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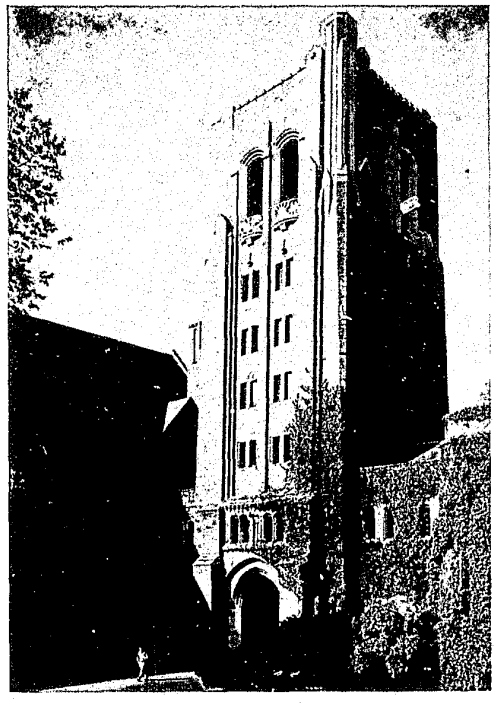

Techniques in the Investigation and Prosecution of Organized Crime

Theft and Fencing: A Simulated Investigation.

Teachers Guide and Background Materials.

G. ROBERT BLAKEY • RONALD GOLDSTOCK

Cornell Institute on Organized Crime
1976 Summer Seminar Program

TRAINING MATERIALS ON THE INVESTIGATION AND PROSECUTION OF THEFT AND FENCING

G. Robert Blakey
Ronald Goldstock

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Redistribution Systems (Theft and Fencing): An Overview*

*These materials are based on Blakey and Goldsmith, "Criminal Redistribution of Stolen Property: The Need for Law Reform," 74 Mich. L. Rev. 1512 (1976). For an analysis of theft and fencing from the police perspective see the excellent Strategies for Combatting the Criminal Receiver of Stolen Goods, (LEAA 1976).

Preface

This publication has been designed to provide prosecutors with materials for conducting in-house training in the techniques used in the investigation and prosecution of sophisticated theft and fencing rings. The materials were derived from, and are substantially identical to, the theft and fencing materials used in the 1976 Summer Seminar Program of the Cornell Institute on Organized Crime. The materials are divided into two sections. Section One consists of an overview of the theft and fencing problem in the United States today. The overview focuses on three general areas: the modern fencing process, social control of fencing through the law, and basic tactics and strategy for law enforcement. Section Two consists of a five lesson simulated investigation of a theft and fencing ring involving an organized crime syndicate. This section includes all of the raw data needed to conduct the exercise, e.g., detectives' observation reports, transcripts of wiretapped conversation, grand jury testimony, and a lesson by lesson teacher's guide. More information on the simulated investigation is contained in the introduction to Section Two.

These materials have been designed to be used as an effective and largely self-contained course for instruction in the practical and legal issues associated with the investigation and prosecution of theft and fencing. In this regard, however, footnotes, citations, and other indicia of scholarship have been kept to a minimum. (See generally,

Blakey and Goldsmith, "Criminal Redistribution of Stolen Property: The Need for Law Reform," 74 Mich. Law Rev., 1512 [1976].) Where cases, articles, or other sources are noted it is because they have been directly quoted or are particularly relevant to the accompanying text. While noted sources will be helpful in gaining a more detailed knowledge of specific points of law, they are not requisite for the successful use of the materials.

Both the overview in Section One and the simulated investigation in Section Two should be read, studied, and taught in sequence. This advice is particularly relevant to the simulated investigation. Each of the five workshops is dependent, at least in part, on information that has preceeded it. A rearrangement of the various parts may cause the student to misperceive the intent of the entire project.

These materials could not have been produced without the support of Mr. Richard W. Velde, the Administrator of the Law Enforcement Assistance Administration, and Mr. James Golden and Mr. Jay Marshall of the Administration staff.

The quality of the editing, typing, and reproduction of these materials was also immeasurably improved by the able efforts of Linda Weise and Winifred Bayard of the Institute staff. The final manuscript was typed by Help, Inc., Ithaca, New York.

G. Robert Blakey, Director
Ronald Goldstock, Exec. Director

Cornell Institute on Organized Crime
Cornell Law School
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SECTION ONE:

REDISTRIBUTION SYSTEMS (THEFT AND FENCING):

AN OVERVIEW

SECTION ONE: OUTLINE

I. CRIMINAL REDISTRIBUTION SYSTEMS: THE REALITIES OF THE MODERN FENCING PROCESS

A. Nature of the Problem

¶1 Society's "theft-oriented" approach to the "theft" problem is fundamentally misdirected because it fails to recognize that the modern day thief steals for profit rather than for consumption. Fencing systems provide the economic foundation for this activity because most thieves are unable to deal with the consuming public directly, and therefore "must operate through a middleman, the professional receiver of stolen property" who will pay them for their labor and assume responsibility for redistributing their stolen goods. Although thieves typically receive a bare fraction of the retail value of their goods, the fence's willingness to make prompt payment, thereby facilitating a rapid disposal of the goods and relieving the thief of any prolonged risk of detection, has fostered the development of a symbiotic relationship without which few thieves could survive. Functioning in this manner, a reliable fence satisfies the thief's motive for stealing, and provides the incentive for future theft.

¶2 The absence of statistics, directly documenting the scope of fencing activity, has not foreclosed other means of estimating the magnitude of this national problem. Crimes against property have increased 182 per cent since 1960. Predictably, the economic consequences made manifest by this

trend have been severe. By conservative estimates, property crimes cost American business (and ultimately American consumers) 16 billion dollars annually.[1] This situation has been seriously aggravated by the indirect economic losses which are an inevitable consequence of frequent criminal intrusions into the marketplace. The free flow of commerce is impeded; insurance rates are pressured upward; additional

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[1] "'Hijackers, burglars, thieves, and other criminals are costing U.S. business close to $16 billion a year--an official study by the U.S. Department of Commerce indicates the situation is getting steadily worse--possibly three times that amount.'" Quoted in Criminal Redistribution Systems and Their Economic Impact on Small Business, Hearings Before the Select Committee on Small Business, United States Senate, 93rd Cong., 1st Sess., pt. 1 at 1 (1973). The $16 billion figure was broken down into the following categories:

Estimates in This Study	1971 - (Billions)
Retailing	4.8
Manufacturing	1.8
Wholesaling	1.4
Services	2.7
Transportation	1.5
Arson	0.2
Preventive	3.3
	15.7

Id. at 370. "In almost every case, the estimates are conservatively stated, inasmuch as they do not attempt to include unreported crimes, which are considered to be high." Id. at 369. Significiantly, small businesses "suffer an impact that is 3.2 times the average, and 35 times that of businesses with receipts over $5 million. These small firms are less able to afford the overhead required for extensive protective measures to absorb these losses." Id. at 374. See Department of Justice, Law Enforcement Administration and Department of Transportation, Cargo Theft and Organized Crime: A Deskbook for Management and Law Enforcement 5-6 (1972). See also Cornell Institute on Organized Crime, Techniques in the Investigation and Prosecution of Organized Crime, Tab B (1976). See also Preliminary Staff Report, The Economic Impact of Crimes Against Business at 361, in Victims of Crime, Hearing Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, United States Senate, 92nd. Cong., 1st. Sess., (1971-72).

administrative costs are incurred; sales are "delayed" and customer relations become strained, profits are irretrievably lost; employees are laid off; public relations "image" problems develop, and business opportunities consequently decline as firms decide either to relocate, or to divert their cargo to other ports or modes of transportation; tax revenues suffer; and ultimately, the free enterprise system itself is jeopardized.

¶3 Recent Senate investigators have come to the conclusion that theft and fencing activity <u>together</u> have been primarily responsible for the major part of the economic loss attributed to property crime. This conclusion represents an unequivocal rejection of society's traditional theft-oriented attitude and a realization that "[t]here are two basic elements of a property theft crime: the theft itself, and second, the distribution of stolen property."[2] The basis for this conclusion is provided by four factors which, when analyzed collectively, forcefully argue for the prevalence of large scale fencing activity.

¶4 Foremost among these factors is the very magnitude of theft activity. Although the $16 billion figure is not a gauge of crimes exclusively related to theft, this sum, once factored and analyzed in terms of its components, may still provide a reasonably accurate measure of the dimensions of this

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[2]<u>Staff Report, An Analysis of Criminal Redistribution Systems and Their Economic Impact on Small Business</u>, Staff Report, Select Committee on Small Business, United States Senate. 2 (1972).

problem.[3] On this basis, Senate investigators have concluded that since "[t]he magnitude of theft is so great. . .the only reasonable outlet must be to legitimate consumers." Obviously, this can be achieved only if the goods are channeled through a criminal redistribution scheme.

¶5 The types of goods being fenced today and the nature of most theft activity add further support to this position. Although virtually any item can be fenced, preferred objects are high value, low volume goods which produce handsome profits and can be easily hidden and transported. The relative scarcity of such items, however, has compelled most fences to focus on more traditional, high volume goods that are of a lower value, but are generally less susceptible to identification by their true owners or law enforcement authorities. Functioning as a business, fencing operations are typically very responsive to seasonal trends and market conditions. In light of these considerations, the range of commonly fenced items covers a wide span of high-demand products. Significantly, "[a] positive correlation seems to exist between the general market and large scale theft."[4]

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[3]An analysis of the theft and recovery of stolen property based on statistics compiled by the Federal Bureau of Investigation is sobering. Broadly, these data indicate that in 1960, for every 100 persons in the United States, $502 worth of property was stolen. By 1973, the figure had risen to $1,375--174% in 14 years. Even corrected for inflation, the increase was 83 percent. In contrast, the percentage of stolen property recovered dropped from 52.4 percent in 1960 to 37 percent in 1973. See generally U.S.R. 1960-1973.

[4]J. Hall, Theft, Law, and Society 162, (1952 ed.).

Shoplifters, employees, and burglars, whose joint activities are responsible for the majority of commercial theft, clearly steal items which are in public demand and pass them on for redistribution. Similarly, it is apparent that large scale cargo heists are engaged in for resale purposes; people simply do not hijack tractor-trailer loads of razor blades, tires, or tuna fish for their own personal consumption. Redistribution for profit is always the ultimate objective.

¶6 Finally, the one factor which most directly supports fencing activity, and is simultaneously the best evidence of its existence, is the facile availability of a consumer market that is quite willing to absorb these stolen goods. Although consumers are often unaware that they are purchasing stolen property, many bargain hunters have displayed a marked proclivity to buy such merchandise once offered the opportunity to do so. On another level, many ostensibly legitimate businesses have demonstrated their willingness to handle stolen merchandise. These establishments, and others which are openly unconcerned about their reputations for probity, are fundamental to any large scale fencing operation because their ready access to cash resources facilitates the bulk transfer of stolen property. For these reasons, it has become apparent that the survival of criminal redistribution systems ultimately depends upon the continued propensity of both consumers and businesses to engage in illicit activity .

B. The Fencing System

1. Marketing theory and the fence

¶7 The operation of any criminal redistribution system, however primitive, necessarily involves the application of marketing principles. Although patterns of redistribution differ in sophistication, the fence is essentially a businessman who is engaged in "the performance of business activities that direct the flow of goods. . .from producer [thief] to consumer or user."[5] As a distributor-middleman, the fence must be able to locate supplies of stolen property, establish contacts with producers (thieves), finance the transfer process, and assure ultimate delivery by providing transportation and storage facilities. Throughout this process he "faces two major types of risk: the risk of detection while performing any one of the middleman functions and a significant economic risk. . . [that] arises because he has committed resources for goods which he may not be able to sell at a profit."[6]

¶8 Since the fence's survival depends upon his ability to minimize both of these risks, successful fencing operations commonly employ marketing management techniques which parallel those used by legitimate businessmen. For example, both the

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[5]Roselius and Benton, "Marketing Theory and the Fencing of Stolen Goods," 50 Denver L.J. 177, 178-79 (1973) [hereinafter cited as Roselius and Benton, Marketing Theory].

[6]Roselius and Benton, Marketing Theory, supra note 5 at 187.

fence and his legitimate counterpart must evaluate prevailing supply and demand trends to determine whether a steady and profitable movement of goods can be maintained through the distribution chain.

¶9 Once supply and demand have been gauged, the product itself must be priced. In any marketing system, this process involves a consideration of production costs, available capital resources, current market rates, and the costs of doing business, when the operation is illegal, however, price determination becomes more complicated because the risk of detection compels the fence to take appropriate protective measures: identifying features must be removed, goods must be surreptitiously handled, and frequently bribes must be paid. The price of stolen merchandise is directly related to the length of the distribution chain and the costs that must be incurred to legitimize the product. If the price, at some point approaches legitimate retail or wholesale levels, stolen goods will lose their appeal, and fencing may become an unprofitable activity.

¶10 In response to these economic and legal pressures, many fences have preferred to specialize. The fence specializing in art, jewelry, or automobiles, for example, develops an expertise that enables him to evaluate the quality of his product with great facility, to determine supply and demand with more skill, and to master the intricacies of the particular transfer process in which he is involved. Even so, specialization is not a guarantee of success; it only

reflects a marketing decision to minimize and confront certain types of risks instead of others. Risk, however, is inherent to the criminal redistribution process, and marketing principles can be applied only to obviate -- not eliminate -- its ultimate consequences.

2. Patterns of redistribution: The modus operandi of modern criminal receivers

a. The "neighborhood connection"

¶11 By definition, the neighborhood fence directs a comparatively small time operation. He may steal his own merchandise, but more commonly he relies upon local "boosters," (i.e. thieves) usually small time shoplifters of cargo employees, to supply him with resaleable commodities. Although neighborhood fences tend to specialize, they will generally buy whatever "swag" (i.e. stolen property) the booster has available, so long as the price is right and the item itself is in demand. Once payment has been made, the purloined goods are stored in a "drop," such as the trunk of a car or simply in the receiver's basement.

¶12 Even though the neighborhood fence has no permanent place of business or front operation, "hot" goods are almost never hustled on the streets because of the obvious risks involved. Instead, neighborhood sales may be conducted in living rooms, local bars, or garages, and some goods are channeled directly to small retail stores or pawnshops. Little or no effort is made to disguise the identity of the swag, and because his operations are essentially localized, the neighborhood fence

rapidly acquires a reputation as a dealer in stolen property, eventually developing a regular clientele. If he is "well connected," the neighborhood fence will be able to expand his activities by accepting special orders for designated goods, working closely with other fences, and serving as a "down-the-line [distributor]" for large organized crime jobs.

b. The "legitimate" business

¶13 Many businesses that are primarily legitimate operations, are nevertheless responsible for the distribution of large quantities of stolen goods. Selling swag on the legitimate market offers obvious economic advantages. Consequently, businesses from all sectors of the economy have, consciously and unconsciously, facilitated the redistribution of stolen property by serving as convenient outlets for the re-entry of illicit merchandise into traditional streams of commerce.

¶14 Most legitimate businesses, especially the large and prestigious establishments, will not deal directly with thieves. Instead, the transfer is engineered by a "professional" fence or a "master" fence who is performing a wholesaling function by distributing stolen goods which have recently been the subject of a large scale heist. Prior to delivery, the merchandise usually has been repackaged, and all identifying features have been removed; the swag is now ready for consumer consumption.

¶15 Although any establishment that handles stolen property is technically involved in fencing activity, its criminal liability is contingent upon establishing the appropriate

mens rea, or state of mind, an element which is not susceptible to easy proof. Whether a particular business actually has, for example knowledge that it is dealing in swag depends upon the particular pattern of redistribution involved. For example, when a fence approaches an individual proprietor directly, there are often several indicia of illegality. The immediate tip-off is an asking price which is substantially below wholesale market value, but other indicators may include the absence of manifest evidence of ownership beyond mere possession, an insistence on cash payment, or simply the failure to give any receipt. In another context, the department store management itself often has no actual knowledge of illegal transactions, but may nevertheless be promoting fencing activity by allowing store buyers to operate too independently, or consciously avoiding learning the details of relevant transactions. Too many establishment buyers may succumb to the economic pressures of their occupation by responding favorably to a fence's offer of stolen goods. Finally, a significant number of businesses dealing in stolen property are compelled to maintain their distribution networks by organized crime pressures. Consequently, their culpable participation is considerably less than others, despite their knowledgeable participation in fencing activity.

c. The professional fence

¶16 As the term connotes, the professional fence is a criminal receiver who conducts an apparently legitimate business, specializing, however, in the distribution of stolen

property. Fronting as a legitimate businessman, the professional maintains a permanent base of operations, usually a retail establishment, which serves as the focal point for his illegal activity. He may be a specialist or a generalist fence; often this is determined by the nature of his front activity. In contrast to his "legitimate" counterpart, who may handle swag as an occasional or sideline practice, the professional fence is primarily a criminal distributor, although the volume of legitimate business may also be high; the legal aspects of his business are designed primarily to accommodate this central unlawful purpose. Paradoxically, the professional fence, operating under a front, must simultaneously "go public", and develop a reputation for dealing in swag. In a sense, he must engage in a delicate process of dual image-building; his business must appear sufficiently respectable to ward off most law enforcement suspicions, or at least to color his conduct so that investigation is hindered, yet capable of both attracting swag-oriented consumers and facilitating direct contacts with a steady flow of suppliers.

¶17 Once a fence has gone public, his contacts with shop-lifters, dishonest employees, and burglars assure him of maintaining an adequate inventory of stolen goods. Indeed, as the operation grows in sophistication, stealing-on-order becomes a common occurrence. Thieves are naturally inclined to deal with the professional because they do not have ready access to the legitimate outlet and his extensive capital

resources make him a more attractive customer than the neighborhood fence. When a particular swag item is desired in quantities that cannot be furnished by individual theives, the professional fence may rely upon the wholesaling efforts of a "master fence," or attempt to organize his own large scale heists.

¶18 The use of a front affords the professional fence the opportunity to frustrate law enforcement efforts by skillfully making his illegitimate conduct indistinguishable from the normal activities of the legitimate business world. Even so, upon delivery, the professional fence incurs a major risk of detection because he normally retains physical possession or control over the stolen property. Most professionals, however, are able to minimize this risk by reselling the goods within hours of their arrival. When this is not possible, efforts are made to mingle stolen goods with those lawfully acquired, so that they become indistinguishable. False receipts, often with vague descriptions, can also be used to diminish the possibility of precise identification. Finally, even when identification has been established, the more wily professionals have devised methods that enable them to argue convincingly that they had no reason to know that the goods were stolen. Thus, the professional fence is generally able to avoid detection, much less conviction, while he continues to funnel stolen goods into the legitimate economy.

d. The master fence

¶19 The master fence performs an important wholesaling

function in the fencing system. Through his services, many stolen goods are channeled to outlet fences for ultimate redistribution. The master fence directs a big-time operation; he either organizes large scale heists or serves as a middleman for other organizers. Consequently, whenever a master fence is involved, his swag items, though not necessarily great in terms of quantity, are always the product of large scale theft activity. While other fences share these characteristics, the master fence is distinguished by his ability to insulate himself from the actual theft and the subsequent redistribution process. More akin to a broker, the master fence buys and sells hundreds of thousands of dollars worth of stolen goods, and yet he rarely, if ever, sees or touches any of it.

¶20 To be successful, a master fence requires a broad operational base. He must have contacts with a wide network of both informants and potential large scale purchasers. For example, if he is an organizer, and therefore actually promotes theft activity, the master fence will rely upon his paid connections (i.e. a dock employee of a manufacturing company or a dispatcher of a trucking outfit) to provide him with detailed information concerning shipments which contain attractive swag items; quantity and quality are specified, and, whenever possible, any additional information that would facilitate the theft is also provided. Receiving this information directly or through a lieutenant, the master fence then proceeds to contact probable buyers. Once an

agreement has been reached (with one or more purchasers), the theft itself will then be organized. Boosters will be contacted; a safe "drop", usually a warehouse, will be set up, and transportation facilities for subsequent disposal will then be arranged. There, the merchandise is unloaded, and to the extent possible, all incriminating identification is removed; the goods are then repackaged, reloaded (into different vehicles), and delivered to their buyer(s).

¶21 The success of the master fence's operations depends upon the availability of sufficient capital resources to finance the redistribution scheme. These resources, and others, are usually provided by individuals connected with "organized crime." The degree of assistance rendered by snydicate-connected people depends on the nature of the syndicate's relationship with a particular fence. While some master fences may be actual members, and consequently receive considerable additional assistance in the form of information, personnel, equipment, and storage space, most are content to function outside formal membership in a group and simply participate in the redistribution process, reaping a share of the profits.

¶22 Because of their tendency to deal in large quantities of stolen goods, master fences have had a sharp impact on the national economy. Their high overhead costs, however, have induced them to rely upon outside sources for support, with the consequence that the success of the master fence has simultaneously become a measure of the extent to which

organized crime syndicates have been able to exercise a measure of control over the theft and fencing system.

3. The role of organized crime

¶23 In recent years, the demonstrated willingness of consumers and businesses to purchase stolen goods has encouraged organized crime syndicates to expand their operations in this sector. This expansion has been facilitated by the ability of organized crime to respond to the complex financial and logistical problems that are inherent to large-scale theft and fencing activity. In addition to servicing the needs of master fences, other large-scale organizers have relied upon the financial resources, "well-placed contacts, . . . and sophisticated network of connections and techniques which generally can only be provided by organized crime."[7]

¶24 Organized crime's increased involvement in large-scale theft activity is exemplified by the evolution of sophisticated hijacking procedures. For example, the traditional "stick-up" hijacking is essentially a relic of the

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[7]Department of Justice, Law Enforcement Assistance Administration and Department of Transportation, Cargo Theft Organized Crime: A Deskbook for Management and Law Enforcement 8 (1972) (emphasis added). [hereinafter cited as Cargo Theft and Organized Crime].

The concept of "organized crime" is much like the fictional crime portrayed in Akira Kurasawa's 1951 film, "Rashomon." In it, a ninth century nobleman's bride is raped by a bandit, and the nobleman lies dead. This double crime is then acted out in the film in four versions, as seen by the three participants and a witness. Each version is not quite like the other.

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past; today, most hijackings can more appropriately be characterized as "give-ups," since prior arrangements have generally been made for the driver to hand over the goods, and then claim that he has been victimized by a hijacking. Naturally, the drivers are rewarded for their duplicity, but in reality, organized crime members often extort their

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[7](continued)
Those who have looked at "organized crime" have been much like those whose stories were told in Kurosawa's film. Some have seen nothing, and decided that nothing was there. See, e.g., G. Hawkins, "God and the Mafia," The Public Interest No. 14, Winter 1969, pp. 24-51; compare the summaries of wiretaps reprinted in H. Zeiger, The Jersey Mob (Signet ed. 1975). Others have examined the phenomenon through the senses of an anthropologist, and have seen not a "conspiracy," but a "social system." See, e.g., F. Ianni, A Family Business (Simon and Shuster 1972). Others have looked only at press accounts, and have seen in it little more than a public relations gimmick. D. Smith, The Mafia Mystique (Basic Books 1975). Others have looked at it as an organizational theorist, and have seen its special character in its functional division of labor. D. Cressey, Theft of a Nation (Harper and Row 1969). Some have examined it as a lawyer, and seen it as "conspiracy." See, e.g., G. Blakey, "Aspects of the Evidence Gathering Process in Organized Crime Cases," in President's Commission on Law Enforcement and the Administration of Justice, Task Force Report, Organized Crime at 80, 81-83 (1967), [hereinafter cited as Task Force Report: Organized Crime]. This, too, was the view taken of it by the President's Crime Commission; the Crime Commission has identified "organized crime," not with the Mafia (La Cosa Nostra was termed only the "core" of organized crime, Task Force Report: Organized Crime, supra at 6; other groups were recognized to be involved), but with conspiratorial criminal behavior, when its sophistication had reached the level where its division of labor included positions for an "enforcer" of violence and a "corruptor" of the legitimate processes of our society. Ibid. at 8. A good summary of this use of the term "organized crime" was composed by the Department of Justice--Department of Transportation in a study of cargo theft. See Cargo Theft and Organized Crime supra at 23-24. For a discussion of the concept of "organized crime" broken down into "enterprises," "syndicates" and "ventures" see G. Blakey, Electronic Surveillance: Report of the National Commission on the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, pp. 190-92 (1975).

cooperation by threatening to foreclose on their gambling and loansharking debts. In effect, organized crime has developed a network of inside information sources and potentially compliant drivers by utilizing its gambling and loansharking contacts as a lever for effecting control over vulnerable employees.

¶25 Throughout the hijacking process, organized crime members are often able to remain completely insulated. The give-up itself is executed by non-members, often persons "aspiring to become members" or themselves indebted to the mob, and neither the driver nor the thieves have any contact with the member of the syndicate boss responsible for the heist.

¶26 Once the give-up has been accomplished, the swag is delivered to a drop, and organized crime syndicate people proceed to provide both affiliated and independent organizers with all-important service: an efficient and effective redistribution process. The mob's connections with master and professional fences, and the influence it exerts over many legitimate businesses, have enabled it to develop a redistribution system capable of funneling stolen goods through interstate commerce with great facility. Goods hijacked at 4:30 P.M. may be on retail shelves by 5:15 P.M. The availability of a redistribution network that can function in this manner inevitably stimulates large scale theft activity. The control of a redistribution process which provides a market for large scale theft is sufficiently

profitable to assure organized crime's continued and substantial involvement in this area.

II. SOCIAL CONTROL THROUGH LAW

¶27 Anti-fencing legislation has traditionally been centered around statutory measures that outlaw the receipt of stolen property. Under such legislation, to win a conviction, the prosecution is required to establish the following elements: (1) the receipt (2) of stolen property (3) with knowledge of its stolen character. When defined strictly in these terms, each of these elements poses major obstacles to a successful prosecution.

A. Receipt - The Required Conduct

¶28 Following the original passage of legislation in seventeenth century England, the actus reus prohibited by most statutes was simply the buying or receiving of stolen property. Since this language did not deal directly with the sort of fence who, by serving as a broker avoided physical contact with the goods and never made a personal purchase, many states expanded the scope of the basic offense to include withholding, concealing, or aiding in the concealment of stolen property. On the federal level, Congressional action seemed to reflect a similar concern, but no uniform formula

has been developed to deal with typical situations.[8]

¶29 In contrast, the approach taken by S.1, the most recent Congressional proposal for the reform of the federal criminal code, provides a solution which makes a realistic effort to deal with fencing activity in a modern context. Under S.1, "[a] person is guilty of [receiving stolen property]. . . if he buys, receives, possesses or obtains control of property of another that has been stolen."[9] By focusing on the control of stolen property, the statute concisely covers a broad range of modern fencing activities which do not require physical possession.

¶30 The proposed federal legislation, however, is not yet law, and only a handful of the statutes have adopted a simple control-oriented definition of the actus reus. Even so, the same result has effectively been accomplished in some jurisdictions by judicial construction which, by viewing the offense in broad terms, has expanded the scope of most statutes to include any conduct which might be considered to constitute constructive possession, effective control, or an exercise of dominion over the stolen property.

¶31 Either by judicial construction or sporadic legislative reform, the basic conduct outlawed by receiving statutes may

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[8]For a more detailed discussion of the federal law on theft and fencing see generally, Cornell Institute on Organized Crime, Techniques in the Investigation and Prosecution of Organized Crime, Tab 3 (1976).

[9]The Criminal Justice Reform Act of 1975, S.1, 94th Cong., 1st Sess. §1732 (1975) [hereinafter cited by section].

still be adequate for prosecution and conviction. Even if further substantive reforms are initiated, critical impediments in the evidence-gathering process bearing on this element must be overcome. For example, if the suspect is not apprehended in physical possession of the goods, control or its equivalent-- constructive possession, may be difficult to establish. Under such circumstances, conviction is not a possibility unless the merchandise can in some way be linked to the defendant-fence. The use of immunity grants or informants can facilitate the investigative process, but, unless there is independent corroboration, for example, the product of a wiretap, the resulting evidence may not lead to a conviction.[10]

¶32 In effect, as a tactical matter, the prosecution's task is appreciably lightened only when it has obtained independent corroboration of control or constructive possession, or has apprehended the defendant in actual physical possession of the goods, which seldom occurs at the higher levels of fencing activity. The use of a search warrant is all too often an inadequate investigative method for this purpose, since the warrant may be issued only after probable cause has been established. Too often, the experienced fence is able to

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[10]Granting a thief immunity may compel him to divulge information which effectively incriminates the fence. Where the thief is considered to be an accomplice of the fence, however, many states will require a cautionary jury instruction or expressly preclude a conviction unless his testimony is independently corroborated by other evidence. See infra ¶40-41.

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dispose of his goods before the police can acquire probable cause and obtain and execute the warrant. Alternatively, the use of the "buy-bust" technique may offer a more viable solution, at least against the neighborhood outlet or professional fence.[11] It obviously offers little hope of success against a well insulated master fence. The situation,

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[10](continued)

Where a non-thief informant is involved different problems are involved. First, the police may be reluctant to reveal his identity, since such a disclosure would destroy his future effectiveness and jeopardize his physical safety. Rugendorf v. United States, 376 U.S. 528 (1964) (non-disclosure in fencing case upheld). Second, informants, by their very nature, do not make credible witnesses. And finally, in some cases, the use of an informant may raise issues under the doctrine of entrapment. Predisposition to commit the crime, however, remains the key legal issue on the federal level. United States v. Russell 411 U.S. 423 (1973) (supplying key material not per se entrapment); Hampton v. United States (Id. "heroin"); Russell argues that a "sell and bust" program in the fencing area might not run afoul of the entrapment doctrine if targets were carefully selected. "Attempted receipt," not "receipt," of course, would be the charge. Such a program might well, however, run into judicial opposition. See Young v. Superior Court, 253 Cal. App. 2d 848, 61 Cal. Reptr. 355 (1967), where the trial court's erroneous understanding of entrapment might have aborted a prosecution. (Instead, an appellate court's erroneous understanding of attempt terminated the case.)

[11]The "buy-bust" or "sell-bust" technique may be utilized against both fences and thieves. In the case of a fence, the process would involve an attempt by an undercover officer to sell goods to, or purchase swag from, a suspected fence. If the fence is responsive, an arrest can be made. When thieves are the target of the technique, the undercover policeman assumes the identity of a fence who pronounces his willingness to buy stolen goods. At an appropriate time, arrests can then be made. See generally, "Catch Ya' Later, Man!": Report on Charlie's Second Hand Store, An Undercover Storefront Operation (State of New Mexico Governor's Organized Crime Prevention Commission, 1976); the Law Enforcement Assistance Administration has recently launched a major program in this area. See generally 122 Cong. Rec. §1222-25 (daily ed. July 12, 1976).

too, is further complicated by the general absence of conduct that clearly bespeaks its own illegality; the able fence utilizes the legitimate aspects of his business to disguise any underlying criminal conduct. Even so, this shroud of legitimacy may in some cases be ultimately pierced by intensive police surveillance work, both physical and electronic. By engaging in such extraordinary surveillance activity, the police can facilitate the establishment of the probable cause not otherwise available using conventional methods of enforcement; a warrant might not then be required for an immediate arrest and search since the fence is known to be in criminal possession; and the risk of lost evidence should therefore be minimized. Although admittedly time-consuming, expensive, and an obvious drain on manpower, once the authorities have been tipped off as to the operations of a particular fence, an intensive affirmative action program probably offers the only realistic hope of acquiring sufficient evidence of conduct to justify an arrest.

B. The Goods Must be Stolen - The Attendant Circumstances

¶33 Basic element of the offense is the requirement that the goods must, in fact, have been stolen and must retain their stolen character throughout the redistribution process. This prerequisite initially posed definitional problems, since the judiciary was inclined, at least at one time, to restrict the term "stolen" to include only those items which were obtained by common law larceny. In recent years, however, the potential

for a technical defense based upon common law distinctions has been eliminated by judicial and legislative action which expanded the scope of the prohibition to include property obtained by false pretenses, embezzlement, or any type of felonious taking.

¶34 Even with a liberalized definition, conviction is often foreclosed by the prosecution's inability to identify the goods as stolen. Typically, stolen merchandise lacks any distinctive identifying indicia, and whatever identification is provided can easily be removed. Product serialization, combined with efficient recording procedures, could be an effective deterrent to theft and fencing because any identification number, by potentially facilitating both the recovery of stolen property and the ultimate prosecution of any guilty parties, is an inevitable impediment to illicit resale efforts. In the absence of a reliable identification system, fungible stolen goods are easily commingled with legitimate merchandise, so that precise identification by law enforcement is precluded.

¶35 Further, in many jurisdictions, identification efforts are potentially hampered by the requirement that the goods retain their stolen character throughout the redistribution process. Quite often, the police are able to catch the original thieves or intercept the transmission of stolen goods and, with the cooperation of the apprehended criminals, proceed to complete delivery to the intended recipients. Utilizing this approach, identification problems are minimized,

and the goods are directly traced to a professional fence or another seemingly legitimate business establishment. Once any swag has been recovered by law enforcement authorities however, the goods immediately lose their stolen character, and no subsequent receivers can be prosecuted for receiving stolen property. Although this result is legally sound, when the authorities are also unable to prosecute subsequent receivers for attempted receipt of stolen property, a valuable investigative technique is left largely emasculated.

C. Character of the Goods as Stolen - The State of Mind Requirement

¶36 In addition to establishing both the required conduct and the character of the property as stolen, the prosecution has always been required to prove that the defendant had knowledge of the goods' stolen character. On the federal level, knowledge of the property's interstate character has never been required for a violation of the substantive offense, since this element has uniformly been regarded as a purely jurisdictional requirement. Although for many years the circuits had split over the question of whether knowledge of the jurisdictional element must be established in conspiracy cases, the Supreme Court has recently facilitated conspiracy prosecutions by rejecting the older analysis that argued that such a showing should be required. Even so, while knowledge of the jurisdictional requirement has effectively been recognized as a strict liability aspect of the offense, both

state and federal officials are still faced with the difficult task of proving the defendant's knowledge of attendant circumstances.

1. The appropriate standard of knowledge

¶37 Most jurisdictions require only a belief rather than sure knowledge of the good's stolen character. Even when framed in these terms, the state of mind element, though almost universally required, has not received uniform application in the state and federal courts. In the absence of a specific legislative directive, the judiciary has been unable to resolve uniformly the question of whether an objective (negligence) or subjective (actual) test of knowledge or belief is appropriate.

2. Proof of knowledge - availability of direct evidence

¶38 Proof of knowledge is an inherently difficult task because of the sophisticated fence's ability to "erect the most elaborate legal defenses."[12] The professional fence maximizes the potential afforded by his facade of legitimacy to both reduce the possibility of identification and to create fictional evidence, such as false receipts, which can be used against prosecutorial attempts to establish his guilty knowledge of the goods' stolen character. Similarly, the master fence, through a complex process designed to achieve maximum insulation, has limited contacts with sources

[12] Criminal Redistribution Systems and Their Economic Impact on Small Business, Hearings Before the Select Committee on Small Business, United States Senate, 93rd. Cong., 1st Sess., pt. 1 at 4 (1973).

of evidence which could be used to establish the state of mind element. All too often, traditional evidence gathering methods have been unable to surmount these barriers, and, as a result, direct evidence of guilty knowledge has rarely been available. In the absence of a more sophisticated investigative approach, the only serious danger confronting the fence is the potential informant.

¶39 Although this situation is dismaying, the modern legislative process can, and sometimes has, provided law enforcement officials with potentially powerful evidence gathering tools. For example, despite the widespread reluctance of thieves to testify against their fences, the use of immunity grants may provide a viable means of compelling such testimony.[13]

¶40 The testimony elicited through the use of an immunity grant may provide direct evidence establishing the state of mind element. This, of course, depends upon the thief's ability to give a detailed account of his transaction(s) with his fence. At times, the thief may not know the identity of his fence, but, even then, a series of immunity grants could be used to travel up the chain of command against the higher echelon criminals. Inevitably, even the master fence's

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[13]For a good summary of the development and potential effectiveness of immunity grants, see Cornell Institute on Organized Crime, Techniques in the Investigation and Prosecution of Organized Crime, Tab J (1976); Blakey, Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis, 80, 85-88, in President's Commission on Law Enforcement and the Administration of Justice, Task Force Report, Organized Crime (1967).

carefully constructed insulation network can be endangered.

¶41 Regardless of their obvious potential, the effectiveness of immunity grants is considerably hampered by the rule in many jurisdictions which either requires a cautionary jury instruction or expressly precludes a criminal conviction whenever the testimony of an accomplice has not been corroborated. The corroboration rule grew out of the judiciary's initial reservations concerning the credibility of a witness with an obvious penal interest in providing testimony favorable to the prosecution. Although initially conceived as "merely . . . a [discretionary] counsel of caution given by the judge to the jury,"[14] the practice evolved into a strict rule of law that, depending on the jurisdiction, required either a cautionary instruction or a directed verdict of acquittal.

¶42 In receiving cases, a number of jurisdictions have circumscribed the impact of the general rule by reasoning that, because the thief has technically committed a separate offense (theft) and is therefore not subject to indictment for the same crime (receiving), he is not a receiver's accomplice and vice versa. According to other cases, this view is patently superficial since the conduct of both has obviously made possible the successful commission of the theft and the receiving, and the testifying witness has the same penal interest at stake from either point of view, theft or

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[14]J. Wigmore, Evidence, §2056, (3rd Ed. 1940).

receiving. Nevertheless, the ultimate result on the evidentiary issue is frequently the same, because even those jurisdictions abiding by the general rule of no cross substantive liability between theft and receiver recognize an exception whenever there has been a prior agreement or relationship between a fence and his thief. Given the number of fences who have a regular stable of thieves and the high volume of the "steal-to-order" business, it would seem that the corroboration doctrine is a potential problem in the prosecution of all large scale fencing activity.

¶43 Since both accomplice and informant testimony are inherently vulnerable to credibility attacks, direct evidence establishing guilty knowledge should, if practicable, be gathered in a more reliable and persuasive manner. Electronic surveillance clearly affords law enforcement authorities with the most direct access to evidence capable of establishing the state of mind element. The Supreme Court found no per se constitutional problem under the Fourth Amendment in the use of electronic surveillance in 1967, and Congress responded by enacting legislation, modeled after the court's own guidelines, which was specifically designed to meet the constitutional objections raised in earlier decisions. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 authorizes federal and state electronic surveillance upon a magistrate's finding of probable cause, and "sets up a system of strict judicial supervision which imposes tight

limitations on the scope of the investigation."[15] It has received widespread judicial approval in the various circuits, and it is capable of providing the "mainstay" of an attack upon organized crime in general and the fencing problem in particular.

¶44 Through the effective use of wiretapping and bugging techniques, direct evidence of knowledge will, in many cases, be readily obtainable. By commencing an electronic surveillance operation, particularly a bug, at a professional fence's place of business, investigators can directly overhear incriminating remarks, and are assured of maintaining an actual audio record of what has been said. The resulting evidence is completely reliable, and so there is little danger of credibility attack at trial. Numerous prosecutions have been facilitated in this manner,[16] and it is apparent that if the method was widely implemented professional fences would run a substantially higher risk of having guilty knowledge shown by the government, despite their hiding behind a facade of legitimacy.

¶45 In addition to establishing the state of mind element, a successful "wire" is capable of producing information that establishes "control" or "receiving"; it can also make

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[15] United States v. Cox, 449 F.2d 679, 684 (10th Cir. 1971); cert. denied, 406 U.S. 934 (1972).

[16] The following case study provided to the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance demonstrates the effectiveness of such techniques in the fencing context:
(continues)

possible the location and identification of other stolen property, and it can provide enforcement officials with sufficient leverage to induce the testimony of other witnesses.

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[16] (continued)

An informant who was employed at the XYZ Auto Wreckers described the illegal activities taking place at his place of employment to an Assistant District Attorney (A.D.A.) of the Rackets Bureau of the Bronx District Attorney's Office. He said that stolen cars were delivered to XYZ, broken up into parts within an hour of delivery, and then the parts were sold to various body shops in and out of the state. In addition, he stated that various police officers were receiving monies from the owner of XYZ in order to avoid arrest. Specifically, the informant stated that orders to steal specific cars were taken from various auto repair shops over the telephones located in the office of XYZ. The owners of XYZ then relayed the orders to their accomplices by using the same phones. Once stolen, the cars were driven into the XYZ garage and immediately dismantled. The front ends which had been ordered were then delivered to the auto repair shops. In addition, once a week an out-of-state truck came to pick up the engines of these stolen cars.

The Internal Affairs Division of the N.Y.P.D was called in, and they made observations of the location from a tall adjoining building. These observations revealed that cars recently reported stolen were being driven into XYZ and immediately dismantled. Observations were also made of police officers driving into XYZ and then going into the business office. Having shown the informant's reliability as to the auto ring's operation, the information about police corruption was thought also to be reliable. The phones of XYZ were tapped, pursuant to court order, in order to seek the names of all participants and evidence relating to the auto theft ring. The office was also bugged, pursuant to court order, in order to get information on the police corruption aspect. This effort proved successful; eleven people were arrested for the auto larceny conspiracy and three police officers were arrested for bribery. One police officer was acquitted. The other individuals arrested were all convicted by plea. Two individuals indicted were never apprehended. A motion to controvert the wiretap orders was denied.

This case is a good example of how wiretapping can be effective against an organized criminal conspiracy. Staff Studies and Surveys: National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance 259-60 (1975).

At this point, the stage has been set for a successful immunity grant. It may also offer added hope of making an effort to move up the ladder against the master fence.

¶46 Yet despite their demonstrated success, wiretaps and electronic bugs have rarely been used in the investigation of fencing cases. Only 23 jurisdictions have enacted electronic surveillance statutes pursuant to Title III authorization, and of the 964 intercept orders issued in 1973, for example, just 28 were designated for suspected possession of stolen property. Thus, either by legislative omission or investigative oversight, law enforcement authorities, for the most part have failed to take advantage of the most effective evidence-gathering device available to combat large scale fencing activity.

¶47 Even if this were not the case, however, it must be acknowledged that electronic surveillance is no panacea for current deficiencies in the evidence-gathering process. Electronic devices are particularly difficult to use in certain kinds of cases, especially where the master fence does not operate from a fixed place of business. In addition, as with search warrants, logistical considerations may delay or completely preclude a successful wire, and once installed, reception is often marred by mechanical difficulties or background noises. These complexities, combined with the reluctance demonstrated by legislators and investigators to utilize electronic surveillance, have, perhaps more than necessary, led investigators and prosecutors to attempt the

more difficult task of proving knowledge by circumstantial rather than direct evidence.

3. Proof of knowledge - Circumstantial evidence and the development of criminal presumptions

¶48 "In most cases there is no direct testimony of the receiver's actual belief. Proof thereof must therefore be inferred from the circumstances surrounding his receipt of the stolen property."[17] Accordingly, the character of the seller, the price paid, and the manner in which the goods are received and subsequently treated, may provide sufficient circumstantial evidence to justify a jury finding of guilty knowledge. Under appropriate circumstances, proof of prior similar acts by the defendant, or his possession of other stolen property, may also be received into evidence for purposes of establishing the scienter element.

¶49 In the case of retail and wholesale dealers, circumstantial evidence, however limited in force, potentially affords the only means of penetrating a facade of legitimacy. Indeed, it is possible for the prosecution to turn this facade to its own advantage by demonstrating the defendant's deviation from normal business practices.[18] Evidence of poor bookkeeping procedures, unrecorded secret transactions, the failure to retain itemized receipts, unusual methods of payment (i.e., cash), or of the buyer's failure to make proper

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[17] W. LaFave & A. Scott, Criminal Law 686 (1972).

[18] See, e.g., United States v. Lambert, 463 F.2d 552, 555 (7th Cir. 1972) (manner, timing and price of sale justified inference of knowledge).

inquiry concerning his seller's credentials and the source of his goods are persuasive indicia of the defendant's underlying knowledge.[19] Simply put, innocent transactions are not often engaged in outside the ordinary course of business.

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[19] See note 18 supra.

The Association of Grand Jurors of New York County has summarized these characteristics as follows:

> When a commodity is offered for sale to a business-wise merchant, firm or corporation, it is reasonable to presume that he or it knows or will ascertain, before buying, certain things. These are:
>
> 1. The market value of the commodity.
> 2. The cause for its price being disproportionately low.
> 3. That certain identification marks usually appearing on the article or its container have not been removed or altered.
> 4. That the seller has the legal right to sell and conforms to the customs of the trade in so doing.
> 5. That the seller represents a firm known to the trade or is personally known to the buyer.
> 6. That the seller has a permanent address.
> 7. If the seller is a stranger to the buyer, that he can furnish trade and other reliable references as to his good standing.
> 8. That nothing connected with the seller or his goods indicates fraud.

Prison Committee of the Association of Grand Jurors of New York County, Criminal Receivers in the United States, (1928) 69-70.

And they have added the recommendations of experts in this field:

> Mr. Leon Hoage of the New York office of the Holmes Electric Protection Company, already mentioned, holds that an alleged fence should be required to explain to the jury acts or omissions, such as the following:
>
> 1. Failure to keep bona fide books of accounts in connection with a business enterprise.
> 2. Neglect of dealer to keep bills received with goods delivered to him, for a reasonable period, such as two years.
> 3. Omission of the dealer to demand and keep as bills the receipts given in his commercial transactions.
> 4. Lack of itemized bills of job lots of standard goods purchased, apart from the balance of the items.

(continues)

¶50 Even so, the availability of circumstantial evidence is certainly not a guarantee of conviction. Restrictions in most state courts on the trial judge's right to comment on the evidence often preclude jurors from drawing inferences they otherwise would make if the judge could share his expert knowledge with them, and the quantum of incriminating circumstantial evidence necessary to convince a jury beyond a reasonable doubt varies widely with each case. Moreover,

> [i]n the absence of direct evidence on a controverted issue, almost all jurisdictions require the prosecution to prove that all the circumstances are consistent with guilt and inconsistent with any reasonable hypothesis of innocence.[20]

Although this rule is not applied in the federal courts,[21] its impact on the state level has been profound because it "imposes an unjustifiably heavier burden on the state than does the reasonable doubt standard."[22]

¶51 The difficulties inherent in proving knowledge on the basis of circumstantial evidence alone have motivated the

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[19](continued)

> 5. Inability or unwillingness of the possessor of goods ostensibly covered by a bill of sale from a reputable firm, to communicate with the firm, at the time the purchase is made, to corroborate the sale.
> 6. Presentation of a bill of sale, the billhead of which gives the name and address of a non-existent firm.
> 7. Purchase of valuable merchandise from a push cart, or similarly unreliable vendor. Id. 70-1.

J. Hall, Supra, note 4, at 224-25, note 72.

[20]Note, Sufficiency of Circumstantial Evidence in a Criminal Case, 55 Colum. L. Rev. 249, 549-50 (1955).

[21]Holland v. United States, 348 U.S. 121, 139-40 (1954).

[22]Note, supra, note 20, at 551.

courts and the legislatures to strengthen the prosecutorial process by developing several common law and statutory presumptions or inferences. In receiving cases, most prominent among these evidentiary rules is the presumption of knowledge that is triggered by the unexplained recent possession of stolen property:

> Possession of the fruits of crime after its commission, justifies the inference that the possession is guilty possession, and, though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence.[23]

¶52 Recognizing that "[w]ithout the inference it would be difficult, if not impossible, to convict knowing possessors or fences of stolen goods . . .,"[24] the state and federal courts have accorded the rule widespread application. The relatively few remaining presumptions developed to facilitate fencing prosecutions have generally focused on the character of the seller, the merchant's duty of inquiry, the market value of the goods, and the possession of other stolen property. But, in contrast to the recent possession doctrine, these presumptions have been strictly statutory creations which, despite their potential utility, have not been the subject of legislative action in the great majority of jurisdictions.

¶53 Considerable confusion has been generated concerning the impact of the recent possession rule and other evidentiary

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[23] Wilson v. United States, 162 U.S. 613, 619 (1896).

[24] State v. DiRenzo, 53 N.J. 360, 251 A.2d 99, 106 (1969).

inferences in a criminal case. McCormick characterized the term presumption as one of "the slipperiest member[s] of the family of legal terms,"[25] and was able to conclude only that "a presumption is a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts."[26] Both the courts and the legislature, however, by using the terms presumption and inference interchangeably, and consequently blurring any distinction between the two, initially experienced difficulty arriving at a consistent formula for determining what this uniform treatment should be. As a result, the potential effect of any criminal presumption has ranged from simply enabling the prosecution to escape a directed verdict of acquittal, or allowing the judge to give a jury instruction concerning permissible inferences which might be drawn, to effectuating a complete shift (with regard to the presumed element) in either the burden of going forward or even the risk of nonpersuasion.

¶54 This wide range was eventually narrowed by the realization that constitutional constraints preclude the operation of a "true presumption" in a criminal case. In civil cases, a "true presumption" has traditionally effected a shift in the burden of producing evidence by requiring the jury to find the presumed fact in the absence of evidence

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[25]McCormick, McCormick's Handbook of the Law of Evidence, §342 at 802-03 (2nd ed. E. Cleary, Gen. Ed., 1972).

[26]Id. at 803.

rebutting this element. "In a criminal case, however, . . . '[i]t can be taken as axiomatic that a verdict cannot be directed against the accused. . .,'"[27] since this would run counter to both his right to a jury trial and the requirement that the prosecution establish all the elements of its case beyond a reasonable doubt. Accordingly, although the language of presumption is still frequently used in criminal cases, its actual effect has been reduced to that of a permissible inference: the jury is instructed that it may infer the presumed fact from proof of the basic fact, but that it is not required to do so.

¶55 Even though the burden of persuasion formally remains on the prosecution the effect of the inference is to pressure the defendant into presenting exculpatory evidence, since once an instruction has been given, the defendant assumes the risk that the jury will follow the force of the proven facts.[28] For this reason, due process limitations protecting the accused have been imposed upon the creation of criminal presumptions.

¶56 Under the due process analysis initially formulated by the Supreme Court in Tot v. United States,[29] the basic fact and the element presumed must have a common foundation in

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[27]J. Weinstein and M. Berger, Weinstein's Evidence: Commentary on Rules of Evidence for the United States Courts and Magistrates, §303[04] at 303-22 (1975).

[28]Barnes v. United States, 412 U.S. 837, note 12 (1973). See J. Weinstein, supra, note 27, §303[04], at 303-26.

[29]319 U.S. 463 (1943).

the experience of everyday living:

> [A] statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.[30]

¶57 The "rational connection" test was further refined in Leary v. United States,[31] which held that "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[32] The court in Leary did not reach the question of whether the rational connection test must also satisfy the "beyond a reasonable doubt" standard which is constitutionally required in criminal cases.[33] Nevertheless, the primary purpose of modern presumptions is not to lower the standard of proof, but to facilitate the fact-finding process by providing jurors with information concerning a probable relationship between a designated fact

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[30] Id. 319 U.S. at 467-68.

[31] 395 U.S. 6 (1969).

[32] 395 U.S. at 36.

[33] Leary v. United States, 395 U.S. 6, 36, note 67 (1969).

pattern that is often beyond their common experience. By creating a presumption, the law, in effect, serves, through the medium of the judge's instructions, as an expert witness who gives testimony regarding the evidentiary significance of a particular fact pattern. There is, moreover, no reason why this particular type of "expert testimony" should receive special treatment simply because of its status as a legislative of judicial presumption.

¶58 Despite this analysis, which would more easily uphold presumptions, the Supreme Court's willingness to examine empirical data from legislative history or furnished by the prosecution gives some hope that criminal presumptions, particularly of the statutory mold, will retain their effectiveness even under the more rigorous standard. As yet, however, the court has expressly refrained from deciding which evidentiary standard is controlling,[34] so the entire issue awaits further resolution.

¶59 Of the various criminal presumptions developed in the fencing context, only the recent possession doctrine has received relatively extensive attention under the rational connection line of analysis. Prior to the Supreme Court's decision in Barnes v. United States,[35] several state courts had found the doctrine constitutionally deficient under the

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[34]Leary v United States, 395 U.S. 6, note 67 (1969).

[35]412 U.S. 837 (1973).

more-likely-than-not standard of review.[36] The Barnes decision, however, recognizing the "impressive historical basis" underlying the recent possession rule, considered "[t]his longstanding and consistent judicial approval of the instruction, reflecting accumulated common experience [as providing] . . . strong indication that the instruction comports with due process."[37] Even so, historical considerations alone were not considered sufficient to warrant automatic constitutional approval, so the court proceeded independently, "in light of present day experience," to hold that the inference complies with due process, regardless of which evidentiary standard is applied.[38]

¶60 The due process analysis articulated in Barnes provides the groundwork for the adoption of more advanced criminal presumptions designed "to keep pace with the more sophisticated techniques employed by some contemporary [fencing] criminals."[39] The court's analysis clearly suggests that the creation of criminal presumptions is not limited by historical considerations, and that an application of the rational connection test in a modern context is to be determinative. Moreover, in addition to its due process

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[36] See, e.g., Carter v. State, 82 Nev. 246, 415 P.2d 325, 326-7 (1966).

[37] 412 U.S. at 844.

[38] 412 U.S. at 844-46.

[39] Note, Statutory Criminal Presumptions: Judicial Slight of Hand, 53 Va. L. Rev. 702, 703-05 (1967).

analysis, the court also reaffirmed the principle that a permissive inference does not violate a defendant's Fifth Amendment privilege against self-incrimination, so long as the jury is instructed that the accused has a constitutional right not to take the stand and that the basic incriminating fact "could be satisfactorily explained by evidence independent of petitioner's testimony."[40] The inevitable fact that a permissive inference or the introduction of any evidence tending to implicate the defendant increases the pressure on him to testify was considered to be a consequence of the adversary process which could not be regarded as violative of the Fifth Amendment privilege. If the defendant is the only party with access to facts capable of rebutting the inference, his misfortune is "inherent in the case" and not necessarily created by the evidentiary presumption.

¶61 Currently, it is apparent that the recent possession rule alone is not capable of responding to the increasing sophistication of the modern fencing process. For the doctrine to apply, the defendant must be proven to have had unexplained, exclusive possession of recently stolen property. Moreover, recent possession alone, in the absence of other affirmative evidence pointing towards guilt, will not be sufficient to sustain a conviction.[41] While not every

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[40] 412 U.S. at 846-47.

[41] See State v. Long, 415 P.2d 171, 173 (Sup. Ct. Ore. 1966).

explanation will preclude a jury instruction,[42] the more sophisticated fences have demonstrated their facility for taking precautionary measures which subsequently enable them to give reasonable explanations consistent with innocence. Even when no such explanation is forthcoming, some jurisdictions, reasoning that a presumption cannot be based upon circumstantial evidence, will disregard the rule completely where the prosecution is only able to establish constructive possession. This approach directly impedes the successful prosecution of the master fence who, by definition, always avoids any physical contact with the stolen goods. Nor will the recent possession doctrine be of substantial assistance where the defense is able to establish that the possession was non-exclusive because other persons, not involved in theft or fencing activity with the defendant, also had access to the goods. Finally, since any inferential weight attributed to the possession of recently stolen property weakens with time, the doctrine's affectiveness as a prosecutorial tool is always limited by the fence's potential ability to conceal goods until the recency element is no longer present.

III CONCLUSION: BASIC TACTICS AND STRATEGY FOR LAW ENFORCEMENT

¶62 Since fencing is a crime which has increasingly assumed

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[42] See Barnes v. United States, 412 U.S. 837, 845, note 10 (1973).

an interstate nature investigative efforts will often require increased cooperation between federal and state enforcement agencies. Priorities must be altered so that renewed emphasis is given to convicting the fence rather than the thief. Whenever necessary, "use" immunity grants should be relied upon to secure incriminating evidence against major fences. To the extent possible, law enforcement priorities should be further broken down in terms of fencing categories. No special effort would be made with regard to the neighborhood fence, as his economic impact is relatively slight. Large scale "legitimate" businesses are more serious offenders, but, depending both on their size and the relative proportion of their fencing trade, securing a conviction may be quite difficult. The master fence, of course, is the most dangerous violator; however, he is also the most difficult to convict. Extensive undercover work, reliance on informants, and successful wiretaps will be necessary to win a conviction. Although this type of investigative effort is possible, the professional fence is the more inviting target, since his shield of legitimacy can be pierced relatively easily by bugging his place of business. Some additional investigative work will obviously be required so that probable cause can be established for a court order authorizing electronic surveillance, but this should not be a major barrier because the professional fence lacks the insulation of the master fence. Focusing on the professional fence is also profitable because visual surveillance of his

premises can be expected to provide leads resulting in the apprehension of his illegal suppliers, who are themselves a potentially valuable source of information concerning other fences. Regardless of which priorities are adopted, it should be apparent that these choices are not necessarily mutually exclusive, and will often depend upon available resources and the exigencies of a particular locality.

SECTION TWO:

SIMULATED INVESTIGATION

INTRODUCTION TO THE SIMULATED INVESTIGATION

As noted in the preface, the simulated investigation is divided into five workshops. Each of these workshops is in turn divided into two parts: the raw data of the investigation, i.e., the observations and intelligence reports, eavesdropping affidavit, daily plant reports, and grand jury testimony, and the teacher's guide to be used for that particular workshop. The raw data requires no further comment, the teacher's guide, on the other hand, may benefit from some further explanation.

The teacher's guide provided for each workshop contains a statement of the premise of each workshop, a list of the problems that must be resolved, and the actual guide. The guide consists of a series of statements, issues, and questions that ought to be presented to the students. In addition, most of the workshop guides contain a commentary or analysis of the applicable raw data and of the problems raised by that set of data. The specific teaching style is, of course, a matter of choice by the workshop leader. Whatever style is adopted by the individual, however, it should be designed to call for the kind of analysis and to expose all of the issues that are outlined in the teacher's guide.

The suggested time for completion of each of the first four workshops is 1 1/2 hours. The suggested time for the fifth workshop is one hour. These times are <u>exclusive</u> of the

time needed to prepare for each workshop. All the material should be read prior to the workshop. Please remember that these are only suggested times. The actual time required for a thorough treatment of each exercise will depend upon the interests and aptitute of the participants.

The use of this simulated investigation will be effective in direct proportion to the students' perception of the materials as an actual case, not as a training exercise. In short, to succeed, it must be viewed as more than realistic; it must be authentic.

Frankly, it has become authentic to the Institute staff. DeNoto, Uncle Ricky and their associates have become actual people with identifiable personalities. After several readings of the observations and intelligence reports, those who use them, too, will have mental images of the individuals involved, and can, with little effort, attribute certain real characteristics to them.

In this spirit, but more specifically, to make it easier to employ the problem materials in the workshop, what follows, as best as can be reconstructed, is the thinking that went into the development of the problem.

The dramatis personae of the problem are modeled after organized crime and underworld figures who have played major roles in completed investigations. In some cases, they are compositions. The plot, and the manner in which it unfolds, were developed to simulate events as they have or could be

expected to occur. Only the broad outlines were constructed to present certain inherent problems, e.g., the bailbondsman's office with attorneys present, the inadequacy of conventional means of investigation, etc. Plant reports, verbatim conversations, and grand jury testimony, are similarly based on transcripts and fact patterns which were not altered merely to fit the holdings of court decisions. In fact, the cases cited in the perjury and contempt section of the teacher's guide were researched and found only after the testimony had been written.

As a result, not all the facts presented are pertinent. Merely because a piece of information exists in an observation report does not mean that it was put there for a purpose. One job of the prosecutor is to establish probable cause and to make investigative decisions on the basis of a mass of raw material. On the other hand, as it noted in the commentary, the importance of several facts is not apparent, and may be revealed only by intense scrutiny, insight or luck. As suggested above, the significance of several facts were discovered by the staff only after the reports were completed and analyzed; they were not planned. In certain situations, where fine tuning would have created additional desirable legal problems, manipulation of the facts was foregone to avoid a contrived law school-type exam pattern.

In short, the reports should be treated as if they came out of the detectives' typewriters with all the problems, inconsistencies, irrelevancies and inadequacies that could be

expected to be found there. The simulated problem was pretested prior to its use in the 1976 Summer Seminar. It was, of course, used in the Seminar. Since then, it has been reviewed. There should not be any serious design defects in it. It should not, therefore, be necessary to suggest to a student that a problem exists as a result of a mistake made by the draftsman. If the detective who wrote the report or the Grand Jury stenographer who transcribed the minutes made a mistake--fine; they often do. But the prosecutor must live with the mistake or attempt to correct it.

WORKSHOP #1

Electronic Surveillance - Decision to Employ

Suggested Time: 1 1/2 hours

WORKSHOP #1

Observation and intelligence reports

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COMPLAINT FOLLOW-UP
D 313-131 (REV. 9-74)
ORIGINAL DD 51

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Complaint File No.:

DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 *	19 PCT	22 COMPLAINT NO
2/8/75	DAOS				

PREVIOUS CLASSIFICATION	38 *	41 *	42 PCT OF ARR	45 ARREST NOS

CLASSIFICATION CHANGED TO	50 *	52 *	53 *	54 *

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 *

REFERRAL CHANGE FROM _____ TO _____

CASE STATUS:

☒ ACTIVE ☐ CLOSED ☐ UNFOUNDED

ALARM NO DATE TRANSMITTED

OFFICER'S NAME (Printed) RANK, FIRST, LAST COM D.

Detective Douglas Korol

TAX REG. NO.

DO NOT ENTER PROPERTY PREVIOUSLY REPORTED

60 TYPE OF PROPERTY	62 VALUE STOLEN	68 VALUE RECOVERED
01 Motor Veh stolen or recov		
02 Motor Veh recd. by other author.		
04 CURRENCY		
05 JEWELRY		
06 FURS—CLOTHING		
07 FIREARMS		
08 OFFICE EQUIPMENT		
09 T.V. RADIO, CAMERAS ETC.		
10 HOUSEHOLD GOODS		
11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

Directed to participate in interview of Rosemary Field a/c by Detective John Flynn 1st Burg-Larc, Forgery 2° (check) at 1300, FNCB. Informant advised of rights, stated that she used to be girlfriend of Tommy DeNoto until she left him about six months ago. DeNoto brought her perfume, TV and liquor which he said was "a gift of the trucking industry." DeNoto hung around luncheonette, Avenue A and 4th Street, telephone # 293-0825, where she used to call him. His partners were Big Jimmy (211, 6'2", heavy, dark hair, 35-40 years); Pellpo (ph) (med. height, stocky, balding, 30's) and Tony Trayber (ph) (no description). She met Big Jimmy and Pellpo on one or two occasions. She says DeNoto is with "Busty" (probably Charles Bustamonte), and that "he robs trucks for him."

Informant gave information because she is afraid she will go to jail, as a second felony offender. She is very scared, has already been threatened by DeNoto (he carries a gun) and refuses to testify. She was promised that we would not disclose her cooperation to anyone.

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COMPLAINT FOLLOW-UP
PD 313-081 (REV. 9-74)
(FORMERLY PD 51)

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Complaint File No.

DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 *	19 PCT	22 COMPLAINT NO	EAP
2/14/75						

PREVIOUS CLASSIFICATION	38 *	41 *	42 PCT. OF ARR	45 ARREST NOS

CLASSIFICATION CHANGED TO	50 *	52 *	53 *	54 *

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 *

REFERRAL CHANGE FROM _____ TO _____

CASE STATUS:

☐ ACTIVE ☐ CLOSED ☐ UNFOUNDED

ALARM NO DATE TRANSMITTED

OFFICER'S NAME (Printed) RANK, FIRST, LAST COM'D.

Detective Douglas Korol

TAX REG. NO.

DO NOT ENTER PROPERTY PREVIOUSLY REPORTED

60 TYPE OF PROPERTY	62 VALUE STOLEN	68 VALUE RECOVERED
01 Motor Veh stolen or recov		
02 Motor Veh recd. by other authority		
04 CURRENCY		
05 JEWELRY		
06 FURS—CLOTHING		
07 FIREARMS		
08 OFFICE EQUIPMENT		
09 T.V. RADIO, CAMERAS ETC.		
10 HOUSEHOLD GOODS		
11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

Check with Miss Weisel, Telephone Security
Telephone # 293-0825 listed to North Side Eatery, 143 Avenue A, New York.
Date of Installation: 4/14/74.

Int Div. record check--Thomas DeNoto B#283-187.
Called by Rick (LNU) 9/12/67 at M & P Decorator, 143 Ave A, re: hijacking Decorators 143 Ave A. Rick believed to be Ricardo Barcelona B#274-189.

Ricardo Barcelona B#274-189

Identified by Joseph Valachi as a member of the Bustamonte crime family. He is reputed to be a lieutenant in the family with interests in theft and labor racketeering.

Frequents: Roving Metal Comp., 414 South Main Street, Yonkers (reputed to be the owner);
Lenny's Bar, 83 W. 27th Street;
Manny's Florists, 143 Avenue A.

N.Y. Daily Journal, September 15, 1974

TRUCKERS WANT ESCORTS TO PROTECT THEM FROM MOB

New York City is an impossible place to do business. So say 200 burly truckdrivers, their powerful arms holding placards and their booming voices demanding police escorts, as they paraded in front of the mayor's residence. According to an officer of the International Brotherhood of Truck Drivers, the perils of driving trucks through the city is just too great for any man. Citing statistics which show that 15% of all drivers have been held up to date, and 10% of those have been injured, International Brotherhood of Truck Drivers Vice President, John Duncan complained that the valuable cargoes they carry were an inviting target for hijackers. "Give us police, or shotguns," was the demand made by Duncan and echoed by the drivers.

A spokesman for the police department admitted that a hijacking problem existed, but claimed that they did not have the manpower to handle it. "There are 5,000 trucks in the city at any given time," he said, "and the mob can choose any one they want." "How can we guard each one?" he asked rhetorically.

A similar response was received from the FBI which has jurisdiction over thefts from interstate shipments. The FBI confirmed that the mob was in back of a large portion of the hijackings.

A knowledgeable source within the Bureau identified Ricardo Barcelona, a caporegime in the Bustamone family, as one of the major figures involved in the hijacking, theft and fencing of property. The source noted, however, that Barcelona, like Charles "Busty" Bustamonte, was probably immune from prosecution. "He never touches the stuff, he has others handle the dirty work," the source explained.

The mayor has scheduled a meeting with IBTD officials to discuss the problems later this week the Journal has learned.

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DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 *	19 PCT	22 COMPLAINT NO	EAR
2/25/75						

PREVIOUS CLASSIFICATION	38 *	41 *	42 PCT. OF ARR	45 ARREST NCS

CLASSIFICATION CHANGED TO	50 *	52 *	53 *	54 *

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 *

REFERRAL CHANGE FROM _____ TO _____

CASE STATUS:

☐ ACTIVE ☐ CLOSED ☐ UNFOUNDED

ALARM NO DATE TRANSMITTED

OFFICER'S NAME (Printed) RANK, FIRST, LAST COM'D.
Detective Douglas Korol

TAX REG. NO.

DO NOT ENTER PROPERTY PREVIOUSLY REPORTED

60 TYPE OF PROPERTY	62 VALUE STOLEN	68 VALUE RECOVERED
01 Motor Veh. stolen or recov.		
02 Motor Veh. recov. by other author.		
04 CURRENCY		
05 JEWELRY		
06 FURS—CLOTHING		
07 FIREARMS		
08 OFFICE EQUIPMENT		
09 T.V. RADIO, CAMERAS ETC.		
10 HOUSEHOLD GOODS		
11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

3:10 p.m. Unknown male exits North Side and enters a Buick blue station wagon bearing N.J. license plates registered to Carla Trebort, Fort Lee, N.J. and proceeds west on 4th Street (male tentatively identified as Anthony Trebort).

3:30 p.m. Thomas DeNoto, B# 283-187, arrives at North Side by foot--enters eatery. DeNoto is observed by undersigned officer to immediately proceed to pay telephone in front of luncheonette and place a telephone call. After two or three minutes DeNoto went into back of luncheonette.

3:50 p.m. Male tentatively identified as Anthony Trebort parked vehicle (see 3:10 p.m. above) in front of luncheonette and entered.

4:15 p.m. DeNoto exited luncheonette, walked to vehicle, opened back door, looked in back seat and returned to luncheonette.

4:20 p.m. Undersigned officer looked in back seat and observed what appeared to be a large carton covered by a blanket.

4:22 p.m. DeNoto made telephone call from telephone in front of luncheonette.

4:23 p.m. Anthony Trebort and unknown male (W, 5'10", brown curly hair, 150 lbs.) leave luncheonette, enter vehicle, and drive east on 4th Street. Undersigned followed, but due to traffic congestion, lost vehicle on 10th St. and Ave C. (Note: vehicle went through two red lights).

5:20 p.m. Officers returned to luncheonette.

10:00 p.m. Officers left area.

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Complaint File No.

DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 *	19 PCT	22 COMPLAINT NO
2/26/75					

PREVIOUS CLASSIFICATION	38 *	41 *	42 PCT. OF ARR	45 ARREST NOS

CLASSIFICATION CHANGED TO	50 *	52 *	53 *	54 *

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 *

REFERRAL CHANGE FROM _____ TO _____

CASE STATUS:

☐ ACTIVE ☐ CLOSED ☐ UNFOUNDED

ALARM NO DATE TRANSMITTED

OFFICER'S NAME (Printed) RANK, FIRST, LAST COM'D.
Detective Douglas Korol

TAX REG. NO.

DO NOT ENTER PROPERTY PREVIOUSLY REPORTED

60 TYPE OF PROPERTY	62 VALUE STOLEN	68 VALUE RECOVERED
01 Motor Veh stolen or recov		
02 Motor Veh recv'd by other author's		
04 CURRENCY		
05 JEWELRY		
06 FURS–CLOTHING		
07 FIREARMS		
08 OFFICE EQUIPMENT		
09 T.V. RADIO, CAMERAS ETC		
10 HOUSEHOLD GOODS		
11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

12:00 p.m. Officers placed premises North Side luncheonette under observation.

1:17 p.m. Observed two males (#1, see obs. report 2/25/71 at 4:23 p.m.; #2, m/w, 200 lbs., 6'2"-6'3", mid-40's, red jacket, blue pants) leave premises walking west of 4th St. Male #2 did take from his pocket a piece of paper and throw it into garbage can on the corner of 4th St. and 1st Ave. The undersigned officer retrieved said piece of paper and found it to be an envelope addressed to James Cullone, 143 Ave. A, N.Y.C.

2:00 p.m. Tommy DeNoto arrives at North Side driving red convertible Cadillac. Enters premises.

4:00 p.m. Male #1 and Male #2 (tentatively identified as James Cullone) return to North Side luncheonette.

4:10 p.m. Undercover officer, Donald Ogalt #1403 observed entering premises.

4:12 p.m. Ogalt observed exiting premises (see attached report).

5:50 p.m. Male and female enter.

5:55 p.m. Male enters (m/w 5'6" black hat) and leaves 5 minutes later. As male left he was putting what appeared to be money into a wallet.

6:15 p.m. Male enters carrying manila envelope (letter size). Male left in ten minutes with Cullone, neither appeared to have envelope. Male and Cullone entered grey 4-door Ford license #IK2 X82 (registered to Beales Leasing Co., Framingdale, N.Y.) and drove north on Avenue A. Vehicle trailed across Brooklyn Bridge to Brooklyn-Queens Expressway, back to Manhattan over 59th St. Bridge and south on Lexington Ave. Officers lost tail near 14th St. due to repeated traffic violations (stop light, one-way street).

8:00 p.m. Officers returned, lights were off in luncheonette.

1:00 a.m. While returning home, Officer Cobert observed DeNoto using key, enter 143 Avenue A, use the telephone therein, and leave. DeNoto then drove east.

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COMPLAINT FOLLOW-UP
PD 313-151 (REV 9-74)
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Complaint File No.

DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 *	19 PCT	22 COMPLAINT NO	24
2/26/75						

PREVIOUS CLASSIFICATION	38 *	41 *	42 PCT OF ARR	45 ARREST NOS

CLASSIFICATION CHANGED TO	50 *	52 *	53 *	54 *

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 *

REFERRAL CHANGE FROM _____ TO _____

CASE STATUS:

☒ ACTIVE ☐ CLOSED ☐ UNFOUNDED

ALARM NO DATE TRANSMITTED

OFFICER'S NAME (Printed) RANK, FIRST, LAST COM'D.

Detective Donald Ogalt

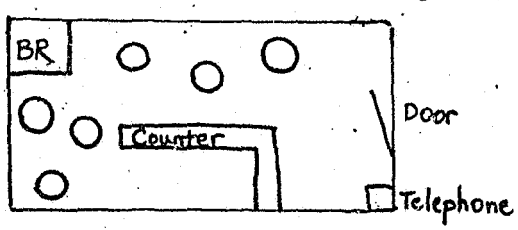
TAX REG. NO.

DO NOT ENTER PROPERTY PREVIOUSLY REPORTED

60 TYPE OF PROPERTY	62 VALUE STOLEN	68 VALUE RECOVERED
01 Motor Veh stolen or recov		
02 Motor Veh rec'd by other author		
04 CURRENCY		
05 JEWELRY		
06 FURS—CLOTHING		
07 FIREARMS		
08 OFFICE EQUIPMENT		
09 T.V. RADIO, CAMERAS ETC.		
10 HOUSEHOLD GOODS		
11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

4:00 p.m. Assigned undercover officer entered North Side luncheonette, 143 Avenue A. Luncheonette is one room, approximately 20' x 40' with a long counter on the left (see diagram):



Immediately after entering, observed a M/W who approached me to ask what I wanted. M/W was later identified to be Anthony Trebort. I stated that I had to use the pay telephone which I had seen from the street. Trebort stated, "This is private, use the phone in the drugstore on the corner." At this time persons later identified to me as Tommy DeNoto and male #1 were seated at the table on the far left. Three other persons were seated at the the counter and a M/W (60-70, 5'4", grey hair, 150 lbs.) was sweeping up near the bathroom. The counterman was using a telephone at the counter.

Trebort then opened the door for me to leave and bumped against me (probably to feel for a gun) as I left.

...

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COMPLAINT FOLLOW-UP
313 (31 (REV 9-74)
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Complaint File No.

DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 *	19 PCT	22 COMPLAINT NO	[illegible]
3/1/75						

PREVIOUS CLASSIFICATION	38 *	41 *	42 PCT OF ARR	45 ARREST NOS

CLASSIFICATION CHANGED TO	50 *	52 *	53 *	54 *

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 *

REFERRAL CHANGE FROM _____ TO _____

CASE STATUS:

☒ ACTIVE ☐ CLOSED ☐ UNFOUNDED

ARM NO DATE TRANSMITTED

OFFICER'S NAME (Printed) RANK, FIRST, LAST COM'D.

Detective Douglas Korol

TAX REG. NO.

DO NOT ENTER PROPERTY PREVIOUSLY REPORTED

60 TYPE OF PROPERTY	62 VALUE STOLEN	68 VALUE RECOVERED
01 Motor Veh. stolen or recov.		
02 Motor Veh. recv'd. by other authority		
04 CURRENCY		
05 JEWELRY		
06 FURS—CLOTHING		
07 FIREARMS		
08 OFFICE EQUIPMENT		
09 T.V. RADIO, CAMERAS ETC.		
10 HOUSEHOLD GOODS		
11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

2:00 p.m. Undersigned officer observed DeNoto, Cullone and two males previously seen at luncheonette talking on corner of Avenue A and 4th St. DeNoto and Cullone entered luncheonette.

2:30 p.m. Cullone made a telephone call.

3:00 p.m. Blue van license #381 AVC (registered to Acme Foods Inc.) parked outside luncheonette. Cullone exited luncheonette and entered van. Cullone then entered luncheonette and returned to drive of van and spoke with him for several minutes in what appeared to be an argument. Undersigned officer then walked by luncheonette and overheard driver state, "If you don't want it, somebody else will." Cullone answered, "Tommy says the stuff's no good--call when it's something worth our while." Officers followed vehicle to novelty store at 118 W. 42nd St., N.Y.C. and observed driver enter. Ten minutes later two men from store came out to van, emptied six cartons marked "Hugushi Quartz Watches" from van into store. (Note: 118 W. 42nd St. is reputed to be swag place).

5:00 p.m. Officers returned to luncheonette.

Hugushi Computing Company reports that thefts of watches amounted to 25 cases in the past 60 days. Cartons are coded in Japanese on the carton, but individual units were not marked with identifying numbers. Value of watches is $1,000/case.

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COMPLAINT FOLLOW-UP
PD 313-081 (REV. 9-74)
FORMERLY PD 51

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Complaint File No.

DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 *	19 PCT	22 COMPLAINT NO	EAR
3/2/75						

PREVIOUS CLASSIFICATION	38 *	41 *	42 PCT. OF ARR	45 ARREST NOS

CLASSIFICATION CHANGED TO	50 *	52 *	53 *	54 *

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 *

REFERRAL CHANGE FROM _____ TO _____

CASE STATUS:

☒ ACTIVE ☐ CLOSED ☐ UNFOUNDED

ALARM NO DATE TRANSMITTED

OFFICER'S NAME (Printed) RANK, FIRST, LAST COM'D.

Detective Douglas Korol

TAX REG. NO.

DO NOT ENTER PROPERTY PREVIOUSLY REPORTED

60 TYPE OF PROPERTY	62 VALUE STOLEN	68 VALUE RECOVERED
01 Motor Veh stolen or recov		
02 Motor Veh recd. by other author.		
04 CURRENCY		
05 JEWELRY		
06 FURS—CLOTHING		
07 FIREARMS		
08 OFFICE EQUIPMENT		
09 T.V. RADIO, CAMERAS ETC.		
10 HOUSEHOLD GOODS		
11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

5:00 p.m. Officers observed Anthony Trebort and James Cullone i/f/o 143 Ave. A. Officers advised surveillance truck to pull to curb next to subject. Officer inside vehicle overheard Cullone say to Trebort, "Even with the 1,500, the f------ bartenders will still water down the drinks. F--- the b--------." Trebort then pointed to the surveillance truck and both entered the premises. Trebort used the telephone in the luncheonette and returned to the truck with two males and looked all around it, noting license plate.

Note: A truck from Jones & Jones Liquor Wholesale was hijacked today (see attached report).

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COMPLAINT FOLLOW-UP

PD 313-151 (REV. 9-74)
FORMERLY PD 151

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Complaint File No.

DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 *	19 PCT	22 COMPLAINT NO
3/2/75					

PREVIOUS CLASSIFICATION	38 *	41 *	42 PCT OF ARR	45 ARREST NOS

CLASSIFICATION CHANGED TO	50 *	52 *	53 *	54 *

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 *

REFERRAL CHANGE FROM _____ TO _____

CASE STATUS:

☒ ACTIVE ☐ CLOSED ☐ UNFOUNDED

LARM NO DATE TRANSMITTED

OFFICER'S NAME (Printed) RANK, FIRST, LAST COM'D.

Det. Thomas Dooley Safe, Loft and Truck

TAX REG. NO.

DO NOT ENTER PROPERTY PREVIOUSLY REPORTED

60 TYPE OF PROPERTY	62 VALUE STOLEN	68 VALUE RECOVERED
01 Motor Veh stolen or recov		
02 Motor Veh recd by other author		
04 CURRENCY		
05 JEWELRY		
06 FURS—CLOTHING		
07 FIREARMS		
08 OFFICE EQUIPMENT		
09 T.V. RADIO CAMERAS ETC.		
10 HOUSEHOLD GOODS		
11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

Samuel Zincaid, driver for Jones & Jones Liquor Wholesale, reported that he was driving a truck containing 1,500 cases of assorted liquor. On this date, at approximately 3:10 p.m. at the West Side Highway and 40th St., two men approached Zincaid, displayed a gun, and forced him into the bathroom of the bar at that location. Zincaid was found two hours later after a bar patron alerted the bartender. Zincaid describes both as being of average height and weight, no distinguishing characteristics. Zincaid did not have his license with him, and stated that he must have lost it. Estimated value of shipment--$120,000.

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COMPLAINT FOLLOW-UP

PD 313-031 (REV. 9-74) (FORMERLY PD 51)

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Complaint File No.

DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 *	19 PCT	22 COMPLAINT NO	EAR
3/3/75						

PREVIOUS CLASSIFICATION	38 *	41 *	42 PCT OF ARR	45 ARREST NOS

CLASSIFICATION CHANGED TO	50 *	52 *	53 *	54 *

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 *

REFERRAL CHANGE FROM _____ TO _____

CASE STATUS:

☒ ACTIVE ☐ CLOSED ☐ UNFOUNDED

ALARM NO DATE TRANSMITTED

Detective Douglas Korol

OFFICER'S NAME (Printed) RANK, FIRST, LAST COM'D.

TAX REG. NO.

DO NOT ENTER PROPERTY PREVIOUSLY REPORTED

60 TYPE OF PROPERTY	62 VALUE STOLEN	68 VALUE RECOVERED
01 Motor Veh stolen or recov		
02 Motor Veh recd by other author		
04 CURRENCY		
05 JEWELRY		
06 FURS—CLOTHING		
07 FIREARMS		
08 OFFICE EQUIPMENT		
09 T.V. RADIO, CAMERAS ETC.		
10 HOUSEHOLD GOODS		
11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

2:00 p.m. Officers placed subject premise under surveillance.

2:15 p.m. to 3:30 p.m. Approximately ten persons, at different times, entered luncheonette and left after remaining two to four minutes.

4:15 p.m. DeNoto walked into luncheonette and then exited with Cullone and unknown male. Cullone handed keys to unknown male who then entered Trebort wagon (see 2/25/75, 3:10 p.m.) and drove east on 4th St. Officers followed station wagon to 5th Ave. and 12th St., and lost vehicle in traffic.

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COMPLAINT FOLLOW-UP

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Complaint File No.

DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 *	19 PCT	22 COMPLAINT NO
3/7/75	DAOS				

PREVIOUS CLASSIFICATION	38 *	41 *	42 PCT OF ARR	45 ARREST NOS

CLASSIFICATION CHANGED TO	50 *	52 *	53 *	54 *

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 *

REFERRAL CHANGE FROM _____ TO _____

CASE STATUS:

☒ ACTIVE ☐ CLOSED ☐ UNFOUNDED

ALARM NO DATE TRANSMITTED

OFFICER'S NAME (Printed) RANK, FIRST, LAST COM'D.

Detective Douglas Korol

TAX REG. NO.

DO NOT ENTER PROPERTY PREVIOUSLY REPORTED

60 TYPE OF PROPERTY	62 VALUE STOLEN	68 VALUE RECOVERED
01 Motor Veh stolen or recov		
02 Motor Veh rec'd by other author		
04 CURRENCY		
05 JEWELRY		
06 FURS—CLOTHING		
07 FIREARMS		
08 OFFICE EQUIPMENT		
09 T.V. RADIO, CAMERAS ETC.		
10 HOUSEHOLD GOODS		
11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

Undersigned officers spoke with Detective Thomas Dooley, S, L & T re: stolen liquor. Dooley advised undersigned that one of his informants thought that a "fence" known as "Sacky" recently handled shipment of liquor. The informant had heard information on the street and did not know who Sacky was.

Note: "Sacky" may be Albert Sackworth, B# 842-986, subject of Investigation DAOS 920/76.

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COMPLAINT FOLLOW-UP
PD 313-151 (REV. 9-74)
(FORMERLY PD 51)

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Complaint File No.

DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 *	19 PCT	22 COMPLAINT NO
3/8/75	DAOS				

PREVIOUS CLASSIFICATION	38 *	41 *	42 PCT. OF ARR	45 ARREST NOS

CLASSIFICATION CHANGED TO	50 *	52 *	53 *	54 *

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 *

REFERRAL CHANGE FROM _____ TO _____

CASE STATUS:

☒ ACTIVE ☐ CLOSED ☐ UNFOUNDED

ALARM NO DATE TRANSMITTED

OFFICER'S NAME (Printed) RANK, FIRST, LAST COM'D.

Detective Douglas Korol

TAX REG. NO.

DO NOT ENTER PROPERTY PREVIOUSLY REPORTED

60 TYPE OF PROPERTY	62 VALUE STOLEN	68 VALUE RECOVERED
01 Motor Veh. stolen or recov		
02 Motor Veh. recov. by other auth.		
04 CURRENCY		
05 JEWELRY		
06 FURS—CLOTHING		
07 FIREARMS		
08 OFFICE EQUIPMENT		
09 T.V. RADIO, CAMERAS ETC.		
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11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

Surveillance of 283 Barley Street.

4:00 p.m. Assigned officers were directed to proceed to above premise as a result of information obtained from 1973 G.J. investigation of Albert Sackworth as a result of DAOS 920/72. Sackworth stated that he had used his brother-in-law's (J.T. Landock) bailbond's office at said address to conduct his fencing operation. Sackworth was not indicted as a result of receiving immunity.

5:00 p.m. Officers left area--no unusual activity observed.

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COMPLAINT FOLLOW-UP
PD 313-081 (REV 9-74)
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Complaint File No.

1 DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 *	19 PCT	22 COMPLAINT NO	YEAR
3/10/75						

PREVIOUS CLASSIFICATION	38 *	41 *	42 PCT OF ARR	45 ARREST NOS

CLASSIFICATION CHANGED TO	50 *	52 *	53 *	54 *

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 *

REFERRAL CHANGE FROM _____ TO _____

CASE STATUS:

[X] ACTIVE [ ] CLOSED [ ] UNFOUNDED

ALARM NO DATE TRANSMITTED

OFFICER'S NAME (Printed) RANK, FIRST, LAST COM'D.

Detective Douglas Korol

TAX REG. NO.

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04 CURRENCY		
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09 T.V. RADIO, CAMERAS ETC.		
10 HOUSEHOLD GOODS		
11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

12:00 p.m. Officers assigned to surveillance of 143 Avenue A.

1:15 p.m. Observed Cullone at telephone in front of subject premises. Cullone handed telephone to DeNoto. DeNoto and Cullone left premises and proceeded to vehicle IKZ 482 (see 2/26, 6:15 p.m.) which Cullone entered. Officer overheard DeNoto state "He can't have it until I tell you. On this deal I got to speak to Uncle Ricky first."

1:20 p.m. DeNoto returned to the luncheonette and made a telephone call. Cullone drove east on 4th St. and was followed by officers. Officers lost Cullone at 8th St. and 2nd Ave., and proceeded directly to 283 Barley St. Cullone was observed in the back room talking to Sackworth.

2:10 p.m. Sackworth received a telephone call and after several minutes handed the phone to Cullone.

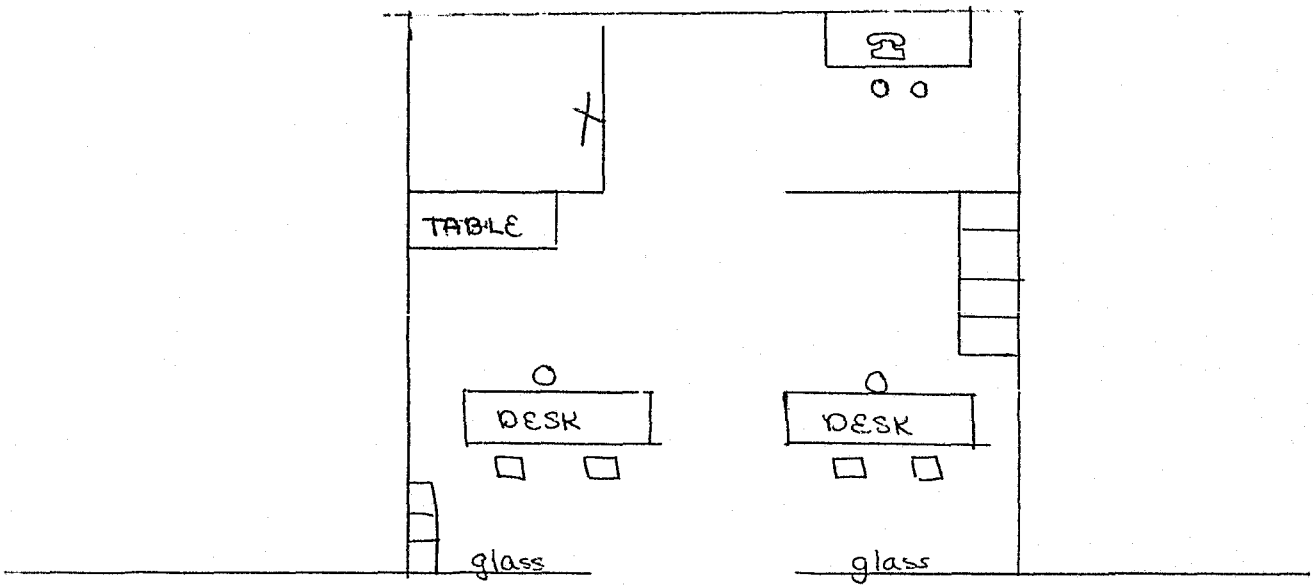
2:15 p.m. Sackworth and Cullone exchanged something and Cullone left. (Note: Cullone may have received money).

2:20 p.m. Cullone left premises and drove north on Barley. Officers remained.

2:30-3:00 p.m. Sackworth made several telephone calls.

3:00 p.m. Sackworth left.

See attached diagram.



Barley Street

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COMPLAINT FOLLOW-UP
PD 313-151 (REV. 9-74)
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Complaint File No.

DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 *	19 PCT	22 COMPLAINT NO
3/11/75					

PREVIOUS CLASSIFICATION	38 *	41 *	42 PCT. OF ARR	45 ARREST NOS

CLASSIFICATION CHANGED TO	50 *	52 *	53 *	54 *

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 *

REFERRAL CHANGE FROM _____ TO _____

CASE STATUS:

☒ ACTIVE ☐ CLOSED ☐ UNFOUNDED

ARM NO DATE TRANSMITTED

OFFICER'S NAME (Printed) RANK, FIRST, LAST COM'D.

Detective Douglas Korol

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01 Motor Veh stolen or recov		
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04 CURRENCY		
05 JEWELRY		
06 FURS-CLOTHING		
07 FIREARMS		
08 OFFICE EQUIPMENT		
09 T.V. RADIO, CAMERAS ETC.		
10 HOUSEHOLD GOODS		
11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

11:00 a.m. Officers placed premises 283 Barley St. under observation.

11:30 a.m.-2:30 p.m. Numerous individuals, male and female, entered premises and exited. Some had conversations with J.T. Landock, bailbondsman who has desk in front of store. Undersigned noted that several individuals were attorneys (names unknown) who undersigned has seen in court during court appearances. On several occasions, Sackworth spoke to persons either in front of store or in rear.

2:45 p.m. John Antessi, known to this department as a cigarette smuggler, entered premises, went immediately into rear of premises, and spoke to Sackworth. Sackworth made two telephone calls. After the second, he pointed toward the front door and Antessi appeared to nod. Both individuals then moved into the corner of the rear room out of sight of the undersigned.

3:10 p.m. Antessi left premises and walked north on Barley.

3:15 p.m. Landock, Arnold Paslick (mob lawyer) and Sackworth met in rear of premises.

3:30 p.m. Sackworth left premises and entered a cab.

3:40 p.m. Anthony Trebort entered premises, spoke to Landock for several seconds and left. Undersigned trailed Trebort to 143 Avenue A (North Side) and maintained surveillance at that location.

4:15 p.m. DeNoto, Cullone and male, white, 5'9"-5'10" (could be male #1 2/26/75 at 1:17 p.m.) left premises and entered red convertible Cadillac known to be used by DeNoto. Officer followed Cadillac to

Panko Diner, Fort Lee, N.J. and observed three subjects enter diner. Undersigned entered diner and took a seat at the counter. Officer was able to see 3 subjects at table with 2 males (male A--40's, 5'11", 180 lbs, red hair, beard), (male B--6'2", 220 lbs, 35-40, dark curly hair). Male B tentatively identified as Jack Kusac known to DAOS as stick-up man.

6:20 p.m. Males A & B left premises and entered tan, Mercury sedan, license N.Y. 833-6MB registered to Marion Kusac 82-24 192nd St., Queens, N.Y.

6:30 p.m. Undersigned returned to office.

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COMPLAINT FOLLOW-UP
PD 313-081 (REV. 9-74)
(FORMERLY PD 51)

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DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 *	19 PCT	22 COMPLAINT NO
3/13/75					

PREVIOUS CLASSIFICATION	38 *	41 *	42 PCT. OF ARR	45 ARREST NOS

CLASSIFICATION CHANGED TO	50 *	52 *	53 *	54 *

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 *

REFERRAL CHANGE FROM _____ TO _____

CASE STATUS:

☒ ACTIVE ☐ CLOSED ☐ UNFOUNDED

ALARM NO DATE TRANSMITTED

Detective Douglas Korol
OFFICER'S NAME (Printed) RANK, FIRST, LAST COM'D.

TAX REG. NO.

DO NOT ENTER PROPERTY PREVIOUSLY REPORTED

60 TYPE OF PROPERTY	62 VALUE STOLEN	68 VALUE RECOVERED
01 Motor Veh stolen or recov		
02 Motor Veh recov by other authority		
04 CURRENCY		
05 JEWELRY		
06 FURS—CLOTHING		
07 FIREARMS		
08 OFFICE EQUIPMENT		
09 T.V. RADIO, CAMERAS ETC.		
10 HOUSEHOLD GOODS		
11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

Received arrest records for Jack Kusac B#783-197; John Antessi B#691-625.

Intelligence Unit advises that Jack Kusac t/n, John Kusac, was target of numerous investigations by N.Y.P.D. Informants indicate that Kusac is a truck hijacker who threatens victim's family with bodily harm if victim describes Kusac or testifies against him. Kusac is known as a "psycho."

-no known address
-separated from Marion Kusac 81-24 192nd St., Queens, N.Y.

Telephone Company check indicates J. T. Landock, Bailbonds, 283 Barley St., N.Y.C. has two telephones:

#1 - 725-9818 (two extensions-in front and rear)
#2 - 725-9819 (in front)

Date of installation-2/15/69

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COMPLAINT FOLLOW-UP
PD 313-151 (REV. 9-74)
(FORMERLY PD 51)

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Complaint File No.

DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 ★	19 PCT	22 COMPLAINT NO
3/14/75					

PREVIOUS CLASSIFICATION	38 ★	41 ★	42 PCT. OF ARR	45 ARREST NOS

CLASSIFICATION CHANGED TO	50 ★	52 ★	53 ★	54 ★

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 ★

REFERRAL CHANGE FROM _____ TO _____

CASE STATUS:

[X] ACTIVE [ ] CLOSED [ ] UNFOUNDED

ALARM NO DATE TRANSMITTED

OFFICER'S NAME (Printed) RANK, FIRST, LAST COM'D.

Detective Douglas Korol

TAX REG. NO.

DO NOT ENTER PROPERTY PREVIOUSLY REPORTED

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01 Motor Veh. stolen or recov.		
02 Motor Veh. recd. by other author.		
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05 JEWELRY		
06 FURS—CLOTHING		
07 FIREARMS		
08 OFFICE EQUIPMENT		
09 T.V. RADIO, CAMERAS ETC.		
10 HOUSEHOLD GOODS		
11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

9:00 p.m. Placed premises 283 Barley St. under observation--premises closed at this time.

9:15 p.m. Sackworth opened premises and sat in front part of store.

9:30-10:30 p.m. Sackworth made and received numerous telephone calls.

10:45 p.m. Green Ford sedan license #YVB-386 with two men inside parked on east side of Barley St. (registration-no hit) [note: appears to be same vehicle parked on street 3/11/75].

10:50 p.m. J.T. Landock entered premises.

11:00-2:00 p.m. Numerous individuals entered and exited premises.

2:15 p.m. Sackworth exited premises and entered taxi. Green Ford sedan followed taxi.

2:45 p.m. Officers returned to 143 Avenue A.

3:20 p.m. DeNoto, Cullone and Trebort exit North Side and enter blue station wagon registered to Trebort. Vehicle turned left on one-way street through red light and disappeared. Search of area failed to reveal whereabouts of vehicle.

6:15 p.m. Vehicle driven by Cullone returned to North Side. DeNoto and Cullone left vehicle and entered premises.

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COMPLAINT FOLLOW-UP

PD 313-151 (REV 9-74)
(FORMERLY PD 51)

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Complaint File No.

DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 *	19 PCT	22 COMPLAINT NO	EAR
3/16/75						

PREVIOUS CLASSIFICATION	38 *	41 *	42 PCT OF ARR	45 ARREST NOS

CLASSIFICATION CHANGED TO	50 *	52 *	53 *	54 *

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 *

REFERRAL CHANGE FROM _____ TO _____

CASE STATUS:

[xx] ACTIVE [ ] CLOSED [ ] UNFOUNDED

ALARM NO DATE TRANSMITTED

OFFICER'S NAME (Printed) RANK, FIRST, LAST COM'D.

Detective Douglas Korol

TAX REG. NO.

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04 CURRENCY		
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06 FURS—CLOTHING		
07 FIREARMS		
08 OFFICE EQUIPMENT		
09 T.V. RADIO, CAMERAS ETC.		
10 HOUSEHOLD GOODS		
11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

Advised by technical liason and assistance office that green Ford sedan license #4VB-386 is used by F.B.I.--instructed to call S.A. Horace J. Clearwater who has been notified of P.D.'s interest in vehicle.

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COMPLAINT FOLLOW-UP

3137/91 (REV. 9-74)
PREVIOUSLY CD 51

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Complaint File No.

DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 *	19 PCT	22 COMPLAINT NO
3/16/75					

PREVIOUS CLASSIFICATION	38 *	41 *	42 PCT OF ARR	45 ARREST NOS

CLASSIFICATION CHANGED TO	50 *	52 *	53 *	54 *

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 *

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10 HOUSEHOLD GOODS		
11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

OFFICER'S NAME (Printed) RANK, FIRST, LAST COM'D.

Sargeant Lawrence Nagel

TAX REG. NO.

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

Contacted S. A. Horace J. Clearwater, F.B.I. who advised that 283 Barley Street is subject premises of investigation into untaxed cigarettes. According to Clearwater, FBI has informant information that tractor-trailers of cigarettes are coming from N. Carolina and are being disposed of by master fence (unnamed) who uses Sackworth to sell large amounts of the goods. Note: I got the impression that the informant is part of the operation, but Clearwater would not affirm nor deny. Clearwater did say, however, that the informant knows that Sackworth uses the phone to contact outlets.

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

3/16/75

Dear Sargeant Nagel:

This is to confirm our conversation of today regarding information received from a confidential source. Please be advised that said source is an individual who has regularly supplied valuable information to the Federal Bureau of Investigation in the past. He has been assured that his identity would not be divulged to any other authority without his specific permission.

The individual has insisted that the agreement remain intact. Therefore we will be unable to supply you with the information you have asked for. Moreover, in response to your intimations during our conversation, as you know, it is the policy of the Bureau to refrain from promising anybody immunity from prosecution or to allow anyone to engage in illegal activity.

As a matter of courtesy, however, we would formally request that you continue with your investigation, you advise us of any developments so that we do not act at cross-purposes.

Sincerely,

S. A. Horace J. Clearwater, III

DOB 1/17/40

Thomas DeNoto aka Tommy	DOB 1/17/40	B# 283-187	
Thomas DeNoto	2/15/58	Dis Con	dism.
Thomas DeNoto	9/7/60	Weapon Usurious Loan Records	$1,000
Tommy Dennis	4/18/65	Armed Robbery	7 yr.
Tommy DeNoto	5/15/70	CPSP	dism.

Ricardo Barcelona	DOB 6/12/28	B# 274-189	
Ricardo Barcelona	12/15/63 143 Ave A	Dis Con.	dism.
Rick Barcelono	2/7/64 143 Ave A	Dis Con.	$50/5 days

Rosemary Field		DOB 8/22/46	B# 892-292
Rosemary Field	FBI 9/22/72	Consp. Import Narco. (maraj.)	2 yr.

Jack Kusac	B#783-197	DOB 9/15/39	
Jack Kusac	12/13/60	armed robbery	plea to petty larceny
Jack Kusac	2/2/61	burglary	dismissed
Jack Kusac	2/9/72	robbery, kidnapping	dismissed

John Antessi	B#691-625	DOB 6/28/24	
John Antessi	2/3/59	bookmaking	$50/5 days
John Antessi	8/1/64	dis con	unconditional discharge
John Antessi	9/3/69	possession untaxed cigarettes	$250/30 days
John Antessi	3/4/73	conspiracy	acquitted

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DATE OF THIS REPORT	UNIT REPORTING	CASE NO	18 *	19 PCT	22 COMPLAINT NO
3/19/75					

PREVIOUS CLASSIFICATION	39 *	41 *	42 PCT OF ARR	45 ARREST NOS

CLASSIFICATION CHANGED TO	50 *	52 *	53 *	54 *

55 CLOSE	56 PREV. CLOSE	57 RE-OPEN	58 *

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CASE STATUS:

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ALARM NO DATE TRANSMITTED

OFFICER'S NAME (Printed) RANK, FIRST, LAST COM'D.

P.O. Lawrence Marshall

TAX REG. NO.

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60 TYPE OF PROPERTY	62 VALUE STOLEN	68 VALUE RECOVERED
01 Motor Veh stolen or recov		
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04 CURRENCY		
05 JEWELRY		
06 FURS—CLOTHING		
07 FIREARMS		
08 OFFICE EQUIPMENT		
09 T.V. RADIO, CAMERAS ETC.		
10 HOUSEHOLD GOODS		
11 CONSUMABLE GOODS		
12 LIVESTOCK		
13 MISCELLANEOUS		

DETAILS AS REPORTED BY FOLLOW - UP INVESTIGATING OFFICER

Defendant: Albert Sackworth
P/O 283 Barley Street Time: 18:10 hours
A/O Marshall 3 DD Burglary

Arrest of def. at T/P/O as a result of execution of S.W. #75/108 issued by Judge Cozzis, New York Criminal Court. Assigned officers entered premises and observed defendant in possession of two cartons which contained 96 watches (Bulova-Series E) vouchered under 3 DD/ Burg/ 1804 M.

After being adivsed of rights, def. stated "That's the last time I'll use this place, it's too hot."

Complainant Mr. Ernest Seales, Bulova Watch Co., states that Bulova is the owner of said watches and that the def. did not have permission to possess same.

OPTIONAL (see p. 126)

WORKSHOP #1

Teacher's guide

WORKSHOP #1: Electronic Surveillance - Decision to Employ

Premise: The student is a prosecutor in an organized crime unit. Sgt. Nagel and Det. Koral present him with the observation-intelligence report package, and they indicate to him that they require his help in pursuing the investigation.

The assistant prosecutors may ask questions of Nagel and Koral. Indeed, they should be encouraged to question the detectives as part of the simulation. The workshop leader should answer these questions for purposes of workshop in anyway he chooses, as long as there is no conflict with the materials to follow.

Problem: 1) Determine what the investigative plan should be;

2) If electronic eavesdropping is appropriate, of what type and where.

Guide:

I. The Observation and Intelligence Reports

A. What criminal activity is described?

B. What is the part that each of the named parties plays in this activity?

1. Role in organized crime family[§23-26 of the Overview]

2. Role in theft and fencing operation [you may want to consider using a chart]

C. What are the aims and priorities of the investigation?

1. Intelligence

2. Incarceration of organized crime personnel

I. C. 3. Relieve immediate problem of known hijackers

- physical danger

- economic loss

4. Reduction of economic impact of theft and fencing as a whole--¶2-6 of the Overview

5. Secure evidence against other hijackers who pose danger

D. Would the continued use of conventional means of investigation succeed in achieving those aims?--¶38 of the Overview

1. Physical surveillance

a. experience to date

b. driving tactics

c. wariness [observation of surveillance truck]

d. inability to watch all trucks

e. do not know where Kusac lives

2. Undercover officer

a. traditional organized crime problem

b. experience of Det. Ogalt on 2/26

3. Informants

a. Fields is scared and will not testify

b. Dooley's informant?

c. F.B.I.'s letter

4. Witnesses

a. victims are threatened

b. purchasers of stolen merchandise will not come forward

c. none others

I. D. 5. Search warrants--¶32 of the Overview

a. no indication of where stolen property located

b. problem proving knowledge even if located--¶38 of Overview

6. Grand jury and compulsion of testimony

a. insufficient information with which to effectively question

b. roles are not known - problem of who should be granted immunity--¶39-40, 45 of the Overview

c. corroboration requirement if accomplice--¶31, 40-43 of the Overview

II. Electronic Surveillance

A. Is it suitable?

1. Conventional means have not and could not succeed --¶38 of the Overview ["most courts, . . ., require little more than a showing by the applicant that other investigative techniques are infeasible." Cornell Institute on Organized Crime, Techniques in the Investigation and Prosecution of Organized Crime, Tab Q ¶28 (1976).]

2. Criminal activity is of serious nature and poses a threat to community

3. Use of telephones and oral conversations

a. sufficient for requirements of statute

b. would, in fact, produce evidence and investigatory leads

4. Probable cause requirements [here explicitly save details for next workshop]

5. Matters which cannot be answered from observations report

a. manpower - quantity and quality

b. money resources - equipment

CONTINUED

1 OF 2

II. B. If yes, what location and type?

1. Vehicle, Northside Eatery, Bailbond's office - [phone tap, bug]

2. Tactical considerations

   a. obtain evidence

   b. leads to higher ups

      (1) organized crime

      (2) theft and fencing operation

   c. dangerous persons

   d. recovery of stolen property

   e. leads to other investigations - aid other jurisdictions

   f. economic impact

   g. symbolic impact

3. Legal and practical considerations

   a. firmest probable cause

   b. fewest "fruit" problems

   c. other legal problems - available alternative means (e.g., federal investigation)

   d. installation

   e. minimization

      (1) intrinsic-extrinsic

      (2) privilege

      (3) control over eavesdropped location and phones

      (4) vehicle could require multi-jurisdictional orders

Guide:

III. Since the following installments of the problem assume that the prosecutor will seek a luncheonette tap, the optional report of 3/19/75 must be disclosed if the workshop decides that the Landock office should be the focus of electronic surveillance.

Commentary on B

A tap at the eatery seems to be a likely choice, but alternatives should be explored. While the use of vehicle bugs can be quite productive, it does not appear to be a viable option in this investigation. As a practical matter, the only real alternative is a bug or tap in the rear room of the Bailbond's office.

The location appears to be quite attractive. Sackworth deals not only with outlets, but with master fences and a host of hijackers. He apparently uses both the telephone and speaks personally to others in his cubbyhole in the rear of the Bailbond's office. The following questions about the location should be explored:

1. Would a tap or bug lead to higher ups in the organized crime family?
2. Would it necessarily lead to the dangerous individuals executing the hijackings or only their bosses? Which is more important?
3. Does the Federal informant constitute an alternative means of investigation?
4. What are the consequences of working with the F.B.I. and possibly its informant at this stage?

5. What type of minimization problems are involved with lawyers constantly in the location? Are there advantages?
6. What about the "Sackworth phone" having an extension in the "Landock" part of the office?
7. Are there "fruit" problems with use of immunized testimony (see observation report 3/8/75)?
8. Should the use of electronic surveillance at both locations be employed?

WORKSHOP #2

ELECTRONIC SURVEILLANCE - DRAFTING OF ORDER

Suggested Time: 1 1/2 hours

WORKSHOP #2

Proposed Affidavit for Eavesdropping Warrant

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the interception of certain wire communications transmitted over telephone line and instrument assigned number 293-0825 located in the North Side Eatery, 143 Avenue A, New York New York.	AFFIDAVIT IN SUPPORT OF APPLICATION FOR EAVESDROPPING WARRANT

STATE OF NEW YORK]
] ss.:
COUNTY OF NEW YORK]

_____, being duly sworn, deposes and says:

1) I am an Assistant District Attorney for the County of New York assigned to the Rackets Bureau, the principle functions of which are the investigation and prosecution of cases involving organized crime, official corruption and labor racketeering.

2) This affidavit is submitted in support of an application for an eavesdropping warrant.

3) I am currently conducting an investigation into the activities of several persons including Thomas DeNoto, Anthony Trebort, James Cullone and Ricardo Barcelona, who, there is probable cause to believe, are conducting a theft and fencing operation in violation of the Penal Law of the State of New York using the above captioned premises and telephone.

4) In February of 1975, Detective Douglas Koral conducted an interview of an individual who will hereafter be referred to as Informant. Informant advised that Thomas DeNoto had hijacked trucks containing perfume, televisions and liquor. According to Informant, DeNoto frequents the luncheonette at Avenue A and 4th Street with his partners, "Big Jimmy" and "Tony Treyber" (ph). Informant states that she has met the former, described as 35 - 40 years old, 6'2", heavy, dark hair. According to Informant, DeNoto is with "Busty." The luncheonette telephone number is 293-0825.

5) According to the intelligence division of the New York City Police Department, "Busty" is Charles Bustamonte, the leader of one of New York's crime families. According to the records of the Division, Thomas DeNoto, B#283-187 has a criminal relationship with Ricardo Barcelona B#274-189, a lieutenant in the Bustamonte crime family.

6) From the end of February to the middle of March 1975, members of the DAOS of the NYCPD maintained surveillance over DeNoto and others who frequented the North Side Eatery. The observations fully corroborate Informant's information and provide probable cause to believe the subjects of the investigation are using the telephone located therein and are conducting their illegal stolen property business.

a. 2/25/75, 3:30 p.m. DeNoto used telephone in front of the eatery and spoke for two or three minutes.

4:15 p.m. DeNoto went to the car driven by Anthony Trebort, and looked in the back seat. Observation disclosed that a carton was located therein.

4:22 p.m. DeNoto made a call from the above telephone.

b. 2/27/75, 1:00 a.m. DeNoto made a telephone call from premises.

c. 3/01/75, 2:30 p.m. James Cullone used the above telephone.

3:00 p.m. James Cullone spoke to a driver in a van and the following conversation ensued:

Driver: If you don't want it, somebody else will.

Cullone: Tommy says the stuff's no good--call when it's something worth our while.

d. 3/04/75, 5:00 p.m. James Cullone stated to Anthony Trebort, "Even with the fifteen hundred, the f--- bartenders will still water down the drinks. --- the b---. (Note: A Jones and Jones liquor truck containing 1,500 cases of liquor was hijacked at 3:10 p.m. at W. 40th St. on said day).

e. 3/10/75, 1:15 p.m. Cullone and DeNoto used the above telephone. Both of them approached a vehicle and DeNoto stated to Cullone, "He can't have it until I tell you. On this deal I got to speak to Uncle Ricky first."

1:20 p.m. DeNoto made a call using the above telephone.

7) It is clear from the above observations and Informant information that there is probable cause to believe that the persons named in paragraph 3, supra are engaged in a theft and fencing operation and that the above captioned telephone is commonly used by said persons.

8) Conventional means of investigation are inadequate to secure evidence necessary to successfully prosecute the subjects of this investigation. Proving crimes against thieves and fences is difficult since it is almost impossible to

establish that the defendant knew that the property in his possession was, in fact, stolen. I am informed by the police officers assigned to this case that persons engaged in theft and fencing operations must use the telephone to conduct their illegal business.

9) Wherefore, I respectfully request that the annexed eavesdropping warrant be issued by this Court.

10) Said eavesdropping warrant is specifically limited to the conversations of the persons named herein regarding the crimes set forth in ¶3, supra.

11) The kind of criminal activity being investigated is such that more than one conversation is required to be intercepted. It is thus further requested that the authorization not automatically terminate upon the interception of the first conversation.

_____

ADA

WORKSHOP #2

Teacher's Guide

WORKSHOP #2: Electronic Surveillance - Drafting of Order

Premise: At the conclusion of the first workshop, you have decided to apply for authorization to intercept telephonic communications at the Northside Eatery. A law school student working in the office has been assigned the job of drafting an affidavit in support of that application. He has been given a copy of your state wiretap statute (here you may assume it is modeled on Title III, and it has as "designated crimes" all "felonies dangerous to live, limb and property"), and the observation and intelligence reports. He produces the second hand-out.

Problem: What, if any, change would you make? [An alternative method of conducting this exercise would be to have each participant draft his own affidavit to be criticized by the others. This would, of course, require a substantial commitment of time.]

Guide:

I. Decide who should be designated as named parties.

It seems clear that there is probable cause to believe that DeNoto and Cullone are using the telephone at the Eatery to conduct a theft and fencing operation. There does not, however, appear to be probable cause as to Barcelona, Bustamonte, Kusac, or Sackworth. Trebort is more troublesome; he used the telephone only once (3/26), and he is not the subject of any overheard conversation. It is true that

Cullone spoke to him about 1500 cases of liquor, but he could be merely a confidante. The informant does not place him squarely in the operation. (Note here the discrepency in pronounciation of name: Trā-bĕr v. Trē-bört). There is, of course, also a staleness problem.

The recommended procedure would be to refrain from naming Trebort as a person whose conversations are sought to be intercepted, but to bring his name to the attention of the issuing judge as "a person as yet unknown" i.e., as to whom there is no probable cause but whose conversations might be intercepted. In addition, ask the judge for any special minimization instructions. This would give Trebort all the benefits of being named, but you would not run a "probable cause" risk. See U.S. v. Bernstein, 509 F.2d 996 (4th Cir. 1975), judgment vacated, 20C-L 4169.

The Supreme Court has recently had occasion to ride on this point, but unfortunately it did so in language that fails to resolve the issue:

> . . . a wiretap application must name an individual if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone.

United States v. Donovan, 20 Crim. L. Reptr., 3043 (Jan. 9, 1977).

II. Analyze the draft affidavit paragraph by paragraph. [For a more thorough discussion of the topics analyzed below, see Cornell Institute on Organized Crime, Techniques in the Investigation and Prosecution of Organized Crime, Tab Q ¶15-32 (1976).

II. A. Caption: the phrase "presently assigned number" is suggested because the telephone number could be changed without the officers knowing it, and although the lines and instrument might be the same, the warrant may technically be invalid.

B. ¶1 and ¶2: no problem.

C. ¶3: This paragraph could be treated in one of two ways.

1. As a scope of investigation paragraph

In this case all parties who are designated, targeted or connected to the investigation could be named, their backgrounds disclosed, and their probable roles analyzed. The notion of probable cause would have to be excluded at this point.

Advantages

a. the affidavit is more understandable

b. the Judge is advised of the probable targets

c. the importance of the investigation and of the targets are emphasized

Disadvantages

d. the document will almost definitely become a public record. If for some reason the investigation is aborted, the subjects will become aware of the extent of your understanding of their operation.

e. the Judge may view the application as a subtrafuge to get at persons unconnected with the immediate criminal activity (a fishing expedition)

2. As a probable cause paragraph

If this alternative is chosen, the assistant can set out early in the application, the named parties and the designated offenses. The reader is then in a position to evaluate each piece of evidence knowing against whom it is being applied.

Both types of paragraphs can be used in the affidavit. Paragraph 3 in the draft confuses the two notions.

II. D. ¶4 Informant information

1. Informant

   a. don't use needless information that would tend to identify informant--"perfume"

   b. don't use pronouns--"she"

   c. indicate why informant is not named--fear and threats

2. Reliability of informant--corroboration, if any

   a. Big Jimmy fits description of Cullone

   b. lack of promises made at time information was given

   c. telephone number of Eatery and location are verified

   d. admissions against interest--(Crim. Poss. of Stolen Prop.)

3. Source of knowledge

   a. first hand--spoken to DeNoto
   --used phone at Eatery
   --met Jimmy

4. Time information received--must disclose--but approximate in way which does not reveal identity

The problem with ¶4 is that maximum use of the informant, discounted by need to maintain anonymity, was not achieved.

In using informant information in affidavits the following format is suggested:

1. Give the facts
2. Describe the informant's reliability
3. Note how and when the informant obtained information
4. Offer to disclose the informant's identity to the issuing judge in a separate, sealed confidential affidavit, if necessary

II. E. ¶5 Identification of individuals named by informant--use of intelligence division information

1. Much of this information could have been used in ¶3, if the "scope of investigation" option was chosen

2. The identification of "Busty" could be bolstered by the New York Journal article [cf. United States v. Harris, 403 U.S. 573 (1971) (reputation evidence)]

3. Criminal arrest records of the targets can also be attached as exhibits or at least described in a footnote

4. The "criminal relationship" between DeNoto and Barcelona is apparently based on the intelligence division's report noted on 2/14. The 1967 information most likely comes from a pre-Title III wiretap and is therefore, potentially tainted. That information, if inquiry into its source does not lead to a contrary conclusion. should not be used. Mention of the possible eavesdropping and of the fact that no use was made of it should be noted in the affidavit, infra ¶17.

5. The fact that this same location was used and frequented by Bustamonte in the past is noteworthy and should be mentioned

6. Verification of the telephone numbers by the business records of the Telephone Company should be set out

F. ¶6 Physical Surveillance

1. Officers involved

2. Basis of identification

3. Demonstration that subjects use telephones "to conduct"

4. Observation reports

a. should be described in detail

b. quote language to avoid charge of misleading

c. can attach all non-sensitive reports as an appendix (apparently all in this case)

II. F. 5. Expert testimony

a. describe qualifications of agent/officer

b. have him describe theft and fencing operation

c. quote from recognized sources (CIOC materials)

6. Significance of observation

a. explain in detail

b. relate to expert testimony regarding method of operation

7. Make reasonable deductions from observations

a. 1st driver did not have license--Kusac threatens families and therefore would keep license as permanent record of driver's home address

b. discussion about cases of liquor were overheard at 5:00--driver was not released until 5:10

8. Use of telephone

a. document repeated use of telephone by targets

b. tie use to criminal activity (e.g., 3/10 at 1:15 and 1:30)

c. note complete dominion and control over use thereof (e.g., [1] report of Det. Ogalt, [2] ob. report 2/26, 1:00 a.m.)

G. ¶17 Conclusory paragraph as to probable cause

1. Designate named parties and "others as yet unknown" U.S. v. Kahn, 415 U.S. 143 (1974).

2. Specify designated offenses

3. State that named parties are using captioned telephone to commit designated offenses

H. ¶8 Conventional means

1. Use analysis of Workshop I

2. Relate specifically to this investigation [United States v. Kalustian, 529 F.2d. 585 (9th Cir. 1975).]

II. H. 3. Enumerate and demonstrate exhaustion of conventional means

I. ¶9 No problem

J. ¶10 Identification of communications sought

1. Limit to persons and crimes in ¶7, supra

2. Note identities of others who may be overhear but as now constitute some of the "persons as yet unknown" (e.g., Trebort) (U.S. v. Donovan, supra, p. 139)

3. Describe conversations in general sense, e.g., conversations re:

a. planning of hijackings

b. obtaining weapons

c. storage of stolen property

d. disposition of property

e. meeting between conspirators

f. payment of moneys

g. distribution of proceeds

K. ¶11 Length of time required

1. Describe need for more than single conversation

2. Indicate need for,and specify maximum time; 30 days or less

3. Relate to expert testimony

L. ¶12 Hours - note use of telephone by DeNoto at 1:00 a.m. on 2/26.

M. ¶13 Statement that conversations sought are not privileged

N. ¶14 Statement indicating who will maintain custody of tapes, where they will be maintained, and the fact that they will be sealed immediately upon expiration of the tap

II. O. ¶15 Statement that order will be executed in a manner designed to minimize the interception of non-specific or privileged conversations

P. ¶16 Indicate at what intervals progress reports will be made to issuing judge

Q. ¶17 Note any previous eavesdropping conducted on subjects of investigation - indicate 1967 conversation in report of 2/14/75

WORKSHOP #3

ELECTRONIC SURVEILLANCE - EXECUTION

Suggested Time: 1 1/2 hours

WORKSHOP #3

Execution Instructions, Daily Plant Reports,

and Transcripts

EXECUTION OF ELECTRONIC EAVESDROPPING ORDERS
OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF NEW YORK

> "... a court should not admit evidence defived from an electronic surveillance order unless, after reviewing the monitoring log and hearing the testimony of the monitoring agents, it is left with the conviction that on the whole the agents have shown high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion."
>
> U.S. v Tortorello

Introduction

Before conducting any electronic surveillance read the authorizing Order and Supporting Affidavits especially noting the designated crimes and subjects.

The goal is to execute the Order, recording those conversations which are designated, and minimizing the interception of non-relevant or privileged communications.

No machine is to be left unattended on automatic. "Minimization" requires the police officer to determine whether or not each conversation is relevant and subject to interception.

Anytime a conversation or any part thereof is monitored it is to be recorded. If the machine has a separate monitor switch, such switch is not to be activated unless the machine is recording. However, if the machine malfunctions, or a tape has just run out,

monitoring is permissible, while the situation is being remedied.

Procedure

Listen to the beginning of each conversation only so long as is necessary to determine the parties thereto and the subjects thereof.

1. If the parties and subjects are covered by the Order, continue to listen and record as long as the conversation remains pertinent.

2. If either the parties or subjects are not covered by the Order, turn off the machine. Check periodically by activating the monitor and record switches to determine if the parties or subjects have changed and fall within category #1 above. Note the length of time occuring between the periodic checks, and the time of each check.

3. If the conversation does not fall within category #1, but it is apparent at the outset that a crime is being discussed, record the conversation insofar as it is pertinent to said crime, Immediately notify the supervising A.D.A. of the conversation for instructions.

Generally, the Order will authorize the interception of conversations of certain named persons, as well as the agents, co-conspirators, and accomplices. If a named person is a participant in the conversation, the statements of the other participants may be intercepted if pertinent to the investigation specified in the Order.

In determining the relevancy of the conversation, the executing officers may take into account the coded, guarded and

cryptic manner in which persons engaged in criminal activity often converse. It is therefore imperative that the officers be familiar with the background of the investigation and the conversations already intercepted in order to properly evaluate the meaning of the language used by the subjects.

Conversations between a husband and wife, doctor and patient, attorney and client, and an individual and member of the clergy are privileged and are not to be intercepted and recorded. Such conversations lose the privileged status when the participants are co-conspirators in the criminal activity which is the subject of the conversation, but such decision must be made by the supervising A.D.A.

Daily Plant Report

Abstracts of each conversation are to be made at the time of interception and are to be included in the DPR (see sample attached). If the conversation was not entirely recorded, an appropriate notation should be made as to why not (e.g. non-pertinent, privileged). Where the exact words used by the participants are important, that portion of the conversation should be transcribed verbatim. The original of the DPR should be delivered to the supervising A.D.A. at the beginning of the following day.

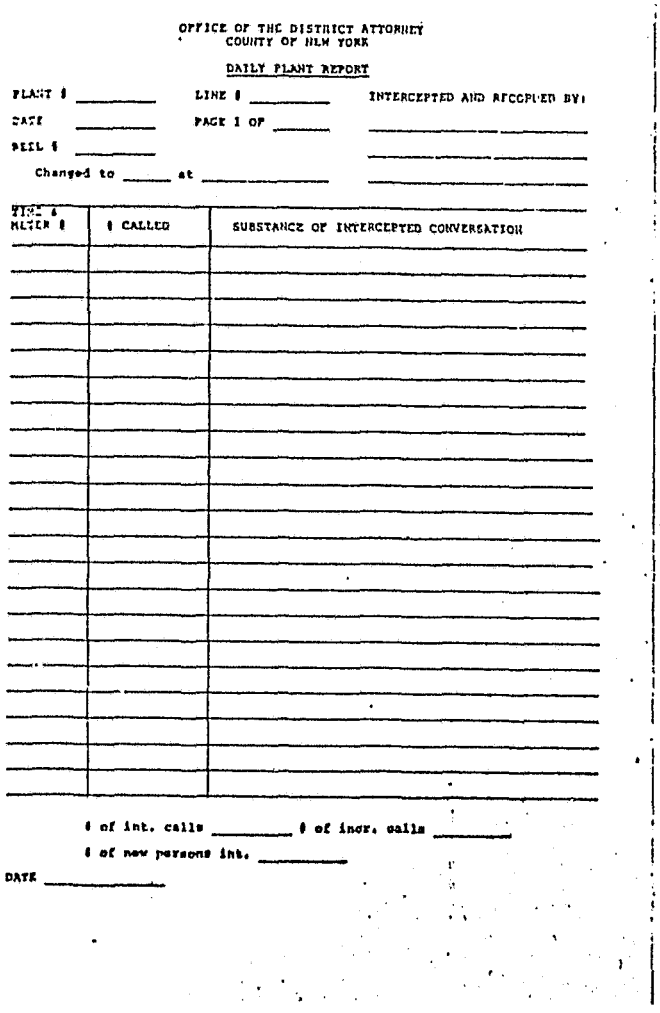
Observation Reports

Electronic surveillance is used as the last resort in any investigation. Conventional means of investigation are preferred and in any event should be used in conjunction with court ordered electronic surveillance. Whenever meaningful observations are feasible,

they should be made and should be recorded on OR's, the originals of which should be submitted with the DPR's.

Reels

The intercepted conversations are to be recorded on pre-numbered Investigation Bureau reels. After each reel has been completed, it is to be rerecorded, and the original is to be returned to the Investigation Bureau vault. Under no circumstances should any portion of any tape be erased.



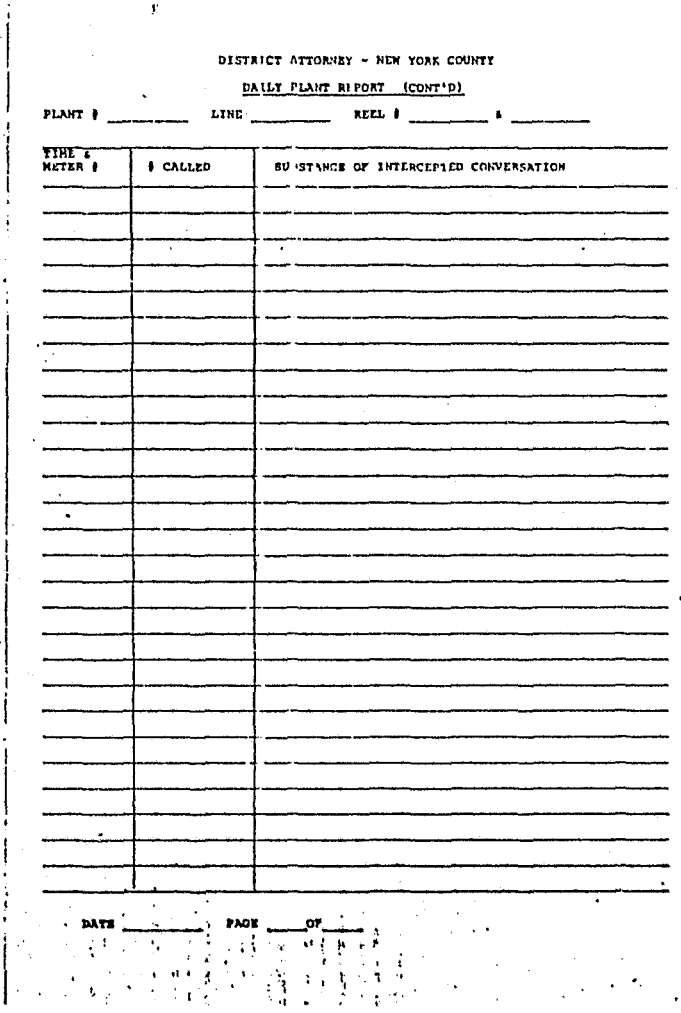
OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF NEW YORK

DAILY PLANT REPORT

PLANT # _____ LINE # _____ INTERCEPTED AND RECORDED BY:
DATE _____ PAGE 1 OF _____
REEL # _____
Changed to _____ at _____

TIME & METER #	# CALLED	SUBSTANCE OF INTERCEPTED CONVERSATION

# of int. calls _____ # of incr. calls _____
# of new persons int. _____
DATE _____



DISTRICT ATTORNEY - NEW YORK COUNTY

DAILY PLANT REPORT (CONT'D)

PLANT # _____ LINE _____ REEL # _____ & _____

TIME & METER #	# CALLED	SUBSTANCE OF INTERCEPTED CONVERSATION

DATE _____ PAGE ____ OF ____

OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF NEW YORK

DAILY PLANT REPORT

PLANT # 75/8 LINE # _____ INTERCEPTED AND RECORDED BY:

DATE 3/26/75 PAGE 1 OF 3 Det. Korol

REEL # A1403 Det. McCongee

Changed to _____ at _____

TIME & METER #	# CALLED	SUBSTANCE OF INTERCEPTED CONVERSATION
12:15	230-6700	male (in) to female (out); partial recording N/P
1:00	Incoming	male(out) to Trebort(in). Male asks Trebort if anyone called. Trebort says "no." Male #2 gets on phone and male #1 asks if they can get together that night. Male #2 says that he has something going that looks good and if it comes through he can't make it. Male #1 wishes #2 good luck.
1:30	Incoming	Jack(out) to DeNoto(in)--Jack says that he might have something in a few hours and he needs two guys to drive. Jack tells DeNoto to hold on, he has to to check in the other room. (DeNoto off phone, calls Trebort and has 1-1/2 minute conversation re:"tonight". DeNoto asks Jack if he's set with everything else. Jack says he will call back later--he needs 2 guys to drive only, everything else is ready and if its not today, it will be tomorrow. DeNoto asks if the girls are big or small. Jack doesn't know yet but will know one way or the other when he calls back in an hour or so. DeNoto may be out.
1:35	514-2681	Male #2, (1:00 call)(in) to female (out) social conversation.
1:42	809-8080	DeNoto(in) to female(out)(may be Tommy's wife).

# of int. calls _____ # of incr. calls _____

# of new persons int. 109

DISTRICT ATTORNEY - NEW YORK COUNTY

DAILY PLANT REPORT (CONT'D)

PLANT # 75/8 LINE _____ REEL # A1403 & _____

TIME & METER #	# CALLED	SUBSTANCE OF INTERCEPTED CONVERSATION
1:42(cont)		DeNoto asks how things are at work. Female
		calls him Honey and says o.k. DeNoto says he may
		be busy tonight but will have something nice
		for tomorrow for her. DeNoto is leaving club
		for a couple of hours.
3:18	incoming	Jack(out)(see 1:30 conv.) to Al(in)--Jack asks for
		"my man" and is told he is out. Conv. re: Miami va-
		cation and Joey who is at Deauville/ --machine
		off for 10 seconds--N/P--machine off 10 seconds.
		Jack says "they're small broads who like to stay
		inside on dates, you'll like them."--discuss Al's
		relative who knows a lot of good lawyers. Jack
		says that all lawyers are shysters and they'll take
		everything you got "we do the work for them." Jack
		will call back later, or will call other place.
		(NOTE: Bad connection--hard to tell voices).
3:34	411 (Informa)	Rosie's Bar on Avenue C: 470-2121
4:15	Incoming	DeNoto to Trebort--any messages--Trebort says
		Jack called and Al took message.
5:52	Incoming	Unknown male(out) to male(in) asks for Tommy.
		Male (in) tells Tommy its your mouthpiece.
		Tommy DeNoto says "hey buddy, what's happening?"
		Male (out) asks if DeNoto knows where he can get 50%
		airline tickets, he and his wife want to go to
		Rome. DeNoto tells male to call his friend
		Freddy at 203/840-1011 and say that he (male)
		got the number from T.D. DeNoto (laughing) says
		don't go yet, I may need you soon.

DISTRICT ATTORNEY - NEW YORK COUNTY

DAILY PLANT REPORT (CONT'D)

PLANT # 75/8 LINE _____ REEL # _____ & _____

TIME & METER #	# CALLED	SUBSTANCE OF INTERCEPTED CONVERSATION
8:20	414-3891	Female (in) (may be girl who works at counter) to male (out). Bunny says that she's short, can male help her out. Male asks where she stands now and Bunny says that she's down from $500 to $150. Male says o.k., this time at three points. I'll call you there tomorrow.
10:15	718-5296	DeNoto (in) to Uncle Rick (out). "No problems"-- they then speak in Italian for about four minutes.

TELETYPE MESSAGE - 2300 hours 26 March 1975

Unusual occurrence 26 March 1975
2100 hours-Theft of truck and contents [500 remote control Zenith black and white television sets: set #18W5469A-18WW5968A].
Value of contents - $100,000. P/O-N.Y. side Lincoln Tunnel
Victim/Driver-Carl Salamandi, Herkimer, California
Truck belongs to Cal-Cross Country (CCC) Trucking, Ossina, California. UF61 #12-2099 Det. Russ for description of perp.

OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF NEW YORK

DAILY PLANT REPORT

PLANT # 75/8 LINE # _____ INTERCEPTED AND RECORDED BY:

DATE 3/27/75 PAGE 1 OF 1 Det. Korol

REEL # A1403 Det. McCongee

Changed to _____ at _____

TIME & METER #	# CALLED	SUBSTANCE OF INTERCEPTED CONVERSATION
12:15	Outgoing	Tony Trebort(in) to female(out). T.T. states that it was rough the night before, that they scored but came up with the wrong stuff. Female says, oh, but you promised me one. T.T. says that we got them but not the right kind (conversation is confusing but apparently they could have hijacked one of two trucks and chose the wrong one). T.T. says that Tommy is really mad--it looks like the driver will talk and can give up the "animal" and he still has to get rid of the stuff.
1:23	(916)672-8919	Hunterville, Cal. P.D.--Tommy (in) asks for Det. George Megan. "Call me back from a safe phone."
1:28	Incoming	George Megan (out) to Tommy (in). *Re: strong arm (see attached conversation).
2:15		DeNoto(in) to Al Sackworth (out) re stolen goods (see attached conversation).

# of int. calls _____ # of incr. calls _____

# of new persons int. _____

MEGAN: Thomas?

DENOTO: Your phone o.k.

MEGAN: No sweat, what's up?

DENOTO: Can you handle a little job?

MEGAN: The Chief don't like us to moonlight (laughter).

DENOTO: Huh?

MEGAN: Nothing.

DENOTO: Look there's a guy who lives out there who could hurt some of my people by opening his mouth.

MEGAN: Yeah.

DENOTO: If he don't it's worth the usual.

MEGAN: Do you want me to lean a little bit.

DENOTO: You know what you have to do for our business.

MEGAN: O.k., I'll rough him up a bit. . . nothing a good doctor can't fix.

DENOTO: Whatever you think is necessary.

MEGAN: What's the info?

DENOTO: Not now. Our buddy with the licenses will get in touch.

MEGAN: Take care.

DENOTO: Thanks.

SACKWORTH: Bailbonds.

DENOTO: Hello.

SACKWORTH: Yeah, how are you doing?

DENOTO: Listen, you see the papers?

SACKWORTH: Yeah.

DENOTO: There was a mix-up, you know.

SACKWORTH: Yeah, it's very bad.

DENOTO: Uh, I just wanna tell you the price.

SACKWORTH: Oh, all right.

DENOTO: Uh, you know for a hundred, you know for a hundred.

SACKWORTH: yeah.

DENOTO: It's 6.

SACKWORTH: Well, how many do you have?

DENOTO: 500.

SACKWROTH: All right (pause) I think I know what you mean.

DENOTO: Uh, you know, 6, without the rainbow.

SACKWORTH: Yeah, I know.

DENOTO: Tell them, uh, you know if they want it.

SACKWORTH: I think I know what you mean by 6.

DENOTO: Thou.

SACKWORTH: Yeah.

DENOTO: Yeah, and uh, there'll be room for you too.

SACKWORTH: All right, good.

DENOTO: You know what I mean?

SACKWORTH: Well uh, you know, but less than the other kind.

DENOTO: Uh, definitely, uh you make uh.

SACKWORTH: All right, thats all right.

DENOTO: All right? And if it's more, more than a hundred then we can come down a little bit.

SACKWORTH: All right, I'll have to see.

DENOTO: But like, you gotta figure like 4 is gotta be rock bottom if one guy takes the lot--

SACKWORTH: I'm not going to say too much.

DENOTO: Yeah, uh, tell them, it's this is you know? The ones with the magic button.

SACKWORTH: Yeah, all right.

DENOTO: Okay.

SACKWORTH: Okay, fine. I'll call you about 7:30. I'm not going to speak to him until about 7:00.

DENOTO: Okay. Be careful about the phones.

SACKWORTH: I always am.

DENOTO: Bye.

SACKWORTH: Bye.

WORKSHOP #3

Teacher's Guide

WORKSHOP #3: Electronic Surveillance - Execution

Premise: The prosecutor supervising the execution of the eavesdropping warrant, which resulted from the prior workshop, has instructed the officers to supply him on a daily basis with plant reports or logs of the intercepted conversations. Due to problems in installing the wiretap, only two days remain of the period of authorization before a renewal must, if at all, be drafted.

The prosecutor has, of course, also given the officers a set of minimization and execution instructions; they are set out in the handout. The eavesdropping warrants designate DeNoto and Cullone as named parties; the issuing judge is also aware of the likelihood that conversations of Trebort may be intercepted as "a person as yet unknown." He specifically declined to issue particular instructions as to him. The crimes that are designated are those which relate to hijacking and fencing, e.g., weapons, robbery, larceny, possession and receipt of stolen property, etc.

Problems:

1. Are the instructions adequate? [How could they be improved?]
2. What criticism or new instructions should the executing officers be given with respect to each of the intercepted conversations?
3. Are amendments (retrospective or prospective) required?

4. What changes should be made if an extension is sought?

Guide:

I. These are actual instructions used by the New York County D.A.'s Office. There are no apparent mistakes. A minimal amount of time should be devoted to suggestions for improvement. [For a more detailed discussion of the Execution of an Electronic Surveillance Order, including minimization and amendment problems, see generally, Cornell Institute on Organized Crime, Techniques in the Investigation and Prosecution of Organized Crime, Tab R (1976); see also Comment, "Post-Authorization Problems in the Use of Wiretaps. Minimization, Amendment, Sealing and Inventories," 61 Cornell L. Rev. 92 (1975).]

II. 3/26

12:15--The number of lines used to record the conversation or the time involved should be noted. There is no way to know how long the investigators listened before turning off the machine or whether they spot monitored. N/P indicates non-pertinent but does not indicate the substance of the intercepted portions--"N/P-conv. re: weather" would be better.

1:00--The portion of the conversation between Trebort and male #1 is apparently so short that the monitoring officers could not be expected to turn it off. (As in

the previous conversation meter numbers and/or the time span is important.) The second portion of the conversation is more troublesome. Male #1 and male #2 are unnamed parties and there is no reason to believe that they are unknown accomplices. As such, they are not subject to having their conversations intercepted. One question which ought to be explored is whether the monitoring officers know the voices of the named parties. If not, then they obviously could listen a little while longer, perhaps 2 minutes [U.S. v. Bynum, 360 F. Supp. 400 (S.D. N.Y.) (1973) aff'd 485 F.2d 490 (2d Cir. 1973) vacated on other grounds 417 U.S. 903 (1974)], for identification purposes. Even if the parties are unnamed, interception is permitted if they are discussing a crime. While the conversation is ambiguous, it is not at all clear that criminal activity "is afoot" and thus the interception should be terminated and spot monitoring employed.

The technique of monitoring or "minimization" employed in this investigation and described in the instructions issued by the New York County D.A.'s office is known as "intrinsic minimization." Intrinsic minimization requires the simultaneous recording and overhearing of a conversation by the monitor. The editing decisions that are made by the monitor are based on the content of each call as it is intercepted.

In contrast to this technique, "extrinsic

minimization" is not based on the content of individual calls, but rather on techniques such as visual surveillance of the telephone to determine when the suspect is using the phone, and limiting interception to a certain time of day when the suspect is known to use the phone.

While the intrinsic method is usually considered to be the more effective technique, both methods have been used in combination with one another quite successfully [Cornell Institute on Organized Crime, Techniques in the Investigation and Prosecution of Organized Crime, Tab R ¶12-15 (1976).]

1:30--"Jack to DeNoto about having people drive a truck" is clearly within the order and is a sought conversation. When Jack leaves the phone, and DeNoto holds, however, the microphone in the mouthpiece becomes a bug, and the conversation between he and Trebort is not subject to seizure. At that point the interception must cease and spot monitoring used to determine when Jack returns. [cf. United States v. Tortorello, 480 F.2d 764 (2d Cir. 1973).] The third portion of the conversation about driving, and "girls" is cryptic and ambiguous. Merely because "girls" could refer to females does not mean that the interception is not authorized. "Girls" could be a code for trucks--"large" and "small" referring to trailers and regular trucks. Monitoring should continue

and, depending on what is learned from the conversations at this, the initial stages of the tap, modifications in monitoring can be made in the future. The last line in the conversation is important. If Jack calls when DeNoto "is out," that call should be intercepted regardless of who answers. That individual is acting as DeNoto's agent, and therefore his conversations, in that capacity, ought to be siezed.

1:35--Same problems as 12:15 call.

1:42--If the call is to DeNoto's wife, it is privileged and cannot be intercepted. Aside from the privileged aspect, however, the call is relevant, since DeNoto makes potentially incriminating statements [On the subject of marital privilege, see Cornell Institute on Organized Crime, Techniques in the Investigation and Prosecution of Organized Crime, Tab R , ¶11 (1976)]. Officers should be questioned to determine their basis for suggesting the "female out" might be DeNoto's wife. If it is nothing more than the phrase "honey," some investigation should be done to avoid the problem in the future. The telephone number should be checked through the telephone company, and the investigators should determine if DeNoto's wife works at the location. Perhaps a detective, using a ruse, could obtain a voice sample to be compared with the intercepted conversation.

3:18--Jack to Al is apparently the conversation referred to in the 1:30 call. DeNoto is out, so it can be expected that Jack will give the message to Al. When, however, the conversation turns out to be social, the officers correctly turned off the machine and spot monitored. The 10 second period is probably a bit short under normal circumstances, but does make sense when an important or incriminating conversation is expected. The repetition of "broads," "dates," etc., is again not determinative. The language could very well refer to trucks which will be housed "inside" after the theft.

The latter part of the conversation is again social. Even though there are potentially incriminating statements, the conversation should be spot monitored at this point. Al is no longer DeNoto's agent, having already received the message, and should be considered an unnamed party.

The fact that the connection was bad, does, however, allow the detectives to stay on the line a little longer to make sure they know who is speaking.

3:34--Information call--should indicate who called for number, if known. [cf. United States v. Falcone, 364 F. Supp. 877, 882 (D.N.J. 1973)]

4:15--No problem.

5:52--This is a problem call. The caller is identified as DeNoto's "mouthpiece" which indicates that there may

be a lawyer-client privilege. On the other hand, not all conversations between an individual and his attorney are privileged--and until the substance of the conversation is revealed, it is impossible to know whether this particular one is. To be on the safe side, the officers probably should have turned the conversation off--there is no indication that an attorney is a named party of "a person as yet unknown." [On the subject of attorney-client privilege, see Cornell Institute on Organized Crime, Techniques in the Investigation and Prosecution of Organized Crime, Tab R, §9 (1976).]

In fact, the conversation has little or nothing to do with DeNoto's hijacking operation. It does, however, seem to involve the attorney's desire to purchase half-price, probably stolen or forged, airline tickets. Since the commission or planning of a crime is being discussed, the conversation is subject to interception. [U.S. v. Bynum, supra.]

The last line is a little tricky since it may involve a privileged statement. There appears to be little chance to minimize the single line, however.

8:20--This conversation involves the commission of the crime of criminal usury. As such, it is subject to interception. Again, the meter numbers are required to determine whether the crime was apparent from the outset of the conversation between two unnamed parties.

10:15--If there is no way of determining whether the conversation is within the scope of the order, it cannot be intercepted. Thus, the foreign language problem is one which plagues the intercepting officer. The easy answer is to have an Italian speaking officer on the plant, but, of course, this contingency could have hardly been foreseen. The conversation probably should not have been intercepted. On the other hand, justification for seizing it ought to be explored--the phrase "no problems" in the context of the planned activities for the night, the relationship of Rick to DeNoto, etc.

The conversation still could be minimized by having an Italian speaking officer minimize as he listens. This is probably not necessary, however. Once the conversation has been seized, it is most likely seized for all purposes, and it should be translated in toto.

III. 3/27/75

12:15--Trebort should now be subject to interception in the way that Minnie Kahn was [United States v Kahn, 415 U.S. 143 (1974)]. The conversation does not appear to be otherwise privileged and it does concern the hijacking operation. Officers should have noted the number called or the reason for not doing so.

1:23--No problem.

1:28--No problem.

2:15--Check to see if Al in previous conversation is Al Sackworth (same voice as this conversation).

IV. Amendments for order--Retrospective (Special Application)

[A retrospective amendment is required when incidentally intercepted evidence of new crimes is to be used in either a grand jury or trial.]

1. Conversations in which use must be preserved:

3/26: 1:00; 3:18; 5:52; 8:20

3/26: 12:15

All other conversations are either non-incriminating or have a named party as a participant concerning a designated offense.

V. Amendments for order--Prospective (assuming a renewal)

A prospective amendment is required when evidence of a new crime is intercepted and there is probable cause to believe that similar conversations will recur. There is no constitutional requirement for a prospective amendment when no communications by persons not named in the original order are intercepted. Whether a prospective amendment is required in a "new person" case depends upon the applicable statute. [For a thorough discussion of amendments--both retrospective and prospective--see Cornell Institute on Organized Crime, Techniques in the Investigation and Prosecution of Organized Crime, Tab R, ¶16-38 (1976)].

V. A. Additional named parties to hijacking conversations

1. Trebort

2. Jack

3. Al

4. Maybe Rick, depending on substance of conversation in which he participated

B. New crimes

1. Airline tickets--no (no probable cause to believe similar conversations will occur in the future)

2. Loansharking--[male (out) in 8:20-3/26 conversation] indicated that he would call again concerning loan at 3% per week (need expert textimony that 3 points is 156%/year).

3. Assault, coercion--[Megan] Probable cause that he will advise DeNoto of results--close but probably good.

WORKSHOP #4

EXAMINATION OF WITNESSES IN GRAND JURY

Suggested Time: 1 1/2 hours

WORKSHOP #4

Grand Jury Testimony

The People of the State of New York

v.

Thomas DeNoto et al.

Before a Quorum of the 2nd August 1975 Grand Jury

August 14, 1975

Witnesses:

Albert Sackworth
George Megan

Q Did your buddy with the licenses get in touch with you?

A No, he did not.

Q You deny he got in touch with you?

A I deny it.

Q So your testimony to this grand jury is that your buddy did not call you?

A Not that I can remember.

Q Well, did he call you or didn't he?

A I don't recall.

Q Do you deny that your buddy with the licenses called you?

A I don't deny it.

Q Do you admit that your buddy with the licenses called you?

A I don't admit it either.

Q You neither admit nor deny that your buddy with the licenses called you.

A I don't remember

* * * [portions of testimony deleted]

Q Did Thomas DeNoto ever tell you to use a safe phone to call him?

A He ain't never told me to use a safe phone.

* * * [portions of testimony deleted]

Q Did DeNoto say that there was a guy who lived out there who could hurt some of his people and he wanted you to rough him up a bit?

A No.

* * * [portions of testimony deleted]

Q Did DeNoto ever tell you that your buddy with the licenses would get in touch with you?

A Somebody else told me that.

* * * [portions of testimony deleted]

Q Did DeNoto say to you, "if he don't, it's worth the usual?"

A I think so.

Q Well, did he say it, or didn't he say it?

A Yeah, he said it.

Q Has DeNoto ever paid you for similar work in the past year?

A Yes, he has.

Q How many times?

A Once

Q What is the usual amount?

A I don't remember.

Q What was the amount he paid you?

A I don't remember.

Q Did he pay you $1,000?

A He may have.

Q Did he or didn't he?

A I don't remember.

Q Did he pay you $10,000?

A $10,000 is a lot of money, but I can't be sure.

Q How much did you make last year?

A Around $20,000.

Q And was that your total income for the year?

A Yes, it was.

Q Did DeNoto in the past year pay you $20,000?

A No.

Q Did DeNoto in the past year pay you $10,000?

A I don't think so.

Q Do you admit that the usual amount that DeNoto paid you was $10,000?

A I don't remember.

Q Do you deny it was $10,000?

A I have no recollection whatsoever.

* * * [portions of testimony deleted]

Q Do you know the location of DeNoto's luncheonette?

A Yeah, it's on Avenue A.

Q Have you ever been there?

A A couple of times.

Q Were you there on March 26, 1975?

A No.

* * * [portions of testimony deleted]

Q Did you ever use the telephone in the luncheonette?

A Maybe, I'm not quite sure.

Q Did you use it on March 26, 1975?

A I might have.

Q Did you speak to a man named Jack over that telephone on that day?

A Oh, yes, I did.

Q Then you were in the luncheonette on March 26, 1975?

A Yes, I was.

* * * [portions of testimony deleted]

Q Did you discuss the hijacking of a truck with "Jack"?

A Not that I recall.

Q Have you ever discussed a truck hijacking with anyone in the past six months?

A No.

Q Would you remember discussing a hijacking if you had?

A Yes.

Q Did you discuss the hijacking of a truck with "Jack?"

A I don't remember.

* * * [portions of testimony deleted]

Q Is it your testimony that Mr. DeNoto never mentioned the words "magic button" during your conversation with him on March 27, 1975?

A Yes, it is.

* * * [portions of testimony deleted]

Q And what commodity were you purchasing from DeNoto?

A Fish.

Q What did you understand DeNoto to mean when he said "without the rainbow?"

A He could not sell rainbow trout.

Q What was the sale price of the fish to you?

A Around $3 per pound.

Q What do you mean by "around?"

A Approximately.

Q More than $2?

A Yes.

Q Less than $4?

A Yes.

* * * [portions of testimony deleted]

Q Did you discuss the price of the fish with DeNoto?

A I think so.

Q Did he tell you it was "6 for a 100"?

A If that's what your transcript says.

Q Do you deny he told you that?

A No, that's what he said.

Q What did you understand "6 for a 100" to mean?

A $600 for a hundred pounds.

Q What was the cost to you per pound of fish?

A $6 per pound.

* * * [portions of testimony deleted]

Q Did DeNoto tell you that 6 meant "6 thou"?

A I guess so.

Q The Grand Jury cannot base its decisions on the guesses of witnesses. They require, and are entitled to, your best recollection.

A Yes, he did.

Q What did you understand DeNoto to mean by "6 thou?"

A 6 thousand dollars.

Q 6 thousand dollars for what?

A 6 thousand dollars for a hundred fish.

Q $60 per fish?

A They were Big fish, I guess.

Q How big?

A 5 pounds apiece.

WORKSHOP #4

Teacher's Guide

WORKSHOP #4: Examination of Witnesses in Grand Jury

Premise: Megan and Sackworth have been subpoenaed to appear before the 2nd August 1975 Grand Jury which is hearing the case against Thomas DeNoto et. al. Each is represented by an attorney and has been granted immunity from prosecution.

Exercise: Have individuals briefed and available to play the roles of Megan and Sackworth. Students should be selected, in teams of two, to examine those witnesses "before the Grand Jury." After 5-10 minutes, the observing students should undertake a critical evaluation of their performance. Thereafter, a second team should be chosen, etc.

Guide:

I. Time limitations may not allow a discussion of whether or not Megan and Sackworth should have been subpoenaed to testify and been granted immunity. If, however, questions are asked in that regard the following points should be raised:

   A. Is there sufficient evidence to convict one or the other?

   B. Would their truthful testimony be helpful to the Grand Jury?

   C. How likely is it, that either or both would testify truthfully? [Note that Sackworth has previously testified (O.R. 3/8/75)].

   D. If either or both refuse to answer or lied, would there be sufficient evidence to convict?

   E. What consequences flow from the grant of immunity (testimonial or transactional)?

II. The witnesses should be prepared beforehand to answer the questions in manner designed (1) to avoid aiding the

Grand Jury and (2) to protect themselves from perjury or contempt convictions. Questions propounded to the witnesses by the students should be based on the transcripts of the intercepted conversations. If experience is a guide, the witnesses can be expected to create inventive explanations for their conversations. The grand jury minutes in part 5 suggest some possibilities. The Institute directors are available to offer others.

The students should be expected to deal effectively with refusals to answer based upon legal arguments devised by counsel or by evasive and equivocal responses by the witness. Suggested legal objections are set forth in III. The workshop leader should be prepared to rule on motions brought by either the prosecutor or defense attorney before the judge who empanelled the Grand Jury.

III. Suggested Legal Objections:

A. Objections by Megan or Sackworth

1. I have been advised by my attorney that I may have been the subject of illegal wiretapping and that consequently I cannot be compelled to testify before the Grand Jury. To do so would violate my rights under the Constitution of the United States and the State of New York. Furthermore, I have been told by my attorney that

to discuss or divulge matters which resulted from illegal surveillance would subject me to civil and criminal penalties in view of the relevant provisions of the Omnibus Crime Control and Safe Streets Act of 1968.

2. My attorney has advised me that he cannot adequately represent me when he cannot hear the questions asked of me. I therefore respectfully request that he be allowed to enter the Grand Jury room for the purpose of advising me as a witness.

I have been advised by counsel that to deny him permission to enter this Grand Jury room is in contravention of the 6th and 14th Amendments of the Constitution of the United States. It not only denies me assistance of counsel at a critical stage in this proceeding, but creates a totally biased atmosphere in which the prosecutor is unrestrained by a neutral magistrate or opposing counsel.

Mr. Foreman, my attorney has advised me to respectfully point out to the Grand Jury that recent disclosures of government abuse in the areas of civil liberties make it imperative that he be allowed to adequately advise me of my legal rights and not to rely on the good faith of the District Attorney.

B. Objections by Megan

1. I have been advised by counsel that the law of the State of California strictly forbids the use of electronic surveillance. I have been further advised that I am appearing before the Grand Jury to testify about a conversation which was intercepted by New York authorities at a time I was in California. My attorney has asked me to respectfully decline to answer any questions based on the interception of such conversation on the grounds that to do so would violate Article IV Section I of Constitution of the United States which mandates that N.Y. must give full faith and credit to the laws of California.

2. Upon the advice of Counsel I respectfully deline to answer on the grounds that to do so would abridge my rights under the 5th and 14th amendments.

I am a resident of the State of California and as such am not protected by the transactional immunity conferred upon me by the State of New York. I have been advised by my attorney that when I return to California, authorities in that State could seek to charge me with crimes alleged to be revealed by my testimony. I would, therefore, be denied the guarantee of equal protection of the laws.

C. Objection by Sackworth if optional report of 3/19 was used.

1. My premises were illegally searched in February 1975. I consequently can respectfully decline to answer any questions based upon the fruits of that search. Upon advice of counsel I wish to move for a hearing to establish the illegality of that search.

WORKSHOP #5

DRAFTING PERJURY AND CONTEMPT INDICTMENTS

Suggested Time: 1 hour

WORKSHOP #5

Teacher's Guide

(This workshop will use the Grand Jury testimony used in Workshop #4)

WORKSHOP #5: Drafting Perjury and Contempt Indictments

Premise: Sackworth and Megan have been examined before the Grand Jury and their testimony transcribed. Certain portions of their testimony have been singled out for scrutiny as potential bases for contempt or perjury charges.

Problem: 1. Which, if any, of the portions of testimony are legally sufficient to support a count in an indictment

a. for perjury?

b. for contempt?

Guide: Start with Megan's testimony and discuss each portion in light of the cases cited below.

I. Megan Testimony

A. page ii. (1)

This testimony, when considered as evasive contempt, raises a special New York problem. Here, Megan expressly denied that his buddy got in touch with him and equivocated only after further questioning on the same subject.

See, People v. Renaghan, 33 N.Y. 2d 991, 992; 353 N.Y. s. 2d 962, 963; 309 N.E. 2d 425, 425-426 (1974).

> Defendant's initial responses to the District Attorney's inquiries expressly denied that he was told by Keeley that Mulligan requested the transfer of Sangiriardi. This explicit testimony was neither incredible as a matter of law nor patently false and if later shown

> to be false, could provide a sufficient basis for a perjury charge. Accordingly, even if perjurious, the subsequent testimony could not properly be deemed a refusal to answer.... For whatever purpose and however the question was thereafter rephrased by the District Attorney, it had already been answered with firmness and without equivocation. In these circumstances there is no indication that defendant's alleged failure to unequivocally respond to the rephrased questions on the same subject obstructed in any way the Grand Jury's proceedings.

But See People v. Martin, 47 A.D. 2d 883; 367 N.Y.S. 2d 8 (1st Dept. 1975), where Renaghan was distinguished on the basis that:

1. the record as a whole demonstrated a refusal to answer,
2. the questioning dealt with the "recent past,"
3. the circumstances about which the witness was questioned involved "unusual circumstances," and
4. the witness admitted that the events should have left an impression upon him.

Researchers found no parallel cases from other jurisdictions.

Some additional matters, not dealing with the Renaghan problem, which might be explored are;

1. charging obstruction of justice if the jurisdiction's statute is applicable
2. charging perjury by inconsistent statements--"NO" v. "I don't remember"
3. charging perjury ("I don't remember") after demonstrating by questioning that he would have to remember [cf. People v. Martin, supra]

B. page ii (2)

Clearly, DeNoto did tell Megan "call me back from a safe phone." Unfortunately, Megan's response "ain't never," while implying an answer in the negative, is a double negative, which literally means "yes"

This is similar to U.S. v. Cook, 489 F. 2d 286, 287 (9th Cir. 1973):

> Q: You don't have any knowledge of anybody currently on the force who participated in shakedowns?
>
> A: I do not.

The Court reversed the conviction.

But see, U.S. v. Andrews, 370 F. Supp. 365, 367-368 (D. Conn. 1974):

> Q: In November of 1972 were you engaged in bookmaking activities involving a numbers operation?
>
> A: I am not engaged in bookmaking period. I mop floors for a living.
>
> Q: Is the answer no?
>
> A: No
>
> Q: In December of 1972
>
> A: No.

Here the Court held that the answer "no" to the question "Is the answer no," in the context of the testimony, did not mean "No, the answer is not no."

C. page ii-iii

It must be stressed that compound and complex questions should never be asked. In this situation,

DeNoto stated that "there is a guy out there who could hurt some of my people," But it was Megan who used the words "rough him up a bit." Thus, Megan's "no" was literally true.

Cf. U.S. v. Esposito, 358 F. Supp. 1032, 1033 [N.D. Ill. 1973]:

> Q: Now did you ever drive in an automobile from the Hyatt House to the Thirsty Whale accompanied by Edward Speice?
>
> A: No, I haven't.

The Court held that the answer was not perjury, when the testimony disclosed that Esposito left the Hyatt House alone and picked up the passenger on the way to the Thirsty Whale.

D. page iii (2)

This is a classic unresponsive answer, which cannot form the basis of a perjury indictment. While "somebody else told me that" implies DeNoto did not, it is not, in fact a denial.

U.S. v. Bronston, 409 U.S. 352, 354 (1972):

> Q: Do you have any bank accounts in Swiss banks, Mr. Bronston?
>
> A: No, sir.
>
> Q: Have you ever?
>
> A: The company had an account there for about six months, in Zurich.
>
> Q: Have you any nominees who have bank accounts in Swiss banks?
>
> A: No, sir.

Q: Have you ever?

A: No, sir.

The Court held that it was undisputed that the defendant's answers were literally true; the Court aptly observed:

> ...it does not matter that the unresponsive answer is stated in the affirmative, thereby implying the negative of the question actually imposed; for again, by hypothesis, the examiner's awareness of unresponsiveness should lead him to press another question or reframe his initial question with greater precision. Precise questioning is imperative as a predicate for the offense of perjury.
>
> It may well be that petitioner's answers were not guileless but were shrewdly calculated to evade. Nevertheless. . .any special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution.
> [(emphasis added) 409 U.S. at 362.]

E. page iii-iv

Good evasive contempt.

II. Sackworth Testimony

A. page v (1) and (2)

Portion (1) and (2) are inconsistent; the problem is whether or not the second is a recantation of the first.

The questions to be explored include:

1. Was the first statement (no) knowingly and falsely made or could it have been a mistake?

    a. Was there a motive for the witness to lie about being at the luncheonette?

b. Was there later a motive for the witness to change his story?

2. Was the lie manifest before the recantation?

3. Did the recantation come from the witness or was it prompted by the prosecutor?

4. Was the recantation complete so that the Grand Jury could act on the second statement?

5. If the Grand Jury indicted, could the case be won at trial?

B. page v-vi

Good evasive contempt [could it be treated as a perjury?]

C. page vi (2)

"Q: Is it your testimony. . . A: Yes," is literally true; it cannot form the basis for a perjury indictment. This form of question ought to be avoided.

cf. U.S. v. Cuevas, 510 F.2d 848, 850 (2d Cir. 1975):

Q: Is it your testimony that you have never given anybody even a small amount of cocaine?

A: No

This answer was held ambiguous, but it was taken out of case by agreement of counsel at trial that the answer in fact meant that the witness was saying "that he never gave anybody a small amount of cocaine." In addition, the Court found the question and answer not "central to the charge."

D. page vi-vii

In the last three portions of testimony Sackworth makes three inconsistent statements:

1. the fish cost around $3/lb.
2. the fish cost $6/lb.
3. the fish cost $12/lb.

Here the same analysis should be used that was used with the "being in the luncheonette on March 26" testimony (II, A.). By comparison, however, note that Sackworth was here fabricating an entire story and, in attempting to rationalize it with details that developed, ran into inconsistencies.

A WORD ABOUT THE CORNELL INSTITUTE ON ORGANIZED CRIME

Established in 1975, the Cornell Institute on Organized Crime is a joint program of the Cornell Law School and the Law Enforcement Assistance Administration. Its objective is to enhance the quality of the nation's response, particularly on the state and local level, to the challenge of organized crime by:

1. establishing training seminars in the area of the investigation and prosecution of organized crime, and the development of innovative techniques and strategies for its control;
2. preparing, updating, and disseminating manuals of investigation and prosecution; the law and procedure relating to organized crime;
3. sponsoring scholarly and empirical research into organized crime and the techniques of its social control through law, and the publication and dissemination of such research, and
4. developing an organized crime library collection and legal research bank, and creating a comprehensive bibliography and index.

END