NO. 09-1559

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ALFRED W. TRENKLER,
PETITIONER-APPELLANT

V.

UNITED STATES,
RESPONDENT-APPELLEE

ON APPEAL FROM A JUDGMENT IN A CRIMINAL CASE,
ENTERED IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES

STATEMENT OF JURISDICTION

The petitioner, Alfred Trenkler, appeals from an order denying a motion under 28 U.S.C. §2255 to vacate, set aside, or correct a sentence of a person in federal custody. The district court, which had jurisdiction under 28 U.S.C. §2255, issued its order denying the motion on March 19, 2009, and the order was entered on the docket the same day. [D.24].[1] Trenkler filed a timely notice of appeal on April 17, 2009. [D.25]. This Court has jurisdiction under 28 U.S.C. §2253(a) and 28 U.S.C. §1291.

STATEMENT OF ISSUES

1. The district court properly found that Trenkler's approved claims were time-barred or did not state violations cognizable under §2255. Trenkler's unapproved claims should not have been reached, or, alternatively, were properly denied.

2. To the extent the district court was required to consider Trenkler's claim of actual innocence, that claim was properly denied.

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[1]The citation "[D._]" refers to a docket entry in the civil docket for the §2255 proceeding. Other citations are as follows. The defendant's brief and addendum are cited, respectively, as "[Br._]" and "[D.Add._]." The defendant's appendix is cited as "[D.App._]." The government's supplemental appendix is cited as "[G.App._]."

STATEMENT OF THE CASE

On July 20, 2007, Trenkler filed an application in this Court seeking authorization to file a second or successive motion under 28 U.S.C. §2255. On September 6, 2007, this Court granted authorization. [D.Add.5-6]. On October 18, 2007, Trenkler filed a motion to vacate, set aside, or correct his sentence in the district court, which was amended on November 8, 2007. [D.3, 5].[2] The government filed a response and Trenkler thereafter file several additional documents, some raising additional claims. [D.8, 10, 10-11, 15-21].

On March 16, 2009, the district court (Zobel, J.) issued a memorandum and order denying Trenkler's motion. [D.24]. Trenkler filed a notice of appeal and, later, a request for a certificate of appealability. [D.25, 28]. On July 15, 2009, the district court granted a certificate of appealability "as to all issues raised." [D.7/15/2009].

[2]In its brief, the government cites to the amended motion.

STATEMENT OF FACTS

A. The Government's case against Trenkler.

In October 1991, a bomb exploded at the Roslindale residence of Thomas L. Shay ("Shay Sr.)." *United States v. Trenkler ("Trenkler I")*, 61 F.3d 45, 47 (1st Cir. 1995).[3] The bomb had been found in the driveway of the residence by Shay Sr. the day before the explosion and had apparently been attached to the bottom of the car by magnets sometime before that, becoming dislodged when Shay Sr. drove the car down the driveway. *Id.* at 47, 49. At the time the bomb exploded, it was being examined by two police officers who had been sent to investigate the device – one officer, Jeremiah Hurley, was killed in the explosion and a second, Francis Foley, was seriously injured. *Id.* at 47. The bomb was later determined to have been intended to be radio controlled, containing a receiver that, when activated, would cause a servo motor to move a toggle switch that fired the bomb. *Id.* at 49, 54 & n.15; [G.App.19-20]. An investigation into the bombing eventually identified Trenkler and Shay Sr.'s son, Thomas A. Shay ("Shay Jr."), as responsible for the bombing. 61 F.3d at 48.

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[3]The history of this case and nature of the evidence introduced at trial has been recounted in other opinions, *see Trenkler v. United States ("Trenkler V")*, 536 F.3d 86, 89 (1st Cir. 2008), *cert. denied*, 128 S.Ct. 1363 (2009)(summarizing history and citing prior appeals), and the government relies on this Court's prior recitations of the facts of the case, supplemented where appropriate by citations to the trial record, in setting out the relevant background.

The two were indicted together but their trials were later severed and Trenkler was tried second. *Id.*

The government's theory at Trenkler's trial was that Trenkler constructed the bomb for Shay Jr. to use against his father. *Id.* In support of this theory, the government introduced, among other things, undisputed evidence that, in 1986, Trenkler had constructed a radio-controlled bomb for a friend, Donna Shea, as a means to intimidate individuals with whom she was involved in a business dispute. *Id.* This bomb, referred to as the "Quincy bomb," bore a number of similarities to the Roslindale bomb – in addition to also being made to operate by radio control, the bomb was designed to be attached to the bottom of a vehicle by magnets and included similar components, including a toggle switch and slide switch – although it was substantially less powerful. *Compare id.* at 48, *id.* at 49. There was also evidence that Trenkler had bought parts for the Quincy bomb at a Radio Shack store and once asked a nephew to buy parts on his behalf. *Id.* at 49. The government claimed that this had also occurred with the Roslindale bomb, introducing evidence, including a confession by Shay Jr. and a Radio Shack receipt[4] from a store near where Trenkler

[4]Trenkler contends in a footnote that this receipt was subsequently shown to be "bogus" and attaches a 1999 affidavit from a representative of Tandy Corporation, which operates Radio Shack stores. [Br.32 n.9; D.App.113]. It does not appear this affidavit was presented below and therefore it is not part of the record. In any event, the document does not state that the receipt was fraudulent, it merely states that the

was then working, which showed the purchase of a toggle switch that the government claimed was used in the bomb, and testimony that Trenkler had been seen in the store during the fall of 1991. *Id.* at 48-49. The government introduced expert testimony based, in part, on a computer database search suggesting that the shared characteristics of the bombs suggested a common builder. *Id.* at 50.

The government also introduced other evidence identifying Trenkler as the one who had constructed the bomb. David Lindholm, who shared a cell with Trenkler for several days in 1992, testified that Trenkler had admitted during their conversations that he built the bomb, although he claimed he had not placed it on the car. *Id.* at 50-51. Two agents who interviewed Trenkler after the bombing testified that Trenkler had admitted during the interview that he built the 1986 bomb and drew a diagram of it. *Id.* at 51. When asked how the diagram would differ if the bomb had used the type of explosive used in the Roslindale bomb, Trenkler modified the diagram to include two electrical blasting caps, a feature of the bomb that had not been released to the public. *Id.* One agent additionally testified to a statement by Trenkler during

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corporate offices, in 1999, had no record of the information. Moreover, the inference Trenkler attempts to draw from the affidavit is contradicted by the fact, acknowledged by Trenkler in the district court, that records from Tandy Corporation prior to trial verified that this store sold the toggle switch tied to the bomb on the date alleged by the government – indeed, this was what initially led investigators to the store. [D.5, App.6].

an interview in which Trenkler had said "If we did it, then only we know about it. How will you ever find out . . if neither one of us talk[]?" *Id.* (ellipsis and brackets in original). Other evidence introduced at trial established Trenkler's familiarity with electronics and explosives. *Id.* at 60.

To establish Trenkler's motive, the government introduced evidence from which the jury could have found that Trenkler and Shay Jr. knew each other and possibly had an intimate relationship and that Trenkler had in the past given gifts and provided support to men with whom he was close. [G.App. 45-49, 53-55]. The government also introduced evidence that Shay Jr. harbored negative feelings towards his father based on past abuse of Shay Jr. and his mother, that Shay Jr. had stated that he wanted to "get even" with his father, and that Shay Jr. may have hoped to benefit from a lawsuit in which Shay Sr. was then involved. *Id.* at 49; [G.App.29-35, 38-40, 43-44].

Trenkler's principal witness at trial was Denny Kline, a former special agent in the Federal Bureau of Investigation ("FBI") with extensive experience in the investigation of bombings. [G.App.61-63]. Kline disputed the government's claim that the 1986 and 1991 bombs possessed sufficiently distinctive similarities to suggest a common builder and identified differences in the way the bombs were made and operated. *Trenkler I*, 61 F.3d at 49, 54 n.15. Kline also discussed a test he had

performed to determine how long the batteries in the 1991 bomb would have remained capable of triggering the device after it was turned on. [G.App.64-66]. Kline made a mock-up of the bomb's firing mechanism using the parts it was believed to have contained, turned it on, then tested it every two hours or so to determine at what point it would no longer work. [G.App.65-66]. Kline performed this test twice and found that the batteries would have lasted about 22 hours. [G.App.66]. Kline also noted that no physical evidence recovered from any location linked to Trenkler had been connected to the bomb. [G.App.67].

In his closing, Trenkler emphasized the lack of physical evidence and challenged the government's claim that the 1986 and 1991 bombs were similar. [G.App.77-78, 83-90]. Trenkler also questioned the credibility of the government's witnesses, including Lindholm, and the plausibility of the government's time line, which suggested that the bomb was placed on the car approximately 40 hours before it exploded. [G.App.79-82, 90-91]. The jury rejected these arguments and convicted Trenkler. *Trenkler I,* 61 F.3d at 51.

B. Post-trial proceedings.

Trenkler appealed, arguing that evidence of the 1986 Quincy bombing, the results of the database search, and Shay Jr.'s out-of-court statements were erroneously admitted. *Id.* at 51-52. This Court held that the district court properly admitted the

evidence of the 1986 bomb under Fed. R. Evid. 404(b) and that Shay Jr.'s out-of-court statements did not violate his rights under the Confrontation Clause. *Id.* at 55-56, 61-62. This Court agreed with Trenkler that the database evidence should not have been admitted, because the database consisted of hearsay reports of bombings that did not fit with a hearsay exception and for which the government failed to establish "circumstantial guarantees of trustworthiness" allowing their admission under the residual hearsay exception. *Id.* at 57-59. This Court concluded, however, that this error was harmless beyond a reasonable doubt, because the other evidence introduced by the government "convince[d] [the Court] that no rational jury could have entertained a reasonable doubt of Trenkler's guilt even in the absence of the [database]-derived evidence." *Id.* at 61.

Following his direct appeal, Trenkler sought unsuccessfully to challenge his conviction and sentence in several further proceedings. In 1995, Trenkler filed a motion for a new trial in the district court in which he alleged that: (1) a reduction in Lindholm's sentence that occurred after Trenkler's trial indicated the existence of an undisclosed deal between Lindholm and prosecutors; and (2) certain medical testimony by a Dr. Robert Phillips bearing on Shay Jr.'s credibility, which this Court had held should have been admitted at Shay's trial, *see United States v. Shay*, 57 F.3d 126, 133-34 (1st Cir. 1995), had been "unavailable" to Trenkler at the time of his trial

and justified retrial. *United States v. Trenkler ("Trenkler II")*, 1998 WL 10265, *1-2 (1st Cir. Jan. 6, 2008)(unpublished). Before the court acted on this motion, Trenkler filed a second motion alleging juror misconduct. *Id.* at *2. Both motions were denied and this Court affirmed in an unpublished decision. *Id.* at *2-4. With respect Lindholm, this Court stated that "[t]he district court rightly observed that nothing in the record indicates that Lindholm perjured himself or that his early release from prison was the result of a deal made prior to the trial that the government failed to disclose" and that the fact that Lindholm later obtained a reduction did not justify a new trial. *Id.* at *3.

Trenkler later filed a motion pursuant to 28 U.S.C. §2255 in which he argued that his attorneys' failure to seek to introduce Dr. Phillips' testimony constituted ineffective assistance of counsel. *Trenkler v. United States ("Trenkler III")*, 268 F.3d 16, 19 (1st Cir. 2001). The district court dismissed the motion as time-barred by the one-year statute of limitations for §2255 claims and this Court affirmed. *Id.* at 27. Still later, in 2002, Trenkler filed a petition under 28 U.S.C. §2241, arguing that the Supreme Court's decision in *Jones v. United States*, 529 U.S. 848 (2000), had "decriminalized the conduct for which he was convicted and sentenced." *Trenkler v. Pugh*, 83 Fed.Appx. 468, 469 (3rd Cir. Dec. 18, 2003)(unpublished). This claim was rejected by the district court and the Third Circuit affirmed. *Id.* at 472.

Most recently, in 2006, Trenkler brought a claim styled as a petition for a writ of *coram nobis* in the district court seeking to have his life sentence overturned due to an alleged violation of statutory procedures for imposing such a sentence. *Trenkler V*, 536 F.3d at 90. The district court granted Trenkler's petition, but this Court reversed, finding that Trenkler's claim was a prohibited second or successive §2255 motion. *Id.* at 90-91, 98.

C. Trenkler's §2255 motion alleging newly discovered evidence.

1. Trenkler's request for permission to file.

On July 20, 2007, Trenkler filed a request in this Court for permission to file a second or successive §2255 motion based on alleged newly discovered evidence. Trenkler identified five claims in support of his request:[5]

- Defense expert Kline had "revealed on July 2007" that he saw an unidentified fingerprint on electrical tape from the bomb when he observed the government's evidence before trial. This observation was brought to the attention of ATF agents and Trenkler's defense counsel, but not Trenkler. Trenkler claimed that this fingerprint would show that he had not constructed the bomb.

- The government had failed to reveal to Trenkler the fingerprint noted above as well as the results of tests performed on fingerprints obtained from the undercarriage of Shay Sr.'s car.

- Prompted by documents he found in boxes of legal materials

[5]To avoid confusion, the government presents Trenkler's claims in the order presented to and addressed by the district court.

received from his attorneys, Trenkler had reviewed photographs of the switch contacts found at the scene (apparently taken by the Bureau of Alcohol, Tobacco, and Firearms ("ATF")) and claimed that they did not match the contacts present on the type of Radio Shack switch Shay Jr. had bought but matched a different model of switch. This claim was supported by a page of photographs including one showing a twisted set of contacts (apparently those from the bomb) and others showing sets of switch contacts allegedly taken from the Radio Shack switch model Shay Jr. had purchased and from a second type of switch. In a separate filing, Trenkler provided a portion of a letter from his attorney to the attorney for Shay Jr., dated March 17, 1993, and a page from a report by Kline, both stating that Kline did not believe the bomb contacts matched the Radio Shack switch.

- Trenkler claimed to have obtained information from a representative of Futaba, the manufacturer of the remote control receiver in the bomb, from which Trenkler had calculated that the batteries in the bomb would have been capable of causing it to fire for only two hours after it was turned on, which was inconsistent with the government's theory that the bomb was placed on the car up to 40 hours before it exploded.

- On July 18, 2006, Shay Jr. had participated in an interview during which he stated that Trenkler was innocent. This claim was supported by a transcript, attached to a separate filing, memorializing an interview during which Shay Jr. stated that Trenkler was innocent and that Shay Sr. and others built the bomb. According to Trenkler, Shay Jr. was willing to provide a sworn statement, but no such statement was included.

In a judgment entered on September 6, 2007, this Court granted Trenkler's request. [D.Add.5-6]. The Court stated that, under applicable law, it was required to "determine whether Trenkler has made a *prima facie* showing of newly discovered

evidence that would show by clear and convincing evidence that a reasonable fact finder aware of such evidence would not have convicted him." [D.Add.5]. This Court noted that Trenkler "alleged under oath new forensic evidence that, if established, could well be substantial," but that Trenkler's reliance on "exculpatory statements by a co-defendant are less impressive." [*Id.*]. The Court went on to say that it was "less clear" that the evidence identified by Trenkler was in fact newly-discovered or that Trenkler could show that "its earlier unavailability reflects any constitutional violation." [*Id.*]. This Court noted that the test for certification is to be applied swiftly "and often will have to be done, as here, on a highly incomplete record," and stated that "we have determined to grant the certification, but without prejudice to summary resolution by the district court if further information required from Trenkler or tendered by the government so warrants." [D.Add.5-6].

2. Trenkler's §2255 motion in the district court.

On November 8, 2007, Trenkler filed a §2255 motion in the district court. [D.5]. The motion identified the five grounds presented to this Court with some further elaboration and/or support, including the following:

- Trenkler submitted an affidavit from an advocate for his release, Morrison Bonpasse, in which Bonpasse claimed he was told by Kline on July 29, 2007, that Kline had seen "traces of a fingerprint" between layers of electrical tape from the bomb during a view of the evidence in March 1993 at which

prosecutors, defense lawyers, and ATF agents were present. [D.5, App.1]. Kline allegedly told the ATF agents "and possibly some others" and claimed that he never saw the same layers of tape again. [*Id.*].

- Trenkler submitted a copy of a Boston Police Department ("BPD") document stating, *inter alia*, that five fingerprints had been lifted from the undercarriage of Shay Sr.'s car and a copy of a page from a defense motion requesting production of exculpatory evidence. [D.5, App.3-4].

- Trenkler submitted photographs, diagrams and other information allegedly supporting his contention that the switch contacts from the bomb did not match the Radio Shack switch. [D.5, App.15-23]. Trenkler also alleged that he had information (from an unidentified individual) regarding a conversation between "government officials" outside the courtroom in which these individuals stated that the contacts from the scene did not match the Radio Shack switch. [*Id.*, pp.3-5].

- Trenkler submitted a letter from a Futaba representative containing information about certain parts associated with the bomb, along with handwritten notes of calculations by Trenkler allegedly demonstrating that the receiver would have operated for about 10 hours after it was turned on. [D.5, App.28-33].

- Trenkler submitted additional letters and other information reporting claims by Shay Jr. that neither he nor Trenkler were involved in the bombing and that others – in particular Shay Sr. – were responsible. [D.5, App. pp.52-56, 60-69]. Trenkler also added documents that, he claimed, showed that Shay Sr.'s account of events on the day of the bombing was inconsistent with other evidence. [D.5, App. pp.45-51].

In addition, Trenkler included a sixth claim in his motion, alleging that Michael Cody, a government witness at trial, had told Trenkler's step-father and step-brother

in 2001 that his testimony at trial was false in certain respects. [D.5, pp.11-12]. Specifically, Trenkler alleged that Cody admitted to lying when he said that he had seen round magnets and a radio-controlled car in Trenkler's car and that Trenkler had caused a loud explosion during an outing with friends. [*Id.*].[6] This assertion was supported by affidavits from Trenkler's step-father and step-brother, but not from Cody, who Trenkler stated would not tell the truth unless granted immunity from prosecution for perjury. [*Id.*; *see also id.*, App.70-71].

On December 14, 2007, the government filed an opposition. The government argued that Trenkler's claims were not cognizable under §2255 because they did not identify constitutional violations and that they were time-barred because Trenkler possessed or reasonably could have possessed the "new evidence" more than a year prior to filing his §2255 motion. [D.8, 21-35]. The government also noted in its opposition that the physical evidence in the case had been destroyed in December 2005 and February 2006. [*Id.* at 20-21].

On January 10, 2008, Trenkler filed a "rebuttal" in which he asserted that

[6]At trial, Cody testified that he had been a friend or companion of Trenkler's between 1980 and 1983, and that Trenkler was "very much interested in remote control and electronics." [G.App.52, 56]. Cody also testified that Trenkler had a small remote controlled Jeep in his car; that at some time during their relationship, Cody had seen a number of small magnets "with a hole in the middle" in Trenkler's car and that, on another occasion, Trenkler had set off a loud explosion at a "remote area" where Trenkler, Cody, and others were having a bonfire. [G.App.57-58].

certain of the evidence – in particular, the fingerprint on the electrical tape, the results of fingerprint tests performed on prints taken from Shay Sr.'s car, and the photograph of the toggle switch contacts – constituted exculpatory evidence that had been improperly withheld in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). [D.10, pp.3-12]. Trenkler also implied that the government violated *Brady* by making it difficult for his expert to obtain repeat access to the switch contacts and to the electrical tape containing the print. [*Id.* at 6-8, 10-11].

Trenkler further argued that the factual predicate for his claims was "newly discovered" and that he had used due diligence in pursuing his claims, contending that any delay was justified by the fact that he was a prisoner and that the information that led to the discoveries was found in 40 boxes of legal materials that "had been in the hands of appellate and post conviction attorneys until 2005." [*Id.* at 22]. Trenkler argued that he should not be held responsible for information his counsel or expert possessed, but never told him about. [*Id.* at 23].[7]

[7]Trenkler also asserted below, but does not press on appeal, that his motion was timely under §2255(2), because the government prevented Trenkler from filing his petition by withholding the facts underlying the claims during discovery. [*Id.*].

3. Trenkler's supplemental filings.

Trenkler subsequently filed documents in the district court raising additional arguments. In an "addendum" dated July 21, 2008, Trenkler argued that the destruction of evidence was improper, because, by the time the destruction of evidence took place, he had filed a letter attacking his sentence in the district court. [D.14, pp.4-5]. Trenkler also stated that he had recently discovered that the government had assisted John Shea, the husband of Donna Shea, in obtaining a reduced sentence sometime after the Trenkler trial due to Donna Shea's assistance during the Trenkler prosecution. [D.14, p.6]. Trenkler claimed that this showed that the government had lied when, in December 23, 1992, it represented that it had told Donna Shea that it was "unlikely that her husband would derive any benefit from her testifying before the grand jury" and had generally failed to reveal inducements it had offered. [D.14, pp.7-8 & Exh.J]. Trenkler included as an attachment to the "addendum" a letter from the foreperson of the jury at his trial stating that, in light of questions that had been raised regarding some of the evidence, she would not have voted to convict Trenkler. [D.14, Exh.K].

In a letter dated August 11, 2008, Trenkler submitted a copy of a letter that had been previously sent to the district court by Bonpasse. [D.17]. The letter reiterated some of the same arguments previously made by Trenkler, but also presented

arguments not appearing in the motion or addendum, including an argument that the circumstances surrounding Lindholm's early release following Trenkler's trial constituted a fraud on the district court and this Court. [D.17, pp.5-6]. Specifically, Bonpasse stated that Lindholm committed a fraud on the district court by seeking a sentence reduction based on his assistance in the Trenkler case after testifying at trial that he would not do so; and that the government committed a fraud on this Court by allegedly not disclosing at the time of oral argument on Trenkler's direct appeal that Lindholm had obtained a sentence reduction. [*Id.*].

In October 2008, a second juror submitted a letter stating that, based on Trenkler's claims regarding the evidence, she would not have voted to convict him. [D.18]. Later the same month, Trenkler filed a second "addendum" in which he argued, *inter alia*, that this letter supported his claim that "no reasonable fact finder" would have found him guilty had it been aware of the evidentiary shortcomings identified in his various filings. [D.18, p.1].[8]

On December 1, 2008, Trenkler filed a third "addendum." [D.21]. Trenkler stated that he had recently discovered that there had been "large speed bumps" at the Chelsea Naval Hospital in 1991, which had been removed in the "late 1990s or early

[8]Trenkler also argued that the letter supported his conclusion that the jury would not have recommended a life sentence for him [D.18, pp.3-6] – an argument directed at his sentencing claim, which was then on appeal.

2000's." [D.21, pp.1, 3]. Trenkler argued that the existence of the speed bumps cast doubt on the truthfulness of Shay Sr.'s testimony regarding his activities on the morning the bomb was discovered – which included a trip to the Naval Hospital[9] – and the plausibility of the government's time line, which proposed that the bomb was placed on the car a day or more prior to when it was discovered. [D.21, pp.1-5]. Trenkler further argued that, if the jury had this information, it would not have convicted him. [D.21, pp.4-5]. Trenkler included as an attachment a letter from a third juror stating that the juror would not have convicted him had he been aware of certain of Trenkler's claims about the government's evidence. [D.21, Ex.7].

D. The district court's decision.

On March 16, 2009, the district court issued a memorandum and order denying Trenkler's motion. The court bypassed the question whether Trenkler could present claims that had not appeared in his initial request in this Court, choosing to "[a]ssum[e], without deciding, that Trenkler may add grounds discovered after his application was certified." [D.App.20 (emphasis in original)]. The court nonetheless found that none of Trenkler's claims required review on the merits, either because the

[9]Shay Sr. testified that, on the morning of October 27, 1991, he had taken a drive in his car during which, among other things, he had gone to the Chelsea Naval Hospital to visit his uncle. [G.App.23-24]. Shay Sr. also testified that he did not recall "driving over any heavy bumps or railroad tracks" or "hitting any speed bumps at high speeds that morning." [G.App.24-25].

factual predicate for the claim was or could have been discovered more than one year prior to Trenkler's motion – and thus the claim was time-barred – or because the claim did not allege a constitutional violation.[10] Specifically, the court found:

- Trenkler's claim regarding an undisclosed fingerprint between pieces of electrical tape was untimely, because the existence of the fingerprint was known to Trenkler's defense team, and thus imputedly to Trenkler, prior to trial. [D.App.15].

- Trenkler's claim regarding an undisclosed fingerprint analysis of prints found on Shay Sr.'s car was untimely, because Trenkler knew of the existence of the prints at the time of trial and could have obtained the results of the analysis earlier. [D.App.15-16].

- Trenkler's claim that the switch contact remains did not match the Radio Shack switch was not "new" because, as Trenkler's documents showed, Trenkler's counsel knew of the expert's doubts about the match before trial. [D.App.16]. That Trenkler did not personally know of his expert's views "does not reset the limitations period." [*Id.*].

- Trenkler's claim regarding the operating time of the Futaba receiver could have been raised earlier, given that Trenkler's expert "presented a version of this theory at trial" and the so-called "newly discovered evidence" consisted of information about the bomb components that "was discoverable through due diligence at the time of trial." [D.App.17]. The court further

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[10]In evaluating the timeliness of the claims, the court considered each claim individually, an approach adopted by the Third and Sixth Circuits for habeas petitions, but not by the Eleventh Circuit. [D.App.13 (citing with approval *Fielder v. Varner*, 379 F.3d 113, 118 (3rd Cir. 2004)(Alito, J.)(adopting claim-by-claim approach) and *Bachman v. Bagley*, 487 F.3d 979, 984 (6th Cir. 2007)(same), and rejecting *Walker v. Crosby*, 341 F.3d 1240, 1246 (11th Cir. 2003)(holding that one timely claim could save other, untimely claims in the same application)].

found that Trenkler's calculations were incorrect and that, properly analyzed, Trenkler's own figures suggested an operating time of about 30 hours. [D.App.17-19].

- Shay Jr.'s public claims that Trenkler was not responsible for the bombing, while "arguably new," did not allege a constitutional violation and thus were not a valid basis for overturning Trenkler's conviction. [D.App.19].

- Trenkler's claim that government witness Michael Cody had admitted to Trenkler's step-father and half-brother in 2001 that he had lied at trial was time-barred. [D.App.19-20].

- Trenkler's claims that witnesses Donna Shea and William Lindholm had received sentence reductions after Trenkler's trial did not establish violations because: (1) the fact that either one ultimately received sentencing benefits "was not inconsistent with the information given Trenkler" prior to trial, since the evidence did not show that there was an agreement to provide those benefits at the time of trial;[11] and (2) Trenkler could have discovered the basis for these claims "through due diligence many years ago." [D.App.21-22].

- Trenkler's claim that the government failed to disclose the existence of speed bumps was time-barred, given that Trenkler could have discovered the existence of the speed bumps on his own at trial or any time thereafter prior to the time they were removed. [D.App.22].

Separately, the district court analyzed whether Trenkler had made a showing of "actual innocence" that could excuse his failure to meet §2255's statute of

[11]The district court noted in this context that this Court had already heard and rejected the claim that Lindholm's receipt of a sentence reduction stated a cognizable violation. [D.App.21-22 n.14 (quoting *Trenkler II*, 1998 WL 10265, at *4).

limitations. [D.App.23-26]. The court concluded that Trenkler had not made such a showing. The bulk of Trenkler's claims did not suggest that he was "factually innocent" of the bombing, but merely undercut certain aspects of the government's evidence. [D.App.24 ("Even if Trenkler proved that the switch used to construct the bomb was not from Radio Shack, it would not foreclose the jury from concluding that Trenkler built the bomb. Similarly, even if the evidence of speed bumps had been presented, the jury could still have concluded that the bomb had been placed under Shay Sr.'s car before he drove to the Hospital, but that it was not dislodged during the drive.")]. While Shay Jr.'s statements exonerating Trenkler did allege innocence, these statements were "hampered not only by the general skepticism accorded recanted testimony, but by the unreliability of [Shay Jr.]," who Trenkler had argued in his first 2255 motion "suffered from a mental disorder that caused him to tell self-aggrandizing lies" and thus was an "unreliable" witness. [D.App.25 (quoting *Trenkler II*, 268 F.3d at 18)].

Finally, the district court noted that this Court, in Trenkler's direct appeal, had found the evidence in Trenkler's case sufficiently powerful that the erroneous admission of database evidence was harmless beyond a reasonable doubt, *Trenkler I*, 61 F.3d at 61 – and Trenkler's claims did little to cast doubt on the bulk of the evidence relied on by this Court in reaching that conclusion. [D.App.26]. Given this,

Trenkler could not show that "no reasonable juror would have convicted him in the light of the new evidence." [*Id.*].

On April 17, 2009, Trenkler filed a notice of appeal from the district court's decision. [D.25]. On July 9, 2009, Trenkler filed a motion for certificate of appealability on all claims raised in his §2255 motion and various addendums [D.28] and, on July 15, 2009, the district court entered an endorsed order granting a certificate of appealability "as to all issues raised." [D.7/15/2009].

SUMMARY OF ARGUMENT

Trenkler fails to establish any error in the district court's rulings. The district court properly concluded that Trenkler's claim based on Shay Jr.'s recanted testimony did not establish a constitutional violation cognizable under §2255 and that the remaining four claims authorized by this Court were barred by §2255's one-year statute of limitations, because Trenkler was aware, through his attorneys, of the factual basis for the claims at the time of trial and could have pursued the claims years ago had he acted with reasonable diligence.

The district court should not have reached Trenkler's remaining claims, which were not approved by this Court, because §2244 only permits a district court to "consider" claims contained in an application that has received circuit court authorization. If properly reached, the district court did not err in rejecting these

claims. Indeed, with two exceptions, Trenkler does not argue otherwise. While Trenkler suggests that the government erred in destroying the evidence, he does not establish that the government acted in bad faith, as he must to establish a constitutional violation. Trenkler's claim that the government had a constitutional obligation to disclose the existence of speed bumps along the route traveled by Shay Sr. is a non-starter, as this information was equally available to both parties.

Having found that Trenkler's principal claims were time-barred, the district court did not need to consider whether Trenkler had established "actual innocence," because actual innocence does not excuse the failure to comply with §2255's one-year statute of limitations. Assuming the court properly reached the issue, it did not err in finding that Trenkler had not shown actual innocence. To the extent supportable at all, Trenkler's claims establish only that certain evidence may not have been disclosed that could have been useful at trial. Trenkler does not establish that the evidence introduced at trial was substantively false. Nor does Trenkler come close to showing that no reasonable jury could find him guilty beyond a reasonable doubt. This conclusion is not altered by Trenkler's introduction of letters from jurors, since settled law precludes the use of such evidence to attack a jury verdict.

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND THAT TRENKLER'S APPROVED CLAIMS WERE TIME-BARRED OR DID NOT STATE VIOLATIONS COGNIZABLE UNDER §2255. TRENKLER'S UNAPPROVED CLAIMS SHOULD NOT HAVE BEEN REACHED, OR, ALTERNATIVELY, WERE PROPERLY DENIED.

Trenkler fails to establish any error in the district court's rulings that his claims were either time barred or failed to state constitutional violations. The claims for which Trenkler received authorization from this Court were properly rejected for the reasons stated and for additional reasons set forth below. The district court should not have reached the remaining claims Trenkler presented, since they were not authorized by this Court; nonetheless, those claims were also properly rejected. To the extent that Trenkler relies on new evidence and/or new claims, not raised below, that material is not properly before this Court.

A. Standard of review.

On appeal from an order denying a motion under §2255, this Court reviews conclusions of law *de novo* and reviews findings of fact for clear error. *Ellis v. United States*, 313 F.3d 636, 641 (1st Cir. 2002). In *Wood v. Spencer*, in reviewing a district court's denial of a §2244 petition, this Court held that, where "the district court has denied a habeas petition on a procedural ground without taking evidence, we afford *de novo* review," and further stated that this standard "applies with full

force to the district court's due diligence holding." 487 F.3d 1, 3 (1st Cir.), *cert. denied*, 552 U.S. 912 (2007). Other courts, however, have held that a district court's assessment of due diligence is reviewed for clear error. *See Aron v. United States*, 291 F.3d 708, 710 (11th Cir. 2002)(citing and adopting the reasoning of *Montenegro v. United States*, 248 F.3d 585, 591 (7th Cir. 2001)). Regardless of the standard of review, however, Trenkler cannot prevail.

B. The district court correctly found that the claims approved by this Court were time barred or did not establish constitutional violations.

On appeal, Trenkler does not dispute that §2255 required him to file his claims within one year of "the date on which the facts supporting his claim or claims could have been discovered through the exercise of due diligence."[12] Nor does Trenkler dispute that, to constitute a basis for relief under §2255, his claims had to establish not only the existence of newly discovered evidence, but that its earlier absence was the result of a constitutional violation or another "traditional habeas ground." *See Conley v. United States*, 323 F.3d 7, 14 (1st Cir. 2003)("Merely to claim that new evidence casts doubt, even grave doubt, on the correctness of a conviction is not a

[12]Trenkler also does not dispute the district court's determination that the one-year statute of limitations should be applied on a claim-by-claim basis, consistent with *Fielder*, 379 F.3d at 118, and *Bachman,* 487 F.3d at 984. [D.App.13]. The government therefore follows the district court in addressing the timeliness of the claims individually.

ground for relief on collateral attack."); *see also Hill v. United States*, 368 U.S. 424, 426-27 (1962)(explaining that, to obtain relief under §2255, a prisoner must establish either a constitutional error or a "fundamental defect which inherently results in a complete miscarriage of justice"). While Trenkler nonetheless argues that his claims should succeed, his arguments are unavailing.

1. The alleged fingerprint on electrical tape.

The district court found that Trenkler's claim that the government withheld evidence of a fingerprint observed by Trenkler's expert on black electrical tape was time-barred, because Trenkler was chargeable with the knowledge of Kline and his defense team. [D.App.15]. On appeal, Trenkler continues to argue that he could not have discovered the fingerprint earlier and now suggests that his counsel were not informed of Kline's discovery. [Br.17, 27-28]. Trenkler's arguments are unavailing.

At the outset, the district court's assumption that these circumstances could support a finding of a *Brady* violation is incorrect. *Brady* prohibits "the suppression by the prosecution of evidence favorable to an accused" where that evidence is "material either to guilt or to punishment." *Kyles v. Whitely*, 514 U.S. 419, 432 (1995). Evidence has not been "suppressed" for *Brady* purposes, however, "if the defendant either knew, or should have known of the essential facts permitting him to take advantage of any exculpatory evidence." *Ellsworth v. Warden*, 333 F.3d 1, 6 (1st

Cir. 2003); *see also Lugo v. Munoz*, 682 F.2d 7, 10 (1st Cir. 1982)("The purpose of the *Brady* rule is not to provide a defendant with a complete disclosure of all evidence in the government's file which might conceivably assist him in preparation of his defense, but to assure that he will not be denied access to exculpatory evidence known to the government *but unknown to him*.")(emphasis added, citation omitted). Nor does *Brady* require the government to perform particular tests on evidence available to both parties in order to develop information favorable to the defense; once the evidence is disclosed, "the defendant must bear the responsibility of failing to conduct a diligent investigation." *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002)(holding that *Brady* was not violated when neither the government nor the defendant conducted tests on crime scene evidence that defendant later claimed might have exonerated him).

Trenkler's team had access to the tape and (as discussed below) was aware of the importance of determining whether it contained fingerprints. Moreover, the print was observed, and allegedly brought to the attention of the government, by Trenkler's expert. The government is not aware of any case suggesting, on similar facts, that the government had a constitutional obligation to report this information to Trenkler or defense counsel on the chance that there might be some internal failure to

communicate.[13]

In any event, the district court did not err in finding this claim to be time-barred. This Court has repeatedly held that defendants seeking a new trial under Fed. R. Crim. P. 33 on the basis of newly discovered evidence cannot prevail "when their lawyers knew at trial about the evidence that [the] defendants now claim is newly discovered." *United States v. Lenz*, 577 F.3d 377, 382 (1st Cir. 2009); *see also United States v. Desir*, 273 F.3d 39, 44 (1st Cir. 2001)("For purposes of a Rule 33 motion based on newly discovered evidence, defense counsel's knowledge of the evidence and his or her understanding of its legal significance are imputed to the defendant."). *Wood* held that this principle applies equally in determining when the one-year statute of limitations for §2255 newly discovered evidence claims begins to run. *See* 487 F.3d at 4-5.

The district court found *Wood* applicable, noting that Trenkler's initial application in this Court had stated that "neither defense counsel nor expert divulged this fingerprint evidence" to him, which suggested that the information was "only

[13]Trenkler's claim also fails to establish the *Brady* requirement of materiality, since his contention that the alleged, untested fingerprint would exculpate him is wholly speculative. *See United States v. Gary*, 341 F.3d 829 833-34 (8th Cir. 2003)(rejecting as too speculative claim that non-disclosure of fingerprint card was "material" under *Brady* on the theory that "*if* the print was usable and *if* it matched someone other than [the defendant], the fingerprint card *could* have been critical to the defense")(emphasis in original)

new to [Trenkler] personally" and was known to his defense team. [D.App.15]. Although not referenced by the court, this conclusion is consistent with the affidavit of Bonpasse, filed with Trenkler's amended §2255 application, which stated that Kline saw the tape and fingerprint during a meeting "with ATF agents, *defense lawyers* and prosecutors." [D.5, App.1 (emphasis added); *see also* D.App.87-1 (same)].

On appeal, Trenkler contends that his attorneys were not informed of Kline's alleged observation, stating that his "trial counsel has no recollection" of the trace fingerprint. [Br.17, 28]. The record, however, does not support this assertion. Trenkler did not file an affidavit from his attorney or any other evidence in the district court indicating that the attorney was not informed. The §2255 record contains only Bonpasse's affidavit, which states that defense counsel were present at the meeting where the fingerprint was observed.

Although Trenkler contends that his counsel's actions at trial suggest he was not aware of Kline's discovery [Br.28], the record supports the opposite conclusion. The examination of ATF agent Cynthia Wallace, in particular, shows that both parties were aware of the possibility that the electrical tape from the bomb could have contained recoverable fingerprints. During its direct examination, the government quoted a passage from Kline's expert report which stated that certain evidence –

including an item described as "six layers of plastic tape recovered from the [bomb]" – did not appear to have been tested for fingerprints. [G.App.4]. The government went on to elicit testimony from Wallace in which she stated that this evidence was reviewed by a fingerprint examiner, who had processed those items believed to contain usable information. [G.App.4-5]. During cross-examination and on redirect, Wallace further explained that she had pulled the multi-layered piece of tape apart; that the evidence had thereafter been reviewed for possible fingerprint analysis; and that the fact that the fingerprint examiner had not taken the evidence indicated that the evidence did not contain any prints of value. [G.App.13-14, 16-18]. While this exchange does not conclusively establish that Kline's discovery was known to defense counsel, Kline's comment in his report and the attention paid the issue on direct and cross-examination strongly suggest that the defense had been informed.

On appeal, Trenkler provides for the first time an affidavit by Kline himself. [D.App.87-1A, 87-1B]. This evidence is not properly part of the record in this case. *See Rice v. Hall*, 564 F.3d 523, 526 (1st Cir. 2009)(finding that an affidavit submitted for the first time on appeal was not part of the record and striking it). Nonetheless, this document also supports the conclusion that defense counsel was aware of Kline's discovery, stating that, when Kline did not see the tape during a second view of the

evidence, he "mentioned this to defense counsel." [D.App.87-1B].[14]

Trenkler thus has not established that the district court erred in concluding that Trenkler was on notice at the time of trial, through counsel, that the electrical tape might contain fingerprints. Yet he never sought to have the tape independently tested for fingerprints until June 2006 [D.5, App.5-6] – by which time it had already been destroyed. Trenkler's 13-year delay did not constitute due diligence and the district court properly found the claim to be time-barred.

Trenkler also argues that the government affirmatively prevented him from testing the tape by making it "unavailable" during Kline second viewing of the evidence. [Br.27-28]. Trenkler's contention that the government intentionally withheld the evidence has no record support. Even Kline's affidavit does not suggest that this occurred, stating only that the tape was not present at the second viewing and that he "did not know how the issue had been resolved." [D.App.87-1A].

Moreover, the record provides reason to doubt that the tape was in fact unavailable after the first viewing. At trial, Kline testified that he had observed the bomb evidence two times prior to trial and had "satisfied [himself] with respect to

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[14]Kline's affidavit does not state that defense counsel were present at the initial view of the evidence, but does not contradict the Bonpasse affidavit's statement that they were. Kline's affidavit states that members of the prosecution were at the meeting and that he "believe[d] others were present," but could not "recall their identities." [D.App. 87-1A].

inspecting and examining [that] evidence" – not suggesting that anything was missing. [G.App.69]. Moreover, Wallace's testimony suggests the possibility that the tape was present during the second viewing, but Kline did not recognize it because it was no longer in its original form. Although Wallace did not indicate the precise time frame, she testified that she had pulled the piece of tape apart before it was reviewed for fingerprints. [G.App.13-14]. Thus, there may no longer have been a single, six-layer piece of tape.

Finally, the record strongly suggests that the tape was present at Trenkler's trial. On the fourth day of trial, defense counsel began a discussion of the six-layered piece of electrical tape but discontinued his questioning because the exhibit containing the tape was not present. [G.App.7-10]. The next day, defense counsel indicated that the exhibit was in court, and the nature of the questions suggests that the tape was in a bag given to Wallace to look at during part of the examination. [G.App.15-16]. Had Kline or anyone else believed the tape contained a potentially exculpatory print that had not been tested, it is hard to believe that this issue would not have been raised once the tape was brought into court.[15]

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[15]While Trenkler's claim of restricted access lacks factual support, it would not excuse Trenkler's failure to meet the statute of limitations even if true. Once Trenkler was on notice of the existence of the print on the piece of tape, the lack of prompt access at the time of trial would not justify Trenkler's delay of 13 or more years in pursuing the issue.

2. Fingerprints on Shay Sr.'s car.

The district court held that Trenkler's claim that he had not been provided with the results of a BDP analysis of fingerprints taken from Shay Sr.'s car – including five from the undercarriage of the car – was time-barred because Trenkler was aware at the time of trial that the fingerprints had been found and, with due diligence, could have obtained the results of the analysis long before July 2007. [D.App.15-16; Br.17-18]. On appeal, Trenkler appends a BPD report, which he contends he obtained for the first time in July 2009 (after his case was already on appeal), containing the allegedly missing analysis. [D.App.BP-11 to BP-13]. This report states that 24 prints were found on Shay Sr.'s vehicle and were compared to the prints of a number of individuals, including Shay Sr., Shay Jr., Trenkler, and several members of the BPD. [*Id.*]. The report states that 13 fingerprints could be positively identified and all of those belonged to members of the BPD bomb squad. [D.App.BP-13].

This report was not presented below and therefore is not properly before this Court. *Rice*, 564 F.3d at 526. Even if considered, however, it does not save Trenkler's claim. First, given the report's contents, it would not constitute material, exculpatory evidence within the scope of *Brady* even assuming it was not disclosed. The report did not identify any prints as belonging to another person who could have been considered a suspect (in particular, no match was found with the prints of Shay

Sr.) and the presence of prints from members of the bomb squad was hardly surprising. *See Myatt v. United States*, 875 F.2d 12-13 (1st Cir. 1989)(concluding that FBI analysis of fingerprints and other evidence from robbery scene showing no match with defendant's accomplices was properly deemed non-material; robbery occurred in a public place and it is "not surprising however to learn that fingerprint, palm print, and hair samples retrieved from a busy public place did not match those of [the alleged accomplices]"); *Lieberman v. Washington*, 128 F.3d 1085, 1092-93 (7th Cir. 1997)(finding no *Brady* violation in failure to produce fingerprint analysis showing that fingerprints taken from places in a residence where defendant was believed to have been did not belong to defendant but to the residents or were unidentified; the presence of unidentified prints was "not unusual" because "[a]ny number of people have legitimate social or service reasons to visit a residence, and could leave unidentifiable fingerprints while doing so")(alteration in original). Moreover, of the five prints reported as "unidentified," it does not appear that any came from the undercarriage of the car.[16]

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[16]The report does not specify the locations from which each print was taken, but states that the police initially took 17 fingerprints in two groups. [*See* D.App.88]. The upper part of the vehicle was dusted for prints on November 31, 1991 and 12 prints were lifted. [*Id.*]. The next day, the car was "placed on a mechanical lift," and five prints were taken from the undercarriage. [*Id.*]. A logical inference is that the undercarriage prints were those listed on the report as prints 13 through 17, all of which were found to belong to bomb squad members or to contain insufficient detail

In any event, Trenkler advances no argument rebutting the district court's finding that this claim was untimely. Trenkler had obtained, prior to trial, a BPD report stating that fingerprints had been found and was thus on notice of the existence of some sort of analysis of the prints and of copies of the fingerprint lifts themselves. Trenkler cannot show that he acted with reasonable diligence in waiting close to 14 years before attempting to obtain this evidence.

3. Switch contacts.

The district court concluded that Trenkler's claim that the government had wrongly withheld evidence showing a mismatch between the switch contacts found at the scene and the Radio Shack switch was time-barred, because Kline had seen the contacts and identified the possibility of a mismatch prior to trial. [D.App.16; *see also* D.App.110, 112]. On appeal, Trenkler suggests that Kline's observation of the switch contact remains did not satisfy the government's disclosure obligations because Kline "was never granted access to the switch remains [after his initial observation was made] in order to verify his observation." [Br.31-32]. Trenkler contends that the limitations period for this claim thus did not begin to run until he discovered photographs of the switch contacts that, he claims, he did not receive prior to trial. [Br.19-20].

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for identification. [D.App.BP-12].

The record provides no basis for accepting Trenkler's contention that the switch contacts were, in fact, unavailable for a second look. At trial, Kline testified that he viewed the physical evidence on two occasions and never suggested that he was not able to view the switch contacts the second time. [G.App.69]. Trenkler has not provided an affidavit from Kline or anyone else to rebut the inference that Kline saw the contacts at least on two occasions. Trenkler's claim of inadequate access also cannot be squared with the fact that, after initially expressing doubts about the identification of the switch, Kline testified at trial that he "agreed with the identification the ATF made that the switch used in the '91 bomb was in fact a Radio Shack switch of the same model" identified in the receipt linked to Shay. [G.App.68]. It strains credulity that Kline would change his mind on this significant point without having an adequate opportunity to review the evidence. The logical reading of this record is that, while Kline initially believed that the switch contacts did not match, he saw the physical evidence a second time and concluded that they did.

In any event, none of the foregoing arguments provide a basis for doubting the district court's conclusion that, under the reasoning of *Wood*, Trenkler was on notice of the possible lack of a match between the switch contacts at trial and, with due diligence, could have developed the factual basis of his present claim far earlier.

Trenkler's suggestion that the government committed a separate *Brady*

violation by failing to disclose photographs of the contacts is unavailing. Even assuming that the photographs were not made available to Trenkler's team prior to trial – a doubtful assumption[17] – Trenkler does not identify any case suggesting that *Brady* requires the government to produce photographs of physical evidence already available to the defendant where those photographs do not have independent evidentiary significance. *See United States v. Sipe*, 388 F.3d 471, 491 (5th Cir. 2004)(expressing doubt that *Brady* would require government to turn over photographs of the area in which the crime occurred if they only showed the nature of the surroundings and noting that the defendant "could certainly have taken his own photographs of the scene" if he thought that would be helpful); *cf. United States v. Boyd*, 208 F.3d 638, 644 (7th Cir. 2000), *vacated in part on other grounds*, 531 U.S. 1135 (2001)(noting that government could have obligation under *Brady* to disclose

[17]Trenkler claims that the photographs were found in an envelope obtained from Shay Jr.'s attorney and – apparently – no similar envelope was found in his own attorney's materials. [D.App.111]. Even if true, this is weak evidence of non-disclosure. The government would have no reason to give photographs to one defendant and not the other and there are many reasons other than non-disclosure why Trenkler may have not found them at this late date. Moreover, it is apparent that at least one photograph of the switch contacts was introduced at trial, although it is not clear whether it was the same photograph Trenkler now relies on. [*See* G.App.3]. Moreover, a review of the government's discovery file indicates that a "complete set of photographs taken by ATF during the course of [the] investigation" was sent to Trenkler's attorney on January 25, 1993.

a *difference* between an original evidence tape and a subsequent copy).[18]

4. Operating time of Futaba receiver.

Trenkler argued below that information he obtained from Hobbico in 2007 showed that the bomb's electronics would have drawn down its batteries in only 10 hours, and thus that the government's time line for when the bomb must have been placed on Shay Sr.'s car was incorrect. [D.5, pp.6-8 & App.27-33]. The district court rejected this argument on three grounds: Kline had made a similar argument about the bomb at trial, determining that the bomb would have had a 22-hour operating time;[19] Trenkler could have obtained the information for his calculations earlier; and Trenkler had made a calculation error that led him to find an operating time of 10 hours when his numbers suggested an operating time of 30 hours. [D.App.17-19].

On appeal, Trenkler provides a revised analysis – first presented in his request

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[18]Trenkler contends on appeal that the district court should have addressed his claim that a "for now unnamed witness" overheard "high ranking state and government officials directly involved with this case" acknowledging during trial that the bomb toggle switch was not from Radio Shack. [Br.32]. A district court need not, however, consider a prisoner's claims where the supporting allegations are "vague, conclusory, or palpably incredible." *David v. United States*, 134 F.3d 470, 478 (1st Cir. 1998).

[19]At trial, the government argued that Kline's test, which required him to activate the remote control servo periodically to determine whether the battery would still work, understated the actual operating time, because every servo test drained the battery. [G.App.72].

for a certificate of appealability – that, he claims, establishes that his estimate of the operating time was correct and the district court's was not. [D.App.104-2 to 104-6]. In addition, Trenkler presses the unsupported claim that a Futaba dealer told an ATF agent during the investigation that the older model slide switch used in the bomb would have reduced its operating time, potentially to as little as two hours. [Br.20-21]. Trenkler contends that this conversation was not disclosed and that the statute of limitations on this claim therefore did not begin to run until the date (not specified in his brief) when he discovered this information. [Br.21].

Trenkler's continually evolving explanation of why the batteries would have run down renders it doubtful that his present argument was preserved (as well as providing cause for substantial skepticism as to its merits). Moreover, Trenkler has not provided anything but his bare assertion to support the claim that the ATF was told that the slide switch would reduce the operating time to two hours. This Court, however, need not reach these issues, because Trenkler fails to establish that the district court erred in concluding that this claim was time-barred. As Trenkler acknowledged below, his investigation into the operating time of the receiver (as well as his identification of the salesperson allegedly contacted by ATF) resulted from a hand-written report, apparently from ATF, that he found in the materials he obtained from his attorneys. [D.App.6-8 & App.30-31]. Trenkler thus is chargeable with

knowledge of the report as of the time of trial, *Wood*, 487 F.3d at 4-5, and the district court properly concluded that, with reasonable diligence, Trenkler or his counsel could have followed up on this issue many years ago.

5. Shay Jr.'s recantation.

The district court found that Trenkler's claim that Shay Jr. had recanted his statements inculpating Trenkler, while "arguably new," did not allege a constitutional violation and, therefore, was "not a basis for vacating a sentence under 28 U.S.C. §2255." [D.App.19]. On appeal, Trenkler makes no attempt to counter the court's finding, [*see* Br.33-34], and the district court's ruling therefore must be affirmed.

While this provides sufficient basis to reject the claim, documents included by Trenkler in the appendix to his §2255 motion establish that this claim is also time-barred. These documents show that the BPD received a hand-written letter from Shay Jr. sometime in 2001 in which he claimed that Trenkler was innocent and that Shay Sr. and his attorney were responsible for the bombing. [D.5, App.69]. On September 10, 2001, the government sent a copy of this letter to Charles Rankin, Esq. – Trenkler's attorney in the pending appeal of the denial of his first motion under §2255, *see Trenkler III*, 268 F.3d at 17. [D.5, App.68]. Trenkler was thus on notice by at least 2001 that Shay Jr. was proclaiming Trenkler's innocence and failed to act with due diligence in waiting until 2007 to pursue the claim.

C. The district court lacked jurisdiction to consider claims not first raised before this Court.

Section 2255 provides that a second or successive motion under §2255 must be "certified as provided in [28 U.S.C.] section 2244." Section 2244 specifies, in relevant part, that:

> Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application,

28 U.S.C. §2244(3)(A); and that

> The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

28 U.S.C. §2244(3)(C). This Court has held that the prior approval provisions of §2244 "allocate[] subject matter jurisdiction to the court of appeals by stripping the district court of jurisdiction over a second or successive [motion] unless and until the court of appeals has decreed that it may go forward." *United States v. Pratt*, 129 F.3d 54, 57 (1st Cir. 1997).

By its terms, the statutory language requires that a prisoner's claims be included in an application reviewed and approved by this Court before they may be acted on by the district court. A prisoner must "make[] a prima facie showing that

the application satisfies the requirements of [the] subsection;" if he does, he obtains "an order authorizing the district court to *consider the application*." 28 U.S.C. §2244(3)(A, C)(emphasis added). Thus, the only application that the district court may "consider" is the one approved by this Court. The logic of this provision dictates that, to the extent a prisoner presents claims outside of an approved application, the district court cannot entertain them and, indeed, is without jurisdiction to do so. *Pratt*, 129 F.3d at 57.

The same conclusion is supported by this Court's local rule and application form implementing the approval of second or successive §2255 motions. The local rule provides that a prisoner seeking approval must submit "a completed application form . . . stating the new claim(s) presented and addressing how . . . Section 2255's standard is satisfied." Local Rule 22.1(a)(1). The form application for leave to file a second or successive motion similarly requires a prisoner seeking approval to "[s]tate concisely every ground on which you now claim that you are being held unlawfully." United States Court of Appeals for the First Circuit, Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence, p.7 (emphasis omitted). The logical reading of these statements is that a prisoner is required to bring all of his claims before this Court before they may be approved and heard in the district court.

The district court, relying on *Hazel v. United States*, 303 F. Supp.2d 753 (E.D. Va. 2004), assumed that a court may consider claims added to an approved successive motion after circuit court review, at least where the grounds for the claims arose after the successive motion was approved. [D.App.20]. It then proceeded to further consider several of Trenkler's later-raised claims. For the reasons set forth above, however, *Hazel*'s conclusion is contrary to the statutory language and should not have been followed by the district court.

Moreover, while *Hazel* purported to rely on *United States v. Winestock*, 340 F.3d 200 (4th Cir. 2003), *Winestock* does not support its conclusion. *Winestock* held only that, because §2244 speaks of "applications," circuit court approval of an application "authorize[s] the prisoner to file the entire application in the district court, even if some of the claims [contained] in the application do not satisfy the applicable standards." *Id.* at 205; *accord Nevius v. McDaniel*, 104 F.3d 1120, 1121 (9th Cir. 1997). *Winestock* does not suggest that circuit court approval of an application authorizes the presentation of claims *outside* the application. In fact, the logic of *Winestock* supports the government's position – if Congress's use of the word "application" means that a circuit court's authorization extends to the entire application and allows the district court to "consider" anything within an approved "application," so too it must mean that anything *not* within an approved application

has *not* been authorized for a district court to "consider."

For the foregoing reasons, the district court should not have considered any claims beyond the five originally authorized by this Court and should have dismissed any additional claims for lack of jurisdiction.

D. Alternatively, Trenkler's remaining claims were properly rejected.

If properly reached, the district court correctly rejected Trenkler's additional claims as time-barred or otherwise unavailing. Indeed, with two exceptions Trenkler does not argue otherwise.

1. Cody's recantation.

The district court found Trenkler's claim that government witness Cody had recanted his testimony to be time-barred, given that the affidavits reported conversations that occurred in 2001. [D.App.19-20].[20] Trenkler does not address this claim on appeal, and therefore has waived any objection to the district court's conclusion. *DeCaro v. Hasbro, Inc.*, 580 F.3d 55, 64 (1st Cir. 2009)("[C]ontentions not advanced in an appellant's opening brief are deemed waived.").

[20]This claim, like the claim that Shay Jr. had recanted, also fails to allege a constitutional violation and therefore would not be cognizable in any event.

2. Inducements to Shea and Lindholm.

The district court found that Trenkler's claim that the government had failed to disclose inducements promised to Shea and Lindholm could not succeed because: (1) the evidence did not establish that any agreements to assist Shea or Lindholm with obtaining reduced sentences existed at the time of trial; and (2) Trenkler could have discovered the bases for these claims earlier – in fact, the claim regarding Lindholm was previously raised in this Court and rejected. [D.App.13-15 (*citing Trenkler II*, 1998 WL 10265, at *4)]. Here again, Trenkler does not appear to contest the district court's disposition of these claims and has therefore waived any objection. *DeCaro*, 580 F.3d at 64.

3. Destruction of evidence.

The district court declined to find that the destruction of evidence in this case violated Trenkler's rights, ruling that destruction of the evidence in late 2005 was "likely improvident, given Trenkler's continuing and well-publicized fight against his conviction," but that the government's claim that no collateral attack on the judgment was pending at the time the government authorized the destruction "was not factually incorrect." [D.App.21 n.13]. Trenkler establishes no error in the district court's conclusion that the destruction of evidence did not violates Trenkler's rights.

The evidence at issue here (the black electrical tape, the fingerprints lifted from

Shay Sr's car, the switch contacts) represented, at most, "potentially useful evidence," which the Supreme Court has described as "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *See Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988); *see also Olszewski v. Spencer*, 466 F.3d 47, 55-57 (1st Cir. 2006)(discussing the distinction drawn in Supreme Court destruction-of-evidence cases between evidence that is only "potentially useful" and evidence that is known to be exculpatory at the time it is destroyed). When the government destroys evidence that is only "potentially useful," even at the time of trial, this violates a defendant's rights only if the destruction is undertaken in bad faith. *See Olszewski*, 466 F.3d at 55-57.

On appeal, Trenkler contends that the government authorized the destruction "knowing of [the evidence's] exculpatory value and knowing that Trenkler has been continually fighting his case" [D.34], but the record does not support this serious accusation. Rather, it supports the district court's finding that destruction of the evidence was authorized at a time when no collateral attack was pending,[21] a finding

[21]Destruction of the evidence was authorized "on or about October 17, 2005." [D.14, Exh.B]. The record contains conflicting information as to when the destruction occurred, with one document stating that some evidence was destroyed on October 31, 2005, and other evidence on February 24, 2006, while another states that evidence was destroyed on December 19, 2005. [D.14, Exh.B &C]. While Trenkler apparently sent a letter raising a challenge to his sentence on December 1, 2005 [D.14, Exh.D], this was after the government had given its authorization.

implicitly rejecting Trenkler's suggestion of bad faith. Thus, the destruction of evidence would not have violated Trenkler's constitutional rights even had it occurred at the time of trial, and cannot possibly constitute a violation now, more than a decade after his trial was concluded.

4. Speed bumps.

The district court rejected Trenkler's claim that his discovery that there had been speed bumps along the route traveled by Shay Sr. on the day of the bombing could constitute "newly discovered evidence," given that Trenkler could readily have discovered this at the time of trial. [D.App.22]. On appeal, Trenkler does not meaningfully challenge this conclusion.[22] Instead, he contends that the government withheld a report and videotape concerning a November 17, 1991 "re-enactment" of Shay Sr.'s trip, using a replica bomb and Shay Sr.'s car. [Br.35-36; D.App.BP-15]. Trenkler claims that the report (which he has now obtained) and the videotape (which

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Moreover, Trenkler did not file any formal request to set aside his sentence until nearly a year later, on November 6, 2006, and the government was not notified that it should respond until January 26, 2007 – both long after the evidence had been destroyed. [Civ.D.06-12072, Nos.1, 2].

[22]Trenkler states in his brief that it was "no longer possible but also not logical to retrace the route" during trial preparations, because, by that time, Shay Sr. no longer had the car he drove on the day of the bombing. [Br.34-35]. This argument makes no sense. Whether or not the defense had access to the specific car, it could have (and should have) retraced the route to assess the government's theory that Shay Sr. drove with the bomb attached to the bottom of his car.

he has not found) are exculpatory, because they reveal that the replica bomb used in this test did not fall off the car in the driveway, and were not revealed to him, although a second videotape of a different "re-enactment" was provided. [Br.22-23].

This Court should not reach this claim. Trenkler did not identify this claim in his application to file a successive §2255 motion and it was not approved by this Court. Nor was the claim or the evidence supporting it presented in the district court. Thus, the district court was without jurisdiction to address the issue and, even if it was not, this Court has no evidence properly before it that could support this claim. *See Rice*, 564 F.3d at 526.

II. TO THE EXTENT THE DISTRICT COURT WAS REQUIRED TO CONSIDER TRENKLER'S CLAIM OF ACTUAL INNOCENCE, THAT CLAIM WAS PROPERLY DENIED.

Trenkler contends that the district court erred in concluding that his newly discovered evidence claims did not constitute an adequate showing of actual innocence. [Br.38-43]. To the extent that the district court properly reached the issue, Trenkler's claim was properly denied.

A. The district court was not required to consider Trenkler's claim of actual innocence.

A claim of "actual innocence" in the collateral review context ordinarily serves as a "gateway" by which a prisoner may obtain a review of a constitutional claim that has been procedurally defaulted and for which the prisoner cannot establish cause and prejudice. *See Schlup v. Delo*, 513 U.S. 298, 314-15 (1995).[23] Here, the district court, having found that Trenkler's claims were either time-barred or not cognizable under §2255, went on to consider whether Trenkler had made a viable claim of actual innocence and thus could "have his otherwise barred constitutional claims considered on the merits." [D.App.23 (quoting *Barreto-Barreto v. United States*, 551 F.3d 95, 102 (1st Cir. 2008)].

Such an analysis might have been appropriate in this case if Trenkler had presented his claims in a timely manner, in order to excuse the procedural default

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[23]The Supreme Court has "assume[d], for the sake of argument in deciding" two cases, "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no [other] avenue open to process such a claim." *Herrera v. Collins*, 506 U.S. 390, 417 (1993); *see also House v. Bell*, 547 U.S. 518, 554-55 (2006). The Court has not suggested, however, that a "freestanding" actual innocence claim could exist outside the capital context. Moreover, the Court has made clear that, even where such a claim could be brought, it would require a threshold showing of innocence that was "extraordinarily high." *House*, 547 U.S. at 555. As set forth below, Trenkler's claim falls far short of meeting that standard, evening if such a claim could exist in a non-capital case.

resulting from his failure to raise his claims on direct review. *See Owens v. United States*, 483 F.3d 48, 56-57 & n.6 (1st Cir. 2007). Trenkler's claims were not timely, however, and this Court has "not adopted an actual innocence exception to §2255's one-year limitations period." *See Barreto-Barreto*, 551 F.3d at 102. To the contrary, this Court has stated that "defendants who may be innocent are constrained by the same explicit statutory or rule-based deadlines as those against whom the evidence is overwhelming." *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003).

This Court's position is consistent with that of the Seventh Circuit in *Escamilla v. Jungwirth*, which held that "'actual innocence' is unrelated to the statutory timeliness rules." 426 F.3d 868, 871 (7th Cir. 2005). A finding of actual innocence "clears away a claim that the prisoner defaulted . . . by omission [of his claim] from the first federal petition – but does not extend the time to seek collateral relief." *Id.*; *see also Flanders v. Graves*, 299 F.3d 974, 978 (8th Cir. 2002)(holding that, to the extent that actual innocence is relevant to the time limits at all, a defendant would, at least have had to show that he was reasonably diligent in finding the facts underlying his claim); *but see Souter v. Jones*, 395 F.3d 577, 597-98 (6th Cir. 2005)(citing cases suggesting a broader "actual innocence" exception to the one-year statute of limitations for claims under §2254).

This Court's statements and those of the Seventh Circuit in *Escamilla* correctly

interpret Congress's intent in establishing the one-year statute of limitations for motions under §2255. While this Court stated in *Barreto-Barreto* that it did not have to "settle" the issue, 551 F.3d at 102, this Court's precedents have consistently supported the view that prisoners cannot circumvent Congressional limits on collateral review except in the rare circumstances in which §2255 is "inadequate or ineffective," a showing Trenkler has not begun to make. *See Trenkler V*, 536 F.3d at 98; *United States v. Barrett*, 178 F.3d 34, 56 (1st Cir. 1999). Given this, the district court was not required to consider Trenkler's actual innocence claim, because it could not excuse Trenkler's failure to file a timely motion.

B. The district court properly rejected Trenkler's claim of actual innocence.

Assuming the district court properly reached the issue, it did not err in concluding that Trenkler had not made a viable showing of actual innocence. In *Schlup*, the Supreme Court explained that, "[t]o be credible," a prisoner claiming actual innocence must "support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." 513 U.S. at 298. Moreover, the prisoner must show "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). The district

court reviewing a claim of actual innocence must "consider all the evidence, old and new, incriminating and exculpatory," and "make a probabilistic determination about what reasonable, properly instructed jurors would do." *House*, 547 U.S. at 538. The standard will only be met when the prisoner "demonstrate[s] that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt." *Id.*

Trenkler falls far short of making a plausible showing of actual innocence. Shorn of speculation or unsupported assertion, Trenkler fails to establish that any of the evidence presented at trial was, in fact, incorrect. That Trenkler believes based on review of a photograph that the switch contacts were misidentified, hardly refutes the conclusion of Kline – who had the benefit of observing the contact remains themselves – that the switch contacts were properly linked to the model of Radio Shack switch Shay Jr. bought. So too, while it is possible that Trenkler's communications with Hobbico produced some new information that might have been relevant to the determination of the operating time of the bomb, the combination of this information and Trenkler's constantly evolving pen-and-paper calculations fall far short of establishing that Kline erred in testifying at trial that the bomb could have operated for approximately 22 hours. Shay Jr.'s recantation similarly falls short of establishing that the statements by him that were introduced at trial were false, given

the well-established "unreliability of this specific witness" [D.App.25] – a characterization Trenkler does not contest on appeal.

Trenkler's remaining claims, to the extent supportable at all,[24] merely suggest the possibility that Trenkler did not receive information that might have had some value at trial. Assuming, for example, that the fingerprint report from the car was not turned over,[25] Trenkler arguably could have made something of the fact that none of the prints were found to belong to him or Shay Jr. So too, if Trenkler had been aware at the time of trial of speed bumps at the Chelsea Naval Hospital (assuming this could possibly be considered *Brady* material) or of any agreements between the government and Shea or Lindholm (assuming Trenkler had any evidence that such agreements existed), this would have provided some additional grounds for arguing that the

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[24]Trenkler's brief contains several allegations for which no support whatsoever is provided, including, *inter alia*: that a salesperson told ATF that the device would operate for only two hours once turned on; that government officials were overheard acknowledging that the switch contacts didn't match; and that the government "knew" that certain evidence was exculpatory at the time it authorized its destruction. [Br.20, 28, 32-33]. These claims need not be considered. *David*, 134 F.3d at 478 (explaining that courts need not consider claims that are "vague, conclusory, or palpably incredible").

[25]A dubious assumption given, as noted above, that records indicate that, at least in the case of the switch photographs, Trenkler received the documents he contends were withheld.

government's time line or its witnesses should be distrusted.[26] This informaiton would not require that the government's evidence be rejected.

Moreover, Trenkler's claims do little to undercut other significant evidence at trial, including the bulk of the evidence this Court relied upon in concluding in Trenkler's direct appeal that the erroneous admission of computer database evidence was harmless beyond a reasonable doubt. In that appeal, this Court focused on the evidence of similarities between the 1986 bombing and the 1991 bombing (including, among other things, the fact that both bombings involved radio controlled bombs built to assist friends with personal disputes and relied on certain similarities in construction and operation), coupled with Lindholm's testimony, Trenkler's inculpatory statements to police and the diagram he drew at the request of agents, his relationship to Shay Jr., and other evidence, and concluded that "no rational jury could have entertained a reasonable doubt of Trenkler's guilt." 61 F.3d at 60-61. Of the foregoing factors, Trenkler only directly attacks Lindholm's testimony, and that on a ground that this Court previously rejected as lacking factual support. *Trenkler II*, 1998 WL 10265, at *4. Given this, Trenkler's claim that "no reasonable juror" could find him guilty beyond a reasonable doubt cannot possibly succeed.

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[26]While the issue is not properly before this Court, the same is true of Trenkler's claim that he was not provided a copy of a videotape of a re-enactment of Shay Sr.'s activities on the day the bomb was discovered.

Trenkler's submission of letters from various jurors stating that they would not have found him guilty had they been aware of certain of Trenkler's allegations is inappropriate and, in any event, irrelevant to this inquiry. Federal Rule of Evidence 606(b) expressly prohibits a juror from testifying or providing an affidavit commenting on "the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict" as part of "an inquiry into the validity of a verdict." In doing so, "Rule 606(b) codifies the firmly established common-law rule that prohibits admission of juror testimony to impeach a jury verdict." *United States v. Villar*, 586 F.3d 76, 82-83 (1st Cir. 2009)(internal quotation marks and citation omitted).

This Rule is supported by "important policy considerations . . . including finality, maintaining the integrity of the jury system, encouraging frank and honest deliberations, and the protection of jurors from subsequent harassment by a losing party," *id.* (internal quotation marks omitted), and forecloses the use of juror statements in an effort to challenge a verdict for purposes of seeking a new trial under Rule 33, *see United States v. Burns*, 495 F.3d 873, 875 (8th Cir. 2007)(concluding that the principle behind Rule 606(b) "extends to testimony about what [juror's] mental processes would have been had the evidence at trial been different" for purposes of determining whether a defendant is entitled to a new trial based on newly

discovered evidence), or on collateral review, *see Gosier v. Welborn*, 175 F.3d 504 (7th Cir. 1999)(concluding that it would be "altogether inappropriate for a federal court to entertain [evidence of juror statements in] a collateral attack, when neither a federal nor a state court allows a verdict to be challenged directly using evidence of this kind"); *Capps v. Sullivan*, 921 F.2d 260, 262 (10th Cir. 1990)(holding that affidavits from jurors was inadmissible in habeas proceeding to establish that jurors "would have voted differently had they been given an entrapment instruction"). Thus, the juror statements submitted on Trenkler's behalf are entitled to no weight in assessing whether he has made viable showing of actual innocence.

In sum, Trenkler's claims, to the extent that they establish any errors at all in his trial that are cognizable on collateral review, fall far short of establishing that he is actually innocent of the crime for which he was convicted and thus provide no basis for reaching the merits of those claims. Nor has Trenkler advanced any other arguments that would permit him to raise at this late date claims based on information that Trenkler knew or could have learned of with reasonable diligence many years ago but chose not to investigate. His claims were therefore properly denied.

CONCLUSION

For these reasons, the government respectfully requests that the Court affirm the district court's order.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CERTIFICATE OF COMPLIANCE WITH
TYPEFACE AND LENGTH LIMITATIONS

Appeals No. 09-1559

ALFRED W. TRENKLER
Petitioner-Appellant

v.

UNITED STATES,
Respondent-Appellee

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