

P R O C E E D I N G S

1 THE COURT: Good morning.

2 [Whereupon, the jury entered the courtroom.]

3 THE COURT: Good morning, please be seated.

4 Miller Thomas, resumed

5 Continued Cross-Examination by Ms. Gertner

6 Q Mr. Thomas, I believe you testified that you, after you  
7 were called on scene, you talked briefly to Thomas Shay, Sr.;  
8 is that right?  
9

10 A That's correct, ma'am.

11 Q How long was that conversation?

12 A Initially, for about ten minutes, ma'am.

13 Q Now, on the 28th, did you participate at all in any of  
14 the door to door searches on Eastbourne Street?

15 A The canvassing of the neighborhood, ma'am?

16 Q Yes.

17 A I don't believe so, no.

18 Q Well, were you present during the canvassing, the  
19 discussion with Mr. McKernan?

20 A I recognize the name, but I'm not sure if I was talking  
21 with the man.

22 Q In any of the conversations that you were a participant  
23 in, were any of the individuals on the block asked if they had  
24 beepers, cellular phones, portable phones, words to that  
25 effect?

1 A Not that I'm aware, of ma'am.

2 Q In the ten-minute conversation that you had with Shay,  
3 Sr., did the subject of his lawsuit with the Dedham Service  
4 Center come up?

5 A Not in the initial conversation, ma'am.

6 Q Who was with you during the initial conversation, sir?

7 A Detective Fogerty, Detective O'Malley, and Captain  
8 McNally.

9 Q And did you do a report?

10 A The initial conversation?

11 Q Yes.

12 A No, ma'am.

13 Q Did either of them do a report?

14 A There was a report done, but not of the initial  
15 conversation that I'm aware of.

16 Q And what was your purpose in interviewing Shay, Sr. in  
17 the initial conversation?

18 A To give us some direction which way we would proceed,  
19 ma'am.

20 Q Was anyone taking notes?

21 A I'm not sure, ma'am.

22 Q But in any event, sir, you were not taking notes?

23 A That's correct.

24 Q And so all that you got from that initial conversation  
25 was information concerning the box that he had seen; is that

1 right?

2 A Yes, ma'am.

3 Q He showed you the clump of grass outside?

4 A That's correct.

5 Q You did a visual inspection of his car?

6 A I did not do a visual inspection.

7 Q Did you direct anyone to visual inspection of his car?

8 A Members of the Boston Police bomb squad did, yes.

9 Q Did you direct someone as to -- did you have a discussion  
10 with him about the magnets in his hand?

11 A No, ma'am.

12 Q So the first time Shay, Sr. talked about his civil  
13 lawsuit was on Tuesday the 29th; is that right?

14 A No, ma'am.

15 Q When was the first time he talked of his lawsuit to you?

16 A As I recall, it was later on that evening, ma'am.

17 Q Later on that evening, the same evening the day the bomb  
18 we want off; is that right?

19 A That's correct.

20 Q And you were questioning him, were you not about, who  
21 could possibly have planted a bomb under his car, who would  
22 have want to do that; is that right?

23 A Yes, ma'am.

24 Q Was his lawyer present at the time?

25 A His lawyer was later present, yes, he was there at some

1 point.

2 Q And did you tell Mr. Shay to call his lawyer?

3 A No, ma'am.

4 Q Was his lawyer present during the discussion of the civil  
5 lawsuit?

6 A Yes, ma'am.

7 Q And what, if anything, did he say about the civil  
8 lawsuit?

9 A That he thought it was a viable suit and that they would  
10 prevail.

11 Q I'm sorry, Shay, Sr., what if anything did Shay, Sr.  
12 describe to you about the civil lawsuit?

13 A He described his condition, loss of hearing; he said he  
14 had some kind of stress syndrome from it. And there was one  
15 other condition he described, I'm not sure what that was.

16 Q Well did he say to you someone had thrown a quarter stick  
17 in a drum?

18 A He described it also being M80, there was I remember  
19 there was a difference -- and I'm want sure the two are the  
20 same, ma'am.

21 Q We will did he say, M80 at one point, 1/4 stick of  
22 dynamite at another point?

23 A Not that I recall, ma'am.

24 Q But, in any event, you weren't taking notes on this  
25 occasion either?

1 A No, ma'am.

2 Q Who was taking notes?

3 A I have no idea, ma'am.

4 Q Who else was present during this interview?

5 A Detective O'Malley, Fogerty, and later on there was a  
6 more indepth interview done with him with some other  
7 detectives.

8 Q But that was the indepth interview of the notes of which  
9 I showed you on Friday; is that right?

10 A That was an 8-page report that they had consolidated from  
11 their notes, yes, ma'am.

12 Q But that report didn't reflect your conversation with  
13 Shay, Sr.?

14 A No, I don't think so, no.

15 Q We're not going to find a report anywhere that reflects  
16 your conversation with Shay, Sr. on October 28th, or on  
17 October 29th; is that right?

18 A I don't think so, no, ma'am.

19 Q Apart from telling, talking about an explosion in a  
20 barrel next to him, did he mention the names of the  
21 individuals involved, that he was suing?

22 A Yes.

23 Q What were their names, sir?

24 A Mr. Berry and Mr. Giamarco.

25 Q And did you at any point visit Mr. Berry and

1 Mr. Giamarco?

2 A Yes, ma'am.

3 Q Did you investigate them?

4 A Yes.

5 Q Did you ever search the places that they lived at?

6 A As I recall, no, there was no search warrant done to  
7 their houses.

8 Q Did Mr. Shay tell you that these people he believed had  
9 followed him at one point?

10 A He believed that he was being followed by someone. And  
11 we subsequently followed up on that information.

12 Q I beg your pardon?

13 A He believed that he was being followed by an individual.  
14 And we followed up on the information he gave us.

15 Q Did he say that, I thought these people were following  
16 me, Berry, Giamarco, someone from the Dedham Service Center?

17 A He said it was a person not known to him that was  
18 following him.

19 Q And did he talk to someone dumping garbage, old fenders,  
20 et cetera, into his driveway?

21 A Yes, ma'am.

22 Q And did he indicate that he thought that was connected  
23 with Berry and Giamarco?

24 A Yes, ma'am.

25 Q Did he tell you that he thought they had sick minds,

1 these people, the people at Dedham Service Center?

2 A I don't recall that, him describing them sick minds, no.

3 Q Did he ever say to you that sometimes he would seem see  
4 them on Washington Street in Dedham and he would be  
5 intimidated by them or words to that effect?

6 A No, I don't recall that, ma'am.

7 Q Well, at some point, you went back and you interviewed  
8 Mr. Shay for the purposes of determining what his whereabouts  
9 had been on October 26th and 27th, and 28th; is that right?

10 A Yes.

11 Q And that was an interview that you did alone?

12 A I don't think so.

13 Q I beg your pardon?

14 A I don't believe so.

15 Q Who else was present, if you know?

16 A There was probably O'Malley and Fogerty, one of the two,  
17 usually always together.

18 Q And your goal was to find out exactly where the man had  
19 been from roughly Friday the 25th through the time of the  
20 bombing?

21 A Yes, ma'am.

22 Q So that you could go to these places and investigate  
23 them?

24 A Yes, ma'am.

25 Q And in fact you made a list of all the places he had been

1 from Friday to Monday from the time the bomb went off; is that  
2 right?

3 A I believe there was a list made, yes.

4 Q And that was a list that you compiled?

5 A I'm not sure if I compiled it, but I am aware of a list  
6 ma'am.

7 Q Did you go to each and every one of the places on the  
8 list?

9 A I personally?

10 Q Yes.

11 A No.

12 Q Burger King on Boylston Street? Did you go to the Burger  
13 King on Boylston Street in the Fenway area?

14 A That was a list of places he we want to on Sunday, if you  
15 are referring to a report?

16 Q Yes.

17 A That's a report that reflects the drive that we did with  
18 him.

19 Q You actually got in the car and you went around from  
20 place to place with him?

21 A We videotaped the car with, what we thought was a replica  
22 of the device, attached to the car. And had him drive in  
23 several different points using the same time frame, and we had  
24 him simulate, to the best of his ability, everything he did in  
25 each place.

1 Q For the purposes of seeing if the box would fall off?

2 A Whether the box would fall off, there would be time for  
3 someone to attach it, we were look being at all different  
4 angles, ma'am.

5 Q You drove around with him to all places that had he had  
6 been to on Saturday -- Sunday, rather October 27; is that  
7 right?

8 A That Sunday, yes, ma'am.

9 Q Did you investigate where he had been the Saturday  
10 before?

11 A As I recall, I'm not sure if he had that vehicle at the  
12 time. I know there was, there was an exchange of vehicles,  
13 where his vehicle was in the possession of some other  
14 individuals.

15 Q Would it refresh recollection if I told you the vehicle  
16 exchange had taken place on Friday, October 25th?

17 A That's sounds reasonable, I know that it was a vehicle  
18 exchange which day it was, I'm not sure, ma'am.

19 Q It's fair to say that your memory you then investigated  
20 all places he had been after that vehicle exchange took place?

21 A Yes, ma'am.

22 Q Did you consider whether or not the Rotmans, the people  
23 who he exchanged the vehicles, were the target the bomb?

24 A Yes, ma'am, that was considered.

25 Q Did you interview the Rotmans?

1 A They were interviewed; I did not personally interview  
2 them.

3 Q And did you go to the club on Shawmut Avenue where the  
4 man had been on Saturday night?

5 A That was done. I did not personally do it.

6 Q You didn't personally, okay. Your personal job was  
7 simply going around to these places on Sunday; is that right?

8 A That was one of the things I did, yes.

9 Q And at each of the some ten or so -- eight locations,  
10 Mr. Shay went to, seven or eight locations that he went to,  
11 did you investigate, talk to people, talk to witnesses?

12 A Did we specifically talk to people at the Berger King?  
13 No, ma'am.

14 Q Did you talk to people at the Dunkin Donuts in Malden or  
15 the Caldor construction site?

16 A No ma'am.

17 Q Or did you speak to the customer that Mr. Shay had gone  
18 to see at 90 Avon Street in Malden?

19 A That person was spoken to, yes, ma'am.

20 Q And the people at the Chelsea Naval hospital?

21 A Yes, ma'am.

22 Q People at Castle Island?

23 A Castle Island is an area --

24 Q Pretty big?

25 A Pretty big. And trying to find an exact person who was

1 there on any given Sunday would be quite difficult.

2 Q By the way what was name of the customer that Mr. Shay  
3 went to see at 90 Avon Street?

4 A I don't remember the name. I could guess. I think the  
5 last name begins with an R.

6 Q Did you make a report concerning these interviews?

7 A There was a report done, yes.

8 Q Just one second, your Honor.

9 In addition, you went to Shay, Sr.'s house on  
10 November 11th, did you not?

11 A Possibly, ma'am, I'm not --

12 Q You went at some point to look at two Duracell battery  
13 packs that had been shown in photos taken on October 28th,  
14 1991; is that right?

15 A I remember that we, we were instructed to go back to the  
16 house at some point to look at that at the Duracell battery  
17 packs, yes.

18 Q At the point you were instructed to go back was some two  
19 or three weeks after the explosion; is that right?

20 A Yes.

21 Q So far as you knew, when you went back no one had  
22 bothered to take these battery packs on the 28th?

23 A That's correct.

24 Q Did you physically gather up the battery packs on  
25 October -- in November when you went back, did you actual take

1 them?

2 A I don't recall, ma'am.

3 Q By time you went back to Shay, Sr.'s house did you know  
4 whether or not a battery pack of some sort has been involved  
5 in the explosion?

6 A I think there was a reference, as I recall, there was a  
7 reference to the date that was stamped on the packaging that  
8 the bomb techs had narrowed down a date for the batteries.

9 Q And because this date was, the date of the battery packs  
10 that you saw at the Shay, Sr. residence was consistent with  
11 that date or inconsistent?

12 A I don't recall exactly why we were going to go back to  
13 that, and look at that. I would have to see the report to  
14 figure it out.

15 Q Well, I have your report dated 11/9/91. Page 2 and ask  
16 if there a refreshes your recollection of the circumstances  
17 under which you got the battery pack?

18 (Pause.)

19 A This second page where it talks about the battery packs  
20 is not a part of my report. I think what you have is two  
21 different, separate reports.

22 Q The battery pack comes from a different report?

23 A It appears that it does from looking at this.

24 Q Do you have that report?

25 A I have what you have here, ma'am.

1 Q Do you have in your files a report that is reflected,  
2 that reflects the visit to get the battery pack?

3 A I don't have any files, ma'am, on this particular report  
4 or any other reports.

5 Q You have no files on this case in your possession?

6 A All our files went to one central facility, the ATF  
7 facility.

8 Q So the ATF would have any files that you had?

9 A That's correct, ma'am.

10 Q So the page I showed you that says, battery packs at the  
11 Shay house, doesn't refresh your recollection as to the  
12 circumstances of your taking the battery packs, does it?

13 A I'm aware of the battery packs being taken, or the  
14 information about them, the report there says they were  
15 taken. We, we did go back at the instructions of the bomb  
16 techs to retrieve those battery packs.

17 Q My question was did you in fact retrieve them or just  
18 talk to him about them?

19 A The report says taken, so if the report says we took  
20 the --

21 Q Not the report says Thomas Shay says showed two battery  
22 packs pass, shown in photos taken on October 28th, is that --

23 A That's what we did. We got the expiration dates on the  
24 packs.

25 Q You didn't physically take the battery packs?

1 A No, ma'am.

2 Q You just got the expiration dates; is that right?

3 A Yes.

4 Q And you did no further investigation; you did no further  
5 searches of Shay, Sr.'s home; is that right?

6 A Not that I'm aware, no, ma'am.

7 Q Now, apart from this interview with Shay, Sr., you just  
8 described -- the videotaping of where he was on October 27th,  
9 did you have any other interviews with Shay, Sr.?

10 A That I participated in, ma'am?

11 Q Yes.

12 A Not that I'm aware of, no. I think there was other  
13 conversation with him, but that were done by other  
14 individuals, yes.

15 Q But none that you participated in?

16 A Not that I'm aware of.

17 Q You did interview Mary Flanagan, did you not?

18 A Yes.

19 Q And that you would have been sometime on November 13th;  
20 is that right?

21 A That sounds reasonable, yes.

22 Q Was Mr. Shay, Sr. present during the course of that  
23 interview?

24 A I don't think so, I think we tried to. If I'm not  
25 mistaken we tried to separate her from Shay, Sr. in order to

1 interview her.

2 Q By the way, on the October 28th the very first day, hours  
3 after the bombing, was Ms. Flanagan home?

4 A She eventually came home, yes, ma'am.

5 Q Did you interview her on this occasion, also?

6 A No, ma'am.

7 Q The searches that you conducted on October 28th, of 39  
8 Eastbourne and the garages and areas around it, that was done  
9 with the approval of the Mr. Shay, Sr.'s lawyer?

10 A No, it was done with Mrs. Flanagan's approval, the  
11 property owner and the lawyer was also present.

12 Q And Mr. Shay, Sr. conferred with his lawyers in your  
13 presence?

14 A Yes.

15 Q And so it's fair to say then the lawyer had arrived after  
16 the, after -- strike that-- before the searches took place; is  
17 that right?

18 A Yes.

19 Q Did you have occasion to talk to the lawyer again in any  
20 of the subsequent days?

21 A I believe he was present the next day.

22 Q He was present on Tuesday, October 29th, wasn't he?

23 A Yes, ma'am.

24 Q And on Tuesday October 29th, I believe you testified that  
25 you were, that you got word that Shay, Jr. had arrived at

1 39 Eastbourne Street; is that right? At some point learned  
2 that Shay, Jr. had arrived on the scene?

3 A These are separate and distinct times. The Shay, Jr.  
4 thing was around 2 something in the morning; Mr. Pransky was  
5 later on in the daytime part of the 29th.

6 Q What was the occasion on which you saw Mr. Pransky on  
7 Tuesday?

8 A He was at the household.

9 Q And that's the occasion when you were interviewing  
10 Mr. Shay, Sr. again?

11 A Yes, he was, yes.

12 Q Was there ever an occasion when you interviewed Mr. Shay  
13 Sr. when his lawyer wasn't present?

14 A Yes.

15 Q And when was that?

16 A As far as I know, before the 28th the lawyer came later  
17 on the day. So there was hours before Mr. Pransky was  
18 present.

19 Q But at least Mr. Pransky got there before the searches  
20 took place on the 28th?

21 A The consent search, yes.

22 Q And Mr. Pransky was there the next day; is that right?

23 A Yes.

24 Q And at some point, though, you got word later on in the  
25 early morning hours of I guess it would be the 30th, 29th,

1 30th, that Shay, Jr. had arrived at Eastbourne Street; is that  
2 right?

3 A No, you're getting your dates confused.

4 Q It is Tuesday, the early morning hours of Tuesday, the  
5 29th, you got word that Shay, Jr. had arrived at Eastbourne  
6 Street, right?

7 Or we could do it the opposite direction, early  
8 morning hours of the 28th into the 29th, approximately 2 a.m?

9 A Yes, that's correct.

10 Q And you were beeped to go back to homicide; is that  
11 correct?

12 A That's correct.

13 Q And did you have prior to going back to homicide, on the  
14 29th, the early morning hours, 2:30 a.m., did you have  
15 occasion to speak to Alan Pransky at all before you talked to  
16 Shay, Jr. that first time?

17 A Yes, we did, we spoke to Mr. Pransky on the 28th.

18 Q Did you talk to Mr. Pransky about Mr. Shay, Jr.?

19 A No, I don't recall that.

20 Q At any point, did you talk to Mr. Pransky on the subject  
21 of Shay, Jr.?

22 A Yes.

23 Q And that would have been before you interviewed Mr. Shay  
24 on the 31st; isn't that right?

25 A Yes.

1 Q Getting back now to the 29th, you simply waited for Shay,  
2 Jr. in the homicide office; is that right?

3 A No.

4 Q What did you do?

5 A When we arrived he was already there, coming into the  
6 building.

7 Q Okay. And you sat down and talked to him; is that right?

8 A Yes.

9 Q And there were no Miranda warnings read?

10 A No, ma'am.

11 Q And he showed you an EMT badge; is that right?

12 A Yes.

13 Q Did you ever investigate whether or not Shay, Jr. was in  
14 fact an EMT?

15 A I think it was looked into, yes, ma'am.

16 Q And you discovered that he was not?

17 A That's correct.

18 Q And you -- Shay, Jr. told you that he had tried to call  
19 his father; is that right?

20 A That's correct, ma'am.

21 Q And that when he called he knew that you guys "had the  
22 phone tapped"; is that right?

23 A I believe those were his words, yes, ma'am.

24 Q But in fact the phone wasn't tapped, right?

25 A No, ma'am.

1 Q And he indicated, he appeared agitated; isn't that right?

2 A Yes.

3 Q And he said that he wanted to talk to his father; isn't  
4 that right?

5 A Yes.

6 Q He seemed to be concerned about his father's well-being,  
7 agitated, upset a normal reaction, wouldn't you say?

8 A I would say so.

9 Q And he thought that the only way he could talk to his  
10 father is through you; is that right?

11 A No, ma'am.

12 Q Well, did he say that you somehow were the conduit to his  
13 father or words to that effect?

14 MR. LIBBY: Objection, your Honor.

15 THE COURT: What's the objection?

16 MR. LIBBY: Relevance as to line of questioning.

17 THE COURT: May I see counsel for a moment.

18 [Conference at the bench, as follows:

19 THE COURT: Why are we reviewing this excruciating  
20 detail of all of this stuff?

21 MS. GERTNER: It won't be very much more excruciating  
22 detail. I do want to get out his state of mind, and there  
23 were -- the Government is making a case on the basis of  
24 certain innuendos and raised eyebrows here and there. It  
25 seems to me I can do the same. He thought that the only way

1 he could talk to his father was talking to homicide.

2 THE COURT: All of the stuff they did at Shay, Sr.'s  
3 house and what they didn't do?

4 MS. GERTNER: That just goes to the inadequacy of the  
5 investigation, your Honor. That just goes to the minutia of  
6 the homicide investigation. They don't take the batteries  
7 when they know -- I mean, it just goes to the inadequacy. I'm  
8 off that subject now.

9 THE COURT: I understand that. I was wondering for  
10 the last half hour.

11 Questions about Shay, Jr. and going to homicide, what  
12 is the purpose of that?

13 MS. GERTNER: There are a number of purposes. One,  
14 again, to bring out the numbers of times that Shay, Jr. lies  
15 about his family and his status, gratuitous lies, and the  
16 other, to get out his state of mind. He was obviously not all  
17 there, is the only way to describe it.

18 THE COURT: Why isn't it admissible?

19 MR. LIBBY: It's clearly his admissions. Statements  
20 are admissible. But we're going over the very same matters we  
21 have gone over before during suppression, with respect to the  
22 alleged involuntariness of the statements.

23 THE COURT: No, but the purpose of it is not to show  
24 that the statements were involuntary. I understand you are  
25 not planning to argue that to the jury.

1 MS. GERTNER: Actually, that's not true, your Honor.  
2 We'll be arguing we're entitled to raise again the  
3 voluntariness of the statements to the jury.

4 THE COURT: Is that the purpose of this?

5 MS. GERTNER: It's a two-fold purpose, one to show  
6 he's simply not all there, and the other to show he's simply  
7 not there and these statements are not reliable. In other  
8 words, the same measure by which the Court determines  
9 voluntariness: Does he know what he's doing and is it to be  
10 relied on, is exactly what the jury is going to have to  
11 decide.

12 MR. LIBBY: I don't know what "all there" means.  
13 Either we have an insanity defense in this case or we don't.  
14 It seems to me counsel wants to have her cake and eat it too.  
15 She wants to get in this notion that somehow her client is  
16 suffering from some psychological deficit. She doesn't want  
17 to plead it as a defense and raise it in the normal course,  
18 but we can have expert testimony. She simply wants to walk  
19 that motion across the jury. It's perfectly improper to do  
20 that.

21 THE COURT: It is improper?

22 MR. LIBBY: I believe so. In terms of getting it in,  
23 it's irrelevant without --

24 THE COURT: Certainly, the defendant's intent is a  
25 question in this case, is it not?

1 MR. LIBBY: Defendants?

2 THE COURT: Knowledge and intent is an issue that the  
3 Government has to prove.

4 MR. LIBBY: That's right. That's right. His state  
5 of mind as of the charged offenses with respect to the charged  
6 offenses, what counsel wants to do is to call into question  
7 some kind of curb side psychiatric diagnosis of her client as  
8 being "not all there." Quite frankly, the government doesn't  
9 know what that means. There is a perfectly proper way of  
10 getting this in front of the jury, if the Court didn't  
11 bifurcate the trial. As a result, what we have here, what we  
12 see here, is a de facto insanity defense. We're going to be  
13 to dealing with that throughout, the Government objects.  
14 That's not proper. It's not proper to call into question,  
15 however indirectly, in layman's terms, the state of mind of  
16 the client as he makes these admissions on some de facto  
17 insanity defense.

18 THE COURT: Are you suggesting that the defendant  
19 cannot put before the jury the whole series of statements that  
20 he made, some of which may or may not be deemed to be  
21 contradictory?

22 MR. LIBBY: Your Honor, it is the Government's  
23 position that -- and we will be offering only those portions  
24 of his admissions which we believe are relevant to the case.

25 THE COURT: The ones in which he says he did it?

1           MR. LIBBY: We say that he comes right out and says  
2 that.

3           THE COURT: Are you saying she's not entitled to put  
4 in, if he says in one sentence, I am guilty, I'm guilty of  
5 buying this stuff, and in another sentence he says I didn't  
6 know what the stuff was, you don't think she can put that in?

7           MR. LIBBY: Oh, certainly, she can put that in. The  
8 question to this witness, if I'm correct, was something along  
9 the lines of agitated, now we're going to get into: You  
10 didn't think he was all there? You'll be getting questions --

11           THE COURT: She's not going to be able to put  
12 questions to this witness about what he thought and what his  
13 psychiatric interpretation was.

14           MS. GERTNER: Your Honor, there's case law, we  
15 anticipated this. There is case law that enables us to  
16 challenge the voluntariness of his actions.

17           THE COURT: But you're not allowed to put into  
18 evidence this witness's perception of what was voluntary or  
19 not.

20           MS. GERTNER: No, but this witness's perception is  
21 different from Bridgeforth, which is the perception of  
22 demeanor, that would include whether he thinks he was agitated  
23 or slow, as we got it from Bridgeforth.

24           Let me also say two things: Before we begin our  
25 case, we had prepared a memorandum on the subject of

1 psychiatric testimony on the statements. In other words,  
2 where someone is suffering from a preexisting mental  
3 condition, as this young may be, preexisting, there can be  
4 testimony about that condition. This is affirmative testimony  
5 later on. For example, if a someone testifies to seeing X, Y,  
6 and Z, a doctor can testify that this person's vision is, you  
7 know, so impossible. Here we talk about preexisting mental  
8 condition, adequacy, documented by existing records, which  
9 reflect on his desire for attention, his inability to even to  
10 give a fair medical history to be trusted -- in the earlier  
11 records, now not. And we will offer that testimony. I don't  
12 believe the mental condition is out of the case entirely.  
13 We'll offer that. And the doctor will prepare a report which  
14 we'll give, when we were away from the insanity defense, a  
15 different report that will reflect the testimony, and we'll  
16 get that to the Government as soon as possible. That's an  
17 affirmative defense.

18 On the issue of these statements, it simply goes to  
19 voluntariness, reliability. And all my questions will go to  
20 his perception of Shay, Jr.'s, demeanor, which are the  
21 questions that they have been asking as well. They want the  
22 jury to believe that the statements were a product of a  
23 rational, intelligent man. I'm trying to show the  
24 circumstances.

25 THE COURT: How much more do you have?

1 MS. GERTNER: Perhaps half an hour.

2 THE COURT: A half hour more?

3 MR. LIBBY: Your Honor, please, I expect we'll have  
4 this with every witness. These witnesses are perfectly  
5 entitled to say and how he appeared when he said it, his  
6 demeanor, what they saw and what they heard. Then we're going  
7 to get into curb side diagnosis indirectly or on the periphery  
8 as to everyone of these witnesses.

9 THE COURT: We're not.

10 MR. LIBBY: If the Court please.

11 THE COURT: I will permit her to inquire of this  
12 witness's perception about how he looked and appeared and so  
13 on, but we're not going to inquire of these witnesses whether  
14 they thought that he was all there or not.

15 MS. GERTNER: No. But there is a point, his records,  
16 I simply want to inquire at some point that he was aware of  
17 his psychiatric background, social background. The Government  
18 has dabbled in that already.

19 THE COURT: You may ask about whether they got  
20 records. We're not going to get from this witness any kind of  
21 his perception of the man's psychological state.

22 MR. LIBBY: If your Honor please, I want to make sure  
23 I understand. If we get into this notion that we have this  
24 box of psychiatric records, that would call into question, I  
25 don't want to hear any questions, witness after witness: What

1 was your understanding of what the records said?

2 THE COURT: No.

3 MR. LIBBY: That's an insanity defense, and we don't  
4 have that in the case.

5 THE COURT: The issue of voluntariness depends not  
6 only on Shay's, Jr.'s state of mind but what the Government  
7 understood his state of mind to have been.

8 THE COURT: Well, you may inquire as to whether they  
9 learned of his background and hospital, boys' schools, and so  
10 on. You may inquire as to the witness's perception as to  
11 demeanor and appearance. You may not inquire of the witness's  
12 perception of mental state. He cannot give us his conclusion  
13 whether he was all there or not.

14 ...end of conference at the bench.]

15 Q Did Mr. Shay, Jr. indicate that he believed the only way  
16 he was going to get to talk his father was only by talking to  
17 you?

18 A Which time are we speaking of?

19 Q I beg your pardon?

20 A Which time are we speaking of??

21 Q The first time you met with him on the 29th, early  
22 morning hours?

23 A No, ma'am, he did not indicate that.

24 Q At some point did he say to you the only way he believed  
25 he was going to get to talk to his father was by talking to

1 you?

2 A No, I don't recall him saying that, ma'am.

3 Q He indicated, did he not, when he was there on the 29th  
4 that his primary reason for being there was to speak to his  
5 father?

6 A No, I don't recall him saying that ma'am.

7 Q Do you recall testifying, sir, at a previous hearing in  
8 this case, do you recall testifying in this court on a  
9 previous hearing?

10 A Yes.

11 Q And do you recall being asked by -- your report doesn't  
12 say that he wanted to speak to the police. It says: He wants  
13 to speak with his father; is that right?

14 Answer: That's right, his preliminary reason for  
15 being there is he wanted to speak to his father; is that  
16 right?

17 A Could I see that, please?

18 Q The bottom.

19 (Pause.)

20 A Yes.

21 Q So his main reason for talking to you on this occasion  
22 was that he thought he wanted to talk to his father?

23 A Yes.

24 Q And he told you, did he not, he told you a little bit  
25 about his background, right?

1 A Yes.

2 Q He told you his parents were divorced, but still friendly  
3 and go out dinner?

4 A Yes.

5 Q Did you investigate whether that was true?

6 A Yes.

7 Q And you found it to be untrue; isn't that right?

8 A That's correct.

9 Q And he told you that his mother sells condos; is that  
10 right?

11 A Sells condos?

12 Q Yes. Or had some property to sell?

13 A That she had property and she sold that property to buy a  
14 condo.

15 Q And that she somehow in the buying of selling of condos  
16 or words to that effect?

17 A No, I don't recall him saying that she was into real  
18 estate.

19 Q And he told you that he once went to South Carolina to  
20 buy fire crackers when he was younger; is that right?

21 A He said that he would go there on family vacations.  
22 They'd go down to the Carolinas on a yearly kind of situation,  
23 seasonal, rather.

24 Q Did you check whether or not that was true with either  
25 his mother or his father?

1 A As far as I know, that's not true.

2 Q And did he tell you that he was working for his father at  
3 the time that the -- he was working for his father in the auto  
4 body business?

5 A At present?

6 Q No?

7 A On the 28th?

8 Q No. Way back in '87 when the lawsuit, the events giving  
9 rise to the lawsuit took place?

10 A Yes.

11 Q And that wasn't true, either, was it?

12 A As far as I know that was true, ma'am.

13 Q That was working for his father?

14 A Yes.

15 Q Full-time, part-time occasionally?

16 A I'm not sure as to what capacity, what hours.

17 Q Now, sir, you also testified that he talked about playing  
18 with submarines, toy submarines, right?

19 A Yes.

20 Q And that he talked about remote control submarines; is  
21 that right?

22 A Yes.

23 Q Did you ask him about whether or not he played with any  
24 kind of toys?

25 A No.

1 Q Did he ask him when whether or not he had any remote  
2 controls devices?

3 A No.

4 Q It's your testimony that he simply volunteered the  
5 subject of playing with remote toy submarines?

6 A It was in relation to the throwing of the fireworks at  
7 the submarine.

8 Q He said that he went, he was describing his childhood to  
9 you essentially; is that right, trying to describe his  
10 childhood to you; is that right?

11 A We were trying to get background information of the  
12 family.

13 Q And so talks about going to South Carolina and then he  
14 talks about blowing up submarines?

15 A Yes.

16 Q And he mentioned to you, he used the word "remote  
17 control," is that right, with respect to submarines?

18 A Yes.

19 Q Now, you did two reports of this October 29th  
20 conversation, did you not?

21 A That's correct.

22 Q And what's the time between report 1 and report 2?

23 A A matter of maybe an hour or less.

24 Q In one report you say, he would bring them back to  
25 Boston, that is to say, the fire crackers and his friends

1 would throw them in the water at a remotely controlled  
2 submarine that he owned, that was in one report. And in a  
3 second report you simply say he and his friends would throw  
4 them in the water at a submarine he owned and blow it up.

5 Which is correct, sir?

6 A The first report in terms of a remotely controlled  
7 submarine was. When I revised the report, the second report  
8 is a revised report. It had no significance to me so it was  
9 not there. It was a submarine, I didn't care whether it was  
10 remotely controlled or not just the idea of it being a  
11 submarine, that's why it is in with one report, not the  
12 other.

13 The second report is the fact, the report that I  
14 wrote after the initial report, the initial report has  
15 "remotely controlled." It had in significance to me, so I  
16 took it out of the report after discussing it with Detective  
17 O'Malley, and that's why it's not in that second report.

18 Q So in the first report, you wrote, you mention "remotely  
19 controlled submarine," right, in the first report?

20 A That's correct.

21 Q But in the second report, you take out the order word  
22 "remote," right?

23 A That's correct.

24 Q And you take it out because someone to whom you spoke  
25 said it had no significance?

1 A No.

2 Q Did you talk --

3 A We disagreed as to that particular word being spoken. It  
4 was my memory that it had been said. And it was Detective  
5 O'Malley's memory that it hadn't been said. It was not  
6 something I was going to fight about over a report. I put  
7 just the words submarine. There was no significance to the  
8 word.

9 Q Okay. So there was a division among the officers who had  
10 interviewed Shay, Jr. as to whether the word remote was  
11 spoken; is that fair to say?

12 A There were two of us. We both heard something  
13 different. We both heard submarine. One of us heard remotely  
14 controlled, the other one of us didn't so we just took it out.

15 Q In your second report, you took it out; is that right?

16 A That's correct, ma'am.

17 Q Now, in your second report, though, you testified on  
18 direct examination that Shay, Jr. had talked about, while he  
19 was at his father's lawyer's law office he was looking for a  
20 through Fortune magazine, and asked Attorney Pransky whether  
21 his father would be able to afford an item in Fortune  
22 magazine; do you remember that testimony?

23 A Yes, ma'am.

24 Q And Shay, Jr. asked the lawyer whether or not he could  
25 afford a particular item, and the lawyer said, absolutely; is

1 that right?

2 A Yes, ma'am.

3 Q And Shay, Jr. at that point leaned back and smiled at the  
4 officers; is that right?

5 A Yes.

6 Q I think you said he came back in his chair and put his  
7 hands behind his head?

8 A Yes.

9 Q That paragraph, that description of the Attorney Pransky  
10 Shay, Jr. conversation was not in your first report; is that  
11 right?

12 A That is also correct.

13 Q Now, is this something that the other officer heard but  
14 you did not?

15 A No, we both heard it. I just didn't pay any-- there was  
16 no significance to it, in the beginning, to me. In the  
17 beginning, when I spoke to O'Malley he said, well, you should  
18 put this in because it is part of the other thing he said.

19 Q Part of what other thing he said?

20 A It was part of a conversation that I had that I left  
21 out.

22 Q You were doing an interview with the son of the man whom  
23 you believed to have been the target of the explosion; is that  
24 right?

25 A Yes.

1 Q This was an important interview, was it not?

2 A Not at the time, it was late in the morning. We were  
3 tired, wanted to get home. I didn't take notes at the time.  
4 We just wanted to talk to him, and be on the way.

5 Q Was anybody else taking notes at the time?

6 A There was only two of us, ma'am.

7 Q Did the other officer take notes at the time?

8 A No, ma'am.

9 Q How long did this whole interview take?

10 A Less than a half hour.

11 Q How much after, how long after the interview did you  
12 write up these impressions?

13 A When I got back in in the morning.

14 Q So you wrote these two versions up in the morning after  
15 you came in; is that right?

16 A The initial version was written, I showed it to Detective  
17 O'Malley. And he said, Oh, you got for got to do this.

18 Q Okay. The initial version then, lacked the word -- had  
19 had the word "remote" but lacked any discussion of Attorney  
20 Pransky and this discussion of the lawsuit; is that right?

21 A Yes.

22 Q And the second version you took out the word "remote,"  
23 but you talked about Attorney Pransky; is that right?

24 A Yes.

25 Q And the description of the conversation with Attorney

1 Pransky, did you remember that or was that something that  
2 Detective O'Malley reminded you of.

3 A No, I remembered it.

4 Q Was there a third version of this report, of 10/29, was  
5 there a third version?

6 A No, ma'am.

7 Q Are there underlying notes concerning this 10/29 report?

8 A No, ma'am.

9 Q So essentially these two versions are the only ones that  
10 are out there?

11 A Those are reports -- the first report got destroyed. And  
12 the revised report was going to be the report that was going  
13 to be submitted.

14 Q On 10/29 did you think that Shay, Jr. looked, in addition  
15 to looking agitated and upset, would you say he looked  
16 confused or nervous like he was on drugs?

17 A No, ma'am.

18 Q Did you believe he looked a little retarded or seemed  
19 slow?

20 MR. LIBBY: Objection, your Honor.

21 THE COURT: Well, I think it's going a bit over the  
22 line; the objection is sustained.

23 Q Were you present on October 31st during the second  
24 interview of Shay, Jr.?

25 A Yes, ma'am.

1 Q And you had been in touch with Attorney Pransky in the  
2 hours before 10/31, had you not? In the hours before you  
3 interviewed Shay, Jr.; is that right?

4 A Not that I recall, ma'am, no.

5 Q Well, you knew, you had words sometime on that Thursday  
6 that Shay, Jr. was going to be giving a press conference at  
7 the Greyhound Bus Terminal?

8 A Did I know that, ma'am?

9 Q Yes.

10 A It was the Trailways Bus Terminal.

11 Q Trailways?

12 A And I was aware of it, yes.

13 Q And between the time that you -- and you determined that  
14 you would try to interview him afterwards; isn't that right?

15 A That was the determined, yes.

16 Q And at the time did you -- between the time that you  
17 found out about the press conference and the time that you  
18 interviewed him, did you have a conversation with Attorney  
19 Pransky?

20 A Not that I'm aware of, no, I don't remember talking to  
21 him, no.

22 Q Did you have a conversation with Shay, Sr.?

23 MR. LIBBY: Your Honor, the Government would object  
24 at this point. The question is going beyond the scope of this  
25 witness. We'll have another witness with respect to the

1 31st.

2 THE COURT: That's true, he did not talk about the  
3 31st at all on direct.

4 MS. GERTNER: I know, your Honor, I thought it was  
5 easier to address issues --

6 THE COURT: Let me explain to the jury, when counsel  
7 called the witness to the stand, and inquires about a series  
8 of subjects then on cross-examination, counsel may only  
9 inquire about those subjects. So that if Mr. Libby had asked  
10 about topics 1 through 10, Miss Gertner may ask only about 1  
11 through 10 on cross-examination. If she asks only about 1  
12 through 5 on cross-examination, then next round Mr. Libby is  
13 limit to one through five and can't again be ask about 6  
14 through 10. We're always trying to narrow the scope, not  
15 expand it. And he's correct that this witness did not testify  
16 about anything having to do with October 31. Therefore, she's  
17 now going beyond the scope of the preceding examination and  
18 therefore the objection is sustained.

19 Q In your second conversation with Shay, Sr., in addition  
20 to talking about having been followed, and in addition to  
21 talking about the dumping incident, it is your testimony that  
22 he talked to you about the fact that he knew his son was gay;  
23 is that right?

24 A Yes.

25 Q And he said this in a disapproving way; is that right?

1 A Yes.

2 Q And is there any report that reflects that, sir?

3 A I am not aware, ma'am.

4 Q All right.

5 And you also said that his son showed up unexpectedly  
6 at a club, bar he was in and Shay, Sr. took his son to a race  
7 track; is that right?

8 A Yes.

9 Q And is this in any report that you ever written?

10 A I know it is in one of the reports. It is not something  
11 I wrote.

12 Q Not something that you wrote?

13 A Yes.

14 Q And what report is that, if you can tell us?

15 A I couldn't tell you offhand. I would have to go look  
16 through the file, ma'am.

17 Q And was that piece of information, this piece of  
18 information about the race track is that something you got  
19 recently or around the time of the investigation of the  
20 explosion?

21 A The day of the explosion, ma'am?

22 Q Is it something you got recently or something you had the  
23 28th or the 29th?

24 A During the week, during the initial week during the  
25 investigation it was discovered, yes. Exactly what date it

1 was discovered, I'm not sure. The information was in fact  
2 gleaned from the father.

3 Q Did you get any notes or anything from Shay, Sr. having  
4 to do with this race track visit, from Shay, Sr. concerning  
5 this race track visit?

6 A Did I personally? No, ma'am.

7 Q Yes. But it is your testimony that somewhere in the  
8 reports generated around the time of this incident or the week  
9 afterwards, we would say find a reference to this outing to a  
10 race track; is that right?

11 A Yes, ma'am.

12 Q Thank you.

13 MS. GERTNER: No further questions.

14 THE COURT: Any redirect?

15 MR. LIBBY: Yes, your Honor, just a few.

16 Redirect Examination by their Mr. Libby

17 Q You mentioned here previously this morning about these  
18 two reports that you generated on Tuesday morning on the  
19 29th.

20 A Yes, sir.

21 Q What time did you leave the homicide unit that morning of  
22 the 29th?

23 A About 3 a.m.

24 Q What time did you get back to work?

25 A About 8:30.

1 Q When did you do, when did you generate the first report?

2 A Within an hour of arrival.

3 Q And you typed it yourself?

4 A Yes.

5 Q And after you did that what did you do with it?

6 A I showed it to my partner when he arrived.

7 Q Is that common practice for you, Detective, to do that?

8 A Yes.

9 Q And why?

10 A Well, when you are not taking notes some situations,  
11 many times you see different things or have not listened to  
12 different things, and in a case like it is easier for both  
13 guys look at it and decide whether or not that's everything  
14 that we both heard.

15 Q And how long did you discuss with the Detective O'Malley  
16 that morning about the conversation previously in the early  
17 morning hours?

18 A Just a couple of minutes.

19 Q And he brought to your attention the conversation that  
20 Shay, Jr. had restated about Attorney Pransky's law office  
21 where he had opened a Fortune magazine?

22 A Yes.

23 Q Did you independently of Detective O'Malley recall that?

24 A As soon as he said it to me, it came instantly in mind.

25 Q You went back and typed up another version?

1 A Yes.

2 Q Now you mentioned something about destroying notes  
3 destroying earlier versions of the reports?

4 A When I typed the second report, the first report did not  
5 mean anything because it was actually the same report.

6 Q Is it your common practice to do that, sir?

7 A If in fact it is the same report it is not a separate  
8 independent report, it's the same report, just expanded. I  
9 had an intention to intent to destroy that initial report that  
10 was always just a continuation of the same report.

11 Q Do you oftentimes draft or have versions under draft of  
12 your reports?

13 A Yes.

14 Q Is it your common practice to destroy earlier versions?

15 A Yes.

16 Q Now, with respect to counsel's questioning when Shay, Jr.  
17 first visited with you the early morning hours Tuesday the  
18 29th, the question was whether you had read him a Miranda  
19 warnings?

20 A Yes, sir.

21 Q Do you recall that question?

22 Do you have a means, typically, when you wish to give  
23 someone Miranda warnings, do you have a means by which you do  
24 that?

25 A Yes.

1 Q And how do you do, that, sir?

2 A I read from a Miranda card.

3 Q Where is your Miranda cards?

4 A It is in my wallet.

5 Q What does it consist of? How does it appear?

6 A It is a laminated plastic card that says at the top,  
7 Boston Police Department, and next line on it is Miranda  
8 Warning.

9 Q When you visited with Shay, Jr., the early morning hours,  
10 you didn't read him any Miranda rights?

11 A No, sir.

12 Q Why not?

13 A He was a suspect and he wasn't in custody.

14 MR. LIBBY: I have nothing further, your Honor.

15 THE COURT: Do you all understand what the lawyers  
16 are talking about when they make reference to Miranda?

17 Anything else, Ms. Gertner?

18 MS. GERTNER: No, your Honor.

19 THE COURT: Thank you, Mr. Thomas, you are excused.

20 MR. LIBBY: Your Honor, the United States calls  
21 Detective Harris.

22 THE COURT: Let's stretch.

23 (Pause.)

24 MR. LIBBY: Your Honor, if counsel could see you at  
25 the side bar, for just a moment.