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PC-20,23
Trenkler
comments
on Government
Trenkler
MEMO

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)
)
 v.) CRIMINAL NO. 92-10369-Z
)
 ALFRED W. TRENKLER)

MEMORANDUM OF LAW IN SUPPORT OF GOVERNMENT'S MOTION
IN LIMINE TO ADMIT EVIDENCE OF 1986 BOMBING

INTRODUCTION

The Superseding Indictment (hereinafter, "Indictment") charges Alfred W. Trenkler ("Trenkler") and Thomas A. Shay ("Shay Jr.") with: conspiracy to receive explosives, having knowledge and intent that the explosives would be used to kill, injure or intimidate Thomas L. Shay ("Shay Sr.") (Count One); receipt of explosive materials, with knowledge and intent that these materials would be used to kill, injure or intimidate Shay Sr. (Count Two); and attempted malicious destruction of Shay Sr.'s automobile by means of explosive (Count Three). The cases have been severed. At trial against Shay Jr., the government pursued its theory that Shay Jr. aided and abetted Trenkler in Trenkler's design and construction of the 1991 remote-controlled explosive device, (the "1991 Device"). A jury has since found Shay Jr. guilty on the conspiracy and "attempted malicious destruction" counts. Trial as against Trenkler commences Monday, October 25, 1993.

In order to prove the charged offenses at Trenkler's trial, the government will be required to establish that one of the

conspirators -- Shay Jr. or Trenkler -- had the knowledge, skill, ability and experience to build the 1991 Device.¹ By virtue of its theory of the prosecution and the language of the Superseding Indictment, the government must show that Trenkler was this person.

By the accompanying motion, the government seeks a ruling from the Court in limine allowing it to offer evidence concerning Trenkler's design, construction and detonation -- in 1986 -- of an improvised explosive device, the nature and circumstances of which are remarkably similar to the device which exploded in Roslindale on October 28, 1991, killing Boston Bomb Squad Officer Jeremiah Hurley. As further detailed below, the government is prepared to prove at trial:

1. That Trenkler designed, built and detonated an explosive device in September, 1986 (hereinafter, the "1986 Device") containing components and features significantly similar to those present in the 1991 Device (i.e. remote-controlled, circular magnet, toggle switch assembly, soldered and taped wires, batteries, duct tape, etc.);
2. That Trenkler utilized a distinctive modus operandi in 1986, similar to that involved here (i.e., device was product of conspiracy, built by Trenkler for another; Trenkler used others to acquire components for him, device attached to vehicle by means of round magnet etc.);
3. That a computer-based analysis of over 14,000 bombings and attempted bombings occurring nationwide over a 12-year period (1979-1991) indicates that when certain features are "queried" or compared -- namely (1) bombings and attempted bombings, (2) remote control, (3) toggle switch, (4) cars and trucks, (5) affixed by

¹ The Indictment charges a two-person conspiracy. It does not charge the existence of any other "known or unknown" conspirators. See Indictment, Count One.

SEE 86-7

SEE TL
VS. BC 20/DS-16

SEE QRC 1
EXIS 1,2,3,4

round magnet to undercarriage of vehicle, (6) presence of duct tape, (7) soldered wires and (8) AA batteries -- two explosive devices from the entire 12-year nationwide computer database result: the 1986 Device and the 1991 Device.

AS this Memorandum will show, the proffered evidence constitutes "signature"-type evidence, admissible, under Fed. R. Evid. 404(b), for purposes of proving, among other legitimate issues, "identity" (United States v. Ingraham, 832 F.2d 229, 231 (1st Cir. 1987)); "experience, knowledge and skill" (United States v. Lattore, 922 F.2d 1 (1st Cir. 1990)); and "intent" (United States v. Zeuli, 725 F.2d 813, 816 (1st Cir. 1984)).

SUMMARY OF MATERIAL FACTS

A. Summary of Evidence Relating to the 1991 Bombing

At trial, the government will adduce evidence from both fact and expert witnesses explaining the design and construction of the 1991 Device and the circumstances leading up to its detonation substantially as follows:

At approximately noon on Monday, October 28, 1991, an explosion took place in the driveway of 39 Eastbourne Street, Roslindale, Massachusetts, a residential neighborhood. The source of the explosion was determined to be an improvised device which among other things, featured a radio signal receiver powered by four (4) "AA" batteries. When activated by a remote control (transmitter) unit, the receiver would activate a servo motor which, in turn, would "throw" a single-throw toggle switch. The 1991 Device was designed so that, when thrown, the toggle

switch would close an electrical circuit allowing energy to flow, in turn initiating detonation of the explosive material.

SEE ATF 3
The ends of several of the wires used within the 1991 Device were soldered when attached, rather than simply clipped or twisted together, and then taped.² Certain of the materials used in the Device were consistent with those appearing on an October 18, 1991 receipt from Radio Shack, confirming sale of these items to one "SAHY JYT".³ Among the items purchased ten days before the Roslindale explosion were a toggle switch, a "AA" battery holder, a small lamp (two to a package), and lamp holder capable of testing circuitry.

NOT USED
SEE ATF 5, 6
SEE ATF 4
SEE ATF 3
The 1991 Device was held together, in part, by means of duct tape and was designed to receive a radio signal from a remote control transmitting unit by means of an antenna consisting of stranded of wire. The effective range for remote control triggering of this device was up to one-half mile. This Device was ultimately affixed to the undercarriage of a motor vehicle

86 - NO SNAP CONNECTORS ON BATTERIES - SOLDERED AND FU7ABA PLUGS
2 The wires in the 1986 Device were likewise attached to each other in this fashion. This is one of the many points of similarity which ATF Explosives Enforcement Officer Thomas Waskom, the government's expert on improvised explosive devices, deems significant in the course of his opinion that a "signature"-like relationship exists between the 1991 and 1986 Devices. Other similarities between the two bombings, both forensic and circumstantial, also deemed significant by EEO Waskom in this respect, are set out on pp. 25 and 26, infra.

3 Dwayne Armbrister, then a store clerk at the 197 Massachusetts Ave. Radio Shack (across the street from the Christian Science Broadcast Center, where Trenkler then had a project ongoing), will testify as to the circumstances regarding the transaction reflected within the October 18, 1991 Radio Shack receipt.

belonging to Shay Jr.'s father, Thomas L. Shay ("Shay Sr."), by means of magnets, including round magnets, consistent with those found in stereo speakers. *ANTENNAS, MOTORS SEE ATF 2,7*

Three days after the Roslindale bombing, investigators assigned to this case found, in Shay Jr.'s possession, a handwritten notebook containing a series of names and telephone numbers. Included in this notebook was the entry: "Al Trenkler Bpr 617-553-0778."

SEE BC 27
AND 86-6

Within a few days thereafter, investigators learned that, in 1986, a remote-control explosive device had been detonated, damaging a fish truck in Quincy, Massachusetts. Investigators learned that the 1986 Device had been affixed to the undercarriage of this vehicle by means of a round (i.e., stereo speaker) magnet. Investigators also learned that, when first interviewed by detectives from the Quincy Police Department within days after the Quincy bombing, Trenkler -- then residing in Quincy -- denied involvement in the 1986 Bombing but later admitted to having designed and built the device in conjunction with others.

B. Summary of Evidence Relating to the 1986 Bombing

At trial, the government is prepared to adduce evidence as to the components of the 1986 Device and the circumstances surrounding that bombing substantially as follows:

86-6
1:30-2AM
TODD 11 YEARS OLD
SEE BC-25
TL-31

In the early morning hours of September 1, 1986, Quincy Police responded to a residential driveway outside 295 Willard Street, Quincy, on receiving report of an explosion. On arrival,

no visible damage

police found that a commercial truck belonging to the Capeway Fish Market had sustained damage as a result of the detonation of an explosive Device attached to the undercarriage of the vehicle.⁴ The investigation later revealed that one Donna Shea, a long-time associate of Trenkler's, had had an ongoing dispute with the owners of the Capeway Fish Market and, in the days preceding the 1986 Bombing, had communicated that dispute to Trenkler.

*NO VISIBLE DAMAGE
SEE 86-6*

Also within days immediately before the September, 1986 explosion, and in the vicinity of the Lake Street, Weymouth, public housing project, Trenkler noticed an stereo speaker abandoned in a dumpster. From his automobile, Trenkler told another individual (who will testify at trial) to go over to the speaker, take it apart and retrieve for him the "donut"-shaped magnet inside; the individual did as Trenkler directed. Within a day or two thereafter, Trenkler drove this same individual to a nearby Radio Shack store and handed him a piece of paper containing a hand-written list of items which the individual was to purchase; Trenkler ultimately joined this individual inside the store, picked out certain electronic items, paid for them and left.

*FROM CAR HOW
CAN ONE NOTICE
SOMETHING IN
DUMPSTER?*

*SAYS WITH BOB
CRAIG SAYS NEVER
WENT WITH ME TO
GET PARTS
SEE BC 23*

*Confered
Donna
Craig*

This witness is also expected to testify that he observed the 1986 Device several times while Trenkler was working on it.

*CRAIG
- 10 MINUTES
TO PUT TOGETHER
SEE BC 22*

⁴ Debris left by the explosive device was gathered and submitted to the Commonwealth's Department of Public Safety Crime Laboratory for forensic examination.

Particularly, this individual recalls that this device: featured the "donut"-shaped magnet which the individual had previously obtained for Trenkler; came wrapped in duct tape; and featured silver soldering. Finally, this individual is expected to testify that all of the foregoing took place within in approximately one week before the 1986 Bombing.

Craig
SEE BC 22

In addition, one of Trenkler's former roommates (whom the government will call at trial) is expected to testify that the 1986 Device was constructed with, among other things, parts taken from a remote-control car and a magnet stripped from a stereo speaker; the device was ultimately wrapped in duct tape. The former roommate is also expected to testify that Trenkler conceived the idea to affix this device to the undercarriage of the target vehicle by magnetic means.

The government's other evidence, both from forensic examination and the Quincy detectives for whom Trenkler detailed the circumstances of the 1986 blast, will show the following: The 1986 device used four (4) "AA" batteries to power a remote-control radio signal receiver and was equipped with a wire antenna to receive the signal. The device could be triggered from a distance up to one-half mile away. The device featured a toggle switch assembly and was wrapped in duct tape. The ends to the wires in the 1986 device were soldered, rather than clipped together at points of connection, and then taped. The 1986 Device was affixed to the undercarriage of a motor vehicle by means of a round magnet. Before the explosive material was

affid
1/17/86

71 DEV CAME WITH WIRE ANT - 86 USED SCRAP CRAIG SPARES 60 WARDS IN 91 - NOT ALL WIRES SOLDERED IN 86 ALL WIRES SOLDERED SEE BC 26

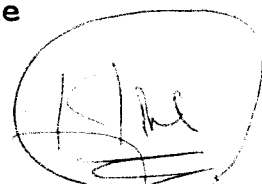
inserted into this device, Trenkler utilized a small test bulb to determine that the wiring circuitry was working properly.⁵

On Wednesday, September 3, 1986, and on the basis of an investigative lead, two detectives from the Quincy Police Department, Detectives William Lanergan and Thomas Tierney, appeared at Trenkler's apartment at 35 Union Street, Quincy. The detectives introduced themselves to Trenkler, told Trenkler that they were investigating an explosion which had recently occurred involving a Capeway Fish market truck, and advised him of his Miranda rights.⁶ Trenkler acknowledged that he understood his constitutional rights and indicated that he was willing to speak with the detectives regarding the subject explosion. Trenkler stated that he knew of some problems between one Donna Shea, a friend, and the Capeway Fish Market. Trenkler then stated that he had had dinner at Donna Shea's home on Sunday night (the evening of the explosion), but denied any involvement in the explosion, claiming that he had returned to his apartment

⁵ The explosive material utilized in the 1986 device was an M-21 artillery simulator, a military pyrotechnic known as a "Hoffman Device", and was detonated electronically. The explosive used in the 1991 Device was dynamite, which was detonated by means of blasting caps. The government will demonstrate that, under pertinent federal regulations, the charges used in the 1986 and 1991 Devices were both potentially lethal and classified as "high explosive." SEE DK1, DK2, ATF1, 86-1, L-2

⁶ Detective Tierney testified, during Trenkler's Suppression Hearing, that, in view of Tierney's history of dealings with Trenkler, Detective William Mahoney from the Boston Police Department Homicide Unit sought Tierney's assistance in locating Trenkler on November 5, 1991. Tierney ultimately recognized Trenkler outside Trenkler's 133 Atlantic Avenue residence later that evening.

IN ATF HANDBOOK
MAY 86 DEV
DESCRIBED AS
LOW EXPLOSIVE
CLASS B SPECIAL
FIREWORKS



directly from Shea's home. Trenkler then told the detectives that they -- the detectives -- must "consider [him] to be a good suspect" because he "[was] an electrical engineer and works on micro-wave ovens." Trenkler then said words to the effect that "anyone can get a M-80 and make that kind of stuff." Detective Lanergan responded that neither detective had mentioned any type of device and asked Trenkler why he had mentioned "an M-80."⁷ At this, Trenkler gave the detectives a blank stare, stated only that he had to leave for work "at Northeastern in Boston", and left.

On the following day, Detectives Lanergan and Tierney once again met with Trenkler (again advising Trenkler of his Miranda rights, which he acknowledged as understanding); Trenkler agreed to speak with the detectives, and then began to tell them that he -- Trenkler -- had been contacted by an unidentified male who had paid him to make a remote-control device. Detective Lanergan responded that Trenkler's story made no sense and that he -- Detective Lanergan -- did not believe him. Without responding directly to that statement, Trenkler went on to describe the design and construction of this device, which included the use of "AA" batteries and a receiver (featuring a

⁷ Debris from the 1986 explosive device was not forwarded to the Commonwealth's Department of Public Safety Crime Laboratory for analysis until October 17, 1986, some six weeks following the explosion. The resultant Report of Examination (issued by Francis R. Hankard, Assistant Chief of Crime Laboratory), which detailed the presence of, among other things, an artillery flash simulator, a circular magnet and a remote control receiver on that explosive device, was not completed until November 20, 1986 a month later.

TECHNICALLY A MICRO
SWITCH WAS USED
SEE 86-2

ONLY REMOTE CONTROL
WAS PURCHASED FROM
RADIO SHACK

wire antenna), toggle switch assembly and a "remote control" which he had acquired from Radio Shack. Trenkler also stated that he had used a small light bulb to check that the circuit was working properly. ^{SEE EXIS 7, 10} Trenkler then explained that he had attached the wires from the circuit to a "plastic-type simulator" and bound it all with duct tape, to which he then attached a 6-inch speaker magnet. Trenkler explained that this device could be detonated from a distance of no further than 1/2 mile.

The detectives then asked Trenkler if he wished to change any part of his story; Trenkler answered, "Yes." Trenkler then admitted that there was no "unidentified male", but rather, that he had put the device together for Donna Shea, who wanted to "scare the shit out of" the owners of the Capeway Fish Market.

kill
Trenkler admitted to the detectives that he had constructed the remote control triggering mechanism for the device before going to Donna Shea's house for dinner that Sunday evening. Trenkler brought this mechanism with him to Shea's home. Trenkler told the detectives that later that evening, Trenkler wired the triggering mechanism and the plastic explosive charge together and then, using a small test lamp, checked to see that the circuitry was working properly.

Although he denied having affixed the device to the Capeway truck, Trenkler admitted to having left the Shea's home at approximately midnight, and having accompanied Donna Shea and her husband, John Shea, in the Shea's automobile to the vicinity of 295 Willard Street. At this point, according to Trenkler,

Trenkler told the Sheas that he would not place the device on the fish truck and demanded to be taken home. Thereafter, according to Trenkler, Trenkler drove in his own car to the vicinity of Copeland and Willard Street, at which time he heard a loud explosion. On driving closer to the vicinity of Willard Street, Trenkler stated that he saw police and fire units at the scene, approached no further and then drove away.⁸

C. Summary of Evidence Regarding Search of Nation-Wide Database ("EXIS") For Features Common to the 1986 and 1991 Devices.

The government will also adduce testimony at trial from Steven Scheid, Intelligence Research Specialist assigned to the ATF's Explosives Incident Systems ("EXIS") Branch as to the nature of the detailed forensic information encoded and stored in the EXIS system -- compiled from field investigation of explosive incidents throughout the United States -- and the manner and means of retrieval of such information for intelligence and investigative purposes. Specialist Scheid will describe his search, by computer, of over 14,000 bombings or attempted bombings occurring within the United States (and its territories) from January, 1979 through December, 1991, for features common to the 1986 and 1991 Devices. Particularly, the government's evidence will establish that, when the EXIS database encompassing these thousands of bombings and attempted bombings was "queried",

⁸ The former roommate's expected testimony contradicts Trenkler on this point, i.e., the roommate will testify that following the explosion Trenkler returned home, explaining how he had detonated the charge.

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SEE QRC-1
EXIS 2,3,4

that is, programmed to search for and identify all explosives incidents with features determined to be common to both the 1986 and 1991 Bombings (i.e., bombings and attempted bombings; remote control; cars and trucks as targets; device affixed by round magnet to undercarriage) and when further comparison was conducted (i.e., presence of toggle switch; duct tape; AA batteries and soldering) only two devices resulted: the 1986 Device and the 1991 Device.

WAS MICROSWITCH
SEE QRC 1
EXS 314
86-2

The government's explosives expert, ATF Explosives Enforcement Officer Thomas Waskom, will then testify that, based on his training, education and experience in the field of improvised explosive devices, and taking into account: 1) the presence, in each device, of these discrete components and materials; 2) each configured as described above; 3) coupled with the similarity in modus operandi between the 1986 and the 1991 bombings, the 1986 and 1991 Devices were designed and constructed by the same person.

ARGUMENT

THE GOVERNMENT'S EVIDENCE AS TO TRENKLER'S INVOLVEMENT IN THE 1986 BOMBING SHOULD BE ADMITTED AT TRIAL AGAINST TRENKLER WHERE: (1) SUCH EVIDENCE IS OFFERED NOT TO SHOW TRENKLER'S BAD CHARACTER, BUT FOR ITS GREAT PROBATIVE VALUE ON SEVERAL MATERIAL ISSUES; AND (2) THE VALUE OF SUCH EVIDENCE IS NOT SUBSTANTIALLY OUTWEIGHED BY ANY CLAIMED DANGER OF UNFAIR PREJUDICE.

I. Admissibility of Evidence, Generally, Under Rule 404(b)

Rule 404(b) provides, in pertinent part, as follows:

Other crimes, wrongs, or acts - Evidence of other crimes, wrongs, or acts is not admissible to prove the

character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at trial.

Rule 404(b) (emphasis added).⁹

When considering the admission of "prior bad act" evidence, the trial court undertakes a two-pronged analysis: First, the trial court must determine whether the evidence offered is probative of a material issue other than character. Id.; see Huddleston v. United States, 485 U.S. 681, 685 (1988) ("Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct"); United States v. Williams, 985 F.2d 634, 637 (1st Cir. 1993) (trial court must first determine whether evidence has any "special relevance" to material issue).

Second, the court must consider whether, under Rule 403, such relevant evidence is nonetheless inadmissible on grounds that the probative value of the proffered evidence is

⁹ The list of permissible purposes set out in Rule 404(b) is by no means exhaustive. See United States v. Fields, 871 F.2d 188, 196 (1st Cir. 1989) ("[T]he range of relevancy outside the ban is almost infinite; and further, . . . the purposes are not mutually exclusive for the particular line of proof may fall within several of them"), quoting McCormack, Evidence § 190, at 448 (Cleary ed. 1972).

"substantially outweighed by the danger of unfair prejudice." Huddleston, supra, at 687;¹⁰ see United States v. Mazza, 792 F.2d 1210, 1222 (1st Cir. 1986) (where "prior act" evidence proves relevant to legitimate issue, such evidence admissible subject only to balancing test of Rule 403); United States v. Ferrer-Cruz, 899 F.2d 135, 138 (1st Cir. 1990) ("similar act" evidence survives Rule 404(b)'s absolute ban against "bad character" evidence where at least one permissible inference possible).

Indeed, current First Circuit law characterizes Rule 404(b) as an evidentiary rule of inclusion, rather than exclusion:

The most striking aspect of the Rule is its inclusive rather than exclusionary nature: Should the evidence prove relevant in any other way it is admissible, subject only to the rarely invoked limitations of Rule 403. (citation omitted). Moreover, the test of admissibility is committed primarily to the trial court (citation omitted).

United States v. Zeuli, 725 F.2d 813, 816 (1st Cir. 1984) (emphasis supplied); see generally Huddleston, supra, at 688-89 (" . . . Congress was not nearly so concerned with the

¹⁰ In Huddleston, the Supreme Court went on to resolve a split between the circuits relating to the standard by which trial courts are to determine whether the quality and quantity of such "similar act" evidence is sufficient to be presented to the jury: Under Huddleston, "similar act" evidence is admissible if the evidence is sufficient to allow the jury to find that the defendant committed the prior act. Huddleston, supra, at 685, citing, among others, United States v. Ingraham, 832 F.2d 229, 235 (1st Cir. 1987).

"Sufficiency of the evidence" is not an issue in this trial because, as the proffered evidence shows, Trenkler made detailed admissions regarding his design and construction of the 1986 Device to the Quincy detectives.

potential prejudicial effect of Rule 404(b) evidence as it was with insuring that restrictions would not be placed on the admission of such evidence").

II. The Proffered Evidence As To The 1986 Device, And The Circumstances Surrounding The 1986 Bombing, Are Admissible Under Rule 404(b) Since Such Evidence Is Plainly Probative of Trenkler's "Identity"; "Experience, Skill and Knowledge"; And "Intent" To Commit The Charged Offenses.

Evidence of the 1986 Device and bombing is offered not to show criminal propensity, but to prove Trenkler's knowledgeable participation in the Count One conspiracy and role as the bombmaker as to Counts Two and Three (by way of establishing his identity as the designer and builder of the 1991 Device, and through his proven experience, knowledge and skill in the design and construction of an improvised explosive device); and to meet the government's exacting burden of proof as to Trenkler's intent to both join the charged conspiracy and to commit the substantive explosives laws offenses charged in Counts Two and Three.

A. Identity, Skill, Experience and Knowledge Are Legitimate Means of Proving Trenkler's Membership In the Conspiracy and Guilt On the Substantive Counts.

As noted, Count One charges Shay Jr. and Trenkler alone with conspiracy to violate certain federal explosive laws, "with the knowledge and intent that [the explosives] would be used to kill, injure and intimidate another individual and damage and destroy real and personal property, including an automobile"

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ATF SA-110 3 REASONS
SEE K-1

Moreover, the "Overt Acts" section of Count One charges that in October, 1991 and in furtherance of the conspiracy and to effect the objects thereof, Trenkler built the remote-controlled device at issue.

To meet its burden as to Count One, then, the government must adduce evidence sufficient for a reasonable jury to find two elements: first, that the specific conspiracy charged in the indictment existed; and second, that the defendant under consideration, *i.e.*, Trenkler, knowingly and intentionally joined that conspiracy. *E.g.* Braverman v. United States, 317 U.S. 49, 53 (1942); United States v. Stubbert, *supra*, 655 F.2d at 456 (1st Cir. 1981); United States v. Thompson, 621 F.2d 1147, 1151 (1st Cir. 1980).¹¹

Whether cast as a question of "identity" of conspirators, or a question of the "skill", "experience" or "knowledge" of one said to be a member of the charged conspiracy, the government must adduce evidence sufficient to show that one of the co-conspirators was capable of building such a device, and that the individual capable of building such a device was in fact the same individual who participated in the charged conspiracy. In short, the government must adduce evidence sufficient to permit a

¹¹ Neither the existence of the illegal agreement nor the fact of any particular defendant's participation in it need, of course, be proved by direct evidence. See *e.g.*, United States v. Ruiz, 905 F.2d 499, 506 (1st Cir. 1990); United States v. Guerro, 693 F.2d, 10, 12 (1st Cir. 1982). Rather, "a common purpose and plan may be inferred from a 'development and a collocation of circumstances'." Glasser v. United States, 315 U.S. 60, 80 (1942).

reasonable jury to determine that the Count One conspiracy to violate federal explosives laws indeed took place. See United States v. Stubbert, 655 F.2d 453, 456 (1st Cir. 1981).

Rule 404(b) Evidence as Proof of Identity

The First Circuit has found a "special relevance" between the charged crime and a prior crime if the prior act is "methodologically so reminiscent of the charged crime as to earmark them as the defendant's handiwork." United States v. Ingraham, 832 F.2d 229, 231 (1st Cir. 1987); see United States v. Williams, supra, 985 F.2d at 635 (evidence of modus operandi admissible to prove identity), citing Wright and Miller, Federal Practice and Procedure, § 5246 at 512-13 (1978).¹² Ingraham

¹² Williams, a cocaine conspiracy case in which the First Circuit recently considered, and ultimately found erroneous, admission of certain Rule 404(b) evidence, is readily distinguished from our case. At trial in Williams, the government offered testimony from one Gray, a former girlfriend of defendant Williams, that Williams had, during the course of the conspiracy, told her that he had "killed a couple of people." Williams, supra, at 637. At sidebar, the government argued, successfully, that the statement was relevant because (as the First Circuit restated the argument) "Williams was or claimed to be a murderer, [and thus] was more likely than not also to be a cocaine trafficker who uses guns in his business." Id.

On appeal, the government argued that such evidence was admissible, under Rule 404(b), to prove both Williams' "plan" and his "identity" as the drug trafficker in the case. Williams' "plan", the government urged, was to establish a cocaine distribution system, featuring a packaging center and several retail outlets operating out of Boston-based apartments. The distinctive feature of this plan, according to the government on appeal, was the "carrot and stick" approach used by Williams in his efforts to "locate an apartment from which to sell cocaine." Id. In this respect, Gray testified that Williams had (unsuccessfully) offered Gray's mother "double rent" for an apartment near another outlet. Id.

(continued...)

2008 CRAIG/DONNA SHEA
VS TODD LEACH

SEE 86-6
PK 2, ATF 1
BC1 DS/TL

involved a charge of interstate (i.e., telephone) threats to kidnap or injure another. Defendant Ingraham stipulated at trial that he had previously authored some thirty letters sent to four

¹²(...continued)

While the First Circuit did not question the validity of the government's theory as to "plan", the appeals court ruled the statement as having been improperly admitted for this purpose where the government failed to show that Williams had made the challenged statement to intimidate either Gray or her mother, or to otherwise connect the challenged statement to Williams' attempt to rent any apartment. Id. at 637-38. In short, the First Circuit ruled that the government's evidence did not "link the 'carrot' and the alleged plan to the 'stick.'" Id.

The government's "identity" theory was likewise found wanting: Although the First Circuit acknowledged that "[e]vidence of modus operandi is admissible under Rule 404(b) to prove identity", the appeals court ruled that there was no question of "identity" in that case. Id. Instructive for our purposes, the First Circuit went on to indicate that, even if identity were indeed an issue there, the challenged evidence as to modus operandi fell short of the degree of "distinctiveness" required:

For conduct to be characterized as a modus operandi, it generally must be "'so unusual and distinctive as to be like a signature.'" 22 Wright & Miller at 513 (quoting C.T. McCormick, Evidence, § 190, at 449 (1972)). On this record, neither Williams's boast of committing or actual commission of murder is so distinctive a device as to prove his identity as the drug trafficker in this case.

Id. at 637 n.5.

In the instant case, unlike Williams, the proffered evidence is properly admissible because it cuts, with substantial probative effect, to establishing the intent; the "skill, knowledge and ability" and the "identity" of one of the members of the charged conspiracy, and thus serves purposes for which Rule 404(b) was expressly designed. The particulars as to the 1986 Bombing -- both as to the device itself and the conspiracy underlying it -- are, as demonstrated above, indeed significantly similar to the device and conspiracy at issue in Count One. Rather than showing "bad character", this evidence serves the crucial, and plainly permissible, purpose of proving the existence of the charged conspiracy by way of identifying one member of that conspiracy as having the experience, skill and knowledge required to build such a device.

particular public officials, all relating to Ingraham's ongoing civil rights actions brought against the University of Maine. On comparing the substance of the earlier letters and the charged (telephone call) offense, the Ingraham Court affirmed the trial court's admission, under Rule 404(b), of Ingraham's earlier letters, where there were "numerous substantial and distinctive points of agreement [i.e., the targets of Ingraham's written threats were the same as those threatened by telephone; the letters and the charged telephone call all centered on the "obscure" lawsuits against the University of Maine] . . . more than ample to constitute the requisite signature notwithstanding the deviant modes of communication" Id. at 232. The Ingraham court described this as "signature"-type evidence:

DIFFERENT MODES
OF COMMUNICATION
FOR SAME PURPOSE
HOW IS THIS COMPARED
TO OUR CASE

Because of the evidence on (special identifying) characteristics and distinctive touches, we have said that, for a practice to be attributable to the accused, it must contain what amounts to "his signature." But the required signature need be but a fair congener, not a facsimile or exact replica. See United States v. Scelzo, 810 F.2d 25 (1st Cir. 1987) (requirement is that the evidence "must have a similarity sufficient to be probative"); United States v. O'Brien, 618 D.2d 1234, 1238 (7th Cir. 1980) ("similar [wrongful] acts need not be duplicates"). In the last analysis, the court must make a reasoned determination as to "whether the characteristics relied upon are sufficiently idiosyncratic to permit an inference of pattern for purposes of proof."

Id. at 231-32 (emphasis supplied). Significantly, the First Circuit rejected Defendant Ingraham's argument that certain differences in "form and content" (i.e., use of the mail in the first case and telephone in the later, charged offense) precluded

admission, ruling that:

[T]he (distinctive) likenesses easily overbalance the (less significant) differences in the form and content of the communications. As we have said, "some variation in the peripheral facts . . . does not lessen the probative value of [the] evidence," nor bar its admissibility. Scelzo, 810 F.2d at 4. Like images in a many-sided mirror, the letters, though distorted at certain angles, formed a composite which faithfully reflected the singular distinctiveness of the charged call. Thus, we conclude that the correspondence was relevant to the question of [the telephone caller's] identity.

Id. at 233. See also United States v. Beaver, 524 F.2d 963, 966 (5th Cir. 1975) (appeal of counterfeiting case upholding admission of defendant's somewhat different prior counterfeiting activity; "[T]he acts need not be identical"). Rather, according to the First Circuit, any "discrepancies -- though themselves not unimportant -- go to the weight of the challenged evidence, not to its admissibility." Ingraham, supra, at 233.¹³

Scott - chub

¹³ Another case exemplifying "sufficiently similar" evidence admissible under Rule 404(b) to establish identity is seen in United States v. Gutierrez, 696 F.2d 753 (10th Cir. 1982). Gutierrez involved evidence of similar modus operandi used in a prior bank robbery and the charged robbery. The trial court found, and the appeals court later affirmed, that the two robberies were sufficiently similar where, in each case, the government showed that: 1) one of the two defendants, armed with a gun, robbed a bank while; 2) the other defendant, a female, drove the getaway car; and 3) one or more children were present in the getaway vehicle as "cover" for the robbers' escape. Gutteriez, supra, 696 F.2d at 755. See also United States v. Belle, 516 F.2d 578, 581 (8th Cir. 1975) (evidence of earlier, "clever scheme" for cashing forged checks admissible to prove identity of instant defendant and thus, defendant's connection with charged check forgery).

ALSO DIFFERENT
- I BOUGHT PART
FOR 86 DEV -

Rule 404(b) Evidence as Proof of Specialized
Knowledge, Experience, Ability And Skill

The First Circuit has also upheld the admissibility of "similar act" evidence, under Rule 404(b), in cases where such evidence tended to show knowledge, experience and skill exercised in both an earlier crime and the charged offense. For example, in United States v. Scelzo, 810 F.2d 2 (1st Cir. 1987), evidence of a defendant's involvement in a prior credit card scheme was deemed especially probative of defendant's knowledge and intent with respect to the charged credit card scheme. Id. at 4. Likewise, in United States v. Maldonado-Medina, 761 F.2d 12 (1st Cir. 1985), the First Circuit approved the admission of evidence of a prior kidnapping where it showed that it had been perpetrated in a manner "very similar" to the later, charged kidnapping. Id. at 15. Also, in United States v. Lattore, 922 F.2d 1 (1st Cir. 1990), the First Circuit approved the admission of evidence of an earlier tractor-trailer theft, where that evidence, "if believed", tended to establish the defendant's "experience, skill and knowledge . . . to plan and carry out a successful hijacking." Id. at 8. ¹⁴

¹⁴ Other circuits are in accord: In United States v. Hughes, 729 F.2d 1302 (11th Cir. 1984), defendants were charged with engaging in "bust out" schemes in violation of RICO. At trial, the court allowed evidence of a number of earlier fraudulent schemes, some of them "bust out", involving some of the defendants. Among other legitimate issues (including criminal intent to commit the substantive offenses as well as to engage in the RICO conspiracy), the appeals court upheld the admission of such prior bad acts evidence where it "depicted the plan of operation and showed the defendants' experience and
(continued...)

B. Evidence of Prior Bad Acts Are Legitimate Means of Proving Trenkler's Intent to Both Join the Count One Conspiracy And to Commit the Substantive Offenses.

Intent is a critical element of each count of the Superseding Indictment.¹⁵ Trenkler has pleaded "Not guilty" to each of these counts; his defense, to date, has been a complete denial of any involvement with respect to the 1991 Bombing. Intent thus remains at issue, and the government is entitled to

¹⁴(...continued)
ability to execute such schemes . . ." Id. at 1315 (emphasis supplied). Likewise, in United States v. Garcia, 880 F.2d 1277 (11th Cir. 1989), defendant was charged with making false statements on a loan application. In its case-in-chief, the government introduced testimony that defendant had previously signed another individual's name on a document purporting to be a purchase and sale agreement. Id. at 1278. The 11th Circuit found no error, ruling that the government's evidence as to defendant's prior act of forging a signature (even if done, as defendant had claimed, in a joking fashion) was relevant to the legitimate issue of defendant's:

. . . ability to prepare documents purporting to bear signatures which were faked. There was no question but that documents submitted to the bank on behalf of appellant where such documents; signatures were forged on them.

Id. (emphasis supplied).

¹⁵ Paraphrasing the Court's instructions to the jury in Shay as to each of these counts, the government must prove that Trenkler: Knowingly and willfully became a member of the conspiracy, with an understanding of the unlawful character of the conspiracy (Count 1) (see Shay Trial Transcript ("Tr.") 19-106); received explosive materials with knowledge and intent to either kill, injure or intimidate another (Count 2) (Tr. 19-99); and acted purposefully, that is with intent to break the law, with respect to the attempted destruction of Shay, Sr.'s automobile (Count 3) (Tr. 19-103).

adduce evidence as to the 1986 Bombing pursuant to the "intent" exception to Rule 404(b). As the First Circuit has ruled:

In a conspiracy case, each party's intent to conspire must be proven beyond a reasonable doubt. Thus, as the Fifth Circuit stated in the United States v. Roberts, 619 F.2d 379, 383 (1980),

In every conspiracy case, therefore, a not guilty plea renders the defendant's intent a material issue and imposes a difficult burden on the government. Evidence of such extrinsic offenses as may be probative of a defendant's state of mind is admissible unless he "affirmatively takes the issue of intent out of the case." [citation omitted.

United States v. Zeuli, 725 F.2d 813, (1st Cir 1984). See also United States v. Oppon, 863 F.2d 141, 146 (1st Cir. 1988) ("Other acts" evidence may be admitted when it is probative of an issue other than character even when the defense is a general denial of the charges"). Because Trenkler's "knowing participation and intent is an issue of crucial import", United States v. Scelzo, 810 F.2d 2, 4 (1st Cir. 1987), evidence of Trenkler's involvement in the 1986 Bombing is "especially appropriate." Id. Accord, United States v. Costa, 947 F.2d 919, 925, (11th Cir. 1991) (intent becomes material issue whenever defendant pleads not guilty to charge of conspiracy).

III. The Proffered Evidence As To the 1986 Device, And the Circumstances Surrounding the 1986 Bombing, Are Admissible Under Rule 404(b) Where It Is Clearly Probative Of Trenkler's Knowledgeable Participation In the Count One Conspiracy And Trenkler's Intent to Commit the Substantive Offenses.

Evidence concerning the 1986 Bombing is manifestly relevant to both the existence of, and Trenkler's knowledgeable participation in, the Count One conspiracy, as well as Trenkler's intent to commit the substantive offenses in Counts 2 and 3. Certainly, unequivocal evidence -- including Trenkler's detailed, insider's admissions -- of Trenkler's previous planning, design and construction of a remote-control explosive device:

(1) likewise borne out of a conspiracy, where others acted at Trenkler's specific direction, (2) carrying many of the earmarks later seen in the 1991 Device, and (3) ultimately affixed by round magnet to the undercarriage of the target motor vehicle, tends to "to make the existence of [the charged conspiracy] more . . . probable than it would be without the evidence." Fed. R. Evid. 401; see United States v. Scelzo, supra, 810 F.2d at 4 (evidence of similar past crime "especially appropriate" in conspiracy case, where "knowing participation and intent is an issue of crucial import").

In support of his expert opinion that the 1986 and 1991 Devices were designed and constructed by the same person, EEO Waskom will testify, generally, that similarities discovered between the componentry and configuration of the two devices, as well as between the modus operandi utilized in the respective

WASKOM - WASKOM
SITING - SITING
SITING - SITING
AT RIGHT

I DID EVERYTHING
AND RELIED ON
NO OTHER PERSON
SEE BC
DS
TL

bombing conspiracies, lead to his conclusion that this was the handiwork of the same individual. Particularly, EEO Waskom will testify that he deemed the following forensic similarities to be significant factors in his "signature" analysis:

- 1) The ends of the wires in each device were soldered and then taped (rather than simply twisted together); SEE ATF 2, ATF 3
- 2) Components in each device were wrapped with duct tape; SEE ATF 4, 86-3
- 3) Each device was affixed to the undercarriage of a motor vehicle;
- 4) Each device was so affixed by means of round magnets;
- 6) Each device employed a toggle switch in its respective firing circuit. SEE 86-2 d
- 7) The maker of the 1986 Device utilized a small test bulb to test the circuitry; Mr. Waskom infers (from the Radio Shack receipt, reflecting purchase of two test lamps and lamp holder, and, consistent with his expertise and experience regarding procedures typically followed by builders of improvised explosive devices) that the builder conducted a similar test as to the 1991 Device.
- 6) Each device was designed to be triggered by means of a remote control system.¹⁶

NOT LESS WIRES
ONLY DUCT TAPE
IN 91 USED WIRE TAPES

ONE MAG 86
18 MAGS 91

ONLY SOME WIRE SOLDERED IN 91 - BATTERY SNAPS COM ALL WIRES IN 86 SOLDERED EVEN TO BATTERIES

BOX HELD 91 DEV TOGETHER DUCT TAPE HELD 86 DEV TOGETHER
HOW DOES HE KNOW HOW 86 WAS CONFIGURED - NO REMAINS - NO PHYSICAL THING TO COMPARE TO

¹⁶ No persuasive argument can be made that a finding of "sufficient similarity" between the devices, and thus relevance, turns in any respect on whether each device was housed in a box: First, as Mr. Waskom will testify, the componentry of each device coupled with the configuration of those components are most relevant in reflecting the presence of any distinctive technique. The fact that a later explosive device is housed in a custom-made box, while the earlier device was not so housed, in no way, according to Mr. Waskom, precludes a "signature" opinion. It is precisely a facial distinction such as this which led the Ingraham court to conclude that "an exact match is not necessary; If there is a sufficiently striking family resemblance, the fact that a feature here or a mark there may vary is not enough to destroy the requisite degree of probability." United States v. Ingraham, supra 832 F.2d at 232. |

BUT THERE CANNOT BE AN ACCURATE COMPARISON TO SOMETHING THAT DOES NOT EXIST - HOW CAN ONE SAY 'X' IS SIMILAR OR NOT SIMILAR TO THE UNKNOWN 'Y' (continued...)

Further, Mr. Waskom will testify that, as an explosives enforcement officer, it is part of his duties to assess and take into consideration features relating generally to modus operandi. In this respect, Mr. Waskom will testify that he considers circumstances common to each of the 1986 and 1991 incidents, i.e., the explosive device in each was built for application to the undercarriage of a motor vehicle, such vehicle operated by a person with ties to another individual in that conspiracy; the bomb builder utilized an individual, other than himself or herself, to purchase electrical components, including a test lamp capable of testing circuitry, to be both significant and integral to his expert "signature" opinion.¹⁷

¹⁶(...continued)

Accordingly, even if viewed as a "discrepancy" (to the contrary, Mr. Waskom will characterize it as consistent with the nature of the explosive charge to be housed (i.e., dynamite) and expected refinement of technique), that factor cuts only to "the weight of the challenged evidence, not to its admissibility." Id. at 233.

¹⁷ In light of all of the circumstances presented to the Court regarding bomb-making technique common to each of the 1986 and 1991 Devices, the five-year period separating the two explosions in no way detracts from its probative weight. For example, the defendant in United States v. Franklin, 704 F.2d 1183 (10th Cir. 1983), a white male, was charged with violating the civil rights of two black persons, i.e., by shooting and killing them. Id. at 1185. During trial, the government adduced evidence that four years prior to the shooting, defendant had sprayed two individuals who had been travelling together -- one black and one white -- with Mace. An investigating law officer further testified that defendant later told him that he (Franklin) thought that interracial interaction was wrong. Id. at 1187.

On appeal following conviction, Franklin argued that the Mace incident should have been excluded as too remote in time

(continued...)

SEE DS 16, 18
BC 21, 23,
24, 25
TL 14, 15, 16, 17

AGAIN - DONNA
BOB CRANE GJ
VS TODD LEACH G

WHERE IS IT SAID
I SENT SOMEONE TO
PURCHASE A TEST LAMP

¹⁷(...continued)
(i.e., four years), from the charged offenses. The Franklin court disagreed:

"[T]here is no absolute rule regarding the number of years that can separate offenses. Rather, the court applies a reasonable standard and examines the facts and circumstances of each case." United States v. Engleman, 648 F.2d 473, 479 (8th Cir. 1981) (no abuse of discretion when district court admitted evidence of crime that defendant committed thirteen years before charged offense). See also United States v. Dudley, 562 F.2d 965 (5th Cir. 1977) (admitting evidence of prior Dyer Act [i.e., interstate transport of stolen motor vehicles] conviction within six years); United States v. Zeidman, 540 F.2d 314 (7th Cir. 1976) (five years); United States v. Barash, 412 F.2d 26 (2nd Cir.), cert. denied, 396 U.S. 832, 90 S. Ct. 86 (1969) (case charging attempted bribery of IRS agent; evidence of bribe offered to accountant five years previously admitted as relevant, minimal prejudice). But see United States v. Gilliland, 586 F.2d 1384 (10th Cir. 1978) (prior Dyer Act convictions fourteen to thirty-four years old insufficiently relevant to instant charge); United States v. Burkhart, 458 F.2d 201 (10th Cir. 1972) (prior Dyer Act convictions four and fifteen years old insufficiently relevant).

Id. at 1189. [In Burkhart, supra, the Tenth Circuit reversed the conviction, not on grounds of time, per se, but because:

[t]he so-called similar offense evidence consisted of certified copies of the judgments of conviction [which] were not shown to have been connected with the case on trial . . . in terms of sharing a common . . . scheme, design or intent, or in terms of factual or other similarity except that they were all Dyer Act violations.

United States v. Burkhart, supra, 458 F.2d at 203. For reasons stated above, this rationale has no application to our case.]

The Franklin court went on to rule that "under the circumstances of this case, the trial court's determination that the evidence was relevant, probative and not unduly prejudicial was not an abuse of discretion. Id. at 1189 (emphasis supplied).

Mr. Waskom will testify that, in the course of determining, generally, whether any signature-type features may be present in
(continued...)

For these reasons, the government's evidence as to the distinctive configuration of the 1986 Device and the contours of the earlier conspiracy bears directly on the fundamental jury issue of Trenkler's intent as to each count, and is thus admissible for this purpose under Rule 404(b). See United States v. Dworken, supra; United States v. Latorre, supra.

IV. In View Of Its Great Probative Value, Such Evidence Is Not Excludable Under Rule 403, On Any Claim That It Is Substantially Outweighed By Any Claimed Risk Of Unfair Prejudice.

Under Rule 403, otherwise admissible evidence may yet be excluded, but only should the court determine that unfair prejudice or confusion would result and that such unfair prejudice or confusion substantially outweighs its probative value. As the First Circuit puts it, 404(b) evidence may be excluded only where the trial judge believes there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is "unjustly disproportionate to the probative value of the offered evidence." United States v. Zeuli, 725 F.2d 813, 817 (1st Cir. 1984); see also United States v. Day, 591 F.2d 861, 878 (D.C. Cir. 1978), where the appeals court stated:

¹⁷(...continued)
two or more devices, passage of time between incidents rarely presents any substantial difficulty. According to Mr. Waskom, the five years between the two explosive incidents in this case in no way hampered his ability to form his expert opinion as to the "signature" common to the two devices. This is so, according to Waskom, because of the specialized skills which remote-control bombmakers (by definition) possess and their tendency to exhibit their individualized technique, in their product, over time.

HAS WASKOM
SEEN 86 DEVICE
NOT!

In determining whether "the probative value is substantially outweighed by the danger of unfair prejudice", it is a sound rule that the balance should generally be struck in favor of admission when the evidence indicates a close relationship to the offense charged.

Id. (emphasis in original). Moreover, in assessing probative value, the court does not pass on credibility: "Weighing probative value [under Rule 403] . . . means probative value with respect to a material fact if the evidence is believed, not the degree the court finds it believable." Bowden v. McKenna, 600 F.2d 282, 284-85 (1st Cir.), cert. denied, 444 U.S. 899 (1979). See also United States v. Thompson, 615 F.2d 329, 332-33 (5th Cir. 1980).

Simply showing prejudice is insufficient: To prevail under Rule 403, a defendant must show that such evidence is unfairly so. See Onujioqu v. United States, 817 F.2d 3, 6 (1st Cir. 1987) (all evidence meant to be prejudicial; only unfair prejudice proscribed under Rule 403).¹⁸ The First Circuit has

¹⁸ The First Circuit conceded the inevitability of prejudice to a defendant by admission of Rule 404(b) evidence in United States v. Scelzo, 810 F.2d 2 (1st Cir. 1987):

Scelzo further argues that [the 404(b) evidence as to earlier credit card fraud] was prejudicial because he was being tried for the exact same crime: fraudulent credit card activity. It is true that this evidence has the possibility of being prejudicial; but this is inevitably true since, for such evidence to be properly admitted, it must have a similarity sufficient to be probative Thus the possibility of prejudice is always present in these cases, since the prior unlawful acts will be at least similar if not nearly identical. The prior unlawful act was not, however, shocking or heinous and so was not likely to inflame the jury.

Id. at 5.

HOW SHOCKING
CAN CREDIT CARD
FRAUD BE?

[citation omitted]. But "if there is simply no other practical means to prove the point, then the need factor points strongly toward receipt" of such evidence. 2 Louisell and Mueller Federal Evidence § 140, at 116-117 (1978).

IF THERE IS NO PRACTICAL MEANS - THERE IS NO CASE!

United States v. Cohen, 888 F.2d 770, 776 (11th Cir. 1989) (emphasis supplied). See also United States v. Ingraham, 832 F.2d 229, 234 (1st Cir. 1987) (trial judge more directly familiar than court of appeals with need for evidence).

To summarize, therefore, a defendant seeking to exclude "prior bad act" evidence may prevail under Rule 403 only where the trial court first determines: (1) that the prior act constitutes "shocking" or "heinous" behavior; which (2) gives rise to a "genuine risk that the emotions of the jury will be excited to irrational behavior"; and (3) that such risk of irrational jury behavior is disproportionate to the probative value of -- and the government's need for -- the evidence. Scelzo, supra; Zeuli, supra United States v. Vest, supra.

Any argument raised in this case seeking to preclude evidence of the 1986 Device under Rule 403 falls far short of satisfying any of these cumulative obligations: On points (1) and (2) of the above calculus, the circumstances surrounding that device simply cannot be said to be "shocking" or otherwise of the variety of conduct which would even remotely create a real risk that a jury would then run amok and dishonor its obligations to weigh the evidence evenhandedly. As to point (3), and even assuming arguendo contrary conclusions as to each of points 1) and 2), this evidence is still not barred by Rule 403. The

STEW REBUTT - NO DAWDLE VS THERIA - TRUCK BLOW UP

IT IS OBVIOUS TO USE '86 TO LINK ME TO A HEINOUS CRIME HOW CAN THIS NOT BE SHOCKING?

probative value of the detailed evidence as to the 1986 Device and Bombing is unquestionably great. The government's evidence as to the distinctive components and configuration of the 1986 Device, as well as the contours of the conspiracy giving rise to the Capeway Fish truck bombing, is obviously relevant at trial against Trenkler, where it cuts directly to the central issues of the 1991 bombmaker's identity and -- given Trenkler's continuing claim of total uninvolvedness and innocence -- the requisite intent as to each count. Largely by means of Trenkler's detailed admissions (corroborated forensically) to law officers, this evidence establishes the existence of an earlier, similar conspiracy furthered by a remarkably similar modus operandi, resulting in the construction and planting of a significantly similar explosive device in a (once again, similarly) residential neighborhood.²⁰ The government's need for this evidence is also great: Because there is no eyewitness or other direct testimony regarding the planning, design, construction or placement of the 1991 Device, there are "simply no other practical means to prove the point." United States v. Cohen, supra.

Accordingly, even if the Court were to somehow consider the proffered evidence "shocking", with the potential to create a "genuine risk" of jury misconduct, one cannot say that these elusive, if not imponderable, concerns substantially outweigh the

²⁰ Given Trenkler's extensive admissions as to the facts and circumstances surrounding the 1986 Device and Bombing, there is virtually no risk of confusion or waste of time in placing that evidence before the jury.

- WHAT EVIDENCE
86 DEVICE REMAINS
ARE NON-EXISTING

CORROBORATED
TO WHAT?
DYWIDAG VS
CLASS B FURNISHING
SEE 86-1, DK2
ATF 1, L-2

SEE DS, BC
TL

BUSINESS
ZONE