CASE SUMMARY

The defendant Max Grabelsky, an FBI agent assigned to the Organized Crime Task Force (OCTF) of the Buffalo-Niagara Police Department, has been charged with Theft by Unlawful Taking, Robbery, and Second Degree Murder stemming from his alleged complicity in the theft of approximately two and a quarter million dollars from the Off Track Betting (OTB) of Buffalo-Niagara which resulted in the deaths of one Luther Bybel, an OTB employee who was allegedly in on the theft and one Chester Krupczyk, an OTB patron who was present at the OTB parlor when the theft took place.

The Commonwealth alleges that Agent Grabelsky, while purporting to be working undercover as a member of the White Russians, an organized crime (O.C.) group, facilitated the crime by purposely withholding critical information about the crime until the eleventh hour and then intentionally giving the OCTF false, inaccurate or misleading information about the details of the theft with the result that the OCTF agents went to the wrong OTB branch while Grabelsky and his White Russian co-conspirators, Lyman Zygra, Kyser Sosay and White Russian kingpin, Rolo Tomassi, were committing the crime at another OTB location.

During the course of the crime, Tomassi murdered Luther Bybel by breaking his neck inside the OTB vault and then shot Chester Krupczyk in the abdomen as he exited the parlor. Before expiring, Krupczyk, an inveterate gambler, pulled out a gun and shot Zyrga in the posterior as he left the OTB parlor behind Agent Grabelsky. By the time the OCTF agents arrived on the scene in response to a 911 call, Zyrga was incapacitated from his injury, Agent Grabelsky was tending to the dying Krupczyk and Sosay and Tomassi had gotten away. They are still at large.

Captain Karl Kowalski of the OCTF interviewed Lyman Zyrga who, after retaining counsel, agreed to cooperate with the OCTF and testify against Agent Grabelsky (and against Tomassi and Sosay if they are ever apprehended), in exchange for a guilty plea to Robbery in the First Degree upon a 10-year sentence commitment in lieu of a potential 25 years to life sentence for Second Degree Murder.

The Commonwealth contends that Agent Grabelsky purposely misled the OCTF about the OTB theft to get back at Captain Kowalski for exerting what he (Grabelsky) believed was excessive influence in the prosecution of his older brother, Ziggy Grabelsky, a lifelong Tomassi friend and enforcer, who got fifteen years on an Assault charge after refusing to roll over on Tomassi. This incident allegedly prompted the Grabelskys' ailing father, Edward Grabelsky, to take his own life.

The defense denies that Agent Grabelsky, a decorated war hero and highly regarded FBI agent, misled the OCTF in any way. They contend that Agent Grabelsky kept the OCTF fully apprised of all of his undercover activities with the White Russians and advised Captain Kowalski of certain late-developing changes in the OTB theft plan as soon as he could without jeopardizing his own life.

According to the defense it was Captain Kowalski's misinterpretation of Agent Grabelsky's message that resulted in the OCTF's going to the wrong OTB location. The defense further alleges that Captain Kowalski was so bitter over his failure to make a case against Rolo Tomassi and advance his own career, that he blamed Agent Grabelsky for the OCTF's colossal error in this case on the word of an organized-crime figure (Zygra) who has cut a deal for his testimony.

STIPULATIONS REGARDING EVIDENTIARY MATTERS

- 1. The Federal Rules of Criminal Procedure and the Federal Rules of Evidence apply.
- 2. All witnesses called to testify who have identified the parties, other individuals, or tangible evidence can, if asked, identify the same at trial.
- 3. No team is permitted to attempt to impeach a witness by questioning the witness or arguing to the jury that a signature appearing on a document does not comport with signatures or initials located on an exhibit.
- 4. Other that what is supplied in the problem itself, there is nothing exceptional or unusual about the background information of any of the witnesses that would bolster or detract from their credibility.
- 5. "Beyond the record" shall not be entertained as an objection. If a team believes that a witness is inventing facts, that team may impeach through cross-examination using facts found in the record.
- 6. Each party must call the two witnesses listed as that party's witnesses on the witness list.

- 7. All exhibits in the file are authentic. In addition, each exhibit contained in the file is the original of that document unless otherwise noted on the exhibit or as established by the evidence.
- 8. Presentation and argument of pretrial motions shall be at the discretion of the trial judge. There shall be no written pretrial motions.

Relevant sections of the Widener Criminal Code

Sec. 201 Theft by unlawful taking or disposition.

- (a) *Movable property*. --A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof.
- (b) *Immovable property*. --A person is guilty of theft if he unlawfully transfers, or exercises unlawful control over, immovable property of another or any interest therein with intent to benefit himself or another not entitled thereto.

Sec. 221 Grading of theft offenses.

- (a) Felony of the second degree. -- Theft constitutes a felony of the second degree if:
- (1) The offense is committed during a manmade disaster, a natural disaster or a warcaused disaster and constitutes a violation of section 3921 (relating to theft by unlawful taking or disposition), 3925 (relating to receiving stolen property), 3928 (relating to unauthorized use of automobiles and other vehicles) or 3929 (relating to retail theft).
- (2) The property stolen is a firearm.
- (3) In the case of theft by receiving stolen property, the property received, retained or disposed of is a firearm.
- (4) The property stolen is any amount of anhydrous ammonia.
- (a.1) Felony of the third degree. --Except as provided in subsection (a) or (a.2), theft constitutes a felony of the third degree if the amount involved exceeds \$ 2,000, or if the property stolen is an automobile, airplane, motorcycle, motorboat or other motorpropelled vehicle, or in the case of theft by receiving stolen property, if the receiver is in the business of buying or selling stolen property.
- (a.2) Felony of the first degree. -- Theft constitutes a felony of the first degree if, in the case of theft by receiving stolen property, the property received, retained or disposed of is

- a firearm and the receiver is in the business of buying or selling stolen property.
- (b) *Other grades.* --Theft not within subsection (a), (a.1) or (a.2), constitutes a misdemeanor of the first degree, except that if the property was not taken from the person or by threat, or in breach of fiduciary obligation, and:
- (1) the amount involved was \$ 50 or more but less than \$ 200 the offense constitutes a misdemeanor of the second degree; or
- (2) the amount involved was less than \$ 50 the offense constitutes a misdemeanor of the third degree.
- (c) Valuation. -- The amount involved in a theft shall be ascertained as follows:
- (1) Except as otherwise specified in this section, value means the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime.
- (2) Whether or not they have been issued or delivered, certain written instruments, not including those having a readily ascertainable market value such as some public and corporate bonds and securities, shall be evaluated as follows:
- (i) The value of an instrument constituting an evidence of debt, such as a check, draft or promissory note, shall be deemed the amount due or collectible thereon or thereby, such figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.
- (ii) The value of any other instrument which creates, releases, discharges or otherwise affects any valuable legal right, privilege or obligation shall be deemed the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.
- (3) When the value of property cannot be satisfactorily ascertained pursuant to the standards set forth in paragraphs (1) and (2) of this subsection its value shall be deemed to be an amount less than \$ 50. Amounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade of the offense.
- (d) *Definitions*. --As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Manmade disaster." -- Any industrial, nuclear or transportation accident, explosion, conflagration, power failure, natural resource shortage or other condition, except enemy action, resulting from manmade causes, such as oil spills and other injurious environmental contamination, which threatens or causes substantial damage to property, human suffering, hardship or loss of life.

"Natural disaster." -- Any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life.

"War-caused disaster." -- Any condition following an attack upon the United States resulting in substantial damage to property or injury to persons in the United States caused by use of bombs, missiles, shellfire, nuclear, radiological, chemical or biological means, or other weapons or overt paramilitary actions, or other conditions such as sabotage.

Sec. 301 Robbery.

- (a) Offense defined.
- (1) A person is guilty of robbery if, in the course of committing a theft, he:
- (i) inflicts serious bodily injury upon another;
- (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;
- (iii) commits or threatens immediately to commit any felony of the first or second degree;
- (iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury;
- (v) physically takes or removes property from the person of another by force however slight; or
- (vi) takes or removes the money of a financial institution without the permission of the

financial institution by making a demand of an employee of the financial institution orally or in writing with the intent to deprive the financial institution thereof.

- (2) An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.
- (3) For purposes of this subsection, a "financial institution" means a bank, trust company, savings trust, credit union or similar institution.
- (b) *Grading*. --Robbery under subsection (a)(1)(iv) and (vi) is a felony of the second degree; robbery under subsection (a)(1)(v) is a felony of the third degree; otherwise, it is a felony of the first degree.

Sec. 101 Criminal homicide.

- (a) *Offense defined.* --A person is guilty of criminal homicide if he intentionally, knowingly, recklessly or negligently causes the death of another human being.
- (b) *Classification*. --Criminal homicide shall be classified as murder, voluntary manslaughter, or involuntary manslaughter.

Sec. 102 Murder

- (a) *Murder of the first degree*. --A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.
- (b) *Murder of the second degree*. --A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.
- (c) *Murder of the third degree*. --All other kinds of murder shall be murder of the third degree. Murder of the third degree is a felony of the first degree.
- (d) Definitions. -- As used in this section the following words and phrases shall have the

meanings given to them in this subsection:

"Fireman." --Includes any employee or member of a municipal fire department or volunteer fire company.

"Hijacking." -- Any unlawful or unauthorized seizure or exercise of control, by force or violence or threat of force or violence.

"Intentional killing." -- Killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.

"Perpetration of a felony." -- The act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

"Principal." -- A person who is the actor or perpetrator of the crime.

GRABELSKY JURY INSTRUCTIONS

PRESUMPTION OF INNOCENCE--BURDEN OF PROOF--REASONABLE DOUBT

- 1. A fundamental principle of our system of criminal law is that the defendant is presumed to be innocent. The mere fact that he was arrested and is accused of a crime is not any evidence against him. Furthermore, the defendant is presumed innocent throughout the trial and unless and until you conclude, based on careful and impartial consideration of the evidence, that the Commonwealth has proven him guilty beyond a reasonable doubt.
- 2. It is not the defendant's burden to prove that he is not guilty. Instead, it is the Commonwealth that always has the burden of proving each and every element of the crime charged and that he defendant is guilty of that crime beyond a reasonable doubt. The person accused of a crime is not required to present evidence or prove anything in his own defense. If the Commonwealth's evidence fails to meet its burden, then your verdict must be not guilty. On the other hand, if the Commonwealth's evidence does prove beyond a reasonable doubt that the defendant is guilty, then your verdict should be guilty.
- 3. Although the Commonwealth has the burden of proving that the defendant is guilty, this does not mean that the Commonwealth must prove its case beyond all doubt and to a mathematical certainty, nor must it demonstrate the complete impossibility of innocence. A reasonable doubt is a doubt that would cause a reasonably careful and sensible person to hesitate before acting upon a matter of importance in his or her own affairs. A reasonable doubt must fairly arise out of the evidence that was presented or out of the lack of evidence presented with respect to some element of the crime. A reasonable doubt must be a real doubt; it may not be an imagined one, nor may it be a doubt manufactured to avoid carrying out an unpleasant duty.
- 4. So, to summarize, you may not find the defendant guilty based on a mere suspicion of guilt. The Commonwealth has the burden of proving the defendant guilty beyond a reasonable doubt. If it meets that burden, then the defendant is no longer presumed innocent and you should find him guilty. On the other hand, if the Commonwealth does not meet its burden, then you must find him not guilty.

THEFT BY UNLAWFUL TAKING OR DISPOSITION--MOVABLE PROPERTY

1. The defendant has been charged with theft of movable property. To find the defendant guilty of

this offense, you must find that the following four elements have been proven beyond a reasonable doubt:

First, that the defendant took or exercised control over the sum of \$5,210,244.00;

Second, that the \$5,210,244.00 was movable property of another. "Movable property" is property the location of which can be changed;

Third, that the taking or exercising of control was unlawful; and

Fourth, that the taking or exercising of control was with the intent to deprive the OTB of its property.

2. A person acts with intent if it is his or her conscious object to engage in such conduct or cause such a result.

ROBBERY--FELONY OF THE FIRST DEGREE

1. The defendant has been charged with robbery. To find the defendant guilty of this offense, you must find that the following two elements have been proven beyond a reasonable doubt:

First, that the defendant:

- a. inflicted serious bodily injury on the victim; or
- b. threatened the victim with serious bodily injury; or
- c. intentionally put the victim in fear of immediate serious bodily injury; or
- d. committed or threatened to immediately commit the felony of assault with a deadly weapon and

Second, the defendant did this during the course of committing a theft.

- 2. "During the course of committing a theft" means that you can find the defendant guilty if you find beyond a reasonable doubt that he did these things either while actually committing a theft, attempting to commit a theft, or while fleeing after either committing or attempting to commit a theft. A theft, of course, means taking unlawful control of or exercising unlawful control over someone else's property intending not to give it back.
- 3. "Serious bodily injury" is defined in the law as a bodily injury that creates a serious risk of death or causes serious permanent disfigurement, or protracted loss or impairment of any bodily member or organ. This means an injury that causes a substantial risk that

the victim will die or an injury that permanently and seriously disfigures the victim, or that causes a long-term loss or limitation on the use of any part of the body.

SECOND-DEGREE MURDER

- 1. I will start with some terminology and basic principles. The more serious types of crimes are called felonies. For example, robbery is a felony. Second-degree murder is often called felony-murder because it is a killing connected with a felony. When two people are partners in a successful or unsuccessful attempt to commit a felony and one of them kills a third person, both partners may be guilty of felony-murder.
- 2. The defendant has been charged with second-degree murder, that is, felony murder. To find the defendant guilty of this offense, you must find that the following four elements have been proven beyond a reasonable doubt:

First, that Rolo Tomassi killed Luther Bybel;

Second, that Rolo Tomassi did so while he and the defendant were partners in committing a certain robbery;

Third, that Rolo Tomassi did the act that killed Luther Bybel in furtherance of the robbery; and

Fourth, that the defendant was acting with malice. You may find that the defendant was acting with malice if you are satisfied beyond a reasonable doubt that he and Rolo Tomassi were partners in committing or attempting the robbery. Because robbery is a crime inherently dangerous to human life, there does not have to be any other proof of malice.

4. Going back to the requirement that the defendant and Rolo Tomassi were partners in committing the robbery:

I instruct you that they were partners if they were both principals or one of them was a principal and the other was an accomplice. A person is a "principal" if he or she actually commits the crime or makes the attempt himself or herself. A person is an "accomplice" if, with the intent of encouraging or helping the commission of the crime he or she asks the principal to commit it or helps or agrees or attempts to help the principal in committing it.

I instruct you that they were partners if they conspired to commit the robbery. Two people "conspire" to commit a crime if, with the intent of encouraging or helping the commission of the crime, they agree that one or both of them will commit the crime or that one of them will help the others in planning or committing it. Their agreement may be express and verbal--they may actually talk about it. Or their agreement may be an unspoken agreement that can be inferred from their words and conduct and the surrounding circumstances. Each knows what the other is thinking--they don't have to talk about it. Finally, to complete the conspiracy, one of the conspirators must commit what the law calls an overt act. An overt act is an act by any member of the conspiracy that would serve to further the goal of the conspiracy. Here, the Commonwealth contends that the robbery was such an act.

5. I shall now explain the meaning of the "in furtherance" element:

A partner's act that kills is not in furtherance of the felony if the partner does the act for his or her own personal reasons that are independent of the felony.

A partner's act that kills is in furtherance of the felony if he or she does the act while fleeing from the scene and if there is no break in the chain of events between the felony and the act. However, even though the partner's act that kills may seem to meet these requirements, it is not in furtherance of the felony if the partner does the act for his or her own personal reasons that are independent of the felony and the effort to flee.