

1 demeanor on that occasion, how he appeared to you?

2 A He seemed strange or weird, something strange about him,
3 I don't know if that was that one time or if that's just the
4 way he is, because I don't really know him too well.

5 MS. GERTNER: I have nothing, your Honor.

6 THE COURT: Mr. Libby.

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

8 THE COURT: Thank you, Mr. Kaplan, you are excused.

9 Who is next?

10 MS. GERTNER: Scott Critcher.

11 Scott Critcher, sworn

12 Direct Examination by Ms. Gertner

13 Q Good morning, sir. Would you state your name, please.

14 A Scott Critcher.

15 THE COURT: How do you spell your last name, please.

16 THE WITNESS: C R I T C H E R.

17 Q And directing your attention to October 25th, 1991, can
18 you tell me where you were working at the time?

19 A Store 24 in Quincy.

20 Q Okay. And what are your hours, what were your hours?

21 A Four to midnight.

22 Q Who relieved you at midnight?

23 A Greg, I forget his last name.

24 Q Greg Calver?

25 A Yes, I believe.

- 1 Q And what were your responsibilities?
- 2 A I was a clerk, cashier.
- 3 Q Have you ever met Tom Shay?
- 4 A Yes.
- 5 Q And do you recall, had you ever met Tom Shay?
- 6 A About 6 o'clock that day.
- 7 Q That was Friday, October 25th?
- 8 A Yes.
- 9 Q And where was Tom Shay?
- 10 A He came into Store 24 where I was working.
- 11 Q And how long did he stay in this Store 24, if you recall?
- 12 A He was in and out at different points of time during the
13 evening until I left.
- 14 Q And did you and he have a conversation?
- 15 A Yes.
- 16 Q Had you ever met him before?
- 17 A No.
- 18 Q Did you and he go anywhere after you met on that Friday
19 in Store 24?
- 20 A Yes, when I got off work we walked up to Quincy Center
21 and sat in front of the post office.
- 22 Q Without telling us the nature of the conversation, did
23 you say, during the course of the time you were in the store,
24 did you have a regular conversation, just exchange pleasantries?
- 25 A Yes, we talked about things. We have a mutual friends.

1 MR. LIBBY: Objection to the substance of the
2 conversation, thank you.

3 Q After you got off from work, did you go somewhere with
4 Mr. Shay?

5 A Yes, we went to Quincy Center, just sat up the street.

6 Q And how long did you spend in Quincy Center?

7 A About an hour.

8 Q What was the -- what was the distance from the Store 24
9 to the Quincy Center?

10 A I don't know, maybe about 500 yards, it's not that far.

11 Q Where is the Store 24 located?

12 A It's on Washington Street, just outside Quincy Center.

13 Q And where did you go after you and he talked on that
14 evening?

15 A I went home.

16 Q Did you exchange addresses?

17 A Yes.

18 Q Did Mr. Shay indicate to you where he was living?

19 A He told me he was living in the Falls in Quincy.

20 MR. LIBBY: Objection, your Honor.

21 THE COURT: The objection is sustained.

22 MR. LIBBY: Thank you.

23 Q When did you next see Mr. Shay, sir?

24 A The next evening.

25 Q And roughly when was that?

1 A Probably about the same time, somewhere around sundown.

2 Q And where were you located when you saw him?

3 A I was at my home.

4 Q You were at your home?

5 A Yes.

6 Q And did you -- did he call, did he appear at the door?

7 A He called, I was having a party, and he called and said
8 he wasn't going to be able to make it --

9 MR. LIBBY: Objection, your Honor. If we could have
10 the witness instructed as to the substance of the
11 conversations.

12 THE COURT: Try not to tell us anything that Mr. Shay
13 told you, if you would, please.

14 THE WITNESS: Okay.

15 Q The party that you had on Saturday night, what kind of a
16 party was it?

17 A It's a Halloween party.

18 Q This is a fairly traditional Halloween party?

19 A Yes.

20 Q And Mr. Shay called with reference to that?

21 A Yes.

22 Q And after his phone call, is that the first time he ever
23 called you at your home?

24 A Yes.

25 Q And after the phone call, did you see him?

- 1 A Yes.
- 2 Q And where did you see him next?
- 3 A Out in front of my house.
- 4 Q Did he come inside the house at some point?
- 5 A Yes.
- 6 Q And was the party going on?
- 7 A Yes.
- 8 Q How long did he spend at the party, if you recall?
- 9 A He stayed there until about midnight, maybe a little bit
10 after.
- 11 Q Do you recall -- how many people were at the party?
- 12 A Probably about 20, 25 people.
- 13 Q And without telling us what they consisted of, you had
14 conversations with Mr. Shay?
- 15 A Yes.
- 16 Q And was he -- how big was your house?
- 17 A It's two rooms downstairs, two rooms downstairs.
- 18 Q Was the party throughout the house?
- 19 A Yes.
- 20 Q When you say that he left around midnight, do you have a
21 specific memory of him leaving?
- 22 A No, not specific, no.
- 23 Q Where were -- do you recall -- everyone was dressed in
24 costume, isn't that right?
- 25 A Well, mixed, yes.

- 1 Q And you were the host?
- 2 A Yes.
- 3 Q And did he talk to you before he left?
- 4 A No. Not to tell me he was leaving.
- 5 Q But at some point you turned around and he was gone; is
- 6 that fair to say?
- 7 A Yes.
- 8 Q And when was the next time you saw him?
- 9 A The next evening at Store 24.
- 10 Q Again, were you on your regular shift?
- 11 A Yes.
- 12 Q And how long did he stay, do you recall?
- 13 A Well, he was again in and out most of the night and he
- 14 stayed right up until I left.
- 15 Q And where did he go after that?
- 16 A I don't know.
- 17 Q Did he walk out with you?
- 18 A Yes.
- 19 Q And where did you go?
- 20 A I had arrived home and he left.
- 21 Q And what time was this on Sunday, sir?
- 22 A Midnight.
- 23 Q When did you next see Mr. Shay?
- 24 A It was over New Year's, the next year was January 3rd of
- 25 '92.

- 1 Q I beg your pardon?
- 2 A January 3rd, I believe it was, it was over New Year's.
- 3 Q And where did you see him?
- 4 A At Store 24 again.
- 5 Q And this was the same Store 24 that you're talking about?
- 6 A Yes.
- 7 Q And you and he had a conversation?
- 8 A Yes.
- 9 Q And where, how long did you spend in Store 24?
- 10 A Well, I was there until midnight and sort of a similar
- 11 thing, we went up to Quincy Square again.
- 12 Q I beg your pardon?
- 13 A We went up to Quincy Square again.
- 14 Q How long did you spend together?
- 15 A Well, he came back to my house that evening.
- 16 Q And he stayed overnight at your house?
- 17 A Yes.
- 18 Q And where do you live, sir?
- 19 A I'm at 222 Center Street in Quincy.
- 20 Q This was the next day?
- 21 A Right.
- 22 Q So this would be January 4th, 1992?
- 23 A Yes.
- 24 Q And where did you go that day?
- 25 A That day we went over to his mother's house.

- 1 Q And where was that?
- 2 A The Falls in Quincy.
- 3 Q And how long did you spend at his mother's house?
- 4 A A couple of hours, maybe, not too long.
- 5 Q And where did you go after you went -- strike that.
- 6 Was his mother there at the time?
- 7 A Yes.
- 8 Q Who else was there at the time?
- 9 A Her boyfriend.
- 10 Q And what was his name?
- 11 A I do not recall.
- 12 Q How long did you spend it in Mr. Shay's mother's house?
- 13 A About two hours.
- 14 Q Where did you go next?
- 15 A We went to Quincy Square, I had to go to work.
- 16 Q How did you get to Quincy Square?
- 17 A Took a cab.
- 18 Q And where did Mr. -- Did Mr. Shay come with you?
- 19 A Yes, he came to Quincy Square with me. I went to work
- 20 though.
- 21 Q So you didn't see him after that?
- 22 A No.
- 23 Q When did you next see Mr. Shay?
- 24 A That night, the next day actually. It's like two in the
- 25 morning, he called me.

1 Q He called you at your home?

2 A Yes.

3 MR. LIBBY: Objection, your Honor.

4 THE COURT: To what?

5 MR. LIBBY: As to the question when he saw Mr. Shay
6 next.

7 MS. GERTNER: I'll rephrase the question.

8 Q When did next hear from Mr. Shay?

9 A At 2 in the morning the next day.

10 Q And he woke you up?

11 A Yes.

12 Q Did you see him after that conversation?

13 A Yes, he came over.

14 Q And was he alone?

15 A No, his mother and her boyfriend were with him.

16 Q Okay. And did they stay overnight with you?

17 A Yes, they did.

18 THE COURT: All three of them?

19 THE WITNESS: Yes.

20 Q And the next morning, the morning of approximately
21 January the 5th, you all woke up, where did you go?

22 A We went out for breakfast, McDonalds.

23 Q And where did you go after breakfast?

24 A Went back to his mother's house for a little bit.

25 THE COURT: I assume there will be a connection.

1 MS. GERTNER: Yes, your Honor.

2 THE COURT: When?

3 MS. GERTNER: At the closing.

4 (Laughter.)

5 Q How long did you stay at his mother's house?

6 A Oh, about an hour.

7 Q Where did you go next?

8 A I went back to my house.

9 Q How long did you spend at your house?

10 A I stayed there. Tom was there with his mother's
11 boyfriend, and I sent them home.

12 Q And after that, have you seen him since?

13 A No.

14 Q In connection with the time you saw him from January 3rd,
15 through January 5th, did Mr. Shay talk about his concern about
16 going back to jail?

17 MR. LIBBY: Objection, your Honor.

18 THE COURT: You may answer that yes or no.

19 A Yes.

20 Q And what did he say?

21 MR. LIBBY: Objection.

22 THE COURT: The objection is sustained.

23 MS. GERTNER: Your Honor, if we can be heard at side
24 bar.

25 THE COURT: Yes, I will hear you at side bar.

1 [conference at the bench, as follows:

2 MS. GERTNER: If allowed to testify, this witness
3 would say that he talked about being very concerned about
4 going back to jail on a probation matter, period. That bears
5 directly on --

6 THE COURT: I understand how it bears, but how is it
7 admissible?

8 MS. GERTNER: It bears on his state of mind. It's
9 offered for nonhearsay purpose which is his state of mind at
10 the time, in addition for purposes, we want to show that he
11 did not flee immediately upon getting out of jail, and he was
12 essentially socializing and living his life. That's a bearing
13 on the issue --

14 THE COURT: Why isn't that admissible to show state
15 of mind?

16 MR. LIBBY: Self-serving admissions, your Honor. She
17 can't get her own client's statements in, period.

18 MS. GERTNER: It's offered for nonhearsay purposes.

19 MR. LIBBY: It hasn't been offered for nonhearsay
20 purposes. It is totally meaningless and irrelevant without
21 substance attached to it.

22 THE COURT: The substance attached to it is his state
23 of mind.

24 MR. LIBBY: Well, your Honor, I think -- his state of
25 mind--

1 THE COURT: I mean the Government is arguing that he
2 left because he was afraid of being incarcerated in this case,
3 and--

4 MR. LIBBY: And without truth associated with what he
5 says, it strips it of all relevance, entirely of all meaning.

6 MS. GERTNER: Mr. Libby doesn't understand the state
7 of mind exception to the hearsay rule.

8 MR. LIBBY: Where is it, please?

9 MS. GERTNER: There is a state of mind exception
10 essentially under 80 --

11 THE COURT: It's not an exception, it's considered
12 not hearsay.

13 MS. GERTNER: It's considered not hearsay.

14 THE COURT: An out-of-court statement not to show the
15 truth of the statement, but really to show state of mind.

16 MR. LIBBY: This is the corollary, this is the
17 corollary of Mr. Kelly's argument where he prevailed which is
18 she said, No, I'm not getting it in for the truth of it, no,
19 he said the words. The response to that is to argue the
20 untruthfulness of the statements, there has to be some
21 relevance, some importance attached to the substance of what
22 he says in order for it to be admissible as nonhearsay here.

23 MS. GERTNER: It's simply wrong, if the Government
24 wants to infer from the fact the flight, the inference that he
25 was there for his state of mind, is that he feared the bombing

1 investigation, we are entitled to bring in statements, indeed,
2 they brought in his conversation with Bonnano, the taped
3 conversation, and it was exactly the same issues, and he said
4 I fear the probation matter. All of this goes to the state of
5 mind.

6 THE COURT: The Government doesn't have to worry
7 about the hearsay in this context. They can offer any
8 statement that he makes, more or less.

9 MS. GERTNER: But the bottom line is --

10 THE COURT: The question is whether you can offer it.

11 MS. GERTNER: As a state of mind, it bears on his
12 state of mind. You can explain to the jury that this is not
13 for the truth of the matter which is to say that he, whether
14 or not he was going back to jail on a probation matter or
15 anything is simply --

16 THE COURT: That's what it is being offered to --

17 MS. GERTNER: It's being order to show express
18 concern. We can give you authorities up the gazoo, G A Z O O,
19 on this.

20 (Laughter.)

21 He said if he put I'm afraid of Paul Kelly, that
22 could come in. If it bears on his state of mind at a critical
23 time.

24 MR. LIBBY: Your Honor, it only has meaning if in
25 fact he truthfully was afraid of Paul Kelly or--

1 MS. GERTNER: That is endemic in the state of mind
2 exception.

3 MR. LIBBY: And your Honor, that means it's going
4 into the truth. They're meaningless without that connection.

5 MS. GERTNER: It is endemic that Mr. -- What Mr.
6 Kelly has done before, what he's quarreling with is a hundred
7 years of law with respect to hearsay, that this isn't being
8 offered for the truth of something or other purposes is
9 frequently a nicety of what lawyers do. This, however, is the
10 law. It is for his state of mind only, and so instruct the
11 jury. It was the same issue with prior inconsistent
12 statements, but --

13 THE COURT: Except that here contained in the -- the
14 jury would have to determine that he was speaking truthfully
15 as to his state of mind. It's not the ordinary --

16 MS. GERTNER: But --

17 THE COURT: It's different from the usual
18 state-of-mind evidence.

19 MS. GERTNER: We recognize that essentially it's just
20 what he -- I mean the other purpose would be to show what he
21 knew he was facing, and whether or not he was in fact facing
22 that is irrelevant. The issue is what he said he believed he
23 was facing. In other words, the issue, he's saying that I'm
24 facing this jail on a probation matter, and that bears on his
25 knowledge of what was in the offing, and that informed what he

1 did. I think it's a completely appropriate question.

2 MR. LIBBY: Your Honor's observation is absolutely
3 accurate.

4 THE COURT: It wasn't an observation.

5 MR. LIBBY: You're using that. When you say, in
6 order for the jury to assess, to attach any significance to
7 what was said, they, of course, have to determine whether it's
8 true. I'm afraid of going back to jail. Not that the words
9 were spoken, but that that was a truthful statement, because
10 that's what makes flight relevant here. And without that
11 connection, the simple fact that the words were spoken have no
12 meaning, so we object.

13 THE COURT: I will allow it.

14 MS. GERTNER: Thank you.

15 ... End of conference at the bench.]

16 Q Mr. Critcher, did Mr. Shay talk to you about his concerns
17 about the probation matter?

18 A Yes.

19 Q What did he say?

20 A He didn't want to go back to jail.

21 Q And did he say going back to jail with reference to a
22 probation matter?

23 THE COURT: Now, tell us, please, everything he said
24 on that subject?

25 A On that subject? That there was some sort of hearing

1 coming up and he felt badly, he felt that it wasn't something
2 that he was going to -- that he would be doing time. I forget
3 the exact words, but that he did not want to go back to jail,
4 and that he felt that that was going to happen.

5 Q Did he use the word "probation matter"?

6 A I don't remember -- I don't recall exactly what words he
7 used.

8 Q Did he indicate to you that he had been in jail before?

9 A Before January?

10 Q Yes.

11 A I knew he was.

12 Q And did he tell you what he had been in jail for?

13 MR. LIBBY: Objection, your Honor.

14 THE COURT: I think we're going too far afield now.

15 The objection is sustained.

16 MS. GERTNER: Just one second, your Honor.

17 Q Was that time on January 5th, the last time you saw
18 Mr. Shay?

19 A Yes.

20 Q At any point in the course of your dealing with him, sir,
21 in January of 1992, did he mention the Roslindale bombing?

22 A No.

23 MS. GERTNER: Thank you.

24 THE COURT: Any questions, Mr. Libby?

25 MR. LIBBY: May I have a moment, your Honor.

1 (Pause.)

2 Cross-Examination by Mr. Libby

3 Q Mr. Critcher, did you testify, I'm sorry, that Shay, Jr.
4 called you about that party?

5 A Yes.

6 Q You're certain of that?

7 A Yes.

8 Q The phone rang at your home, your testimony is that the
9 phone rang to your home and you recognized the voice, it was
10 Shay, Jr. calling you, true?

11 A He told me who he was.

12 Q But it's your testimony that he called you?

13 A Yes.

14 Q No question in your mind about that?

15 A Yes.

16 Q If I may, your Honor, April 2 transcript, please, page
17 21, you appeared before the grand jury, Mr. Critcher in this
18 case?

19 A Yes.

20 Q Swore to tell the truth?

21 A Yes.

22 Q And so far as you know you did so on that occasion,
23 correct?

24 A Yes.

25 Q And in fact, I asked you some questions on that occasion,

1 right?

2 A Yes.

3 Q You are certain about your answer to that question as of
4 everything else you told this jury today?

5 A Yes.

6 Q Look please -- I'm sorry, page 20, line 23.

7 "So the following day, did you speak with Shay, Jr.
8 before you saw him again."

9 "Answer: Yeah, I called him about, I would say, like
10 6 o'clock."

11 Where did you call him?

12 Where did I call him?

13 "Question: Yes.

14 "Answer: Where did I call him, you mean?

15 "Question: Yes.

16 Where was he?

17 "Answer: I called him at his mother's home in
18 Quincy." And then the question: "How did you know how to
19 reach him"?

20 Answer: "He gave me his address and phone number."
21 Did I read that correctly?

22 A You read that correctly.

23 Q Now, you testified that Shay, Jr. showed up at your Store
24 in Quincy, 6 o'clock in the evening of the 25th, Friday?

25 A Right.

1 Q You're certain of that too?

2 A Well, the time I'm not sure of.

3 Q It was 6 o'clock?

4 A I was working.

5 Q But is it your testimony before the jury today,
6 Mr. Critcher that you're certain that it was 6 o'clock?

7 A Well, I said about six o'clock.

8 Q Well, certainly not as late as 7 o'clock, you're that
9 certain?

10 A I don't know.

11 Q Would it have been 7 o'clock?

12 A It could have been.

13 Q Could it have been 8 o'clock?

14 A It could have been.

15 Q Could it have been 9 o'clock?

16 A No, I don't think it was 9 o'clock.

17 Q Your response to counsel's questioning was it was 6
18 o'clock, but now you're saying it could have been as late as 8
19 o'clock; is that true?

20 A I guess, yes.

21 Q So your memory has a two-hour Kentucky windage factor on
22 it?

23 MS. GERTNER: Objection.

24 THE COURT: The objection to the characterization is
25 sustained.

1 Q As you are sitting here today you have no independent
2 memory of when Shay, Jr. arrived, do you?

3 A I guess not, no.

4 Q Sometime that evening?

5 A Right.

6 Q Now, you also testified that he left with you at about
7 midnight; is that right?

8 A Right.

9 Q And he was there throughout that time?

10 A In and out during the evening, yes.

11 Q Well, when you say in and out, step out the door and step
12 back in, could you see him is that what you mean by in and
13 out?

14 A No.

15 Q That he would hang around the parking lot and came back
16 in; is that your testimony?

17 A I didn't know what he was doing.

18 Q He would be gone no more than five or ten minutes at a
19 time, is that your testimony, are you certain of that?

20 A Yes.

21 Q He wasn't gone -- strike that.

22 Page 16, please, same grand jury transcript.

23 Now, I asked you questions before the grand jury in
24 this matter relating to that area, do you recall that, Mr.
25 Critcher?

1 A Yes.

2 Q Page 16, like 13, you read along with me.

3 Did Shay, Jr. leave the store at any time, get in the
4 car and leave?

5 "Answer: When he left around 10 o'clock or whatever
6 time, exactly what time it was, but when they both left. And
7 then he came back, well, they both came back eventually around
8 11:30 or so"; did I read that correctly?

9 A Yes.

10 Q So your memory is today or rather back in April of 1992,
11 some six or seven months after the explosion in Roslindale,
12 that Shay, Jr., in fact, left the Store 24 for at least an
13 hour and a half?

14 A Right.

15 Q And in fact, based on your earlier testimony,
16 Mr. Critcher, that period of time could have been far greater
17 than an hour and a half, true?

18 A I guess, I don't know, I guess so.

19 Q It certainly could have been, true, two hours, two and a
20 half hours?

21 A I was working. He was in and out.

22 MR. LIBBY: Nothing, further, your Honor. Thank you.

23 THE COURT: Anything further?

24

25

1 Redirect Examination by Ms. Gertner

2 Q The individual who was with Mr. Shay on that Friday, sir,
3 what was the name of the individual?

4 A I can never remember his name, to tell you the truth. He
5 worked at a clothing store, I know that much.

6 Q If I told you Randy, does that reflect your recollection?

7 A Yes, that's the name. I never remember it.

8 Q When you say Mr. Shay was in and out on that Friday, he
9 was periodically coming over and having conversations with
10 you; isn't that right?

11 A Yes.

12 Q And having conversations with others in the store that
13 you could see?

14 A No, not so much in the store, not that night.

15 Q The conclusion of your shift is midnight?

16 A Yes.

17 Q And you remember distinctly leaving at midnight?

18 A Yes, around there.

19 Q And your memories with respect to the other parts of your
20 testimony, whatever the characterization was, that evening,
21 that is to say you walked with him to Quincy Square?

22 MR. LIBBY: Objection, your Honor at this point, to
23 the form of the question.

24 THE COURT: I'm sorry.

25 MR. LIBBY: Form of the question, your Honor.

1 MS. GERTNER: I'll rephrase the question.

2 Q Apart from times and hours, is your, are you certain that
3 you saw Tom Shay Friday night, Saturday night, Sunday night?

4 A Yes.

5 MR. LIBBY: Objection, your Honor.

6 THE COURT: I think he's already answered the
7 question.

8 MS. GERTNER: No further questions.

9 MR. LIBBY: I have nothing, thank you.

10 THE COURT: Thank you, Mr. Critcher. You're
11 excused. Who is next?

12 MS. GERTNER: Mr. Greg Calver.

13 Greg Calver, sworn

14 Direct Examination by Ms. Gertner

15 Q Would you state your name, please?

16 A Gregory Calver.

17 Q And where are you employed, sir?

18 A Store 24.

19 Q And were you employed at the Store 24 on or about the
20 weekend of October 25th, 26th and 27th?

21 A Yes, I was.

22 Q And what's your job in the Store 24?

23 A At the time I was a customer service representative.

24 Q And were you working on the evening Saturday, October
25 26th, in the early morning hours of Sunday, October 27th?