

P R O C E E D I N G S

1 [In the absence of the jury.]

2 THE COURT: Good morning, please be seated.

3 Do we need to wait for the defendant?

4 MS. GERTNER: I don't think so, your Honor.

5 THE COURT: With respect to the 404(b) evidence, as I  
6 understand it, it is being offered on two -- to show two  
7 things: One is the, Mr. Trenkler's skill and knowledge; and,  
8 two, the background, development and existence of the  
9 conspiracy.

10 I'm assuming for purposes of this ruling that it is  
11 proper 404(b) evidence and would be admissible against  
12 Mr. Trenkler. I need to decide, therefore, whether it is  
13 relevant under 401 against Mr. Shay. And if so, whether it  
14 is, nevertheless, so prejudicial as to come out under 4 -- go  
15 out under 403.

16 I think it is relevant, at least to show the skill  
17 and knowledge of Mr. Trenkler, the co-conspirator. I find  
18 that the two devices are, without question, similar, but I am  
19 not persuaded that they are identical, as that requirement has  
20 been defined in Ingraham and Williams, and the other line of  
21 cases. That is, I do not think, and find, that it is not so  
22 unusual and distinctive as to be like a signature, the 1986  
23 and 1991 devices.

24 It is not relevant, I find, to show the background  
25

1 and existence of the conspiracy. And I'm persuaded of that by  
2 first the five-year difference, as opposed to Crocker where  
3 there was one month difference, there was different  
4 participants entirely. The only overlap was Mr. Trenkler.  
5 Again, unlike Crocker, where there were a number of people who  
6 were involved in 1993, I think and again in the charge  
7 conspiracy beginning in 1994.

8 There was a different victim. There was a different  
9 object of the conspiracy. And there is finally, no evidence,  
10 indeed, I think the Government stipulated that Mr. Shay knew  
11 anything about the 1986 device at any time or that he even  
12 knew Mr. Trenkler in 1986.

13 I find, moreover, that the evidence would, in this  
14 case, be highly prejudicial, and that this prejudice outweighs  
15 substantial, substantially outweighs, what I regard to be the  
16 marginal probative value to show the defendant's skill, which  
17 is already in evidence in a number of different ways. The  
18 risk of prejudice to Mr. Shay is twofold. There is first the  
19 danger that the jury will see it as evidence of propensity  
20 rather than simply to show skill and knowledge by  
21 Mr. Trenkler, and here there is a particular risk of guilt by  
22 association; that is, guilt of the defendant by associating at  
23 some point with Mr. Trenkler. And I think that risk of  
24 unfairness is further enhanced, because the evidence of the  
25 association between the defendant and Mr. Trenkler is

1 relatively slim.

2 I will, therefore, rule on these grounds, rule out  
3 the proposed so-called 404(b) evidence without addressing the  
4 additional difficulties raised by the defendant with respect  
5 to the Government's predicate evidence, namely the  
6 confrontation clause and hearsay issues. We don't even get to  
7 those, because rule it out on prejudice grounds.

8 With respect to the psychiatric expert offered by the  
9 defendant, as I understand that, it is offered to show that  
10 the defendant has an uncontrollable need to draw attention to  
11 himself and will say anything to satisfy his need, and in  
12 particular, it is offered to explain away his inculpatory  
13 statement. Under 702 expert evidence is admissible to assist  
14 the jury to understand evidence or to determine a fact in  
15 issue. The record in this case is replete with the  
16 defendant's contradictory statements, indeed, his fantastic  
17 ones about tanks and bombers, and other things.

18 Under these circumstances, the jury does not need  
19 expert evidence on the issue of the defendant's credibility.  
20 And there is, with respect to this evidence, the additional  
21 danger that the expert will go beyond the brief references  
22 to -- I think it's called -- pseudologiafantastica in the  
23 areas that are in fact inadmissible such as diminished  
24 capacity, personality, deficit, and so on.

25 The quintessential question is whether the jury will

1 believe what the defendant says, and on that question, given  
2 this record, the jury does not need any additional expert  
3 evidence or any expert evidence. Accordingly, I will rule out  
4 the defendant's proffer on that issue, and your objection is  
5 noted as is the Government's.

6 MS. GERTNER: I just want to put something on the  
7 record, an error that has been made up until now. You ruled  
8 out diminished capacity in our case on the grounds that it was  
9 too late. In fact, our notice of insanity defense, which is  
10 in the record, gives notice of both claims.

11 THE COURT: But you waived it. You decided not to go  
12 forward on it.

13 MS. GERTNER: Only with respect to the insanity  
14 defense.

15 THE COURT: I don't believe the Government understood  
16 that nor did I. Let's bring the jury down.

17 MR. KELLY: Your Honor, while the jury is coming  
18 down, I know we discussed this yesterday, off the record. And  
19 I just want to make sure that we have reference on the record  
20 that the Court's ruling as to 404(b) matter, is not  
21 determinative of Mr. Trenkler's disposition.

22 THE COURT: Absolutely not, he's in a very different  
23 position than Mr. Shay.

24 THE COURT: I'm not saying it comes in, but I'm  
25 certainly not say it stays out.