

# 2007 WINNING STRATEGIES SEMINAR

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## Jury Instructions

Susan J. Walsh, Esq.

Moskowitz and Book, LLP

1372 Broadway, 14<sup>th</sup> Floor

New York, New York 10018

[SWalsh@moskowitzandbook.com](mailto:SWalsh@moskowitzandbook.com)

**Susan J. Walsh** is a partner in the Manhattan firm of Moskowitz and Book, LLP. Ms. Walsh is a member of the CJA panel in the Southern District of New York and admitted in New York, New Jersey and Colorado, the Southern and Eastern Districts of New York, as well as the District of New Jersey. Her concentration is in criminal defense in both state and federal jurisdictions, both trials and appeals. In addition, Ms. Walsh services clients in a variety of civil matters and has tried cases from money laundering to murder. She serves on the Board of Directors of the New York County Lawyers Association and on its Executive Committee. Ms. Walsh has chaired NYCLA's Criminal Court Task Force, co-chaired NYCLA's Criminal Justice Section. She is a member of the New York State Bar Association's House of Delegates and serves on that Association's Task Force on the Future of Indigent Defense Services. Ms. Walsh is a graduate of Tuft University and the George Washington University Law School. She has appeared as a commentator on Court TV and is a member of the National Association of Criminal Defense Lawyers.

Swalsh@moskowitzandbook.com

I. Anticipating the Instruction - In Reverse

A. A preserved objection to a jury instruction will be reviewed *de novo*, and be the grounds for reversal if all of the instructions taken as a whole, caused the defendant prejudice. *See United States v. Bok*, 156 F.3d 157 (2<sup>nd</sup> Cir. 1998).

Harmless Error analysis - the error is harmless if the finding of guilt “would surely not have been different absent the constitutional error.” *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

B. An unpreserved objection to jury instructions is reviewed for plain error. *See Fed. R. Crim. Pro. 52(b)*. *Johnson v. United States*, 520 U.S. 461, 466 - 67 (1997).

Fed. R. Crim. Pro. 30 - “A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury’s hearing and, on request, out of the jury’s presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).”

Object with “sufficient distinctness to alert the court to the nature of the claimed defect.” *United States v. Gallerani*, 68 F.3d 611, 617 (2d Cir. 1995)

A request to charge does not preserve an objection for the court’s failure to give it. **You must object to the omission.** *United States v. Friedman*, 854 F.2d 535, 554 - 56 (2d Cir. 1988).

“[W]e will vacate a judgment only if we find that the Court made a mistake that is clear and obvious, affected substantial rights, and seriously affects the fairness, integrity of public reputation of judicial proceedings.” *United States v. Danielson*, 199 F.3d 666, 671 (2d Cir. 1999).

- C. It Happens - *See, United States v. Gaines*, 2006 U.S. App. LEXIS 18289  
(Hand Out One)

“The U.S. Court of Appeals for the 2<sup>nd</sup> Circuit denounces any instruction that tells a jury that a testifying defendant’s interest in the outcome of the case creates a motive to testify falsely.”

- D. Thinking about your case from the get-go with the use of instruction

- Read the instruction to help diagnose your case
  - what is the weak link in my Hobbs Act case?
  - is there obviously a conspiracy and my gal was not a member?
  - Enterprise? What enterprise?

## II. MAKING IT MADE FOR TELEVISION

### A. Use it, Use it, Use it (The Instruction)

1. Get the Judge to Commit (if you can or if you know)
2. Consider Opening on your key to it -
  - build your credibility by building off the Court’s
  - “story time plus”
  - the more they hear it the more they remember it
  - use it, use it, use it
3. Requests to Charge - Do Complicated Instructions Help or Hurt?

### III. Specific Samples on Requests to Charge in Complex Cases

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*But see: U.S. v. Gaines*, 2006 US. App. Lexis 18289 (Handout One)

“It is far better for a trial judge’s instructions not to assume the defendant’s guilt at all than to assume his guilt and then attempt to mitigate the damage by saying he is nevertheless capable of telling the truth....to prevent a needless threat of dilution of the presumption of innocence, the US Court of Appeals for the Second Circuit directs district courts ....not to charge juries that a testifying defendants’s interest in the outcome of the case creates a motive to testify falsely.” at \*24

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“The defense specifically requests that the jury be instructed using the term “non-guilt” rather than innocence. In addition, in connection with the instruction on a juror’s obligation to deliberate openly and with a willingness to listen to the vies of others, the jurors should be reminded of their right to adhere to their individually held vies, provided they have honestly considered the views and arguments of others.”

“Lack of Evidence” (Hand out 2 & 4)

### III. MAKING IT MADE FOR PRIME TIME

#### A. Use it, Use it, Use it

##### 1. Sum up on it

Rule 30 of the Federal Rules of Criminal Procedure provides in part 1) the parties may file written requests for jury instructions, and 2) the court must inform counsel of its proposed action on their requests before they give summations.

The rule requires only that the court rule on the requests - not that the court proffer the entirety of the charge. *United States v. Welbeck*, 145 F.3d 493 (2d Cir. 1998).

##### 2. To Let Em Have It or Not to Let Em Have It

The decision to provide the jury with a written copy of the court's instruction is committed to the trial court's discretion. *United States v. Russo*, 110 F. 3d 948 (2d Cir. 1997).

IDEA: "It should be noted that the defense has no objection to submitting the written charge to the jury should the Court deem it appropriate, with two caveats. First, we request that each juror be given their own set of instructions, so that each juror will have equal access to the charge and will not be dependent on one juror's re-reading of it. In addition, we request that the jury not be permitted to take the charge out of the jury room at any time during deliberations."

(HANDOUT 4)

A. DEMONSTRATIVE EVIDENCE - use it, use it, use it

B. OR MAKE THEM COME BACK OUT

Chart (To be Distributed)

## V. SURPRISE ENDINGS

### THE "ALLEN CHARGE"

#### A. Case Study

The Court: This case is important to both sides. Both parties as well as I have expended a great deal of time, effort and resources in seeking a resolution of this indictment. It is desirable if a verdict can be reached, but your verdict must represent the conscientious judgment of each juror...Do not hesitate to change your opinion if, after discussion of the issues, in consideration of the facts and the evidence in this case, you are persuaded that your initial position may have been incorrect. However, I do emphasize that no juror should vote for a verdict unless it represents his or her conscientious judgment.

***Put another way, I have not intention of letting you go home.*** You may continue your deliberations. (No emphasis supplied!). (Hand Out 5)

#### B. WHAT TO DO?

- show your aggravation!!!!
- object, preserve, be specific!!!!

#### SOME LAW:

"At the heart of the Allen charge jurisprudence lies the basic principle that a defendant has 'the right to have the jury speak without being coerced.'" *Smalls v. Batista*, 6 F. Supp 2d 211 (SDNY 198) *quoting United States v. Burgos*, 55 F.3d 933, 936 (4th Cir. 1995).

The charge sometimes referred to as a dynamite charge and "like dynamite, it should be used with great caution and only where absolutely necessary." *United States v. Flannery*, 451 F.2d 880 (5th Cir. 1971).

Reversible error when trial court gave coercive Allen charge, "you have got to reach a verdict in this case." *Jenkins v. United States*, 380 U.S. at 446.

When a jury returns a verdict shortly after receiving the "Allen" charge, the time elapsed, or lack thereof, is "a significant factor in detecting coercion." *Smalls v. Batista*, 6 F.Supp. 2d 211 (SDNY 1998) *aff'd* 191 F.3d 272 (2d Cir. 1999) *citing United States v. Beattie*, 613 F.2d 762, 765 (9th Cir. 1980); *see also, United States v. Bonam*, 772 F.2d 1449, 1451 (9th Cir. 1985).

**Susan J. Walsh**

Gould Reimer Walsh Goffin Cohn, LLP

61 Broadway, Suite 1601

New York, New York 10006

212-267-2600

Swalsh@gfrglawfirm.com

**4. JUROR OBLIGATION (2-4)**  
**(Second Circuit Charge)**

I know you will try the issues that have been presented to you according to the oath which you have taken as jurors in which you promised that you would well and truly try the issues joined in this case and a true verdict render. If you follow that oath, and try the issues without fear or prejudice or bias or sympathy, you will arrive at a true and just verdict.

Authority: Sand et al., *Modern Federal Jury Instructions*, Instruction 2-4 (2005) (Second Circuit charge requested).

## 6. CONDUCT OF COUNSEL (2-8)

It is the duty of the attorney for each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. Counsel also have the right and duty to ask the court to make rulings of law and to request conferences at the side bar out of the hearing of the jury. All those questions of law must be decided by me, the court. You should not show any prejudice against an attorney or his client because the attorney objected to the admissibility of evidence, or asked for a conference out of the hearing of the jury or asked the court for a ruling on the law.

As I already indicated, my rulings on the admissibility of evidence do not indicate any opinion about the weight or effect of such evidence. You are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

Authority: Sand et al., *Modern Federal Jury Instructions*,  
Instruction 2-8 (2005)

## 11. CONSIDER EACH DEFENDANT SEPARATELY (3-5)

The indictment names four defendants who are on trial together. In reaching a verdict, however, you must bear in mind that guilt is individual. Your verdict as to each defendant must be determined separately with respect to him, solely on the evidence, or lack of evidence, presented against him without regard to the guilt or innocence of anyone else.

In addition, some of the evidence in this case was limited to one defendant. Let me emphasize that any evidence admitted solely against one defendant may be considered only as against that defendant and may not in any respect enter into your deliberations on any other defendant.

Authority: Sand et al., *Modern Federal Jury Instructions*,  
Instruction 3-5 (2005)

## 18. DEFENDANT'S REPUTATION (5-14)

The defendant has called witnesses who have testified to his good reputation in the community. This testimony is not to be taken by you as the witness' opinion as to whether the defendant is guilty or not guilty. That question is for you alone to determine. You should, however, consider this character evidence together with all the other facts and all the other evidence in the case in determining whether the defendant is guilty or not guilty of the charges.

Such character evidence alone may indicate to you that it is improbable that a person of good reputation would commit the offense charged. In fact, character evidence, when considered with all other evidence in the case, may create a reasonable doubt. Accordingly, if, after considering the question of the defendant's good reputation, you find that a reasonable doubt has been created, you must acquit him of all the charges.

On the other hand, if, after considering all of the evidence, including that of the defendant's reputation, you are satisfied beyond a reasonable doubt that the defendant is guilty,

you should not acquit the defendant merely because you believe he is a person of good reputation.

Authority: Sand et al., *Modern Federal Jury Instructions*, Instruction 5-14 (2005); Edgington v. United States, 164 U.S. 361, 365-66 (1896)

## 19. OPINION OF DEFENDANT'S CHARACTER (5-15)

The defendant has called witnesses who have given their opinion of his good character. This testimony is not to be taken by you as the witness' opinion as to whether the defendant is guilty or not guilty. That question is for you alone to determine. You should, however, consider this character evidence together with all the other facts and all the other evidence in the case in determining whether the defendant is guilty or not guilty of the charges. In fact, character evidence, when considered with all other evidence in the case, may create a reasonable doubt.

Accordingly, if after considering all the evidence including testimony about the defendant's good character, you find a reasonable doubt has been created, you must acquit him of all the charges.

On the other hand, if after considering all the evidence including that of defendant's character, you are satisfied beyond a reasonable doubt that the defendant is guilty, you should not acquit the defendant merely because you believe him to be a person of good character.

Authority: Sand et al., *Modern Federal Jury Instructions*, Instruction 5-15 (2005); Edgington v. United States, 164 U.S. 361, 365-66 (1896)

**22. INFERENCE OF PARTICIPATION FROM MERE PRESENCE (6.3)**

You may not infer that any defendant is guilty of participating in criminal conduct merely from the fact that he was present at the time the crime was being committed and had knowledge that it was being committed.

Authority: Sand et al., *Modern Federal Jury Instructions*,  
Instruction 6-3 (2005)

**23. INFERENCE REGARDING CONSPIRACY (6-3)**

You may not infer that any defendant is a member of the conspiracy merely from the fact that he was present at the time and place when the conspiracy was being carried on and had knowledge that it was being carried on.

Authority:        United States v. Diez, 736 F.2d 840 (2d Cir. 1984); Sand et al., *Modern Federal Jury Instructions*, Instruction 6-3 (2005)

24. IMPERMISSIBLE TO INFER PARTICIPATION  
FROM ASSOCIATION (6-4)

You may not infer that any defendant was guilty of participating in criminal conduct merely from the fact that he associated with other people who were guilty of wrongdoing.

Authority: Sand et al., *Modern Federal Jury Instructions*,  
Instruction 6-4 (2005)

**25. INFERENCE REGARDING ASSOCIATION WITH CONSPIRATORS (6-4)**

Mere association with conspirators or those involved in a criminal enterprise is insufficient to prove a defendant's participation or membership in a conspiracy.

Authority: Seventh Circuit Pattern Instruction No. 3.04; Sand et al., *Modern Federal Jury Instructions*, Instruction 6-4 (2005)

## 28. INTEREST IN OUTCOME (7-3)

In evaluating credibility of the witnesses, you should take into account any evidence that the witness who testified may benefit in some way from the outcome of this case. Such an interest in the outcome creates a motive to testify falsely and may sway the witness to testify in a way that advances his own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care.

This is not to suggest that every witness who has an interest in the outcome of a case will testify falsely. It is for you to decide to what extent, if at all, the witness' interest has affected or colored his or her testimony.

Authority: Sand et al., *Modern Federal Jury Instructions*,  
Instruction 7-3 (2005)

### 38. ELEMENTS OF THE OFFENSE (52-28)

In order to prove that any defendant violated § 1962(c), the government must establish beyond a reasonable doubt each of the following four elements of the offense as to that defendant:

First, that an enterprise existed as alleged in the indictment;

Second, that the enterprise affected interstate or foreign commerce;

Third, that the particular defendant was associated with or employed by the enterprise;

Fourth, that the particular defendant knowingly and willfully became a member of the conspiracy.

Authority: Sand et al., *Modern Federal Jury Instructions*,  
Instruction 52-28 (2005)

**39. FIRST ELEMENT - THE ENTERPRISE (52-29)**

For the purposes of this case, an enterprise includes any legal entity, such as a partnership, corporation or association, and some other entities as I shall define them for you.

The government has charged that the enterprise in this case is as follows:

[Read the counts or allegations which relate to the enterprise]

If you find that this was, in fact, a legal entity such as a partnership, corporation or association, then you may find that an enterprise existed.

An enterprise also includes a group of people who have associated together for a common purpose of engaging in a course of conduct over a period of time. This group of people, in addition to having a common purpose, must have an ongoing organization, either formal or informal, and it must have personnel who function as a continuing unit. This group of people does not have to be a legally recognized entity, such as a partnership or corporation. This group may be organized for a legitimate and lawful purpose, or it may be organized for an unlawful purpose.

The government has charged the following in the indictment as constituting the enterprise.

[Read the counts or allegations which relate to the enterprise.]

If you find that this was a group of people characterized by (1) a common purpose, (2) an ongoing formal or informal organization, and (3) by personnel who function as a continuing unit, then you may find that an enterprise existed.

If you find that this enterprise existed, you must also determine whether this enterprise continued in an essentially unchanged form during substantially the entire period charged in the indictment. This does not mean that everyone involved has to be the same, but the core of the enterprise has to be the same throughout.

Authority: Sand et al., *Modern Federal Jury Instructions*,  
Instruction 52-29 (2005)

#### 40. SECOND ELEMENT - EFFECT ON INTERSTATE COMMERCE (52-30)

The second element the government must prove beyond a reasonable doubt is that the enterprise was engaged in or had an effect upon interstate (or foreign) commerce.

Interstate commerce includes the movement of goods, services, money and individuals between states.

The government must prove that the enterprise engaged in interstate commerce or that its activities affected interstate commerce in any way, no matter how minimal. It does not have to prove that the racketeering activity affected interstate commerce, although proof that racketeering acts did affect interstate commerce is sufficient to satisfy this element. It is not necessary to prove that the acts of any particular defendant affected interstate commerce as long as the acts of the enterprise had such effect. Finally, the government is not required to prove that any defendant knew he was affecting interstate commerce.

Authority: Sand et al., *Modern Federal Jury Instructions*,  
Instruction 52-30 (2005)

**41. THIRD ELEMENT - ASSOCIATION WITH THE ENTERPRISE (52-31)**

The third element which the government must prove beyond a reasonable doubt as to each defendant is that that defendant was associated with or employed by the enterprise.

It is not required that the defendant have been employed by or associated with the enterprise for the entire time that the enterprise existed. It *is* required, however, that the government prove, beyond a reasonable doubt, that at *some* time during the period indicated in the indictment, the defendant in question was employed by or associated with the enterprise.

A person cannot be associated with or employed by an enterprise if he does not know of the enterprise's existence or the nature of its activities. Thus, in order to prove this element, the government must prove beyond a reasonable doubt that the defendant was connected to the enterprise in some meaningful way, and that the defendant knew of the existence of the enterprise and of the general nature of its activities.

Authority: Sand et al., *Modern Federal Jury Instructions*,  
Instruction 52-31 (2005)

#### **42. FOURTH ELEMENT - MEMBERSHIP IN THE CONSPIRACY (52-32)**

The fourth element the government must prove beyond a reasonable doubt as to each defendant is that that defendant knowingly and willfully became a member of the conspiracy. This means that in order to meet its burden of proof, the government must show that each defendant agreed to participate, directly or indirectly, in the affairs of the enterprise through a pattern of racketeering activity.

The focus of this element is on the defendant's agreement to participate in the objective of the enterprise to engage in a pattern of racketeering activity, and not on the defendant's agreement to commit the individual criminal acts. The government must prove that each defendant participated in some manner in the overall objective of the conspiracy, and that the conspiracy involved, or would have involved, the commission of two racketeering acts. The government is not required to prove either that the defendant agreed to commit two racketeering acts or that he actually committed two such acts, although you may conclude that he agreed to participate in the conduct of the enterprise from proof that he agreed to commit or actually committed such acts.

For the purposes of this count, the indictment alleges that the following racketeering acts were or were intended to be committed as part of the conspiracy.

[Read relevant portion of indictment.]

Again, the government must prove that two of these acts were, or were intended to be, committed as part of the conspiracy, although it need not prove that defendant committed or agreed to commit any of these acts as long as the government proves that defendant participated in some manner in the overall objective of the conspiracy.

Authority: Sand et al., *Modern Federal Jury Instructions*,  
Instruction 52-32 (2005)

### 43. ATTEMPTED LARCENY BY EXTORTION UNDER NEW YORK LAW

Because Count one of the indictment alleges that some of the racketeering acts which were or were intended to be committed as part of the conspiracy constituted the crime of attempted larceny by extortion under New York law, I will now define this crime for you.

In order for you properly to consider the crime of attempted larceny by extortion you must be familiar with two different sections of the New York Penal Law, one which defines the crime of larceny by extortion and another which defines an attempt to commit a crime.

The crime of larceny under New York law is defined by section 155.05, subdivision 1, of the Penal Law of New York State. Insofar as it applies to this case, that statute reads as follows:

A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully obtains such property from an owner thereof.

The key terms in this general definition of larceny are the terms "wrongfully obtains," and "with intent to deprive or appropriate." I will define them for you.

A person "wrongfully obtains" property from its owner when, knowing he does not have the consent of the owner or any claim of right to sch property, he obtains such property with the

intention of exercising control over it to the exclusion of the rights of its owner.

A person is the "owner" of property when he has a right of possession thereof superior to that of the obtainer. It does not matter that still another person may have a right even superior to that of the possessor.

A person intends permanently to "deprive" the owner of his property (1) when he causes such property permanently to be withheld [or causes it to be withheld for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to the owner] or (2) he disposes of such property in such manner or under such circumstances as to render it unlikely that the owner will recover such property.

A person intends permanently to 'appropriate' property of an owner to himself or a third person (1) when he exercises control over it permanently [or for such an extended period or under such circumstances as to acquire the major portion of its economic value or benefit] or (2) when he disposes of the property for his own [or another's] benefit.

Section 155.05, subdivision (2)(e), of the Penal Law of New York State defines larceny by extortion as follows:

A person obtains property by extortion when he compels or induces another person to deliver such property to himself by means of instilling in him a fear that if the property is not so delivered, the defendant will: (i) Cause physical injury to some

person in the future; or (ii) Cause damage to property. Thus, according to the laws which I have read to you, a person commits the crime of 'larceny by extortion' when he wrongfully obtains property from the owner with the intention permanently to 'deprive' the owner of such property or permanently to 'appropriate' it for his own use or benefit and when he compels or induces the owner to deliver such property to him by instilling in him a fear that, if not so delivered he will cause physical injury to some person in the future or cause property damage.

Therefore, to establish that a defendant committed the crime of larceny by extortion, the government must prove to your satisfaction beyond a reasonable doubt each of the following three elements:

1. That on or about the dates charged as to each racketeering act, in the Western District of New York, a defendant, 'wrongfully obtained,' as I have defined that term for you, property from the owner thereof by instilling in him a fear that if he did not deliver the property to him, the defendant would cause physical injury to some person in the future or cause property damage.

According to the law, 'property' means any money, personal property, thing in action, evidence of debt or contract, or any article, substance or thing of value.

2. That the threat, to cause physical injury to some person in the future or cause property damage, did in fact

instill fear in the owner and did in fact induce and cause the owner to deliver property to the defendant.

3. That at the time the defendant in question made such threat to the owner and 'wrongfully obtained' such property from him, the defendant intended permanently to 'deprive' the owner of his property or permanently to 'appropriate' such property for his own use or benefit, as I have defined the terms 'deprive' or 'appropriate' to you.

According to the law, a person intends permanently to deprive an owner of property, or permanently to appropriate such property to his own use or benefit, when his conscious aim or objective is permanently to deprive such owner of property or permanently to appropriate such property to his own use or benefit.

Section 110.00 of the Penal Law defines an attempt to commit a crime and reads as follows:

A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

The meaning of this statute, as applied to this case, is that if a person intends to commit a particular crime, that is, his conscious objective is to commit that crime, in this case, larceny by extortion and if, acting with such intent, he engages in conduct which tends to effect the commission of the crime of larceny by extortion, then he has then committed

attempted larceny by extortion even though the larceny was not completed or accomplished.

You will note that the required conduct for the commission of an attempted larceny by extortion must be of the type which "tends to effect" the commission of the larceny by extortion. This means doing an act or acts directed toward the accomplishment of the larceny by extortion. Such conduct does not have to be the last act necessary to effect the commission of the larceny by extortion, but it must be conduct which constitutes a substantial step toward the commission of the larceny by extortion. The required conduct must be related to and directed toward the accomplishment of the larceny by extortion, -- that is, conduct which goes beyond mere preparation and planning, conduct so related to the commission of the larceny by extortion that in all reasonable probability the larceny by extortion would have been committed but for some interference or intervention.

Therefore, in order for you to find that a defendant committed the crime of attempted larceny by extortion, the government is required to prove, from all of the evidence in the case beyond a reasonable doubt, each of the following two elements:

1. That on or about the dates charged in the indictment, in the Western District of New York, the defendant intended to commit the crime of larceny by

extortion, to wit, he intended to wrongfully obtain property from the owner with the intention permanently to deprive the owner of such property or permanently to appropriate it for his own use or benefit and intended to compel or induce the owner to deliver such property to him by means of instilling in him a fear that, if not so delivered, the defendant would cause physical injury to some person in the future or cause property damage, and

2. That acting with such intent, the defendant engaged in conduct which tended to effect the commission of such crime.

If you find that the government has proved to your satisfaction beyond a reasonable doubt each of these two elements as to any defendant, then you may find that the government has established that that defendant committed the crime of attempted larceny by extortion.

On the other hand, if you find that the government has failed to prove to your satisfaction beyond a reasonable doubt either or both of these elements, then you must find that the government did not establish that the particular defendant committed the crime of larceny by extortion.

Authority: Criminal Jury Instructions, New York, charges for Penal Law § 110.00 (Attempt to Commit a Crime) and § 155.05(2)(e) and § 155.40 (Larceny by Extortion) combined.

#### 44. CONSPIRACY UNDER NEW YORK LAW

Count one of the indictment also alleges that the crime of conspiracy to commit larceny by extortion under New York law is another racketeering act, number 20, which was or was intended to be committed as part of the federal conspiracy charged in this case. Therefore, I will now define the crime of conspiracy to commit larceny by extortion for you.

New York's Penal Law, insofar as it is applicable to this case, reads as follows:

A person is guilty of conspiracy when, with intent that conduct constituting a class C felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

In order for you to find that any defendant committed this crime, the government is required to prove, from all of the evidence in the case beyond a reasonable doubt, each of the following five elements:

1. That on or about the dates charged in the indictment, in the Western District of New York, the defendant wrongfully obtained property from the owner thereof by instilling in him a fear that if he did not deliver the property to him, the defendant would cause physical injury to some person in the future or cause property damage.
2. That in so doing, the defendant agreed with one or more persons, to engage in or cause the performance of certain conduct, to wit, [read overt acts within Racketeering Act No. 20 of Count One (insert from indictment)].

According to the law, "conduct" means an act or omission and its accompanying mental state.

3. That such conduct constituted larceny by extortion, which, according to the law, is a crime.

I have previously charged you on the elements the government must prove beyond a reasonable doubt to establish extortion, and those elements apply here.

4. That at the time of such agreement the defendant intended that such conduct constituting larceny by extortion be performed.

According to the law, a person intends that conduct constituting larceny by extortion be performed when his conscious aim or objective is that such conduct be performed.

5. That after such agreement was made, the defendant committed at least one of the overt acts charged in the indictment, to wit, those alleged within the indictment under this specific racketeering act.

An overt act is one directed toward and tending to further, to accomplish or to bring about the ultimate object or purpose of agreement.

Therefore, with respect to racketeering act No. 20 within count one of the indictment, if you find that the government has proved to your satisfaction beyond a reasonable doubt each of these five elements as to a defendant, as I have just explained them: (1) that on or about the dates charged, in the Western District of New York, the wrongfully obtained property from the owner thereof by instilling in him a fear

that if he did not deliver the property to him, the defendant would cause physical injury to some person in the future or cause property damage, (2) that in so doing, the defendant agreed with one or more persons, to engage in or cause the performance of certain conduct, as charged under racketeering act No. 20, (3) that such conduct constituted larceny by extortion, which, according to the law, is a class C felony, and which I have defined for you previously, (4) that at the time of such agreement the defendant intended that such conduct constituting larceny by extortion be performed, and (5) that after such agreement was made, the defendant or one or more of his alleged co-conspirators, committed at least one of the overt acts charged in racketeering act No. 20 in the indictment, then you may find that the government has established that the particular defendant committed the crime of conspiracy to commit larceny by extortion.

On the other hand, if you find that the government has failed to prove to your satisfaction beyond a reasonable doubt any one or more of these five elements, then you must find that the government has not established that the defendant committed conspiracy to commit larceny by extortion.

Authority: Criminal Jury Instructions, New York, charges for Penal Law § 105.10 (conspiracy in the fifth degree) and § 155.05(2)(e) and § 155.40 (larceny by extortion) combined.

#### 54. DUTY TO CONSULT AND NEED FOR UNANIMITY (9-7)

The government, to prevail, must prove the essential elements beyond a reasonable doubt, as already explained in these instructions. If it succeeds as to a particular defendant, your verdict should be guilty as to that defendant; if it fails, it must be not guilty. To report a verdict, it must be unanimous.

Your function is to weigh the evidence in the case and determine whether or not each defendant is guilty, solely upon the basis of such evidence.

Each juror is entitled to his or her opinion; each should, however, exchange views with his or her fellow jurors. That is the very purpose of jury deliberation -- to discuss and consider the evidence; to listen to the arguments of fellow jurors; to present your individual views; to consult with one another; and to reach an agreement based solely and wholly on the evidence -- if you can do so without violence to your own individual judgment.

Each of you must decide the case for yourself, after consideration with your fellow jurors, of the evidence in the case.

But you should not hesitate to change an opinion which, after discussion with your fellow jurors, appears erroneous.

However, if, after carefully considering all the evidence and the arguments of your fellow jurors, you entertain a

conscientious view that differs from the others, you are not to yield your conviction simply because you are outnumbered.

Your final vote must reflect your conscientious conviction as to how the issues should be decided. Your verdict on each count as to each defendant, whether guilty or not guilty, must be unanimous.

Authority: Sand et al., *Modern Federal Jury Instructions*,  
Instruction 9-7 (2005)

1

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2006 U.S. App. LEXIS 18289, \*

UNITED STATES OF AMERICA Appellee, -against- **PRINCE GAINES**, Defendant-Appellant,

Docket No. 04-5616-cr

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2006 U.S. App. LEXIS 18289

July 5, 2005, Argued  
July 20, 2006, Decided

**PRIOR HISTORY:** [\*1] **Prince Gaines** appeals from a judgment of the United States District Court for the Southern District of New York (Naomi Reice Buchwald, District Judge) convicting him of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The judgment of conviction is vacated, and the case is remanded for further proceedings.

#### CASE SUMMARY

**PROCEDURAL POSTURE:** Defendant appealed from a judgment of the United States District Court for the Southern District of New York that convicted him of being a felon in possession of a firearm in violation of 18 U.S.C.S. § 922(g).

**OVERVIEW:** A cab in which defendant was riding was pulled over by two officers, who told defendant to get out of the cab. One officer searched the cab and found an inoperable small-caliber handgun wedged between the seat cushion and the seat back. Defendant was arrested, and because he was a convicted felon, he was charged with violating 18 U.S.C.S. § 922(g). At trial, the district court's jury charge included an interested-witness instruction pertaining to defendant's testimony. Defense counsel objected, arguing that the charge implied that defendant's testimony was false, or at least less credible than the testimony of the other witnesses. The appellate court noted that the record was insufficiently developed to permit appellate review of the district court's order denying the motion to suppress. As for the challenged jury instructions, the court found error in the instruction that defendant's interest in the outcome of the case created a motive to testify falsely, and the court prohibited the use of such instructions in future trials. The court also expressed its disapproval of instructions that highlighted a testifying defendant's deep personal interest in the outcome of a trial.

**OUTCOME:** The appellate court vacated the judgment of conviction and remanded the case for further proceedings consistent with the opinion. Specifically, defendant was afforded a new evidentiary hearing on his motion to suppress evidence. In the event the motion was denied once again, he would be entitled to a new trial.

**CORE TERMS:** cab, credibility, motive, window, personal interest, tinted, deep, seat, testifying, partition, motive to lie, presumption of innocence, false testimony, motion to suppress, guilt, testify falsely, truthful, sticker, street, hypothetical, scrutinized, livery, suppression hearing, jury charge, presumed innocent, admonition, balancing, quotation, picked, instruct

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[Criminal Law & Procedure](#) > [Search & Seizure](#) > [Warrantless Searches](#) > [Stop & Frisk](#) > [Reasonable Suspicion](#) 

**HN1** ↓ In order to stop a car, the police must have either probable cause or a reasonable suspicion, based on specific and articulable facts, of unlawful conduct. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. [More Like This Headnote](#)

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**HN2** ↓ An appellate court reviews a district court's findings of fact for clear error. Particularly strong deference is given to factual findings that are based on credibility determinations by the court. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Search & Seizure](#) > [Warrantless Searches](#) > [Stop & Frisk](#) > [General Overview](#) 

**HN3** ↓ A seat belt spotted on an empty seat would not be a basis for a search. [More Like This Headnote](#)

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**HN4** ↓ In deciding a claim regarding jury instructions regarding the evaluation of a defendant's testimony, an appellate court's review is de novo; the court reverses only if the charge, taken as a whole, was prejudicial. At the outset, two propositions are clear. First, a testifying defendant in a criminal trial has a personal interest in its outcome that is as deep as it is obvious. Second, by testifying, the defendant places his credibility directly in issue, and his interest in the outcome may properly be considered by the jury in determining how much, if any, of his testimony to believe. The fact that a witness is the defendant creates an interest greater than that of any other witness, and to that extent affects the question of credibility. It is therefore a matter properly to be suggested by the court to the jury. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Trials](#) > [Defendant's Rights](#) > [Right to Fair Trial](#) 

[Criminal Law & Procedure](#) > [Trials](#) > [Defendant's Rights](#) > [Right to Testify](#) 

**HN5** ↓ Trial judges should not intimate that the defendant's interest in the outcome of the trial deprives his testimony of probability: It must be remembered that men may testify truthfully, although their lives hang in the balance, and the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The trial court may instruct the jury that the defendant has a deep personal interest that may be considered by the jury, and the caveat that there be no declaration nor intimation that the defendant has been untruthful in his testimony. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Jury Instructions](#) > [Particular Instructions](#) > [Presumption of Innocence](#) 

**HN6** ↓ The presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the

administration of our criminal law. To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established beyond a reasonable doubt. Accordingly, the United States Court of Appeals for the Second Circuit has placed out of bounds practices that threaten to dilute the presumption of innocence. [More Like This Headnote](#)

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**HN7**  The United States Court of Appeals for the Second Circuit denounces any instruction that tells a jury that a testifying defendant's interest in the outcome of the case creates a motive to testify falsely. [More Like This Headnote](#)

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**HNS**  It is far better for a trial judge's instructions not to assume the defendant's guilt at all than to assume his guilt and then attempt to mitigate the damage by saying he is nevertheless capable of telling the truth. Accordingly, to prevent a needless threat of dilution of the presumption of innocence, the United States Court of Appeals for the Second Circuit directs district courts in the circuit not to charge juries that a testifying defendant's interest in the outcome of the case creates a motive to testify falsely. [More Like This Headnote](#)

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**HN9**  In future cases, district courts should not instruct juries to the effect that a testifying defendant has a deep personal interest in the case. Rather, a witness's interest in the outcome of the case ought to be addressed in the court's general charge concerning witness credibility. If the defendant has testified, that charge can easily be modified to tell the jury to evaluate the defendant's testimony in the same way it judges the testimony of other witnesses. [More Like This Headnote](#)

**COUNSEL:** MICHAEL FARBIARZ, Assistant United States Attorney for the Southern District of New York (Karl Metzner, Assistant United States Attorney, Of Counsel; David N. Kelly, United States Attorney, on the brief), New York, NY, for Appellee.

DARRELL B. FIELDS, The Legal Aid Society, Federal Defender Division Appeals Bureau, New York, NY, for Defendant-Appellant.

**JUDGES:** Before: JACOBS, B.D. PARKER, Circuit Judges, and GLEESON, District Judge. n1

n1 The Honorable John Gleeson of the United States District Court for the Eastern District of New York, sitting by designation.

**OPINIONBY:** John Gleeson

**OPINION:** JOHN GLEESON, *United States District Judge*:

**Prince Gaines** appeals from a judgment of the United States District Court for the Southern District of New York convicting him of being a felon in possession of a firearm, in

violation [\*2] of 18 U.S.C. § 922(g), and sentencing him principally to a 92-month term of imprisonment. On appeal, Gaines argues, *inter alia*, that the district court erred by (1) denying his motion to suppress evidence; and (2) instructing the jury that his interest in the case "create[d] a motive for false testimony," that he had a "deep personal interest" in the outcome of the trial, and that his testimony should be carefully scrutinized.

The judgment of conviction is vacated, and the case is remanded for further proceedings. The record is insufficiently developed to permit appellate review of the district court's order denying the motion to suppress. As for the challenged jury instructions, we find error in the instruction that the defendant's interest in the outcome of the case created a motive to testify falsely, and we prohibit the use of such instructions in future trials. We also express our disapproval of instructions that highlight a testifying defendant's deep personal interest in the outcome of a trial. We recommend that a witness's interest in the outcome of the case be addressed in the court's general charge concerning witness credibility; if the defendant [\*3] has testified, the trial court should tell the jury to evaluate the defendant's testimony in the same way it judges the testimony of other witnesses.

## FACTS

**Prince Gaines** was picked up by a livery cab at the corner of 167th Street and Findlay Avenue in the Bronx at approximately 11:30 p.m. on January 28, 2004. Almost immediately, the cab, which was owned and operated by Raul Juarez, was pulled over by Sergeant Ralph Cilento and Officer Ronald Schudde. Cilento approached the driver's side of the cab. He opened the rear door, told Gaines to get out, and examined the rear of the cab. He found an inexpensive, inoperable, small-caliber handgun wedged in the space between the seat cushion and the seat back. Gaines was thereupon arrested. Because he was a convicted felon, he was charged with violating 18 U.S.C. § 922(g).

### A. The Suppression Hearing on the Morning of Trial

The case was scheduled for trial on Monday, May 10, 2004. In a letter sent by facsimile the evening before, Gaines's lawyer moved to suppress the gun seized from the livery cab. The following morning, he explained why the motion came so late. Whereas the complaint filed on the day of the [\*4] arrest had justified the stop of the cab by recounting the officers' alleged observation that it lacked a safety partition, n2 a police report that was disclosed on the eve of trial suggested a different reason: that the cab bore a sticker inviting safety checks by the police. Defense counsel also learned the day before trial that Sergeant Cilento had previously stopped Gaines for marijuana possession. Based on these newly-disclosed facts, together with the undisputed fact that the cab had no safety check sticker, Gaines moved to suppress on the ground that the police had illegally stopped the cab. Specifically, he contended that the cab was stopped not because of an observed traffic infraction, but because the officers had just seen Gaines get into it, and they had an interest in him.

----- Footnotes -----

n2 Livery cabs must have such a partition unless they are equipped with an alternate safety device, see N.Y. Comp. Codes R. & Regs., tit. 35, § 6-13(a)(2003), such as an in-vehicle safety camera.

----- End Footnotes -----

After expressing her annoyance [\*5] at the government's last-minute disclosure of witness statements, and her resentment that a suppression hearing was made necessary by that practice even as a jury panel was waiting, the district judge reluctantly determined to "have

the most narrow, narrow suppression hearing right now."

Cilento testified that he and Schudde were in their patrol car directly behind the cab. Both cars were on the south side of the street. The cab had tinted windows, and it was almost midnight. Cilento pulled the cab over because he saw it had no safety partition between the front and back seats. He acknowledged the particular difficulty of seeing inside a car with tinted windows late at night, but nonetheless insisted that he observed the absence of a partition. Cilento admitted that the cab was equipped with a security camera and had a window sticker so indicating, which meant it was not required to have a partition. But he claimed not to have seen the window sticker before making the stop. n3 He denied the defense allegation that he had stopped the cab because he had an interest in Gaines, asserting that he had "just caught a little glimpse of the person getting in" the cab, and did not know at [\*6] the time who he was.

----- Footnotes -----

n3 Cilento also asserted yet another reason for the stop: that Gaines was picked up as a street hail, which livery cabs are not permitted to do.

----- End Footnotes-----

The defense called Detective Luke Waters, the case agent, who also testified, among other things, that the cab had tinted windows.

The district court denied the motion to suppress, stating as follows:

I appreciate the argument that tinted windows and nighttime do make it more difficult to see, but the witness said he did see, and there hasn't been any reason offered as to why at the time he was not operating for the reasons that he stated he was.

So under the circumstances, while as I say I appreciate that it is obviously more difficult to see through tinted windows and more difficult to see at night than during the day, I found [Cilento's] manner to be credible, and in the absence of some motive for him to have made this stop that was inappropriate, I am going to deny the suppression motion.

The court then proceeded [\*7] to select a jury.

#### B.The Trial Testimony

At trial, Cilento again testified that the livery cab was stopped because he observed that there was no partition and because the cab had picked up a street hail. He added that while

he was still in the police car, he observed through the tinted rear window that the passenger in the rear of the cab "got up on his knee, turned to the side and sat back down quickly."

When Cilento opened the rear door of the cab, Gaines engaged him in some "quick banter" about things of no importance and appeared nervous. This aroused Cilento's suspicion. Gaines was instructed to get out of the cab, and he complied. In the rear seat was a black plastic bag containing some personal items. Also, upon shining his flashlight into the back seat, Cilento observed a chrome object wedged into the "crevice" in the back seat, where the back rest meets the seat itself. It looked to Cilento like it could have been the chrome part of a seatbelt buckle. When he moved closer he saw it was the bottom of an upside-down handgun that had been wedged down into the crack of the seat.

Cilento then arrested Gaines. As the handcuffs were being placed on him, Gaines said [\*8] "What are you doing? That's not mine."

Juarez, the driver of the cab, testified that the customer before Gaines had inspected the back seat for 30 to 40 seconds, finding nothing. Juarez further testified that he instructs all of his passengers to do that at the end of their rides. In direct contradiction of the arresting officers, Juarez testified that his cab did not have tinted windows.

Gaines testified in his own defense, stating that after he was ordered out of the back of the cab, he heard the officers say they had found a gun. He denied that it was his or that he had been aware of its presence. According to Gaines, the police told him, "We found a gun. It's yours." On the way to the precinct, they told him he would face eight years in jail and asked whether he wanted to cooperate.

#### C.The Jury Charge

The district court's jury charge included an interested-witness instruction pertaining to Gaines's testimony. The charge read as follows:

The defendant in a criminal case never has any duty to testify or come forward with any evidence. This is because, as I've told you, the burden of proof beyond a reasonable doubt remains on the government at all times, and Mr. [\*9] Gaines is presumed innocent.

In this case Mr. Gaines did testify and he was subject to cross-examination like any other witness. Obviously, the defendant has a deep personal interest in the result of his prosecution. This interest creates a motive for false testimony and, therefore, the defendant's testimony should be scrutinized and weighed with care. You should examine and evaluate his testimony just as you would the testimony of any witness with an interest in the outcome of this case. In appraising the defendant's credibility you may take that into account.

It by no means follows, however, that simply because a person has a vital interest in the end result he is not capable of telling a truthful and straightforward story. It is for you to decide to what extent, if at all, the defendant's interest has affected or colored his testimony.

Defense counsel objected, arguing that the charge implied that Gaines's testimony was false, or at least less credible than the testimony of the other witnesses. Counsel specifically objected to the statements that the defendant had a motive to testify falsely and that his testimony should be scrutinized with care. [\*10]

## DISCUSSION

### A. The Search of the Livery Cab

Gaines, appeals the district court's denial of his motion to suppress the gun seized from the back of the cab. He argues that the police officers did not have a lawful basis to stop the cab.

**HN1** In order to stop a car, the police must have either "probable cause or a reasonable suspicion, based on specific and articulable facts, of unlawful conduct." United States v. Scopo, 19 F.3d 777, 781-82 (2d Cir. 1994) (internal quotation marks omitted). "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Whren v. United States, 517 U.S. 806, 810, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). Thus, if Sergeant Cilentio and Officer Schudde observed a traffic offense committed by the driver of the cab, the stop was reasonable. And if the stop was reasonable, Cilentio was authorized to order Gaines to get out of the cab. See Maryland v. Wilson, 519 U.S. 408, 415, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997). Finally, if a weapon was in plain view once Gaines was out of the cab, the entry into the back of the cab to extract [\*11] it from between the seat cushions was permissible. Scopo, 19 F.3d at 782.

The government argues that Cilentio's observation that the cab lacked the required safety partition justified the stop. Gaines contends that Cilentio "straight out lied" about why he stopped the cab, and that the government failed to prove a justification for the stop.

**HN2** We review a district court's findings of fact for clear error. United States v. Mendez, 315 F.3d 132, 135 (2d Cir. 2002) (citing United States v. Eng, 997 F.2d 987, 990 (2d Cir. 1993)). Particularly strong deference is given to factual findings that are based on credibility determinations by the court. *Id.* Although this case may eventually test the limits of that deference, the current record is insufficiently developed to permit appellate review of the district court's denial of the motion to suppress. For the reasons set forth below, we find it appropriate to vacate the order denying the motion to suppress and to remand to the district court for a new hearing on the motion.

The first and most obvious problem with the government's case at the suppression hearing was Cilentio's claim [\*12] that he could actually observe, at night and through tinted windows, the *absence* of a partition in the cab. Recognizing the implausibility of that testimony, and the fact that the cab's owner testified that it did *not* have tinted windows, the government argues on appeal that, "[a]s the District Court found ... Cilentio may have been mistaken about the tinting of the windows ...." But the district court found no such thing. Indeed, it found the opposite, that is, it believed Cilentio's testimony that he could see into the cab *despite* the tinted windows and the darkness.

Of course, if the district's court's implicit finding that the car had tinted windows is clearly erroneous, that means it was more likely that Cilento could have observed the absence of a partition. On the other hand, if Cilento's testimony about the tinted windows is rejected, it could undermine the credibility of his other observations and testimony.

Tinted windows or not, even if Cilento saw that the cab had no partition, the stop was lawful only as long as he did *not* see the sticker on the window of the passenger-side rear door indicating that the cab was equipped with a security camera. Because [\*13] such a camera is an approved safety device that may be employed in lieu of a partition, its undisputed presence in the cab vitiated the government's asserted basis for the stop. The district court found that Cilento did not observe the sticker, but, as discussed above, the district court may choose to revisit that finding on remand.

Moreover, Cilento testified at the suppression hearing that another reason he stopped the cab was that it had picked up Gaines as a street hail, which livery cabs are not permitted to do. The district court made no finding with respect to this alternate justification for the stop.

Finally, the district court made no finding with regard to whether the seized firearm was in plain view. Cilento testified at trial that he observed a chrome object that looked like a seat belt buckle in the seam between the seat cushion and the seat back in the rear of the cab. <sup>HN3</sup> A seat belt spotted on an empty seat would not be a basis for a search. Though Cilento said a "closer look" revealed it to be a handgun, it is not clear from his testimony whether that closer look occurred only after he reached his hand into the crevice and removed the weapon.

We recognize that the [\*14] district court's insufficient factfindings may be the result of the procedural irregularity of the eleventh-hour motion to suppress. There were no formal motion papers, before or after the hearing, setting forth each side's factual and legal contentions. Rather, the motion was made literally as the trial was to begin, and was decided immediately after a brief hearing and a couple of minutes of oral argument.

In light of the anomalous and incomplete findings, we vacate the order denying the motion to suppress and remand the case to the district court for further proceedings, including a new evidentiary hearing, on the motion. See *United States v. Matsushita*, 794 F.2d 46, 49 (2d Cir. 1986) (remanding for clarified and more explicit findings with respect to motion to suppress evidence).

#### B. The Jury Charge

Gaines argues that the district court's jury instructions regarding the evaluation of his testimony deprived him of a fair trial. Specifically, Gaines challenges the following instruction: "Obviously, the defendant has a deep personal interest in the result of his prosecution. This interest creates a motive for false testimony and, therefore, the defendant's [\*15] testimony should be scrutinized and weighed with care." This language unfairly disparaged his credibility, Gaines argues, and did so in a close case that hinged directly on the jury's credibility determinations.

<sup>HN4</sup> In deciding such a claim, our review is *de novo*; we reverse "only if the charge, taken as a whole, was prejudicial." *United States v. Caban*, 173 F.3d 89, 93 (2d Cir. 1999). We conclude that the charge in this case prejudiced Gaines, and that a new trial is required.

At the outset, two propositions are clear. First, a testifying defendant in a criminal trial has a personal interest in its outcome that is as deep as it is obvious. Second, by testifying, the defendant places his credibility directly in issue, and his interest in the outcome may properly be considered by the jury in determining how much, if any, of his testimony to believe. Beyond those indisputable propositions lies more than a century of litigation over what a trial

judge may properly say to a jury about a testifying defendant's credibility.

The Supreme Court stated in *Reagan v. United States*, 157 U.S. 301, 305, 15 S. Ct. 610, 39 L. Ed. 709 (1895), that the fact that a witness is [\*16] the defendant "creates an interest greater than that of any other witness, and to that extent affects the question of credibility. It is therefore a matter properly to be suggested by the court to the jury." However, in both *Reagan* and *Hicks v. United States*, 150 U.S. 442, 14 S. Ct. 144, 37 L. Ed. 1137 (1893), the Court identified a limit on what else a trial court could tell the jury about the defendant's interest in the outcome. In *Hicks*, the jury instructions included, *inter alia*, the following admonitions about the defendant's testimony:

He is in an attitude, of course, where any of us, if so situated, would have a large interest in the result of the case; the largest perhaps, we could have under any circumstances in life; and such an interest, consequently, as might cause us to make statements to influence a jury in passing upon our case that would not be governed by the truth. We might be led away from the truth because of our desire.

150 U.S. at 451. In other words, the jury was told that the defendant's "large" interest in the outcome of the case gave him a motive to lie.

In reversing the conviction, the Supreme Court held that [\*17] <sup>HNS</sup> trial judges should not "intimate" that the defendant's interest in the outcome of the trial "deprive[s] his testimony of probability":

[I]t must be remembered that men may testify truthfully, although their lives hang in the balance, and the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability.

*Id.* at 452. Two years after *Hicks*, in *Reagan*, the Court reiterated both the general rule, *i.e.*, that the trial court may instruct the jury that the defendant has a "deep personal interest" that may be considered by the jury, and the caveat that there be no "declaration nor intimation that the defendant has been untruthful in his testimony." 157 U.S. at 311.

Both *Hicks* and *Reagan* addressed this issue in the context of a defendant's right to testify, which at the time was a statutory right of relatively recent vintage. See *Reagan*, 157 U.S. at 304 [\*18] (citing predecessor to 18 U.S.C. § 3481). More recently, courts have evaluated challenges to such instructions against the backdrop of the presumption of innocence. See, *e.g.*, *United States v. Vega*, 589 F.2d 1147, 1155 (2d Cir. 1978) (Gurfein, J., concurring) (a "heavily weighted" instruction about the defendant's self-interest "makes the choice of the

defendant to testify ... the basis for inferentially downgrading the presumption of innocence"); *United States v. Rollins*, 784 F.2d 35, 37 (1st Cir. 1986) ("Since [Reagan], the lower courts have been increasingly troubled with the seeming psychological inconsistency of charging in one breath that a defendant is presumed to be innocent, and in the next that his, or her, testimony is peculiarly suspect.").

**HN6** The "presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895). "To implement the presumption, courts must be alert to factors that may undermine the fairness [\*19] of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established ... beyond a reasonable doubt." *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Accordingly, this Court has placed out of bounds practices that threaten to dilute the presumption of innocence. See, e.g., *United States v. Oshatz*, 912 F.2d 534, 539 (2d Cir. 1990) (even though guilt-assuming hypothetical questions, posed on cross-examination to a defendant's character witnesses, have probative value in assessing the credibility of the witness, they are "nevertheless to be prohibited because [they] create[] too great a risk of impairing the presumption of innocence").

Particularly instructive to the case at hand is *United States v. Dove*, 916 F.2d 41 (2d Cir. 1990), which involved the trial court's jury charge. The challenged instruction was a hypothetical inquiry into "whether Jack shot Mary," which was intended to illustrate the concept of circumstantial evidence. *Id.*, at 44. The problem, we explained, was that the hypothetical [\*20] assumed Jack's guilt. *Id.*, at 46. In reversing and remanding for a new trial, we observed that "a hypothetical that assumes guilt where defendant asserts his innocence is disfavored." *Id.*

This principle **HN7** leads us to denounce any instruction, including the one at issue here, that tells a jury that a testifying defendant's interest in the outcome of the case creates a motive to testify falsely. We do so not because the instruction is necessarily inaccurate, either generally or as applied to Gaines. To the contrary, we think it clear that defendants frequently have a motive to lie. Indeed, in a perfect world, where prosecutors charged only the guilty, defendants would *always* have a motive to testify falsely. But an instruction that the defendant has a motive to testify falsely undermines the presumption of innocence. In this regard, there is an important distinction between a "motive to lie" instruction and an instruction that a defendant has a deep personal interest in the case. A defendant has a deep personal interest in the outcome of a trial whether or not he is guilty. Thus, the instruction, though unnecessary and potentially prejudicial, as we discuss further [\*21] below, is at least always true. But a defendant does not always have a motive to testify falsely. An innocent defendant has a motive to testify truthfully. As the government candidly acknowledged at oral argument, the district court's charge that Gaines's "interest create[d] a motive for false testimony" was true only if Gaines was, in fact, guilty.

Indeed, the instruction challenged here poses an even greater threat of undermining the presumption of innocence than the instruction in *Dove*, as it assumed the guilt not of a hypothetical "Jack," but of Gaines himself. Gaines was presumed innocent, and that presumption accompanied him to the witness stand. We do not mean that a defendant who is presumed innocent should also be presumed to testify truthfully. Neither does the Supreme Court, which has made it clear that a defendant's credibility should be subject to the same scrutiny as the testimony of other witnesses. See *Portuondo v. Agard*, 529 U.S. 61, 73, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000). We do believe, however, and hold, that the trial court's jury instructions about a defendant's testimony must not assume that he is guilty.

We recognize that our precedents in this [\*22] area include cases that find no error in similar jury instructions so long as the "motive to lie" charge is "balanced" by a further

instruction that the motive does not preclude the defendant from telling the truth. *See, e.g., United States v. Gleason*, 616 F.2d 2, 15-16 (2d Cir. 1979) (charge that defendant's interest "creates, at least potentially, a motive for false testimony" was sufficiently balanced by further charge that "it by no means follows that ... he is not capable of telling a truthful, candid, and straight-forward story") (internal quotation marks omitted). n4 The rule has not been easy to administer. For example, the absence of such balancing language resulted in reversal in *United States v. Matias*, 836 F.2d 744, 749-50 (2d Cir. 1988) (admonition to "consider" defendant's testimony was insufficient to balance motive to lie instruction), but not in *United States v. Floyd*, 555 F.2d 45, 47 and n.4 (2d Cir. 1977) (admonition that "you must decide whether to believe him" was "adequate," though explicit statement that motive to lie is not inconsistent with the ability to render truthful testimony is "preferable"), [\*23] or *United States v. Schlesinger*, 598 F.2d 722, 727 (2d Cir. 1979) (failure to include balancing language not error).

----- Footnotes -----

n4 *See also, e.g., United States v. Martin*, 525 F.2d 703, 706 and n.3 (2d Cir. 1975) (no plain error where "motive for false testimony" charge balanced by "however, it by no means follows that ... [the defendant] is not capable of telling a truthful and straightforward story"); *United States v. Tolkow*, 532 F.2d 853, 859 and n.3 (2d Cir. 1976) (upholding charge substantially identical to that in *Martin*).

----- End Footnotes -----

We find this approach unsatisfactory for a reason that transcends its difficulty of administration. The critical defect in a jury instruction that says the defendant has a motive to lie is its assumption that the defendant is guilty. That defect is not cured by a further charge that a defendant can still be truthful. Rather, the two instructions can act in synergy; as Judge Gurfein observed in *Vega*, George Washington is said [\*24] to have admitted to chopping down the cherry tree. 589 F.2d at 1155 (Gurfein, J., concurring). And indeed, in the courtroom, the practical effect of the "balancing" language our cases have endorsed is a message more akin to "even guilty people can occasionally admit it" than to "even defendants may truthfully deny the accusations." In any event, we conclude that <sup>HNS</sup> it is far better for a trial judge's instructions not to assume the defendant's guilt at all than to assume his guilt and then attempt to mitigate the damage by saying he is nevertheless capable of telling the truth. Accordingly, to prevent a needless threat of dilution of the presumption of innocence, we hereby direct district courts in the circuit not to charge juries that a testifying defendant's interest in the outcome of the case creates a motive to testify falsely.

We also have concerns with the district court's charge that Gaines had a "deep personal interest" in the outcome of the trial. Arguably, the juxtaposition of that instruction with the further admonition that Gaines's testimony should "therefore ... be scrutinized and weighed with care" constitutes the sort of "intimation" that the defendant has [\*25] been untruthful that *Hicks* and *Reagan* prohibit. We need not decide that question today, as the combination of those instructions with the motive to lie charge discussed above warrants the vacatur of Gaines's conviction. Nevertheless, we join those courts that have expressed disapproval of a jury instruction highlighting a testifying defendant's deep personal interest in the outcome of a trial. Among the first was the Eighth Circuit in *Taylor v. United States*, 390 F.2d 278 (1968), which involved an instruction reminding the jury of "the very grave interest" the testifying defendant had in the case. *Id.* at 284. Citing *Reagan*, among other cases, then-Circuit Judge Harry Blackmun rejected the challenge, but observed that the continuing and frequent complaints about such instructions warranted their elimination. A defendant's credibility is better addressed "by reference in the court's general instructions as to all

witnesses. We would prefer that the defendant not be singled out. His interest is obvious to the jury." *Id.* at 285. Two years later, the First Circuit agreed with *Taylor*. Rejecting, on plain error review, a challenge [\*26] to a charge that the defendant's interest is usually greater than that of any other witness, the court nevertheless endorsed *Taylor's* suggestion that the defendant's interest be referenced by a simple addition to the court's general instructions about witness credibility. *Carrigan v. United States*, 405 F.2d 1197, 1198 (1st Cir. 1969) (per curiam).

As for this Court, our opinions policing charges about a testifying defendant's interest in the outcome of the trial are replete with misgivings about the need for them. See, e.g., *Schlesinger*, 598 F.2d at 727 ("While we do not retreat from [the view that a defendant's 'vital interest' charge requires balancing language, we] question the need for any instruction as to the effect the defendant's interest may have on his credibility...."). Indeed, we have expressly disapproved a jury charge stating that the defendant's interest is "of a character possessed by no other witness," albeit in the context of a charge infused with multiple other errors. *United States v. Assi*, 748 F.2d 62, 68 (2d Cir. 1984) (internal quotation marks omitted) (citing *United States v. Araujo*, 539 F.2d 287, 289-90 (2d Cir. 1976)). [\*27]

Nothing could be more obvious, and less in need of mention to a jury, than the defendant's profound interest in the verdict. Is there harm in stating the obvious? Perhaps so; as the First Circuit has observed, when the trial court mentions a defendant's "great personal interest," "[a] jury might well think that the court had a purpose in stating the obvious ..., a purpose unfavorable to the defendant." *United States v. Dwyer*, 843 F.2d 60, 63 (1st Cir. 1988). In the absence of a need to give such an instruction, and we perceive none, the risk of unfairly denigrating the defendant's testimony should not be incurred.

All of the pattern jury instructions of the circuits that have them eliminate these concerns by adopting *Taylor's* suggestion. The First and the Eleventh Circuits' general credibility charges include, as one of several factors to consider, the witness's interest in the outcome of the case, and include no specific charge for a defendant's testimony. n5 The Fifth, Sixth, Seventh, Eighth and Ninth Circuits' general credibility charges do the same thing, and in the event the defendant testifies, they add a statement that his credibility is to be evaluated [\*28] in the same way as that of any other witness. n6 No further instruction is necessary. The relevant instruction in *Modern Federal Jury Instructions* instructs the jury to "evaluate [the defendant's testimony] just as you would the testimony of any witness with an interest in the outcome of this case." Leonard B. Sand, et al., *Modern Federal Jury Instructions*, Inst. 7-4 (2005); see also Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions*, § 15.12 ("You should judge the testimony of [the defendant] in the same manner as you judge the testimony of any other witness in this case.")

----- Footnotes -----

n5 First Circuit Pattern Criminal Jury Instructions Drafting Committee, *Pattern Criminal Jury Instructions for the District Courts of the First Circuit*: § 3.06 (1998) ("You may want to take into consideration such factors as ... any interest you may discern they may have in the outcome of the case ..."); Eleventh Circuit District Judges Association Pattern Jury Instructions Committee, *Pattern Jury Instructions, Criminal Cases*: § 5 (2003) ("In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: ... Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? ..."). [\*29]

n6 Fifth Circuit District Judges Association Pattern Jury Instructions Committee, *Pattern Jury Instructions, Criminal Cases*: § 1.08 (2001) ("The testimony of the defendant should be

weighed and his credibility evaluated in the same way as that of any other witness."); Sixth Circuit District Judges Association Pattern Criminal Jury Instructions Committee, *Pattern Criminal Jury Instructions*: §§ 1.07, 7.02B (2005) ("(1) You have heard the defendant testify. Earlier, I talked to you about the 'credibility' or the 'believability' of the witnesses. And I suggested some things for you to consider in evaluating each witness's testimony. (2) You should consider those same things in evaluating the defendant's testimony."); Committee on Federal Criminal Jury Instructions for the Seventh Circuit, *Pattern Criminal Federal Jury Instructions for the Seventh Circuit*, § 1.03 (1998) ("You should judge the defendant's testimony in the same way that you judge the testimony of any other witness."); Eighth Circuit Committee on Model Criminal Jury Instructions, *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit*: § 3.04 (2000) ("You should judge the testimony of the defendant in the same manner as you judge the testimony of any other witness."); Ninth Circuit Committee on Model Criminal Jury Instructions, *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit*: §§ 3.4, 3.9 (2003) ("The defendant has testified. You should treat this testimony just as you would the testimony of any other witness.")

----- End Footnotes----- **[\*30]**

In sum, <sup>HN9</sup> in future cases, district courts should not instruct juries to the effect that a testifying defendant has a deep personal interest in the case. Rather, a witness's interest in the outcome of the case ought to be addressed in the court's general charge concerning witness credibility. n7 If the defendant has testified, that charge can easily be modified to tell the jury to evaluate the defendant's testimony in the same way it judges the testimony of other witnesses. Though we do not purport to micromanage such charges, the Seventh Circuit's pattern instruction is set forth in the margin as an example. n8 If for some reason an additional free-standing charge on the defendant's testimony is deemed appropriate, we suggest as an example the one given in this case -- stripped of the language we find to have prejudiced Gaines. n9

----- Footnotes -----

n7 In this regard, we disagree with the government's assertion that "Gaines was the only interested trial witness, and so he was the only witness as to whom an interested witness charge was appropriate." Though it may pale in degree when compared to a defendant's, arresting officers have an indisputable interest in the outcome of cases they testify in. Anyone who believes otherwise does not understand modern law enforcement. For this and other reasons, the interest-in-the-outcome factor should always be part of the general charge on credibility. It will almost always be relevant to some degree, and will do no harm even if it is not. **[\*31]**

#### n8 **1.03 TESTIMONY OF WITNESSES (DECIDING WHAT TO BELIEVE)**

You are to decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all, as well as what weight, if any, you give to the testimony of each witness.

In evaluating the testimony of any witness, you may consider, among other things:

- the witness's intelligence;
- the ability and opportunity the witness had to see, hear, or know the things that the witness testified about;
- the witness's memory;
- any interest, bias, or prejudice the witness may have; - the manner of the witness while testifying; and - the reasonableness of the witness's testimony in light of all the evidence in the case.

[You should judge the defendant's testimony in the same way that you judge the testimony of any other witness.]

n9 Such a charge would read as follows:

The defendant in a criminal case never has any duty to testify or come forward with any evidence. This is because, as I have told you, the burden of proof beyond a reasonable doubt remains on the government at all times, and [the defendant] is presumed innocent. In this case, [the defendant] did testify and he was subject to cross-examination like any other witness. You should examine and evaluate the testimony just as you would the testimony of any witness with an interest in the outcome of the case.

----- End Footnotes----- [\*32]

\* \* \* \* \*

Applying the foregoing principles to this case, we find error in the challenged instructions regarding Gaines's testimony. As the government acknowledges, the aspect of the instruction that attributed to Gaines a "motive for false testimony" was correct only if Gaines was guilty. It therefore undermined the presumption of innocence. In combination with the directive to carefully "scrutinize[]" Gaines's testimony, and the unnecessary emphasis on his already-obvious self-interest, we hold that the charge viewed as a whole was so unbalanced as to amount to reversible error. n10

----- Footnotes -----

n10 The government argues that this Court has "consistently approved interested-witness charges such as" the one in this case. But all of the cases it relies on are distinguishable. This case involves (1) a preserved challenge to a charge that (2) the defendant has a deep personal interest giving rise to (3) a motive to lie and a resulting need to (4) carefully scrutinize the defendant's testimony. At least one of those factors is absent in every case the government cites. See *United States v. Mahler*, 363 F.2d 673, 678 (2d Cir. 1966) (no

objection; no motive to lie instruction); *Martin*, 525 F.2d at 706 (no objection; no careful scrutiny instruction); *Tolkow*, 532 F.2d at 859 n.3 (no careful scrutiny instruction); *Floyd*, 555 F.2d at 47 (no careful scrutiny instruction); *United States v. Rucker*, 586 F.2d 899, 904 (2d Cir. 1978) (no objection); *United States v. Hernandez*, 588 F.2d 346, 349-50 (2d Cir. 1978) (no objection); *Vega*, 589 F.2d at 1154 (no objection); *Gleason*, 616 F.2d at 15 (instruction that interest "creates, at least potentially, a motive for false testimony" does not assume guilt) (emphasis added) (internal quotation marks omitted).

----- End Footnotes----- [\*33]

The government argues that any such error was harmless because the evidence against Gaines was "overwhelming." We disagree. This was a close case. Even viewed charitably, the officers' testimony was mistaken in material respects, and even if believed, it was not inconsistent with Gaines's claim that the inoperable weapon hidden in the crevice of the cab's back seat was not his. The trial boiled down to the credibility of Gaines's testimony, and thus the erroneous instructions cannot reasonably be considered harmless. n11

----- Footnotes -----

n11 Our decision has no bearing on jury instructions related to the testimony of informants and accomplices, which raise related but distinct issues. Unlike defendants, such witnesses are not presumed innocent, and the nature of their interest in the outcome (which can depend on, e.g., their agreement, if any, with the government; the terms of an immunity order; and whether they are called by the prosecutor or the defendant) is often not obvious at all. This case does not implicate such instructions, and we therefore express no view on them.

----- End Footnotes----- [\*34]

## CONCLUSION

For the foregoing reasons, the judgment of conviction is vacated and the case is remanded for further proceedings consistent with this opinion. Specifically, Gaines shall be afforded a new evidentiary hearing on his motion to suppress evidence. In the event the motion is denied once again, he shall be entitled to a new trial.

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2

[REDACTED]  
United States District Court  
Southern District of New York  
500 Pearl Street  
New York, New York 10007  
By Email and Hand Delivery

April 1, 2005

Re: *United States* [REDACTED]

Dear Judge [REDACTED]

Pursuant to the Court's direction, on behalf of [REDACTED], I submit the following requests for the Court's consideration. I also request permission to join co-counsel's objections and motions *in limine* to the extent they apply to the conspiracy count under which all three defendants are charged. Since the transcripts are still in draft form and the evidence has not yet been produced at trial, I respectfully reserve my client's right to make further objections at the time the evidence is moved for introduction at trial, including objections to attribution, translation and relevance of the calls. I have received the Government's proposed draft transcripts yesterday and am in the process of comparing them with the voice recordings, which are all in Spanish with the assistance of my client, who does speak Spanish.<sup>1</sup>

First, I respectfully request that the Court inquire of the potential jurors within the following subject matters specifically pertinent to this case, in addition to the Court's standard voir dire:

- If any potential juror is a naturalized American as opposed to one born in the United States;
- If any juror may harbor potential bias or prejudice against non-English speaking persons living in the United States;
- If any juror may harbor potential bias or prejudice against Mexican-Americans;
- If any juror is bi-lingual;
- If so what languages he or she speaks;

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<sup>1</sup> Presumably this issue will be addressed and perhaps resolved at the conference before the Court currently scheduled for Monday, April 4, 2005.

If any juror has a family member or someone close to them who has suffered a drug problem;  
If any juror is or has a family member or close friend in law enforcement or security;  
If any juror is or has a family member or close friend who has been accused or convicted of a crime;  
If any juror has lived in or is familiar with the geography of Southern California specifically Rancho Cucamongo or Bellflower, Long Beach, Pico Rivera, Mission Viego;

I also specifically request the following proposed jury instructions adapted from 1 L. Sand, et al., Modern Federal Jury Instruction:<sup>2</sup>

Instruction 2-11	Improper Considerations
Instruction 3 -5	Consider Each Defendant Separately
Instruction 3 -7	Multiple Defendant's - One Count
Instruction 3 -11	Venue
Instruction 4 -1	Reasonable Doubt Including the language "evidence or lack of evidence"
Instruction 5-9	Transcripts of Tape Recordings
Instruction 5-14	Defendant's Reputation
Instruction 5-15	Opinion of Defendant's Character
Instruction 5 -19	Statement of Defendant

"There has been evidence that the defendant made certain statements. In deciding what weight if any to give the alleged statements, you should first examine with great care whether each statement was made; under what conditions it was alleged to have been made and whether it was voluntarily and understandingly made. If you determine that such statements were made, I instruct you that you are to give the statements such weight, if any, as you feel they deserve in light of all the evidence."

Instruction 7-3	Interest in the Outcome <sup>3</sup>
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<sup>2</sup>Defendant [REDACTED], respectfully reserves the right to amend, omit or include additional instructions depending on the evidence presented at trial, as well as, to object to proposed instructions by the other parties.

<sup>3</sup>Defendant [REDACTED] requests this instruction only to the extent that it applies to the testimony of the anticipated cooperating witness(s). However, being a realist and given the anticipated request by the Government for such a charge if the Defendant exercises his right to

Instruction 7-5  
Instruction 7 -11

Cooperators Called by the Government  
Co-Defendant's Plea Agreement

To the extent they can be made at this stage of the litigation and to the extent that they have not been worked out among the parties, objections to the Government's proposed Exhibits, are included, as per the Court's direction, on a single exhibit list included in the Government's submission. Specifically, [REDACTED] will not require the government to call a witness from California to testify to certain business records foundation, provided the government files a stipulation including an affidavit that the witness is available and willing to testify if called.

Finally, the Government has indicated that they do not intend to offer any 404(b) evidence against my client. Accordingly that matter is not addressed herein.

Respectfully submitted,

Susan J. Walsh  
Attorney for Defendant  
[REDACTED]

cc: [REDACTED] 19 627 0086  
[REDACTED]  
[REDACTED] USA  
B: [REDACTED]  
[REDACTED]

---

testify, I respectfully request that the Defendant himself, not be singled out in the instruction, unless, the cooperating witness is also so identified.

3

SPECIAL JURY INSTRUCTION NO. EIGHT

CONSPIRACY—ELEMENTS

The defendant is charged with intentionally and knowingly conspiring to distribute or possess with intent to distribute five or more kilograms of mixtures and substances containing a detectable amount of cocaine in violation of Section 846 of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, beginning on or about January 2003, and ending in or about June 2004, in the Southern District of New York, there was an agreement between two or more persons to commit the crime as charged in the indictment; and

Second, the defendant knowingly and intentionally became a member of the conspiracy knowing of its objects of distributing and possessing with intent to distribute five kilograms of cocaine, intending to help accomplish this and;

Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed.

I shall discuss with you briefly the law relating to each of these elements.

A conspiracy is a kind of criminal partnership—an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

Based upon 9<sup>th</sup> Circuit Instruction 8.16; United States v. Ortiz-Rengifo, 832 F.2d 722, 724 (2<sup>nd</sup> Cir. 1987)

SPECIAL JURY INSTRUCTION NO. NINE

**MULTIPLE CONSPIRACIES**

You must decide whether the conspiracy charged in the indictment existed, and, if it did, who at least some of its members were. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you may find that some other conspiracy existed. Similarly, if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy.

Based upon 9<sup>th</sup> Circuit Instruction 8.17; *United States v. Bauer*, 84 F.3d 1549, 1560-61 (9th Cir.1996), *cert. denied*, 519 U.S. 1131 (1997); *United States v. Perry*, 550 F.2d 524, 533 (9th Cir.), *cert. denied*, 431 U.S. 918, 434 U.S. 827 (1977)

4

Hon. [REDACTED]  
United States District Judge  
Southern District of New York  
500 Pearl Street  
New York, New York 10007

4

Re: *United States v.* [REDACTED]

Dear Judge [REDACTED]:

We are writing to set forth the defendant's preliminary request for proposed jury instructions in this case. We have attempted to anticipate applicable instructions in advance of trial as per the Court's direction and respectfully reserve the right to modify our requests following the evidentiary portion of the trial and in light of the Government's requests. Many of the requested charges referenced below are adapted, as indicated from *Modern Federal Jury Instructions*, Sand, Siffert, Loughlin and Reiss, Mathew Bender & Co., Inc. (2000)(hereinafter "Sand").

At the outset, it should be noted that the defense has no objection to submitting the written charge to the jury should the Court deem that appropriate, with two caveats. First, we would request that each juror be given their own set of instructions, so that each juror will have equal access to the charge and will not be dependant upon one juror's re-reading of it. In addition, we request that the jury not be permitted to take the charge out of the jury room at any time during deliberations.

#### Requests of General Applicability

The defense respectfully requests that the Court give the following general instructions:

1. Function of the Court and the Jury and Juror Obligations  
Sand 2-2, 2-3, 2-4
2. Indictment Not Evidence  
Sand 3-1

"The defense requests that the entire pattern instruction be given, including the final sentence which provides as follows: "In reaching a determination of whether the government has proved the defendant guilty beyond a reasonable doubt, you may consider only the evidence introduced or the lack of evidence."

We make this request particularly if the Court is inclined to provide the jury with a copy of the indictment.

3. Statements of Court and Counsel Not Evidence  
Sand 2-8, 2-9
4. Government as Party  
Sand 2-5
5. Improper Considerations  
Sand 2-5
6. Sympathy  
Sand 2-12
7. Presumption of Innocence and Burden of Proof

"Although the defendant has been indicted, you must remember that an indictment is only an accusation. It is not evidence. The defendant has pled not guilty to the indictment. As a result of the defendant's plea of not guilty the burden of proof is on the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant for the simple reason that the law never imposes upon the defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. The law presumes the defendant to be innocent of all the charges against him. I therefore instruct you that the defendant is to be presumed by you to be innocent throughout your deliberations, until such time, if ever, you are satisfied that the government has proven him guilty beyond a reasonable doubt. The defendant begins the trial with a clean slate. This presumption of innocence alone is sufficient to acquit the defendant unless you as jurors are unanimously convinced beyond a reasonable doubt of his guilt, after a careful and impartial consideration of all the evidence in this case. This presumption is with the defendant from the beginning of trial and remains with him even now as I speak to you and will continue with the defendant into your deliberations unless and only if you are convinced the government has proven his guilt beyond a reasonable doubt." See, *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979); *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930 (1978).

8. Reasonable Doubt

"I have said that the government's burden is to prove the defendant guilty beyond a reasonable doubt. The question naturally is what is a reasonable doubt? The words almost define themselves. It is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing all of the evidence or lack of evidence. It is a

doubt which would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. A reasonable doubt is not a caprice or whim; it is not a speculation or suspicion. It is not an excuse to avoid an unpleasant duty. And, it is not sympathy. In a criminal case the burden is at all times upon the government to prove guilt beyond a reasonable doubt. The law does not require that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden to prove each of the elements of the crimes charged beyond a reasonable doubt never shifts to the defendant. If, after fair and impartial consideration of all of the evidence or lack of evidence, you are satisfied of the defendant's guilty beyond a reasonable doubt you should vote to convict. On the other hand, if after fair and impartial consideration of all of the evidence you have a reasonable doubt, it is your duty to acquit the defendant." *Holland v. United States*, 348 US 121 (1954).

9. Number of Witnesses and Uncontradicted Evidence  
Sand 4 -3
10. Specific Investigative Techniques  
Sand 4-4
11. Direct and Circumstantial Evidence  
Sand 5-2
12. Inferences  
Sand 6-1
13. Testimony, Exhibits, Stipulations  
5-4, 5-6, 5-7
14. Expert Witness  
Sand 7 - 21
15. Witness Credibility  
Sand 7 -1
16. Bias and Hostility  
Sand 7-2
17. Accomplices Called by the Government  
Sand 7-5
18. Witness Using Drugs/Alcohol  
Sand 7-9.1

This request is limited to any finding the jury may make that a witness was using drugs or alcohol at the time during which any events about which he or she testifies took place.

19. Cooperator's Plea Agreement  
Sand 7 -11  
Scrutiny of testimony pursuant to an agreement

The case against [REDACTED] is entirely and exclusively based upon cooperators' testimony. Accordingly, any agreement reached between the government and the cooperators' is the jury's concern and quite properly before them to consider when evaluating the testimony of the cooperators. In fact, there is a pattern instruction directly on point which has been charged and approved in this district. See *United States v. Gleason*, 616 F.2d 2 (2d Cir. 1979) cert. denied, 444 U.S. 1082 (1980). The existence of the agreements between the Government and the lay witness that are anticipated to be called at trial on the prosecution's direct case should be considered by the jury in determining the credibility of the witnesses, their motives and bias. The absence of any instruction indicating that the cooperating witness has a potential bias in the outcome or motive to fabricate by virtue of their agreement with the government, has been held reversible error in this Circuit, particularly where the only evidence of guilt is the cooperators' testimony. See, *United States v. Ramirez*, 973 F.2d 102 (2d Cir. 1992); see also, *United States v. Freidman*, 854 F.2d 535 n. 7 (2d Cir 1988).

The defense proposes the following instruction preliminarily:

"You have heard witnesses who testified that they were actually involved in planning and carrying out the crimes charged in the indictment. The Government argues, as it is permitted to do, that it must take the witnesses as it finds them. It argues that only people who themselves take part in criminal activity have the knowledge required to show criminal behavior of others. For those very reasons the law allows the use of accomplice testimony. Indeed, it is the law in federal courts that the testimony of accomplices may be enough in itself to convict, if the jury finds that the testimony established guilt of every element of the crimes charged beyond a reasonable doubt. However, it is also the case that accomplice testimony is of such a nature that it must be scrutinized with great care and viewed with particular caution when you decide how much of that testimony to believe. I have given you general instructions on credibility and I will not repeat all of them here. However, let me say a few things you may want to consider in your deliberations. You should ask yourselves whether these so-called accomplices would benefit more by lying or by telling the truth. Was their testimony fabricated in any way because they believed or hoped that they would somehow receive favorable treatment by testifying falsely? Or did they believe that their interests would be best served by telling the truth? If you believe that any witness' testimony was motivated by hopes of personal gain, was the motivation one which would cause him to lie or was it one that would cause him to testify truthfully? Did this motivation color his/her testimony? While discussing how you may evaluate the credibility of witnesses, I must draw your attention to the fact that there has been evidence that (one or more) who testified may benefit in some way from the outcome of this case. Such an interest in the outcome creates a motive to testify falsely. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, the you should bear that fact in mind when evaluating the credibility or lack of credibility of his or her testimony with great care. In sum, you should look at all the evidence in deciding what credence and what weight, if any, you will give to the accomplice witnesses."

*United States v. Bufalino*, 683 F.2d 639 (2d Cir. 1982); *United States v. Frank*, 494 F.2d 145 (2d Cir.) *cert denied*, 419 U.S. 828 (1974).

20. Impeachment by Prior Inconsistent Statement  
Sand 7 -19
21. Law Enforcement Witness  
Sand 7 -16
22. Improper Consideration of Defendant's Right Not to Testify  
Sand 5-21
23. Limited Use of Uncharged Acts  
Sand 2.14; 3-3

The defense requests that if the government admits proof of prior bad acts or uncharged crimes, a contemporaneous limiting instruction be submitted to the jury at the time the evidence is admitted. *United States v. Pitre*, 960 F.2d 1112 (2d Cir. 1992); *United States v. Ramirez*, 894 F.2d 564 (2d Cir. 1990); *see also, United States v. Colon*, 880 F. 2d 650 (2d Cir. 1989). In addition, the defense requests that the Court instruct the jury as to the specific permissible purpose for which the evidence is being offered. *United States v. Youts*, 229 F.3d 1312 (10<sup>th</sup> Cir. 2000).

In addition, the defense proposes preliminarily the following language in anticipation of the admission of 404(b) evidence:

"You have heard evidence that [REDACTED] committed other ..... you may not use this evidence to infer that because of his character the defendant carried out the acts charged in this indictment. You may consider this evidence only for the limited purpose it was offered: (describe purpose). Remember this is the only purpose for which you may consider this evidence. Even if you find that the defendant may have committed these acts in the pasts, this is not to be considered as evidence of character to support an inference that [REDACTED] committed the acts charged in this case."

24. Impermissible to Infer Participation From Mere Presence or From Association

"You may not infer that [REDACTED] is guilty of participating in criminal conduct from that fact that he may have been present at the time was being committed and had knowledge that is was being committed." *Hicks v. United States*, 150 U.S. 442, 14 S.Ct. 144 (1893).

"You may not infer that Mr. [REDACTED] is guilty of participating in criminal conduct merely from the fact that he may have associated with other people who are guilty of wrongdoing."

*United States v. Terry*, 702 F.2d 299 (2d Cir.) cert denied, 103 S.Ct. 2095 (1983); *United States v. Johnson*, 513 F.2d 819 (2d Cir. 1978)

Sand 6-3; 6-4

25. Defendant's Reputation and/or Opinion of Defendant's Character

In the event that the defense adduces such evidence the defense requests that the appropriate instruction be given pursuant to Sand 5-15 and 5-15. To the extent that Opinion Evidence, as opposed to Reputation Evidence is adduced, the defense recognizes that the Second Circuit does not require the "standing alone" instruction. We do however, request that the instruction include the language that "such evidence may indicate to you that it is improbable that a person of this character is guilty."

The defense request this specific charge adapted from Sand 5-15 be instructed:

"Defendant [REDACTED] has called a number of witnesses who have given their opinion that he is a peaceful person. That testimony bears on the defendant's character. Character testimony should be considered together with all other evidence in the case in determining the defendant's guilt or non-guilt. Evidence of good character may in itself create a reasonable doubt where, without such evidence, no reasonable doubt would have existed. Such evidence may indicate to you that it is improbable that a person of this character is guilty. Accordingly, if after considering all the evidence, including evidence of about the defendant's good character, you find a reasonable doubt has been created, you must acquit him of all the charges. On the other hand, if after considering all the evidence including that of defendant's character, you are satisfied beyond a reasonable doubt that the defendant is guilty, you should not acquit the defendant merely because you believe him to be a person of good character."

In the event that a character witness is cross-examined with respect to specific acts allegedly committed by the defendant, the defense requests that an instruction pursuant to Sand 5-16 be given.

26. Right to See Exhibits and Have Testimony Read During Deliberations

27. Verdict of Guilt or Lack of Guilt must be Unanimous

The defense specifically requests that the jury be instructed using the term "non-guilt" rather than innocence. In addition, in connection with the instruction concerning a juror's obligation to deliberate openly and with a willingness to listen to the views of others, the jurors should be reminded of their right to adhere to their individually held views, provided they have honestly considered the views and arguments of others.

28. Trial Perjury

If any witness is shown to have willfully lied about any material matter, you have the right to conclude that that witness also lied about other matters. You may either disregard all of that witness' testimony or you may accept whatever part of it you think deserves to be believed. *United States v. Passero*, 290 F.2d 238 (2d Cir. 1961).

### Requests as to Specific Charges

It is our understanding that the government intends to submit a complete set of proposed instructions as to each of the crimes charged in the indictment. We, of course, reserve the right to review those proposed instructions and raise any appropriate objections or submit modifications. There are however, a few specific requests which the defense has on several aspects of the substantive charge

#### Multiple Counts

29. The defense requests that the Court give the general instruction with respect to multiple counts.

#### Conspiracy

30. The defense requests that the general instruction regarding mere presence and association be reiterated at some point in connection with the conspiracy instruction.  
Sand 6-3; 6-4
31. Multiple Conspiracies  
Sand 19-5

The defense proposes the following language:

"I have already charged you on the law of conspiracy. The defendant is charged with a conspiracy. When two or more people join together to further one common unlawful design or purpose, a single conspiracy exists. By way of contrast, multiple conspiracies exist when there are separate unlawful agreements to achieve distinct purposes. Whether there existed a single unlawful agreement, many such agreements, or indeed, no agreement at all, is a question of fact for you, the jury to determine in accordance with my instructions. Proof of several separate and independent conspiracies is not proof of the single overall conspiracy charged in the indictment, unless one of the conspiracies proved happens to be the single conspiracy described in the indictment. As to the conspiracy charged you may find that there was a single conspiracy despite the fact that there were changes in either personnel, or activities or both, so long as you find that some of the co-conspirators continued to act for the entire duration of that conspiracy for the purposed charged in the indictment. The fact that the members changed or are not always identical throughout the duration does not necessarily imply that separate conspiracies exist. On the other hand, as to the conspiracy charged, if you find that the conspiracy did not exist or that

the defendant was not a member of the conspiracy you cannot find the defendant guilty. Similarly, as you examine the evidence, if you find that the defendant was a member of some other conspiracy which is not charged, then you must acquit the defendant. Therefore, you must determine whether the conspiracy charged in the indictment existed. If it did, you must determine the nature of the conspiracy and who were its members.

Adapted from Sand, 19-5

32. Narcotics Charge

With respect to the narcotics conspiracy charged, the defense requests that the Court instruct the jury with respect to the amount of drugs charged. *See United States v. Nordby*, 225 F.3d 1053 (9<sup>th</sup> Cir. 2000)(citing *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000); *see also*, *Jones v. United States*, 526 U.S. 227 (1999)).

33. Weapons Offense & Murder Counts

Sand 35-76 through 35-80.

The defense particularly requests the limiting instruction be given as to this count as well as to both of the murder charges; that is counts two, three and four.

Specifically, the jury must be instructed that if they find the defendant not guilty of Count One, the narcotics conspiracy than they need not consider any other counts.

After the Government has completed the evidentiary portion of this matter, the defense respectfully requests an opportunity to be heard further with respect to the appropriate charges. At this phase of the litigation, the above requests outline those issue that are reasonably foreseeable.

Respectfully submitted,



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*Walsh*, 40 F.3d 569 (2d Cir. 1991); *Rivera v. United States*, 928 F.2d 592 (2d Cir. 1991).

As the cooperating witness, John admitted at trial that the so-called confidential informant was, in fact, in contact with [REDACTED] as late as April 2004 - close to five months after the commencement of the wiretap investigation and four months before the close of the wiretap investigation. (T 1009, ln 12-1014 ln 2). This "non-disclosure" alone and particularly when coupled with the government's material omission regarding the confidential informant's three week intoxication at the time he provided information require, at a minimum, a hearing. In combination with the other issues raised herein, and in the context of this entire case, a new trial pursuant to Rule 33 is warranted.

### The "Allen" Charge

In three days of deliberations, the jury requested read back of testimony and exhibits, which increasingly focused in particular on the issue of Mr. [REDACTED] guilt or innocence. The first note requested the legal charges, one transcript of a call, the board with names and pictures, the western union receipt, the cooperator's plea agreement and a portion of his testimony. (T 1858, Court Exhibit F). As the deliberations continued, it was clear that jury was particularly deliberating the guilt of Mr.----- . The jury was dismissed at 5:00 pm and returned to deliberations at 9:30 am the next day. (T 1864). That morning the jury requested the testimony of the cooperating witness at 11:10am. (T 1869, Court Exhibit H). Later that same day, the jury requested the testimony of Mr.----- . (T 1870; Court Exhibit I). At 4:30 pm, the jury still had not reached a verdict and requested to be excused for the day after specifically requesting the testimony of Detectives [REDACTED] both of whom testified as to issues directly related to Mr. John DOe. (T 1870, Court Exhibit j).

After more than three hours of deliberations on the third day, the jury requested the testimony of the "landlord," (T 1886, Court Exhibit L), whose testimony only implicated Mr. John DOe. And, finally, the jury submitted a note to the Court indicating that it had reached verdicts on two defendants, but was unable to reach a unanimous verdict on the third - clearly the jury was hung on the guilt or innocence of Mr. John DOe. (T 1887; Court Exhibit M: "We have come to a verdict on two of the three defendants. After deliberating for two days, we know with certainty that no one will change their mind."). Whereupon the Court, over defense counsel objection, proceeded to give the jury an "Allen" charge. (T 1888-89). The Court so instructed the jury:

This case is important to both sides. Both parties as well as I have expended a great deal of time, effort and resources in seeking a resolution of this indictment. It is desirable if a verdict can be reached, but your verdict must represent the conscientious judgment of each juror. While you may have honest differences of opinion with your fellow jurors, during your deliberations each of you should seriously consider the arguments and opinions of the other jurors.

Do not hesitate to change your opinion if, after discussion of the issues, in consideration of the facts and the evidence in this case, you are persuaded that

your initial position may have been incorrect. However, I do emphasize that no juror should vote for a verdict unless it represents his or her conscientious judgment.

***Put another way, I have no intention of letting you go home.*** You may continue your deliberation. (T 1888-89) (emphasis added).

That instruction was in error.

The jury's note indicating a deadlock was marked at 3:11 pm. (Court Exhibit M). The jury was given the "Allen" charge at 3:44 pm and, just 40 minutes after the coercive instruction, returned a note indicating they had reached a verdict. (T 1888 -89; Court Exhibit N; *see also*, letter from counsel, dated May 2, 2004, moving to correct erroneous times recorded in transcript).

Prior to the instruction, defense counsel for Mr. John DOe specifically objected to the giving of the charge at all, (T 1888), attempted to elaborate further on the objection and, after the giving of the charge, defense counsel for Mr. John DOe objected in particular to the specific language employed by the Court, particularly that the Court "had no intention of letting [the jury] go home." (T 1889). The Court gave no indication to the jury that it would ever release them without a verdict and made no qualifying statement that the Court meant it would not let them go home that day or at that point, but instead, without elaboration, bluntly stated that there was "no intention of letting [them] go home." (T 1889). Particularly indicative of the coercive effect of the entire instruction, the jury returned a verdict shortly after having been so charged.

This Circuit has held "that when a trial court receives notice that the jury is deadlocked it may give a charge commonly referred to as an "Allen" charge, that urges the jurors to continue deliberations in order to reach a verdict." *United States v. Henry*, 325 F.3d 93, 106 (2d Cir. 2003). "At the heart of the Allen charge jurisprudence lies the basic principle that a defendant has 'the right to have the jury speak without being coerced.'" *Smalls v. Batista*, 6 F.Supp. 2d 211 (SDNY 1998), *quoting United States v. Burgos*, 55 F.3d 933, 936 (4th Cir. 1995). The charge is sometimes referred to as a "dynamite" charge and "like dynamite, it should be used with great caution and only where absolutely necessary." *United States v. Flannery*, 451 F.2d 880 (5th Cir. 1971). "[T]he propriety of an Allen-type charge depends on whether it tends to coerce undecided jurors into reaching a verdict by abandoning without reason conscientiously held doubts." *United States v. Robinson*, 560 F.2d 507, 517 (2d Cir. 1977). "A trial courts decision to give an Allen charge is reviewed under an abuse of discretion standard. Reversal is appropriate when the charge tends to coerce undecided jurors into reaching a verdict." *United States v. Crispo*, 306 F.3d 71, 77 (2d Cir. 2002). "An individualized determination of coercion" is required when considering the effect of the charge. *Robinson*, 560 F.2d at 517. To make such an individualized determination the charge must be viewed "in its context and under all the circumstances." *Jenkins v. United States*, 380 U.S. 445, 446 (1965); *Lowenfeld v. Phelps*, 484 U.S. 231 (1988). In context and under the circumstances of this case, indeed, the defense respectfully submits that, standing on its own, the charge in this case was coercive and violated the defendant's right to a fair trial.

First, in context, this was by no means an overwhelming case. As has been delineated in detail above, the sole inculpatory evidence of criminality admitted against Mr. John DOe was the testimony of a single cooperating witness, Silly John. Setting aside the inconsistencies in John's accounts to law enforcement, his testimony of drug storage and trafficking from the house rented by Mr. John DOe was wholly uncorroborated. Not a single piece of scientific evidence was offered to prove that drugs, much less drugs of that quantity, had been under the stairwell or in the closet where he claimed they were routinely stored. No evidence of excessive wealth of the defendant was admitted at trial nor was a single inculpatory piece of evidence seized from his home or his automobile, in comparison to the more than \$50,000 in cash, money counters, hidden "traps," illegal weapons and drug ledgers seized from his codefendants.

Moreover, John's account of Mr. John DOe was entirely at odds with the stellar employment record of the 45-year-old defendant, who lived by modest means in a trailer home and worked continuously throughout his lifetime (sometimes at more than one job), and the defendant's documented interest in pursuing a law enforcement career, which was, in part, corroborated by four adult character witnesses, some of whom have known the defendant for more than a quarter century, employed him as a personal bodyguard and worked side-by-side with him the past decade. Furthermore, despite six months of wiretap investigation, including one on his own phone and more than 20 separate wiretaps, not a single incriminating or "coded" telephone call was admitted against Mr. John DOe. Finally, not only was he described as respectful and cooperative by the agents on the morning of his arrest, he told them he knew that his cousin, the so-called "leader" of the organization, had been arrested weeks earlier. Nevertheless, Mr. John DOe was found in his home preparing for work on the morning of his arrest, and characteristically requested permission to notify his employer of his absence from work that day.

In short, as indicated by the three days of deliberation, most of which focused exclusively on the testimony pertinent to Mr. John DOe's guilt or innocence, this was a very close case. Nonetheless, over defense counsel's objection, (T 1888), and with limited opportunity for counsel to review the proposed "dynamite" charge the court so charged the jury,<sup>5</sup> indicating in no uncertain terms, that notwithstanding their inability to reach a unanimous verdict, the Court had "no intention of letting them go home." (T 1889). Moreover, the abbreviate language of the charge, which appeared to be crafted from a civil instruction, contained no reiteration of the burden of proof and encouraged the jury that they "should not hesitate to change [ ] opinions. . ." (T 1888).

In *Jenkins v. United States*, the Supreme Court held that it was coercive for the trial court

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<sup>5</sup> Although the Court did give counsel some opportunity to read the proposed instruction and omitted the last line from the proposed instruction at defense counsel's suggestion, the Court did not hear argument concerning the content of the proposed charge or the propriety of giving it at all. (T 1889). See *United States v. Henry*, 325 F.3d 93 (2d Cir. 203) (defense counsel should be afforded the opportunity to review the proposed instruction), citing *United States v. Ruggiero*, 928 F.2d 1289 (2d Cir. 1991).

to instruct the jury: "you have got to reach a decision in this case." *Jenkins*, 380 U.S. at 446. Based on that instruction, the Supreme Court reversed. This Court's instruction was tantamount to telling the jury that they had to reach a decision in this case. See *Sand, Siffert, Loughlin & Reiss*, Modern Federal Jury Instructions, Inst. 9-11 at 9-47 (2004) ("Instructions either setting a deadline for the jury to reach a verdict or threatening to keep the jury deliberating until they do reach a verdict are both regarded as so coercive as to require reversal."), citing *United State v. Amaya*, 509 F.2d 8 (5th Cir. 1975), cert denied 429 US 1101 (1977); *Goff v. United States*, 446 F.2d 623 (10th Cir. 1971); *Gibson v. United States*, 271 F.3d 247 (6th Cir. 2001) (additional citations excluded). That is true particularly because the Court gave no indication how long it would keep them - that day or that week. Indeed, to a lay jury, the plain language of the Court instruction gave no indication that it would ever let them go home without a verdict. Much like the instruction in *Jenkins*, this instruction erroneously coerced the deadlocked jury into reaching a verdict.

Second, where a jury like this one returns a verdict shortly after receiving the "Allen" charge, the time elapsed, or lack thereof, is "a significant factor in detecting coercion." *Smalls v. Batista*, 6 F.Supp. 2d 211, 221 (SDNY 1998), aff'd 191 F.3d 272 (2d Cir. 1999), citing *United States v. Beattie*, 613 F.2d 762, 765 (9th Cir. 1980); see also, *Campos v. Portuondo*, 320 F.3d 185 (2d Cir. 2003) (brevity of deliberations following "Allen" charge is a circumstance indicative of coercion); *United States v. Bonam*, 772 F.2d 1449, 1451 (9th Cir. 1985) (a "jury verdict reached immediately after an Allen charge can be an indication of coercion."); Cf., *United States v. Melendez*, 60 F.3d 41 (2d Cir. 1995), vacated on other grounds by *Colon v. United States*, 516 U.S. 1105 (1996). Here, the jury had been deliberating for more than two days; the nature of the notes and testimony requested indicated clearly that they were focusing on Mr. John DOe at the time the Court gave the instruction. Following the charge, it took at most forty one minutes after the instruction for a jury who had just expressed that "it know with certainty that no one will change their mind," to do just that. (T 1887).<sup>6</sup> The shift from deadlock to unanimous guilt in such a short time is demonstrable evidence of the coercive effect of the Court's instruction, which gave the jury "the implicit suggestion . . . that is was more important to be quick than thoughtful." *United States v. Flannery*, 451 F.2d 880, 883 (1st Cir. 1971).

In addition, the Court's charge was significantly modified and short. While it included some mollifying language that the "verdict must represent the conscientious judgment of each juror," (T 1888), the Court wholly omitted the burden of proof from the instruction, as well as cautionary language instructing the jurors "not to change their mind just because other jurors see things differently, or just to get the case over with." Nor did it tell the jury "to take as much time as you need to discuss things. There is no hurry," as urged in most pattern jury instructions. See *Sand, Siffert, Loughlin & Reiss*, at Inst. 9-46, fns. 54 and 59 (collecting cases); see also,

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<sup>6</sup> It should be noted that the times in the transcript and those inscribed on the notes from the jury are sometimes inconsistent, as noted by counsel in a subsequent writing to the Court May 2, 2005, the evening that the jury returned a verdict. Defense counsel submits that it was significantly shorter than 41 minutes after the charge that a verdict was reached; however, that time period seems to be what is reflected in the actual notes from the jury. (T 1886-87, 1890-91, Court Exhibits M & N).

*Flannery*, 451 F.2d at 883, *citing Pugliano v. United States*, 348 F.2d 902 (1st Cir. 1965), *cert denied* 382 U.S. 939. On the contrary, instead of simply encouraging the jurors to try to continue to deliberate, reiterating the burden of proof, the Court told them they should “not hesitate to change their opinion if, after discussion of the issues . . . you are persuaded that your initial position may have been incorrect.” (T 1888-89). It is hard to imagine that any minority juror would have been able to resist such an invitation from the Court, particularly after learning that there “was no intention of letting [them] go home.” (*Id.*)

For all of the above reasons, either in combination or alone and particularly in the context of the entire case, Mr. John DOe respectfully requests that this Court vacate the judgment and order a new trial, or for whatever alternative relief, including but not limited to a hearing on the issues, the Court deems just and fair.

Respectfully submitted,

Susan J. Walsh

cc: