

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

United States of America,
Plaintiff

v.

Thomas A. Shay,
Alfred W. Trenkler,
Defendants

Criminal No.: 92-10369-Z

**DEFENDANT ALFRED TRENKLER'S MOTION TO RECONSIDER
PORTIONS OF MAGISTRATE'S MEMORANDUM AND ORDER
ON PRETRIAL MOTIONS OF JANUARY 26, 1993**

Now comes defendant and moves to reconsider the following parts of the Magistrate Judge's January 26th Order:

- A. Motion for Production of Government Interview Reports And Grand Jury Testimony of Individuals Who Will Not Be Witnesses At Trial (p. 3 of Jan. 26th Decision)

In support of this motion, defendant relies on the attached memorandum (Exhibit A) which he submitted to the Magistrate Judge.

Additionally, defendant's counsel has been informed by the prosecutor that there are "thousands" of pages of grand jury testimony in this case, and that many grand jury witnesses will not testify at trial. Clearly, such testimony of non-trial witnesses contains evidence "favorable" to the defense, and defense counsel, not the prosecutor, should have the opportunity to review the grand jury testimony and interviews of witnesses the prosecution does not plan to use at trial to determine what material falls within Brady. Alternatively, defendant suggests this Court, review in camera,

said material to determine if defendant is entitled to it. See U.S. v. Augurs, 427 U.S. 97, 106 (1976).

B. Motion of Defendant For Disclosure of Bad Acts, "Specific Conduct" And Criminal Convictions, If Any (p. 3-4 of Jan. 26th Decision)

Defendant moves to reconsider to the extent the Magistrate Judge failed to require the government to disclose Rule 404(b) material at least 60 days before trial and to the extent the government is not required to provide the material listed in defendant's Rule 404(b) request (Exhibit B) filed with the Magistrate Judge.

In support of this motion, defendant submits the prosecution, in its affidavit (see paragraphs 33 and 35 of Exhibit C) in support of a wire tap application, relies heavily on the claim that the 1986 non-electric military simulator which defendant attached to a truck is strikingly similar to the 1991 bomb which killed Officer Hurley. To adequately prepare for a Rule 404(b) hearing, defendant requires sufficient time to have experts examine all aspects of the 1986 device. Accordingly, the prosecution should be required to file the Rule 404(b) material requested in the attached motion (Exhibit B) at least 60 days before trial.

C. Defendant's Motion To Compel All Government Experts To File Written Reports Prior To Trial (p. 4-5 of Jan. 26th Decision)

Defendant filed the attached motion (Exhibit D) which was denied. Although ATF Agent Kerr quotes Larry McCune extensively (see paragraphs 33-35 of Exhibit C) in his application for wire tap authorization and it is clear Mr. McCune is a key government

witness, the result of the Magistrate Judge's order it that Mr. McCune and other government experts will be able to testify by ambush at trial, because the defense experts will not have time to examine their reports and conclusions prior to trial, since Mr. McCune, etc., will not be required to write reports or state conclusions in writing.

Given the seriousness of the charges, defendant submits this motion, which would be routinely allowed in a civil case, will produce evidence of such substantial value that elemental fairness requires it be granted, cf. U.S. v. Augurs, 427 U.S. 97, 110 (1976).

D. Motion For Bill of Particulars (p. 5-6 of Jan. 26th Decision)

Defendant by the attached bill of particulars motion (Exhibit E) merely attempts to secure information to adequately defend himself. As written, for example, this unfocused indictment contains only general 30 day time periods when defendant is alleged to have agreed to construct a bomb, ("In or about September, 1991, Trenkler...agreed to construct a remote controlled explosive device." (overt act (a)), is alleged to have built the device ("In or about October, 1991," (overt act d)). Reading the indictment and the bill of particulars, it is clear defendant is only asking the prosecution to particularize the dates, places, and manner and means of the conspiracy so he can adequately defend himself.

E. Defendant Alfred Trenkler's Motion For Specific Exculpatory Evidence And/Or Evidence "Material To The Preparation Of The Defense" Pursuant To Rules 16(a)(1)(C) and 16(a)(1)(D) (p. 7-10 of the Jan. 26th Decision)

Based upon the attached affidavit (Exhibit F), defendant submits he is clearly entitled to the following material which the Magistrate Judge denied him:

3. All the reports, notes and writings of Larry McCune, an explosives enforcement expert with ATF, made in connection with the investigation of this case. More particularly, any writings or material of Mr. McCune which relate in any way to the material discussed by Special Agent Jeff S. Kerr at paragraphs 33-35 of his "Second Affidavit" executed before the United States District Court on March 12, 1992.

6. All ATF profiling reports, including said reports involving Thomas Shay, Jr., defendant and Thomas Shay, Sr.

12. All diagrams of circuits and photos of the explosive device which were circulated to members of the International Association of Bomb Technicians and Investigators.

13. All notes, reports and writings of ATF Forensic chemist Cynthia Wallace in connection with her work on the investigation of the 1991 explosion.

18. The specific efforts the government and BPD made to corroborate Shay's "proffer" of October 6 and 9, 1992. More particularly, what aspects was ATF or BPD able to corroborate and what aspects were determined to be untrue.

19. Whether ATF or the BPD was able to corroborate any aspects of the Shay "proffer" as it related to implicating Trenkler, what efforts were made to attempt to corroborate said aspects, with what results.

20. The basis for the statement in the November 12, 1992, letter to Shay's counsel that, "I am unable to conclude he has been entirely truthful and cooperative concerning the offense under investigation."

24. The dates on the reports turned over pursuant to the Automatic Discovery Order.

26. Names and addresses of all witnesses listed in the 6300 pages of automatic discovery.

28. The grand jury testimony and interview notes, statements, etc., of all persons who were either interviewed or testified before the grand jury and whom the government does not plan to call to testify at trial.

36. The identification of any witness who was interviewed by the government in the course of its investigation of this case, but whom the government chose not to present before the grand jury, for any reason, including but not limited to the reason that the information provided by the witness did not comport with other information in the government's possession.

38. Any information which may show or tend to show that the defendant was not involved in the allegedly illegal activity that is charged in the indictment in this case or that may assist in the preparation or presentation of his defense to the charges:

- a. any statements Alfred W. Trenkler made to others consistent with his claims of innocence; and
- b. information concerning the circumstances that led any government witness to become a government

witness, including but not limited to information as to whether or not he was confronted with evidence of his criminal conduct, when and under what circumstances he decided to cooperate, correspondence between the witnesses (or their attorneys) and the government, memoranda on the subject, and the like.

F. Defendant Alfred Trenkler's Motion for Further Specific Exculpatory Evidence And/Or Evidence "Material To The Preparation Of The Defense" Pursuant To Rules 16(a)(1)(C) and 16(a)(1)(D) (p. 10-11 of Jan. 26th Decision)

Based upon the attached affidavit (Exhibit G), defendant submits he is clearly entitled to the following material which the Magistrate Judge denied him:

1. The ATF Explosive Technical Branch reports of reconstruction of the device. Said reports should include, inter alia, information on how the electronic components recovered by ATF function.
2. Any ATF mock-ups of the device and any information reflecting how they function.
3. Any material submitted to the BPD or AFT by the Christian Science Church in connection with the investigation and this case. Said material would, inter alia, include the security log at the Church for September and October, 1991, reflecting people who signed in and worked on the roof of the Church in connection with a satellite installation.

6. Any material in the possession of the BPD, ATF or the U.S. Attorney which has not already been turned over and reflects defendant's whereabouts on October 18, and 27, 1991.

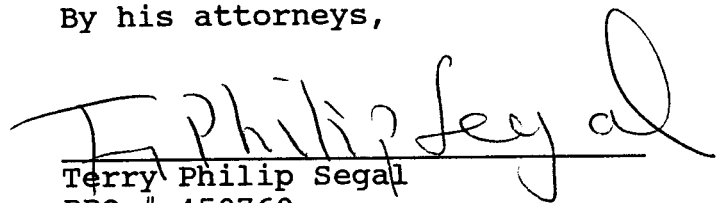
7. Any material in the possession of BPD, ATF or the U.S. Attorney which has not been turned over and reflects law enforcement's unsuccessful efforts to prove defendant purchased, received, or obtained the explosives used to build the device.

8. Any material presently in the possession of BPD, ATF or U.S. Attorney reflecting Radio Shack or other electronics store purchases by defendant from 1988-1991.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(c), defendant respectfully requests oral argument in connection with the enclosed motion.

Respectfully submitted,
For the Defendant,
ALFRED W. TRENKLER,
By his attorneys,



Terry Philip Segal
BBO # 450760
Scott P. Lopez
BBO # 549556
Segal & Feinberg
210 Commercial Street
Boston, MA 02109
(617) 720-4444

Dated: February 2, 1993