

CONFIDENTIAL & PRIVILEGED INTER-OFFICE MEMO
Attorney/Client –Work Product

TO: LAW CLERKS
FR: Benson B. Weintraub, Esq.
RE: United States v. Johnson, Case No. 03-6345-Cr-Smith
SU: Motion for New Trial

Please prepare a memorandum to assist me in drafting a motion for new trial pursuant to Rule 33, Fed. R. Crim. P. on behalf of our client, Eric Johnson, who was just convicted of one count of conspiracy [18 U.S.C. 371], ten counts of bank fraud 18 U.S.C. 1014], and ten counts of mail fraud [18 U.S.C. 1341] in United States District Court. The following is a summary of the facts underlying the case.

I.
BACKGROUND

The federal and state agents who investigated the case dubbed it “Operation Flipper,” a reference to the practice in the real estate industry of purchasing property at or below market price and selling at a profit within a short time. There is nothing inherently illegal in “flipping” property.

Eric Johnson was a mortgage broker licensed to do business in the State of Florida through his firm, Atlantic Mortgage, Inc. Mary Christenson

was an “investor” seeking to fund the purchase and development of distressed properties in a poor section of the city.

Christenson’s son, Jim, was actually the driving force behind Mary’s real estate activities. Although Jim died in an automobile accident two years prior to the indictment in this case, much of the evidence focused on his conduct. Jim Christenson, who had casually known Johnson from the local trade, approached him in 1998 with a suggestion that Johnson serve as his mortgage broker for the sale of Wm. Meredith Properties in Ft. Lauderdale to Mary Christenson. This property, largely dilapidated housing units, was comprised of three buildings, each with twenty units.

Eric, of course, was excited but chagrined when he observed that Christenson’s loan files had been already been “processed.” That is, all the verifications, bank statements, all of the typical things a mortgage broker compiles, were already in the file.

Johnson immediately noticed that the appraisals had the “wrong name” on them, First Financial of Boston, with whom Johnson understood Christenson had previously done considerable business. Surprised, Johnson inquired why—since the files had already been processed—he was changing brokers. Christenson explained that he was unhappy with First Financial of Boston, so he decided to give the business to Johnson.

Johnson's staff modified the files to reflect Atlantic Mortgage, Inc.'s participation, not First Financial of Boston and immediately arranged to meet with each of the three borrowers (Vegazo, Blanchette and Smith) because he wanted to verify who they were and that the information on the loan applications were accurate.

Satisfied, Johnson's staff then shipped approximately 41 files to the lenders. Approximately two or three weeks later, Atlantic Mortgage began receiving calls from underwriters stating that the appraisals were "screwed up." Johnson became distressed and enraged with Christenson and instructed his staff to "call the lenders and ship the files back." He demanded to see Christenson about what had upset him so intensely.

When Johnson met with Christenson, Christenson blamed the appraiser, John Podleszek, stating "he must have messed up the files." Johnson didn't believe this; he became infuriated; told Christenson he would not close the loans; and threw Christenson out of his office. When Johnson received the files back from the lenders, he notified Christenson.

In the following weeks, Christenson tenaciously pursued Johnson, remorseful and apologetic. Finally, Johnson relented and agreed to handle the mortgages, emphatically stating "but don't think about Podleszek. I wouldn't even consider doing business with him."

On September 14, 1998, investigators from the State Comptroller's Office went to Johnson's office and told him they were there to look at some of the loan files that he originated for Vegazo, Blanchette and Smith. The investigators advised Johnson that "we have suspicions of mortgage fraud. . . it appeared the properties were being flipped; that the appraisals weren't true appraisals of the property; and that the "borrowers" were just straw buyers."

II.

CLIENT IS INDICTED FOR FRAUD

Although Johnson fully cooperated with the investigators and provided all documents requested, he was charged with conspiracy, bank fraud and mail fraud. Johnson sought our representation, steadfastly maintaining his innocence. Prior to trial, we were able to negotiate a plea agreement for Eric to obtain a sentence of probation if he testified against Mary Christenson. He refused the deal, again proclaiming his innocence and stated that he did not intentionally defraud anyone.

III.

THE TRIAL

The trial commenced in the United States District Court for the Southern District of Florida in October 2003 and lasted 22 days. Johnson and Christenson were convicted on all counts. Johnson is presently awaiting sentencing and continues, for the moment, to be free on bond.

Since the trial judge's evidentiary rulings do not appear subject to serious challenge, I believe that whatever hopes there may be for an appeal and motion for new trial, we should focus on the dynamics of the jury because under the circumstances set forth below, I firmly believe that the verdict was tainted.

I attempted to seek more information about the jury's deliberative process and filed a post-verdict motion for leave to interview the jurors. In denying the motion, the judge recapped the important chronology of significant juror events in this case in his order:

. . . After a month long trial, the jury began its deliberations on Monday, November 18, 2002 in the late afternoon[.] They deliberated for about an hour before being allowed to go home for the evening. The jury resumed its deliberations on Tuesday morning and continued to about 1:30 p.m. . . The deliberations continued on Wednesday, November 20, 2002.

Shortly before 3:57 p.m. the jury indicated that they had reached a verdict. The foreman indicated that the jury had arrived at verdicts on both defendants, concurred by all jurors. The clerk published the verdicts, which were guilty on all counts as to both defendants. At the defense request, the jury was polled.

As the clerk asked the jurors whether the verdict was their verdict, Juror #7, Marian Uvo, began to cry. She continue[d] to cry while the first six jurors were polled. When asked if the verdict was her verdict, Mrs. Uvo said nothing. The court asked the clerk to repeat the question and when she did, Ms. Uvo answered in faint voice, "yes."

In an abundance of caution, the Court indicated that it had not heard the answer. At that point, Ms. Uvo asked “can we talk first?” The Court asked the jury to continue the deliberations.

After the jury returned to their deliberations, the prosecutor reminded everyone that Ms. Uvo was the juror who had a medical problem, and the Court had scheduled several recesses in the trial to accommodate Ms. Uvo’s doctors’ appointments.

The jury then sent a note indicating that they did not have a unanimous decision. The Court asked the jury to continue their deliberations and also asked if the jury would like to take a break for the evening. When more than one juror indicated that they would like to recess, the Court told them to return the next morning and resume their deliberations.

After less than an hour of deliberation on November 21, 2002, the jury sent out a note requesting a meeting with the Court to get some direction and indicating that the jury room had become a hostile situation.

At defense counsel’s request, the Court requested an explanation of what they meant by “hostile situation.” The jury then explained in a written response that the hostile situation involved: one juror making threats upon another; the foreman having to step between two jurors to obtain order in the jury room; and one juror being scared. However, in conclusion, the note indicated that they felt they had the situation under control.

The Government then requested an *Allen* charge; defense objected, and the Court declined to give the instruction at that time. Then the jury sent out another note indicating that they did not have a unanimous decision that they were certain that they would not reach a unanimous verdict.

The Court modified the *Allen* charge at the defense request, and gave the *Allen* instruction; however, any *Allen* instruction was given over defense objections. The jury deliberated about an hour before returning a unanimous guilty verdict on both

defendants on all counts. The Court polled the jury, accepted the verdict, and discharged the jurors. . .

IV.
RESEARCH PROJECT

I have begun research on this matter and attach the cases and authorities which I find relevant.

Please review these materials and draft a memorandum setting forth with specificity and particularity your findings and conclusions with respect to whether there is a valid basis for the grant of a new trial based on the conduct of the jury in this case.

If you have any questions or concerns, please contact me. However, it's critical that I receive this memo no later than January 26, 2004.

Thank you.