

1 Frederick M. Burke, sworn

2 Direct examination by Mr. Kelly

3 Q Good morning.

4 Would you state your name and spell your last name  
5 for us, please.

6 A Frederick Michael Burke, B U R K E.

7 Q Where do you reside at the present time, Mr. Burke?

8 A Seattle, Washington.

9 Q Where were you residing in the months of February and  
10 March of 1992?

11 A In San Francisco, California.

12 Q How old a person are you, Mr. Burke?

13 A I'm currently 28.

14 Q And would you tell us how you're employed, please?

15 A I'm a freelance journalist and comic book writer.

16 Q And I want to direct your attention to the date of  
17 February 21st, 1992, where were you on that particular date,  
18 sir?

19 A In the neighborhood around my home in San Francisco.

20 Q And is there a particular street in San Francisco?

21 A Yes, Castro street, C A S T R O.

22 Q Did you meet someone for the first time on that date?

23 A Yes, sir, I did.

24 Q And what name did this person provide at the time you  
25 first met him?

1 A James Keough.

2 Q Would you describe for the jury the circumstances of your  
3 first meeting this individual?

4 A It was a rainy day. I was on my way to meet a friend for  
5 pizza. I was walking down Castro Street and got to a section  
6 of the street where panhandlers often sit, and there was a  
7 young man with a large poster board sign with black lettering  
8 on it, about 20 lines worth of lettering. And the sign said  
9 that his boyfriend had been killed by gay bashers in Boston,  
10 that he had gone on television and had talked about it, and in  
11 fact, led to him being ostracized by his family, that he had  
12 been kicked out of the military for being gay, and that he was  
13 in San Francisco to start over, and could he please get the  
14 help of the community, and that he needed any help he could  
15 get, be it money, work, phone numbers for friends or hugs.

16 Q Do you see the person in the courtroom here today you saw  
17 that day on the street corner in San Francisco?

18 A Yes, sir.

19 Q Would you point him out for us, please.

20 A (Witness complies.)

21 Q What is he wearing?

22 A A blue tie and white shirt.

23 MR. KELLY: Your Honor, may the record indicate that  
24 the witness has identified the defendant.

25 THE COURT: Yes.

1 Q Mr. Burke, what if any acquaintanceship or relationship  
2 did you have with this person during the 30-day period after  
3 you first met him?

4 A I probably saw him between 7 and 10 times. We were  
5 friends only. I tried to help him in any way that I could  
6 because I felt he was a deeply sad person.

7 Q Did he ever reside at your home?

8 A No, he did not. I did store some belongings there for  
9 him, however.

10 Q Now, you mentioned that he provided the name James  
11 Keough, what if any means of identification did he show you  
12 that reflected this same name?

13 A A military ID.

14 Q And what was the name on the ID. As you recall it?

15 A James Keough.

16 Q How, if at all, did this person purport to be employed,  
17 when you first met him?

18 A He didn't actually purport to be employed, although he  
19 did have business cards that said James Keough Massage  
20 Services. He was trying to start some kind of a business.

21 Q And did he provide you with one of these business cards?

22 A Yes.

23 Q Now, at some point, Mr. Burke, did you learn that this  
24 person was really not James Keough?

25 A Yes, I did.

1 Q And how and when did that occur, sir?

2 A That occurred several weeks after our meeting, and I  
3 was -- I spent a lot of time trying to get James to open up to  
4 me and be more honest with me, because there was just a sense  
5 that something was off, and I felt he needed a confidant.  
6 There was something in his past, child abuse, which is what I  
7 figured, that he was upset about. So, I dabble in astrology  
8 and I have a computer program that's an astrology computer  
9 program, and I said: Hey, I want to do a horoscope on you, an  
10 astrology chart. I said: Do you want to do it? And he said,  
11 Sure.

12 Well, I said, I'll need your real name. I was just  
13 curious as to what he would say. He said, Tom Shay. And I  
14 said, I'll need your date of birth, because his military ID  
15 said he was 23, and he gave me his real date of birth, so that  
16 I could actually do the astrology, and that's when I first  
17 knew he was 20-years old.

18 Q After learning that the name was Thomas Shay and not  
19 James Keough, what if any conversation did you have with  
20 Mr. Shay about why he had been using a fictitious name?

21 A I asked him why. He said that there had been a bomb  
22 planted under his father's car and that people in Boston  
23 thought he might have had something to do with it.

24 Q Now, during the course of the time that you knew this  
25 person, what if any statements did he make to you about the

1 relationship between himself and his father?

2 A Several different times he spoke of his father,  
3 oftentimes at my instigation. I asked a lot of questions.  
4 Sometimes he had a good relationship with his father, you  
5 know, everything was fine. He was sorry that he had to leave  
6 home. Other times he had a terrible relationship with his  
7 father, an abusive relationship with his father.

8 Q When you say "sometimes good," "sometimes bad," are you  
9 saying that sometimes when he was conversing, he would  
10 describe him in a certain way?

11 A Yes.

12 Q Or are you telling us that the relationship --

13 A No, sometimes in conversation he would describe it as  
14 being an okay father/son relationship , and other times I got  
15 a completely different story.

16 Q What if any statements or remarks did he make to you,  
17 sir, about the question of abuse or negligent, things of that  
18 matter?

19 A At one point I do recall him being very saddened in  
20 speaking about his relationship with his father as being  
21 abusive and neglectful.

22 Q At any time during your conversations did Mr. Shay  
23 mention any other members of his family?

24 A He did mention his mother.

25 Q And in what respect?

1 A He mentioned his mother, in terms of abuse, that she too  
2 had been abused. He also mentioned his brother-in-law when I  
3 asked him how he got the name James Keough. He said that it  
4 was his brother-in-law's ID. And at another point, I believe,  
5 I don't recall when exactly, he gave me his sister's phone  
6 number.

7 Q Did there come a time, Mr. Burke, when Mr. Shay was  
8 arrested in San Francisco?

9 A Yes.

10 Q And do you recall when that was?

11 A I think it would be around the 22nd or 23rd of March,  
12 after about a month.

13 Q And following this arrest, sir, what if any contact did  
14 you have with Mr. Shay before he physically left the San  
15 Francisco area?

16 A Tommy would call me at my home.

17 Q And how many times did you speak with him by telephone,  
18 as best you can recall, before he left the San Francisco area?

19 A From San Francisco, about six or seven times.

20 Q So, he's in custody in San Francisco, you speak six to  
21 seven times?

22 A Right.

23 Q Did you have any face to face contact with him during  
24 that period of time?

25 A No.

1 Q Exclusively by telephone?

2 A Yes.

3 Q Prior to today, when is the last time that you saw  
4 Mr. Shay, personally?

5 A Probably a couple of days prior to his arrest.

6 Q Now, during the course of these telephone conversations,  
7 after he had been placed under arrest in San Francisco, what  
8 if anything did Mr. Shay ask you to do for him?

9 A At one time he asked me if I would get in touch with all  
10 of the local media outlets and present his story to them in  
11 person.

12 Q Did you do that?

13 A I told him that I couldn't do that, that that was just  
14 too time-consuming, and I didn't want to get that involved.  
15 He was so -- you're my only friend. I've got to get my side  
16 of the story out. I agreed to take verbatim dictation from  
17 him over the phone and FAX that to all the media outlets.

18 Q So he provided you some information over the telephone?

19 A Correct.

20 Q You reduced it to some typewritten form?

21 A Correct.

22 Q And disseminated it in some fashion as you described?

23 A Yes.

24 Q In connection with this, did Mr. Shay make any mention to  
25 you of a man named Al Trenkler?

1 A Al Trenkler, yes.

2 Q Did you hear that name before?

3 A No, sir.

4 Q At some point, Mr. Burke, did you have conversation with  
5 Mr. Shay about this person, Al Trenkler?

6 A Yes, I did.

7 Q And when did that occur?

8 A In probably the next phone call.

9 Q And would you describe the conversation for us.

10 A Well, I was very concerned because I had felt up to that  
11 time that this was all fabrication.

12 Q What was all a fabrication?

13 A The story of the bombing, that it was just another story,  
14 and suddenly I was given an hour and a half's dictation full  
15 of horrendous events and names and specific details which led  
16 me to think, well, there is something here; this is a real  
17 problem.

18 Q Confine your answer, if you would, to your discussion  
19 about Al Trenkler, what if any discussion did you have with  
20 Mr. Shay about this person, Alfred Trenkler?

21 A So, I asked him about Al Trenkler because that was a part  
22 of this piece. And the thing I remember most pointedly was --  
23 several times I would bring up Al Trenkler, and the  
24 conversation would be changed. It was not something really  
25 that he wanted to discuss. And finally, I just outright

1 said: Do you think Al Trenkler had anything to do with the  
2 bombing.

3 Q How did he respond?

4 A He said I don't know, very sadly, very resolutely, very  
5 quietly.

6 Q What was his general demeanor during the course of this  
7 conversation about, Mr. Trenkler?

8 A We would just talk about other things. He seemed a  
9 little bit --

10 MS. GERTNER: Objection, your Honor.

11 THE COURT: Well, he can tell us -- you mean voice,  
12 rather than demeanor, because it was on the telephone, as I  
13 understand it.

14 MR. KELLY: Right.

15 Q Obviously, you're limited in being able to describe  
16 demeanor, since you can't see the voice, but are you able from  
17 the tone of voice or from the tempo he was speaking?

18 A Absolutely.

19 Q Describe what you recall of that while you were having  
20 this conversation about Mr. Trenkler?

21 A I got the impression that he was fearful of this Al  
22 Trenkler person.

23 Q And at one point, a few moments ago, sir, you said when  
24 you raised this, he tried to change the subject. Tell me  
25 about that, what do you mean?

1 A He just wouldn't address that, you know. I would be  
2 around about him in a way of bringing it up, and he would be  
3 around about it, and talk about something else.

4 Q He didn't want to talk about that?

5 A Not until I directly brought him to that subject, no.

6 Q During the course of any of your conversations with  
7 Mr. Shay, did he ever make mention to you about a lawsuit that  
8 was pending in Boston that involved his father?

9 A Yes, he did.

10 Q What did he tell you about that?

11 A That was also in the press release document. It was the  
12 first I ever heard and, actually, the last I ever heard of  
13 that, and it was about something having to do with a gas  
14 station and an explosion in a gas station and how his father  
15 was involved in it.

16 Q Now, you knew this person for the first two weeks as  
17 James, correct?

18 A Approximately two weeks, yes.

19 Q And then after this setting where you talked about  
20 astrology, you knew his name as Thomas or Tommy?

21 A He told me his name was Tom Shay. But then I heard him  
22 refer to himself as Thomas, and that seems -- that in my head  
23 would be Thomas Shay.

24 Q At any point during this approximately 30-day period  
25 prior to the time he was arrested, had James or Tommy,

1 whatever name he was using, had he ever mentioned to you any  
2 of the circumstances surrounding this bombing event in Boston  
3 prior to that arrest?

4 A Yes, one time.

5 Q Okay. And do you remember that specific conversation?

6 A That was after -- that was part of and after the  
7 astrology conversation, when I said: Well, why are you going  
8 under a fake name?

9 Q Did he get into a lot of detail at that time?

10 A No.

11 Q Had he ever mentioned this lawsuit prior to the time he  
12 was arrested?

13 A No.

14 Q Had he ever mentioned this person Trenkler prior to the  
15 time he was arrested?

16 A No.

17 Q Following the arrest, during the course of any of your  
18 conversations, what if any statements did Mr. Shay make to  
19 you, sir, about the bomb squad officers in Boston?

20 A In the course of telling me the press release, as well as  
21 a couple of other times, he expressed dismay at the death, the  
22 injury, but also seemed to want very much to say that it  
23 wasn't the bomb that did it, that they were careless, so as to  
24 distance the two events--

25 MS. GERTNER: Objection, your Honor. If we can just

1 have quotes, rather than --

2 THE COURT: The "so as" may go out.

3 Q I'm trying to focus on what you recall him saying the  
4 words you recall him saying, do you remember any specific  
5 statements in that regard, sir?

6 A Just what I took down verbatim that I typed out.

7 Q Did he mention anything about protective equipment,  
8 things of that nature?

9 A Yes, he did.

10 Q What did he say?

11 A He said that they were not wearing protective gear.

12 Q And any other statements in that regard?

13 A Only dismay that they weren't.

14 MR. KELLY: I have nothing further of this witness.

15 THE COURT: Ms. Gertner.

16 MS. GERTNER: Yes.

17 Cross-examination by Ms. Gertner

18 Q During the two-week period that you knew Mr. Shay as Jim,  
19 Jim Keough, he kept his personal effects at your home; is that  
20 right?

21 A After about a week he asked me if he could keep a duffle  
22 bag of his possessions at my home, instead of at the home of  
23 someone else, and I told him that would be fine.

24 Q How regularly did you see him during the period of time  
25 that he was James Keough to you?

1 A Every couple of days, except for a one-week period when  
2 he didn't come by, which kind of concerned me.

3 Q He would come by and would talk, right?

4 A Yes.

5 Q It's fair to say that Tom Shay talks a great deal, right?

6 MR. KELLY: Objection, your Honor.

7 THE COURT: What's the objection?

8 MR. KELLY: That's argument, I'm not sure there's a  
9 question there.

10 THE COURT: I'll allow that.

11 Q Tom Shay talks a great deal?

12 A Yes.

13 Q And he would come to your house to tell you about his  
14 life; is that right?

15 A Yes.

16 Q And he created a whole story about himself as James  
17 Keough, did he not?

18 MR. KELLY: Your Honor, I object to any statements by  
19 Mr. Shay to this witness as being hearsay.

20 MS. GERTNER: Your Honor, may we be heard at the side  
21 bar?

22 THE COURT: This is the same issue we've met before.  
23 I don't understand -- it seems to me that part of the reason  
24 you're offering it is, indeed, the hearsay reason.

25 MS. GERTNER: No, your Honor. Two things, one is the

1 issue of context, that the course of conduct, the jury should  
2 hear it all, the course of the relationship. The Government  
3 can't distill the facts it wants and we can't distill the  
4 comments that we want. In addition, we're offering it for a  
5 non-hearsay purpose, under Rule 600, whatever, as the Court  
6 identified the last time. Actually, it was 804(b) -- I'm  
7 sorry, it's 801(d)(1).

8 THE COURT: I don't think it comes in under that.

9 MS. GERTNER: Your Honor, may we be heard at side  
10 bar.

11 THE COURT: Yes.

12 [Conference at the bench, as follows:

13 MS. GERTNER: Two things, your Honor.

14 THE COURT: It's not being offered for the truth of  
15 what he said, right; it's being offered to show that he makes  
16 nutty statements, correct.

17 MR. KELLY: If you're talking about truthful  
18 statements or untruthful statements, you're talking about  
19 content, you're talking about them themselves. Once you offer  
20 it for the essence, the truth, the substance of the statement,  
21 you're right in the grips of the hearsay rule.

22 MS. GERTNER: Your Honor, that's exactly right --

23 THE COURT: Which one, 801(d)(1) or (2)?

24 MS. GERTNER: It's for the hearsay purpose. I'm  
25 looking at the rules with respect to impeachment which I can

1 introduce instances. I can cross-examine with respect to  
2 instances -- actually, this witness -- instances of lying.  
3 Two things, every time I have put in, they have put in a  
4 statement, and there's been an objection about context, what  
5 is fill out the context, you've done that with respect to a  
6 single conversation. In part, what we're asking is, this is a  
7 month relationship, where we're asking them to do that with  
8 respect to a month as well.

9 In addition, it is not offered for the truth of the  
10 matter. It's exactly the purpose. I mean, you put your  
11 finger on it better than I have.

12 THE COURT: Too bad I can't remember any of that.

13 MS. GERTNER: It's offered for a non-hearsay purpose,  
14 which had to show, simply to show, he had said different  
15 things at different times. You're not saying that any one of  
16 these statements is true, you're not identifying anything as  
17 true. You'r simply saying: Here is what he said, A; and  
18 here's what he said, B. It's essential to the defense.

19 THE COURT: I understand it is essential to the  
20 defense. The question is: Can the defendant put it in, and  
21 on what basis can the defendant put it in?

22 MS. GERTNER: His objection concerns the Keough part  
23 of it.

24 MR. KELLY: My objection is to the question of some  
25 kind of story that had been created. I don't remember the

1 name Keough.

2 MS. GERTNER: That when he was under the identity of  
3 Keough he just went beyond -- to craft the whole story.

4 THE COURT: What else did he say about Keough or  
5 about his life as Keough, do you object, he doesn't  
6 characterize it as a story?

7 MR. KELLY: I think it's still hearsay, but I  
8 understand. I asked about a couple of discreet things,  
9 namely, statements about father, statements about mother,  
10 relationship with father, statements about Trenkler,  
11 relationship with Trenkler, I mean, and statements about  
12 lawsuit. I think those are the areas that I asked about  
13 specific statements.

14 MS. GERTNER: It was raised as a self-serving  
15 admission. It would be were any of this was offered for the  
16 truth. They are not. We could agree that the Court could  
17 give an instruction. We are not asking the Court to land on  
18 any one of these statements, simply to show that he makes  
19 these statements regularly. It's absolutely offered for a  
20 nonhearsay purpose.

21 I'm going to inquire in two respects. One is the  
22 kinds of things he said about James Keough because they've  
23 opened the door to the use of the alias for nefarious  
24 purposes, they're opening the door, and I'm going to inquire  
25 about what else he said about Keough and what the context of

1 that was.

2 THE COURT: Why is that not admissible?

3 MR. KELLY: I don't have a problem with that. I do  
4 have a problem with self-serving hearsay statements. They're  
5 offering it for untruth. I mean, they want to say he makes  
6 all of these statements, and then they later want to try to  
7 connect it up.

8 THE COURT: Let's go through it for a moment. You  
9 don't object to any additional statements --

10 MR. KELLY: Not about his life as Keough. She's  
11 asking about the use of the name Keough and any statements he  
12 made to this witness on Keough and identification.

13 MS. GERTNER: It wasn't the same issue with Mr. Plant  
14 on the stand. He talked about one part of the conversation, I  
15 could talk about another part of the conversation.

16 MR. KELLY: That is because the Government chose not  
17 to object. That doesn't mean the Government forever objects  
18 to clearly hearsay testimony.

19 THE COURT: I don't believe it's hearsay.

20 MR. KELLY: You're calling for the self serving  
21 statements of another witness.

22 MS. GERTNER: We're not going to argue any of them  
23 are true.

24 MR. KELLY: They're clearly going to argue that  
25 they're not true.

1 MS. GERTNER: We're going to argue that you cannot  
2 trust that anything Tom Shay says beyond a reasonable doubt.  
3 We're going to argue it at the closing. This is what this  
4 witness entitles us to do, and the whole issue of prior  
5 inconsistent statements is just that. You don't need to bring  
6 in prior inconsistent statements and therefore the prior  
7 statement is true and the testimony is false. It's an  
8 inconsistent remark, that's all.

9 MR. KELLY: They clearly want to offer the  
10 statements, these allegedly fanciful statements, for the  
11 substance of the matter asserted. They are definitely  
12 hearsay. They want to get them on the record.

13 THE COURT: The Government wants to show, X. They  
14 also want to show he said the opposite effects. I think  
15 that's what she's trying to do, simply to show when whenever  
16 he said X, he also said the opposite. Whenever he said Y, he  
17 also said the opposite of Y, not to prove the truth of the  
18 opposite of Y, but simply the fact that he said the opposite  
19 of Y.

20 MR. KELLY: Then they want to argue, as she said, at  
21 the end that all of those statements are untruthful and not to  
22 be believed.

23 MS. GERTNER: I'm going to argue that the whole  
24 course of conduct is insufficient and probative of reliability  
25 to land on any one of them. I'm not going to argue he said,

1 no, that's what I'm entitled to argue for prior inconsistent  
2 statements.

3 MR. KELLY: You're talking about the defendant who is  
4 the declarant. His statements are clearly self-serving  
5 because they suit this theory, being offered through another  
6 witness. I mean.

7 MS. GERTNER: Essentially, the Court is going to have  
8 to instruct that these are not offered for the truth, and if  
9 that's so --

10 THE COURT: That's very difficult to do. That's a  
11 hard concept to explain at any time, and particularly here,  
12 where we have all of these statements all over the lot and not  
13 offered for the truth.

14 MS. GERTNER: That's the point.

15 THE COURT: Only the ones the defendant offers.

16 MS. GERTNER: Essentially, the Government may well be  
17 right in that regard, which is the defendant's statements of  
18 the defendant that we offered --

19 THE COURT: Let me understand what questions you're  
20 going to ask, so I can make a ruling, either, A, find out what  
21 Mr. Kelly objects to and rule on the category.

22 MS. GERTNER: Let me say one thing. In the course,  
23 of their examination, this witness was permitted to testify  
24 about the demeanor between one statement and another, which  
25 one was true and --

1 THE COURT: In fact he was not. He was allowed to  
2 describe the tone of voice, the demeanor, you objected. It  
3 was sustained.

4 MS. GERTNER: They want the jury to believe to stuff  
5 that's already testified what's true and what's not. It seems  
6 to me this is critical.

7 THE COURT: Tell me what questions you want to ask.

8 MS. GERTNER: With respect to Keough, for example, he  
9 talked for two weeks, essentially, about his other identity as  
10 Keough. He talked to him about how he had been on the Oprah  
11 Winfrey show.

12 THE COURT: You're objecting to all of that?

13 MR. KELLY: I'm objecting to any of these fanciful  
14 statements that they purport to offer. I think it's offered  
15 to show, in this instance, the lack of truth of the  
16 statements. It's clearly hearsay. I don't have a problem  
17 with demeanor. She can certainly ask without getting into the  
18 substance of the statement.

19 THE COURT: Could the witness, for example, describe  
20 say, for example, you brought out he made statements about he  
21 couldn't walk without making two steps without him falling  
22 down. What's being asked here is being offered for much the  
23 same. It's not being offered to show that the truth or the  
24 lack of truth, but simply for the fact that he made all of  
25 these statements.

1 MR. KELLY: Just using the example she cites, the  
2 Oprah Winfrey show, this witness has no independent knowledge  
3 of whether this guy went on the Oprah Winfrey show or not.

4 MS. GERTNER: At the conclusion of the case, there  
5 will be instructions that, essentially, prior inconsistent  
6 statements are not offered for the truth.

7 THE COURT: This is not inconsistent. Mr. Kelly is  
8 right. The fact that he talks about Oprah Winfrey without  
9 evidence that is untrue, you can't make the argument.

10 MS. GERTNER: It isn't offered for the truth.

11 THE COURT: It's relevant that he said it, unless it  
12 is obviously not true, Oprah Winfrey, unless we have evidence  
13 that he was or wasn't on Oprah Winfrey.

14 MS. GERTNER: Same issue with respect to Plant. He  
15 talked about tanks and M 16s. Are we going to have to show --

16 THE COURT: That's so obvious. I mean, that one the  
17 jury can deduce of its own tanks and fighter planes. Oprah  
18 Winfrey is a different story. Lots of people are on Oprah  
19 Winfrey.

20 MS. GERTNER: My question is the stories he told  
21 about himself as James Keough, the extent to which they got  
22 into this identity and just spun a web. He's already gotten  
23 out part of that story. He's gotten out sitting with a sign,  
24 my lover had been killed by a gay basher. There's going to be  
25 no evidence as to whether or not that was true, either.

1 It's -- he's introducing that to show that Tom Shay made a  
2 false statement with respect to his name, his alias, and his  
3 reason for being there. I should be able to bring out the  
4 context of those statements about Keough. That's all I'm  
5 trying to get at.

6 THE COURT: You're not bringing out context. You're  
7 bringing out a good deal more than context here.

8 MS. GERTNER: I'm not sure what he's going to say  
9 beyond Oprah Winfrey. I can't imagine, if the Government  
10 simply raised -- if the Government's examination had been  
11 nothing more than: Did he use the name Keough? Did he tell  
12 you he was James Keough? Did he show you his military ID?  
13 and skip from that to -- it would be -- their examination is  
14 far broader than that. It seems to open all of these doors.  
15 What else did he tell about here?

16 MR. KELLY: I think I asked what statements did he  
17 make about the father.

18 THE COURT: There is no dispute that Keough was a  
19 name that's not his name. You can already argue that he's  
20 telling all sorts of stories about that.

21 MS. GERTNER: It's more than just -- his conduct is  
22 more than a rational human being using.

23 THE COURT: Oprah Winfrey, it seems to me, Mr. Kelly  
24 is right, for all we know, he was on Oprah Winfrey.

25 MS. GERTNER: For example, he'll talk about his

1 message service with thousands, he had thousands of  
2 customers. I mean, he simply puffed regularly about what he  
3 was doing.

4 THE COURT: With respect to Keough, the problem with  
5 that is he had assumed an identity that he was then trying to  
6 carry through with this witness until he came up with a  
7 correct identity, so he was making stuff up in order to  
8 buttress --

9 MS. GERTNER: They could bring that out. What I'm  
10 saying, they want to bring out the course of conduct. He got  
11 on to this, he spun off on this theory, when he talked about  
12 Thomas Shay he spun off on another direction. I'm not going  
13 to say any of this is true. This is all what he said at  
14 various times.

15 MR. KELLY: That's not true. The argument they will  
16 make is that it was all fiction, fantasy, untrue.

17 MS. GERTNER: It's absolutely untrue. The  
18 examination we've done --

19 THE COURT: All she wants to argue is they made  
20 statements in all directions, that he talked, that he talked  
21 incessantly; and, therefore, the jury should look at every  
22 statement in a particular way.

23 MR. KELLY: I don't have a problem with asking this  
24 witness in a general way whether or not he made a variety of  
25 different statements at different times, and some of which

1 this witness understood to be fanciful. I do object to the  
2 specific statements, the content of the specific statements, I  
3 think they clearly are hearsay.

4 MS. GERTNER: He believed Tom regularly fabricated,  
5 the generic question.

6 MR. KELLY: I don't have a problem with that.

7 THE COURT: Got it.

8 MS. GERTNER: I will go on, but I'll leave out James  
9 Keough.

10 THE COURT: Not a whole lot more. There's no need to  
11 go into this excruciating detail.

12 MS. GERTNER: This is a much more important witness  
13 than it may first appear. There are a couple of witnesses in  
14 this case that are people he actually talked to at great  
15 length and had a quasi-relationship with.

16 THE COURT: I will allow you to do a little bit of  
17 that but not to the extent of which you want.

18 MS. GERTNER: Okay.

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

20 Q For two weeks you knew the defendant as James Keough,  
21 right?

22 A Correct.

23 Q And just yes or no: He told you a lot of stories about  
24 his life and his background, right?

25 A Yes.

1 Q And it was your impression that he was fabricating,  
2 right?

3 A Yes.

4 Q And I believe you testified before that he talked  
5 incessantly, right?

6 A Yes.

7 Q And that's the reason why you candidly set him up with  
8 your astrology game; is that right?

9 A Yes.

10 Q You wanted to find out what the real truth was?

11 A Yes.

12 Q So you asked him what his real name was; is that right?

13 A Correct.

14 Q And what his real age was?

15 A Yes.

16 Q And he said Thomas Shay, age 20?

17 A Correct.

18 Q And at that point he told you that the ID was his  
19 brother-in-law's?

20 A The ID.

21 Q The ID that he had carried around was his  
22 brother-in-law's?

23 A Yes.

24 Q And that he left Boston because a bomb had been placed  
25 under his father's car?

- 1 A Yes.
- 2 Q And he said he was wanted for questioning over that?
- 3 A No.
- 4 Q What did he say?
- 5 A He said that people in Boston thought he might know  
6 something.
- 7 Q What was his demeanor when he said that?
- 8 A Just his regular, you know, here-I-am-telling-a-story  
9 demeanor.
- 10 Q And at that point he asked to call his family; is that  
11 right?
- 12 A Yes.
- 13 Q And you were present when he called his family, right?
- 14 A Yes.
- 15 Q Did he indicate his side of the conversation, or did he  
16 subsequently indicate to you who he had called?
- 17 A I got the impression he called his sister.
- 18 Q And you believed that the conversation that you overheard  
19 was about a family matter, right?
- 20 A Yes, I did.
- 21 Q You didn't believe that the conversation you were  
22 overhearing was about the bombing in any way, about any  
23 bombing, right?
- 24 A Correct.
- 25 Q Did you ever hear him talking to his father?

1 A No.

2 Q How many times did he call his family?

3 A Once.

4 Q Between the time that he admitted who he was and the time  
5 that he was arrested was what period of time?

6 A About two weeks.

7 Q And during this period of time -- strike that.

8 Before you found out what his name was, did he talk  
9 to you about his father when he was in the James Keough  
10 person?

11 A Yes.

12 Q What if anything did he say about his father?

13 A As James Keough, he told me that he missed his father,  
14 that he was a disappointment to his father because he was gay  
15 and that that was very sorrowful to him.

16 Q And in the Tom Shay person, what did he say about his  
17 father?

18 A At one point that his relationship with his father was  
19 fine and at another point his relationship with his father was  
20 abusive.

21 Q Did he indicate to you when the abuse had taken place?

22 A Yes, that it was repeated over a number of years.

23 Q Did he indicate to you what had happened right before he  
24 went to California; in other words, did he say to you that  
25 before he left to California that things were okay?

1 A Never really said. The impression I got was because he  
2 was in California, obviously, things weren't okay, so I never  
3 asked.

4 Q So he never said anything specifically about that?

5 A As James Keough he said that he was in California because  
6 he had been kicked out of the military and he needed to start  
7 his life over, that he had gone on television and doubted  
8 himself, et cetera.

9 MR. KELLY: Objection -- I withdraw it.

10 Q And then with respect to -- I believe you testified on  
11 direct examination that he had called his father on the phone?

12 A I'm sorry?

13 Q Did you testify on direct examination that he had called  
14 his father on the phone?

15 A No, I don't think so.

16 Q Did he ever talk about his relationship with his mother?

17 A A little bit, yes.

18 Q What did he say about that?

19 A That she had also been abused by his father.

20 Q And did he tell you what his relationship with her was?

21 A No, he did not.

22 Q Did you ask him -- you a sense, did you not, you believed  
23 there was abuse somewhere in the background, right?

24 A Yes.

25 Q It's fair to say you drew him out on this subject; is

1 that right?

2 A Yes.

3 Q And he told you what he had, or at least you believed he  
4 was telling you about the abuse he had suffered, right?

5 A Yes.

6 Q Did you question him about other aspects of his family  
7 relationship?

8 A I did ask him about how he felt about his father.

9 Q And that's when he would say sometimes good, sometimes  
10 bad?

11 A Correct. That's when sometimes he would say it was good  
12 and sometimes he would say it was bad.

13 Q In fact, you found that with him a great deal; isn't that  
14 right?

15 A Yes.

16 Q Sometimes he would say one thing and sometimes another?

17 A Yes.

18 Q Sometimes in the same sentence, he would contradict  
19 himself?

20 A In the same half-hour.

21 Q Same half-hour. And it's fair to say that that was about  
22 everything?

23 A Yes.

24 Q Details of his life, his identity, everything?

25 A Everything.

1 Q Now, you -- after he had been arrested, your only contact  
2 was with him was via telephone, right?

3 A Correct.

4 Q And he asked you to do a press release; is that right?

5 A He asked me to go in person to all the local media  
6 outlets and tell his story. My compromise was, well, if you  
7 really feel strongly about this, I'll write a press release  
8 and FAX it out to people, but I want to distance myself from  
9 this.

10 Q Before he was arrested, did he ever tell you that he did  
11 a crime -- that he did a bombing?

12 MR. KELLY: Objection.

13 THE COURT: Sustained.

14 Q Other than what you testified about -- that he believed  
15 that people thought he might be involved, did he say anything  
16 else about --

17 MR. KELLY: Objection. Sorry.

18 Q -- the bombing?

19 MR. KELLY: Objection.

20 THE COURT: Sustained.

21 Q Other than what you testified about before he was  
22 arrested, did he breach the subject of the bombing, again?

23 MR. KELLY: Objection.

24 THE COURT: That's the same objection for the third  
25 time, and it's sustained for the third time. You may have

1 another question.

2 Q You said you took dictation over the phone, right?

3 A Correct.

4 Q And I'm going to show you a document, and ask you if this  
5 is the dictation that you took?

6 A With some blacking out, yes.

7 Q Is that the type script from your typewriter?

8 A From my computer, yes.

9 Q I'd like to introduce this at this time, your Honor.

10 MR. KELLY: Objection.

11 THE COURT: We'll mark it for identification.

12 THE CLERK: It's 10.

13 (Defendant's Exhibit 10 marked for identification.)

14 Q Well, he told you over the phone --

15 THE COURT: I don't think we will get into the  
16 details of what he said, since it was marked for  
17 identification only, and I don't believe it can come in.

18 MS. GERTNER: Your Honor, if we could be heard at the  
19 side bar. It raises the same issue.

20 THE COURT: It does indeed. But I think it is of a  
21 will different gender, and I think Mr. Kelly is correct on  
22 this one. And it will remain marked for identification, and  
23 that's it.

24 Q You testified that -- you talked to him in custody six or  
25 seven times; is that right?

1 A Correct.

2 Q And during this period of time he mentioned Al Trenkler,  
3 right?

4 A Correct.

5 Q You asked him if Al Trenkler was involved in the bombing,  
6 and he said he didn't know?

7 A Yes.

8 Q You asked him about other details; isn't that right?

9 A Yes.

10 Q You asked him about who he thought -- you asked him if he  
11 ever had anything to do with the bombing, and he said no; is  
12 that right?

13 MR. KELLY: Objection to anything he said.

14 THE COURT: Well, I don't know to what extent what  
15 Ms. Gertner is now doing, among other things putting into  
16 context what was asked about on direct examination, and I  
17 think she's certainly entitled to do that. So I will allow  
18 the question and answer in the context of that one  
19 conversation about Mr. Trenkler.

20 Q You asked him if he had anything to do with the bombing,  
21 and he said no?

22 A Yes.

23 Q At one point he told you, too, that he was afraid someone  
24 was going to kill him in the prison?

25 A Yes.

1 Q And he said it was some kind of Mafia thing?

2 A Yes.

3 MR. KELLY: Objection.

4 THE COURT: You object to that statement?

5 MR. KELLY: Yes.

6 THE COURT: That has nothing to do with context, in  
7 any event. The objection is sustained, and the jury will  
8 disregard it.

9 Q In the course of these six or seven conversations with  
10 Mr. Shay, can you identify which of the six or seven  
11 conversations was the Trenkler conversation?

12 A Yes, I can.

13 Q And which one was that?

14 A That was the conversation in which I took dictation over  
15 the phone and a subsequent conversation when I asked questions  
16 about the dictation that I had taken over the phone.

17 Q Okay. And in connection with that conversation, did he  
18 also tell you that he thought that there was some kind of  
19 Mafia plot to get rid of him?

20 MR. KELLY: Objection, your Honor.

21 THE COURT: I don't think that's necessary for  
22 context. The objection is sustained.

23 Q In the course of the conversation, when you talked about  
24 Trenkler, for example, did he indicate to you whom he thought  
25 had done the bombing?

1 MR. KELLY: Objection, your Honor. That is not  
2 offered for context. You're talking about a very broad  
3 conversation, and I object.

4 THE COURT: Sustained.

5 Q Did he say to you, in the course of that conversation, he  
6 thought some sick-o had done this?

7 MR. KELLY: I object. This is repeatedly the same  
8 situation.

9 THE COURT: I don't think we'll get into this same  
10 conversation, other than to the extent necessary to put into  
11 context what was brought out on the direct examination. And I  
12 don't know what was said, so it's hard for me to know ahead of  
13 time whether a particular question is designed for that  
14 purpose.

15 MS. GERTNER: But that's the point, your Honor,  
16 everything that was said in that conversation was context.

17 THE COURT: Well, I don't agree with you on that.

18 Q Did he talk to you about -- in the conversation about  
19 Trenkler, for example, did he talk to you about his father's  
20 role in the bombing?

21 MR. KELLY: Again, I object, your Honor.

22 THE COURT: I'll allow that.

23 A Yes, he did.

24 Q And what did he say?

25 A Different things on different occasions.

1 Q In the Trenkler conversation, for example, what did he  
2 say?

3 A It's hard for me to recall which parts of the Trenkler  
4 conversation and which parts of the father conversation, they  
5 get a little mixed up.

6 Q Well, tell us what you can recall.

7 A In the Trenkler conversation, okay, this is it, in the  
8 Trenkler conversation, he said that his father was -- had no  
9 gambling debts, was not involved in any mob-related stuff, and  
10 that it was a random act of a sick-o who had bombed his father  
11 for no reason.

12 Q And on other occasions?

13 MR. KELLY: Well, I object, your Honor.

14 THE COURT: Sustained.

15 Q In the second Trenkler conversation, do you recall what  
16 he said?

17 MR. KELLY: Your Honor, I object.

18 THE COURT: I didn't realize there was a second.

19 MS. GERTNER: He indicated one was at the time of the  
20 press release, and another was another.

21 THE COURT: Were there two?

22 THE WITNESS: Yes.

23 THE COURT: And what did he say about Mr. Trenkler in  
24 each of those.

25 THE WITNESS: In the first conversation, he said that

1 Mr. Trenkler was being implicated. That's in the written  
2 thing. In the second conversation, when I asked him  
3 outright: Was Mr. Trenkler involved in the bombing, Al  
4 Trenkler? He said: I don't know.

5 THE COURT: What was the question?

6 Q In the second conversation, did he say anything about his  
7 father's role?

8 A In the second conversation, I believe that his father's  
9 role was related to gambling debts.

10 Q So, the first time he said his father had no gambling  
11 debts, and the second time he said he did?

12 A Yes.

13 Q What's the time difference between the first conversation  
14 and the second, how much time passed?

15 A A couple of days.

16 Q And he also talked about the Dedham Service Center case,  
17 right?

18 MR. KELLY: I object. This is nothing but an effort  
19 to work around the Court's ruling.

20 THE COURT: The objection is sustained.

21 Q I believe under direct examination, you talked about a  
22 lawsuit.

23 A Yes.

24 Q Mr. Shay mentioned to you a lawsuit; is that right?

25 A Correct.

1 Q Describe what he said about the lawsuit.

2 A Well, it would be easier if I had it in front of me. I  
3 recall it as being about the gas station and explosion that  
4 happened there.

5 Q And that was -- when did that conversation about the  
6 lawsuit take place?

7 A That was in the conversation when I took the dictation.

8 Q And did he indicate to you, Mr. Shay, whether or not  
9 Mr. Shay indicated to you what his role had been in this  
10 lawsuit in that conversation?

11 A No, he did not.

12 Q Did he indicate to you what his father's role was in that  
13 lawsuit?

14 A He did, but I don't exactly recall.

15 Q Well, did he say to you that his father was suing Dedham  
16 Service Center in Dedham, Massachusetts?

17 A Yes.

18 Q And that his father claimed that a quarter stick of  
19 dynamite was thrown into a 50 gallon drum of thinner?

20 MR. KELLY: I object, your Honor.

21 THE COURT: No, I'll allow that?

22 A Correct.

23 Q And that his father claimed that the explosion made him  
24 lose his hearing?

25 A Correct.

1 Q Did he indicate in that conversation that he was a  
2 witness to it?

3 A I believe he did, yes.

4 Q Did he make any comments about getting money from it?

5 A No, he did not.

6 Q The day that he called you to type up a press release,  
7 was that the first contact you had with him after he was  
8 arrested?

9 A No, it was not.

10 Q When relative to the first time he got in touch with you  
11 did he make this, ask you to take dictation with respect to a  
12 press release?

13 A If it was a day or two later.

14 Q And in the first contact he had with you, after he was  
15 arrested, what if anything did he say?

16 MR. KELLY: Objection.

17 THE COURT: The objection is sustained.

18 MS. GERTNER: I have no further questions.

19 Redirect examination by Mr. Kelly

20 Q You testified that in the course of certain stages there  
21 would be a change in what was being said whether it was within  
22 the half-hour or something to that effect; do you recall that  
23 testimony?

24 A Absolutely.

25 Q Were there changes in the demeanor when there was a