
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ALFRED W. TRENKLER,
Petitioner - Appellant

v.

UNITED STATES OF AMERICA,
Respondent - Appellee

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR PETITIONER - APPELLANT
ALFRED W. TRENKLER

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INTRODUCTION

Petitioner Alfred W. Trenkler ("Trenkler") contends that the government unlawfully withheld exculpatory evidence from Trenkler's trial counsel in direct violation of his constitutional due process rights. At issue are the timeliness of Trenkler's claims, whether he has demonstrated a constitutional violation and whether Trenkler has demonstrated actual innocence.

To complicate matters, in the middle of the writing of this appeal Trenkler began receiving never before viewed exculpatory, actual innocence evidence sent by the Boston Police archives, evidence known by the government but withheld from Trenkler's counsel by means of a elaborate shell game. Neither the district court nor the jury had the benefit of this evidence at trial nor the district court in Trenkler's § 2255.

Trenkler now has documented proof that the government participated in and ordered tests which results are exculpatory and prove Trenkler's actual innocence but were withheld from Trenkler's trial counsel.

Add to the mix the fact that five jurors from Trenkler's trial took the extraordinary step of writing the trial judge concerning the evidence in Trenkler's § 2255 convincing them of Trenkler's innocence, without the knowledge of this new exculpatory evidence.

Accordingly, Trenkler seeks redress in the district court in regards to the issues in his § 2255 as well as the newly discovered evidence just received from the Boston Police.

STATEMENT OF JURISDICTION

The basis for the jurisdiction of the district court was 28 U.S.C. § 2255. That statute, in conjunction with 28 U.S.C. § 1291, provides the basis for this Court's jurisdiction.

The district court's Memorandum of Decision and Order was entered March 16, 2009 and Judgement entered March 19, 2009, D. Add. 1. The Notice of Appeal was timely filed on April 13, 2009, D. Add. 2. The district court granted a Certificate of Appealability as to all issues raised on July 15, 2009, D. Add. 4. This appeal is from a final order denying petitioner Alfred W. Trenkler's petition for relief under 28 U.S.C. § 2255.

STATEMENT OF THE ISSUES

- I. Whether the one-year limitation for filing a petition pursuant to 28 U.S.C. § 2255 should not begin to run until Trenkler was able to discover evidence not known by defense counsel.
- II. Whether the government impeded Trenkler's Constitutional Due Process Rights by the withholding of exculpatory evidence from his counsel.
- III. Whether Trenkler has demonstrated actual innocence where newly discovered evidence withheld by the government would prove the identity of the actual bomb builder and simultaneously prove Trenkler's innocence.

STATEMENT OF THE CASE AND FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

I. STATEMENT OF THE CASE

On November 29, 1993, a jury convicted Trenkler of violating 18 U.S.C. §§ 844 (d) and (i), receipt of explosives and attempted destruction of property by explosives, (counts 2 and 3), as well as conspiracy in violation of 18 U.S.C. § 371, (count 1), for his role in the construction and placement of a bomb under the car of Thomas L. Shay, ("Shay Sr"), in Roslindale, Massachusetts, which exploded and killed one Boston

Police Officer and injured the other, (See Docket 92-cr-10369-RWZ #487). On March 8, 1994, Trenkler was sentenced to life imprisonment on counts 2 and 3 along with a 60 month sentence on count 1, the conspiracy charge, all to be served concurrently. In July of 2007, Trenkler filed, pro se, an application to the First Circuit Court of Appeals for leave to file a second petition for a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), in which Trenkler alleges newly discovered evidence as a basis for relief. See 28 U.S.C. § 2255(h). The First Circuit allowed the application. See Docket 92-cr-10369-RWZ #708, D. Add. 5, 6.

Trenkler alleges newly discovered evidence that would prove actual innocence and that its prior unavailability reflects a constitutional violation of Trenkler's due process rights. Trenkler initially raised five grounds in his petition:

1. Defense bomb expert observed fingerprint on bomb remains collected and held by the Bureau of Alcohol, Tobacco and Firearms
2. The government possesses exculpatory, actual innocence evidence that is favorable to defendant Trenkler.
3. Bomb switch contacts match switches from multiple sources and have been found to be a mismatch to Radio Shack Model number 275-602.
4. Futaba remote control receiver could not operate after being armed for the time period claimed by the government.
5. Codefendant Thomas A. Shay ("Shay Jr") states that Trenkler is innocent and that others are responsible for the bomb.

Subsequent to receiving certification from the First Circuit, Trenkler began receiving further new evidence that he included through the filing with the district court and several addenda to his petition:

1. A witness in the Trenkler trial stated to two witnesses that significant portions of his testimony are untrue.
2. The government, in December of 2007, disclosed in its Opposition to Trenkler's § 2255 that it had destroyed all the forensic evidence in this case in 2005 and 2006.
3. The discovery of non disclosed assistance of U.S Attorney to state inmate for reduction of time in exchange for providing information to the government against Trenkler where previously same U.S Attorney stated under local rule 116 that there would be no assistance to said inmate.
4. Evidence of large speed bumps never disclosed to Trenkler.

Prior to the district court's denial of Trenkler's § 2255, and, as a powerful indication of the value of the newly discovered evidence that had been withheld from Trenkler in violation of his due process rights, Trenkler submitted in his addenda to his § 2255, three (3) letters from jurors that had sat on Trenkler's jury panel that had written to the district court stating that the results of Trenkler's trial would have been different if they had been aware of the newly discovered facts discovered by Trenkler, D.App. 27-29. Subsequent to the district court's denial, Two (2) more jurors wrote to the district court expressing the same sentiment, D. App. 30-32.

Subsequent to the government stating in its December 2007 Opposition response to Trenkler's § 2255 that it had "authorized the ATF to destroy the evidence in this case...", D. App. 36, 37, Morrison Bonpasse, advocate for the truth in Trenkler's case, asked Captain Frank Armstrong of the Boston Police Department about the rules for such destruction.¹ While Captain Armstrong had no idea of federal rules, he advised Bonpasse

¹ Although Trenkler inquired with the clerk of the court and researched federal law, nowhere is it spelled out the procedures for the U.S. Attorney to destroy evidence.

that Massachusetts State law requires that evidence from a given crime remains stored in archives until the defendant is either freed or dies. On behalf of Trenkler, Bonpasse then promptly filed a FOIA request with the Boston Police Department on April 10, 2008 in order to obtain copies of any evidence that the government may not have produced to Trenkler. D.App. 38.

Subsequent to the district court's March 16, 2009 Memorandum and Order denying Trenkler's § 2255, the Office of the Legal Advisor for the Boston Police Department mailed Trenkler and Bonpasse a letter with attached listing of all the evidence "in the possession, custody or control of the Boston Police Department under the Massachusetts Public Records Law", D.App 39, 40, dated April 23, 2009. Bonpasse then scheduled an inspection of whatever evidence the Boston Police held, ordered the pertinent evidence copied which Bonpasse began receiving in July of 2009 and forwarded to Trenkler.

These new documents have a direct bearing on some of the grounds approved by the district court, thus, in this appeal, that demonstrate that even with due diligence these newly discovered facts were not known by Trenkler's trial counsel as a result of the misrepresentation by the government that it had supplied any exculpatory evidence in its possession and control, proving that the government did not uphold its obligation under Brady and its progeny.

This evidence, had it not been withheld, would demonstrate that, more likely than not, no reasonable juror would have convicted Trenkler.

II. STATEMENT OF FACTS

On October 28, 1991, just past noon, a remote control bomb designed to explode only when triggered, allegedly manufactured by Trenkler at the behest of his codefendant, Shay Jr, exploded accidentally while being examined by members of the Boston Police Bomb Squad, killing one officer and wounding another. According to the government's evidence, the bomb had been discovered by Shay Sr on Sunday, October 27 at around 11:30 AM after returning from errands in the Medford, Malden and Chelsea area while driving his 1986 Buick Century, D.App. 46-48. According to Shay Sr, he discovered the bomb after backing in , then driving out of his 39 Eastbourne Street driveway at around 11:30 AM, D.App. 49, 53.

Again, according to the government's evidence, Trenkler became a suspect because of a prior incident in 1986 in Quincy, Massachusetts for which he had been arrested and where he had used a remote control receiver board cannabalized from a \$20 dollar toy car with a 50 foot range to set off a "flash simulator", a class "B" special fireworks device of low explosive flash powder, see D.App. 63, 64, for the wife of a friend as a prank pulled on one of her friends and part time employer. Part of the prank was the fact that the simulator originated with the target of the prank. The device had been cobbled together at a cook out, coupled with a speaker magnet that had been recently thrown away by one of the neighbors attending the cook out, an electronic relay to ignite the simulator and an old toggle switch used as a manually operated back up safety switch. At 2 AM the device was then attached to the side of a fish company truck

parked in Quincy owned by the target of the prank, causing no damage to the truck, D.App.65. Due to the prank nature of this incident, the the charges had been dismissed at the request of the Commonwealth of Massachusetts, D.App. 66, 67.

This incident was combined with the fact that Trenkler had by chance met Shay Jr in June of 1991 when Shay Jr was asking passers by for a ride home to Dorchester while standing in front of a White Hen Pantry store on Boylston Street, across from Fenway Park, that Trenkler just happened to be patronizing. Trenkler had ties to the area dating back to his days attending Wentworth Institute in 1975, worked in the area since 1981, and knew an employee of the White Hen Pantry, Thomas Thompson, whom Trenkler knew since the 70's. Trenkler was living in Quincy at the time which borders Dorchester so Trenkler gave Shay Jr a ride.

Subsequent to that, again in front of the White Hen Pantry, Shay Jr had fabricated a story for Trenkler about a "contact" he allegedly had at a local radio station, across the street, WBCN, looking for a communications company to contract with for antenna work as a ruse in order to obtain a phone number from Trenkler, Trenkler giving Shay Jr his business card with his voice mail pager number that Trenkler had just been issued by Metromedia Paging in July of 1991 after Trenkler had started his second communications company. Shay was supposed to give the business card to the "contact" but this did not occur.

The 1986 fireworks incident, which had been faxed to the Boston Police Department by Quincy Police Officer Thomas Tierney following the 1991 bombing, combined with the chance meeting

of Shay Jr in June of 1991 and Shay Jr having Trenkler's pager number was enough for the government to call it a day, they had their case, or did they?

According to the government's evidence, Trenkler is said to have built the Roslindale bomb with a Radio Shack model number 275-602 toggle switch alleged to have been purchased by Shay Jr at Trenkler's direction on October 18, 1991 at 2:36 PM, the only "proven" concrete, physical overt act by either Shay Jr or Trenkler to join into the alleged conspiracy. A FUTABA brand remote control receiver system of unknown origin was combined with the above toggle switch, set up so that a "servo" motor, a motorized device used to convert an electrical command into a rotary motion, would remotely cause the toggle switch to close a circuit that would ignite 3 to 4 pounds worth of dynamite and at least two blasting caps. The government alleges that Trenkler had re-wrapped the dynamite and blasting caps, also of unknown origin, with a page from a July issue of MuscleMag International, wrapping the magazine page with silver duct tape, then wrapping the duct tape with six layers of black electrical tape. D.APP. 70, 71-b, 75, 82. The explosives, toggle switch and FUTABA remote control and batteries were sealed within a plywood box that had been nailed and glued shut, D.App. 70, 80, then painted black with two types of magnets glued to the outside of the box. The box was surmised to have been constructed with some kind of opening to access an electrical slide switch that armed the bomb by turning on the FUTABA receiver. D.App. 80, 81.

The government then alleges that Trenkler and or Shay Jr

"surreptitiously" armed and attached the bomb to the undercarriage of Shay Sr's Black Buick Century while it was double parked on Shawmut Ave in the middle of Boston at around 8:30 PM, Saturday, October 26, 1991, 15 hours prior to Shay Sr's "discovery" of the bomb, and some 40 hours prior to the October 28 noon time explosion.

According to the government's evidence, Shay Sr returned to his 39 Eastbourne Street driveway on Sunday, October 27 at around 11:30 AM after running errands, including a visit to his uncle at the Chelsea Naval Hospital. Upon his return home, he backed into his driveway and heard a rumbling sound from under his car, D.App. 49, 50, discovering the bomb after he drove out of his driveway. He says he then picked up the bomb, flipped it over and then dropped it from a height of one or two feet beside his house, D.App. 56, 59. Later that same day, Shay Sr picked up and moved the bomb a second time again dropping it from a height of one or two feet onto the ground at its new location, D.App. 59. The following day, October 28, 1991, just before noon, Shay Sr contacted the Boston Police who investigated the scene.²

² - The government downplayed the fact that Shay Sr was in the middle of a lawsuit worth a potential \$400,000.00 dollars, the defendants being former landlords of Shay Sr's that had thrown some kind of explosive near Shay Sr in October of 1987. His lawsuit was based, in part, on paranoia that the former landlords were out to "get" Shay Sr. The government also downplayed the fact that Shay Sr earned a substantial income from several lawsuits over the years, D.App. 60-62, and that on December 17, 1990, Shay Sr told psychologist Carmen Armengol that he (Shay Sr) "has become hypervigilant and is afraid to start his car lest it explode", D.App. 62-2. Also, in the aforementioned delivery of the never before known evidence from the Boston Police Archives in July of 2009, the government never disclosed the fact that Shay Sr had an \$850,000.00 dollar lawsuit that he brought in 1984 where his fender had been hit by a delivery truck while he was parked in his car on the side of the road, D.App. BP 2. Nor did the government mention to Trenkler or counsel that

Just prior to the bomb exploding, Boston Police Bomb Squad Officer Francis Foley noticed the movement of the FUTABA servo motor, D.App. 85, 86.

III. THE DISTRICT COURT'S MEMORANDUM OF DECISION AND ORDER

As the district court ruled in its Memorandum of Decision and Order, "A federal prisoner 'claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States ... or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.' 28 U.S.C. § 2255(a). In addition, the statute requires that any such petition be filed within a one-year period of limitation, insofar as relevant to this case, runs from 'the date on which facts supporting the claim or claims could have been discovered through the exercise of due diligence'". D.App. 11.

The district court noted that the government opposed the petition on two grounds: 1) that Trenkler failed to allege any constitutional violation; and 2) that Trenkler fails to meet the limitation requirement of the statute. D.App. 4. However, in the district court's Memorandum, it ruled that in Trenkler's reply brief he "explicitly cites Brady which adequately alleges a violation of his rights to due process and is sufficient to sustain his petition." D.App. 5. The district court ruled that "the question is whether the facts asserted for each ground are indeed new or whether they could have been discovered through

Shay Sr had a criminal record, D.App. BP 3, or that he possessed a firearms permit, D.App. BP 10, or that the government did not believe Shay Sr's story of how he discovered the bomb, D.App. BP 7, 8.

the exercise of due diligence more than one year prior to [Trenkler's] application to the First Circuit." D.App. 6.

Finally, the district court ruled that Trenkler failed to make the requisite showing of actual innocence and that none of the evidence Trenkler advances directly negates any of the government's facts and is inadequate to show that, more likely than not, "no reasonable juror would have convicted [Trenkler] in light of the new evidence." D.App. 16, 19.

IV. THE GRANTING OF CERTIFICATE OF APPEALABILITY

On April 13, 2009, Trenkler filed a Notice of Appeal from the district court's Memorandum of Decision and Order of March 16, 2009. D.Add 2. An application for a Certificate of Appealability was granted on July 15, 2009. The district court ruled the Certificate of Appealability is "Allowed as to all issues raised." D.Add. 4.

On Order of Court of July 22, 2009, this Court stated "The district court issued a certificate of appealability in Civ. No. 1:07-cv-11823-RWZ (D. Mass.). Accordingly, pursuant to Grant-Chase v. Commissioner, 145 F.3d 431 (1st Cir. 1998), this appeal can go forward on the issue/s for which the district court granted the certificate." D.Add. 7.

This appeal follows.

SUMMARY OF THE ARGUMENT

I. TIME LIMITATION

Evidence had been discovered within one year of Trenkler's July 17, 2007 filing for certificate of appealability with the First Circuit. Subsequent to the filing, additional evidence was brought to Trenkler's attention which, in turn, Trenkler submitted to the district court through several addenda.

Case files had been spread amongst three separate post conviction attorneys whose focus was specifically aimed at legal issues not related to missing or withheld evidence in Trenkler's current § 2255. These files had not been returned to Trenkler, et al, and consolidated until 2006. Until 2006 no one party possessed the entire case file. The evidence submitted in Trenkler's § 2255 was never known by Trenkler's trial counsel nor shared with counsel by the government. Mere possession of various files by three separate post conviction attorneys working on specific, disparate legal issues cannot possibly impute to trial counsel knowledge of missing or withheld evidence as a result of the government's actions, as the district court surmised, D.App. 9, never mind the fact that one has to know what to look for to say it is missing. Unless one has the complete set of files, one cannot verify a particular file is missing.³

³As a result of a conversation with Captain Frank Armstrong of the Boston Police Department, a FOIA request was filed with the Boston Police by Trenkler in April of 2008, prior to the district court's March 2009 denial of Trenkler's § 2255. Trenkler began receiving documents from the Boston Police in July of 2009, resulting in newly discovered evidence that, because of government negligence or design, had been unknown or unavailable to Trenkler's trial counsel. This evidence concerns some of the grounds in this appeal.

II. CONSTITUTIONAL VIOLATIONS

Trenkler demonstrates that he has recently discovered that the government had withheld evidence that had been in its possession and control from Trenkler's trial counsel prior to trial in direct violation of Brady as well as local rules.

The government represented that it was going to abide by Brady but instead impeded Trenkler's constitutional due process rights by the repeated withholding of exculpatory evidence from trial counsel.

Indeed, the government had led Trenkler to believe it was going to comply with Brady and its progeny and provide any exculpatory evidence in its possession and control as the government stated in its December, 1992 Automatic Discovery letter, D.App. 37-2. Trenkler's counsel had diligently submitted a pretrial Brady motion to produce specific exculpatory evidence "material to the preparation of the defense" that has a direct bearing on Trenkler's current § 2255 and that recently had been discovered had been withheld prior to trial, D.App. 91, even though the government had represented it would turn over evidence that Trenkler's counsel had specifically requested, D.App. 96, along with all such exculpatory evidence within its possession, custody and control

Trenkler argues that there are several instances of the improper withholding of evidence than the district court was aware, in fact, as a result of the recent receipt of documents, courtesy of the Boston Police, never before published by the government to Trenkler's counsel, Trenkler now has documented proof of the government's violation of his due process rights.

III. CLAIM OF ACTUAL INNOCENCE

Trenkler has made a colorable showing of actual innocence that, had the entire jury been cognizant, would show that, more likely than not, "no reasonable juror would have convicted Trenkler in light of the new evidence". Indeed, proving the identity of the party physically constructing the bomb and that identity not being Trenkler nor Shay Jr, or evidence that the bomb was never attached to the Shay Sr vehicle would certainly result in a different outcome in a case where not one piece of forensic evidence connecting Trenkler nor Shay Jr to this case exists.

Had the entire jury known of this new evidence, as five jurors to date now realize, never mind what else the government withheld that Trenkler just discovered within a month of this writing, it is hard to believe that it would be "inadequate to show that, more likely than not, 'no reasonable juror would have convicted [Trenkler] in light of the new evidence.'" See Schlup, 513 U.S. at 327.

Indeed, a total of five jurors that had sat on Trenkler's jury panel took the extraordinary step of writing to the district court with their statements that, had they known just some of the grounds Trenkler advances, not including the newly discovered government withheld evidence, they would not have convicted. D.App. 27-32.

LEGAL ARGUMENTS

- I. THE ONE YEAR LIMITATION FOR FILING A PETITION PURSUANT TO 28 U.S.C. § 2255 DID NOT BEGIN TO ACCRUE UNTIL TRENKLER WAS ABLE TO DISCOVER EVIDENCE THAT HAD BEEN UNKNOWN OR UNAVAILABLE TO HIS DEFENSE COUNSEL AT THE TIME OF TRIAL.

A. SUMMARY OF APPLICABLE LAW.

Relevant to Trenkler's timeliness issue, 28 U.S.C. § 2255(f)(4) provides, "A 1-year period of limitations shall apply to a motion under this section. The limitation period shall run from the latest of ... (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."

The Supreme Court noted "that under § 2255 as amended by AEDPA, the one-year time period could restart from the date a new fact 'could have been discovered through the exercise of due diligence.'" Johnson v. U.S., 544 U.S. 295 at 330 (2005).

As this Court has noted, "We understand due diligence to be a 'context-specific concept' generally akin to the degree of diligence a reasonable prudent person would exercise in tending to important affairs." United States v. Garcia-Alares, 541 F.3d 8 at 18 (1st Cir. 2008) and, "The doctrine of equitable tolling suspends the running of [a] statute of limitations if a plaintiff, in the exercise of reasonable diligence, could not have discovered information essential to his claim[s]." Ramirez-Carlo v. United States, 496 F.3d 41, 48 n.3 (1st Cir. 2007).

"[R]equests for § 2255 relief based upon newly discovered evidence reviewable under standards applicable to motion for a new trial under Fed. R. Crim. P. 33. (Quoting Lindhurst v.

United States, 658 F.2d 598, 602 (8th Cir. 1981). 'That exercise would require [Trenkler] to prove 4 elements: (1) the newly discovered evidence was unknown or unavailable at the time of trial; (2) [Trenkler] was duly diligent in trying to discover it; (3) the evidence was material; and (4) the evidence was such that it would probably result in an acquittal upon retrial.'" Awon v. United States, 308 F.2d 133, 140 (1st Cir. 2002).⁴

However, "if the basis for a new trial motion is a Brady violation—that is, a failure on the government's part to disclose Brady information -- the law requires, on the third and fourth prongs of the new trial test, only that the defendant show a reasonable probability that, had the evidence been disclosed in time to permit its use at trial, the results of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433-34 (1995); "That, in turn, requires an analysis of whether the trial, in the absence of the undisclosed evidence, resulted in a verdict 'worthy of confidence.'" Gonzalez-Gonzalez, 258 F.3d at 20 (1st Cir. 2001), quoting Kyles, 514 U.S. at 434.

⁴ Trenkler, et al, has demonstrated due diligence by diligently searching for exculpatory evidence by contacting his trial counsel, private investigator, and bomb expert, searching case files as they became available on known, searched the Trenkler case files at the Waltham archives, contacting the clerk of the district court and searched files held by both of codefendant's attorneys at their separate lawfirms. Short of clairvoyance, unless the government produces exculpatory evidence in its possession and control, there is no possible way for defense counsel to ask for evidence it is unaware exists short of a Brady motion to produce said evidence. Even then, how is the defense supposed to know what the government has withheld?

As soon as Trenkler learned that the Boston Police kept an archive for the Roslindale bombing case, Trenkler diligently filed a FOIA request, had the files inspected and ordered copies of evidence that had never been provided to Trenkler's counsel by the government and presents the pertinent evidence in this appeal.

B. SUPPORTING FACTS

1. THE FINGERPRINT ON THE BOMB TAPE

The first and only mention of the observation of a fingerprint between the 6 layers of electrical tape used to wrap the dynamite sealed inside the 91 bomb was by defense expert Denny Kline ("Kline"), a retired FBI bomb specialist, during a conversation with Trenkler's freedom advocate, Morrison Bonpasse ("Bonpasse"), in July of 2007. D.App. 87.⁵ There were no reports or any documents reflecting this fingerprint observation to be discovered no matter what the degree of diligence displayed. Although Trenkler et al. would confer with both trial counsel, defense expert Kline and Private investigator James Karolides in the years subsequent to trial, at no time was the fingerprint observation mentioned, revealed nor discussed by any party prior to July of 2007, and even then, was only mentioned by Trenkler's defense expert, Trenkler's trial counsel has no recollection. Thus the time for this claim did not begin to accrue until July of 2007.

2. FINGERPRINTS ON THE SHAY SR "TARGET VEHICLE"

The issue of the fingerprint report in Trenkler's § 2255 is based upon the November 2nd, 1991 Boston Police Identification Report that had been provided by the government under discovery rules, D.App. 88, concerning the 17 fingerprint "lifts", five of those "lifts" from the undercarriage of Shay Sr's car, the "target vehicle" the bomb is alleged to have been attached by Trenkler and or Shay Jr.

⁵ See also affidavit of Denny Kline explaining in detail how he observed a fingerprint between layers of tape that had been wrapped around the dynamite that "could positively solve their case".

Although Trenkler and his counsel were aware of this report and had filed a Brady motion for the government to produce the results of the examination, D.App. 91, and the government had even responded it "will provide", D.App. 96. Until all of Trenkler's case files were returned in 2006, the Waltham archives reviewed and Trenkler's defense team had been consulted, Trenkler was never aware that the government had never provided any identification results to his counsel, in regards to the November report. There were no memos or documents mentioning any missing or withheld print results and Trenkler's trial counsel has no recollection.

Until Trenkler had completed the search of known available files in 2006, Trenkler was not able to verify that the government had never provided any print results fom the November 2, 1991 "lifts".

However, this may be mooted as a result of the receipt of evidence from the Office of the Legal Advisor for the Boston Police that had never been provided by the government, concerning a second Boston Police Identification Section Report written on May 25, 1992 listing the recovery of 24 fingerprint "lifts" from the Shay Sr vehicle including a comparison to several persons including Trenkler and Shay Jr with no match to Trenkler or Shay Jr and five unidentified prints from the undercarriage of the car where the bomb is said to have been placed. This second report had never been provided to Trenkler by the government and remained unknown until July of 2009.

As far as Trenkler and counsel were aware, there was only one fingerprint report. If the government never told Trenkler or

his counsel that a second report existed, despite the government's acknowledgement of its discovery obligation and Trenkler's filing "Brady" motions to provide exculpatory evidence negating Trenkler's guilt, Trenkler had no way of discovering this second report.

The second report is indeed newly discovered evidence that was unknown or unavailable due to the government's failure to disclose this favorable evidence to Trenkler's defense, even after the government had maintained that it was going to provide any exculpatory evidence in its possession and control. The government gave no notice that there was a second fingerprint report that indicates that someone else had come in contact with the undercarriage of Shay Sr's vehicle.

This second report is newly discovered evidence that was unknown or unavailable, Trenkler was duly diligent in trying to discover it, there is a reasonable probability that, had the withheld fingerprint evidence been disclosed in time to present its use at trial, the results of the proceeding would have been different, and in the absence of this undisclosed evidence, the verdict was not "worthy of confidence". See Gonzalez-Gonzalez, 258 F.3d at 20 (1st Cir. 2001). See also Juror Marcia Lapson's comments on not being told of prints from the Shay Sr car or whether they were identified. D.App. 29.

3. THE TOGGLE SWITCH

The time for this claim did not begin to accrue until the comparison of the bomb's toggle switch could be proven not to match the Radio Shack toggle switch based on the newly discovered photographic evidence that had never been provided to Trenkler's

trial counsel prior to trial that had been in the government's possession and control and was only discovered by chance at the office of codefendant's counsel. D.App.98.

4. FUTABA OPERATING TIME

Once the case files had been returned to Trenkler by all his post conviction attorneys, Trenkler's step father, Jack Wallace, began contacting the scores of hobby shops that sold the FUTABA remote control used in the Roslindale bomb. One dealer in particular that sold and was familiar with the exact model discovered to have been used in the 91 bomb had told visiting BATF agents that the configuration of the FUTABA and the older model FUTABA slide switch (power switch), D.App. 99, 100, would only yield a two hour operating time. This individual, however, stated that he was not authorized to give an official statement and referred Jack Wallace to the manufacturer, HOBBICO. In September of 2007, the manufacturer wrote with the specifications of the same model FUTABA as used in the 91 bomb, D.App. 101, 102, but with a current model slide switch and Duracell "AA" batteries as they were rated in 2007. Trenkler made his calculations based upon the HOBBICO specification but with Duracell batteries as they were rated in 1991. D.App. 103-104-6

Although Kline did perform a test that yielded a 22 hour operating time, he was never aware of the FUTABA salesman's statement to the BATF that the old slide switch would diminish the operating time, nor was Kline aware that Duracell batteries in 1993 had twice the storage capacity as Duracell batteries purchased in 1991, Kline had conducted his test in 1993 with "brand new fresh batteries". D.App. 106.

The time for this claim did not begin to accrue until 2007, the time of the receipt of the HOBBICO specifications, or, in the alternative, when Jack Wallace obtained the undocumented comment from the local FUTABA salesman of the reduced operating time.

5. SHAY JR STATEMENTS

The district court stated that this evidence was arguably new. D.App. 19.

C. PREVIOUSLY UNASSERTED CLAIMS

1. THE GOVERNMENT REVEALS IT DESTROYED ALL THE EVIDENCE IN THE TRENKLER CASE

Without a doubt, the government was in possession of all the forensic evidence in this case. Unbrought to Trenkler at his July 2007 filing of his § 2255, the United States Attorney's office had ordered the destruction of all the evidence in the Trenkler case in 2005 and 2006. This is indeed new evidence that does not appear on any docket, court order or published memo, thus no way for Trenkler to reasonably discover this fact. Trenkler only learned of this fact when it was published by the government's December Opposition to Trenkler's § 2255. D.App. 36, 37. This may well have been the end of the road for Trenkler, however, since this was a joint BATF and Boston Police investigation, any items possessed by the Boston Police Department would come under the umbrella of the government under Brady. Recent contact with the Boston Police Office of the Legal Advisor on advice of Boston Police Captain Frank Armstrong has revealed exculpatory evidence still in existence that the government never turned over to Trenkler's counsel prior to trial. D.App. BP 1-15.

2. SPEED BUMPS AT THE CHELSEA NAVAL HOSPITAL

Since the government allowed Shay Sr to give his car away, the "target vehicle", early in 1992, D.App. 42, prior to Trenkler even receiving a "target letter" in this case, by the time Trenkler had hired his expert(s) in 1993, D.App. 108, it had ben determined that it was pointless to retrace the route Shay Sr drove without the "target vehicle" since there was no way to ascertain the condition of his 7 year old car to verify Shay Sr's story or the government's theory that the bomb was actually on the undercarriage of Shay Sr's car for some 15 hours and while he drove around Boston on errands and end up dislodging in his driveway.

For some reason, officials let Shay Sr pick his car up on December 5, 1991, just over a month after the bombing. D.App. BP14 .

The speed bump information came from one of the hold out jurors who, in 2008, had written Judge Rya Zobel and had, by coincidence, worked at the Chelsea Naval Hospital in 1991 and who questioned how Shay Sr could have driven over the large speed bumps without the bomb striking, but then the bomb would would rub off on Shay Sr's mildly sloped driveway that even Shay Sr testified "wasn't very steep", D.App 51. This had been brought to the attention of Trenkler's advocate for freedom, Morrison Bonpasse in November of 2008. D.App. 87-2. See also Juror Marcia Lapson letter, D.App. 29.

There were no reports written reflecting the speed bumps. The speed bumps were indeed exculpatory evidence. This ground was not discoverable without the Shay Sr vehicle and only came

about via a juror in 2008.

And once again, with the discovery of the Boston Police archives and the July receipt of the exculpatory evidence never provided to Trenkler's defense counsel by the government, Trenkler has now discovered a detailed report of a reenactment of Shay Sr travels just prior to the bomb allegedly dislodging from Shay Sr's car. D.App. BP 15.

The result of the reenactment, complete with a replica of the bomb as described by police on the scene attached to the undercarriage of Shay Sr's vehicle, was that the bomb never dislodged on the entire trip, including repeated backing of Shay Sr's car into his driveway. This entire trip and the multiple entries into the Shay Sr driveway were videotaped.⁶

The government never provided this report nor video to Trenkler's defense counsel. This report and video is indeed new evidence material to Trenkler's defense, and was unknown or unavailable; Trenkler was duly diligent in trying to discover it; there is a reasonable probability that, had this video and report been disclosed in time to permit its use at trial, the results of the proceeding would have been different; in the absence of this undisclosed evidence, the verdict was not "worthy of confidence".

If a replica of the bomb could not be made to fall off Shay Sr's car, how did Shay Sr "find" the bomb? If the bomb was not on the car then neither Trenkler nor Shay Jr attached it.⁷

⁶ Interestingly, this video tape is missing from the Boston Police archives
⁷ There is also a newly discovered document concerning "primary suspects" written on March 9, 1992 where the government note under Thomas L Shay (Sr) "1. Inconsistent, largely unbelievable story" and a January 16, 1992 Proposed Investigative Plan, the government notes, "3. Inconsistent story RE: discovery of device. D.App. BP 7, 8.

3. JURORS WRITE THE DISTRICT COURT

Beginning in July of 2008, jurors from Trenkler's trial began writing Judge Rya Zobel, Trenkler's trial judge. Trenkler submitted the first three juror letters promptly in addenda to his § 2255 as a strong indication of what the jury would do with the evidence that Trenkler has submitted in his motion, that the results of the trial would have been different with the introduction of the government withheld evidence. See D.App. 27-29. Subsequent to the district court's denial of Trenkler's §2255, two more jurors wrote to the district court with the same message, D.App. 30-32.

II. TRENKLER HAS SHOWN THAT THE GOVERNMENT FAILED IN ITS DUTY TO PROVIDE EXCULPATORY EVIDENCE IN ITS POSSESSION AND CONTROL THUS IMPEDING TRENKLER'S DEFENSE IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS BY THE WITHHOLDING OF FAVORABLE EVIDENCE FROM HIS COUNSEL THAT IS MATERIAL TO GUILT OR TO PUNISHMENT

Relevant to Trenkler's constitutional issues, 28 U.S.C. § 2255(f)(2) provides ... "the limitation period shall run from the latest of ... (2) the date on which the impediment to making a motion created by government action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such government action."

In Brady v. Maryland, 373 U.S. at 87, the Supreme Court held, in 1963, that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment..." In 1985 in Bagley, 473 U.S. at 682, the Supreme Court held that "evidence is material only if there is a

reasonable probability that, had the evidence been disclosed to the defense, the results of the proceeding would have been different." See also Kyles v. Whitley, 514 U.S. 419, 433-34 (1995); Richie v. Pennsylvania, 480 U.S. 39, 57 (1987).

When the grand jury handed down the original Trenkler indictment on December 16, 1992, the federal district court of Massachusetts local rules required automatic disclosure of all evidence within the the government's kin that tended to negate a defendant's guilt. See D. Mass. R. 42(a)(5), (1986). In 1990, the local rules were amended to impose an additional requirement: that the government, on its own initiative, provide the defendant with any and all exculpatory evidence that might be used to impeach witnesses whom it intended to call at trial. See D. Mass. R. 116.1(a)(5), (1990); See also Giglio v. United States, 405 U.S. 150, 154, (1972); Also Ferrara v. United States, 456 F.3d 293 (1st Cir. 2006).

"Given the presumption that prosecutors can be relied on to perform their official duties properly, Ramirez v. Sanchez - Ramos, 438 F.3d 92, 99 (1st Cir. 2006), [Trenkler] should have been able to trust the government to turn square corners and fulfill its discovery obligations. In the absence of a positive indication that it would not comply -- and there was none [in Trenkler's case] -- it is fair to say that the government, at the very least, impliedly promised that it would provide [Trenkler] with any exculpatory evidence." Ferrara, 456 F.3d at 293.

The government made affirmative misrepresentation to Trenkler. In its December 23, 1992 Automatic Discovery letter,

the government explicitly represented that it "recognizes and understands its duty to supply any exculpatory evidence within the meaning of Brady v. Maryland, 373 U.S. 83 (1963), Giles v. Maryland, 386 U.S. 66 (1967), or Giglio v. United States, 405 U.S. 150 (1972)." See D.App. 37-2. That promise went unfulfilled.

In addition, the prosecution "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles, 514 U.S. at 437. "As the Supreme Court has repeatedly written, there is not 'any serious doubt that procedures and regulations can be established to carry [the prosecution's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it". Id at 438 (Quoting Giglio v. United States, 405 U.S. 150 (1972)).

Without question, in Trenkler's case, the government was working hand in hand with the Bureau of Alcohol Tobacco and Firearms and the Boston Police who were all participating in the investigation leading to the criminal case against Trenkler. See for example D.App. 109, a BATF report concerning the "joint ATF, Boston Police Department investigation".

Indeed, the government was obligated to ask the Boston Police Department and the BATF for all exculpatory information in this case. All exculpatory Boston Police and BATF evidence was therefore in the "possession" of the government. Consequently, any exculpatory Boston Police and BATF evidence is in fact Brady material. The government did in fact violate its constitutional duty to Trenkler by not disclosing exculpatory

evidence in its possession and control. Trenkler now has proof that the government withheld exculpatory evidence and did not abide by its constitutional obligation.

B. SUPPORTING FACTS

1. FINGERPRINT ON BOMB TAPE

Defense expert retired FBI agent Denny Kline was allowed to examine the forensic evidence in this case in a conference room set up by the government. Present were Kline, defense investigator and retired ATF agent James Karolides, AUSA Frank Libby and ATF agents Tom D'Ambrosion and Jeff Kerr. None of Trenkler's attorneys were present.

Kline noticed a fragment of several layers of 3/4 inch black plastic tape that had not been examined for latent fingerprints. Using tweezers, he started to remove the top layer of tape and observed a clear fingerprint, showing this to Karolides and the ATF agents, it would only be logical that AUSA Frank Libby was also shown.

Kline recommended that this fragment of tape be resubmitted to the ATF lab advising the ATF agents that this print could positively solve this case since the bomb maker had to have handled the tape during the construction of the bomb.

However, a later ATF lab report stated that no prints had been found and a subsequent visit to the ATF revealed that the tape upon which Kline had found a "clear fingerprint" was now missing. Kline mentioned the missing tape to Trenkler's counsel but no report, memo, nor motion was filed in relation to this tape. See Kline Affidavit, D.App. 87-1, 2.

What is known about this tape and the print observation:

1) the government was in possession of this tape evidence; 2) the government had been shown the fingerprint, ie, it was aware of a case solving fingerprint; 3) the government lab report says no identifiable print had been found; and 4) the tape with the previously observed fingerprint was missing. It is only logical that the government did lift the print and, since it found a negative match to Trenkler nor Shay Jr it made the tape unavailable thereafter.

Once the government knew of the exculpatory, actual innocence evidence that could clear Trenkler and or Shay Jr and prove the identity of the actual bomb builder, it had a duty to produce it.

As for Trenkler's counsel, the most highly probable evidence relating to whether this evidence was known by defense counsel is the conspicuous absence of any crossexamination of BATF agent Cynthia Wallace of the fingerprint observation by defense expert Kline, a matter that was extremely relevant to the defendant's defense, that he did not build the Roslindale bomb. See D.App. 75-78, cross examination of Cynthia Wallace.

Interestingly, nowhere does it spell out how the government learns of exculpatory evidence, only the when it becomes aware of such evidence it has a duty to provide it to the defendant.

While Kline identified the presence of the fingerprint, the ATF lab would possess the identification results that were never shared with the defense, obvious exculpatory evidence that the government had a duty to provide, that the defense never had.

To this day Trenkler's defense counsel has no recollection of this print observation.

2. FINGERPRINTS FROM THE "TARGET VEHICLE"

Through automatic discovery, the government gave Trenkler a November 2, 1991 Boston Police report listing 17 fingerprints "lifted" from the Shay Sr "target vehicle", five of those prints from the undercarriage where the bomb is alleged to have been attached, with no fingerprint analysis. D.App. 88.

Subsequent to that, Trenkler filed a Brady motion specifically asking for the results from the fingerprints on the Shay Sr vehicle showing Trenkler's innocence, based on this November report. D.App. 91. The government acknowledged this specific request stating it "will provide" this request. D.App. 96. However, no analysis was ever provided, which Trenkler was able to verify after much searching in 2006.

However, newly discovered in July of 2009 at the Boston Police archives is a second report that was never published by the government concerning 24 fingerprints "lifted" from Shay Sr's car, written on May 25th, 1992, with a comparison analysis to several persons including Trenkler and Shay Jr with negative results for Trenkler and Shay Jr, See D.App. BP 11-13, certainly exculpatory evidence.

The government was fully aware of this second report, in fact, on entry #14 of a January 16, 1992 "Investigation Plan", it was the government that had the Boston Police expert check the "lifts" taken from the Shay Sr vehicle against prints of key suspects, to include Shay Sr, D.App. BP 5, found in the Boston Police archives in July, 2009.

As far as Trenkler and his counsel were aware, there was only the November 2, 1991 report. The government gave no notice that

there was a second report written on May 25th, 1992, nor that it was refusing to provide it.

Trenkler's counsel did its part by submitting a Brady motion for the production of exculpatory evidence. Beyond that Trenkler had no way to obtain the second print report unless the government chose to provide it.

Indeed, the government did not fulfill its obligation under Brady. There is no question that the Boston Police and the BATF were working hand in hand with each other, D.App. 109, therefore, whatever evidence was held by the Boston Police came under the Brady umbrella. "The individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in this case, including the police." See Kyles, 514 U.S. at 437.

Trenkler has shown the three components of a Brady violation: 1) "the evidence at issue [is] favorable to [Trenkler] [...] because it is exculpatory, [...]; 2) that evidence [...] was suppressed by the [government], either willfully or inadvertently; and 3) prejudice [has] ensued." See Strickler v. Green, 527 U.S. (1999)

Was Trenkler supposed to mistrust that the government was going to do its duty?

Trenkler was prevented from making a motion concerning this second report by the government's action of withholding it and never disclosing it despite making assurances that it had fulfilled its duty under Brady and the local discovery rules.

3. THE TOGGLE SWITCH EVIDENCE

While it is true that defense expert Kline made the "preliminary conclusion" that the toggle switch remains from the Roslindale bomb did not match the Radio Shack 275-602 toggle switch, he had requested another view of the switch remains, D.App. 110, he was never granted access to the switch remains again in order to verify his observation.

What the district court did not take into consideration is the fact that neither Kline nor defense counsel were ever provided with nor were they ever aware of the toggle switch remains photographs that the government had in their possession and control, even though the government, in its automatic discovery letter to defense counsel stated that it would provide Trenkler access to all photographs held by the government, D.App. 37-2.⁸

Had Trenkler been provided with these photographs, Kline would have been able to conclusively prove that there was no concrete physical evidence of any overt act by either Trenkler nor Shay Jr. The other acts assumed by the government were based on mere accusation and conjecture with no physical concrete proof that did not rely on any more than a "smorgasborg on nonconclusive circumstantial evidence". See United States V. Trenkler, 61 F.3d 45, dissent of Juan Torruella.

No mention was made by the district court of the troubling manner in which the toggle stitch came into view as being suspect

⁸ The government had given this photographic evidence to codefendant Shay Jr's counsel but not to Trenkler's defense counsel.

that if true, indicates that the government went ahead with this case with the knowledge that there was no match between the bomb's toggle switch and that of the Radio Shack switch so hotly contested at trial.

Taken with a grain of salt, a grand jury witness that was also a behind the scenes integral part of the government's case against Trenkler, told Trenkler's family that she overheard high ranking state and government officials directly involved with this case discussing the fact that they were aware that the bomb toggle switch was not a Radio Shack switch. This discussion is alleged to have occurred just outside of Trenkler's trial courtroom just prior to trial. D.App. 111.

This of course goes way beyond issues of due diligence. If the cornerstone of the government's case against Trenkler was known by the government to be false it would indeed be a constitutional violation of Trenkler's due process rights to a fair trial, not to mention, fraud on the court.⁹

OPERATING TIME OF THE FUTABA RECEIVER

The BATF had interviewed scores of hobby businesses in the New England area. One Dealer had been interviewed by the BATF and told the ATF agents that the FUTABA receiver used in the 91 bomb

⁹ Circumstantially, this for now unnamed witness's story is corroborated by several facts: 1) Trenkler's counsels' letter to codefendant counsel re: Kline's switch mismatch observation, D.App. 112; 2) Kline's report, the switch mismatch observation and request to re-examine switch remains, D.App. 110; 3) Radio Shack submits affidavit stating receipt alleged from codefendant Shay Jr is bogus, D.App. 113; 4) Trenkler discovers ATF photographs never provided to Trenkler's defense counsel, D.App. 98-1; 5) comparison of Radio Shack switch to to bomb remains and to matching Philmore switch; 6) district court's observation that Radio Shack employee Alan Kingsbury stated that Shay Jr was never in the store making the alleged purchase but rather two "Middle eastern men" had made the purchase, D.App. 115, 116.

would only be able to operate for 2 hours once turned on because of the older power slide switch used. D.App. 99, 100. This information had never been turned over to Trenkler's counsel nor written in any reports.

That the government would bury this fact surely violates Trenkler's due process rights.

Had Trenkler's counsel or expert Kline been aware that the older model FUTABA slide switch would severely lower the operating time, Kline would have conducted a different test.

This was but another example of the government playing hide and seek with exculpatory evidence.

5. SHAY JR.

What can be said of this individual

Has the government knowingly used statements of Shay Jr's that it knew to be false? For every time Shay Jr tells the "truth" for the government, he then turns around and publicly says he was lying. For every time that Shay Jr admits that he was lying, if it deviates from the government's program, Shay Jr is said to be totally unreliable.

Shay Jr then pleads guilty then turns around and states that he plead guilty to avoid facing what he was wrongly lead to believe was a life sentence if he had chosen to go to trial and was convicted. D.App. 117-119.

The government and the courts say that Shay Jr is a normal person whenever his words help the government, but Shay Jr turns into an incredible, untrustworthy, unreliable liar whenever he goes against the flow. The government and the courts can't have it both ways. If Shay Jr is an unreliable liar, then nothing he

says can be trusted. It is a logic question. If Shay Jr says he is a liar, is he telling the truth? If he does, then his own confession is a lie, which means he is not a liar; but if he is not a liar then his confession is true, so he is a liar.

The government bases their logic on Shay Jr being a normal person ... Shay Jr is anything but normal.

B. PREVIOUSLY UNASSERTED CLAIMS

1. THE GOVERNMENT REVEALS IT DESTROYED THE EVIDENCE IN THIS CASE

Without a doubt, the government was in possession of all the evidence in this case. With no notice given to Trenkler, his counsel, nor the district court, the government took it upon itself to quietly order the destruction of the evidence in this case in 2005 and 2006, knowing of its exculpatroy value and knowing that Trenkler has been continually fighting his case. It only mentioned the destruction in its December 2007 Opposition to Trenkler's 2255, D.App. 36, 37. ¹⁰

2. SPEED BUMPS

If the government retraced the route Shay Sr drove on the morning prior to his "discovery" of the bomb, no mention was made of the large speed bumps Shay Sr would have had to cross at the Chelsea Naval Hospital, D.App. 87-2. Subsequent to this trip, on December 5, 1991, Shay Sr was allowed to retrieve his car,

¹⁰ Of the items destroyed of exculpatory value known to Trenkler: the black electrical tape with the observed fingerprint that could exonerate Trenkler, along with two other types of tape, D.App 121; the latent prints "lifted" from the Shay Sr car that were never identified, D.App. BP 12, 13; the recovered toggle switch contacts, D.App 98-2; a video tape that shows a replica of the bomb attached to the undercarriage of the "target vehicle" not dislodging despite multiple "back ups" into the Shay Sr driveway, D.App. BP 15.

D.App. BP 14 (newly discovered police report). Trenkler was indicted on December 16, 1992 and retained his bomb expert, Kline, in February of 1993, D.App. 108. Trenkler's counsel requested an examination of Shay Sr's car, the "target vehicle", only to be told the government had allowed Shay Sr to give his car away in early 1992, D.App. 42. Not only was it no longer possible but also not logical to retrace the route Shay Sr alleged to have driven with his car without the use of the actual Shay Sr car since it would be impossible to accurately duplicate the condition of his then 7 year old car under which Shay Sr is said to have dislodged the bomb in his driveway.

However, there have been another reason to allow Shay Sr to give his car away.

Again, as a result of his April , 2008 FOIA request to the Boston Police, Trenkler is now in possession of a November 17, 1991 Boston Police report of a reenactment of Shay Sr's drive with a replica of the bomb attached to the undercarriage of his car, witnessed by BATF supervisor Vic Palaza and agent Ed Crowley and "Team 5" of the Boston Police, with Shay Sr directing the drive along with Shay Sr's attorney, Alan Pransky. The entire route Shay Sr drove was repeated with no bomb dislodgement. At the Shay Sr driveway, the vehicle had been backed into the driveway a number of times but the bomb had "adhered to the vehicle during this exercise". D.App. BP 15. More importantly, this entire excercise had been videotaped, a powerful indication that the bomb was never on the Shay Sr car. D.App. 15

Neither this report nor this video had been provided to Trenkler counsel..This is indeed exculpatory evidence that would be difficult

if not impossible to duplicate without the Shay Sr vehicle.¹¹

Obviously, the government was aware of this reenactment video since the ATF and the Boston Police were participating in the exercise. Without a doubt, this evidence is material to guilt or punishment and there was certainly a reasonable probability that, had this evidence been disclosed to the defense, the results of the proceeding would have been different.

This was also impeachment evidence against one of the original prime suspects turned government witness, Thomas Leroy Shay (Sr), D.App. 4, 7, "Primary Suspects". If the bomb could not dislodge as Shay Sr said, how then did he "find" the the bomb? If the bomb was not actually affixed to Shay Sr's car but Shay Sr placed the bomb under another car in his back yard, the only logical explanation was that Shay Sr came across the bomb some other way and put it there and Neither Trenkler nor Shay Jr attached it to his car.

Shay Sr was, after all, in the middle of a \$400,000.00 dollar lawsuit where he had predicted the defendants were trying to kill him. In Fact, on December 17, 1990, neuropsychologist Carmen Armengol wrote a report where it was observed that Shay Sr "has become hypervigilant and is afraid to start his car lest it explode". D.App. 62-2.

This newly discovered reenactment report is most definitely favorable to Trenkler because it is exculpatory, was suppressed by the government either willfully or inadvertently and prejudice has ensued. See Strictler v. Green, 577 U.S. (1999).

¹¹ Interestingly, this video was not found at the Boston Police archives, instead, a November 8, 1991 video of a larger box that did fall off of Shay Sr's car was there, and which Trankler had been provided prior to trial.

Was Trenkler supposed to mistrust that the government was going to do its duty?

Trenkler had been prevented from making a motion concerning this second report and videotape by the government's action of withholding this evidence and never disclosing it despite making assurances that it had fulfilled its duty under Brady and the local discovery rules.

3. JURORS WRITE THE DISTRICT COURT

As proof that Trenkler's claims would have produced a different outcome of his trial, if not for the government's withholding of evidence or otherwise impeding Trenkler's defense, Trenkler cites letters from a total of 5 jurors from Trenkler's trial that took the extraordinary step of writing the district court in 2008 and 2009. D.App. 27-32.

The district court merely mentioned in passing Trenkler's submission of three of these juror letters in addenda to his § 2255, the last two jurors wrote too late to be included in his § 2255.

These jurors stated that had they known at trial what they now see what had been withheld by the government, not even including the recently discovered fingerprint evidence nor the reenactment of the Shay Sr being driven without the bomb falling off his car, as stated by Shay Sr and theorized by the government, that Trenkler would not have been convicted, deserves to be set free or should have a new trial to include evidence that had been withheld by the government.

Jurors also stated that now that they know witness Lindholm got a deal from the government after swearing he never would, his

testimony is regarded as highly suspect and that he most likely did have some kind of deal for his testimony.

III. TRENKLER DEMONSTRATES ACTUAL INNOCENCE WHERE NEWLY DISCOVERED EVIDENCE WITHHELD BY THE GOVERNMENT WOULD PROVE THE IDENTITY OF THE ACTUAL BOMB BUILDER, SIMULTANEOUSLY PROVING TRENKLER'S INNOCENCE

A. SUMMARY OF APPLICABLE LAW

Trenkler makes a colorable showing of actual innocence that substantiates Trenkler's claims to be heard.

An actual innocence claim is a "gateway through which a petitioner [may] have his otherwise barred constitutional claims considered on the merits." Schlup v. Delo, 513 U.S. 298, 315. To succeed the petitioner "must establish that in light of the new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt'". House v. Bell, 547 U.S. 518, 536-537 (quoting Schlup, 513 U.S. at 527. Further, "actual innocence requires the petitioner to show factual innocence, not mere legal insufficiency." Bousey v. United States, 533 U.S. 614, 623, as quoted in Barreto-Barretto v. United States, 551 F.3d at 102 (1st Cir. 2008).

"Determining whether no reasonable juror would have found petitioner guilty 'turns upon an examination of the whole record to ascertain what inferences are reasonable in light of the evidence presented.'" Hohn v. United States, F.3d 921, 924 (6th Cir. 1999) (as quoted in Alicea-Torres v United States, 455 F.Supp. 2d 32 (1st Cir. 2006)

"The Supreme Court has provided valuable guidance on how court should apply the relevant standard of proof to the evidence presented in actual innocence cases[...]" "To be credible" an

actual innocence claim requires "new reliable evidence...whether it be exculpatory scientific evidence, trust worthy eyewitness accounts, or critical physical evidence...that was not presented at trial" House, 547 U.S. at 537 (Quoting Schlup)

Trenkler claims actual innocence based on evidence that the government was fully aware it possessed and controlled but withheld that would prove the identity of the bomb builder, "Factual innocence, not mere legal insufficiency" and would show by clear and convincing evidence that a fully informed, reasonable jury would have a reasonable doubt concerning Trenkler's guilt and therefore found him not guilty. See Goldman v. Winn, 505 F.Supp. 200 (D.C. Mass. 2008).

This case was entirely circumstantial with absolutely no physical evidence tying Trenkler to this bombing. Absent what this Court previously ruled was improperly admitted EXIS computer evidence, the government's case against Trenkler consisted of a "smorgasbord of nonconclusive circumstantial evidence" See First Circuit dissenting opinion of Juan Torruella, United States v. Trenkler, 61 F.3d 45 (1st Cir. 1995).

As for that "overwhelming William David Lindholm evidence", not even this Court was aware at Trenkler's 1995 oral arguments that while the government was touting its Lindholm evidence, the government did not bother telling this Court that Lindholm had already been freed prior to oral arguments, which the jurors that have written now say convinces them that Lindholm is really that snake in the grass we all have heard about.

A juror would be looking for concrete physical evidence to

base its findings, and the evidence Trenkler has discovered that had been withheld from his trial counsel would be that evidence.

B. SUPPORTING FACTS

If the jurors were aware that the bomb had to be armed after Shay Sr said he hid it under a car in his back yard in order for the Bomb's servo motor to have caused the bomb to explode, only Shay Sr could have armed the bomb. The government actually said that the "explosion could have occurred with dead batteries", D.App. 35, an impossible occurrence. Bomb squad Officer Francis Foley had testified that he saw the FUTABA servo motor move, "I saw the [servo] arm moving...there was a detonation" D.App.86. If the bomb's batteries were dead, the servo motor could not have moved. If only Shay Sr could have armed the bomb for it to explode then Trenkler and Shay Jr could not have armed the bomb.

The fingerprint on the black plastic tape wrapped around the dynamite sealed within the box that contained the bomb could positively solve the case "since the bomb maker had to have handled the tape during construction of the bomb". If this fingerprint did not belong to Trenkler nor Shay Jr and belonged to the actual bomb maker then Trenkler and Shay Jr would be innocent of building the bomb.

If the fingerprints from the undercarriage of the Shay Sr vehicle where the bomb is alleged to have been placed did not match Trenkler nor Shay, which was recently confirmed, then someone else was in contact with the Shay Sr undercarriage. If the fingerprint "lifts" had actually been compared to a database of fingerprints, a match would be powerful evidence of a party other than Trenkler or Shay Jr contacting the undercarriage of

of the Shay Sr automobile. On the other hand, it is an indication that the bomb was never on Shay Sr's car.

If Shay Sr could drive over large speed bumps at the Chelsea Naval Hospital without the bomb making contact, how then could the bomb dislodge on Shay Sr's mildly sloped driveway? If a newly discovered reenactment of Shay Sr's drive with a replica of the bomb attached under the seat of of the Shay Sr car did not dislodge on the entire trip and, despite multiple attempts, could not be made to dislodge under the same condition as stated by Shay Sr, D.App BP 15, then Shay Sr's story does not hold up, Neither Trenkler nor Shay Jr could have put the bomb under the Shay Sr car, thus be factually innocent of attaching the bomb to the Sr vehicle. The reenactment is very strong evidence that the bomb was never on the Shay Sr vehicle.

If the toggle switch inside the bomb was not purchased by Shay Jr at Trenkler's direction then there would be absolutely no physical evidence of an overt act by either codefendant. Nothing Shay Jr is said to have purchased could be found to be a part of the Roslindale bomb. Trenkler would be factually innocent of sending Shay Jr into a Radio Shack to purchase a toggle switch built into the 91 bomb. Without this switch there is not a stitch of physical evidence that ties Trenkler nor Shay Jr to the purchase or provision of the magnets, FUTABA remote control or explosives. There is no physical evidence that can be pointed to that connects Trenkler nor Shay Jr to the construction of the wooden box to contain the bomb. If neither codefendant could be factually proven to have committed any overt act, there could be no conspiracy. No switch, no overt act, no conspiracy.

As for the jurors, as an indication of how reasonable, properly instructed jurors would react to the new evidence Trenkler has discovered, not including the recently received Boston Police archive evidence, what not a better gauge than five jurors that sat on Trenkler's jury panel that were so impressed with this new evidence that they took the extraordinary step of writing directly to Trenkler's trial judge. D.App. 27-32.

One of the jurors was concerned with the lack of fingerprints or their identity, three jurors referenced how the bomb toggle switch now found not to match the Radio Shack toggle switch was very important, and how the 86 prank device and the 91 bomb signature issue is in doubt, junk science said one juror. Another juror questioned the bomb box inquiring if it had marks consistent with scraping the driveway and how Shay Sr could drive around town without the bomb falling off his car.

If these jurors, never mind the entire jury, were aware of all the evidence that has been recently discovered had been withheld from Trenkler, to include the new fingerprint evidence from the Shay Sr car with negative match to Trenkler nor Shay Jr, and the report and videotape of the Shay Sr reenactment without the bomb falling off his car, there would be more than a reasonable doubt concerning Trenkler's guilt and they would find Trenkler not guilty.

In fact, jury foreperson Sheridan Kassirer wrote, "After studying many of the details recently revealed in the Alfred Trenkler case I am convinced he is innocent", and juror Marie O'Hare wrote, "If I were a juror today and I had to sit on a jury for this trial and all was told I have read, there would not

have been a guilty verdict from me. Today I believe that Alfred Trenkler is in jail and he is a [sic] innocent man."

These jurors should remove all the guess work as to what a jury might have done, why go anywhere else, here are the actual jurors telling the court what they would have done with the evidence Trenkler has discovered. Again, these jurors are not aware of the additional evidence discovered at the Boston Police archives.

It leads to an absurd result if the court will use the jury to convict but disregard the same jurors when they say evidence withheld shows Trenkler's innocence.

If the all the jurors were aware that there was a fingerprint between layers of tape sealed within the bomb that could only have been left by the bomb maker and that print did not belong to Trenkler, that would cast more than a reasonable doubt that Trenkler constructed the bomb. If jurors were aware that of the 24 fingerprints recovered from the undercarriage of the Shay Sr car, none of those prints belonged to Trenkler nor Shay Jr, that would cast a reasonable doubt that Trenkler nor Shay Jr attached the bomb to the Shay Sr car. If the jurors were aware that the reconstructed bomb could not be made to dislodge from Shay Sr's car for Shay Sr to "find" the bomb, there would be more than a reasonable doubt that Trenkler nor Shay Jr could have attached the bomb to the undercarriage of the Shay Sr car. If the jurors were aware that the bomb's servo motor could not have caused the bomb to explode unless armed after the time Shay Sr said he "found" the bomb, there would be more than a reasonable doubt that Trenkler nor Shay Jr could have armed the bomb.

CONCLUSION

For the foregoing reasons, this Court should remand this case to the district court to vacate and set the judgement aside and discharge Trenkler or resentence him or grant him a new trial or correct the sentence as may appear appropriate or to construct a remedy tailored to the constitutional violations of Trenkler's due process rights that as much as possible restores Trenkler to the circumstances that would have existed had there been no constitutional error.

However, due to the fact that Trenkler did not receive the newly discovered evidence from the Boston Police archives until after filing his notice of appeal, the district court never had the benefit of ruling on this new evidence. Should this Court remand this case back to the district court on the matter of the newly discovered evidence in order to reach a finding on the merits?

Respectfully submitted,

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September 11, 2009

CERTIFICATE OF SERVICE

I, Alfred W. Trenkler, hereby certify that I have served the foregoing upon the government by mailing a copy thereof by U.S. mail, postage prepaid to: United States Attorney's Office, One Courthouse way, Suite #9200, Boston, Massachusetts 02210 on September 11, 2009.

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September 11, 2009

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ALFRED W. TRENKLER,
Petitioner - Appellant

v.

UNITED STATES OF AMERICA,
Respondent - Appellee

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Appeal No. 09-1559

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ON APPEAL FROM AN ORDER OF
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FOR THE DISTRICT OF MASSACHUSETTS

APPENDIX

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September, 2009

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