regulations, had they been in effect during the time that Johnson and Kleinberg were stamping meat for White House Beef, would have resulted in the beef being graded “Choice” by USDA inspectors.

Kleinberg tells you, upon being pressed, that he obtained the stamp from a friend in the meat business, Pete Stoner, who died in 1991.

Kleinberg has received a subpoena to testify before the grand jury and to produce all of the books and records of his business.

Questions: What do you do? What questions do you ask? What do you tell your new client? Do you make a presentation to the prosecutor to try to convince the prosecutor not to charge your client? What are the downsides of doing that? What are the upsides?
UNITED STATES v. JONES

EXERCISES
REPORT OF SPECIAL AGENT ALAN START 3/5/05

On January 6, 2005 Robert Dool, Manager of Citibank, 2 Lexington Avenue, New York, NY furnished the following information regarding the robbery of the above named bank on earlier that day.

He advised that at approximately 11:30 a.m., he was at his desk on the platform area, at which time he heard someone say, “Everybody down on the floor.” Dool stated he looked up and saw an African American male (unknown subject (unsub) number one) with a shotgun about 15 feet away. Dool stated he also saw a second African American male (unsub number two), about this time, in the bank, jumping over the tellers’ counter about forty feet away. A few seconds later he observed a third African American male (unsub number three) enter the front door and vault the tellers’ counter. Dool stated that he heard orders being given to open the drawers and heard drawers being opened and closed. He stated that when the robbers left, unsub number one stated, “Stay down five minutes”.

Dool furnished the following descriptions:

Unsub number one:
Race                         African American
Sex                          Male
Age                          Early 20’s
Height                       Approximately six feet
Build                        Medium
Complexion                   Dark
Clothing                     Dark fedora hat, knee-length dark coat, probably suede or imitation suede, light powder blue pants
Weapon                       Carrying what appeared to be a pump action, single-barreled sawed-off shotgun
Characteristics              Probably clean shaven, wearing dark sunglasses with plastic frame.

Unsub number two:
Race                         African American
Sex                          Male
Clothing                     Dark

Unsub number three:
Race                         African American
Sex                          Male
Clothing                     Dark sweater and dark knit ski cap
Dool further stated that while the robbers were removing money from the drawers, he looked up and saw the unsub number one using a blue handkerchief to remove fingerprints from the cash drawers. He heard the unsub number two call the first robber “Rollie”.

Dool advised that he was able to activate the cameras while on the floor by reaching above his desk and pushing the button by his phone. Dool reviewed the films of the robbery and said they were accurate.

On February 5, Dool was shown a series of eight photographs of African American males. The police numbers along the border of the photographs were deleted. Dool picked out the photograph of Roland Jones as unsub one and Rick Malbem as unsub two.

In photographs later developed, unfortunately the camera did not catch unsub one because he was closest to the door.

Prepared on February 6, 2005
GRAND JURY TESTIMONY OF ROBERT DOOL
MARCH 6, 2005

(Witness Sworn)

Q. How are you employed?
A. I am Manager of the Citibank branch at 2 Lexington Avenue.

Q. Is Citibank insured by FDIC?
A. Yes.

Q. On January 6, 2005 was your bank robbed?
A. Yes.

Q. Did you observe three robbers?
A. Yes.

Q. Did two of the robbers vault over the counters and remove approximately $30,000 from the drawers?
A. Yes.

Q. Did one of the robbers remain on the floor of the bank holding a shotgun, ordering everyone to remain on the floor?
A. Yes.

Q. Last month, did you identify one of the robbers from a photo-spread as being Roland Jones?
A. Yes.

Q. Was Jones the robber carrying the gun?
A. Yes.

Q. Will the foreman excuse the witness.

Foreman: The witness is excused.
REPORT OF SPECIAL AGENT ALAN START
FEBRUARY 3, 2005

Ricardo Nicoli, 111 Spaulding Avenue, Brooklyn, NY was interviewed on January 10, 2005 and furnished the following information:

He drives a yellow cab which bears the license number 5T6471. He is an immigrant from Argentina. His visa expired on December 12, 2004.

On January 6, 2005 at approximately 11:30 he was hailed near 2 Lexington Avenue by an African American male. The individual stated “Hold it. I’m waiting for someone. I’ve got three guys coming.” The individuals got into the back seat of the cab and one individual got into the front seat.

The individual in the front seat stated “Take us to Union Square by the BMT.” One of the individuals in the back seat stated “Wait, Rollie. Ask him if he’ll take us to Brooklyn.” The individual in the front seat said “Be cool” and then asked the driver “You mind taking us to Brooklyn?”

Nicolì agreed to drive them to Brooklyn. He drove via the Manhattan Bridge.

During the ride, Nicoli noticed that the individual in the front seat had a sawed-off shotgun under a trench coat. Nicoli told the individual how to engage the safety on the gun. Nicoli observed that one of the individuals in the back was carrying a shopping bag from Drugs “R” Us and looked inside. He observed that that individual put his hands inside the bag and gave another passenger what appeared to be a handful of money. The other passenger started to laugh. At that point the individual in the front seat ordered the other passengers to be silent. He then told Nicoli “Forget everything you saw or heard. I’ve got your hack’s number and name.”

As Nicoli drove past a Chase Manhattan Bank near Vanderbilt and Park Place, one of the individuals in the back said “Rollie, I live around the corner. Have him stop. Look at that Chase, it’s so sweet, but it’s too close.”

According to Nicoli’s records, he dropped the passengers off on Flatbush Avenue and Eighth Avenue, Brooklyn, NY at about 11:45.

Nicolì said the meter came to $12.80 and the passengers gave him a crisp $20.00 and told him to keep the change. Nicoli said he would look to see if he still had the $20.00 bill.
The following are descriptions of the individuals:

**Number One -- Front seat rider:**
- **Sex:** Male
- **Race:** African American
- **Age:** 30
- **Height:** Six feet
- **Build:** Slim
- **Weight:** 170 pounds
- **Hair:** Short with short sideburns
- **Complexion:** Medium
- **Clothing:** Blue suit, blue shirt, grey felt derby hat, black raincoat with no lining
- **Weapon:** Carrying a sawed-off shotgun
- **Background:** Claimed had done time with H. PEPP BROWN on C-76 Block

**Middle Rider in Back**
- **Sex:** Male
- **Race:** African American
- **Age:** 26-28
- **Height:** Five feet two inches
- **Weight:** 130 pounds
- **Complexion:** Dark
- **Hair:** Short
- **Facial Hair:** Thin mustache and growing stubble on rest of face
- **Clothing:** Dungarees, flop hat, windbreaker, white sneakers, sunglasses

**Left Rider in Back**
- **Sex:** Male
- **Race:** African American
- **Age:** 30
- **Height:** Six feet two inches
- **Weight:** 220 pounds
- **Complexion:** Dark
- **Hair:** Short
- **Clothing:** Black trench coat, dark pants

**Right Rider in Back**
- **Sex:** Male
- **Race:** African American
- **Age:** 28-30
- **Height:** Five feet eight inches
- **Weight:** 160-170 pounds
- **Build:** Slender
- **Complexion:** Dark
Nicoli was shown a photo-spread of seven pictures of African American males similar in appearance to Roland Jones and he picked out the picture of Jones.
| Time Out: | 10:30 AM |
| Time In: | |
| Total Hours Worked: | |
| OVER | |
| 1 | 125 W + Buy | 10.35 | 5.7 W + 6h | 10.35 | 1 | 0.10 |
| 2 | 5.2 W + 3h | 10.50 | 1.0 H Pl + 300 Yard | 11.25 | 2 | 0.10 |
| 3 | 42 W + Leg | 11.10 | 1.0 Shaver + Road | 11.25 | 1 | 0.20 |
| 4 | 8. Leg | 11.20 | West Side Flatland + 18h | 11.65 | 4 | 1.20 |
| 5 | 12.55 | 1.10 | 1.10 | 1 | 0.10 |
| 6 | 12.30 | 1.10 | 12.10 | 2 | 2.50 |
| 7 | 12.20 | 1.00 | 1.00 | 1 | 0.10 |

Check readings before going out. Each call must be filled out in detail.
March 7, 2005

John Pebble, Esq.
400 Broadway
New York, NY 10013

Re: Rick Malbem

Dear Mr. Pebble:

On the understandings specified below, the United States will accept a guilty plea from Rick Malbem to one count of an Indictment charging a violation of 18 U.S.C. § 2113(b) on or about January 6, 2005, carrying a maximum sentence of 10 years and a $5,000 fine. If he fully complies with these understandings, Rick Malbem will not be prosecuted by this Office for other existing charges known to this Office hereinafter specified, or for potential charges based upon information supplied to this Office by Rick Malbem.

The understandings are that Rick Malbem shall truthfully disclose all information with respect to the activities of himself and others concerning all matters about which this Office inquires of him, and, further, shall truthfully testify before the Grand Jury and/or at any trial or other court proceeding with respect to any matters about which this Office may request his testimony.

If is further understood that the sentence to be imposed upon Rick Malbem is within the sole discretion of the sentencing judge. This Office cannot and does not make any promise or representation as to what sentence Rick Malbem will receive, nor will it recommend any specific sentence to the sentencing judge. However, this Office will inform the sentencing judge and the Probation Department of (1) this Agreement; (2) the nature and extent of Rick Malbem’s activities with respect to this case; (3) the nature and extent of any and all other activities of Rick Malbem which this Office deems relevant to sentencing; and (4) the full nature and extent of Rick Malbem’s cooperation with this Office and the date when such cooperation commenced. In so doing, this Office will use any and all information it deems relevant, including information and statements provided by Rick Malbem both prior to and subsequent to the signing of this Agreement. In addition, if it is determined by this Office that Rick Malbem has provided substantial assistance in an investigation or prosecution, and if Rick Malbem has otherwise complied with the terms of this Agreement, this Office will file a motion, pursuant to Section 5K1.1 of the Sentencing Guidelines, advising the sentencing judge of all relevant facts pertaining to that determination and requesting the Court to sentence Rick Malbem in light of the factors set forth in Section 5K1.1(a) (1) - (5).
It is understood that, even if such a motion is filed, the sentence to be imposed on Rick Malbem remains within the sole discretion of the sentencing judge. Furthermore, this Office retains the right to present to the sentencing judge and Probation Department, either orally or in writing, any and all facts and arguments relevant to sentencing. It is further understood that this Agreement in no way affects or limits this Office’s right to respond to and take positions on post-sentencing motions or requests for information which relate to reduction or modification of sentence.

It is also understood that, should this Office determine that Rick Malbem has not provided substantial assistance in an investigation or prosecution, or has otherwise breached this Agreement, such a determination will release this Office from any obligation to file a motion pursuant to Section 5K1.1 of the Sentencing Guidelines as described above, but will not entitle Rick Malbem to withdraw Rick Malbem’s guilty plea once it has been entered.

It is further understood that this Agreement is limited to the United States Attorney’s Office for the Southern District of New York, and cannot bind other federal, state or local prosecuting authorities, although this Office will bring the cooperation of Rick Malbem to the attention of other prosecuting offices, if requested by Rick Malbem’s counsel.

If is further understood that Rick Malbem must at all times give complete, truthful and accurate information and testimony and must not commit any further crime whatsoever. Should Rick Malbem commit any further crimes or should it be determined that he has given false, incomplete or misleading testimony or information, or should he otherwise violate any provisions of this Agreement, Rick Malbem shall thereafter be subject to prosecution for any federal criminal violation of which this Office has knowledge, including, but not limited to, perjury and obstruction of justice. Any such prosecutions may be premised upon any information and statements provided by Rick Malbem both prior to and subsequent to the signing of this agreement. Moreover, any such prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against Rick Malbem in accordance with this Agreement, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of any such prosecutions. It is the intent of this Agreement to waive any and all defenses based on the statute of limitations with respect to any prosecutions which are not time-barred on the date this Agreement is signed.

Furthermore, it is agreed that in the event that it is determined that Rick Malbem has violated any provision of this Agreement, (i) all statements made by Rick Malbem to this Office or other designated law enforcement agents, or any other testimony given by Rick Malbem before a grand jury or other tribunal, whether prior to or subsequent to this Agreement, or any leads from such statements or testimony, shall be admissible in evidence in any and all criminal proceedings hereafter brought against Rick Malbem; and (ii) Rick Malbem shall assert no claim under the United States Constitution, any statute, Rule 11(e) (6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule, that statements made by him prior to or subsequent to this Agreement, or any leads therefrom, should be suppressed. It is the intent of this Agreement to waive any and all rights in the foregoing respects.
With respect to this matter, this Agreement supersedes all prior, if any, understandings, promises and/or conditions between this Office and Rick Malbem. No additional promises, agreements, and conditions have been entered into other than those set forth in this letter and none will be entered into unless in writing and signed by all parties.

Very truly yours,

United States Attorney

By: JANE JOFFREY
Assistant United States Attorney

APPROVED:

Jack Glare
Chief, Criminal Division

AGREED AND CONSENTED TO:

Rick Malbem
RICK MALBEM

APPROVED:

John Pebble
JOHN PEBBLE
RM made plans 1/5/03 with Rolla and Paul Miller to meet in back. Paul said he'd bring friends who would drive.

On 1/6/03, phone to see Paul to back. Retold deal and
RM arrived, took cash, put gun in trunk.

to RT+ then jumped over counter. RM was joined by PM. They entered drawers.
RM wiped the counter & drawers with his t-shirt. -- RT had told him to be there the night before to hide fingerprints.
RT was giving orders to everyone to stay down.

Whole robbery took 30 minutes at most.

RT got a front of cash, PM, RM + MT friend
were in back. PM started counting money --
RT told him to stand up

RT, RM + PM got $7,000 each, PM's friend got $3,000.

Prior day store nothing -- no others.

Bakery store change -- a friend used his
checkbook + wrote 2
checks. RT
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

INDICTMENT

ROLAND JONES, a/k/a “Rollie”

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X

COUNT ONE

1. From on or about January 5, 2005 up to and including the present, in the Southern District of New York and elsewhere, Roland Jones a/k/a “Rollie” and others, known and unknown to the grand jury, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate 18 U.S.C. § 2113(a), and § 2113(b).

2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly, with force, violence and/or intimidation, would take from the person or in the presence of another, a thing of value, to wit United States currency in excess of $1,000, belonging to or in the care, custody, control, management or possession of a federally insured member of the Federal Reserve System, in violation of 18 U.S.C. §§ 2113 (a) and (b).

OVERT ACTS

In pursuance of said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

23
1. On or about January 6, 2005 the defendant Roland Jones a/k/a “Rollie” entered the Citibank at 2 Lexington Avenue, New York, New York.

2. On or about January 6, 2005, the defendant Roland Jones a/k/a “Rollie” entered a taxicab in the vicinity of the Citibank at 2 Lexington Avenue, New York, New York.

3. On or about January 6, 2005, the defendant Roland Jones a/k/a “Rollie” removed currency from a cash drawer at the Citibank at 2 Lexington Avenue, New York, New York.

   (18 U.S.C. Sections 2113(a) and (b) and 18 U.S.C. § 371)

   **COUNT TWO**

The grand jury further charges:

On or about January 6, 2005, in the Southern District of New York, the defendant Roland Jones a/k/a “Rollie” unlawfully, wilfully and knowingly, with force, violence and/or intimidation took from the person or in the presence of another, a thing of value, to wit United States currency in excess of $1,000, belonging to or in the care, custody, control, management or possession of a federally insured member of the Federal Reserve System, in violation of 18 U.S.C. § 2113(a) and (b).

   (Title 18, United States Code, Sections 2113(a), (b), Title 18 United States Code Section 2)

   **George Mitchell**
   Foreman

   **Vincent Black**
   United States Attorney
COUNSEL SHOULD EXPECT ROBERT DOOL TO TESTIFY AS FOLLOWS:

You are trying to be as truthful as you can, but you also want to put the robbers in jail, because this was the third robbery in one month of your bank. At one of those robberies, a bank customer was shot, but not seriously injured.

Your statement to the FBI contains several contradictions. You will choose that version which makes the most sense to you. For example, you must decide if it was unsub number one who vaulted the counter or if it was unsub number three who wiped the fingerprints. When confronted on cross-examination with the contradictions, you may explain that you were confused, or the FBI misunderstood, or you don’t know if you said what is in the report, or whatever you like.

When first shown the photo spread, you asked to see the film of the robbery. You identified the photo of Rick Malbem after you saw the film of the robbery which the FBI permitted you to view in stop-action. You will testify that you recall Malbem had brown eyes. There is no frame on the film in which Jones is identifiable. You will assert that you remember him clearly and that you had ample opportunity to observe him during the robbery, even though you will concede you only looked at Jones for a total of 25 seconds.
COUNSEL SHOULD EXPECT RICK MALBEM TO TESTIFY AS FOLLOWS:

You are single, in your 20’s.

Basically you’re testifying because your lawyer said its your best shot to reduce the time you will spend in jail. You’re hoping that by convicting Jones with your testimony, you will go free. In any event, you already got a break because you’re facing only 10 years instead of 25 you could have, if you had been charged with endangering lives while committing the robbery.

Everything you said to the prosecutor is true, even though it contradicts in details what you initially told the FBI.

When confronted with the prior statement to the FBI, you will become a little vague and say “I guess I said that” or “If they say I said it, I must have”. You will have no real explanation why you have changed the story. You simply didn’t trust the FBI when you were interviewed the first time.

Improvise where necessary, but otherwise stick with the version in the Assistant United States Attorney’s notes.
COUNSEL SHOULD EXPECT RICARDO NICOLI TO TESTIFY AS FOLLOWS:

You are a 30 year old cab driver. You are an illegal immigrant from Argentina and are cooperating with the FBI because you do not want to be deported. The FBI told you they would see what they could do for you if you cooperated. No promises were made.

You have been a cabbie for three years and have never filed tax returns, but you send 50% of your income home to your wife and seven kids in Argentina. You keep only $300 a month for yourself to live on.

You have no personal recollection of the addresses where you picked up and dropped off the passengers who you suspect robbed a bank. However, you did fill out the log which you will identify. Often it is your practice to fill out the log at the end of one hour periods. You will initially claim you filled it out on the spot. You will admit your watch was broken so you estimated the times. If pressed, you will admit you cannot recall if you filled out your log simultaneously.

When prepared for trial you will become a little vague about whether the passenger in the front seat carried the gun or the money. However, you are sure you saw both the gun and the money in someone’s hands. You will also become slightly unsure whether someone in the back called the front passenger “Rollie” or whether the passenger in the front said “Rollie” to one of the passengers in the back.

You will testify that you were a nervous wreck the minute you saw the gun (which was almost immediately) and all you could think of was getting to Brooklyn as fast as possible. You even ran a few red lights hoping a cop would stop you. Although you were scared and you barely looked at him for more than 30 seconds, when pressed on cross-examination, you will state that you believe that you recognize the defendant as the passenger in the front seat, although you are not certain. You will not reject or accept any implication that the photo-spread was suggestive.
REPORT OF SPECIAL AGENT ALAN START 3/5/2005

Rick Malbem, dob 6/5/1975 was interviewed on 2/24/05 and provided the following information:

I was born June 5, 1975 at Brooklyn, New York. I graduated from high school and am able to read and write.

On January 6, 2005 Rollie and I robbed the Citibank at 2 Lexington Avenue, New York, NY. Also involved in the robbery were two other individuals whose names I do not know. We planned the robbery at Fort Green Park, Brooklyn, NY the previous evening. On the morning of the robbery we drove to the area of the bank in a stolen blue gypsy cab which Rollie had obtained from a Hispanic known only as Aponte. I was armed with a shotgun and Rollie and the short individual went over the counter to scoop up the money. The driver of the gypsy cab stayed outside the bank and he hailed a yellow cab. We had abandoned the gypsy cab because it broke down in the vicinity of Third Avenue, New York, NY.

We covered the bank officers and customers on the banking floor while we cleaned out the money drawers. We then ran from the bank and drove off in the yellow cab that had been hailed by the individual outside the bank. We went to the roof of a building near a tunnel on Carlton Avenue, Brooklyn, NY. My share was $9,000.00. The individual outside the bank got $3,000.00. Rollie and the other short individual got $9,000.00

I have had one prior conviction of a crime, robbery of a drug store in 1999 for which I was sentenced to 18 months in jail.

I have read the above statement and sign it because it is true and correct.

Rick Malbem

Rick Malbem

He then looked at a photo spread of seven individuals similar in appearance to Roland Jones and picked out Jones as "Rollie".

Malbem was photographed and fingerprinted. NCIC reveals that Malbem was convicted in June 1999 for robbing a drug store and was sentenced to 18 months. He also was convicted in 1994 under the name Rick Colby for armed bank robbery and was sentenced to 3 years. In 1996 under the name Rick Crosby he was convicted of purse snatching and sentenced to 3 years probation. A check of the fingerprint data base also reveals a pending NY State charge for issuing a bad check to Delta Airlines for a round trip ticket to Florida in December 2004.
COUNSEL SHOULD EXPECT SUSAN WILSON TO TESTIFY AS FOLLOWS:

You are Roland Jones’ girlfriend. You are 24 years old, and work as a cashier in a local drug store, Drugs “R” Us. You also work off the books from time to time as a waitress. You have been together for two years. You will testify that Roland was with you at the movies on Flatbush Avenue on January 6, 2005 at around 11:30 a.m., and then you went for lunch together. You have two prior arrests for using stolen credit cards, and have been convicted one time. If asked you will not be able to recall the movie you saw.
UNITED STATES v. WASHINGTON

EXERCISES
MEMORANDUM

To: New Assistant United States Attorney

From: Out-Going Assistant United States Attorney

Date: July 1, 2005

Re: Robert Washington Matter

I’m sorry to dump this on you at the last minute, but the trial I have scheduled has made it impossible for me to prepare for this case. In a nutshell, the defendant is a mail carrier in the South Bronx, and has worked at that station for the past 27 years. Based on complaints from people on his route, the postal inspectors suspected him of stealing mail. These customers said that they had not received checks which were mailed to them. The Postal Inspectors also put test packages through his route, which were not returned to sender. As you know a test package is a package sent to a non-existent name and address with a post office box under the control of postal inspectors as the return address. Here, after they put these test packages through his route and did not receive them back at the return address they decided to video tape him when he received additional test packages and follow him on his route. On two days last spring, April 9 and 10, they video-taped him. Both times he put the test packages in his mail bag. One of them had a beeper that goes in slow mode when the package is not opened and then goes into fast mode when it is opened. The postal inspectors followed him, and lost him for 45 minutes while he was in a housing project. While in there the beeper went off. When he was stopped by postal inspectors after leaving the housing project, he was stopped and agreed to be questioned by postal inspectors. They looked in his mail bag and saw the contents of two of the test packages. They asked him where the wrappers were to the items in his mail bag and he said that he bought them on the street. They Mirandized him and then asked him again where the wrappers were. He said that two people just broke into his mail bag. The postal inspectors did not find a receipt. They also found two unopened videotapes in his mail bag which had not been part of any test package.

Once he was arrested one of the postal inspectors asked if the defendant wanted his car brought back for safekeeping, in order the protect the defendant, the car and the postal inspectors who might be required to accompany the defendant to get his car after arraignment. The defendant said sure and after retrieving the car an inventory search was conducted and the contents of one of the test packages from the previous day was discovered. Upon further search of the contents of the defendant’s mail bag, the other package from the previous day was discovered, un-opened.

The defendant’s motions are due next week. The judge will want to move it to trial soon. Oh, by the way, the defendant turned down a misdemeanor plea we offered him before he was indicted.
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  

UNITED STATES OF AMERICA,  
v.  
INDICTMENT  
ROBERT WASHINGTON,  
S1 01 Cr. 602  
Defendant.  

COUNT ONE  

The Grand Jury charges:  

On or about April 9, 2005, in the Southern District of New York, ROBERT WASHINGTON, the defendant, unlawfully, wilfully, and knowingly did embezzle a letter, postal card, package, bag, mail, and article and thing contained therein entrusted to him and which had come into his possession intended to be conveyed by mail, and carried and delivered by any carrier, messenger, agent and other person employed in a department of the Postal Service, and did steal, abstract, and remove from any such letter, package, bag, and mail, an article and thing contained therein, to wit, ROBERT WASHINGTON, the defendant, stole from the mail entrusted to him for delivery a package containing a New York Giants key chain that was addressed to a non-existent address on his mail route in the Bronx, New York.  

(Title 18, United States Code, Section 1709.)
COUNT TWO

The Grand Jury further charges:

On or about April 10, 2005, in the Southern District of New York, ROBERT WASHINGTON, the defendant, unlawfully, wilfully, and knowingly did embezzle a letter, postal card, package, bag, mail, and article and thing contained therein entrusted to him and which had come into his possession intended to be conveyed by mail, and carried and delivered by any carrier, messenger, agent and other person employed in a department of the Postal Service, and did steal, abstract, and remove from any such letter, package, bag, mail, an article and thing contained therein, to wit, ROBERT WASHINGTON, the defendant, stole from the mail entrusted to him for delivery a package, containing a videotape, that was addressed to a non-existent address on his mail route in the Bronx, New York.

(Title 18, United States Code, Section 1709.)

COUNT THREE

The Grand Jury further charges:

On or about April 10, 2005, in the Southern District of New York, ROBERT WASHINGTON, the defendant, unlawfully, wilfully, and knowingly did embezzle a letter, postal card, package, bag, mail, and article and thing contained therein entrusted to him and which had come into his possession intended to be conveyed by mail, and carried and delivered by any carrier, messenger, agent and other person employed in a department of the Postal Service, and did steal, abstract, and remove from any such letter, package, bag, and mail, an article and thing contained therein, to wit, ROBERT WASHINGTON, the defendant, stole from
the mail entrusted to him for delivery a package, containing a Jets cap, that was addressed to a
non-existent address on his mail route in the Bronx, New York.

(Title 18, United States Code, Section 1709.)

COUNT FOUR

The Grand Jury further charges:

On or about April 9, 2005, in the Southern District of New York, ROBERT
WASHINGTON, the defendant, unlawfully, wilfully, and knowingly did embezzle a letter,
postal card, package, bag, mail, and article and thing contained therein entrusted to him and
which had come into his possession intended to be conveyed by mail, and carried and delivered
by any carrier, messenger, agent and other person employed in a department of the Postal
Service, and did steal, abstract, and remove from any such letter, package, bag, and mail, an
article and thing contained therein, to wit, ROBERT WASHINGTON, the defendant, stole from
the mail entrusted to him for delivery a package containing a watch and golf tees, that was
addressed to a non-existent address on his mail route in the Bronx, New York.

(Title 18, United States Code, Section 1709.)

Carol Jones  Stanley Smith  
FOREPERSON  STANLEY SMITH  
United States Attorney  

34
MEMORANDUM

To: File

From: Postal Inspectors Stocker and Flamingo

Date: April 12, 2005

Re: Investigative Memorandum Of Surveillance, Interrogation
And Arrest Of Postal Carrier Robert Washington

1. Postal Inspectors Flamingo and Stocker placed four test packages in mail carrier Robert Washington’s mail route on April 9 and April 10 in light of complaints from customers on his route that they had not received their mail. These packages contained as follows: package one was addressed to 310 Washington Street, contained a New York Giants key chain and had a return address of the New York Giants; package two was addressed to 755 River Street, contained a watch and golf tees and had a return address of the Sports Locker; package three was addressed to 180 Stone Street, contained a New York Jets cap and had a return address of the Sports Locker; and package four was addressed to 497 Green Street, contained a pornographic videotape and had a return address of Exotic Videotapes. The package containing the Jets cap had a beeper in it which emitted a slow beep when the package was not opened and a fast beep when opened.

2. All four packages were addressed to nonexistent addresses and nonexistent names. A mail carrier is supposed to know his mail route and return immediately to the throwback bin in the Post Office any mail which is to a no such number address.

3. We were able to place two of the packages directly into the parcel bag for his mail bag on the morning of April 9, which meant that both of them would be delivered to him for sorting. On April 10 the parcel bags were not there and we placed the packages in a routing bin, and another employee sorted the mail and placed one of the packages in his parcel bag. We asked a supervisor to place the other package in the mail carrier’s parcel bag which he did.

4. On April 9th we watched him place the two test packages from that day into his mail bag. We did not follow him on April 9, and did not see him after he left the post office. On April 10th, we watched him place two test packages we had arranged to be placed in his parcel bag into his mail bag. On April 10th a slow beep was coming from the package with the beeper in it, indicating that it had not been opened. We videotaped all of this.

5. On April 10, after he left the post office at 9:10, we too left the post office and attempted to keep him in sight. We lost him for about forty-five minutes, and at 9:40 the beeper went from the slow to the fast mode, indicating that the package had been opened.
6. After about 15 minutes after the beeper went off at 9:55, we saw him exiting a building on his route. We followed him for about one and one half blocks. The beeping signal was getting fainter indicating that the packaging had been left behind. We approached him, told him that there was a problem with the mail, and asked if we could speak to him. He said yes, and we then looked in his mail bag, as we are entitled to do under post office regulations. We saw the contents of the two test packages from that day (the Jets cap and the pornographic videotape), and Inspector Stocker asked him where he got the items. He said that he bought them on the street. He also said that he had a receipt. We then Mirandized him and Inspector Stocker asked him where the wrappers were and he said that two people broke into his mail bag. We did not find a receipt upon searching his mail bag or his pockets upon arrest. We did find one of the test packages from April 9th in his mail bag (the one containing the Giants key chain), unopened, as well as two unopened videotapes which were not from any test package.

7. After the arrest, Inspector Flamingo and another agent went through the garbage in the garbage room, and found the wrapping to one of the packages found in Washington’s bag.

8. Inspector Flamingo also assisted in the search for Washington’s car, but was not present when the trunk was searched. The group supervisor said that golf tees were found in the trunk.

John Flamingo  
John Flamingo

Marvin Stocker  
Marvin Stocker
TESTIMONY BEFORE THE GRAND JURY OF INSPECTOR MARVIN STOCKER

Marvin Stocker, being duly sworn, testifies as follows:

Q: How are you employed?
   A: As a postal Inspector for the United States Postal Inspection Service.

Q: How long have you been so employed?
   A: 15 years.

Q: Where are you currently employed?
   A: In the Bronx office.

Q: What is your current job responsibility?
   A: To investigate mail carriers and insure the integrity of the US mail.

Q: What were your job activities on April 9 and 10, 2005?
   A: We were investigating Robert Washington.

Q: Why were you investigating him?
   A: We had received complaints that mail was not getting delivered through his mail route, and that some checks were missing. We had put some test packages through the mail route he was responsible for in the previous weeks and they had not come back to sender.

Q: What is a test package?
   A: It’s a package put together by postal inspectors sent to a non-existent person and address. What is supposed to happen is the mail carrier is supposed to stamp it no such number and return the package to sender, which is a post office box under the control of the postal inspection service.
Q: What happened here?

A: We put test packages through his route on both April 9 and 10. We videotaped him on both days putting them in his mail bag. We did not follow him on April 9. We did follow him on April 10. One of the packages put in his mail bag on April 10 contained a beeper device which sends out a slow beep when the package is closed and sends out a fast beep when the package is opened. He left the post office at 9:10. We lost sight of him, and about 30 minutes after he left the post office, at 9:40, the signal on the beep changed from slow to fast. We saw him 15 minutes later, at 9:55, coming out of one of the buildings on his route pushing his mail cart. We followed him, and heard the beep get fainter. We approached him and asked him if we could speak to him. He said yes, and we then looked into his mail bag, which is US government property and subject to search at any time. I saw the contents of the two test packages from that day in the top of the mail bag and asked him what happened to the wrappers. He said that he bought them on the street and he had a receipt. I then Mirandized him and asked him again what happened to the wrappers. He said that two people broke into his mail bag. I asked him for the receipt and he could not find one. We brought him back to headquarters, and later on that day my supervisor obtained his car keys to safeguard the car. During a routine inventory search we found the contents of one of the test packages from the day before in the trunk of his car. We found the other package from April 9 unopened in his mail bag, as well as two videotapes which were not part of any test package.
TESTIMONY OF ROBERT WASHINGTON, BEFORE THE UNEMPLOYMENT BOARD OF THE DEPARTMENT OF LABOR

Robert Washington, being duly sworn, testifies as follows:

Q: How were you employed on April 9 and 10 of 2005?

A: I was a mail carrier in the South Bronx.

Q: On April 9 and 10 did some packages go through your mail route which were to non-existent addresses?

A: Yes.

Q: Did you place those packages in the “no such number” bin at the post office to be returned to sender?

A: No.

Q: Why not?

A: Because there are rules in the postal service that tell mail carriers that if they have personal knowledge that could enable them to deliver the mail then they should try to do that instead of just returning the package to sender. Since they were addressed to non-existent buildings on streets on my route I figured that I would try to deliver them and if I couldn’t then I would return them to sender.

Q: Did you try to deliver them?

A: I did not deliver my entire route on April 9 because I was sick from a car accident. I was going to try to deliver them the next day. I know that people move on my route all the time and that there always are people living in apartments without their names on the mailbox, so I though that I could find out who the packages belonged to if I asked around. I only had gotten through one stop on my route at the time that I was stopped from delivering.

Q: How did the packages get opened?

A: I did not feel well from the accident I had a few days before. I sat down by the elevator on one of the floors for a few minutes with my head between my legs because I was dizzy. I heard rustling and when I looked up I saw two teenagers going through my mail bag and ripping open some of the mail I had in there. I chased them away, picked up what I could find and continued delivering my route.
Q: Why did you have unopened videotapes in your mail bag?

A: I bought them from a guy selling them in the housing project that morning. I have a collection of over 700 videotapes.

Q: Why did you tell the postal inspectors that you had bought them on the street when the postal inspectors asked you what happened to the wrappers?

A: The postal inspectors did not ask me what happened to the wrappers immediately. They first asked me where I got the items, and I told them that I had bought them on the street. I was talking about the videos that I had bought in the building a few minutes before. I thought I was going to get in trouble since you are not supposed to put personal things in the mail bags, but I had no choice but to tell them that the videos were mine once they asked me about them. It was after I was arrested that they asked me where the wrappers were and I did not know where the wrappers were, and I thought that they had asked me the same question they had before.

Q: Why did you tell them you had a receipt?

A: I never told them that I had a receipt. I said that I did not have a receipt since they do not give receipts on the street.

Q: Why did you have one of the packages from the day before in your mail bag?

A: Because I was carrying around that package to see if I could figure out who it belonged to before I returned it to sender. I have found that I can find the addressee if I hold the package long enough, and then they do not have to go through the trouble of getting the package back from the sender once they realize that the address had been wrong on the package.

Q: Why did you have the contents of the other package from April 9 in the trunk of your car?

A: I did not. That was not there when I parked my car in the morning. I had several people working with me on my car the night before and they will all testify that there was not anything in my trunk the night before. The postal inspectors planted it there. The postal inspectors are also lying when they say that they asked me if I wanted them to get my car. I have worked in this neighborhood for my whole life and I grew up here. My family stills owns a home here. My car was parked in front of my family’s home and I had no concern about the safety of my car. The postal inspectors told me that they had the right to search the car and if I did not give the permission then they would break into the car. This was my sister’s car and I did not want anything to happen to it.
RUTH STEVENS STATEMENT

Ruth Stevens was interviewed by an investigator for the defense on June 1, 2005. She said the following:

1. She is a tenant in the building where Robert Washington was seen exiting on April 10, 2005. He has brought mail to her in the past, and she has given him a tip.

2. There also have been times where she and her neighbors have not gotten valuable mail such as social security checks since the new mailman Robert Washington took over the route two years ago. She has complained once or twice about missing mail.

3. On April 10 she was in her apartment on the third floor. She heard some noise in the hallway and she looked through her peephole and saw two teenagers in the hallway. She also heard some paper rustling, and then she saw the mailman. She did not see the teenagers approach the mailman or his mail bag and she did not know what the rustling was.

4. She said that she liked the mailman who used to deliver the route, because he used to bring her her mail and walk her dog. This new mailman is rude, and cursed at her one time. She does not like that language.

Ruth Stevens
COUNSEL SHOULD EXPECT STOCKER TO TESTIFY AS FOLLOWS:

1. You considered putting fluorescent powder in the test parcels, which would leave a stain on whomever opened them, but you decided that it was not worth it.

2. You left the video camera that you used that morning in the gallery of the post office and did not carry it with you to see if you could videotape the suspect. If asked, you will say it was too much trouble and not necessary. You do not know whether Agent Flamingo carried it with him April 10, 2005 when he left the gallery, and no other agent had it with him or her, as best you can recall.

3. You lost sight of the suspect because you did not think that you needed to follow him at all times. In your mind the most important thing would be if the beeper went off and then you could catch up with him. No one else could possibly open the packages.

4. You are sure that you said wrappers in the first question you asked the suspect, although you acknowledge that the memorandum of interview which you signed says that you asked where he got the items. That was drafted by another agent, and you did not read it very carefully. You did not consider the difference to be significant at all. You forgot to say in your grand jury testimony that when you asked Washington the second time where the wrappers were you were holding the contents of one of the test packages in your hand.
COUNSEL SHOULD EXPECT FLAMINGO TO TESTIFY AS FOLLOWS:

1. You were with Agent Stocker at the time that he questioned Washington. You were not really listening to what he asked him because you were focused on the mail bag, but you knew that he was asking him about the test packages, so you assumed that he asked the suspect where he got the items. That’s what you wrote in the report, which Stocker also signed, but months later Stocker told you that you were wrong in what you wrote.

2. You brought the video camera out of the look-out gallery in the post office where you were watching the sorting of the mail, but you did not think to use it as you were trailing Washington or when Stocker was questioning him.

3. After the arrest of Mr. Washington, you looked for the wrappers for the two opened packages found in the mail bag. You went to several of the garbage rooms in the housing complex and opened up some of the garbage bags, but you did not open all of them since it was dirty work and who really cared if you found both wrappers. You found one of them and that showed that the packages had been opened in the building, which was consistent with when the beeper went off. Both of them really didn’t matter anyway, you said to the other postal inspector searching with you.

4. You also accompanied your supervisor in the search of Washington’s automobile. You were not there when the search of the car was done, but your supervisor said that he had found the contents of one of the test packages in the trunk.
DEFENDANT’S STORY

1. You will never admit that you did what you are accused of doing because you say you are innocent. You tell your lawyer that you have been the victim of a vendetta by the postal service that goes back several years, and that that is the reason why they have targeted you here. As proof of the vendetta you point to your personnel file which contains complaints about your conduct on the route, including complaints about non-delivered mail, going through the garbage in an unauthorized area, and extensive absenteeism.

2. You will tell your lawyer that you never tried to steal the mail. There is a practice in the postal service called “carry around” which is if a mail carrier is not sure who a package is addressed to but believes that he may be able to deliver the package that he carries around the package with him for a while to see if he can locate who it belongs to. You tell your lawyer that the four packages which were put through your mail route were to addresses you knew did not exist, but you figured that with all of the turnover in your mail route, with rental apartments changing tenants and many different people with different last names living in the same apartments that maybe somehow you could find the people these packages belonged to. You will tell your lawyer that there is even a postal service regulation which tells mail carriers that they are to use their personal knowledge of their mail route to try to deliver no number mail before they return the package to sender. Your lawyer will ask for it in discovery.

3. You will tell your lawyer that when you were delivering your mail that day you did not feel well, and sat down on the ground and put your head in between your legs because you were dizzy. While you were doing so two teenagers rifled through your mail bag and ripped up some packages. You chased them away and picked up what they dropped.

4. Before this you bought some video tapes from a vendor wandering through the building. You have a 700 tape collection at home and so it is not unusual for you to be buying tapes from some one on the street. You then continued on your mail route, and when you were stopped by the postal inspectors you agreed to let them ask you questions. The first question you recall them asking you is “where did you get the items”, which you understood to be the tapes you had just purchased and you said that you just bought them on the street. When they asked you in the second question where are the wrappers you said that two teenagers had just rifled through your bag.

5. The postal inspectors did not ask if you wanted them to bring your car back to the station. The car was parked in front of the home in which you had grown up and you had no concerns about the car’s safety or yours. They told you that they have the legal right to search your car and that if you did not give them the keys that they would break into the car. This was your sister’s car and you did not want anything to happen to it. You gave them the keys.

6. You will tell your lawyer that there was no package in the trunk of your sister’s car. You have witnesses to this, including your girlfriend, and a car mechanic, who both will testify that the trunk was empty the night before. The Postal Inspectors planted whatever they said they found there.
7. This is how you testified before an unemployment board when you tried to get your job back several months after you were arrested. You lost at the hearing, although it is your intention to follow up with arbitration.
COUNSEL SHOULD EXPECT HAROLD WILSON TO TESTIFY AS FOLLOWS:

You have been a mail carrier for 25 years in the South Bronx. You are friends with Robert Washington and you both consider yourselves troublemakers in the postal service because you do not follow the ridiculous rules imposed by the bosses.

1. Part of the job of being a mail carrier is knowing your route. You are required to memorize the buildings on your route so that you can organize the mail quickly and know which mail does not belong to you. You know that you are supposed to put mail which is to a nonexistent name or address into the no such number bin as soon as you receive it. Veteran mail carriers do not do that -- instead they “carry around” the package for a period of time to see if they can figure out to whom the package belongs, to save the person the trouble of having to retrieve it from the sender once it is sent back.

2. In your experience there is a lot of movement of tenants in this neighborhood. Also, many times there are other people living in apartments than those whose names appear on the mail boxes.

3. You have taken tips from customers on your mail route for delivering checks to them personally. You know you are not supposed to do that, but everyone does, and it doesn’t hurt anyone.
COUNSEL SHOULD EXPECT RUTH STEVENS TO TESTIFY AS FOLLOWS:

1. You will say that when you looked through your peephole you heard noise, rustling of paper and footsteps, but you only recall seeing the mailman. You will say that you are very nervous and concerned about being criticized for having met with the defense investigators.

2. There have been instances in the housing project where you live where people have been attacked in the hallways.

3. You will say that you have no personal problems with the mailman.
COUNSEL SHOULD EXPECT SUSAN FLEMING TO TESTIFY AS FOLLOWS:

1. You are Robert Washington’s girlfriend. You have dated for three years on and off.

2. You will say that you were with him on April 6 when he got in a car accident. He took his car to an auto mechanic on April 9 to look at the damage to the car. He had to open the trunk of the car at one point to get out the tire jack, and you were standing at the back of the car when the trunk was opened. You will say you did not see any golf tees in the trunk. You did not stay with Robert that night and you do not know what he did in the morning before he went to work.

3. Robert has a extensive video tape collection. He tells you that he has bought them on the street from vendors, but you wonder sometimes when you see empty, stamped mail packaging in the back seat of his car. You have never read the addresses on the packaging so you do not know what the addresses were although you do remember once thinking you saw Robert’s name and address on a magazine label, but are not certain.

4. You have been arrested three times and convicted twice. You were first arrested in July 1995 for passing a bad check and you pleaded guilty the day of your arrest to a misdemeanor, and you were sentenced to an unconditional discharge. You were next arrested for driving under the influence in January 1997, and those charges were dismissed because there was something wrong with the breathalyzer. You were arrested a third time in August 2000 for a felony passing a forged instrument and you pleaded guilty to a forgery misdemeanor in June 2003. You are currently on probation for that offense.
UNITED STATES POSTAL SERVICE REGULATIONS STATE AS FOLLOWS:

1. Mail carriers may not open up mail in their possession, even if they think they can find an address for delivery in the package.

2. If a mail carrier mistakenly opens a piece of mail he or she must return that piece of mail immediately to the Post Office.

3. If mail has not been delivered and is opened by a person other than the person to whom it is addressed, a mail carrier must report that incident immediately.

4. Any incident in the field involving the mail carrier or the mail must be reported immediately.

5. Mail carriers are not allowed to take tips or gratuities for delivering mail.

6. Mail carriers should put mail that is addressed to an address he or she does not recognize into the “no-such number” bin unless, by his or her own personal knowledge of the people on the route or the addresses on the route he or she believes that the package can be delivered. If so, the mail carrier can take the package on the route to attempt delivery.
STIPULATION

It is hereby stipulated and agreed to between the parties as follows:

1. Robert Washington’s mail route on April 9 and April 10, 2005 contained buildings located on Washington Street, River Street, Stone Street and Green Street.

2. 310 Washington Street, 755 River Street, 180 Stone Street and 497 Green Street are non-existent addresses.
UNITED STATES v. BERBARY

MOCK TRIAL
REASSIGNMENT MEMO FROM AUSA MARSHAL

Having indicted Berbary and Noeman, I will be leaving the United States Attorney’s Office to enter private practice.

The file is self-explanatory. A confidential informant met the defendants in late December 2005 or early in January 2006 and got a sample of cocaine. On January 23, 2006, Berbary gave Noeman one ounce of cocaine and Noeman gave it to informant Terry Allen. Noeman and Berbary were arrested at the scene by DEA Agent Greenan.

Noeman has agreed to plead guilty to the first count of the indictment. The cooperation letter is in the file.

All of the lab work has been done and stipulations have been reached with defense counsel. Annexed are:

1. The indictment
2. Noeman’s statement to the Assistant U.S. Attorney prior to arraignment
3. Noeman’s cooperation agreement
4. Statement of Informant Terry Allen
5. Stipulation
6. Case report of S/A Greenan
7. Report of S/A Small
8. Report of S/A Greenan
9. Grand Jury testimony of Noeman
10. Berbary’s statement to the Assistant U.S. Attorney prior to arraignment
11. A note which Ali’s uncle gave to the DEA Agents before he died last week, which apparently was put under his door by Joyce the night of the arrest.

As you know, the reports are written in “governmentese” and the following are the meanings of some of the codes used.

S/A = Special Agent
DEA = Drug Enforcement Administration
SCI = Special Confidential Informant
GS = Group Supervisor
LNU = Last Name Unknown
OGV = Official Government Vehicle

It’s a sure winner.
UNITED STATES OF AMERICA, 

v. 

INDICTMENT 

ELIAS BERBARY a/k/a "ALI" and 
MOHAMED NOEMAN, 

Defendants. 

COUNT ONE 

The Grand Jury charges: 

1. From on or about the 1st day of November, 2005 and continuously thereafter up to and including the 23rd day of January 2006 in the Southern District of New York and elsewhere, ELIAS BERBARY, a/k/a "Ali" and MOHAMED NOEMAN, the defendants, and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code. 

2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would distribute and possess with intent to distribute Schedule II narcotic drug controlled substances, the exact amount thereof being to the Grand Jury unknown, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code. 

OVERT ACTS 

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:
1. On or about January 23, 2006, defendant ELIAS BERBARY, a/k/a “Ali” handed approximately one ounce of cocaine to defendant MOHAMED NOEMAN in a restaurant at 301 East 56th Street, New York, New York.

2. On or about January 23, 2006, defendant MOHAMED NOEMAN handed approximately one ounce of cocaine to another person in a restaurant at 301 East 56th Street, New York, New York.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

On or about the 23rd of January, 2006, in the Southern District of New York, ELIAS BERBARY, a/k/a “Ali” and MOHAMED NOEMAN, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately two ounces of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(a)(1) and 841(b)(1)(A); Title 18 United States Code, Section 2.)

Chris Wood
FOREMAN

Stanley Smith
UNITED STATES ATTORNEY
STATEMENT OF DEFENDANT BEFORE ARRAIGNMENT
MADE TO ASSISTANT UNITED STATES ATTORNEY

Date: 1-24-05

Time Interview Commenced: __________ a.m. __________ p.m.

Q. My name is Richard Marshall, I am an Assistant United States Attorney. You have been arrested for a violation of 21 U.S.C. §411 and §412 which relates to selling cocaine. In a few minutes you will be taken before the United States Magistrate who will fix bail in your case. Do you understand that?

A. Yes

Q. You have a constitutional right to refuse to answer any of my questions. Do you understand that?

A. Nods Yes

Q. You have an absolute right to remain silent, and if you choose to answer any questions, any statement you do make can be used against you in a court of law. Do you understand that?

A. Yes

Q. You have a right to consult an attorney and to have that attorney present during this interview. Do you understand that?

A. Nods Yes

Q. If you do not have funds to retain an attorney, an attorney will be appointed to represent you and you do not have to answer any questions before this attorney is appointed and you can consult with him. Do you understand that?

A. Nods Yes

Q. Would you like to answer some questions about your background? You may pick and choose those questions you wish to answer, and you may stop at any time.

A. Yes
NAME: Mohame Noeman
DOB: 6-29-59
MARITAL STATUS: M
SOCIAL SECURITY NUMBER: DON'T REMEMBER

SPouse: Molly
DOB: 7-7-60

CHILDREN: 2- A GES 6 AND 9

ADDRESS: 140 East 46th St
New York NY

APt. 3A Rent: 900 4 month
BEGAN LIVING THERE: 1/2 YEARS

HOME TELEPHONE: 986-2884
PREVIOUS ADDRESS: 1061 First Ave
DATES: 2 YEARS

EMPLOYED: Falafel
301 East 56th St
Former Owner- Now Manager
Ali Rachman- Present Owner
PREVIOUS EMPLOYMENT:

HOW LONG: 2 YEARS
BUSINESS PHONE: 688-9467
WAGES:
WAGES:

PARENTS: DEAD

WHO RESIDES WITH YOU: WIFE AND 2 KIDS

WELFARE?

FOOD STAMPS?

UNEMPLOYMENT?

ARRESTS: NO
PLACE
CHARGE
DISPOSITION
SENTENCE
TIME SERVED
PROBATION

EDUCATION:

56
CURRENT MEDICAL PROBLEMS:
PHYSICAL: Sprained back - out of work 11 months
MENTAL: NO

HAVE YOU TAKEN OR ARE YOU NOW TAKING DRUGS?
ADDICT?
EVER ADDICTED?
WHAT DRUG?
DRUG PROBLEM?
ALCOHOL? 2 or 3 a day

HEROIN ( ) COCAINE ( V )
MARIJUANA OR HASHISH ( )
AMPHETAMINES ( )
METHADONE ( )
LSD ( ) OTHER:

DO YOU (OR YOUR SPOUSE) HAVE ANY BANK ACCOUNTS? NO
WHERE:

FINANCIAL:
CASH ON PERSON: 20,000
SAVINGS: WIFE HAS SAVINGS
STOCKS OR BONDS: NO
CAR: NO
HOUSE: NO
OTHER PROPERTY: JEWELRY

DOES YOUR SPOUSE WORK? YES
CITIZEN OF: EGYPT
PLACE OF BIRTH: CAIRO
ALIEN REGISTRATION NUMBER: DON'T REMEMBER
REGISTERED WITH SELECTIVE SERVICES:
HAVE YOU EVER SERVED IN THE ARMED FORCES? WHEN?
TYPE OF DISCHARGE:

DO YOU HAVE ANY RELATIVES IN NEW YORK AREA, OTHER THAN THOSE MENTIONED ABOVE? NO
NAME: ADDRESS:

WHERE? AT RESTAURANT-CHEF WORK
ENTRY TO U.S. DATE: 6 YEARS AGO
PORT OF ENTRY: NEW YORK

57
WHEN WERE YOU ARRESTED? 1-23-05 WHERE? RESTAURANT

DO YOU HAVE ANY COMPLAINTS ABOUT THE WAY THE AGENTS TREATED YOU? No

WOULD YOU LIKE TO TELL ME WHAT HAPPENED?
I WENT INTO THE BATHROOM. THE PRICE WAS $700 or $1,400 OR SOMETHING LIKE THAT.
I TOLD ALLEN THAT ALI GOT THE STUFF.
I DON'T WANT TO ANSWER THESE QUESTIONS 'TIL I TALK TO ALI AND GET THE STORY RIGHT.
NO I DON'T WANT A LAWYER. IT'S TOO LATE FOR HIM TO BE ANYBODY TO ME, ANYWAY. RIGHT. I'LL ANSWER YOUR QUESTIONS.
ALLEN BROUGHT IN HIS FRIENDS. HE BROUGHT IN BUSINESS.
I WAS DOING HIM A FAVOR. HE PUT ME UP TO IT. I DIDN'T WANT TO, BUT HE KEPT PUSHERING AND PUSHERING ME FOR THE STUFF. I MEAN COCAINE RIGHT.

ALI BOUGHT IN THE COCAINE TO THE RESTAURANT. HE HAD TWO OUNCES AND GAVE THEM BOTH TO ME.

HE WENT INTO THE RESTROOM AND I HAD THE STUFF AND I GAVE IT TO ALLEN.

I GOT IT FROM ALI, LIKE I SAID

MAY I ASK A QUESTION?

WILL I BE DEPORTED?

USA: WE CAN TALK ABOUT THAT LATER AFTER YOU GET A LAWYER
DEFENDANT'S STATEMENT - Continued.

N- CAN I NOT BE DEPORTED IF I COOPERATE?

AUSA - WELL TALK ABOUT IT LATER. FIRST YOU MUST BE ARRAIGNED BEFORE THE MAGISTRATE.

TIME INTERVIEW TERMINATED: ______ a.m. / 1:30 p.m.

WITNESSED: ASSISTANT U.S. ATTORNEY

RICHARD MARSHALL

AGENTS:

JAMES GREENAN

RICHARD SMALL

BAIL RECOMMENDED:

5000 PRB + SURRENDER + PSA

BAIL SET BY MAGISTRATE:

5000 PRB + PSA + SURRENDER OF PASSPORT

POSSIBLE BAIL SUGGESTED
BY DEFENDANT:

TIME OF
ARRAIGNMENT: ______ a.m. ______ p.m.

HEARING:

BAIL WARNINGS GIVEN?

LAWYER: DAVID WHITEHEAD
ATTORNEY AT LAW
400 BROADWAY
SUITE 1600
NEW YORK NY 10013
United States Department of Justice

United States Attorney

Southern District of New York
One St. Andrew’s Plaza
New York, New York 10007

January 30, 2006

David Whitebread, Esq.
400 Broadway
New York, NY 10013

Re: Mohamed Noeman

Dear Mr. Whitebread:

On the understandings specified below, the United States will accept a guilty plea from Mohamed Noeman to one count of an Indictment charging a violation of 21 USC §§ 812, 841(a)(1) and 841(b)(1)(A) on or about January 23, 2006, carrying a maximum sentence of 15 years and a $25,000 fine. If any term of imprisonment is imposed, then special parole for a minimum of 3 years and a maximum of life will be imposed. If he fully complies with these understandings Mohamed Noeman will not be prosecuted by this Office for other existing charges known to this Office hereinafter specified, or for potential charges based upon information supplied to this Office by Mohamed Noeman. Such immunity specifically includes charges relating to the possession and distribution of cocaine hydrochloride by Mohamed Noeman on January 23, 2006.

The understandings are that Mohamed Noeman shall truthfully disclose all information with respect to the activities of himself and others concerning all matters about which this Office inquires of him, and, further, shall truthfully testify before the Grand Jury and/or at any trial or other court proceeding with respect to any matters about which this Office may request his testimony.

It is further understood that the sentence to be imposed upon Mohamed Noeman is within the sole discretion of the sentencing judge. This Office cannot and does not make any promise or representation as to what sentence Mohamed Noeman will receive, nor will it recommend any specific sentence to the sentencing judge. However, this Office will inform the sentencing judge and the Probation Department of (1) this Agreement; (2) the nature and extent of Mohamed Noeman’s activities with respect to this case; (3) the nature and extent of any and all other activities of Mohamed Noeman which this Office deems relevant to sentencing; and (4) the full nature and extent of Mohamed Noeman’s cooperation with this Office and the date when such
cooperation commenced. In so doing, this Office will use any and all information it deems relevant, including information and statements provided by Mohamed Noeman both prior to and subsequent to the signing of this Agreement. In addition, if it is determined by this Office that Mohamed Noeman has provided substantial assistance in an investigation or prosecution, and if Mohamed Noeman has otherwise complied with the terms of this Agreement, this Office will file a motion, pursuant to Section 5K1.1 of the Sentencing Guidelines, advising the sentencing judge of all relevant facts pertaining to that determination and requesting the Court to sentence Mohamed Noeman in light of the factors set forth in Section 5K1.1(a) (1) - (5).

It is understood that, even if such a motion is filed, the sentence to be imposed on Mohamed Noeman remains within the sole discretion of the sentencing judge. Furthermore, this Office retains the right to present to the sentencing judge and Probation Department, either orally or in writing, any and all facts and arguments relevant to sentencing. It is further understood that this Agreement in no way affects or limits this Office’s right to respond to and take positions on post-sentencing motions or requests for information which relate to reduction or modification of sentence.

It is also understood that, should this Office determine that Mohamed Noeman has not provided substantial assistance in an investigation or prosecution, or has otherwise breached this Agreement, such a determination will release this Office from any obligation to file a motion pursuant to Section 5K1.1 of the Sentencing Guidelines as described above, but will not entitle Mohamed Noeman to withdraw Mohamed Noeman’s guilty plea once it has been entered.

It is further understood that this Agreement is limited to the United States Attorney’s Office for the Southern District of New York, and cannot bind other federal, state or local prosecuting authorities, although this Office will bring the cooperation of Mohamed Noeman to the attention of other prosecuting offices, if requested by Mohamed Noeman’s counsel.

If is further understood that Mohamed Noeman must at all times give complete, truthful and accurate information and testimony and must not commit any further crime whatsoever. Should Mohamed Noeman commit any further crimes or should it be determined that he has given false, incomplete or misleading testimony or information, or should he otherwise violate any provisions of this Agreement, Mohamed Noeman shall thereafter be subject to prosecution for any federal criminal violation of which this Office has knowledge, including, but not limited to, perjury and obstruction of justice. Any such prosecutions may be premised upon any information and statements provided by Mohamed Noeman both prior to and subsequent to the signing of this agreement. Moreover, any such prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against Mohamed Noeman in accordance with this Agreement, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of any such prosecutions. It is the intent of this Agreement to waive any and all defenses based on the statute of limitations with respect to any prosecutions which are not time-barred on the date this Agreement is signed.

Furthermore, it is agreed that in the event that it is determined that Mohamed Noeman has violated any provision of this Agreement, (i) all statements made by Mohamed Noeman to
this Office or other designated law enforcement agents, or any other testimony given by Mohamed Noeman before a grand jury or other tribunal, whether prior to or subsequent to this Agreement, or any leads from such statements or testimony, shall be admissible in evidence in any and all criminal proceedings hereafter brought against Mohamed Noeman and (ii) Mohamed Noeman shall assert no claim under the United States Constitution, any statute, Rule 11(e) (6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule, that statements made by him prior to or subsequent to this Agreement, or any leads therefrom, should be suppressed. It is the intent of this Agreement to waive any and all rights in the foregoing respects.

With respect to this matter, this Agreement supersedes all prior, if any, understandings, promises and/or conditions between this Office and Mohamed Noeman. No additional promises, agreements, and conditions have been entered into other than those set forth in this letter and none will be entered into unless in writing and signed by all parties.

Very truly yours,

STANLEY SMITH
United States Attorney

BY: Stanley Smith
Assistant United States Attorney

APPROVED:

Jessica Taylor
Criminal Division

AGREED AND CONSENTED TO:

Mohamed Noeman
MOHAMED NOEMAN

APPROVED:

John Whitebread
JOHN WHITEBREAD, ESQ.
Attorney for Mohamed Noeman
STATEMENT OF INFORMANT TERRY ALLEN

My name is Terry Allen. My friends call me Terry. I make this statement voluntarily and of my own free will.

I am 27 years old and have been arrested three times. My only conviction was thirteen years ago for jumping a turnstile, which probably isn’t even a crime. It’s more like an offense. I got a suspended sentence. The two other cases are pending charges with the State Court. One is for driving while intoxicated, without a license, and for leaving the scene of an accident. The other is for pickpocketing. I am innocent of both charges.

I have been an informant for the DEA for two years. They have paid me for the information I give, ranging from $50 to $150 depending on how good it is. I give them tips once or twice a month.

In early January a guy named Mike -- I am told his last name is Noeman -- called me. I eat occasionally at his restaurant, so I went there. He told me he thought that I might be interested in making some extra money and wanted to know if I’d like some coke to sell. I said sure. He gave me a free sample of cocaine. He said he could deliver more if I had any buyers.

I took that sample to the DEA and asked if they would help in the State cases if I helped them out. They told me they would try to help and asked me what happened. I told them. I agreed to introduce an undercover agent to Mike.

A couple of days later I went back to the restaurant with Greenan and met Mike in the rest room. Mike said he was waiting for his connection and asked me to come back the next day.

The next day I went back with Greenan at night. There was some problem, so Greenan and I have to leave and to come back later. I went into the rest room with Mike and Greenan joined us. Mike gave me the coke. Greenan arrested Mike.

All three times there was another guy there whose picture I identified out of a photo spread. I am told his name is Berbary.

Terry Allen

TERRY ALLEN

63
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :

v. : 

ELIAS BERBARY a/k/a “Ali” : 
Defendant. :

IT IS HEREBY STIPULATED AND AGREED as follows:

1. Government Exhibit 1 contains 27.25 grams of cocaine hydrochloride, with a strength of approximately 11%.

2. Government Exhibit 2 contains 27.85 grams of cocaine hydrochloride with a strength of approximately 10%.

3. Government Exhibit 3 contains 1.0 grams of cocaine hydrochloride with a strength of approximately 21%.

4. Government Exhibit 4 contains 1.1 grams of cocaine hydrochloride with a strength of approximately 20%.

5. A 1991 green Pontiac with New Jersey license plate 584 HBT is registered to ELIAS BERBARY, 316 N. Oxford Avenue, Ventor, New Jersey.

Dated: New York, New York

Stanley Smith
United States Attorney for the
Southern District of New York

Attorney for the United States of America

By: Richard A. Marshall
Assistant United States Attorney

Corey Davis
Attorney for the Defendant
On January 23, 2005, defendants Elias BERBARY and Mohamed NOEMAN were arrested at the Falafel Dumonde Restaurant, 301 East 56th Street, New York City, after delivery of two ounces of cocaine to an undercover agent. This arrest occurred after Berbary was observed exiting the restaurant, talking to an unknown female seated in a car, and returning to the restaurant empty-handed.
REPORT OF S/A SMALL 2/1/06

1. On January 12, 2006, at approximately 7:30 p.m., surveillance was established in the vicinity of the FALAFEL DUMONDE restaurant, 301 East 56th Street, New York, New York. At approximately 7:35 p.m., S/A Garcia entered and occupied the table nearest the window.

2. At approximately 7:50 p.m., G/S Hochman and S/A Small entered the restaurant and sat at a table together.

3. At approximately 8:05 p.m., S/A Greenan and SCI arrived in OGV parked and entered the FALAFEL DUMONDE restaurant. S/A Greenan was introduced to Mohamed Noeman, “MIKE” the owner of the restaurant. G/S Hochman and S/A Small observed MIKE, SCI and S/A Greenan engage in conversation, G/S Hochman observed MIKE and SCI enter the washroom together, remain a short time, then exit.

4. At approximately 8:15 p.m., a vehicle bearing New Jersey Registration number 584 HBT arrived and parked in front of the restaurant. A lone male left the vehicle and entered the restaurant, observed by S/A Small, who was seated facing the entrance. The male met with MIKE, engaged briefly in conversation and remained in the restaurant. SCI and MIKE again entered the washroom and exited after a brief period.

5. At approximately 8:30 p.m., SCI, S/A Greenan and MIKE exited the restaurant and stood on the sidewalk in front engaged in conversation for a short time. MIKE then returned to the restaurant, S/A Greenan and SCI entered the OGV and departed the area.

PHYSICAL DESCRIPTION:

6. John Doe -- white, male, approximately 5’10”, 175 pounds, age in mid 30’s.

VEHICLE DESCRIPTION:


8. On January 23, 2005, at approximately 8:30 p.m., surveillance was established in the vicinity of the FALAFEL DUMONDE restaurant, 301 East 56th Street, New York, New York.

9. At approximately 9:00 p.m., Special Agent Small entered the FALAFEL DUMONDE restaurant and sat at the table nearest the window. S/A Small observed NOEMAN and John Doe #1 seated at the rear table facing the front of the restaurant.

10. At approximately 9:15 p.m., S/A Greenan and SCI entered the restaurant and walked to the rear and joined NOEMAN and John Doe #1.
11. After a short period SCI left the table with MIKE and stood next to the entrance to the washroom and briefly engaged in conversation, SCI then returned to the table joining S/A Greenan and John Doe #1.

12. After a brief conversation at the table SCI and MIKE entered the washroom. After a short time MIKE and SCI exited the washroom. At approximately 9:40 p.m., S/A Greenan and SCI departed the restaurant. S/A Small asked MIKE if he was closing the restaurant, MIKE replied in five (5) minutes. S/A Small then departed the restaurant.

13. S/A Small observed John Doe #1 leave the restaurant and go to a vehicle bearing New Jersey license plate 584 HBT, which was parked in front of the restaurant and retrieve a short brown leather jacket (Exhibit D) and return to the restaurant. An unknown female was seated in the passenger seat, in front.

14. At approximately 10:15 p.m., S/A Greenan and SCI returned to the restaurant, SCI entered followed shortly by S/A Greenan. At approximately 10:30 p.m., the arrest signal was given and surveillance agents entered the restaurant, where Mohamed NOEMAN, Elias BERBARY and John Doe #1 were arrested. NOEMAN and BERBARY were transported to Region 2 offices by Agents Greenan and Small via OGV.

**PHYSICAL DESCRIPTION:**

15. NOEMAN, Mohamed -- white, male DOB 6/29/1959, 6', 190 pounds, brown eyes, brown hair, no naddis number.


17. JANE DOE -- white, female, approximately 5'3", 115 pounds, age - mid-20's, brown, curly hair.

**VEHICLE DESCRIPTION:**

REPORT OF S/A GREENAN -- 2/1/06

1. On January 10, 2006, SCI was debriefed by G/S Hochman, Special Agents Greenan and Joura at the New York Regional Office. SCI stated that he was in contact with Mike LNU owner of FALAFEL DUMONDE restaurant located at 301 East 56th Street, New York City, telephone number (212) 688-9467. The SCI further stated that he negotiated with Mike LNU at the restaurant for the purchase of a quantity of cocaine. SCI also stated that he contacted Mike LNU at his residence telephone number (212) 986-2886 is subscribed to by Mohamed Noeman located at 140 East 46th Street, New York City, apartment 3A.

2. The SCI then produced a sample of cocaine he obtained from Mike LNU. SCI stated that the sample of cocaine, Exhibit #1, was given to him by Mike LNU at his restaurant at approximately 6:00 p.m., on January 10, 2006. SCI further related that SCI-8-0008 also participated in the negotiations with Mike LNU for the purchase of cocaine.

3. On January 11, 2006, SCI was debriefed by S/A Greenan and S/A James Williams concerning Mike LNU. He informed the S/A’s that Mike’s last name was Noeman. SCI stated that Noeman was prepared to deliver four (4) ounces of cocaine for fifty five hundred dollars. SCI further stated that Noeman wanted him to contact him at the restaurant and Noeman would tell him (SCI) when he would be ready to deliver the cocaine. On January 11, 2006, SCI made a number of telephone calls to Noeman at his restaurant, the FALAFEL DUMONDE, located at 301 East 56th Street, New York City, telephone number (212) 688-9467.

4. On January 12, 2006 SCI again contacted Noeman via telephone. After introducing himself on the phone to Noeman, Noeman requested SCI to meet him at the restaurant at approximately 8:00 p.m., on January 12, 2003.

5. Authority to flash $5,500 was received and preparations were made to have SCI introduce S/A Greenan for the purpose of “purchasing” the cocaine. Plans were made to arrest Noeman upon delivery of the cocaine.

6. At approximately 8:05 p.m., on January 12, 2006, SCI and S/A Greenan entered the FALAFEL DUMONDE restaurant located at 301 East 56th Street, New York City. Upon entering the restaurant, the SCI introduced S/A Greenan as “Bobby” to Noeman. After exchanging greetings SCI and S/A Greenan were seated by Noeman towards the front of the restaurant.

7. At approximately 8:10 p.m., SCI and Noeman had a conversation in the restroom of the restaurant. After the conversation, SCI reported to S/A Greenan that Noeman was waiting for his connection.

8. At approximately 8:15 p.m., SCI reported to S/A Greenan that he just observed a John Doe enter the restaurant and speak with Noeman. The SCI further stated that the male was the same John Doe who was present in the restaurant when the SCI received a sample of cocaine from Noeman. (No report was made of that prior sale.)
9. At approximately 8:20 p.m., SCI and Noeman had a second conversation in the restroom of the restaurant. After this second conversation SCI reported to S/A Greenan that the cocaine which is available is not good and that the deal would have to go another time. SCI then handed Exhibit #2, a free sample of cocaine, to S/A Greenan. SCI stated that he received it from Noeman in the restroom and was meant to placate the SCI for the deal not going smoothly.

10. At approximately 8:30 p.m., SCI and S/A Greenan departed the restaurant. Outside of the restaurant S/A Greenan had a conversation with Noeman. Noeman apologized to S/A Greenan “for not being able to deliver,” but to have patience and that he was expecting something better. SCI and S/A Greenan then shook hands with Noeman and departed the area.

11. On January 23, 2006, at approximately 10:30 a.m., S/A Greenan received a telephone call from NOEMAN at the New York Regional Office. NOEMAN stated that he was ready to deal and that S/A Greenan should bring his money. S/A Greenan asked NOEMAN if he should contact Allen. NOEMAN stated that Allen should be present when the deal goes down.

12. At approximately 11:00 a.m., on January 23, 2006, S/A Greenan was contacted by SCI. SCI stated to S/A Greenan that he was in telephone contact with NOEMAN. NOEMAN stated that he definitely had two (2) ounces of cocaine available and that he was expecting two (2) more ounces.

13. Arrangements were then made to effect the arrest of NOEMAN. Prior to departing the N.Y.R.O., SCI was searched for narcotics by S/A Greenan and G/S Hochman. The search was negative.

14. At approximately 8:30 p.m., on January 23, 2006, the above agents initiated surveillance in the vicinity of 301 East 56th Street, New York City, the location of NOEMAN’S restaurant known as the FALAFEL DUMONDE.

At approximately 9:15 p.m., S/A Greenan and SCI entered the restaurant. S/A Greenan and SCI exchanged greetings with NOEMAN at the front of the restaurant. S/A Greenan then noticed John Doe #1 seated next to NOEMAN.

After a short time SCI left the table and had a conversation (off to the side) with NOEMAN. S/A Greenan then engaged John Doe #1 in general conversation.

SCI then returned to the table and informed S/A Greenan that NOEMAN suspected Special Agent Small who was on surveillance in the restaurant might be a cop. SCI further stated that the deal would not go until the man left the restaurant.

SCI again had a conversation with NOEMAN. It was then agreed that S/A Greenan would leave the restaurant and return when the men were gone and NOEMAN had a chance to close the restaurant.
At approximately 9:45 p.m., S/A Greenan and SCI met with G/S Hochman. S/A Greenan informed G/S Hochman of the above events. It was then decided that S/A Greenan and SCI would re-enter the restaurant, without the money, and conclude the deal. The arrest signals were then discussed and S/A Greenan and SCI returned to the restaurant after S/A Greenan locked the money in the OGV. While locking the money in the OGV, S/A Greenan noticed John Doe #1 observing him from the front window of the restaurant.

At approximately 10:15 p.m., S/A Greenan and SCI returned to the FALAFEL DUMONDE restaurant. S/A Greenan observed that the two agents had left the restaurant and that NOEMAN was in the restaurant along with John Doe #1.

NOEMAN came to the door, unlocked it, and let SCI enter the restaurant. After a short conversation SCI motioned for S/A Greenan to enter the restaurant.

S/A Greenan proceeded to a table and SCI and NOEMAN proceeded to enter the restroom at the rear of the restaurant. John Doe #1 remained seated at a table near the rear.

After a short while NOEMAN was observed going to the kitchen area and return to the restroom with a scale (Exhibit E). Shortly afterwards S/A Greenan entered the restroom. S/A Greenan observed approximately one (1) ounce of white powder (Exhibit #3) on the scale. S/A Greenan observed SCI and NOEMAN checking the weight. S/A Greenan then asked NOEMAN the price. NOEMAN stated that the ounce would cost $1,400. SCI further stated that the first ounce would have to be paid for before he could produce the second ounce. S/A Greenan looked at NOEMAN. NOEMAN nodded his head affirmatively.

At that point NOEMAN was placed under arrest by S/A Greenan. NOEMAN was informed of his Constitutional Rights by G/S Hochman. NOEMAN, identified as Mohamed NOEMAN, stated that he understood his rights. S/A Greenan asked NOEMAN where he got the cocaine. NOEMAN stated that he got the cocaine from "Ali, John Doe #1. S/A Greenan then placed John Doe #1, identified as Elias BERBARY, under arrest. S/A Small informed BERBARY of his Constitutional Rights. BERBARY stated that he understood his rights.

S/A Greenan asked BERBARY if he had the other ounce of cocaine. BERBARY stated he didn’t have any cocaine. S/A Greenan asked BERBARY if the agents could search his car, that before it was searched the agents would have to obtain a warrant, that he had the right to consult an attorney, that he could give permission for the search of his vehicle, and that if he did give permission he could tell the agents to stop searching the car. BERBARY stated "go ahead, search my car, you won’t find any cocaine."

BERBARY’S vehicle was searched by Agents Small and Hochman. Located in the vehicle were Exhibits #6, sample of cocaine.

S/A Small then located a leather jacket near one of the tables. NOEMAN stated that the jacket belonged to BERBARY. BERBARY stated that the jacket was not his and that he never seen the jacket. Contained in the leather jacket (Exhibit d) was Exhibit #4 approximately one (1) ounce of cocaine. Exhibit #3 was discovered by S/A Small.
S/A’s Greenan and Small took Exhibits 1, 2 and 3 and gave them to S/A Hochman. S/A Hochman gave Exhibits 1, 2 and 3 to a DEA chemist, who tested the contents of the envelopes and then returned the envelopes and the contents to S/A Hochman. When they were returned the envelopes were sealed and contained the chemist’s initials. S/A Hochman then gave the envelopes to S/A Greenan, who placed them in a DEA evidence locker.

SCI received $500.00 for this information.
Re: Elias Berbary, aka “Ali” and Mohamed Noeman

Mr. Richard A. Marshal

Mohamed Noeman, called as a witness, having been duly sworn by the Foreman of the Grand Jury, testified as follows:

BY MR. MARSHAL:

Q. Mr. Mohamed, will you please spell your name.
A. Mohamed Noeman, M O H A M E D N O E M A N.

Q. Mr. Noeman, do you understand me?
A. Yes.

Q. This Grand Jury, Mr. Noeman, these people, are investigating violations of federal law. Among the violations of federal law that they are investigating are violations of the federal narcotic’s law, and one of those laws is called 21 U.S.C. Section 841, which says that it’s against the law to possess narcotic drugs with an intent to distribute them.

You have certain rights, Mr. Noeman, in connection with your appearance before the Grand Jury here today. First, you have a right to refuse to answer any question if a truthful answer to that question would tend to incriminate you, personally. Second, you should be advised that anything you do say in this Grand Jury may be used against you in a subsequent legal proceeding, and also you should be advised that if you have retained counsel, a lawyer, the Grand Jury will allow you a reasonable opportunity to step outside the Grand Jury room to consult with your lawyer if you want to do so. Do you understand all those things.

A. Yes.

Q. You have a lawyer, don’t you, Mr. Noeman?
A. Yes.

Q. Is that Mr. Whitebread?
A. Yes.

Q. Mr. Whitebread is right outside in the witness room isn’t he?
A. Yes.
Q. This woman sitting here on your left is a reporter and she is taking down everything that you say and everything that I say and a transcript can be made from those notes that she is taking and you understand you are under oath, you must answer all my questions truthfully and if you do not answer any question truthfully you could be subjected to severe penalties having to do with the crime of perjury. Do you understand that?

A. Yes.

Q. Where are you employed, Mr. Noeman?

A. In Manhattan, East 56th Street.

Q. Is that a restaurant.

A. Yes.

Q. And do you own that restaurant?

A. Yes.

Q. What kind of restaurant is it?

A. Middle east food.

Q. On January 23rd of this year you were arrested, isn’t that right?

A. Right.

Q. And when you were arrested another man was arrested with you?

A. Yes.

Q. Is his name Ali?

A. Yes.

Q. This morning did you meet in my office with me and your attorney?

A. Yes.

Q. And at that time did we discuss and sign an agreement between you and the government?

A. Yes.

MR. MARSHAL: I would ask that this document be marked GRAND JURY EXHIBIT 4.
(So marked)

Q. Mr. Noeman, is this a copy of the document that you signed this morning?
A. Yes.

Q. In November of 2005, did Ali come into your restaurant?
A. Yes.

Q. And at that time did he offer you a taste of cocaine?
A. Yes.

Q. Later in November, did a man named Allen come into your restaurant?
A. Yes.

Q. And did Allen ask you if you knew anybody who sold cocaine?
A. Yes.

Q. Later, on a different day, did Ali come back to your restaurant in November?
A. Yes.

Q. And did he ask you then if you knew anybody who wanted to buy cocaine?
A. Yes.

Q. In December of 2005, did Ali tell you what the price would be for the cocaine that he was going to sell?
A. Yes.

Q. What was the price that he told you?
A. Nineteen hundred.

Q. For how much?
A. For one ounce.

Q. Did Allen tell you that that price was okay, and that he wanted to buy some cocaine?
A. Yes.
Q. On the morning of January 23, 2006, did you have a telephone conversation with Ali?
A. Yes.
Q. And did Ali tell you that he had the stuff and that it was good stuff and that you should set it up for that night?
A. Right.
Q. Did you then call Bob on the telephone?
A. Yes.
Q. And was this at a number that Allen gave you?
A. Yes.
Q. Did you tell Bob that it was set up for the night?
A. Yes.
Q. Did Ali come to your restaurant that night?
A. Right.
Q. Was that at about 7:00 o’clock in the evening?
A. Yes.
Q. And were there other people and customers in the restaurant?
A. Yes.
Q. And about 8:00 o’clock, did Allen and Bob also come to your restaurant?
A. Yes.
Q. What time did your restaurant close that night?
A. 10:00 o’clock.
Q. What happened next?
A. Ali gave me part of the coke from his coat pocket and said I’d get the rest later but that he’d keep it ‘til I paid him. Allen and Bob came back to the restaurant and I gave Allen the cocaine in the bathroom that Ali gave me. Bob arrested me.
My name is Richard Marshall, I am an Assistant United States Attorney. You have been arrested for a violation of 21 U.S.C. §§ 812 and 841 which relates to possession of cocaine with intention to distribute. In a few minutes you will be taken before the United States Magistrate who will fix bail in your case. Do you understand that?

A. Yes.

Q. You have a constitutional right to refuse to answer any of my questions. Do you understand that?

A. Yes.

Q. You have an absolute right to remain silent, and if you choose to answer any questions, any statement you do make can be used against you in a court of law. Do you understand that?

A. Yes.

Q. You have a right to consult an attorney and to have that attorney present during this interview. Do you understand that?

A. Yes.

Q. If you do not have funds to retain an attorney, an attorney will be appointed to represent you and you do not have to answer any questions before this attorney is appointed and you can consult with him. Do you understand that?

A. Yes.

Q. Would you like to answer some questions about your background? You may pick and choose those questions you wish to answer, and you may stop at any time.

A. Yes.
NAME: Elias Berbary

DOB: 3-22-61

SPouse: Sheila - separated

SOCIAL SECURITY NUMBER:

CHILDREN:

APT. RENT:

ADDRESS: with girlfriend
Joyce Kies
Queens

BEGAN LIVING THERE: a few weeks

PREVIOUS ADDRESS: 424 RSD

DATES:

EMPLOYED:

not for several months

HOW LONG:

PREVIOUS EMPLOYMENT:
OWN BUSINESS: 9 o'clock Tabacco
and Novelty - 9th Avenue

ADDRESS Lebanon

WAGES:

PARENTS:
Nicole + Evelyn

SELF: SPOUSE:

WHO RESIDES WITH YOU:

AMOUNT:

UNEMPLOYMENT?

PROGRAM LOCATION:

ARRESTS: NO -1-

YEARS: WHERE:

PLACE

CHARGE

DISPOSITION

SENTENCE

TIME SERVED

PROBATION

EDUCATION:
CURRENT MEDICAL PROBLEMS:
   PHYSICAL: NO
   MENTAL: NO

HAVE YOU TAKEN OR ARE YOU NOW TAKING DRUGS?
   ADDICT?
   EVER ADDICTED?
   WHAT DRUG? NO
   DRUG PROBLEM?
   ALCOHOL?

HEROIN (NO)  COCAINE (NO)
MARIJUANA OR HASHISH (NO)
AMPHETAMINES (NO)
METHADONE (NO)
LSD (NO)  OTHER:

DO YOU (OR YOUR SPOUSE) HAVE ANY BANK ACCOUNTS?
   WHERE:

FINANCIAL:
   CASH ON PERSON:
   SAVINGS:
   STOCKS OR BONDS:  1991
   CAR: Pontiac
   HOUSE:
   OTHER PROPERTY:

DOES YOUR SPOUSE WORK?

CITIZEN OF: Lebanon
PLACE OF BIRTH:
ALIEN REGISTRATION NUMBER: lost the green card
REGISTERED WITH SELECTIVE SERVICES:
HAVE YOU EVER SERVED IN THE ARMED FORCES? WHEN?
   TYPE OF DISCHARGE:

DO YOU HAVE ANY RELATIVES IN NEW YORK AREA, OTHER THAN THOSE MENTIONED ABOVE?
   NAME: Wife
   Louis Larry (uncle)
   Greg Larry (uncle)

   ADDRESS: Brooklyn with her family
   78 Atlantic City
   Atlantic City
WHEN WERE YOU ARRESTED? last night WHERE? Restaurant- 56th Street

DO YOU HAVE ANY COMPLAINTS ABOUT THE WAY THE AGENTS TREATED YOU?

WOULD YOU LIKE TO TELL ME WHAT HAPPENED?

Q - You were in Falafel restaurant last night?
A - Yes.

Q - Did you bring any cocaine with you last night?
A - No.

Q - Did you give any cocaine to Noeman?
A - No.

Q - Do you know what cocaine looks like?
A - Yes

Q - When was the last time you saw any?
A - Last night

Q - Did you ever see any before last night?
A - You can't just see it like that.

Q - What were you wearing when arrested?
A - What I am wearing now
Q - Did you have a coat?
DEFENDANT'S STATEMENT - Continued.

Q- How did you get to the restaurant?
A- Drove my car

Q- Do you own a short brown leather jacket?
A- No.

Q- Were you wearing one last night?
A- No.

Q- Who was with you?
A- Joyce. I don't want her involved. I don't want to talk anymore.

TIME INTERVIEW TERMINATED: 10 a.m. / 30 p.m.

WITNESSED: ASSISTANT U.S. ATTORNEY
Richard Marshall

AGENTs: James Greenan
Richard Small

BAIL RECOMMENDED:

POSSIBLE BAIL SUGGESTED
BY DEFENDANT:

BAIL SET BY MAGISTRATE:

TIME OF
ARRAIGNMENT: a.m. p.m.

HEARING:

LAWYER:

BAIL WARNINGS GIVEN?
Uncle -

Please call me. Ali’s been arrested and wants me to do something I’m not sure I should. I’m real confused and need your help.

Joyce
COUNSEL SHOULD EXPECT S/A GREENAN TO TESTIFY AS FOLLOWS:

You are a special agent with the Drug Enforcement Administration and acted as the undercover in this case.

Stick by what is in the reports. Try to “zing it” to the defendant on cross-examination if the defense lawyer gives you an opening, but you will admit that you did not see Berbary with a leather jacket.
COUNSEL SHOULD EXPECT S/A SMALL TO TESTIFY AS follows:

You are a special agent of the Drug Enforcement Agency.

Read both your report and S/A Greenan's, who was the undercover agent. Stick by what's in the reports except as indicated here on this sheet, even though there is no conceivable way that you could have seen everything you say you saw.

Specifically, you will be certain that you saw Berbary wearing, not carrying, a brown leather jacket into the restaurant. You did not see Berbary leave the restaurant -- the first time you saw him was when he was standing by the car, with the coat on, and did not see or hear the car door closing. The street was dark and you only saw it for two seconds between sips of your coffee (you hate surveillance). Nonetheless you will say you could see it clearly even though the street was poorly lit and you were in a car across the street and there was heavy traffic and lots of people. You will become adamant on cross-examination that you could not be mistaken about the jacket, the color or that Berbary was wearing it.
COUNSEL SHOULD EXPECT MOHAMED NOEMAN

You are the “accomplice” turned state’s evidence.

Read your grand jury transcript and S/A Greenan’s report and your interview form and the letter of cooperation.

You own a restaurant and have pled guilty to the charges. Your main fear is that you will be deported. The DEA has promised privately that if Berbary is convicted they will help you fight deportation. You will not volunteer this information to the prosecutor when he prepares you for direct examination. However, on cross-examination, if you are asked if you have any “deal” besides the cooperation letter, you will admit this promise by the DEA.

There are several inconsistencies in your various stories -- specifically when arrested you said Ali (the defendant) gave you two ounces and in the grand jury you said only one. In the grand jury you did not mention the January 12, 2006 meeting, but at trial you will remember it as it appears in Greenan’s report. You will admit having read Greenan’s report and say it “refreshed your recollection.” You also will “remember” Berbary wearing a brown leather jacket when he came into the restaurant, but left it on the table. You are, in fact, a heavy drug dealer and had a lot of drugs on you when arrested. You will remind the prosecution of this. You may improvise where appropriate, consistent with these instructions.
COUNSEL SHOULD EXPECT JOYCE KIES TO TESTIFY AS FOLLOWS:

You are the defendant’s girlfriend and want to keep him out of jail. You will even lie for him.

You will refuse to talk to the prosecution. Your story will confirm Ali’s claim that the car heater was broken, that he owned no coat like the leather one identified by the DEA Agent. You will deny that you were wearing a coat. Even in mid-winter, you never wore a coat when you went in his car, because the car was so hot and there was a garage attached to your house in Queens, where Ali stayed with you.

Your testimony, if called by the defense, would be as follows: You met Berbary two years ago and began dating at once. He was separated from his wife already. He moved in with you in your Rego Park house. You were a student at CUNY at the time, and are now a secretary in a school.

You have been inside the restaurant on 56th Street with Ali only two times. The first time was in November. As far as you know, Ali never was there before. You met the owner, Mohamed, at that time. Ali and he spoke in Arabic but you understood a little. They spoke about Lebanon, their families and cars -- Ali loves cars. They talked for half an hour. You recall Ali went to the bathroom at one point and that Mohamed and you spoke together a little while. Ali and Mohamed never went out together that night.

The next time was in December. When you and Ali arrived, Mohamed immediately recognized you. Before you sat down, he told you his cab had been disabled and asked Ali to help him out. Ali and you offered to drive him to the cab and help repair it. Mohamed insisted both of you go with him in his friend’s Mercedes. When you got there, Ali tried to fix the cab, and finally got it going. While he worked in the cab, Mohamed and the Spanish cab driver left for about fifteen minutes. Mohamed thanked Ali for fixing the car and drove you back to the restaurant and offered you a free dinner.

When you got back, a man was standing at the corner screaming to two cops that his Mercedes was stolen by Mohamed. Mohamed told the police that the man was his best friend, but the man denied ever seeing Mohamed before. Nonetheless, the man who owned the Mercedes did not want to press charges.

You told Ali you did not want to go back to the restaurant again, because you thought something was strange about Mohamed and you thought he was maybe a drug dealer. Ali, however, liked the fact that Mohamed had remembered him and had asked him to fix the cab.

Whenever Ali went back, you stayed in the car while Ali got some food to take out. That happened twice in January. Once was in the beginning of January and the second was the night of the arrest.
You will always deny hearing Ali or Mohamed ever mentioning cocaine. Your explanation for leaving the scene that night will be that Ali and you had a fight for making you wait so long in the car. You took off in a huff when you saw a taxicab pass by. You will testify that Ali had come out to the car on two or three occasions to get you to join him inside and that he assured you he would not be long when you refused.

When you got home, he called you to say he had been arrested. He told you to throw out the ounce of marijuana he had stashed in the dresser drawer. Your reaction was panic, so you typed a note to Ali’s uncle asking for help. You knew the uncle was an ex-cop (who has since died from a heart condition) who was a gentle man with a good heart. He never called, so you threw out the marijuana, as Ali had requested. Unbeknownst to you, Ali’s uncle gave the note to the prosecution just before he passed away. Unless instructed to admit to this by Ali, you will deny anything about drugs on the stand and will claim that the note had to do with raising bail money.
COUNSEL SHOULD EXPECT ELIAS BERBARY TO TESTIFY AS FOLLOWS:

Your testimony should be worked out with your girlfriend, Joyce Kies, who is lying for you. Use her instruction sheet in creating details.

The following are the major facts about your personal background.

You are the assistant manager of a department store called TSS. Your salary is $600. You were born in Lebanon and came to this country 24 years ago. You went to Southeastern State College in Oklahoma. Upon graduation in 1983, you came to New York City. You married but two and a half years ago separated. You met Joyce two years ago.

You will deny ever telephoning Mohamed.

The word cocaine in Arabic is the same as in English: cocaine.

Your version of what occurred inside the restaurant on the night of the arrest is as follows:

You went to order take out food, but Mohamed insisted you stay for a drink. You sat around and chatted. Occasionally he had to get up and talk to other customers. On two or three occasions you went out to invite Joyce to join you, but she refused. You told her you would not be much longer. You needed to stay around because Mohamed said his driver was having trouble with the car and you might have to fix it.

While you were waiting, Mohamed came up and said that he wanted you to have something because you were being a good friend to him. He put something in your pocket and told you to enjoy it when you got home. He told you to be sure to hide it until you got home. The last time you went to the car to talk to Joyce, you slipped the envelope into the car. You will deny knowing what it was. You guessed that it might have been some marijuana or something like that. You will ask your lawyer whether it would be helpful if Joyce corroborates that you use marijuana, but not cocaine. Based on counsel’s answer and whether you think it will be helpful, you will have Joyce explain the story about the marijuana she threw out.

You will, of course, deny owning a brown leather jacket or removing one from the car and taking it to the restaurant.
COUNSEL SHOULD EXPECT INFORMANT TERRY ALLEN TO TESTIFY AS FOLLOWS:

Stick with your vague story in your statement. It is far less detailed than S/A Greenan’s report and even contradicts it in parts. You cannot remember more because you were high from part of the sample that you kept for yourself, but don’t tell the prosecutor that. You will remain always just a little vague. If the prosecutors try to press for specifics, you won’t quite deliver. In other words, make it hard for them to decide whether to call you as a witness.

Other facts you should know:

You never have had a legitimate job, so say you were a mechanic, or something.

You never have filed a tax return.

The DEA told you they would try to help you in your two State cases, but have promised you nothing, except a try. The DEA has said they would give you a bonus if Berbary is convicted. You will tell this to anyone, provided they ask.

You should not volunteer too much information, but you should express a willingness to help the prosecutors, even though you will remain somewhat vague about the transactions involved.

You will refuse to talk to the defense before the trial.
UNITED STATES v. MONTALVO

MOCK TRIAL
Reassignment Memo from Ausa Jim Spencer

Attached to this memo are the report of Special Agent Ronald Kess, and the Grand Jury testimony of Ralph Etzi and Robert Montalvo, the Report of Police Officer Barth and the statement of Johnnie Cigar.

The potential defendant is Frederick Montalvo and two other unknown subjects hijacked a truckload of 22,000 pounds of frozen seafood valued at $60,000 on December 3, 2004. The driver, Etzi, was picking up seafood in New Jersey and New York and was to deliver the seafood to Philadelphia when he was hijacked in Manhattan. Montalvo’s alibi is that he was working at Fulton Fish Market and then visited his parents when the hijacking occurred. There was a line-up and Etzi identified Montalvo as “probably” one of the hijackers. The other hijackers are still at large and their identities are unknown.

The Grand Jury work is all done and only an indictment need be drafted and presented for a vote. There probably should be a conspiracy count and one substantive count for theft from interstate shipment of goods.
REPORT OF SPECIAL AGENT RONALD KESS

Dictated 1/10/05

On December 3, 2004 at 5 p.m. I received a call from Police Officer Donald Lone that Ralph Etzi had reported a truckload of frozen food was hijacked and that he was held hostage for several hours. At 5:30 p.m. I arrived at the precinct where Etzi and Lone were waiting.

Etzi made the following statement: He had picked up 22,000 pounds of seafood valued at $60,000 in New Jersey and New York that morning at 5:00 a.m. He was about to return to Philadelphia with his cargo, when at 7:00 a.m. he was approached by an unknown male (Unsub. ["unknown subject"] 1) who forced his way into the cab of his truck at 10th Avenue and 13th Street. Unsub. 1 then drove the truck around the corner to 14th Street and made Etzi climb over and drive south along the West Side Highway. Unsub. 1 told Etzi he had a gun. As Etzi was driving, he observed a red Dodge Dart following. Unsub. 1 told Etzi to stop at the pier and Unsub. 2 stopped the Dodge Dart, exited and told Etzi to do as Unsub. 1 said or he would blow Etzi’s brains out. Unsub. 1 then instructed Etzi to drive to the Fulton Fish Market. At the market the Dodge Dart again stopped and Unsub. 2 got into the cab of the truck and he drove Etzi to an unknown Long Island Shopping Center parking lot. The Dodge Dart followed and pulled behind the truck. Unsub. 3 exited the Dodge Dart, joined Unsub. 1 and 2 at the truck and talked. Unsub. 3 and Etzi returned to the Dodge Dart and Unsub. 1 and 2 drove the truck away. 1 hour later Unsubs. 1 and 2 returned with the truck and entered the Dodge Dart, and drove Etzi to an isolated area and dropped Etzi off. Three days later, the truck was found, empty and abandoned, way out in Suffolk County. No usable fingerprints were found.

Etzi described the Dodge Dart in detail:

1990 Dodge Dart, red exterior, blue interior, 57,000 miles on the speedometer; white wires hanging from dashboard; brackets for a tapedeck, which had been removed; sticker showing a 2000 registration expiration and a January 2000 inspection date.

Etzi described Unsub. 1 a follows:

White male, 5’6”, 200 lbs; and scar on left cheek. Dark hair, 30-35 years old.

Etzi described Unsub. 2 as follows:

White male, 5’10”, 160 lbs, slight build; brown hair, moustache; 30 years old.

Etzi described Unsub. 3 as follows:

White male, 6’; 30 years old.
That day an informant named Johnnie Cigar had observed the occupants of a red Dodge Dart acting suspiciously near 14th Street and 10th Avenue, and he wrote down the license number. He said one of the occupants looked like Frederick Montalvo. The license number came up registered to Sally Salome.

Cigar is a reliable informant. I have dealt with him on numerous occasions. He has been paid for his tips -- copies of those receipts are in the file.

Officer Lone and I went to Ms. Salome’s house on December 6, 2004. We observed that a Dodge Dart meeting Etzi’s description was parked in the street. I began to take some photographs when a man who identified himself as “Fred” came to the door. He asked what I was doing. I said I wanted to speak to Ms. Salome. Fred asked me to come in and Ms. Salome was there. In Fred’s presence, I asked Ms. Salome where was her Dodge Dart on December 3, 2004. Salome said she had the car all day on December 3, to do shopping. Then I explained my investigation and how her car was suspected of being involved in the hijacking. Thereupon Fred told her to leave the room. She went to the kitchen. He said he was Salome’s boyfriend, and that she was mistaken, and he had the car, having worked at the fish market and visited his parents. At that point, I fully advised him of his rights and asked him for his full name. He said his name was Frederick Montalvo. Montalvo agreed to answer my further questions. He repeated his story. He claimed he had the car, went to the fish market at 5:00 a.m. When I told him the car had been seen at 10th Avenue and 14th Street, he said that after work, he went for a drink at a bar at 10th Avenue and 14th Street, and that at about 1:00 p.m. he went to his parents in Brooklyn for lunch. He could not remember the name of the bar or any particular people he was with. When I asked him if he hijacked a truck, he took the 5th Amendment.

Montalvo then went into the kitchen and returned with Salome. She said she was thinking about what she told me and had been mistaken; she had the car only on December 2nd and that Montalvo has free access to the car.

After discussion with AUSA Spencer, on December 13, 2004, Mr. Montalvo appeared at a line-up at our office. His previous lawyer was present. Etzi identified Montalvo as a man who “could possibly be [unsub. 2], that he looked like him but I’m not definitely sure.” Attached is a copy of the photograph of the line-up.

After the line-up I showed Etzi the photographs of the Dodge Dart I took and he said that definitely was the car used by the hijackers. Photographs of the Dodge Dart are attached.

I also showed Etzi a photo spread of 50 people known to the FBI as convicted or suspected hijackers of seafood and meat. Montalvo’s picture was not included in the photo spread. I asked Etzi if he could identify any of them. Etzi looked at all of the photographs and said he did not recognize anyone else.

I then conducted a fingerprint analysis of the Dodge Dart. One set of Montalvo’s fingerprints was found. The car appeared to be recently washed.
A check of Etzi revealed that when Etzi was 16, he was arrested and convicted of making false statements about his age in connection with an application for a state pistol permit. Etzi was sentenced to probation as a youthful offender.
TRIAL PRACTICE SEMINAR

GRAND JURY OF RALPH ETZI

January 2, 2005

Q. How old are you?
A. 19.

Q. How are you employed?
A. I am driver for A&B Trucking Co. I am the owner’s son.

Q. On December 3, 2004 what happened?
A. I had just picked up 22,000 lbs. of frozen seafood from two stops in New Jersey and one in Manhattan and was waiting for a light at 15th Street and 10th Avenue. This was about 7:00 a.m. A white male approached the cab of the truck and forced his way in. He drove the truck around the corner of 14th Street, put his hand in his pocket as if he had a gun, and told me to crawl over to the wheel and drive. I drove at his direction south and I noticed a red Dodge Dart following. The first guy told me to stop at a pier and the Dodge Dart also stopped. A second guy got out of the Dodge Dart and went to the far side of the truck so I could not see him. He told the first guy to tell me to do what the first guy told me and to tell me that he, the first guy, would blow my brains out if I didn’t. The first guy didn’t repeat it, because he knew I heard it. The first guy then made me drive to Fulton Fish Market. The Dodge Dart followed. The second guy, who I picked out at the line-up, then got in the truck and drove it to Long Island. When we were driving the second guy told me to look straight ahead and to take my glasses off. We got to a shopping center in Long Island and the Dodge Dart stopped too. I got into the Dodge Dart with a third guy and the first two people then drove off. When they returned two hours later, they had eaten my lunch, which was in the truck, so they gave me two dollars for it.

Q. Do you have those dollar bills.
A. I only have one left. Here it is.

(g.j. Exh. 1 marked)

Q. Showing you g.j. 2 -- what is it?
A. That’s the Dodge Dart that they used.
Q. What happened next?

A. They drove me to an isolated spot and before they let me off they took my driver’s license and copied the address and told me they would get me if anything happened. They made me rub the license between my hands so no fingerprints would remain. Then they let me go.
GRAND JURY TESTIMONY OF ROBERT MONTALVO

December 27, 2004

Q. How old are you?
A. 63.

Q. Are you related to Fred Montalvo?
A. Yeah! He’s my son.

Q. Where were you on December 3, 2004?
A. What day was that?

Q. Tuesday.
A. That’s my day off. My wife and I were at home until about 10:00 a.m. Then we went shopping and visited my brother on Long Island who runs a fish store.

Q. Did you see your son that day?
A. Well, he comes over a lot. If we saw him it would have been before 10:00 a.m. or after 5:00 p.m. when we returned.

Q. Did you see him on Long Island?
A. No.
REPORT OF POLICE OFFICER BENJAMIN BARTH

On September 30, 2004 at 1:00 a.m. I received a call from the owner of Blass’ Fishmongers on Long Island that a robbery was in progress.

When I arrived I saw a 1989 Oldsmobile loaded with crates of frozen seafood and the window of the store smashed. I stopped the driver of the car as he was about to drive off and asked him to get out. He identified himself as Fred Montalvo and he was making a delivery for the Fulton Fish Market. I asked the two other occupants to get out of the car. They identified themselves as Bobo and Rigo Rodriguez. The Rodriguez brothers said, “It’s all Montalvo’s idea.” Montalvo told them to keep quiet. I observed on the seat crates of frozen seafood, crowbars and other burglary tools. I placed the three men under arrest.

The 1989 Oldsmobile was registered in the name of Sally Salome.

The case is set for trial in six weeks.
STIPULATION

It is hereby stipulated by and between the parties as follows:

1. Ralph Etzi picked up 10,000 lbs. of seafood from T.R. Fisherie in Hoboken, New Jersey at 5:00 a.m. on December 3, 2004, 5,000 lbs of seafood from Flounder Inc. in Jersey City at 6:00 a.m. and 7,000 lbs. from Carson’s Fisherie in lower Manhattan at 6:45 a.m. The total value of this seafood is $60,000.

2. Blue Blass, the owner of Blass’ Fishmongers, would testify that $5,000 of seafood was stolen from his store at about 1:00 a.m. on September 30, 2004 and returned upon the arrest of the burglars.

3. No fingerprints were found on the dollar bill that Etzi testified he received from the hijackers.

4. The 1989 Oldsmobile and 1990 Dodge Dart were registered in the name of Sally Salome.

5. One set of latent fingerprints were found on the steering wheel of the Dodge Dart, identifiable as belonging to Frederick Montalvo.
STATEMENT OF JOHNNIE CIGAR

I, JOHNNIE CIGAR, make the following statement of my own free will:

1. I am thirty years old and have been arrested ten times. I have only one conviction for possession of a stolen treasury check. I got a suspended sentence because I testified against the co-defendant who stole the check. This was in 1995.

2. I work lots of different jobs. They are all off the books. I can't remember all of them, but they are odd jobs like cleaning basements, moving stuff, fixing cars for friends and stuff like that. I have also been an informant since 1995 and have earned around $15,000 for various leads that I gave the FBI.

3. On December 3, 2004 at about 5:30 a.m., I saw a beat up red Dodge Dart at 14th Street and 10th Avenue with three guys. I believe one of them was Fred Montalvo whom I knew from the Fish Market where I worked from time to time before I was laid off in 1995. I did not recognize the other two. I copied down the license number of the car and gave it to the FBI. I got $300 for this tip on January 10, 2005.

\[Signature\]

JOHNNIE CIGAR
s/JOHNNIE CIGAR

January 26, 2005
SCI PAYMENT VOUCHER

Date: April 20, 2000

Payee: Johnnie Cigar

Amount Requested: $200

Services Rendered/Information Supplied: Payment for information leading to arrest of

Charlie Longstreet

Case Reference: SCI 22

Case Agent: S/A Kess

Supervisor Approval: S/A Martin
SCI RECEIPT OF PAYMENT

I _______________________ acknowledge receipt of $200.00 on April 27, 2000.

__________________________
Johnnie Cigar
SCI PAYMENT VOUCHER

Date: October 5, 2001

Payee: Johnnie Cigar

Amount Requested: $3,000

Services Rendered/Information Supplied: Payment for conviction of Charlie Longstreet

Case Reference: SCI 22

Case Agent: S/A Kess

Supervisor Approval: S/A Martin
SCI RECEIPT OF PAYMENT

I _______________________________ acknowledge receipt of $3,000.00 on October 12, 2001.

Johnnie Cigar
SCI PAYMENT VOUCHER

Date: January 16, 2002

Payee: Johnnie Cigar

Amount Requested: $200

Services Rendered/Information Supplied: Information relating to stolen cigarettes

Case Reference: SCI 92

Case Agent: S/A Kess

Supervisor Approval: S/A Martin
SCI RECEIPT OF PAYMENT

I _______Johnnie Cigar__________ acknowledge receipt of $200.00 on January 23, 2002.

Johnnie Cigar
SCI PAYMENT VOUCHER

Date: May 1, 1998

Payee: Johnnie Cigar

Amount Requested: $500

Services Rendered/Information Supplied: Information leading to the arrest of Roger Beale

Case Reference: SCI 57

Case Agent: S/A Kess

Supervisor Approval: S/A Martin
SCI RECEIPT OF PAYMENT

I ___________Johnnie Cigar_____________ acknowledge receipt of $500.00 on May 7, 1998.

____________________________
Johnnie Cigar
SCI PAYMENT VOUCHER

Date: August 20, 1997

Payee: Johnnie Cigar

Amount Requested: $2,000

Services Rendered/Information Supplied: Information leading to the arrest and conviction of the McCoy brothers

Case Reference: SCI 32

Case Agent: S/A Kess

Supervisor Approval: S/A Martin
I ________Johnnie Cigar_____________ acknowledge receipt of $2,000.00 on August 25, 1997.

Johnnie Cigar
SCI PAYMENT VOUCHER

Date: December 19, 1997

Payee: Johnnie Cigar

Amount Requested: $1,500

Services Rendered/Information Supplied: Information leading to search warrant of counterfeit operation

Case Reference: SCI 72

Case Agent: S/A Kess

Supervisor Approval: S/A Martin
SCI RECEIPT OF PAYMENT

I ______________________ acknowledge receipt of $1,500.00 on December 24, 1997.

Johnnie Cigar

117
SCI PAYMENT VOUCHER

Date: February 10, 2002

Payee: Johnnie Cigar

Amount Requested: $1,000

Services Rendered/Information Supplied: Payment for information on book making operation

Case Reference: SCI 27

Case Agent: S/A Kess

Supervisor Approval: S/A Martin
SCI RECEIPT OF PAYMENT

I, Johnnie Cigar, acknowledge receipt of $1,000.00 on February 16, 2002.

Johnnie Cigar
SCI PAYMENT VOUCHER

Date: March 10, 2002

Payee: Johnnie Cigar

Amount Requested: $4,000

Services Rendered/Information Supplied: Payment for information leading to the arrest of

Angela Harris

Case Reference: SCI 75

Case Agent: S/A Kess

Supervisor Approval: S/A Martin
SCI RECEIPT OF PAYMENT

I, [Signature] Johnnie Cigar, acknowledge receipt of $4,000.00 on March 18, 2002.

[Signature] Johnnie Cigar

121
SCI PAYMENT VOUCHER

Date: \hspace{1cm} May 27, 2002

Payee: \hspace{0.5cm} Johnnie Cigar

Amount Requested: \hspace{0.5cm} $2,000

Services Rendered/Information Supplied: \hspace{0.5cm} Payment for conviction of Angela Harris

Case Reference: \hspace{0.5cm} SCI 75

Case Agent: \hspace{0.5cm} S/A Kess

Supervisor Approval: \hspace{0.5cm} S/A Martin
SCI RECEIPT OF PAYMENT

I, Johnnie Cigar, acknowledge receipt of $2,000.00 on June 2, 2002.

Johnnie Cigar
SCI PAYMENT VOUCHER

Date: January 3, 2005

Payee: Johnnie Cigar

Amount Requested: $300

Services Rendered/Information Supplied: Payment for information related to license plate

Case Reference: SCI 75

Case Agent: S/A Kess

Supervisor Approval: S/A Martin
SCI RECEIPT OF PAYMENT

I, _____________ acknowledge receipt of $300.00 on January 10, 2005.

_________________________
Johnnie Cigar
COUNSEL SHOULD EXPECT RALPH ETZI TO TESTIFY AS FOLLOWS:

You are a young, innocent wide-eyed kid who is telling the story as best you can remember with no affect, no animosity, and no motive to lie at all.

Stick with your story in the grand jury with the changes indicated in these instructions.

Your line-up identification of Montalvo was weak -- "looked like him, could possibly be, not definitely sure." However, at trial you will ask to come off the stand and take a close look (but not too close, because you're afraid) and then you will say "that's him."

You will obviously not tell the prosecutor what you will do at trial until it actually happens. You will explain your certainty of the Montalvo identification at trial when cross-examined, saying you had only a brief 10-second look through a one-way mirror and "were not sure in a legal sense" whether you should say so. You believed it was him at the line-up but you were hesitant to say so. In other words, you had been bending over backwards to be fair. Your reasons for your previous hesitancy will be brought out only when you are on the stand and not before.

There are several inconsistencies that will appear in the FBI report of what the FBI says you said as compared to the grand jury and as compared to your trial testimony. These include:

1. Montalvo did not threaten you directly when the truck was stopped under the highway, rather Montalvo told Unsub. 1 to communicate the threat to you.

2. You did not see Montalvo at the time of that threat. The first time you saw Montalvo was in the Fish Market.

3. Pre-trial and at trial you will say you saw Unsub. 1 take a gun out of his pocket, although you only said in the grand jury and to the FBI that he appeared to have a gun. Don't let the prosecutors make your testimony consistent with these earlier statements.

4. At the line-up you said Montalvo looked like the hijacker, he possibly could be one of them but you were not sure, whereas at trial you will be sure.

5. Although you told the FBI about the hijackers giving you money for your lunch, the FBI didn't write it in the report.

You will be firm that your present recollection is as it appears in these instructions. You will not change your mind. You may improvise, where necessary.

You will be adamant that you described the car before you were shown pictures of it. Also, you will be sure that your present recollection of the car derives from your observations on the day of the hijacking. You will be certain that it was the right car, although you never saw the
license number. You will firmly state that your present recollection of the car was not influenced by any photos you saw.

You will also recall that after the line-up, the FBI showed you a lot of mug shots but you did not recognize any of the people as the other hijackers. The photograph of the line-up has been doctored, with the sign “It’s me” in front of Montalvo; however, the sign did not appear on Montalvo at the time.

You will acknowledge if asked on cross that the potential for insurance coverage for the lost cargo will improve if there is a conviction, and thus a proven theft.
COUNSEL SHOULD EXPECT BENJAMIN BARTH TO TESTIFY AS FOLLOWS:

You are a good cop on the beat 20 years. Stick to your story in your report. Improvise, where you have to.

You know that Cigar is the cousin of Bobo and Rigo Rodriguez who were arrested with Montalvo at the Blass Fishmonger’s heist. However you will not volunteer this or tell anyone about it unless very specifically asked.
COUNSEL SHOULD EXPECT ROBERT MONTALVO TO TESTIFY AS FOLLOWS:

You are a 63 year old cabbie. You used to be in the Fish Market for 30 years. You live on Flatbush Avenue in Brooklyn. You’ve been an alcoholic but you’ve been clean for five years. This incident may drive you to drink again.

You don’t like your son, Fred. He’s in trouble again. He’s a mamma’s boy and wants you and your wife to get him out of trouble, like you used to do when he was a kid.

When the FBI came to see you, you denied he was with you because you wanted to teach him a lesson and shake him up. However, you will not admit to anyone that you lied in the Grand Jury or to the FBI. Now that you’ve testified in the Grand Jury, you’re stuck with your story. The truth is you can’t recall where you were on December 3, because it was a long time ago.

You think to yourself: Unfortunately for him, the FBI got to you before he did and you testified in the Grand Jury before Freddy ever told you what was up. He didn’t get his story straight and now there’s nothing you can do. It’s just like him -- so dumb that he didn’t even tell you that you were to be his alibi. And it’s just as well, because you’re not sure you would have wanted to help him out of this jam even though it would have been the truth.

You say to the prosecutors and at trial that you have no present memory about December 3, 2004, but that you did remember when you testified in the Grand Jury and you must have been telling the truth then. You will recall that Mondays and Tuesdays are your days off and that December 3, 2004 was a Tuesday. If asked, you also will tell the AUSA that the Fish Market closes down by 9:00 a.m. or 10:00 a.m. It’s never still open at noon. You will cooperate with the defense to the extent consistent with these instructions.

You will deny, if confronted, that you ever beat your son. “He’s my son -- I’d never do that.”

You will also deny being sent to a psychiatric institution 20 years ago, if asked. In fact, you’re not sure whether you were, but you will deny it.

If asked about what you were doing on any day other than the Tuesday you were asked about in the Grand Jury, you simply won’t remember.
COUNSEL SHOULD EXPECT JOHNNIE CIGAR TO TESTIFY AS FOLLOWS:

Stick to the story in your signed statement. Additional information which you possess which is not in the statement is:

1. You have not had a legitimate job since 1995. You have lived by your wits -- running numbers and small jobs. You would be reluctant to admit this on cross-examination and if asked will at first state you have done odd jobs. Only if pressed as to the nature of these jobs will you admit that they are beyond the law.

2. You have not ever filed a tax return.

3. The FBI has intervened on your behalf once since the date of your signed statement with local authorities. This was for a fencing operation of stolen checks which charge was dismissed. You don’t know exactly what the FBI did for you but they told you they had talked to the local DA and that you should not worry.

4. After you gave the FBI information on the license of the Dodge Dart you asked for some money. Like on other occasions the agent in charge said that any money would have to wait at least until after the prosecutor decided to indict and maybe until after any conviction. When the FBI returned a few days later, they asked you if you could identify any of the Dodge Dart’s occupants. You said you believed one of the occupants was Montalvo.

5. You have known Montalvo for about 10 years. You have hated Montalvo ever since he got your two cousins involved in the Blass’ Fishmongers heist on September 30, 2000. You will not tell the prosecutors that Rigo and Bobo Rodriguez are your cousins or that you hate Montalvo. On cross-examination you will admit this if asked, but not before.

6. Do not volunteer any information on your own. The prosecutors should, in preparing you to testify, if they are thorough, ask you questions that would elicit the above information except you will withhold the information about Bobo being your cousin until asked by the defense on cross-examination. Then you will fess up. You should supply the information about the license number freely to the government, but make them work a little harder than simply asking the question “Tell them everything I should know.” But don’t play technical games with their questions and hide things from them. Yet again, if they do not ask questions, don’t volunteer the information.

7. On cross-examination, you will, if asked, say that the prosecutor took copious notes when you spoke to him and told you not to speak with defense counsel. You will be wrong about both points, but you will stick to it.

8. You will testify that whenever you received monies for information you signed receipts.
COUNSEL SHOULD EXPECT SALLY SALOME TO TESTIFY AS follows:

You know Freddy is a dolt but you love him.

When interviewed by the defense, you will be very susceptible to suggestions. You will want to help Freddy. Ultimately you will revert to the first story you gave to the FBI and say you had the car on December 3. If the defense calls you as a witness, you will testify at trial that you had the car on December 3. The reason you changed your story is that Freddy told you to let him handle everything. He said he did not want you to admit to having the car if there was some trouble since you had no alibi. He told you that there would be no problem if he had the car, because he was with his folks that day.

If you testify for the defense, you will deny on cross-examination that the defense in any way suggested your testimony.

You will be willing to talk to the prosecutors and adhere to the story outlined. You will deny that Freddy has confessed to you and you will admit that Freddy had free access to the 1989 Olds involved in the Blass Fishmongers heist and the 1990 Dodge Dart.
INSTRUCTIONS TO FREDDIE MONTALVO

Frederick Montalvo is a born loser. He is also not too smart. He is stuck with his story because he could not think fast enough when questioned by the FBI. He maintains his innocence in this case. In fact, he also did the Blass Fishmongers’ robbery for which he was arrested on the scene and awaiting trial in state court, as well as several others. You will have no convictions, however.

This is Montalvo’s chance to be a big man by keeping his mouth shut about this case and not giving up his friends. The last thing he will do is incriminate his friends or admit he did it.

Montalvo’s story is that he was with his parents on the day in question. He will claim he took the car in the early morning (5:00 a.m.) to go to work at the Fish Market on December 3. He is a loader, and freelances at the market. He left his car parked until 8:00 a.m. He will claim that when the market closed down he went for a drink at 10th Avenue and 14th Street, and then dropped the car off at Sally’s so she could go shopping. He then took public transportation to visit his parents on Flatbush Avenue in Brooklyn from about 11:00 a.m. on. He won’t remember the name of the bar or names of people who saw him at work.

When confronted by his attorney with the fact that his father claims he never saw him that day -- or if he did it was after 5:00 p.m. -- he will act surprised, then he will say, “I only said I went there, I didn’t say I saw them until 5:00 p.m.” If asked about his relationship with his father, he will try to avoid the subject, because it is uncomfortable. He gets along well with his mother and is devoted to her. When she was sick he visited her. But his father thinks he is a no-goodnik.

Montalvo will ultimately say, if pressed, that his father was a mean man who beat him up and was sent to a psychiatric ward about 20 years ago.

Montalvo will do what his attorneys say about testifying, and under oath would testify that he was not involved in the hijacking. He will do anything to beat the rap except rat on his friends.

You will tell your lawyers that you are angry at your first lawyer who let you get identified in the line-up. He should have told you to wear a solid color shirt, instead of the flowery one you wore. To top it off, you think there may have been some funny business about the sign on your chest, but you never looked to see what it had on it.

If and when Johnnie Cigar is called by the government to testify as the informant, you will advise your attorneys that Johnnie is the cousin of Rigo and Bobo Rodriguez who were your two companions in the Blass Fishmonger burglary.

You will tell them that you doubt that the prosecutors know this.
COUNSEL SHOULD EXPECT SPECIAL AGENT
RONALD KESS TO TESTIFY AS FOLLOWS:

Stick with the story in your report.

You are sincere and a super agent.

You will explain to the AUSA that on December 6, 2004, you did not advise Montalvo of his rights immediately because you had no knowledge or suspicion that he was involved until he volunteered he had the car. You will say Montalvo’s admission that he had the car was a stroke of good luck coupled with Montalvo’s low I.Q. In fact, you knew Montalvo was involved before you met him because of Johnnie Cigar’s statement and because you checked him out with P.O. Barth beforehand. You pretended not to know who Montalvo was, hoping for the break you got.

You will tell the AUSA, you didn’t think rights had to be administered anyway because it was a non-custodial interrogation and you gave him his rights in excess of caution.

Etzi’s story, you know, has changed on minor details.

1. Montalvo did not threaten Etzi directly when the truck was stopped by the highway. Rather, Montalvo told Unsub. 1 to communicate the threat.

2. Etzi did not see Montalvo at the time of that threat. The first time he saw Montalvo was in the Fishmarket.

3. Etzi saw no gun but only thought Unsub. 1 had the gun in his pocket.

4. At the line-up Etzi said Montalvo “looked like the hijacker, could be him, but I am not definitely sure.”

5. Etzi had told you about the hijackers giving him money for his lunch, but you didn’t write it in your report.

The inconsistencies simply cannot be helped. You should treat these inconsistencies as inconsequential and not let the prosecutors change your testimony about them.

Be certain to insist that Etzi described the interior of the car well before you showed him photos of it that you took.

If asked why Montalvo’s prints are not on the dollar bill, you will be able to explain that fingerprints show up on dollar bills only 1 in 1,000 times because of the nature of the paper used in money and the print. Although not technically an expert, you had had 500 cases involving fingerprints and 30 of them involved dollar bills, and in none of the 30 was a print picked up. Also, in this case the bill was not recovered from Etzi until one month later.
With respect to the informant, Johnnie Cigar, you will try to persuade the AUSA not to meet him. You will at first claim his life may be jeopardized, but ultimately you will let the AUSA speak to him. You will tell the AUSA that you don’t recall making promises to Cigar. You will not admit that, in fact, you told Cigar you would pay him extra if there was an indictment.

The doctored photograph of the line-up was intended to be a joke. When in the darkroom, you got bored, so you made up the sign “It’s me” and burned it into the print. Unfortunately, in doing so, the negative was destroyed, and no copies of the true line-up exist. The line-up was entirely fair, and you will recall that Montalvo’s lawyer said “It’s a fair line-up” at the time.
UNITED STATES v. BARTON

MOCK TRIAL
REASSIGNMENT MEMO FROM ROBERT FRENCH

Attached to this memo are the report of Special Agent James Haskins and the Grand Jury testimony of David Phelps.

There are two defendants who have been indicted in this case, Joseph Barton and Philip Andrews. One defendant, David Phelps, has pled guilty and is cooperating. Phelps testified before the Grand Jury that he received from Barton securities which the Bureau has identified as having been stolen from Midas & Co. Phelps was indebted to Barton and Barton gave him the securities so that he could obtain a loan to pay off Barton.

Phelps insisted before the Grand Jury that he did not know the stock at issue was stolen. He did admit that the circumstances surrounding his receipt of the securities was unusual and made him somewhat suspicious, but said he decided the less he knew about this, the better. At the plea he admitted to deliberately closing his eyes to whether the securities were stolen.
REPORT OF SPECIAL AGENT JAMES HASKINS

DICTATED 2/28/05

At 11:50 a.m. on 2/26/05 I received a call from Detective Sergeant James Briggs of the First Precinct advising that he just arrested two individuals on charges of possession of stolen securities. He advised that his investigation indicated that the securities in question had been stolen from the Washington, D.C. office of the brokerage firm of Midas & Co.

At 12:45 p.m. I arrived at the First Precinct, which is located at Old Slip and Front Streets in Manhattan, and contacted Sergeant Briggs. At that time he had in custody two individuals, Joseph Barton and David Phelps.

Sergeant Briggs advised that at 9:15 a.m. he received a phone call from John Logan, loan officer at First City Bank located at 1000 Wall Street. Logan advised him that on February 18, 2005 David Phelps, who was a customer of the bank, who had a small checking account with an average balance of $500, and who had on January 7, 2000 made a car loan in the amount of $3600 which was fully paid as of January 7, 2005, came to see Logan about a loan. Phelps wanted to borrow $25,000 which would be secured by listed and unlisted securities in the total amount of $100,000. Logan had Phelps make out a loan application and stated that he wanted the names of the securities that would be placed as collateral. At that point Phelps excused himself, walked away from Logan’s desk, and was observed by Logan to converse with another individual who was standing in the general reception area of the bank. Logan could not describe this individual other than recalling he wore a bright green bow tie and that he was average height and build. Phelps then returned to Logan’s desk and said that the stock which would secure the loan would consist of 100 shares of IBM, 500 shares of General Motors, 1000 shares of Commonwealth Gas, and 400 shares of Coca-Cola Bottling Company of Indiana. Logan advised Phelps that it would take three or four days to process the loan, but that there should be no problem with the collateral. Logan advised Phelps to check with him on February 25th. On February 25, 2005, Logan received a call from Phelps. He advised Phelps to bring the collateral to the bank that afternoon. Logan advised Phelps that the bank’s check in the amount of the loan would be available on the following day, at which time he could sign a note for the loan.

That afternoon Phelps came to the bank and delivered to Logan the stock certificates for the shares mentioned above. Each of the certificates was in the street name Midas & Co. Phelps left the bank at approximately 2:45 p.m. As he was working on the loan papers, Logan recalled an article that he had read in the Wall Street Journal some months before concerning the theft of securities from brokerage houses and thought that he should at least check on the validity of the Midas & Co. street name certificates. He called the New York office of Midas & Co. and gave them the name of the securities and certificate numbers. He asked them if these shares were freely transferable. The representative from Midas whom he talked to said that he would call and let him know. At 9:00 a.m. the following morning Logan received a call from Mr. Jerome Wilson, the Senior Vice President of Midas & Co., who stated that a surprise audit which was conducted the Friday before at the Washington, D.C. office of Midas & Co. had revealed that a
number of certificates had disappeared from that office some time between February 8, 2005 and the date of the audit, February 19, 2005. Logan immediately called the police and advised Sergeant Briggs of what had transpired.

Briggs and his partner, Detective John Wiggins, immediately went to the bank. As they arrived, Logan was on the phone and he interrupted the call to tell them that it was Phelps asking if he could come to pick up his check. Briggs told Logan to tell Phelps that the check was ready. Briggs and his partner explained to Logan that they wanted to allow Phelps to pick up the check with the hope that they might follow him to determine whether anyone else was involved. Briggs and Wiggins then took up a position in the bank where they could observe Logan’s desk without being observed themselves.

At approximately 10:15 a.m. an individual answering the description of Phelps that Logan gave to the officers entered the bank and went directly to Logan’s desk. Briggs observed this individual signing some papers and receiving a check from Logan. As this individual was departing the bank, Briggs went over to Logan who advised him that the man was Phelps. Briggs and Wiggins then followed Phelps into the street. They observed him walk one block north where he met another individual. Phelps showed the other individual the bank check which he had. The other individual looked at the check and then Phelps put it in his own pocket. Phelps and the other individual then hailed a cab. As they started to enter the cab, Briggs determined to make the arrest because he was afraid that he would lose the cab in traffic. Briggs approached the cab and arrested Phelps and the other individual who was Joseph Barton. Briggs immediately transported Barton and Phelps to the First Precinct. When he placed the two individuals under arrest, he advised them that they were being arrested for possession of stolen securities. He did not give them any Miranda warning. Phelps stated, “I had no idea those stocks were stolen.” Barton, who was wearing a green bow tie, told Phelps to shut up.

After they arrived with the two suspects at the precinct, Briggs recalled Logan’s earlier statement that someone had accompanied Phelps to the bank when he first came to arrange the loan. Briggs decided to have Logan come down to the station house immediately to see if he could identify Barton as the man who had been with Phelps on that occasion. Logan arrived at the station house at approximately 12 noon. At this time Briggs brought him to a room with a one-way mirror through which he could observe Phelps and Barton sitting alone in an adjoining room. Briggs said to Logan, “I want to know whether you can identify that other fellow with Phelps.” Logan hesitated for about 30 seconds and then said, “He looks like the man who was with Phelps the first day he came to the bank to talk about the loan.”

The undersigned, with Sergeant Briggs, then attempted to interview the suspects. We spoke to each of them individually and advised them of their rights. Both Barton and Phelps said that they did not wish to make any statement. As we were bringing Phelps back to the detention cell he said, “Look, let me talk this over with my lawyer, and then maybe we can talk.”

Next, during the course of an inventory of the contents of the pockets of the two suspects, an address book was removed from Barton’s pocket. The address book contained a notation -- “Phil -- 202 RE 7-8203.” A check with the District of Columbia Telephone Company reveals that the number RE 7-8203 is listed to Philip Andrews. Investigation by the Washington, D.C.
field office of the FBI revealed that Philip D. Andrews was an employee of Midas & Co. who worked as a receiving clerk in the securities cage. Philip Andrews was interviewed by agents of this office. He stated that he knew nothing about this matter. He stated he never heard of Joseph Barton.

A check of the fingerprints of the suspects revealed the following:

<table>
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<th>Name</th>
<th>Date 1</th>
<th>Description</th>
<th>Place</th>
<th>Charge</th>
</tr>
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<tbody>
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<td>1-15-97</td>
<td>NYPD Arrest</td>
<td>Crim. Ct.</td>
<td>Embezzlement</td>
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<td>Manhattan</td>
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TRIAL PRACTICE SEMINAR

BEFORE THE FEBRUARY ADDITIONAL GRAND JURY AUGUST 5, 2005

David Phelps, having been duly sworn, testified as follows:

(Questions by Mr. French)

Q. Mr. Phelps, before coming here this morning, have you consulted with counsel, and has he advised you that this Grand Jury is investigating possible violations of the Federal Criminal Law and that as a result of these proceedings an indictment may be returned naming you as a defendant?

A. Yes.

Q. Has your attorney also advised you that you do not have to answer any questions before this Grand Jury if you feel that your answers might tend to incriminate you and that if you do choose to answer any question, the answers that you give may be used against you in a subsequent trial?

A. Yes.

Q. Is your attorney sitting outside this room?

A. Yes.

Q. Do you know that if at any time you wish to confer with him before answering any question, you may ask the foreman for permission to leave the room and you will be excused so that you may consult with your attorney?

A. Yes.

Q. Mr. Phelps, on February 25, 2005, did you bring certain stock certificates to the First City Bank at 1000 Wall Street?

A. Yes.

Q. And were those certificates 100 shares of IBM, certificate No. 70367, 500 shares of General Motors, Certificate No. 479832, 1000 shares of Commonwealth Gas, Certificate No. 839610 and 400 shares of Coca-Cola Bottling Company of Indiana, Certificate No. 317528?

A. Yes.
Q. Will you tell the ladies and gentlemen of the Grand Jury how you came to obtain those certificates.

A. These certificates were given to me that day by Joseph Barton.

Q. Would you explain to the ladies and gentlemen of the Grand Jury how it came to be that Barton gave you those certificates on that day.

A. Well, I have a small office supply business located at 503 Broad Street and over a period of a number of years I have been placing wagers with a man named Anthony Silver, who operated out of small bar and grill called the Red Pony which is just off Broad Street. In about June of last year my gambling bets began to grow and it finally reached the point where I owed Silver about $10,000. Silver began to press me for the money and I kept trying to put him off. Finally, about the middle of August, Silver said to me that the people he was working for were not used to waiting for their money and if I knew what was good for me, I’d better find some way to pay them off. I told him this was impossible and I pleaded with him to give me some time or to make some arrangement to pay it off over a period of time. He said he would get back to me. About a week later I saw Silver on the street and he told me to meet him that afternoon at 4:00 o’clock in the Red Pony. When we met that afternoon he introduced me to Barton. He explained that Barton was in the business of lending money and Barton had agreed to loan me the $10,000.

Q. Had you ever met Barton before this occasion?

A. No.

Q. Would you tell us what conversation you had with Barton on this occasion.

A. Barton said that Silver told him that I had a business and he asked me how much I made from the business. I told him that in good years I made as much as $50,000 but over the past year my income had been running closer to $25,000 or $30,000. He asked why I couldn’t draw enough money out of the business to pay Silver, and I said that I had a house with a big mortgage and my personal expenses were eating up every dime I made. He said, well, he would be willing to loan me $10,000 for six months but that the rate of interest would be 10% a month. I said that I thought that was very high and he said, well, if you’d rather answer to Silver’s people, we can forget about the deal. I figured I was in serious trouble unless I could come up with the $10,000, so I agreed. Barton had me sign a note in which I promised to pay him $10,000 in six months at a rate of interest shown on the note of 6%. Barton made it quite clear to me, however, that I had to pay 10% a month.

Q. Do you have a copy of that note?

A. No, he wouldn’t give me a copy of anything.

Q. Did you make any payment on that note?
A. No, I didn’t. I believe I signed the note at about the end of August and my six months would be up . . . I think the date was February 27th.

Q. During the month of February, were you contacted by Barton?

A. Yes, about two weeks before the day I was arrested, I got a call from Barton who said he wanted to see me. I met Barton in the bar where I used to meet Silver. Barton asked me if I was going to have the money which I owed him at the end of the month. I said that I couldn’t raise $10,000 by the end of the month and I asked him for more time. He said, what do you mean, $10,000? You’re forgetting the interest, pal. When that note comes due, you owe me about $17,000. I said I couldn’t possibly come up with that much money, but I could probably do it in another six months. He said he thought he could help me raise the money. He said he had a friend of his who owned some securities, but the friend didn’t want to sell them or use them himself because he was in the middle of divorce proceedings and didn’t want his wife to know that he owned this stock. Barton said his friend would make $100,000 worth of securities available to me for a period of six months so that I could borrow money from the bank to pay off my loan to Barton. Barton said that his friend’s stock would be in street name and that by using these certificates, any bank in the country would give me a loan.

Q. Did you have any discussion about where you should borrow the money?

A. Yes. I said I had a regular account for my business at Chase Manhattan Bank, and I’d also made business loans there, but that I was in default on a loan there of $5,000 in connection with my business. Barton said we’d better not use Chase Manhattan because your sudden appearance with $100,000 in negotiable certificates is liable to cause them to ask questions. Barton then asked me if I did business with any other bank. I told him that I had a small personal account with First City Bank and I had made a car loan there three years ago which I had paid off. Barton said that looked ideal because since the bank knew me, they wouldn’t ask too many questions about the securities. He told me that he would know in a few days the names of the stocks that his friend would make available to us.

Q. Was there any discussion about the amount of the loan?

A. Yes, at one point I said something to the effect that with $100,000 worth of negotiable securities, I shouldn’t have any trouble getting a $17,000 loan. He said what do you mean, $17,000 pal. You think this guy is putting up these securities for nothing? If he’s going to let you have $100,000 worth of securities for six months, he wants $8,000 bucks for himself. You’re going to get a loan in the amount of $25,000.

Q. Were there any discussions of when the loan should be arranged?
A. Yes, he said he would see me in a few days when he would know the names of the stock certificates that would be available, and I could then go to the bank to arrange the loan. He said he was waiting for a call from a friend of his in Washington named Phil.

Q. Did there come a time when you did go to the bank to arrange a loan?

A. Yes, about a week before I was arrested I got a call from Barton, and again we met at the Red Pony. At that time Barton said he now knew the stock certificates that would be available. He said that the stock certificates were IBM, General Motors, Commonwealth Gas and Coca-Cola, and that I should go to the bank and start making the arrangements. I said I could go right then.

Q. Did you go to the bank?

A. Yes, I did.

Q. Did anyone go with you?

A. Yes, as I was about to leave Barton said that maybe he would go along to the bank with me because he would like to see how the bank officer reacted to the deal. He said that he didn’t want to talk to the bank officer and would just stand in the general reception area of the bank where he wouldn’t be noticed.

Q. What happened when you got to the bank?

A. Well, I went and saw ... I believe his name is John Logan. I told him what I wanted and that I would have the securities as collateral. He asked me what the value of the securities was and I said about $100,000. He said he would like to know the names of the companies and the number of the shares. At this point I got confused so I excused myself and went over to see Barton. He told me it would be 100 IBM, 500 General Motors, 1000 Commonwealth Gas and 400 Coca-Cola of Indiana. I then returned and told this to Logan. He then said the loan would be ready in about a week.

Q. Now, you told us before that you did return to the bank with the stock certificates, is that correct, and that this was February 25, 2005?

A. Yes.

Q. Prior to going to the bank did you see Barton?

A. Yes, about noon on that day I got a call from Barton and he said that I should meet him at the Red Pony at about 1:30 and that he would have the certificates. I met him at that time and he gave me the certificates that I mentioned before.

Q. What did you do then?
A. I then went to the bank with the certificates and delivered them to Mr. Logan. I think at that time I also signed some papers at the bank.

Q. Did Barton go with you to the bank?

A. No, I asked him if he wanted to go with me to the bank, but he said that he didn’t like the idea, that the last time he was there with me I came over to talk to him. He said he was afraid that somebody might have seen him there and he didn’t want to be recognized. He did say that I should come back to the Red Pony after I finished at the bank.

Q. Did you meet at the Red Pony after you left the bank?

A. Yes, I did. I told him that Logan had told me the check would be ready in the morning and that I should call to see what time it would be ready. Barton said he would meet me at my office at 9:00 a.m.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :

- v - : INDICTMENT

PHILIP ANDREWS and
JOSEPH BARTON,

: Defendants.

COUNT ONE

The Grand Jury charges:

1. From on or about the first day of February, 2005 and continuously thereafter up to and including the date of the filing of this Indictment, in the Southern District of New York, PHILIP ANDREWS, and JOSEPH BARTON, the defendants and others known and unknown to the grand jury, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other, to commit certain offenses against the United States; to wit violations of Title 18, United States Code, Sections 2314 and 2315.

2. It was a part of said conspiracy for said defendants to unlawfully, wilfully and knowingly transport in interstate commerce securities of the value of $5,000.00 and more knowing the same to have been stolen, converted and taken by fraud.

3. It was further a part of said conspiracy for said defendants to dispose of said securities and to cause said securities to be pledged as collateral for a loan, while said property was moving as, was part of and constituted interstate and foreign commerce, knowing the same to have been stolen, unlawfully converted and taken.
4. Among the means by which the defendants would and did carry out the said conspiracy were the following:


b. Between February 9, 2005 and February 19, 2005 defendant Philip Andrews obtained from said firm of Midas and Company, negotiable stock certificates, hereinafter referred to as the “securities”; to wit:

   100 shares of the common stock of International Business Machines Corporation, Certificate No. 70367

   500 shares of the common stock of General Motors Corporation, Certificate No. 479832

   1000 shares of the common stock of Commonwealth Gas, Certificate No. 839610 and

   400 shares of the common stock of Coca-Cola Bottling Company of Indiana, Certificate No. 317528.

c. On or about February 12, 2005, defendant Joseph Barton, agreed with David Phelps, named herein as a co-conspirator, but not as a defendant, to pledge said securities as collateral for a loan in the amount of $25,000.00.

d. In or about mid-February, 2005, defendants Philip Andrews and Joseph Barton arranged to transport and transported said securities of $5,000.00 and more from Washington, D.C. to New York City, New York for the purpose of obtaining a loan.

e. On or about February 25, 2005, defendant Joseph Barton delivered said securities to David Phelps in New York City who obtained a loan, using said securities as collateral.
f. Defendants Philip Andrews and Joseph Barton arranged for the loan check of $25,000.00 to be cashed and paid over to defendant Barton.

OVERT ACTS

5. In furtherance of the conspiracy and to effect the objects thereof the defendants and co-conspirators performed the following acts:

1. In or about mid-February, 2005 defendants PHILIP ANDREWS and JOSEPH BARTON engaged in one or more conversations.

2. On or about mid-February 12, 2005 defendant Joseph Barton had a phone conversation, and then met with David Phelps at the Red Pony, a bar in New York City.

3. On or about February 19, 2005 defendant Joseph Barton had a phone conversation, and met with David Phelps at said Red Pony bar.

4. On or about February 19, 2005 defendant Joseph Barton accompanied said David Phelps to First City Bank, New York City, New York.

5. On or about February 25, 2005 defendant Joseph Barton met with David Phelps at said Red Pony bar.

6. On or about February 26, 2005 defendant Joseph Barton met with said David Phelps at or about 9:00 a.m. in Phelps' office and then one block away from said First City Bank at or about 10:30 a.m.

(Title 18, United States Code, Section 371)
COUNT TWO

The Grand Jury further charges:

6. From on or about the first day of February, 2005 up to and including the date of filing of this indictment within the Southern District of New York, PHILIP ANDREWS and JOSEPH BARTON, the defendants, unlawfully, wilfully, and knowingly did transport $5,000.00 and more, knowing the same to have been stolen, converted and taken by fraud; to wit:

   100 shares of the common stock of International Business Machines Corporation, Certificate No. 70367

   500 shares of the common stock of General Motors Corporation, Certificate No. 479832

   1000 shares of the common stock of Commonwealth Gas, Certificate No. 839610, and

   400 shares of the common stock of Coca-Cola Bottling Company of Indiana, Certificate No. 317528

7. The allegations contained in Count One are repeated, realleged and made a part hereof of Count Two.

   (Title 18, United States Code, Section 2314)

COUNT THREE

The Grand Jury further charges:

8. From on or about the first day of February, 2005, up to and including the date of filing of this Indictment within the Southern District of New York, PHILIP ANDREWS and JOSEPH BARTON, the defendants, caused to be pledged as collateral for a loan, securities of $500.00 and more; to wit:
100 shares of the common stock of International Business Machines Corporation, Certificate No. 70367

500 shares of the common stock of General Motors Corporation, Certificate No. 479832

1000 shares of the common stock of Commonwealth Gas, Certificate No. 839610, and

400 shares of the common stock of Coca-Cola Bottling Company of Indiana, Certificate No. 317528

which securities were moving as, were a part of and which constituted interstate commerce, to wit from Washington, D.C. to New York City, New York, knowing the same to have been stolen, unlawfully converted and taken.

9. The allegations contained in Count One are repeated and made a part thereof of Count Two.

(Title 18, United States Code, Section 2315)

A True Bill

_Sally James_  
Foreman

_Stanley Smith_  
U.S. Attorney
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------- X

UNITED STATES, : No. 81-14146

Plaintiff,

v. :

DAVID PHELPS,

Defendant.

---------------------------------- X

The Grand Jury charges:

On or about February 18, 2005, within the Southern District of New York, the defendant, DAVID PHELPS, for the purpose of influencing the First City Bank, 1000 Wall Street, New York, New York, whose deposits are insured by the Federal Deposit Insurance Corporation, to make a loan, did knowingly make false statements in an application for a loan in the amount of $25,000.

A True Bill

Sally James,
Foreman

Stanley Smith
United States Attorney
THE FOLLOWING FACTS WERE ALSO ADDUCED BEFORE THE GRAND JURY

STIPULATION

IT IS STIPULATED BY AND BETWEEN the parties hereto that if Jerome Wilson were called as a witness by the government that he would testify that he is Senior Vice President of Midas & Co. with offices located in Washington, D.C. On February 19, 2005 a surprise audit was made at Midas & Co. and this audit revealed that the certificates referred to in the indictment were stolen from the Midas & Co. office sometime between February 8, 2005, and the date of the audit, February 19, 2005. This surprise audit occurred only one month after the conclusion of the regular yearly audit and there was no further audit scheduled for at least another 10 months. It was the practice of their accountants, however, occasionally to have surprise audits. The last surprise audit occurred some five years ago.

Philip Andrews was employed by Midas & Co. in their Washington, D.C. office as a clerk in the securities cage. He was first employed by Midas & Co. on June 6, 1992, and he left their employ on February 27, 2005. Employment records of Midas & Co. indicate that Andrews listed his home telephone number at 202 RE 7-8203.

It is further stipulated that if Special Agent George Brooks of the FBI were called, he would testify that he examined the 100 shares of IBM and the 500 shares of General Motors and discovered a thumb print of Philip Andrews.
I, Mickey McCoy, make the following statement of my own free will:

1. I am 37 years old and have been arrested 17 times. I only have 1 conviction for armed robbery in 2000. I was arrested four other times for fare-beating, five other times for running numbers, and seven other times for possession of gambling paraphernalia. I got a suspended sentence in the armed robbery case because I testified against my co-defendants, and some of the other cases were dismissed because I gave the police information about other people.

2. I have been an informant for the FBI since 1996 and have earned $150 a week for my efforts.

3. In early February, 2005, I ran into an old acquaintance Phil Andrews. When I asked him what’s doing, Andrews told me that he had a good job at Midas & Co. but it didn’t pay well. He said he was looking to work a deal and did I know anyone who could pedal hot stock. I said no. Phil said it didn’t make much difference because he had a lead to a guy in New York named Joe B.

4. I reported this conversation to the FBI on March 1, 2005, after I read in the papers that a guy named Joe Barton got arrested in New York for pedaling hot stock.

March 3, 2005
S/Michael M. McCoy

This statement was marked as an Exhibit before the Grand Jury. McCoy did not testify.
EXCERPTS OF PLEA MINUTES OF DAVID PHELPS

COUNSEL: Mr. Phelps would like to withdraw his previously entered plea of not guilty and, at this time, plead guilty to Count One.

* * *

THE COURT: Having satisfied myself that the defendant wishes to plead guilty and that he does so voluntarily, I will ask the defendant a few questions to be sure there is a basis for it. Swear the defendant.

(the defendant is duly sworn)

THE COURT: What did you do in this case?

PHELPS: I tried to use stocks which I am told were stolen as collateral for a loan.

THE COURT: Did you know they were stolen?

PHELPS: Well, I didn’t steal them and I don’t know who did. Barton never told me they were stolen. I suppose I knew in the sense I suspected something was wrong, but I couldn’t swear they were stolen.

THE COURT: Why did you suspect they were stolen?

PHELPS: Because of the way the whole deal happened. As my lawyer said, I deliberately closed my eyes.

THE COURT: Your only agreement with the government is that they will not prosecute you for conspiracy, and transportation of stolen stock and that you will cooperate and testify truthfully?

PHELPS: That’s right.

THE COURT: I will accept the plea to false statements to the bank.
COUNSEL SHOULD EXPECT JOSEPH BARTON TO TESTIFY AS FOLLOWS:

Joseph Barton is a man who never earned an honest dollar in his life. He did deliver the securities in question to David Phelps and he knew they had been stolen by a guy named Phil Andrews in Washington. He will tell his attorneys, however, the following story and insist to them that this is the absolute truth. When it comes to the trial he will follow his attorneys’ advice as to whether or not he should testify and tell his story.

Barton’s story is that he was introduced to Phelps in the summer of 2000 by a man named Tony Silver. Barton had some money that he had made, he’s not saying where, but if pressed he will say that he made it on investments. Silver told him that Phelps needed some money and that he wanted to borrow $10,000.

Phelps told Barton that he had a good business but that things were just not going too well at the time. Phelps said he was in the office supply business and that when things were right he made about $50,000 a year. Barton asked if he could check Phelps’ books and Phelps said yes. A couple of days later Barton went up to Phelps’ office and checked out the books and found that during a couple of years Phelps had made $50,000 a year or more, but that within the last year or so he had made about $25,000. Barton figured that Phelps was worth a gamble and agreed to make him a loan of $10,000. Phelps agreed to pay him interest at the rate of 10% a month because this was a rather unusual loan. Barton knew that there were laws regulating the amount of interest you were allowed to charge so when he had Phelps sign a note, he put in the note that it would be only 6% a year. Barton’s story is that he felt that because of the nature of Phelps’ financial difficulty, interest in the amount of 10% was justified.

Barton’s story is that Phelps signed this note in late August of 2002 and that the note was to be due in six months. Some time early in February Barton got a call from Phelps. Phelps said that he knew the note was coming due and that he wanted to put a proposition to Barton. Phelps said that he had some stock that he didn’t want to show on his own books but that he would give some of this stock to Barton in payment of the notes. Barton asked Phelps what the problem with the stock was and Phelps replied that there was nothing wrong with the stock, but that he was having problems with creditors and he didn’t want them to be able to trace any of this stock to him. Barton asked Phelps whose name the stock was registered in, and Phelps said the stock certificates were in the street name of Midas & Co. Barton asked Phelps to produce the certificates, which Phelps did. The stock was the 100 shares of IBM, 500 shares of General Motors, 1000 shares of Commonwealth Gas and 400 shares of Coca-Cola Company of Indiana. Barton asked Phelps how he could prove that the stock was legitimate and Phelps said, “Look, if you want, you can call my friend Phil who works at Midas & Co. It was through Phil I got the stock.” Phelps then gave Barton the phone number for this guy Phil Andrews in Washington which was 202 RE7-8203. Phelps said that he would give Barton $15,000 worth of stock to satisfy the $10,000 loan. Barton said he would think it over. The next day Barton called information and got the number for Midas & Co. in Washington. He called this number and said that he wanted speak to Phil Andrews, a broker. The switchboard operator said there was no Phil Andrews who was a broker, but that they did have a Phil Andrews who worked in the back office as a receiving clerk in the securities cage. Barton quickly hung up. As a result of this incident,
Barton became very suspicious of Phelps and his securities and decided that he would have nothing to do with it. The next day he told Phelps that he wasn’t going to take any securities and that if Phelps had the securities, he should bring them to a bank and borrow the money to pay Barton what was owed him. Phelps said o.k., he would try to arrange a loan. About a week or so later, Phelps called Barton and said that he had made arrangements to make a loan and that he was picking up a check which would be more than enough to pay Barton what he owed him. Phelps told Barton to meet him outside the First City Bank at about 10 o’clock the following morning. At about 10 o’clock that morning Barton was on his way to the First City Bank when he saw Phelps coming towards him. As Phelps approached him he took out a check and said, “Look, I just made a loan of $25,000. Now I’ll pay you what I owe you.” Barton took the check from him to look at it and said, “Well, let’s go to a bank where we can cash this thing.” Phelps said, “Great, I’ve got a regular bank nearby. Let’s take a cab.” As they were getting into the cab they were both placed under arrest.

When the police took them to the station they were placed in a room. Barton has been around long enough to realize that the mirror in the room was a one-way mirror which the police probably were using in an attempt to get some identification. After they had been in the room a while, the policeman who arrested them came in and said to him, “Listen, pal, you might as well admit that you were in on this thing because we just had the guy down from the bank and he identified you as having been in the bank with Phelps when he arranged this loan.” Barton told the policeman at this time, “Forget it, I don’t know what you’re talking about.” This incident causes Barton some concern because he thinks that the police have someone who is going to testify that Barton was in the bank with Phelps. Barton will insist that he was never in the bank, but he will be sure to tell his attorney about this incident.

This is not the first time that Barton has been in trouble with the law. In 1994 he was arrested for interstate travel in aid of gambling. What happened was a guy that he knew asked him if he would like to make 100 bucks by delivering a package to a friend in New Jersey. What he didn’t realize was that the package contained the day’s handle from a local book making operation that was being delivered to the headquarters in New Jersey. Shortly after he arrived, the FBI broke in and arrested everybody on the scene. He was convicted after a trial and sentenced in 1995 to two years in prison.

At the time of Barton’s arrest, the officer took from him an address book in which he had a notation of the name Phil and the telephone number 202 RE7-8203, which he will insist was given him by Phelps. Barton is concerned about this because this can link him to this guy Phil Andrews at Midas & Co. and he will be sure to tell his attorneys about this.

The above outline is the story of Joseph Barton, and he will stick to it no matter how hard his attorneys press him, and demand he tell the truth. He will tell his lawyers that he wants to testify but if they indicate that he should not, he will resist slightly, but eventually will abide by their decision. To the extent that the materials do not provide information necessary to answer any questions asked by your attorneys or during the course of the trial, you are free to improvise so long as your answers are in accord with the general outline contained in the summary.
INSTRUCTIONS FOR PHILIP ANDREWS

1. You have one prior arrest four years ago for a bad check. There was no trial and no conviction.

2. You are guilty but will not admit it to your lawyers.

3. You will admit knowing McCoy and deny having any conversation with him about stock. You will tell your lawyers that you would never have such a conversation with McCoy because he had a reputation as an informant.

4. At first you will deny knowing Barton. If faced with your phone number in Barton’s book, you will admit to your attorneys that you know Barton but continue to deny having anything to do with this transaction.

5. You will explain your fingerprints on the stock certificates as not extraordinary in view of the fact that you worked at Midas and constantly handled securities in the course of your job.
COUNSEL SHOULD EXPECT MICKEY MCCOY TO TESTIFY AS FOLLOWS:

Stick to the story in your signed statement. Additional information which you possess which is not in the statement is:

1. You have not had a legitimate job since 1992. You have lived by your wits -- gambling and small jobs. You would be reluctant to admit this on cross-examination and if asked will at first state you have done odd jobs. Only if pressed as to the nature of these jobs will you admit that they are beyond the law.

2. You have not ever filed a tax return.

3. The FBI has intervened with local authorities on your behalf twice since the date of your signed statement. The first time for a gambling bust which pre-dated the date you signed your statement, which charge was dismissed and the second time pickpocketing on a crowded bus, which occurred after you signed your statement, which charge is still pending but which you expect to be dropped. You don’t know exactly what the FBI did for you but they told you they had talked to the local DA and that you should not worry.

4. After you gave the FBI the information on Andrews you asked for a bonus. The agent in charge said that any bonus would have to wait until after the trial.

5. You have known Andrews for about 10 years. You and Andrews pulled a deal about 5 years ago involving passing counterfeit 5-dollar bills.

6. Do not volunteer any of this information on your own. The prosecutors should, in preparing you to testify, if they are thorough, ask you questions that would elicit the above information. You should supply the information freely to them, but make them work a little harder than simply asking the question “Tell me everything I should know.” But don’t play technical games with their questions and hide things from them. Yet again, if they do not ask questions, don’t volunteer the information.

Follow the instructions of the prosecutors (if they give you any) on how to answer questions about your informant relationship with the FBI and the “favors” they have done for you and have promised you. If they don’t give you any instructions on this, answer all questions truthfully on this subject on cross-examination and on direct.
INSTRUCTIONS FOR JAMES HASKINS

Special Agent, Federal Bureau of Investigation

1. Except as indicated below, everything you know about this case is contained in your report dictated 2/28/05. You can obtain a copy of your report from the prosecutors.

2. When you interviewed Philip Andrews, he was at home in Washington, D.C.; another agent was with you, although you conducted the interview -- make up his name; at the outset, you identified yourselves and explained the nature and purpose of your investigation; you did not advise Andrews of his rights; he was not under arrest during the interview; he was not detained by you during the interview; had he asked you to leave, you would have honored his request; in your view, before you interviewed Andrews, there was sufficient evidence to implicate him in both the actual theft of the securities as well as their transfer to Barton; when you asked Andrews whether he knew Joseph Barton, you did not show him a photograph of Barton, or describe him.

3. Field all other questions in accordance with the General Instructions. Only supply information in response to specific questions.
COUNSEL SHOULD EXPECT JOHN LOGAN TO TESTIFY AS FOLLOWS:

All you know about this incident is what is contained in the report of Special Agent Haskins. If asked to identify Barton as the person you saw in the bank, you will state that you recall distinctly that he is the person that you saw with Phelps in the police station and you are pretty sure that he is the same fellow who was in the bank with Phelps when Phelps first came in to make the loan.

It is important for you to know that at the time Logan spoke to Mr. Wilson of Midas & Co., Wilson advised him/her that the specific certificates that Phelps had delivered to the bank were among those stolen from Midas & Co.
COUNSEL SHOULD EXPECT
DETECTIVE SGT. JAMES BRIGGS TO TESTIFY AS FOLLOWS:

Det. Sgt. James Briggs arrested Joseph Barton and David Phelps in the vicinity of First City Bank in New York City on February 26, 2005. The basic information concerning the events leading up to the arrest of these individuals is set forth in the special report of Special Agent James Haskins. If you are asked, you will state that the time you followed Phelps from the bank and saw him meet the individual who turned out to be Barton, you recalled that Logan had mentioned that someone else had accompanied Phelps to the bank at the time he first applied for the loan. You will, however, testify that when you made the arrest, you didn’t think about bringing Barton back into the bank so that Logan could identify him, and it was only when you reached the precinct that you decided to bring Logan down to see if he could identify Barton. If asked why you didn’t advise Barton that he had a right to an attorney before the identification was attempted, you will state that you thought because there was so little time between the arrest and the identification, there was no need to bring in an attorney. You were the person who removed the address book from Barton’s pocket at the police station. You immediately examined the contents of the book to see if you could find any leads. Make up the address book found on Barton, and the bank checks Phelps had.

It is important to remember that Logan told Sgt. Briggs that the specific certificates which Phelps had brought to the bank were identified as being among those stolen from Midas & Co.
WITNESS SHEET FOR DAVID PHELPS

Phelps is now 31. When he was 24 he worked as a cashier in a Grand Union in his neighborhood. Even then he gambled a little and he got into the bookmaker for about $1,000. Over a period of several weeks he took this money from Grand Union and tried to juggle his accounts to cover it up. Apparently his attempts to cover it up didn’t work and he was arrested for embezzlement. He had a Legal Aid lawyer at the time and the lawyer finally worked out a plea to petty larceny. In December 1995 he was fined $500 on this charge which his father paid. This is his only brush with the law and he has never been in trouble since.

Phelps has been indicted and pled guilty, although he still insists he never knew the stocks were stolen.