

No. 09-1559

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UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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ALFRED W. TRENKLER,  
Petitioner - Appellant

v.

UNITED STATES OF AMERICA,  
Respondent - Appellee

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ON AN APPEAL FROM A JUDGMENT ENTERED IN THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS  
DENYING A 28 U.S.C. § 2255 PETITION

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REPLY BRIEF FOR  
PETITIONER - APPELLANT ALFRED W. TRENKLER

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I. Trenkler's claims should not have been time barred and Trenkler stated constitutional violations cognizable under 28 U.S.C. § 2255. Trenkler's unapproved claims and evidence arose subsequent to the approval of the successive motion, thus impossible to include in the original application.

Trenkler's motion was timely under 28 U.S.C. 2255, he exercised due diligence in discovering the facts supporting his claims and his motion was filed within one-year of the date on which he discovered them. Trenkler has plainly alleged facts regarding his diligence that would entitle him to relief in the form of a timely petition.

The government systematically withheld and suppressed favorable, material evidence even after agreeing both generally and specifically to produce it, that, had a jury been aware, the results of the trial would have been different, thus violating Trenkler's constitutional due process rights.

Nothing the government cites states that the district court cannot consider claims or evidence that arose subsequent to the Circuit Court's granting Trenkler's motion for certification.

**A. Standard of review**

"When the district court dismisses claims without holding an evidentiary hearing, we take as true the sworn allegations of fact set forth in the petition unless those allegations are merely conclusory, contradicted by the record or inherently incredible." Ellis v. United States, 313 F.3d 636, 641 (1st Cir. 2002).

("A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence,

there would not have been enough left to convict.") ("Once a reviewing court applying Bagley, 473 US 667, has found constitutional error there is no need for further harmless error review.")

Kyles v. Whitley, 514 US at 434-535.

- B. **Trenkler has proven the approved claims are timely and that evidence withheld by the government established constitutional violations of Trenkler's due process rights.**

Trenkler, et al., used due and reasonable diligence searching for evidence, taking into account that Trenkler is incarcerated and has limited resources to investigate this case. Trenkler's family worked full time and his ailing step father, Jack Wallace, retiring in 2001, ailing from leukemia, neural neuropathy of the legs and chronic pneumonia, depended upon others for transportation and otherwise had an extremely difficult time simply moving around, was the one responsible for discovering leads that led to the new evidence that had been withheld by the government.

Jack Wallace passed away in December of 2009, a year and two months subsequent to the death of his wife and Trenkler's mother, Josephine Wallace.

In spite of the hardships faced by Trenkler, et al., and the countless phone calls, letters and occasional personal visits to Trenkler's trial attorneys, investigator and expert, the clerks of the district and appeals courts, district and appeals court judges, visits to the Waltham archives storage and even calls to the Boston ATF with certain agents using vulgar language and being insulting and discourteous to Trenkler's ailing step

father, none of this evidence Trenkler now argues was uncovered until 2006 and 2007. As more people come forward with what they knew prior to trial but for whatever reason held back, more evidence is uncovered that shows the problems with this case.

The files that Trenkler refers were only the starting point that eventually led to the discovery of evidence that had been buried, hidden or never reported.

Under Bagley, 473 US 667,

"[F]avorable evidence is material and constitutional error results from its suppression by the government if there is a 'reasonable probability' that had the evidence been disclosed to the defendant, the results of the proceeding would have been different. Thus, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. Second, Bagley, materiality is not a sufficiency of evidence test. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict ... Third, [] once a reviewing court applying Bagley has found a constitutional error, there is no need for further harmless error review, since the constitutional standard for materiality under Bagley imposes a higher burden than harmless error Brecht v. Abrahamson, 507 US 619, 623 ... Fourth, the [] disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item by item." 437 US at 675 and note 7. "Materiality is assessed collectively, not item by item." Kyles v. Whitley, 514 US at 434.

"Thus, the prosecutor, who alone can know what is undisclosed, must be assigned the responsibility to gauge the likely effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached. Moreover, that responsibility remains regardless of any failure by the police to bring favorable evidence to the prosecutor's attention." Kyles.

As Barrons Law Dictionary describes suppression of evidence, "The failure to produce evidence may constitute an admission that the evidence is unfavorable to the party refusing to produce it."

**1. Fingerprints on electrical tape sealed within the bomb.**

Trenkler had diligently pursued both his trial counsel and expert Denny Kline, "Kline", constantly over the years and at no point in time was Trenkler ever informed of the fingerprint observation by Kline until Kline himself broke the ice in July of 2007. To this day, Trenkler's trial counsel has no recollection of the observed fingerprint observation and nothing the government can point to positively supports the government's assertion that Trenkler's counsel was ever cognizant of a fingerprint observation.

Shy of clairvoyance, Trenkler had no way of discovering this evidence unless, as what occurred in July of 2007, Kline or the government were to reveal it. Kline had observed the print on the tape indicating that this print would positively identify the bomb builder and that it should be examined at the ATF lab. Upon Kline's second visit to the ATF there were no print results and the tape was now missing. For reasons unknown, there is no documentation of this fingerprint discovery in any files for Trenkler to have discovered.

Without a doubt, this evidence is material to guilt or to punishment, and the government, who was in possession and

control of the tape, was suppressing it. "The 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. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome", US v. Bagley, 473 US 667 at 682.

It is beyond speculation that the fingerprint would exculpate Trenkler, how, for example, would the government explain to the jury that fingerprints sealed within the bomb between layers of tape that had wrapped the dynamite did not belong to Trenkler and expect the jury to convict Trenkler of building this bomb when only the bomb maker could have left this print.

The district court misunderstood the significance of the fingerprint on the bomb tape when it found that "the bomb remains contained a fingerprint that [Trenkler] believes will show that another person constructed or at least handled the bomb." [D.APP. 14] <sup>1</sup>. Another person merely "handling" the constructed bomb could not possibly leave a fingerprint between layers of tape wrapped around the dynamite within the wooden box that had been sealed with glue, nails and paint with no access to the inside of the bomb. Not even Houdini could pull that one off.

The government has identified nothing in the record that

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<sup>1</sup> The citation "[D.APP. \_\_\_]" refers to defendant's appendix, "[Br. \_\_\_]" defendant's brief, "[D. \_\_\_]" civil docket entry for the § 2255 proceeding. The government's brief is cited as "[G.BR. \_\_\_]", and the government's supplemental appendix is cited as "[G.APP. \_\_\_]".

shows affirmatively that Trenkler or his counsel did have timely knowledge of the print observation, and it cannot point to any document that positively indicates that Trenkler's counsel was ever aware, therefore, no amount of diligence could have uncovered this evidence prior to Kline's revelation.

Apparently, once the importance of the fingerprint was realized by the government, Kline would not see the tape again, nor would the government reveal the testing results, similar to the situation with the fingerprint results requested but never delivered from the Thomas L Shay, "Shay Sr", automobile, infra.

The tape was not in a neutral source, it was in the government's sole possession and control.

Similar to Kline's suggestion that a paint stirrer with black paint, similar to the black paint on the bomb, seen in a photograph of Shay Sr's back yard, "should have been recovered and tested", and ATF chemist Cynthia Wallace, "Wallace", stated that the stirrer had been tested with negative results, [D.APP. 71-A], Kline made the statement that this tape should be tested, he reasonably expected the government, with no forensic evidence linking anyone to this crime, to identify the print for positive proof of the bomb builder's identity. Kline would have no reason to suspect that the government would not want the print to reveal a party other than Trenkler. Kline, a retired FBI agent, would reasonably expect that the ATF would, like the paint stirrer, conduct testing.

All is known is that the existence of the fingerprint on the bomb tape was known by Kline and shown to the government. The government would report the result of the paint stirrer seen by Kline, no match to the bomb, but would not mention the print results from the bomb one way or the other.

If the government implied that it would conduct tests on the bomb tape but not report the results when there was no match to Trenkler would indeed be a constitutional violation. Again, there is nothing the government can point to that proves Trenkler had any knowledge or could have obtained any knowledge of this print observation through any other source prior to July of 2007.

How does both the government and Trenkler's counsel being aware of the possibility that the tape from the bomb may contain a fingerprint verify that Trenkler's counsel was aware of an actual print?

If Trenkler's counsel knew of an observed fingerprint, why was there no memorandum, like the toggle switch, or any motion to produce it, like the request for the fingerprints from the Shay Sr automobile, and why would Trenkler's counsel not ask Kline or Wallace about the observed fingerprint if counsel was aware of its presence? Why would Trenkler's counsel not ask Wallace why the ATF lab did not lift and identify an observed fingerprint if counsel was aware of the fingerprint? Certainly counsel would want the jury to hear that there was an observed fingerprint found within the bomb but that the government had

no apparent interest in identifying the print or revealing that the print did not belong to Trenkler.

All this proves is that Trenkler's counsel was not aware of the fingerprint observation.

The government makes reference to a June 28, 2006 motion by Trenkler's step father, Jack Wallace, "For a court order to review the evidence that ATF has from Mr. Trenkler's trial", [D.5 APP. 5-7] as proof that Trenkler waited until June 2006 "to have the tape independantly tested for fingerprints", and stated that this was proof that "Trenkler's 13 year delay did not constitute due diligence and the district properly found the claim to be time barred." [G.Br. 31]. However, the motion was to examine "all the evidence the ATF has in its possession", nowhere is there any mention of electrical tape from the bomb, further proof that Trenkler had no idea of the print observation prior to July of 2007.

Finally, the government observes, "Had Kline or anyone else believed the tape contained a potentially exculpatory print that had not been tested, it is hard to believe that the issue would not have been raised once the tape was brought into court", [G.Br. 32]. That is a good point, but is the government now saying that Kline is now lying or that Bonpasse heard wrong if the Kline affidavit is disallowed in these proceedings? If anything, this all cuts to the chase of Trenkler's argument, that defense counsel was never aware of the observed fingerprint.

How on earth can Trenkler be faulted when no amount of

diligence could reveal that which was only known by Kline and the government and not revealed until July of 2007?

## 2. Fingerprints on Shay Sr's car

Trenkler was, in fact, aware at trial that the government was in possession and control of fingerprints lifted from the Shay Sr "target vehicle" where the bomb is alleged to have been attached, Trenkler is not contesting this point. What both the district court and the government fail to acknowledge is the fact that Trenkler did in fact specifically motion for the production of the results of these prints, [D.APP. 89-92, #16.] The government responded to this specific request that it "will provide, [D.APP. 93-96, #16]. Of course this evidence was obviously exculpatory no motion should have been needed. See Agurs.

Trenkler's counsel did its part in requesting this evidence, but there is another component to this issue that is recognized in Bagley, 473 US 667, where, ironically, "The government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defense trial strategies that it would have otherwise pursued." The court "agree[d] that the prosecutor's failure to respond fully to a Brady request may impair the adversary process in this manner, and, the more specifically the defense request certain evidence, thus putting

the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the non-disclosure that the evidence does not exist and to make pretrial and trial decisions on the basis of this assumption." Id at 682.

"A rule thus declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." Bracy v. Gramley, 520 US 899, 909.

Was Trenkler supposed to mistrust the government would do its duty?

"The reviewing court should assess the possibility that such effect might have occurred in the light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post trial proceeding the course that the defense and trial would have taken had the defense not been misled by the prosecutor's incomplete response." Bagley, Id. at 683.

Trenkler had diligently requested this fingerprint evidence more than 17 years ago, the government stated that it would provide the results requested, but, for whatever reason, did not. Trenkler, not thinking that the government was withholding this evidence, assumed it did not exist.

### 3. Switch contacts

As explained in Trenkler's claims, this evidence came to Trenkler in a surreptitious manner. Trenkler fully agrees that, taken in isolation, a "for now unnamed ... grand jury

...witness ... told Trenkler's family that she overheard high ranking state and [federal] 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", [Br. 32], is "palpably incredible". Coming from this particular witness, who was also a "behind the scenes integral part of the government's case against Trenkler", her statements were treated with a high degree of suspicion.

Trenkler then, as the government now, had no reason to give any weight to the above statement so it was disregarded, kept on the back burner as it were, but given little weight. After all, the government would not take such a chance and misrepresent the truth.

A review of the transcript made it seem clear that the contacts in the bomb matched the Radio Shack switch, giving more weight to the pay-no-mind status of the above witness' statement.

To add to the confusion, Trenkler's step father came across the counsel's letter informing codefendant Thomas A. Shay, "Shay Jr" counsel that Trenkler's expert, Kline, observed the bomb toggle switch did not match the Radio Shack switch. Also found was the Kline report where he stated, "the construction of the Radio Shack toggle switch catalogue [sic] has changed or BATF erred in their identification." [D. 5 APP. 9, D. 5 APP. 8 respectively]

Reviewing the trial transcript indicated that the toggle switch had changed. Q. "and you understand that this is now

discontinued, that series of switch?" [G.APP. 68, D. 5 APP. 13]. This verified Kline's statement that "This suggests that the construction of the Radio Shack switch catalogue has changed." [D. 5 APP. 8].

Subsequently, a trip to codefendant Shay's counsel to look at their files for any exculpatory evidence Trenkler may have missed, revealed the packet of photos not found in any of Trenkler's files. Copies were made and forwarded to Trenkler et al. however, not being engineers, no one was familiar with what these photos depicted until viewed by an associate engineer who opined that some of the photos appeared to be some kind of switch contact. Not much was made of this observation since it appeared the switch issue was dead.

However, a purchase of the same model 275-602 Radio Shack toggle switch was made and compared to the photographs, at the time there was no big surprise, the switch had changed, according to the government. The big surprise came when calls to Radio Shack revealed that the 275-602 toggle switch had not changed.

The next surprise came when a Philmore toggle switch was purchased from You Do It Electronics in Needham Massachusetts since it looked exactly the same as the Radio Shack switch. Like the Radio Shack switch above, this switch was disassembled and found to be an exact match to the bomb photos whereas the Radio Shack switch did not match the ATF photos. [D.5, APP. 10,11A,11B]

Until this discovery, Trenkler had no reason to doubt that the government might be, to put it politely, mistaken about the

switch remains from the bomb matching a 275-602 Toggle switch.

This was quite the coincidence with the statement of the Grand Jury witness. Did the government actually go ahead with this case with the knowledge that there was no match between the bomb toggle switch remains and the Radio Shack switch? Did "the government purposely [] ask the jury to infer facts known by the prosecutor not to be true."? See United States v. Conley, 103 F.Supp 2d 45, 49 (D.Mass. 2000)

Without a doubt, Trenkler was "prejudiced by th[is] suppression in that there is a 'reasonable probability that , had th[is] evidence been disclosed to the defense, the results of the proceeding would be different." United States v. Conley, 249 F.3d 38, 45 (1st Cir. 2001), quoting Strickler v. Green, 527 US 263, 280. "What is more, if the United States knowingly used perjured testimony to obtain a conviction, the standard a defendant must meet [] is 'any reasonable likelihood that the false testimony could have affected the judgment of the jury!'" United States v. Gonzalez-Gonzalez, 258 F.3d 16, 21 (1st Cir. 2001), Quoting Agurs.

"Courts, litigants and juries properly anticipate that 'obligations [to refrain from improper methods to secure a conviction] ... plainly rest[ing] upon the prosecuting attorney, will be faithfully observed'", Berger, 295 US at 78.

Finally, on this subject, as advanced in Trenkler's approved § 2255, if codefendant Shay Jr did not purchase the toggle switch used in the 91 bomb, there was no overt "[a]ct done [by either

Trenkler or Shay Jr] to effect the object of the conspiracy." See United States v. Hirsch, 100 US 33 (1879). "If the offense is made up of the corrupt agreement and the overt act to further it, and it is not complete without the overt act." Hyde v US, 225 US 347 (1912). "The offense consisted in the conspiracy, and the [ ] overt act afforded a locus penitentioe, so that before the act done either one or all of their parties may abandon their design and thus avoid the penalty prescribed in the statute." US v. Britton, 108 US 199, 204 (1883).

Without the switch purchase by either defendant, both would be factually innocent of conspiracy in this matter. The toggle switch was the centerpiece of the alleged conspiracy, no switch, no overt act, no conspiracy, Trenkler and Shay Jr would be factually innocent of conspiring to build a bomb.

The government states in note 17 [G.BR. 37] that "a review of the government's discovery file indicates that 'a complete set of photographs taken by the ATF during the course of [the] investigation' was sent to Trenkler's attorney on January 25, 1993." However, a review of that file reveals no such statement. Of course, this is the same file that said it "will provide" the results of the fingerprint report requested by Trenkler concerning the 17 fingerprints found on the Shay Sr "target vehicle", a report still in question.

#### 4. Operating time of Futaba receiver

Defense expert Kline conducted a test that did not accurately

duplicate the conditions of the 1991 Futaba receiver. First, Kline used batteries with twice the storage capacity as those manufactured in 1991, using "brand new fresh batteries", purchased some time after February of 1993 [G.APP. 69], second, he did not put the same toggle switch torque load on the servo motor as that in the 91 bomb, "3 inch pounds", [D. 5, APP. 28], instead, he used a "microswitch" [G.APP.65], third, he was never told that an obsolete Futaba slide switch would cause a significantly greater drain on the Futaba receiver system. Kline's test did not accurately duplicate the receiver within the 91 bomb.

The district court made a common error in its calculation wherein it arrived with a 30 hour operating time, confusing net drain with required supply capacity and not properly taking the the torque required to operate the toggle switch, [D. 5 APP. 28, 29].

Trenkler did not provide a revised analysis, simply more detailed, [D. 28, 37-41].

The reason the claim from the Futaba salesman is unsupported was that he deferred any official statement to Futaba, he was not a spokesperson for Futaba. Thus, the clock did not begin to run on this claim until Trenkler received the manufacturer's specifications. It should be noted that these figures were not given with the "obsolete" slide switch, but with the torque load of a typical toggle switch like that used in the 91 bomb. [D.5, APP. 28-29]

The merits behind the timing figures are that it would be impossible for the bomb to operate unless it was armed after Shay Sr said he discovered, therefore Trenkler could not have armed the bomb. Only Shay Sr knew where the bomb was, by his

own words, 24 hours prior to its exploding.

Trenkler could not be guilty of arming this device if the device had to be armed by someone else after Shay Sr said he "discovered" the bomb, and if the only person who knew where the bomb was located during the window of when it had to be armed was Shay Sr, logically, only Shay Sr could have armed the bomb.

The government did not want the jurors to know the running time of the bomb, it was arguing with the court on the "life of the batteries" after the court made the observation that "the question was when was [the bomb] armed?" [G.APP.65]

Contrary to the government's assertion, the identification of the Futaba salesman did not come from the ATF hand written report, but rather was discovered from a list of hundreds of contacts that Trenkler's step father was methodically going through. If one were to notice, the phone number on the report for Futaba has a 717 area code and it is not a local distributor, [D. 5 APP.31]. The government simply made this assumption. [G.BR. 39]. Thus, it was not "from the knowledge of th[is] report as of the time of trial" when the time should start to run, [G.BR. 40].

How on earth was Trenkler to know that this salesperson had made a statement to the ATF about the two hour window or that an obsolete switch would be the cause?

This issue is material, if a juror knew that only Shay Sr could have armed this bomb, how would Trenkler be guilty of the same? Physics has a nasty habit of being stubborn and cannot be trumped by the laws of man.

5. Shay Jr's recantation

The government used this strange enigma to inculcate Trenkler. The constitutional violation would be if the government knowingly used statements of Shay Jr it knew to be untrue. This entity is totaly unbelievable. But therein lies the conundrum. If nothing this man says could be corroborated by the government even after offering Shay Jr down to three years if he helped the government "get" Trenkler, how then can the government believe anything that he says when he simply makes statements that fit the government's case, based on information that the government planted in Shay Jr's head? One can't have it both ways.

Trenkler is at a loss, he is now again serving two, albeit illegal, life sentences because of the fanciful ravings of "codefendant" Shay Jr who parroted what his friends in the ATF and the US Attorney's office put in front of him.

Trenkler included Shay Jr's most recent revelations reflected in a habeas motion, [D. 5, APP. 52 - 53], and a Patriot Ledger interview revealing why he plead guilty, proclaiming his and Trenkler's innocence, [D. 5, 54 - 56].

- C. Nothing the government cites states the District Court cannot accept claims or evidence discovered subsequent to the First Circuit's Approval of Trenkler's application ceding jurisdiction to the District Court

Trenkler was not in any way attempting to sneak in issues or evidence, Trenkler was simply submitting evidence to the District Court as soon as Trenkler became aware. Had the evidence in question been discovered prior to the application to the First Circuit,

Trenkler would have included it in his application.

The government cites United States v. Pratt, 129 F.3d 54, 57 (1st Cir. 1997) which only spoke of how a district court must dismiss a second § 2255 or transfer it to the court of appeals since the AEDPA strips the district court of jurisdiction over a second or successive habeas petition until the appeals court cedes jurisdiction, it did not concern the addition of newly discovered claims in the district court while the district court possessed jurisdiction ceded by the First circuit following the approval of an application.

The one case that the government cites reflecting this particular situation where a defendant discovers evidence during the pendency of a district court's jurisdiction under a second or successive § 2255 assumes the district court may consider the claim, Hazel v. United States, 303 F.Supp. 2d 753 (E.D.Va. 2004) discussing post approval discovery claims, "assuming [the] court may consider claims added at least where grounds arose after successive motion was approved."

Hazel, in turn, relied upon United states v. Winestock, 340 F.3d 200 (4th Cir. 2003) which even the government points out, stands for the proposition that a circuit court will "authorize to file an entire application in the district court even if some of the claims in the application do not satisfy the applicable standards." By this reasoning, had Trenkler discovered the same post approval claims in time to include in the application, pre approval, the post approved claims would have been approved anyway.

If anything, the district court, accepting the newly discovered

evidence, saved time and resources, after all, what is the harm done if a claim too late for application is allowed by the district court? After all is said and done, it is the district court that rules on the claims, the appeals court simply rules on the application as a whole.

Next up, Nevius v. McDaniel, 104 F.3d 1120, 1121 (9th Cir. 1996) which simply discusses the fact that until the appeals court deems a second or successive habeas petition may go forward, the district court has no jurisdiction and must transfer the petition presented in the district court to the circuit court, and, like United States v. Winestock, stands for the same proposition that authorizes the circuit court only to authorize claims meeting the requirement of § 2244, "the proper procedure under the statute is for the [circuit] court to authorize the filing of the entire successive application," and goes on to note, "there is no restriction like that on [the district] court's issuance of certificate of appealability which requires [the district court] to indicate specific issue or issues satisfy requisite showing." Id at 1121.

Trenkler could not have brought the additional claims or evidence in his application to the Appeals Court since they were not discovered until after the applications process was completed.

"There is no comparable restriction governing our authorization of successive application for habeas corpus under section 2244(b)," Id at 1121.

Courts have "uniformly rejected a literal reading of section 2244..." 2009 US DIST. Lexis 52012:: Carey v. Blaisdel 2009 (D.Mass.).

1. Coady recantation

The government correctly observes that Trenkler has waived the Coady recantation since Coady refuses to submit an affidavit in support of his recantation. Until he receives immunity, which Trenkler obviously cannot provide, Coady is under the impression that his "creative statements", at the urging of the government, cannot be contradicted for fear of facing perjury charges.

2. Inducements to Shea and Lindholm

Here again Trenkler waives this claim since there is no possible way to prove an unwritten agreement between the government and Shea or Lindholm under Rule 35(b).

A brief word on this subject is in order.

Rule 35(b), Reduction Of Sentence For Changed Circumstances, was amended and effective on December 1, 1991. This insidious statute known throughout the prison system as the "rat", "snitch", or "let's make a deal" statute, "Rule 35(b) ... reflects a method by which the government may obtain valuable assistance from defendants in return for an agreement to file a motion to reduce the sentence, even if the reduction would reduce the sentence below the mandatory minimum sentence." Federal Rules of Criminal Procedure, Title 18 U.S.C.A..

How on earth can Trenkler prove a verbal agreement exists prior to trial, other than the fact that the defendant suspected of having a pre existing deal actually gets his reduction because of Rule 35(b).

The statute is drafted in such a way so that legally, there is no deal on paper, when the testifying defendant is asked if there is a pre existing deal, he is able to legally state that he has no deal for his testimony since the "deal" does not occur until after the successful testimony.

How does one prove a wink and a nod? As long as this statute exists innocent parties will continue to be wrongfully convicted and the guilty will go free.

While the public and the jurors are unaware, the government, the courts, and defense attorneys and the convicted all know how Rule 35(b) operates.

Unless Lindholm admitted that he was testifying in order to reduce his prison sentence, there was no way to uncover the deal. However, the proof of his deal can be inferred from the fact that he displayed working knowledge of Rule 35(b) on the stand, and the fact within two weeks of Trenkler's two illegal life sentences being awarded, Lindholm requested his reduction of sentence, and received a reduction "below the mandatory minimum sentence" for his testimony in the Trenkler trial.

Lindholm's release was not even reported until more than a year after Lindholm walked out of prison, not to Trenkler's counsel, trial judge or even this Court at briefing or oral arguments at Trenkler's direct appeal.

### 3. Destruction of evidence

What is odd is the fact that Trenkler's step father, Jack

Wallace, would submit a motion for a court order to review the evidence the ATF has from Trenkler's trial in June of 2006, [D.672, CR.NO. 92-10369-RWZ] and the first response comes from the government 18 months later, in its December 14, 2007 response to Trenkler's § 2255, where Trenkler's claims were that the government was withholding evidence, and where the government revealed that it had ordered all the evidence destroyed in October of 2005 and February of 2006, [D.7, 20-21]. On January 8, 2008, the government filed a motion in opposition to Trenkler's June 2006 motion to access the evidence, [D.715, 92-10369-RWZ]. The government was quick and quiet in its destruction of the evidence but very slow in informing any party that it had sua sponte decided to have it destroyed.

Trenkler was disadvantaged by the destruction of the evidence, the government was disadvantaged by its existence.

The destruction of evidence was just under 4 months after the denial of certiorari in the Supreme Court and one day over 4 years subsequent to the First Circuit Court's October 16, 2001 denial of Trenkler's motion for a new trial [No. 00-1657] that the government would quietly order the destruction of evidence. The government maintained that it waited for ten years after Trenkler's direct appeal to destroy the evidence, however Trenkler has constantly attacked his conviction and or sentence and the government was well aware of this fact.

The government was well aware of the significance of the evidence in this case, only the government knows what other evidence was destroyed, Trenkler was constantly "sniffing" around, diligently

searching for exculpatory evidence in this case.

The black electrical tape from within the bomb was positive proof of the identity of the bomb builder, the fingerprints from the Shay Sr vehicle not belonging to Trenkler proof that someone else was interested in an uncommon area of Shay Sr's car, coincidentally in the same area as where the bomb is alleged to have been placed, while Trenkler now has the toggle switch photographs to prove the government identified the wrong switch, the actual contacts would be the actual physical proof.

Prior to Trenkler even receiving a "target letter", the government allowed Shay Sr to give his car away, barring Trenkler's experts access to the one piece of evidence that was the element of the interstate component, if it could be proven that the bomb was never on the car, Shay Sr's testimony would be impeached and there would be no effect on interstate commerce and Trenkler would be factually innocent of violating 18 U.S.C. 844(i).

With the total lack of any physical evidence in this case pointing at Trenkler, the government is fully aware that any forensic evidence indicating another person was responsible for this crime would result in a juror being hard pressed to convict Trenkler.

#### 4. Speed bumps

While Trenkler could have discovered evidence of the speed bumps without the Shay Sr vehicle, the fact that the government allowed Shay Sr to give his car away in early 1992, [D.14, AEX. 5], prior to Trenkler receiving his "target letter", even if the speed

bumps had been discovered, Trenkler did not have access to the Shay Sr vehicle and would have no way to know of the condition of Shay Sr's 1986 Buick Century vehicle which was 7 years old at the time Trenkler hired his expert, in order to retrace the route Shay Sr drove just prior to his "discovery" of the bomb. There would be no way to know the condition of Shay Sr's vehicle, such as tires, shock absorbers, springs and general wear and tear without his car.

The government's argument at note 22 [GBR. 47], retracing the route Shay Sr took without his car could not possibly assess the government's theory that Shay Sr drove with the bomb attached to the bottom of his car, without the Shay Sr car, for the above reasons. By this statement, is the government stating that since Trenkler had no way to disprove the government's theory that the government would go ahead with a theory they knew to be false?

The only report submitted to Trenkler was a report of an re-enactment of Shay Sr's return to his driveway to verify his statement of how he discovered the bomb, with a series of back-ups and drive-outs with a replica bomb on the undercarriage with no mention as to the results. [D.APP. 62-3]

In order for there to be a connection to interstate commerce under 18 U.S.C. § 844(i), the bomb had to be attached to the Shay Sr car by Trenkler or Shay Jr in order to effect interstate commerce which was a tenuous tie in the first place, Material evidence that the bomb was never placed on the undercarriage of Shay Sr's vehicle, Trenkler and Shay Jr would be factually innocent of violating § 844(i).

Shay Sr stated that he discovered the device in his driveway

after driving his car out of his driveway and hearing scraping noises under the seat of his car. [D.5, APP.36]. From this the government theorized that Trenkler or Shay Jr had attached the bomb under the seat of Shay Sr's car some time prior to Shay Sr's sunday morning trip. Proving that the bomb could not survive the route Shay Sr stated he drove that sunday morning, would be proof that the bomb was not placed on Shay Sr's car by Trenkler or Shay Jr, proving that Trenkler and Shay Jr are actually innocent of violating § 844(i).

Conversley, the bomb surviving an obstacle larger than that of Shay Sr's mildly sloped driveway would be proof that the bomb could not dislodge as Shay Sr stated and the government theorized. If the bomb could not dislodge, how would Shay Sr and the government explain the bomb was discovered if, but for the dislodgement, Shay Sr would not have noticed the bomb. Not only would this impeach Shay Sr's testimony, the government would have to re-write its screen play.

Without the Shay Sr car component, this case would not have been in front of a jury to hear in its past form.

"A connection to interstate commerce is merely an element of the statutory offense, and, if proof of it is missing, the defendant is entitled to an acquittal." United States v Ryan, 41 F.3d 361 (8th Cir. 1994).

II. The district court misunderstood the evidence of actual innocence Trenkler presented in his motion.

The district court did not give any weight to the evidence Trenkler presented that demonstrates actual innocence in this crime that Trenkler is convicted.

The fingerprint found between layers of tape sealed within the box that contained the explosives could only have been left by the bomb builder. The district court made the assumption, erroneously, that the print could have been left by "another person [who] constructed or at least handled the bomb." [BR.APP. 14]. "Even if the fingerprint matched someone other than Trenkler, that does not rule him out as the source of the bomb." [BR.APP. 23]. Another person other than the bomb builder handling the bomb could not possibly leave a fingerprint between layers of tape sealed within the bomb. If Trenkler's print was not sealed within the bomb, someone else made the bomb, logically, if someone else made the bomb, Trenkler would be actually innocent of building the bomb

How would the government explain to the jury that although someone other than Trenkler left a fingerprint while wrapping the dynamite and blasting caps sealed within a carefully constructed box it still wants the jury to convict Trenkler of being the bomb builder?

This is not mere speculation, this is a supported assertion.

With the court's reasoning, if Trenkler's fingerprint was between the layers of tape sealed within the bomb, that would not rule out someone else as the source of the bomb, a doubtful

proposition.

Trenkler has physical proof based upon ATF photographs that the switch contacts were misidentified, not a belief but actual proof. [D.5, APP. 10-11B].

The government asserted that the Radio Shack switch that Kline purchased was different because Radio Shack had changed the switch model [G.APP. 68], [D.5, 13] which explains why Kline backed down from his observation. The government's whole theory was that, just like in 1986, Trenkler, in 1991, sent another person, Shay Jr, to Radio Shack to purchase a component for the bomb, the toggle switch, to show the jury a similar MO to the 86 incident and to show the court another reason to allow the 86 incident as a prior act against Trenkler and, more importantly, to show that one of the "coconspirators" committed an overt act to join into the conspiracy to build a bomb to kill Shay Sr.

Without "any one of the co-conspirators [] commit[ting] an overt act in furtherance of the conspiracy," [D.APP. 23-24], then neither Trenkler or Shay Jr would be guilty of an overt act in this conspiracy if neither one of them made the switch purchase, they would be "factually innocent" of joining in any conspiracy.

On the subject of logic which, at least on paper the government purports to subscribe, the fingerprint lifted from the Shay Sr "target vehicle" did not match Trenkler or Shay Jr and were not reported to Trenkler. Had the prints matched Trenkler or Shay Jr this discovery would be front page news and prominently displayed in front of the jury. Had the results of a negative match to Trenker

and Shay Jr been given to Trenkler, Trenkler would have published the results to the jury.

Contrary to the government's assertion, the fingerprints on the undercarriage of the Shay Sr vehicle were not in a "busy public place" and no one had any "legitimate social or service reasons to visit [the undercarriage of Shay Sr's car]." [G.BR. 34].

Whoever left the unidentified fingerprints on the undercarriage of Shay Sr's vehicle would have to lie on the ground to leave those particular prints.

A negative match to Trenkler or Shay Jr would indicate that someone else had an interest in the undercarriage of Shay Sr's vehicle and would be actual innocence evidence showing that Trenkler nor Shay Jr were in contact with the Shay Sr car.

The Futaba operating time would prove, if shorter than the time between the explosion and Shay Sr's "discovery" of the bomb, that the bomb would have to be armed by someone that had access to the bomb, which would dictate that, logically, that someone would have to know the whereabouts of the bomb. Klines "test" indicated approximately 22 hours of operation of the Futaba receiver which was close to the time between Shay Sr's discovery and the explosion.

Kline's test was not accurate, he used batteries with twice the storage as batteries in 1991, he did not use a toggle switch in his test, he used a "microswitch", [G.APP.65], his results would yield a significant longer running time than the 91 assemblage.

A running time of approximately 10 hours would make the

arming time sometime around 2 am in the morning of October 28, 1991, the only person on the face of this earth that knew where the bomb had been hidden was Shay Sr, by his own words, at 11:30am, October 27, 1991.

It is a given that the bomb exploded at noon on October 28, it is also a given that the servo arm of the Futaba receiver moved and caused the bomb to explode, [D.APP. 85, 86], so that the government's statement that "[t]he explosion could have occurred with dead batteries" is not credible, [D.8, 15], and the Futaba receiver had to have been armed by someone within its operating window, and if that operating window was only open after Shay Sr says he made the discovery of the device and only Shay Sr knew the whereabouts of the device was, hidden under a car he had in his back yard, it does not take the folks at NASA to figure out that only Shay Sr could have armed the bomb.

If it was impossible for anyone else to arm the bomb before Shay Sr says he discovered it, Trenkler and Shay Jr could not be guilty and would be actually innocent of arming the bomb, a fact, not legal insufficiency..

III. Withdrawl of claims discovered subsequent to the District Court's denial of Trenkler's § 2255 that had been submitted to this Court.

As it has become apparent to Trenkler, the evidence and or claims discovered through the Boston Police in July of 2009, and the Kline affidavit received in September of 2009 subsequent to the denial of Trenkler's § 2255 by the district court must be withdrawn since this evidence is not properly before this Court, too late to include in Trenkler's original application to this Court and too late for submission through addenda to the district court.

In the conclusion to Trenkler's appeal brief, Trenkler recognized the inherent problem stating, "the district court never had the benifit 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?" [Br. 44].

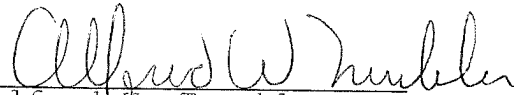
Therefore, Trenkler will voluntarily withdraw the evidence discovered in and subsequent to July of 2009 that had been erroneously entered for the first time in Trenkler's opening brief.

Trenkler will properly file a supplement to his petition with the new evidence that relates back to the original § 2255 in the district court and will file a second or successive § 2255 with this Court with the new evidence and resulting claims that had been discovered subsequent to July of 2009.

CONCLUSION

Trenkler prays that this Court grant oral argument, with the assignment of counsel, or, remand this case to the district court with orders to vacate and set the judgment aside and discharge Trenkler or resentence him or grant him a new trial or to 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.

Respectfully submitted,

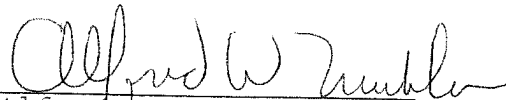


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April 1, 2010

**CERTIFICATE OF SERVICE**

I, Alfred W. Trenkler, hereby certify that I have served the foregoing upon the government by mailing a copy thereof, U.S. mail, postage prepaid, to Randall E. Kromm, Assistant U.S. Attorney, One Courthouse Way, Suite 9200, Boston, Massachusetts 02210, on April 1, 2010.



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