

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)
)
)
 v.) CRIM. NO. 92-10369-Z
)
 THOMAS A. SHAY)
)

GOVERNMENT'S OPPOSITION TO DEFENDANT
THOMAS A. SHAY'S MOTION FOR A NEW TRIAL

Defendant Thomas A. Shay ("Shay Jr.", or "Defendant") has moved, under Rule 33 of the Federal Rules of Criminal Procedure, for a new trial alleging, among other grounds, improper limitation on evidence, improper jury instructions and erroneous denial of Defendant's (pre-trial) Motion to Sequester the jury. The government opposes this motion in every respect: Defendant received a meticulously fair trial before a fair and impartial (and as the verdict reflected, discriminating) jury. Because, as the following will demonstrate, each of the arguments advanced within Shay Jr.'s motion is without merit, Defendant fails to meet the "interest of justice" requirement set forth within Rule 33 and his motion should therefore be denied.

Motions for New Trial -- Legal Standard Applicable

Rule 33 provides that, on motion, the court may grant a defendant a new trial "if required in the interest of justice." Fed. R. Crim. P. 33. In bringing such a motion, the defendant has the burden of showing: 1) that error was committed in the course of trial; and 2) that such error served to prejudice "substantial

rights" of the defendant. E.g., United States v. Cooley, 787 F. Supp. 977, 984 (D. Kansas 1992); United States v. Doherty, 675 F. Supp. 726, 732 (D. Mass 1987) (even where error found, court should refuse new trial unless substantial rights prejudiced).¹ A new trial is an extraordinary remedy: "Courts disfavor new trials, and exercise great caution in granting them." United States v. Cooley, supra, quoting United States v. Troutman, 814 F. 2d. 1428, 1455 (10th Cir. 1987). The decision as to whether a new trial is warranted is committed to the sound discretion of the district court. E.g., United States v. Soto-Alvarez, 958 F.2d 473, 479 (1st Cir. 1992). New trials are seldom granted (United States v. Soto-Alvarez, supra, 958 F.2d at 479) and denial of a motion for such extraordinary relief is reversible only for abuse of discretion. Id., citing United States v. Dockray, 943 F.2d 152, 157 (1st Cir. 1991) and United States v. Leach, 427 F.2d 1107, 1111 (1st Cir.), cert. denied, 400 U.S 829 (1970).

Because, as this Opposition will show, Shay Jr.'s Motion falls far short of establishing any instance of error -- much less that "prejudicial error" warranting extraordinary relief -- the Motion must be denied. This Opposition addresses Shay Jr.'s arguments in the order in which they appear within the Motion.

¹ For this reason, when passing upon a motion brought under Rule 33 and, more particularly, where determining whether a defendant's "substantial rights" have indeed been prejudiced, "a court should keep in the mind the harmless error provision of Fed. R. Crim. P. 52" United States v. Doherty, supra, 675 F. Supp. at 732 (Young, J.).

ARGUMENT

I. & II. THERE WAS NO IMPROPER LIMITATION ON EVIDENCE AS TO SHAY JR.'S DECLARATIONS.

A. The Court Properly Excluded Psychiatric Testimony Purporting To Evaluate The Reliability Of Shay Jr.'s Statements.

Shay Jr.'s Motion alleges that his psychiatric expert, Dr. Robert T. M. Phillips, diagnosed him with a pre-existing mental condition, one involving self-induced fantasies manifesting itself in certain attention-seeking behavior. **Motion, p. 2.** Shay Jr. argues that Dr. Phillips should have been allowed to testify as to Shay Jr.'s alleged mental condition because such expert testimony would have "significantly assisted the jury in evaluating the reliability of Shay Jr.'s statements." (Id.; emphasis supplied). The Court excluded Dr. Phillips' proffered testimony, ruling that the "quintessential question is whether the jury will believe what the defendant says, and on that question, given this record the jury does not need any . . . expert evidence." **Tr. 16-4-5.**²

There was no error in excluding this testimony. In assessing the admissibility of any expert testimony pursuant to Rule 702 of the Federal Rules of Evidence, the court must, among other things, determine whether such testimony would be helpful to the trier of fact. Fed. R. Evid. 702; see United States v. Angiulo, 897 F.2d 1169, 1189 (1st Cir. 1990). The trial court enjoys wide discretion

² In addition to finding that Dr. Phillips' proffered testimony would not be helpful to the jury, the Court went on to acknowledge the "additional danger" that Dr. Phillips' testimony would "go into areas that are inadmissible, such as diminished capacity, personality deficit and so on." **Tr. 16-4.**

over these determinations. E.g., United States v. Lamattina, 889 F.2d 1191, 1193-94 (1st Cir. 1989). Whether cast as a matter of "reliability" or otherwise, the essence of Shay Jr.'s argument here is that, due to an alleged mental deficiency, the jury should not believe anything -- inculpatory or otherwise -- that Shay Jr. said or, more simply, that his statements were not worthy of belief. In this respect, the argument goes, the psychiatrist's testimony would be offered to establish the alleged mental deficiency. This is the same argument which this Court addressed and ultimately rejected in United States v. Kepreos, 759 F.2d 961, 965 (1st Cir. 1985) and, for the same reasons, should be rejected here.³ Other circuit courts are in accord. See United States v. Grizzle, 933 F.2d 943, 948-49 (11th Cir. 1991) (affirming district court's exclusion, in embezzlement case, of proffered expert testimony purportedly showing defendant's mental condition; no insanity defense pleaded); United States v. Sinigaglio, 942 F.2d 581, 584 (9th Cir. 1991) (prosecution for willful failure to file income tax returns; district court properly excluded testimony as to defendant's obsessive compulsive personality disorder where proffered expert psychiatric testimony would not have materially assisted jury).

Moreover, other courts commonly reject offers of purportedly expert opinion testimony as to matters of credibility. See, e.g.,

³ During trial of Kepreos, this Court ruled that, because of the Court's "legitimate concern that it might confuse the jury", the proffered expert testimony would not be helpful and was thus inadmissible. Concurring with that reasoning, the First Circuit affirmed the Court's ruling precluding that testimony. United States v. Kepreos, supra, 759 F.2d at 965.

United States v. Barnard, 490 F.2d 907 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974), where the defendants offered expert psychiatric testimony that a government witness "was a sociopath who would lie in testifying." Id. at 912. The Barnard court upheld the district court's rejection of that so-called expert testimony, reasoning as follows:

Credibility . . . is for the jury - the jury is the lie detector in the courtroom It is now suggested that psychiatrists and psychologists have more [expertise in weighing the veracity of a witness] than either judges or juries and that their opinions can be of value to both judges and juries in determining [credibility]. Perhaps. The effect of receiving such testimony, however, may be twofold; first, it may cause juries to surrender their own common sense in weighing testimony; second, it may produce a trial within a trial on what is a collateral but still an important matter.

Id.⁴

For reasons of collateral issues/jury confusion, jury "poaching" and general failure of jury assistance, the Court properly excluded Dr. Phillips' proffered "expert" testimony. See United States v. Kepreos, supra; United States v. Grizzle, supra; United States v. Sinigaglio, supra.

⁴ Nor may Shay, Jr. be heard to argue that Dr. Phillips' proffered testimony would somehow be admissible as opinion testimony on Shay, Jr.'s "character", pursuant to Fed. R. 404 or 405. Not only does such testimony not fall within the parameters of "character" or "trait of character" as those terms are used within these rules, Rules 404 and 405 do not apply to those circumstances in the first instance where Shay Jr. did not appear as a witness at trial of this case. See Fed. R. Evid. 404 and 405.

B. The Trial Court Properly Sustained The Government's Objections As To Questions Seeking Declarations Made By Shay Jr. Beyond the Scope Of The Government's Direct Examination.

Shay Jr. sought to introduce, through a government witnesses (Fred Burke) and his own witnesses (Scott Critcher; Attorney William McPhee; David Shilalis), certain declarations purportedly made by Shay Jr.⁵ On objection from the government, the Court excluded such testimony. Shay Jr. argues that evidence of his out-of-court declarations should have been admitted by way of these witnesses: 1) as relevant to show the "unreliability" of other of Shay Jr.'s statements; and 2) as "inconsistent statements" under Rule 613(b) of the Federal Rules of Evidence. **Motion, p. 3.** Each of these arguments falls short of the mark.

Taking the second of these arguments first, Rule 613 deals with impeachment of a trial witness by means of that witness' prior inconsistent statements; Shay Jr.'s proffered declarations are not offered to contradict his trial testimony, indeed, Shay Jr. was not a witness at all. These declarations were simply not admissible, as claimed, under Rule 613(b).

Shay Jr. also argues that because the proffered testimony as to his declarations were not offered for their truth, they were admissible as non-hearsay. Defendant's theory here is that the sought-after declarations (set forth within Attorney Gertner's affidavit) fell, generally, within two categories: 1) a declaration said to be inconsistent with another declaration made by Shay Jr.,

⁵ The proffered testimony as to each is set out in Affidavit of Nancy Gertner, appended to Shay Jr.'s Motion.

and offered not for the truth of the matter but to show the contradiction between that statement and another statement made by Shay Jr. (i.e., Shay Jr.'s statement to Attorney McPhee in May, 1992 that Shay Jr. had never before seen the Radio Shack receipt and did not recall making the purchase described within the receipt; see Affidavit of Nancy Gertner, ¶ 5); and 2) declarations which the defense would argue as being fanciful per se (i.e., Shay Jr.'s statement that he had appeared on the Oprah Winfrey and Phil Donahue television shows). In short, the defense sought, to impeach no witness, but rather, her own client's declarations by means of Rule 801(c). The Court's rulings excluding these declarations were also correct and consistent with the Rules of Evidence.

As to the first above-listed category, that is, the purported inconsistency between Shay Jr.'s proffered (purported) statement to Attorney McPhee (wherein he denied having previously seen the Radio Shack receipt of October 18th) and his admission, made on the Channel 56 videotape (that he had indeed purchased the items on the receipt at Trenkler's direction), the Court had ample discretion to determine that such clearly exculpatory testimony was indeed offered for its truth and therefore, offered for an impermissible hearsay purpose.

As to the exclusion of the second ("fanciful") category of declarations, the Court likewise properly excluded the testimony. Rule 403 of the Federal Rules of Evidence permits the exclusion of evidence, even if relevant, where its probative value is

substantially outweighed by dangers of, among others, confusion of the issues and misleading the jury or by concerns of unnecessary cumulative evidence. In our case, the Court expressed concern about the jury's ability to discern the difference between statements offered for their truth and statements not offered for their truth, but for some other purpose. T. 15-77. For its part, the government chose to limit raising its objections to questions seeking Shay Jr.'s declarations to those instances beyond those conversations involving Shay Jr. which the government had gone into during the government's examination of witnesses. See T. 14-60-62.⁶

As to the remaining "fanciful" declarations, the Defendant's repeatedly-expressed theory of "unreliability" oftentimes required additional evidence that the declarations had no basis in fact, evidence beyond that proffered by the defense, in order that the entirety be meaningful. For example, Shay Jr. argues that Fred Burke should have been permitted to testify that Shay Jr. told him that he -- Shay Jr. -- had appeared on the Oprah Winfrey Show. To be relevant under the defense's "fanciful" theory, that is, that such declaration was offered under Rule 801(c) "not for its truth",

⁶ Examples of the government's "limited no objection" position here can be found in the record as regards the examinations of Boston Police Officer William Bridgeforth (wherein Officer Bridgeforth testified as to Shay, Jr.'s statements, made during the October 29, 1991 ride from Homicide to Nancy Shay's Quincy condominium, regarding his mother's alleged ownership of five condos, each of which, according to Shay Jr., she was offering for sale at \$12,000; see T. 9-92 and 96) and Larry Plant (wherein Plant testified as to Shay, Jr.'s claim to knowing where one could buy an F-16 fighter plane or a tank, and how one could make a bomb out of a light bulb and bleach; see T. 13-59).

but, rather, to establish that the declaration had been made, the defense would then have been called upon to demonstrate that Shay Jr. had in fact not appeared on that show. See T. 15-79 (sidebar conference where the Court ruled, in essence, that without correspondingly contradictory follow-up evidence, the sought-after declaration would be inadmissible as irrelevant).

In addition, the danger of opening up collateral matters to predictably extensive requirements of proof was clear. To illustrate using the present example, the evidence at trial established that Shay Jr. had appeared on the "People Are Talking" television show -- a point which, had Mr. Burke been permitted to testify as Attorney Gertner wished, would have raised the collateral matter of the accuracy as to Mr. Burke's recollection as to which television show Shay Jr. and Burke had been talking about.

Engaging in such a procedure as to each of the matters asserted within Attorney Gertner's Affidavit would not only have clearly confused the jury, but would have pulled the jury substantially away from its essential task. Simply put, it was wholly within the Court's discretion to determine the appropriate parameters of questioning in this respect and the Court's decision to limit such testimony, although not expressly noted as such, was one properly exercised under Rule 403.⁷

⁷ As the Court noted at sidebar on July 20, 1993 (sixteenth day of trial), "the record in this case is replete with the Defendant's contradictory statements, indeed, his fantastic ones about tanks, and bombers and other things." T. 16-4.

(continued...)

III. THERE WAS NO ERROR AS TO THE COURT'S INSTRUCTIONS REGARDING THE INTENT REQUIREMENT AS TO EACH OF THE SUBSTANTIVE COUNTS (COUNTS 2 and 3).

Shay Jr. complains that, in response to the jury's question, raised after commencement of deliberations, as to whether a finding of guilt on Counts 2 and 3 "inferred guilt" on the conspiracy count, the Court improperly instructed the jury with respect to the "intent" requirement on the substantive counts. At sidebar and in the course of framing a reply to the jury's question, defense counsel requested that an "aiding and abetting" instruction be given; the Court declined to do so, refusing to take the "aiding and abetting" instruction, already given to the jury, "out of context." T. 20-15. Shay Jr. now claims that the Court's answer to the jury (only partially restated within Defendant's Motion) constituted an instruction that permitted a finding of guilt on the substantive counts without reference to the "intent" element. Again, there was no error, as a review of the full record readily reflects.

The full colloquy on this point between the Court and jury unfolded as follows (that portion not restated within Defendant's Motion is in **bold**):

COURT: Do you have any further questions now?

JUROR: Yes. The general consensus, there's concern whether or not Charge 2 and 3 relate to Charge 1. If there

⁷(...continued)

As to the proffered testimony of David Shilalis and Scott Critcher (set out in part II of Shay, Jr's Motion, ¶¶ 16 through 20), the Court could likewise properly conclude that the probative value of such testimony was, again, substantially outweighed by the danger of jury confusion. See Fed. R. Evid. 403.

are guilty charges in 2 and 3, does that infer guilt in Charge No. 1?

COURT: No. Each is a separate accusation, each needs to be dealt separately, they are not interdependent. It is entirely possible for two people to agree, but then not to participate in doing what they agreed to do, for instance. It is equally possible for two people to participate somehow in doing it but not coming to an understanding that they would, in fact, violate the law. So that there are separate charges. You need to address them separately and come to a separate verdict. And you will recall that, as I outlined to you, each of them has different elements, and you will need to run through the elements on each and determine whether the government has proven each of the elements for each of the counts beyond a reasonable doubt.

T. 20-13 (emphasis supplied). The Court then advised the jury that it would be sending a transcript of the instructions, as previously given in full, to the jury room. T. 20-14. These instructions dealt extensively with the nature of the element of "intent" and the government's burden in that regard. See T. 19-96-97; T. 19-100-01; 19-103 (as to Counts 2 and 3) and T. 19-105-106 (regarding "intention to violate the law"). Read in context, as they must, these instructions were complete and accurate; there was no error. See United States v. Boylan, 898 F.2d 230, 244 (1st Cir. 1990) (courts of appeal gauge each jury instruction in context of charge as a whole, not in isolation).

IV. THE COURT'S "AIDING AND ABETTING" INSTRUCTIONS WERE NEITHER INADEQUATE NOR MISLEADING.

Shay Jr. complains that the Court committed prejudicial error by not transcribing and sending to the jury room the Court's supplemental (oral) instruction on "aiding and abetting." Motion,

p. 8. Again, there was no error of any kind, much less error warranting a new trial.

The panoply of instructions originally given to the jury addressed the basic concept of aiding and abetting, generally, and was accurate and complete in that regard. See T. 19-95-96. Appropriately, those aiding and abetting instructions also focused upon Shay Jr., as he was the sole defendant on trial. The instructions derived from the government's theory of the case that Shay Jr. aided and abetted another in a commission of the substantive counts (Counts 2 and 3). Thereafter, at the request of defense counsel, and in the presence of the jury the following day, the Court went on to particularize the earlier-given instructions, making explicit reference to Alfred Trenkler as Shay Jr.'s sole co-defendant in the Superseding Indictment. T. 20-12. In this respect, the Court told the jury:

Counsel suggested that although it is only Mr. Shay, Jr. who is now on trial, in practical effect, you really have to decide whether Mr. Shay and Mr. Trenkler did the things that the government has said that they did and whether the government has proven that they did it beyond a reasonable doubt. Because only two people are charged. So really, you have to decide whether those two did what they did, even though only one of them is now on trial before you.

T. 20-12.

There was no error. The "aiding and abetting" instruction initially given constituted a correct restatement of the law and, after it received the Court's supplemental, particularized instruction (restated, in full, above), the jury signalled that it

understood them.⁸ The instructions as to aiding and abetting were both complete and accurate (T. 20-17-18) and it was wholly within the province of the Court to decline to send a transcript of the later, isolated colloquy on the point to the jury room, for concerns of undue emphasis and jury confusion. T. 20-17. See United States v. Boylan, supra.

V. THERE WAS NO ERROR WITH RESPECT TO THE EVIDENCE OR INSTRUCTIONS REGARDING THE "VOLUNTARINESS" OF SHAY JR.'S STATEMENTS TO POLICE.

Shay Jr. complains that, in certain instances, he was prevented from eliciting testimony from police officers as to "Shay Jr.'s state of mind" and "what [each officer] knew of it." Motion, p. 9. Particularly, Shay Jr. claims error in the Court's having sustained the government's objection in two circumstances:

1) defense counsel's question to Detective Miller Thomas as to whether Shay Jr. looked "slow or retarded" at the Homicide Unit on October 28, 1991 (T. 10-36); and 2) defense counsel's question to Detective William Fogerty as to whether, by the time of the October 31, 1991 Trailways bus station press conference, Detective Fogerty

⁸ On inquiry from the Court in this regard, the jury indicated that it had no further question for the Court as to "aiding and abetting." T. 20-12-13.

In addition to receiving the jury's unanimous and unhesitating response that it understood the elements of the government's "aiding and abetting" theory on Counts 2 and 3 as to Mr. Shay, the Court also knew, at the time that it declined to send a transcript of the later colloquy into the jury room, that a copy of the Superseding Indictment itself had, by agreement, also been sent to the jury room. T. 19-111-112. On its face, the Superseding Indictment serves to explain Shay Jr.'s and Alfred Trenkler's respective roles as co-defendants in the case.

"knew . . . about Tom Shay's psychiatric history." T. 10-111-112.⁹

Neither of these rulings were erroneous.

While there is no dispute but that the question of "voluntariness of confession" may be relitigated at trial, see 18 U.S.C. § 3501 ("Admissibility of Confessions"), the defense has provided -- and the government is aware of -- no authority supporting a construction of "voluntariness" which Defendant now advances, that is, one permitting, at trial, a layperson's curbside diagnosis of a subject's mental health.¹⁰ Nothing within § 3501

⁹ In specific response to the latter (pre-"Trailways" press conference) objection to Attorney Gertner's question to Detective Fogerty, the Court suggested that defense counsel "go on to something else and let me have the cases so that I can review the matter." Defense counsel continued with another line of questioning. Id.

¹⁰ Even at the suppression stage, the only factors deemed relevant within § 3501 are limited to objective circumstances (i.e., time between arrest and arraignment; whether subject had been advised of his rights to counsel and to remain silent) under which a subject purportedly gave a confession of guilt or made a self-incriminating statement. See 18 U.S.C. § 3501(e).

The only recognized circumstances in which a subject's mental condition may even possibly come into play is, again, in the context of determining "voluntariness" for purposes of a motion to suppress; even then, the reviewing court may consider such evidence only after it has found unconstitutional overreaching on the part of law enforcement. Colorado v. Connelly, 479 U.S. 157, 167 (1986) (coercive police activity necessary predicate to finding involuntary confession); see Derrick v. Peterson, 924 F.2d 813, 819 (9th Cir. 1990) (in passing upon "voluntariness" at suppression stage, threshold inquiry becomes "whether the police's conduct was constitutionally acceptable"; any allegation as to material vulnerability, due to age or mental capacity, for example, is relevant for due process purposes only where reviewing court first finds unconstitutional official coercion). See, e.g., Townsend v. Sain, 372 U.S. 293, 298-99 (1963) (confession obtained from suspect administered truth serum by police physician involuntary and inadmissible).

(continued...)

speaks to any factor to be brought before the jury other than "relevant evidence", and the understanding of either Detective Thomas or Detective Fogerty as to Shay Jr.'s mental status is patently irrelevant to any trial issue. In these circumstances, where Defendant had waived his right to place his sanity at issue, the Court was not thereafter obliged to permit Shay Jr. to bring any evidence as to his mental capacity before the jury under the pretext of "voluntariness."¹¹

Nor was there any error regarding the Court's instruction to the jury as to "voluntariness." In this respect, the Court adequately instructed the jury that before they could consider statements purportedly made by Shay Jr. to law enforcement, they must: 1) first believe the law officers' testimony as to what Shay Jr. supposedly said; and 2) believe that Shay Jr. voluntarily and knowingly made such statements. T. 19-87. Specifically, the Court instructed the jury:

With respect to the statements to the police officers, you must also determine whether the statements were made by the defendant voluntarily and knowingly. In that connection, you just need to look at all the circumstances in which the defendant made those statements. And if you find that any one of them were not

¹⁰(...continued)

By its Order of June 15, 1993, the Court denied Defendant's Motion to Suppress on grounds of "voluntariness."

¹¹ Even assuming arguendo that Defendant was somehow entitled to a question calling for the state of Detective Fogerty's mind as to Shay, Jr.'s mental condition, the matter was mooted when Detective Fogerty testified that whatever he knew of Shay, Jr.'s mental condition "played no role" in Shay Jr.'s questioning at Homicide. T. 11-4.

made voluntarily and knowingly to the police officers, then you cannot consider those statements at all in reaching your verdict. You must simply put them aside and not make them part of your determination thereafter.

T. 19-87 (emphasis supplied). This instruction was a complete and accurate restatement of the law as to "voluntariness" (see, e.g., 18 U.S.C. § 3501(a)(trial judge to instruct jury to give such weight to confession as jury feels it deserves "under all the circumstances"); accordingly, there was no error.

VI. HAVING EARLIER WAIVED HIS RIGHT TO DEFEND ON SUCH GROUNDS, DEFENDANT MAY NOT NOW BE HEARD TO MOVE FOR A NEW TRIAL AS TO INSANITY.

Shay Jr. now complains that this Court's denial of his Motion for Bifurcated Trial "prevented him as a practical matter from raising an insanity defense" and now seeks to bring that matter before another jury. **Motion, p. 10.** Nowhere, however, does Defendant's Motion provide any authority for making such a request within the context of a Rule 33 motion. Rather, the thrust of Shay Jr.'s request here is to challenge the Court's ruling -- made before trial -- denying Defendant's Motion for a Bifurcated Trial. Defendant's "renewed" motion in this respect should therefore be denied.

VII. BECAUSE NO DIMINISHED CAPACITY DEFENSE WAS AVAILABLE TO SHAY JR., THERE WAS NO ERROR IN THE COURT'S PRECLUDING PSYCHIATRIC TESTIMONY PROFFERED ON SUCH GROUNDS

Shay Jr.'s Motion further argues that "expert testimony should have been admitted for the purpose of establishing that Shay Jr. lacked the ability to form the requisite intent to commit the charged offenses" because Defendant "gave notice of his intention to raise [a diminished capacity defense] and did not inform the

government otherwise." Motion, p. 12. More particularly, Defendant's Motion states that on the first day of trial, following the Court's denial of Shay Jr.'s Motion for Bifurcation, defense counsel "informed the Court and the government of [Shay Jr.'s] intention to abandon the insanity defense only." Motion, p. 12 (emphasis supplied). This restatement of the pertinent chronology is inaccurate.

During hearing on pre-trial motions (conducted on the second day of trial, before jury selection was completed but after the Court had denied Shay Jr.'s Motion for Bifurcation), Attorney Gertner advised the Court as to her client's position with respect to a possible insanity defense:

And before the opening, I want to determine as a strategic matter whether we can press the insanity defense at all in light of the Court's ruling on bifurcation. And my inclination now is that we will be obliged to waive it, we will not raise it.

T. 2-6. At no time during this hearing did defense counsel separately treat or otherwise distinguish between the defense of insanity and any claimed defense of diminished capacity. Accordingly, when, on the sixteenth day of trial, defense counsel made reference to a purported defense of diminished capacity, the Court rejected it without hesitation:

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

The Court: But you waived it. You decided

not to go forward on it.

Ms. Gertner: Only with respect to the insanity defense.

The Court: I don't believe the government understood that nor did I. Let's bring the jury down.

T. 16-5.

Clearly, therefore, before opening statements, the defense made a strategic decision to defend on the merits alone. The Court's understanding as to that waiver, consistent with the government's understanding, was based on defense counsel's clear and unambiguous pronouncement of that strategic decision and the trial proceeded accordingly. Simply stated, not until the morning of the last day of the government's case-in-chief did Attorney Gertner notify the Court and the government that her previously-announced waiver of the insanity defense amounted -- in her view -- to a partial waiver. This was a position totally at odds with that which the Court and the government reasonably understood, from Attorney Gertner's comments, made at the outset of the trial (and restated above), as well as with the "no mental health defense" posture which both the government and the Defendant had scrupulously followed in connection with questioning of witnesses and conduct of sidebar conferences up to that point.

Even aside from grounds of waiver, the Court's ruling excluding psychiatric testimony as to diminished capacity was likewise correct where that defense is in any case not recognized in this circuit. See United States v. White, 766 F.2d 22, 24-25 (1st Cir. 1985) (rejecting "diminished capacity" defense), citing

United States v. Kepreos, 759 F.2d 961 (1st Cir. 1985) and 18 U.S.C. § 20(a) ("Comprehensive Crime Control Act of 1984"), abolishing "diminished capacity" as defense to criminal prosecution. In any case, then, Dr. Phillips' proffered testimony would be relevant to no "diminished capacity" issue and was thus inadmissible. See generally Fed. R. Evid. 401.

VIII. THE COURT'S DENIAL OF DEFENDANT'S MOTION FOR MISTRIAL, MADE IN THE COURSE OF ARMBRISTER'S TESTIMONY WAS NOT ERRONEOUS.

During the government's examination of Dwayne Armbrister, the following colloquy took place:

Question: (By AUSA KELLY): Outside asking this information about name and address, did you have any conversation with this customer at the counter?

Answer: Yes, I made a remark like, damn, you're tall, how tall are you?

T. 15-48. On objection, the Court instructed the jury to disregard the answer. Id. At sidebar shortly thereafter, defense counsel moved for a mistrial, which the Court denied. **T. 15-52.** Shay Jr. now claims that the foregoing constitutes grounds for a new trial. **Motion, p. 13.** This argument is without merit.

First, the answer given by Mr. Armbrister was not "elicited", as Defendant's motion claims; to the contrary, the question clearly called for a "yes" or "no" response. Second, the question was obviously asked simply to establish the fact that Armbrister, the clerk at the Massachusetts Avenue Radio Shack, had had more than passing contact with that customer linked with the Radio Shack

receipt already in evidence. This question was perfectly proper, as the expected affirmative answer, awaited by both parties and the Court, would serve to corroborate both the Radio Shack receipt and Shay Jr.'s admission -- made in the course of his videotaped interview with Channel 56.

Although Mr. Armbrister's response carried beyond both the scope of the government attorney's question and the precise parameters of the Court's ruling on identification, such an inadvertent answer is of the type commonly cured by an instruction to the jury, such as that which the Court gave here. E.g., United States v. Blakeney, 924 F.2d 1001, 1030 (6th Cir.), cert. denied sub nom. Kutnyiak v. United States, 112 S.Ct. 646 (1991) (proper curative instructions often sufficient to cure any prejudice resulting from jury hearing inadmissible evidence); cf. United States v. Forzese, 756 F.2d 217, 222 (1st Cir. 1985) (conspiracy prosecution; submitting to jury numerous overt acts unsupported by evidence harmless error, where court instructed jury not to consider overt acts as to which evidence not provided). The curative instruction given was sufficient and expeditiously given; the motion for mistrial was properly denied; and the extraordinary remedy of a new trial is simply not warranted in these circumstances.

IX. THE EVIDENCE AS TO TRENKLER'S DECLARATION AGAINST PENAL INTEREST, MADE TO AGENT LEAHY, WAS PROPERLY ADMITTED

Shay Jr. claims that admission of Trenkler's statement (regarding "shunts", "leg wires", and "sympathetic detonation") made to ATF Special Agent Leahy during the course of ATF's January

31, 1992, search of the garage at 7 Whitelawn Avenue, Milton, was in contravention of Shay Jr.'s rights under the Confrontation Clause and therefore improperly admitted. **Motion, p. 13.**¹² Again, there was no error.

After proffer by the government as to Agent Leahy's testimony regarding Trenkler's statements (reflected within Leahy's ATF Report dated February 1, 1992; **T. 14-96**), and following argument outside the hearing of the jury and a brief recess, the Court found that because Trenkler's statement: 1) was indeed made against Trenkler's penal interests, and therefore within an established exception to the Hearsay Rule; and 2) was offered against Shay Jr., it did not implicate Shay Jr. on the charged offenses. Accordingly, the Court ruled that there was neither any Confrontation Clause nor any Bruton issue precluding introduction of that testimony. **T. 14-12.**

The Court's ruling was correct: Agent Leahy's testimony as to Trenkler's statements in this respect indeed represented Trenkler's statement against penal interest, admissible under Rule 804(b)(3).¹³ Because Trenkler's statements fell within an established exception to the Hearsay Rule, the requirements of the

¹² Contrary to the suggestion appearing in Defendant's Motion in this respect, Trenkler's January 31, 1991 statements to Agent Leahy were not offered as statements of a co-conspirator in the course of and in furtherance of the conspiracy pursuant to Rule 801(d)(2)(E).

¹³ Because of Trenkler's status as a co-defendant, and his attendant constitutional privilege against self-incrimination, Trenkler was "unavailable" for purposes of these proceedings as required by the rule. See Fed. R. Evid. 804(a)(1).

Confrontation Clause were satisfied. See Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539 (1980); Seigfriedt v. Fair, 982 F.2d 14, 16-17 (1st Cir. 1992).¹⁴ Nor was there a Bruton issue here. As the Court observed, Trenkler's statement to Agent Leahy as to his familiarity with explosive materials and technique was "not a statement which implicates Mr. Shay, although it is clearly a

¹⁴ Although hearsay, this evidence is plainly admissible under the "statement against interest" exception to the Hearsay Rule and, in turn, comports fully with the "trustworthiness" requirements of the Confrontation Clause.

As the government's attorneys argued before Agent Leahy was permitted to testify, a recent First Circuit habeas decision, Seigfriedt v. Fair, 982 F.2d 14 (1st Cir. 1992), provides the analytical framework for demonstrating the admissibility of Trenkler's admissions here:

The Confrontation Clause ensures a criminal defendant the right "to be confronted with the witnesses against him." U.S. Constitution amend. VI. . . . While the guarantee restricts the circumstances under which a court may admit the statements of unavailable declarants into evidence, the restriction is not an absolute bar since the keen "societal interest in accurate factfinding" necessarily tempers the sweep of the Confrontation Clause. Bourjaily v. United States, 483 U.S. 171, 182 107 S.Ct. 2775, 2782, 97 L.Ed.2d 144 (1987). Thus, hearsay evidence from an unavailable declarant may survive exclusion if the proponent can demonstrate that the proffered evidence "bears adequate indicia of reliability." Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980) . . . Such indicia can be established either by showing that the evidence "falls within a firmly rooted hearsay exception" or by showing that the evidence possess "particularized guarantees of trustworthiness." Id.; accord Idaho v. Wright, 497 U.S. 805, 816-17, 110 S.Ct. 3139, 3147, 111 L.Ed.2d 638 (1990) (collecting cases).

Seigfriedt v. Fair, supra, 982 F.2d at 16-17 (emphasis supplied).

statement offered against him." T. 14-112. Bruton v. United States, 391 U.S. 123 (1968).

The Court went on to note that a question remained as to whether Agent Leahy had accurately reported and recorded Trenkler's statements. T. 14-112. Counsel for both the government and the defense then conducted an extensive voir dire of Agent Leahy as to the circumstances of Leahy's conversation with Trenkler at the Whitelawn Avenue residence. T. 14-113-124. On examination by Attorney Gertner, Agent Leahy testified that, on that occasion, Trenkler discussed with him, among other things, his familiarity with leg wires, shunts, and sympathetic detonation of high explosives. T. 14-118. Agent Leahy went on to testify that these matters "stood out in his mind" because Leahy "wouldn't expect a layperson to know", as Trenkler clearly did, about the existence and operation of explosive matters such as: shunts on blasting caps; leg wires on a blasting cap ("that it comes with two of them, and that they can act as an antenna"); and the phenomenon of "sympathetic detonation", where one explosive detonates another placed next to it. T. 14-118-119. Following voir dire, the Court ruled that, because of Agent Leahy's "expertise with bombs" and the "obvious understanding of the importance of what Mr. Trenkler was saying", Trenkler's statement "was accurately perceived by this witness and accurately reported" and was permitted to that effect. T. 14-124.

The Court's decision to admit such statement in evidence against Shay Jr. was perfectly proper. The requirements of the

Confrontation Clause (see Ohio v. Roberts, supra ; Seigfreidt v. Fair; supra) and Bruton were clearly met. Agent Leahy's voir dire was extensive, established the basis for his specific recollection of Trenkler's statements, and underscored the accuracy of his February 1, 1992, report in this regard. There was no error.

X. THERE WAS NO ERROR IN CONNECTION WITH THE PLAYING OF THE CHANNEL 56 INTERVIEW VIDEOTAPE.

Shay Jr. argues that the attorneys for both the government and the defendant -- but not the Court -- erred when it "misunderstood" a "ruling" striking that portion of the Channel 56 interview where Shay Jr. admits that the Radio Shack clerk recognized him. There was no such misunderstanding on the part of the government's attorneys, however, because there was no such ruling.

Before the Channel 56 interview was played for the jury, Attorney Gertner and AUSA Kelly worked together for a substantial period of time, jointly editing a transcript of the entirety of that interview so that the transcript -- so revised by stipulation -- could be submitted to a service which would produce a videotape corresponding to the parties' edits. While this process was ongoing, Attorney Gertner called for a sidebar conference to discuss this matter. At the close of this sidebar conference, neither the parties nor the Court had reached a final decision as to how Shay Jr.'s "recognition" admission would be treated. **T. 15-4.**¹⁵ During Mr. Armbrister's direct examination,

¹⁵ In pertinent respect, the sidebar colloquy unfolded as follows:

(continued...)

which followed immediately thereafter, AUSA Kelly sought the Court's permission to "play a 30-second clip from the WLVI videotape that bears directly upon [Mr. Armbrister's] testimony."

T. 15-52-53. The Court declined, replying that the government would be free to "play a piece of it or read the transcript" during closing argument. T. 15-53. The jointly revised transcript was indeed submitted and the Channel 56 interview videotape was so revised, leaving brief portions of "dead air" to reflect those portions deleted, and that videotape was played for the jury.

No objection was raised at any time before, during or after the playing of the interview tape -- or brought to the Court's

¹⁵(...continued)

COURT: It seems to me you can take out the reference to being recognized and identified, but the rest of it certainly sounds independent of that.

MS. GERTNER: Well, if the Court, if the Court please, should that come in then my preference with respect to this witness Agent Leahy, there was a statement the month before which directly contradicted this which says that the Radio Shack clerk committed perjury, he recognized me from the block. So then if the reference to buying something at the Radio Shack is to come in, then we ask the statement of a month before come in.

COURT: Okay.

MR. KELLY: I don't have a problem with that. We clearly want to offer the statement for a number of reasons, and I don't have a problem with Agent Leahy testifying about Tommy's statement about perjury

T. 15-4 (emphasis supplied).

attention at any time before closing argument -- to reflect defense counsel's recently-stated position in this regard.

XI. THERE WAS NO ERROR IN DENYING DEFENDANT'S MOTION TO SEQUESTER.

Shay Jr. argues that the Court's denial of his Motion to Sequester, viewed in light of his claims: 1) that there was extensive publicity both before and during trial of this matter; and 2) that there was a "clear indication" that one or more jurors became aware of certain evidence which the court had suppressed, was in error and constitutes grounds for a new trial. **Motion, pp. 15-16.** There was no error, however, and the government opposes Shay Jr.'s motion in this respect.

To preclude any possibility that pretrial publicity might work an injustice, the Court undertook extensive voir dire of the jury venire, including en masse questioning as to familiarity with the case, generally, followed by extensive (two days) screening of individual jurors in chambers. The questions put to the venire were drafted jointly by Court and counsel and included specific references to the extent of each potential juror's knowledge about the case, from the media or otherwise. Counsel were further afforded an opportunity to inquire, and did inquire, specifically as to whether any juror's general familiarity with the October, 1991 explosion (i.e., typically, knowledge gleaned from the media that there had been an explosion in a driveway in Roslindale and that a police officer had been killed) in any way impaired his or her ability to listen to the evidence and fairly and impartially decide the case based solely on the evidence presented in court.

Every juror ultimately seated passed this rigorous scrutiny. There was no error whatsoever associated with this process.

Moreover, the Court went to great lengths to insure that the undisputedly extensive media coverage of this case played no role whatsoever in the jury's deliberations. At the close of the seventeenth day of trial (July 21, 1993), the date on which the government rested and the defense began its case, the Court instructed the jury as follows:

I want to make it very clear to you that the closer we come to the end of the case, the more important it is that you avoid looking at any newspaper articles, avoid talking to anyone. If anyone should start to talk to you about the case, it is terribly important that you tell that person to shut up and go away and not to talk to you. It is important for you not to watch television. It is not a secret that there has been media interest in this case. So it is very, very important that you should decide the case entirely on the evidence that has been produced in court.

As you know, we operate under a lot of rules that tell us what is appropriate and what is not appropriate, and sometimes the inappropriate creeps into the press. So it is for that reason as well that I ask you not to read anything about it. . . . You are now excused until tomorrow morning at nine

T. 17-115-116.

At the close of all of the evidence, the Court asked the jury:

Can you all assure me that none of you have, to this time read anything about this case in any newspaper, or watched anything on television or heard anything on radio about it?

T. 18-70. Having received an affirmative response from each member

of the jury, the Court went on to admonish the panel as follows:

Again, I ask you please to continue to adhere to that [procedure] and not to talk about it.

T. 18-70-71.

At the close of the first day's deliberations, the Court again admonished the jury:

I ask you most earnestly, please, not to think about the case, certainly not to talk about the case over the weekend. And again, I remind you, as you should be aware this morning, there is intense media interest in this case. Do not read anything about it, do not watch any television. Please ask your families to screen the radio, television, and newspapers for you. . . . I will try to arrange to give you at least some of the press that you are unable to read while you were serving as jurors about this case after it is all over. And I request in return, that you promise absolutely to adhere to this request on my part not to read anything in between and not to watch anything.

T. 19-116.

On the morning of the third day of deliberations (several hours before the verdict was returned), the Court again inquired of the jury:

Members of the jury, will you please assure me that none of you have read or listened or watched any media accounts of this trial?

T. 21-2. The Court then thanked the jury for their response, which was uniformly affirmative. Id.

Clearly, the jury discharged their duties solely by reference to the evidence in the case and without reference to any report carried in the media. "The jurors' assertions of continued impartiality, favorably appraised by the court, comprise testimonials that are not 'inherently suspect,' for a juror is 'well qualified to say whether he has an unbiased mind in a certain

matter.'" United States v. Boylan, 898 F.2d 230, 262 (1st Cir. 1990), quoting Dennis v. United States, 339 U.S. 162, 171 (1950). See also United States v. Angiulo, 897 F.2d 1169, 1186-87 (1st Cir. 1990) (trial court may rely on juror's statement of continued impartiality). The Court rightly concluded that the jury acted in full conformity with its instructions in this regard and thus there was no error.¹⁶

XII. THE COURT DID NOT ERR IN SUSTAINING THE GOVERNMENT'S OBJECTION TO DEFENSE COUNSEL'S QUESTION TO JOHN CATES WITH RESPECT TO A DETECTIVE'S PURPORTED STATEMENT REGARDING A "REWARD."

Shay Jr. argues that, had John Cates been permitted testify in response to Attorney Gertner's question on the matter, Cates would have testified:

One of the detectives said, "use your imagination. Be creative. Come up with something on him [Al]. There is a \$65,000 reward; that's a lot of money." I was told the reward could mean a whole new life for someone.

Motion, p. 15 (¶ 54).

¹⁶ Defendant makes specific reference to a July 29, 1993 article appearing in the Boston Globe, wherein two jurors, interviewed post-verdict, reportedly stated that "the jury thought evidence was suppressed that the jury should have been told about, but would not be more specific." See **Motion p. 15 (¶ 52)**. Shay Jr. argues that, notwithstanding the jury's repeated assertions of compliance with the Court's instructions as to "no media", the foregoing constitutes a "clear indication" that the jurors "became aware of" "evidence which was ruled inadmissible." **Motion p. 15 (¶ 53)**.

Defendant's Motion makes no claim, however, as to precisely what information, said to constitute inadmissible suppressed evidence, these jurors supposedly became aware of through the media. Rather, assuming the news report to be accurate, one readily concludes that the jurors interviewed simply presumed that several of the many sidebar conferences, undertaken in view of the jury, involved issues as to whether one party or the other could bring certain evidence before the jury.

Shay Jr. argues that the foregoing was "not offered for its truth, but as relevant evidence on the issue of the pressure was brought to bear on Trenkler and Shay Jr. as suspects, as contrasted with the polite handling of Shay Sr." Motion, p. 15 (¶ 55). While AUSA Kelly's examination of John Cates on this matter dealt, essentially, with Cate's claim that "a reward" had been "dangled" in front of him in November, 1991 (T. 17-65) (there was public record evidence that the reward did not come into existence until December, 1991), Attorney Gertner sought not to rehabilitate Cates on this point, but to elicit from Cates the specific language which, Cates claimed, the (unidentified) detective allegedly used in telling Cates about the reward. T. 17-71. The government objected on grounds of hearsay and the Court sustained the objection, stating further that "we want to stick to the issues in this case" and "this is not on the issue of credibility anymore. It is going far afield. [T]he objection is sustained." T. 17-71. The Court's ruling was correct and there was no error.

Although casting the detective's purported declaration ("Be creative") as having not been offered for its truth, but for the fact that the words were uttered (and thus non-hearsay), the clear purpose of Ms. Gertner's question was neither to show Cate's purported state of mind, nor, as the Court expressly noted, to rehabilitate the damage done to Cate's credibility by means of AUSA Kelly's question as to "timing." Rather, counsel's transparent purpose in this respect was simply to get before the jury Cate's (inflammatory, as well as empirically incredible) hearsay testimony

and thus, to cast discredit upon the alleged declarant -- an unidentified Boston Police Detective.

The proffered statement, therefore, was neither permissible non-hearsay nor relevant and the Court's ruling was correct.

XIII. THERE WAS NO ERROR WITH RESPECT TO THE COURT'S INSTRUCTION ON PRIOR INCONSISTENT STATEMENTS.

During its case in chief, the government called the Defendant's mother, Mrs. Nancy Shay, as a witness. Pursuant to Rule 611(c) and by agreement, the government examined Mrs. Shay as a "hostile witness." T. 13-2. In the course of his examination of Mrs. Shay, AUSA Libby sought to impeach Mrs. Shay's trial testimony by reading a prior inconsistent statement from her grand jury testimony. At that point, the Court took the opportunity to instruct the jury generally as to how to consider any prior inconsistent statement with respect to a witness' credibility. Shay Jr. argues now that both the instruction and its timing "was unfair and amounted to an instruction that Nancy Shay was not to be believed." Motion, p. 17 (§ 57). There was no error.

The record reflects that the Court's instruction in this respect was as follows:

Let me explain to you, members of the jury, one of the judgments that you will have to make in the course of your deliberations on your verdict is whether you believe what each and every one of the witness's has told you, the extent to which you believe the witnesses have told you. In other words, you have to make a judgement as to the believability of every single witness and then decide what you will credence to, and what not.

One of the things you may take [into] account in judging whether you believe a person, is whether the person has given inconsistent answers in the course of the testimony whether the person has given answers here

that may be different from answers that the person gave, that the witness gave on an earlier occasion.

When the lawyers ask the witness or confront the witness with what they perceive to be or think is, or say it is an inconsistent earlier statement, the first thing you have to decide is whether it is, in fact, inconsistent. And then if you determine if the witness said one thing here and the witness said something else there or earlier, then you have to decide, does that effect your judgment of the believability of the person and how much.

So number one, is what the witness said earlier really different from what the witness is saying here, and if so how does it effect your judgement of the believability of that person?

T. 13-160-161.

At this juncture, Attorney Gertner requested -- in the presence of the jury -- that "the instruction be made clear to the jury that instruction applies to prior witnesses." The Court immediately replied: "I just said every witness who has appeared in the case, every witness who will appear in the case." **T. 13-161.**

The Court's instruction to the jury as to prior inconsistent statements, generally, was correct as a restatement of the law and perfectly innocuous and neutral in tone. The instruction left the matter entirely for the jury as to whether it would believe there existed any inconsistency between any statement previously given by Mrs. Shay, or any other witness called to testify in the case, and if so, whether and how that determination should effect the overall credibility of the witness. This instruction was not directed to Mrs. Shay but to each and every witness in the case. There was no error.

XIV. THERE WAS NO ERROR WITH RESPECT TO THE COURT'S RESPECTIVE RULINGS AS TO PERMISSIBLE SCOPE OF CROSS-EXAMINATION OF RICHARD BROWN, GARY STARKEY AND DAVID SHILALIS.

The Court properly directed that defense counsel's examination of Richard Brown stop short of examining Mr. Brown as to any history of cocaine abuse. Any such answer would have, as the Court clearly and correctly concluded, been not only "inappropriate", but irrelevant to any legitimate issue, including truthfulness. **T. 13-116.** See generally Fed. R. Evid. 401; 403; 608 and 609.

AUSA Libby's questions to Mr. Starkey and Mr. Shilalis, on the other hand, cut plainly towards establishing grounds for each witness' bias in favor of Defendant, and thus towards their truthfulness on the stand. Mr. Libby's questions to Witness Starkey, now challenged as having no legitimate purpose but to create "passion and prejudice", spoke directly to that witness' admitted homosexual relationship with the Defendant. **T. 17-109.** Mr. Libby's questions to Witness Shilalis, also challenged, tended to show Shalalis' persistent unemployment and consequent long-standing and continued reliance upon the Defendant's mother -- who was plainly protective of her son -- for shelter and basic support. **T. 18-64-68.**

Clearly, the government was entitled to bring out these significant grounds of bias and the Court thus committed no error in permitting the government to do so. See, e.g., Alford v. United States, 282 U.S. 687, 692 (1931) (extent of permissible cross-examination lies within sound discretion of trial court).

CONCLUSION

For the foregoing reasons, the government respectfully requests that Defendant's Motion For A New Trial be DENIED.

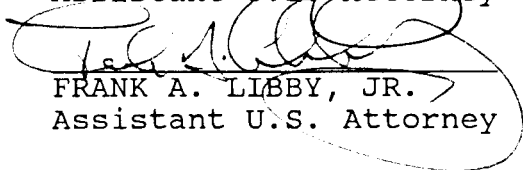
Respectfully submitted,

A. JOHN PAPPALARDO
United States Attorney

By:



PAUL V. KELLY
Assistant U.S. Attorney



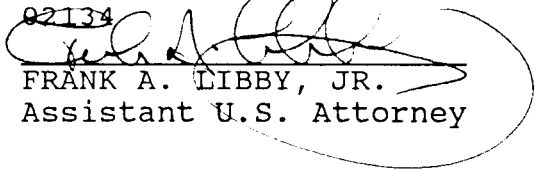
FRANK A. LIBBY, JR.
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

Suffolk, ss.

Boston, Massachusetts
August 30, 1993
31

I, Paul V. Kelly, Assistant U.S. Attorney, do hereby certify that I have served a copy of the foregoing Government's Opposition to Defendant Thomas A. Shay's Motion For A New Trial by first class mail, postage prepaid, to: Nancy Gertner, Esquire, Dwyer, Collora & Gertner, 400 Atlantic Avenue, Boston, Massachusetts 02110 and to Jefferson Boone, Esquire, Boone & Henkoff, 138 Brighton Avenue, Suite 212, Allston, Massachusetts 02134



FRANK A. LIBBY, JR.
Assistant U.S. Attorney