

1           Witness, sworn.

2           [Conference at the bench, as follows:

3           MR. LIBBY: We agree that we did a poor job  
4 explaining what the Miranda was for the jury. It absolutely  
5 skipped our minds. It is clear they watch enough cop shows.

6           MS. GERTNER: Very gratifying.

7           MR. LIBBY: The sole issue for your Honor, we intend  
8 to play that Trailways tape, about 40, 45 minutes here, it  
9 will be a perfect segment into the break. However, the last  
10 ten minutes, the Government has no intention of playing; that  
11 is, after Shay, Jr., walks away from the assembled media and  
12 walks over to the phone, and then Detective Harris came up to  
13 him and they talked and they wander back out down Atlantic  
14 Avenue, we say has no relevance or bearing to the case. He  
15 makes no audible statements.

16           THE COURT: Do you want it?

17           MS. GERTNER: Yes.

18           MR. LIBBY: I don't know what -- if she wants it.

19           THE COURT: I have no idea whether it is relevant or  
20 not.

21           MS. GERTNER: Your Honor, it's just part of -- it's  
22 almost like the 6 res gestae here because it is what he did  
23 afterwards, how he appeared, his mumblings and wanderings, and  
24 all that is part.

25           THE COURT: Why don't we explain to the jury the

1 Government's perfectly content with this, and you offer the  
2 rest?

3 MS. GERTNER: Yes.

4 MR. LIBBY: If the Court's ruling here is that she's  
5 entitled to have all that, I did not, frankly, your Honor, see  
6 how it is relevant. We have been through a suppression  
7 hearing. The Court found there is not involuntariness  
8 associated with this.

9 MS. GERTNER: Let me just, 18 U.S.C. 3501(a) says,  
10 "The judge shall permit the jury to hear relevant evidence on  
11 the issue of voluntariness and shall instruct the jury to give  
12 such weight to the confession as the jury feels it deserves  
13 under all the circumstances."

14 We found case law which suggests -- we're not going  
15 to do this, as I agree, we did at the motion to suppress, for  
16 strategic reasons. What it the does suggest is that we have  
17 the opportunity to present to the jury some of the same  
18 evidence.

19 THE COURT: What's the --

20 MS. GERTNER: 3501(a).

21 MS. GERTNER: We have it available to us to introduce  
22 the same evidence as we did at the suppression hearing.

23 MR. LIBBY: The reference?

24 MS. GERTNER: 18 U.S.C.

25 Perhaps you've heard of it.

1 MR. LIBBY: I have wax in my ears.

2 THE COURT: All right.

3 MR. LIBBY: 35 what?

4 MS. GERTNER: 01(a).

5 THE COURT: It's superseded.

6 MS. GERTNER: Is that right?

7 THE COURT: I'm kidding.

8 MR. LIBBY: I am familiar with this section.

9 That wasn't fair, your Honor.

10 MR. LIBBY: I'm familiar with this section, and I  
11 think it has to do with: They sit down: I did it, and I want  
12 to confess to law enforcement. That's the purpose of that  
13 statute. That's not what we have.

14 THE COURT: Well, it is, in any event, something that  
15 I have already dealt with in the earlier hearing. I think  
16 we'll just hear the whole thing.

17 MR. LIBBY: If that's the Court's ruling, I prefer  
18 there not be any announcement.

19 THE COURT: Fine.

20 MR. KELLY: Shall we be able to do it now or what?

21 Can we have two minutes to set up the hardware?

22 THE COURT: Is there objection to its admissibility?

23 MS. GERTNER: No.

24 THE COURT: Do we need this witness at all?

25 MR. LIBBY: To authenticate it. We can dispense with

1 that.

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

3 THE COURT: We're about to watch a little  
4 television. And for that purpose we need a little time to set  
5 up the monitors.

6 MR. KELLY: Three minutes to set it up.

7 Dennis P. Harris, sworn

8 Direct Examination by Mr. Libby

9 Q Good morning, sir.

10 A Good morning.

11 Q Would you state your name, spelling your last name for  
12 the reporter.

13 A Good morning, your Honor, ladies and gentlemen of the  
14 jury.

15 My name is Dennis P. Harris, H A R R I S.

16 Q And what do you do, sir, for a living?

17 A I'm a detective with the Boston Police Department.

18 Q How long are you been with the Boston Police Department?

19 A Ten years, sir.

20 Q And at some point, are you, where are you specially  
21 assigned right now?

22 A I'm currently assigned to the homicide unit.

23 Q How long have you been on the homicide detective?

24 A Approximately a year and a half.

25 Q Do you recall, sir, when you first joined the homicide

1 unit, what date that was?

2 A Yes, I do, sir.

3 Q What dates was that?

4 A October 31st, 1991.

5 Q You particularly remember your first assignment that  
6 day?

7 A Yes, I do, sir.

8 Q Who was your partner?

9 A Sergeant Timothy Murray, at the time.

10 Q All right.

11 What was your assignment that day, detective?

12 A My initial assignment that day upon appearing at the  
13 homicide unit, was to report to the conference room, where I  
14 met with other members of the homicide unit. There was a  
15 brief conference there. During that conference I was assigned  
16 a task of taking a video camcorder to the Trailways Bus  
17 Station to film a press conference that had been called.

18 Q And do you recall the information available to you as to  
19 what particular press conference you were to videotape?

20 A Yes, an individual by the name of Thomas Shay had called  
21 a press conference that was going to be held at the Trailways  
22 Bus Terminal.

23 Q Do you recall about what time that evening that was to  
24 take place in.

25 A During the conference in the conference room in the

1 homicide unit, we were informed that the bus was due to arrive  
2 at 7:30 that evening.

3 Q All right. And did you actually use the video camcorder  
4 they're evening, sir?

5 A No, I did not.

6 Q What did you do?

7 A I swapped assignments because I was not familiar with the  
8 use of a cam recorder at the time; in turn, Detective John  
9 McCarthy eventually filmed the press conference.

10 Q So, what did you do as a result of that, sir?

11 A I responded to the terminal, along with my partner  
12 Sergeant Timothy Murray, and I maintained a rather discrete  
13 position within the terminal until the completion of the  
14 conference.

15 Q How were you dressed? How was Sergeant Murray dressed?

16 A We were in plain clothes. It was raining that night. I  
17 was wearing a long white raincoat. My partner, Sergeant  
18 Murray, was wearing a long three-quarter length blue raincoat.

19 Q Did you have an opportunity to see Shay, Jr., appear at  
20 that time on that evening?

21 A Yes, I did, sir.

22 Q Do you recall how he was dressed?

23 A Yes, I do.

24 Q And how was he dressed.

25 A He was wearing a blue jacket and a baseball cap.

1 Q And do you see Shay, Jr., in the courtroom today?

2 A Yes, I do, sir.

3 Q Would you point him out, please, for the record.

4 A The individual sitting at counsel table, wearing a white  
5 shirt, flowered tie, short hair.

6 MR. LIBBY: May of the Court indicate that the  
7 witness identified --

8 MS. GERTNER: Stipulated, your Honor.

9 Sorry I can't see.

10 MR. LIBBY: -- has correctly pointed out the  
11 defendant?

12 THE COURT: Right.

13 Q Now, did you stay at the Trailways station during the  
14 press conference?

15 A Yes, I did, sir.

16 Q About how long did it take, if you can recall?

17 A About a half hour to 45 minutes.

18 Q And have you reviewed a video tape, a Boston Police  
19 videotape of that press conference, sir?

20 A Yes, I have.

21 Q Does that video tape fairly and accurately depict the  
22 conference as it unfolded that evening?

23 A Yes, sir, it does, sir.

24 MR. LIBBY: Your Honor, at this point the Government  
25 would offer Exhibits 28 in evidence.

1 THE COURT: I understand it is admitted without  
2 objection, and will be so marked, and we will now go to  
3 watching it.

4 [Government's Exhibit 28 entered in evidence.]

5 MR. KELLY: With the Court's permission.

6 THE COURT: Let me know if the screen reflects. Is  
7 it better if it were further back?

8 [Whereupon, Government Exhibit No. 28, a video tape,  
9 was played to the jury.]

10 [Interruption.]

11 MR. LIBBY: Your Honor, at this point there's about  
12 another ten minutes that we discussed. If I can have  
13 Detective Harris --

14 THE COURT: You said the whole thing was 40 minutes.  
15 We'll take the recess now.

16 Members of the jury, I think you will have to climb  
17 over the bridge here.

18 [Whereupon, the jury was excused.]

19 THE COURT: The Court is in recess.

20 [Recess.]

21 THE COURT: Please be seated.

22 Mr. Kelly, I'm sorry, I didn't intend to dislodge  
23 you. I miscounted the number of chairs.

24 MR. KELLY: That's quite all right, your Honor.

25 THE COURT: You may proceed.

1 MR. LIBBY: If I may, your Honor, may the court  
2 technician, Mr. Harris, explain the next ten-minute or so  
3 inaudible tape what's happening.

4 THE COURT: Yes.

5 Q Detective, if you would, please, sir, explain what we see  
6 on the screen to the jury.

7 A Yes, this is the completion, the termination of the press  
8 conference. And Mr. Shay, Jr., walked over --

9 THE COURT: Hold it. All the jurors can't see when  
10 you're standing like that. Can you see Mr. Schembri, when  
11 he's there?

12 MR. LIBBY: If we can go from the monitor.

13 A (Continuing) In this particular still, this is where the  
14 press conference had terminated. And Mr. Thomas Shay started  
15 walking over to area where the lockers were contained in the  
16 terminal. At this point myself, dressed in the white  
17 raincoat, and my partner, Sergeant Murray, approached  
18 Mr. Thomas Shay. At that time Sergeant Murray introduced  
19 himself as such, and he introduced me as Detective Dennis  
20 Harris, and announced our office that we were from the  
21 homicide unit, and that we would like to speak to Mr. Shay.

22 Now, this is Sergeant Murray speaking to Thomas  
23 Shay. At that is point Thomas Shay responded: What is this  
24 all about? What, are you arresting me?

25 At this point, I interject and say: No, no, relax.

1 All we'd like to do is speak to you. You've just given them,  
2 meaning the press, a half an hour. Can't you give us ten  
3 minutes?

4 MR. LIBBY: Could we roll the tape at this point.

5 Q What's happening here, Detective Harris?

6 A Just before we started to move, Mr. Shay agreed to speak  
7 to us, and he said: Where would you like to talk? And I told  
8 him at that point that we had a car outside and we could speak  
9 there. He also asked if his friend could come along, to which  
10 I responded sure.

11 Q Who did you understand that to be?

12 A I know now that his friend is Mr. Bowdoin.

13 Q Do you know how he's dressed?

14 A Yes, he's dressed in an athletic jacket that's marked  
15 Arlington Catholic, I believe.

16 Q Okay. Let's please run the tape.

17 (Tape played.)

18 Q And what's happening here, Detective?

19 A At this point he asked, again: Are you sure you're not  
20 arresting me? And I tell him: No.

21 And once again I state: Listen, you gave the press a  
22 half an hour, can't you give us ten minutes?

23 Q Was there any discussion about the order of walking out  
24 of the Trailways?

25 A Yes. Just before we started to move again, now, in this

1 still, Mr. Shay stated that if you're not arresting me, and  
2 he's referring to Sergeant Murray, he said: Well, you go  
3 first. I was already in the lead; Sergeant Murray was kind of  
4 side by side by Mr. Shay. And Mr. Shay indicated: Well, if  
5 you're not arresting me, you go first. And he kind of made a  
6 gesture for Sergeant Murray to go in front of him.

7 Q Please run the tape.

8 (Tape played.)

9 Q If we could stop the tape here, please.

10 Where are we here, Mr. Harris?

11 A We're at the homicide office, which is located at  
12 273 D Street, South Boston.

13 Q Why don't we finish the tape, please, John.

14 (Tape played.)

15 Q Detective, if you could resume your seat, please, and we  
16 could unhook the television.

17 (Witness resumed the stand.)

18 THE COURT: You may proceed.

19 MR. LIBBY: Thank you, your Honor.

20 Q Detective, what -- will you take us, please, from where  
21 the tape has left off and you're on your way to the homicide  
22 unit. Again, what time in the evening was that on Thursday,  
23 the 31st?

24 A On arriving -- excuse me.

25 THE COURT: Just a minute, I'll turn it down.

1 A Upon arriving at our office, it was approximately, I'd  
2 say, 9:20, 9:15 in the evening of October 31st, 1991. The  
3 tape ended as we are entering the double doors at street level  
4 of the homicide office. Myself, Sergeant Murray, Thomas Shay,  
5 and my friend Mr. Bowdoin proceeded to the second floor of  
6 that building where my office was located. That's where the  
7 four of us proceeded to is my office.

8 Q And how long did you stay in your office, sir?

9 A About ten minutes, sir.

10 Q And then what happened?

11 A One of the investigators involved in this particular  
12 incident came to my office and asked to speak to both  
13 Mr. Bowdoin and Mr. Shay.

14 Q Did that conversation take place in your office?

15 A No, it did not, sir.

16 Q Do you know if both the friend and Mr. Shay, Jr., left  
17 together?

18 A They did not leave together. They left separately, sir.

19 Q Did you see Mr. Shay, Jr. again that evening?

20 A Yes, I did.

21 Q Now, did you take part in the interview which followed  
22 with Shay, Jr.?

23 A No, I did not.

24 Q But you saw him again later in the evening?

25 A Yes, I did, sir.

1 Q How much longer after the time you left your office did  
2 you see him again?

3 A It was approximately hour and a half to two hours later.

4 Q Would you describe to the Court and jury, please, how it  
5 was that you came to see him again, what you did and what your  
6 role was there?

7 A Yes. Detective Miller Thomas and Detective William  
8 Fogerty asked myself and Sergeant Murray to transport  
9 Mr. Shay to the identification section of the Boston Police  
10 Department, which is located on Warren Ave. on the South End  
11 of Boston.

12 Q What was your understanding of why you were to do that?

13 A He was being booked, arrested.

14 Q Do you know the purpose or the underlying charge of the  
15 arrest?

16 MS. GERTNER: Objection.

17 MR. LIBBY: I'll move on.

18 I'll withdraw the question.

19 MS. GERTNER: Actually, if we could be heard at the  
20 side bar, your Honor, just very quickly.

21 THE COURT: Well, why don't we have a question. Do  
22 you want to talk about the question?

23 MR. LIBBY: Perhaps if I could talk with counsel  
24 here.

25 [Pause.]

1 Q Was the arrest for any charge relating to the explosion  
2 which took place in Roslindale three days before, sir?

3 A No, it was not.

4 Q You and Detective Sergeant Murray took Shay, Jr., the  
5 three of you went to the ID section?

6 A That's correct, sir.

7 Q Where is that located?

8 A On Warren Avenue in the South End.

9 Q How long did it take you to get there?

10 A It was roughly three-to-five minute in a ride from my  
11 office.

12 Q How long did you stay there?

13 A We were there about 10 minutes, 15 minutes.

14 Q What did you there?

15 A Mr. Thomas Shay was booked and processed, fingerprinted,  
16 photographed.

17 Q And while you were there, did you have any conversation  
18 with Sergeant Murray in front of Shay, Jr.?

19 A Yes, I did.

20 Q Would you describe that to the jury, please.

21 A Yes. In my presence, in front of Mr. Thomas Shay,  
22 Sergeant Murray called me to the door of the particular  
23 fingerprinting room. And Sergeant Murray suggested to me that  
24 I play along. At that point Sergeant Murray made a statement  
25 that: Listen to this, his father called and left a message.

1 And that message, and that message stated that to tell him,  
2 meaning Thomas, Jr., that I still love him.

3 Q Did Shay, Jr. have a response to that?

4 A Yes, he did.

5 Q What did he say?

6 A First, he responded: He said that, he thinks that I had  
7 something to do with this.

8 Q Okay. And was there any further comment from Shay, Jr.  
9 at that time, anything he said?

10 A No, sir.

11 Q What did he do after that?

12 A Pardon me?

13 Q What did you and Sergeant Murray do thereafter?

14 A We transported Mr. Shay, Jr. back to the homicide unit.

15 Q And where specifically in the homicide unit did you last  
16 see Shay, Jr.?

17 A At that, upon arriving at the homicide unit, Mr. Shay was  
18 turned back over to Detective Miller Thomas and Detective  
19 William Fogerty.

20 Q At that point on, did you have any role in this case that  
21 involved Shay, Jr.?

22 A No, I did not.

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

24 THE COURT: Ms. Gertner.

25

Cross-examination by Ms. Gertner

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Q Officer Harris, when Officer Murray -- Lieutenant Murray, rather, talked in your presence, told Tommy that his father still loved him?

A That's correct.

Q In fact, you had received no such call from Tommy's father, did you?

A I personally, no, ma'am.

Q As far as you know, did Lieutenant Murray receive such a call from Tommy's father?

A I do not know that he did not receive any such call.

Q So it was a trick you were playing on Tommy to see what his reaction would be?

A That's correct.

Q And his reaction was that: He said, he said that? He thinks that I had something to do with it, or words to that effect; is that right?

A That's correct, ma'am.

Q And then he began to cry; is that right?

A That's correct.

Q Back at the Greyhound Bus Terminal, you also told Tommy that the car -- you invited him to come with you to your car outside, right?

A That's correct.

Q And as you were walking there, the media, it's a little

1 difficult to see on the video tape, but the media kept  
2 saying: Is he being arrested? Is he being arrested?

3 A Yes. Once he left the terminals, the cameras came back  
4 on.

5 Q They were asking you: Is he being arrested? Is he being  
6 arrested?

7 A That's correct.

8 Q And what did you say?

9 A I didn't make any comment at all, ma'am.

10 Q And when you -- you had told Tommy originally that you  
11 were to get into -- that you wanted to talk to him in your  
12 car, right?

13 A That's correct.

14 Q But when you got to the car, in fact, you said to him  
15 let's go to homicide?

16 A Prior to getting into the car, yes, I did say that.

17 Q In fact the plan from the beginning had been to get Tom  
18 Shay, Jr. to the homicide, your Honor?

19 A Correct.

20 MR. LIBBY: Objection, your Honor.

21 THE COURT: What is the objection?

22 MR. LIBBY: Relevance.

23 THE COURT: I'll allow it.

24 A That's correct.

25 Q Were you present during the entire press conference?

1 A In the terminal area, yes.

2 Q You and Lieutenant Murray were both present?

3 A That's correct.

4 Q Were there any other police officers present in the  
5 terminal?

6 A Yes, there was, ma'am.

7 Q And who else was there?

8 A Detective John McCarthy was in the terminal.

9 Q And was he dressed as you were dressed?

10 A Yes, he was dressed in plainclothes, ma'am.

11 Q But he was on the outside of the group that was  
12 interviewing Tommy?

13 A He was, right -- he was on the inside. He was holding a  
14 camcorder filming the press conference.

15 Q The camcorder didn't have any of the call letters of any  
16 TV station on it, did it?

17 A I don't believe it did, ma'am.

18 Q Did it reflect in any way that it was a police camcorder  
19 from the police?

20 A No, it did not.

21 Q And when you got outside with Tommy, where was your car  
22 relative to the Trailways station?

23 A It was parked on the opposite side of Atlantic Avenue.

24 Q And were there any police cars around?

25 A I don't recall that there were.

1 Q Any cars with -- you had no idea where the other officers  
2 were?

3 A No, I didn't at the time, ma'am.

4 Q But you had backup, did you not?

5 A There were other units in the area, yes.

6 Q When you went over to talk to Mr. Shay at the conclusion  
7 of the press conference, did you tell him you were a police  
8 officer?

9 A Sergeant Murray made the introductions, ma'am.

10 MS. GERTNER: I have no further questions.

11 MR. LIBBY: I have nothing, your Honor.

12 Thank you.

13 THE COURT: Thank you, Mr. Harris, you are excused.

14 Who is next?

15 MR. LIBBY: Your Honor, the United States calls  
16 Detective William Fogerty.

17 THE COURT: I think we should stretch.

18 (Pause.)

19 William Fogerty, sworn

20 Direct examination by Mr. Libby

21 Q Good morning, sir.

22 State your name, and spell your last name for the  
23 reporter.

24 A My name is William Fogerty. My last name is spelled  
25 F O G E R T Y.