

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

ALFRED W. TRENKLER

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Criminal No. 92-10369-Z

GOVERNMENT'S MEMORANDUM IN OPPOSITION  
TO DEFENDANT'S MOTIONS TO SUPPRESS

I. INTRODUCTION

Defendant Alfred W. Trenkler ("Trenkler") seeks to suppress evidence, principally in the form of his own statements and admissions to law enforcement officials, proffered by the United States as among the evidence it will offer during the trial of this matter when it commences on October 25, 1993. Trenkler initially filed seven (7) separate suppression motions, however his legal challenges have now crystallized into four (4) categories of evidence. As such, the evidentiary items at issue are as follows:

- A. Physical items seized, and observations made, at Trenkler's apartment, office, and parents' garage on November 5-6, 1991.
- B. Statements made by Trenkler during course of the evening of November 5-6, 1991.
- C. Statements made by Trenkler on January 31, 1992 (at parents' garage) and on February 4, 1992 (at ATF's offices).
- D. The "fruits" of the federal search warrants executed on January 31, 1992.

The government opposes each of Trenkler's motions to suppress and seeks a ruling from the Court authorizing the

admission at trial of each of the above-described items of evidence.

## II. FACTS

### A. November 5-6, 1991

Shortly after 11:00 p.m., November 5, 1991, Detective John McCarthy of the Boston Police Homicide Unit, accompanied by other Boston Police Detectives and Special Agents of the ATF assigned to this investigation, approached the door to the apartment located in the basement of 133 Atlantic Avenue, Quincy. Tr. 1-35; 2-36.<sup>1</sup> Immediately on knocking, Detective McCarthy

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<sup>1</sup> Prior thereto, the members of the investigative team -- consisting of Boston Police detectives and special agents of the ATF-Boston Field Office-- had received an investigative lead and had undertaken to locate and positively identify Trenkler. The investigators split into two groups: The first group consisted of Boston Homicide Detective William Mahoney and Quincy Police Detective Thomas Tierney; Tierney would be able to recognize Trenkler as a result of his investigation (and ultimate arrest) of Trenkler regarding the 1986 Capeway Fish truck explosion. Tr. 3-40; Tr. 3-56. The second group consisted of the remaining law officers who attempted to conduct moving surveillance, during the afternoon hours of November 5, of a grey Lincoln Continental automobile departing from ARCOMM's Weymouth offices and containing two individuals believed to be Trenkler and Trenkler's partner, Richard Brown. Tr. 3-83. At some point that afternoon, this group lost contact with the Continental. Tr. 3-83. No member of the second group was familiar with Trenkler on sight. Tr. 3-56.

At approximately 10:45 p.m., Detectives Tierney and Mahoney relocated to the vicinity of 133 Atlantic Street. Tr. 3-61. At approximately 11:00 p.m., Detective Tierney positively identified Trenkler (outside the rear door of 133 Atlantic St.) for the first time that day, and notified Detective Mahoney of this. Tr. 3-58. Detective Mahoney radioed the other investigative group of this positive identification. Tr. 3-59.

The other group of officers, then located in the public parking lot off Mechanic Street, Quincy, responded to Detective Mahoney's radio call at approximately 11:00 p.m. As Special Agent Jeff Kerr testified, law officers following the Continental thought to be carrying both Brown and Trenkler believed that

(continued...)

identified -- through he closed door -- that the "police" were calling; at this point, as Special Agent Dennis Leahy testified, a voice from inside the apartment stated "I'll get dressed" and a dog began to bark. Tr. 2-36. Conversing through the closed door, Detective McCarthy requested that the dog be put away; a voice coming from behind the door stated words to effect "I'll put the dog in the bathroom. Tr. 2-36. After approximately two minutes had elapsed from the time of the initial knock, Trenkler opened the door. Tr. 2-36. Trenkler was dressed in jeans and a shirt (Tr. 1-38) and appeared wide awake. Tr. 2-102. Detective McCarthy identified himself and then Special Agent Leahy identified himself. Tr. 2-105. Detective Peter O'Malley and one other officer stood behind Detective McCarthy and Special Agent Leahy in the vicinity of the doorway. Tr. 2-106. After having identified themselves, either Detective McCarthy or Special Agent Leahy asked "May we come in?" Tr. 2-105 Trenkler responded by saying "Sure" or "Yes." Tr. 2-105. Although there were other officers in the curved stairway leading to the basement, they were out of line of sight of the doorway. Tr. 2-105-106. These four officers then entered the apartment. Tr. 2-37.

At this point, Special Agent Leahy advised Trenkler that the officers "were here about the bombing" and asked Trenkler if he

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<sup>1</sup>(...continued)  
they'd "been made" (i.e., the occupants of the Continental discovered that they were being followed). Tr. 3-83. Given the clear concern of imminent flight and/or destruction of possible evidence, the investigators proceeded directly to 133 Atlantic Street following Detective Mahoney's call.

lived there; Trenkler responded that yes, he did live there. Tr. 2-37. Within a few feet of this conversation, John Cates Trenkler's roommate, was lying in the apartment's sofa bed. Tr. 2-37.<sup>2</sup> After approximately 10 minutes had elapsed, and in Cates' presence, Special Agent Leahy asked Trenkler if the officers could look through the apartment: Trenkler said he "wanted to cooperate" and that the officers could look through the apartment. Tr. 2-39. During this time, Special Agent Leahy testified that Trenkler answered all of the officers' questions, and that Trenkler's demeanor was "very cooperative and accommodating." Tr. 2-44.<sup>3</sup>

Special Agent Leahy further testified that at no time while the officers were present in the apartment, did any officer exhibit any coercive behavior or profanity towards Trenkler or Cates. Tr. 2-52. After approximately an hour, one of the

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<sup>2</sup> Trenkler told Agent Leahy that he had been living in the basement apartment for approximately eight months. Tr. 2-103. Cates testified that because he was then lying only "5 feet" from the doorway, he was in a position to hear any conversation taking place in the doorway. Tr. 4-18-24. Agent Leahy further testified that Cates made no comments or statements when the officers initially entered the apartment (Tr. 2-37) and made no statements at all until Cates was approached by Detective Murray (Tr. 2-104) and agreed to speak with Detective Murray outside the apartment. Tr. 4-53-54.

<sup>3</sup> Cates raised no objection or otherwise made any comments to the officers as the officers proceeded to search the apartment. Tr. 1-44; Tr. 1-46. Trenkler's Brief makes no argument that Trenkler lacked the capacity to consent to either the officers' entrance into the apartment or to the subsequent search therein; accordingly, the government intentionally omits any reference herein to Cates' interview with law officers outside of the apartment (wherein, for the first time according to Cates, Cates authorized a search of the apartment) as irrelevant.

investigators asked Trenkler "if he would consent to allowing us to search his business." Tr. 2-53. Trenkler responded with words to the effect "Sure, but I don't have any way to get there. I just don't have a motor vehicle." Tr. 1-49. Investigators advised Trenkler that the investigators would provide transportation to ARCOMM and back to Trenkler's apartment. Tr. 1-49. At that, Trenkler said that he needed to find his keys and "wanted to find pack of cigarettes to take with him." Tr. 1-49. On the way out the door, Trenkler spoke to Cates, saying "we're going to my office, I'll see you later." Tr. 1-50. Trenkler rode with Detectives Tierney and Mahoney in Detective Mahoney's automobile for the drive to ARCOMM.<sup>4</sup> During the drive to ARCOMM, Trenkler appeared calm and was chatting with the officers, saying, among other things, "I hope they get those guys that killed that cop", and that he would "like to help the police in any way he could." Tr. 3-62-63.

On arrival at ARCOMM's 82 Broad Street, Weymouth, storefront office, Trenkler was the first to approach the door; at this point, Special Agent Leahy again asked Trenkler "Al, would you mind if we looked?" Tr. 2-55. Trenkler replied "No", and then opened the door, at which point Agent Leahy began to enter. Tr. 2-55. Trenkler grabbed Agent Leahy by the arm, saying "No, let me shut the alarm off first"; Trenkler then crossed to the rear

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<sup>4</sup> Detective Tierney testified that Detective Mahoney drove to ARCOMM "in an orderly manner"; Trenkler sat alone in the back seat of the vehicle (there was no "open bag of guns") with the doors unlocked. Tr. 3-61-62.

of the business and deactivated the alarm. Tr. 2-55; 1-51. During this period, as Detective Tierney testified, Trenkler was "very helpful to everybody, he was showing them around. He was taking things out and showing them to them". Tr. 3-63. Agent D'Ambrosio then asked Trenkler "if it was okay to look around the back storage area and the utility room", to which Trenkler responded "Sure, go ahead." Tr. 1-53. Throughout much of this search, Trenkler was seated at a table in the front room. Tr. 2-56. Trenkler's demeanor, during this search and during Trenkler's subsequent conversation with Agent D'Ambrosio was, as Agent Leahy testified, "very cooperative" and "amiable." Tr. 2-57.<sup>5</sup>

Just before leaving ARCOMM, Agent Leahy asked Trenkler whether he had any storage areas; Trenkler responded that he stored some materials and equipment at his parents garage at 7 Whitelawn Avenue, Milton. Agent Leahy then asked Trenkler if the officers could search that garage. Tr. 2-61. Trenkler responded that "it was late and he did not want to disturb his parents". Tr. 1-59. Agent Leahy immediately addressed that concern, suggesting that Agents Leahy and D'Ambrosio alone would accompany Trenkler to the garage; that the agents would make every effort not to disturb his parents, but if they (the parents) should come

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<sup>5</sup> Detective Tierney likewise testified that Trenkler's demeanor during this time was "very calm, very helpful . . . ." Tr. 3-64. At no time did any law officer brandish a weapon, "crowd" Trenkler's person space (i.e., stand closer than "conversational distance, two to three feet") nor did law officers circle Trenkler at any time that evening. Tr. 2-20-21.

out and inquire, he (Trenkler) could make up whatever story he wanted." Tr. 1-59; 2-51. Special Agent Leahy further testified that he assured Trenkler that the officers "would be very low key. We would take one vehicle. The garage was detached; it would be very quiet; we would park the car away from the house we would do it very quickly." Tr. 2-62. Having received that reassurance, as Agent Leahy testified, Trenkler "was no longer concerned" (Tr. 2-62) and then said "Well then, let's go." Tr. 1-59.

On arrival at 7 Whitelawn, the officers took no longer than 20 to 30 minutes to look through the garage. (Tr. 1-61).<sup>6</sup> One of the officers then asked Trenkler if on the way returning Trenkler home, the officers could search his motor vehicle. Tr. 1-62. Trenkler responded "Sure" and located the vehicle for the officers in a "parking lot in Quincy." Tr. 1-62. That search took no more than 15 minutes following which an agent told Trenkler "that we were done, that we were all tired and that we would bring him home." Tr. 1-63. While driving Trenkler home, as Agent Leahy testified, Trenkler "asked if he could smoke and we said sure. No one had cigarettes and he asked to be driven to a store to get cigarettes, which we did then we drove him to Atlantic Ave." Tr. 2-65. No one accompanied Trenkler into the store; when he returned, Trenkler got into the back (window) seat of the vehicle and was returned home. Tr. 2-23.

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<sup>6</sup> Throughout the search of the garage, as at all other times that evening, Trenkler's demeanor was "cooperative and amiable." Tr. 2-63.

**B. January 31, 1992**

Sometime in early November, following the evening of November 5-6, 1991, Trenkler consulted with an attorney, Martin Cosgrove, who he had retained to assist him with an automobile accident case a couple of months earlier. Tr. 4-130-131 (see also Affidavit of Martin Cosgrove, Esquire). The following day, Attorney Cosgrove called Detective Peter O'Malley and informed O'Malley that Trenkler would not be submitting to a polygraph examination, and that he (Cosgrove) represented Trenkler and did not want Trenkler "to be questioned except in [his] presence." Tr. 4-132.

On or about January 28, 1992, government investigators applied for and were issued warrants to conduct searches at three (3) separate locations: Trenkler's apartment at 133 Atlantic Street in Quincy, MA., Trenkler's business (ARCOMM, Inc.) at 82 Broad Street in Weymouth, MA., and Trenkler's parents' garage at 7 Whitelawn Avenue in Milton, MA. Exh. 14. These federal search warrants were executed on January 31, 1992. Tr. 2-68.

Special Agent Dennis Leahy of ATF and Sergeant William Fogerty of the Boston Police Department were the team leaders of the search which was to be conducted at Trenkler's parents' garage. Tr. 2-68-69. At or about 9:00 a.m. on January 31st, while the search was being conducted, Trenkler arrived at the 7 Whitelawn Avenue location in his grayish-white Toyota. Tr. 2-68, 4-92.

Trenkler approached the driveway area at 7 Whitelawn Avenue and was then told by Special Agent Leahy to "stay back" or "stay in his vehicle", and was informed that a federal search warrant was being executed. Tr. 2-69. Special Agent Leahy explained to Trenkler how the execution of the search warrant would proceed. Id. Trenkler then stated that "he had talked to his attorney" and that "his attorney told him that he did not have to talk ... and he was not to answer any questions." Tr. 4-93. Sergeant Fogerty responded to Trenkler "that he should be governed by what his attorney said and take his advice." Id. Trenkler was told by the officers that "he should not talk" to them. Tr. 2-69.

Despite the foregoing preliminary exchange, Trenkler remained on the scene at 7 Whitelawn Avenue for "an hour or so," and engaged Agent Leahy and Sergeant Fogerty in conversation. Tr. 2-69-70. Trenkler talked about "the investigation, about the neighborhood, his parents" and other subjects. Tr. 4-94. Sergeant Fogerty described him as "a little nervous, ... open, ... talkative, inquisitive." Tr. 4-95. Sergeant Fogerty reminded Trenkler several times that "he had an attorney and he should not speak" to the police. Tr. 2-72. Trenkler replied that "he knew he had an attorney, but wanted to speak. . . anyway." Id., Exh. 17.<sup>7</sup>

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<sup>7</sup> Special Agent Leahy prepared a written report the next morning summarizing pertinent statements made by Trenkler. Tr. 2-72-74, Exh. 17. According to the report, and the officers would so testify, Trenkler talked about the 1986 bomb, blasting caps, dynamite, remote control, Radio Shack, Shay Jr., and other matters. Id.

Over the course of the hour that he was present at 7 Whitelawn Avenue, Trenkler wandered around, he went into his parents' house, "he came and went as he pleased." Tr. 2-70, 4-95. At some point later in the hour, the officers asked Trenkler if he would consent to allow them to use an "electronic sniffer" to search his automobile (to determine if explosives had been present in the car). Tr. 2-70.<sup>8</sup> Trenkler consented to the search and signed a written consent form that Special Agent Leahy had with him. Tr. 2-70, Exh. 11.<sup>9</sup>

At another point during the hour, Trenkler asked Special Agent Leahy if he could use Leahy's his cellular phone. Tr. 2-75. Leahy gave Trenkler the keys to his car, told him he had to start the car to use the phone, and let him use the cellular phone. Id.; Tr. 4-96.

Upon completion of the search at 7 Whitelawn Avenue, the officers took various seized items with them and left an inventory with Trenkler's parents, Mr. and Mrs. Wallace.

Later that morning, Trenkler went to see Attorney Martin Cosgrove. Tr. 4-132. Attorney Cosgrove placed a telephone call

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<sup>8</sup> The results of this search of the car are not at issue since the government will not be offering such evidence at trial.

<sup>9</sup> Special Agent Leahy had brought a consent search form with him because it was his intention to ask Trenkler's parents for permission to search Trenkler's room within the house. Tr. 2-71. The warrant was only for the detached garage. Contrary to Trenkler's argument, Brief at pg. 7, ATF agents do not typically carry consent search forms with them (unless they are executing a search warrant), and such forms were not "readily available" to agents on November 5, 1991 when they first met Trenkler.

to Trenkler's business (ARCOMM, Inc.) at 82 Broad Street in Weymouth. Tr. 1-67. Cosgrove spoke with Special Agent Thomas D'Ambrosio of ATF and asked him whether he had a search warrant for the business; the response was "yes". Cosgrove then asked whether the agents had an arrest warrant for Trenkler; the response was "no." Tr. 1-68, 1-137-138; 4-133-134. The attorney then hung-up the phone. Id.

Attorney Cosgrove ceased his representation of Trenkler "a few days later" (see Affidavit of Martin Cosgrove at page 3) when he perceived a conflict between his two clients on the civil tort case, Richard Brown and Trenkler. Tr. 4-134. Cosgrove received information that Brown had made statements to government investigators that were adverse to Trenkler, who obviously had become a subject of the criminal investigation. Id. Attorney Cosgrove is unable to say precisely when he stopped representing Trenkler; except to say that it was a "few days" after January 31, 1992. Tr. 4-151.<sup>10</sup>

C. February 3, 1992

On February 3, 1992, Trenkler placed two telephone calls to Special Agent Dennis Leahy to request return of certain seized records, or copies thereof. Tr. 2-76-77. Leahy advised Trenkler that he would copy the address book that Trenkler claimed to need for his business and have it available for pick-up the following day. Tr. 2-78. During the second call, Trenkler initiated

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<sup>10</sup> Attorney Cosgrove notified Trenkler of the conflict on January 31, 1992, and recommended he retain Attorney Thomas Dwyer to represent him. Tr. 4-153-154.

conversation and made statements to Leahy concerning his relationship to Shay Jr. Agent Leahy filed a report summarizing Trenkler's comments. Tr. 2-77, Exh. 19.

D. February 4, 1992

On February 4, 1992, at or about 11:00 a.m., Trenkler went to ATF's offices in Boston to pick-up a copy of the address book. Tr. 2-78.<sup>11</sup> Upon his arrival, Agent Leahy met Trenkler and asked him to have a seat in the conference room immediately adjacent to the reception area. Id. Agent Leahy walked back to his desk and picked-up the copies, which were ready, and then asked Special Agent Sandra LaCourse to accompany him to witness the delivery of the documents to Trenkler. Tr. 2-78-79.

Upon being handed the documents, Trenkler leafed through the materials and then asked Leahy for some additional records. Leahy replied, in effect, that was the extent of the seized material that investigators were prepared to copy and supply at that time. Tr. 2-79.

Trenkler then began asking Leahy questions about the investigation. Leahy reminded him "that he had an attorney" and "that he probably shouldn't speak with us." Tr. 2-79. Trenkler continued asking "inquisitive questions." Id. Trenkler remained at ATF almost "two and a half hours" that day, leaving the conference room on one occasion to go out to an elevator lobby to

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<sup>11</sup> Trenkler did not have to go in person to pick up the copied records. Anyone could have picked up the materials. In fact, the agents were a little surprised when Trenkler came himself. Tr. 3-28.

smoke a cigarette. Tr. 2-80. Trenkler expressed a strong desire to talk to the agents; he was "very chatty", "cooperative", "interested in the investigation" and had "a lot of questions"

Id. In addition to speaking with Agent Leahy, Trenkler also talked for "a few minutes" with Special Agent D'Ambrosio who came in for a short time. Id. Ultimately, Agent Leahy had to prompt Trenkler to leave, around 1:30 p.m. Tr. 2083.

Special Agent Leahy prepared a report summarizing Trenkler's comments and questions that day. Tr. 2-81; Exh. 20.

## II. ARGUMENT

### A. The Investigators' Presence In The Basement Apartment at 133 Atlantic Avenue; At ARCOMM; And At 7 Whitelawn Avenue On November 5-6, 1991 Was Pursuant To Trenkler's Valid Consent

As to the events of November 5-6, 1991, the government seeks only to adduce evidence of certain of Trenkler's statements made during that evening as well as observations made of two items: The donut-shaped magnet on top of the refrigerator in Trenkler's apartment; and the diagram which Trenkler drew at ARCOMM. Trenkler seeks to suppress this evidence, on grounds first that no consent was given and secondly, if consent was given, that it was "the product of official coercion, both subtle and blatant." See Defendant's Brief at p. 14. In support of his argument, Trenkler makes reference to, among other things, the officers "blocking all avenues of exits or escape"; "crowd[ing] against Trenkler in the narrow confines of the apartment" and ATF's failure to use a consent form. See Defendant's Brief at pp. 15-

16. These claims are, at best, either gross mischaracterizations or utterly unsupported by record evidence. To the contrary, the great weight of the credible evidence plainly demonstrates that the investigators' presence within, and their observations made at, the various locations visited with Trenkler on the evening of 5-6 November, 1991, was the result of consent validly given by Trenkler.<sup>12</sup>

Generally, "consent searches are a part of a standard investigatory techniques of law enforcement agencies."

Schneckloth v. Bustamonte, 412 U.S. 218, 231-32 (1972).

"Properly conducted, [a consent search] is a constitutionally permissible and wholly legitimate aspect of effective police activity." Id. at 228. Where the subject of the search is not in custody, the government must demonstrate that "the consent was in fact voluntarily given, and not the result of duress or coercion, expressed or implied." Id. at 248.<sup>13</sup> Whether a consent search

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<sup>12</sup> Trenkler's Brief suffers from a fundamental deficiency in that it fails to provide a single transcript or exhibit reference in support of any statement advanced therein. Trenkler has thus rendered it virtually impossible for the government to identify specific instances of failure of record support. More significantly, this failure has served to call both the accuracy and credibility of Trenkler's arguments seriously into question.

<sup>13</sup> The Bustamonte Court noted that the determination as to "voluntariness" reflects:

[a]n accommodation of the complex of values implicated in police questioning of the suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws (citation omitted). Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape

(continued...)

is in fact "voluntary" is a factual question, one determined from "the totality of all the circumstances." Id. at 227. In conducting this assessment, the trial court looks to both the characteristics of the accused and the details of the questioning. Id. at 226. Among the factors to be considered regarding the subject are: age; lack of education; low intelligence; and the presence of physical punishment. Id. at 226.<sup>14</sup> See, e.g., United States v. Mendenhall, 446 U.S. 544, 558 (1980) (consent voluntary when given knowingly by 22 year-old with 11th grade education, plainly capable of a knowing consent); United States v. Pena, 920 F.2d 1509, 1512-13 (10th Cir. 1990) (consent voluntary when given by individual who had sufficient command of English to understand and respond to officers questions), cert. denied, 111 S.Ct. 2802 (1991).

Also relevant here is the subject's demonstrated attitude about the likelihood of discovering contraband (United States v. Crespo, 834 F.2d 267, 272 (2nd Cir. 1987), cert. denied, 485 U.S. 1007 (1988); the degree to which the subject cooperates with the police (United States v. Wilkinson, 926 F.2d 22, 24-25 (1st Cir.), cert denied, 111 S.Ct, 2813 (1991)); and any alleged coercive police behavior. United States v. Wilkinson, supra, 926

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<sup>13</sup>(...continued)

prosecution, and many crimes would go unsolved . . . .  
At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness . . . .

Id. at 224

<sup>14</sup> This "voluntariness" determination turns not upon any "single controlling criterion, but a careful scrutiny of all of the surrounding circumstances." Bustamonte, supra, at 226.

F.2d at 24-25. Moreover, under applicable Fourth Amendment principles, the government may establish voluntary consent without demonstrating knowledge, on the part of the subject, of the right to refuse consent. Id. at 24. Similarly, written consent is not essential to the establishment of a valid consensually search. See, e.g., United States v. Chaidez, 906 F.2d 377, 382 (8th Cir. 1990) (search may be justified by voluntary oral consent even absent valid written consent); United States v. Castillo, 866 F.2d 1071, 1082 (9th Cir. 1988) (refusal to sign consent form does not preclude finding of voluntariness).

First, insofar as Trenkler's personal characteristics are concerned, there can be no dispute but that Trenkler was perfectly capable of consenting that the officers enter the apartment. Trenkler is a college-educated man in his thirties, sophisticated enough in the world of business to lease office space and to run his own electronics communications firm. There is nothing in the record regarding the officers' appearance at the doorway to the basement apartment on the evening of November 5, to permit the conclusion that, as the Supreme Court has put it, Trenkler suffered a "critically impaired . . . capacity for self-determination." Schneckloth v. Bustamonte, supra, 412 U.S. at 225. The First Circuit's decision in United States v. Wilkinson, 926 F.2d 22 (1st Cir. 1991) is instructive as to the exacting circumstances which must be shown before unconstitutional coercion, and subsequent invalidation of consent search, can be found. In Wilkinson, four law enforcement

officers entered the homes of one Mrs. Wilkes. Id. at 24. At that juncture:

Wilkinson appeared at the top of a flight of stairs, hands on his head, telling the officers to leave "Mrs. Wilkes alone", adding that "everything was his." Mrs. Wilkes gave the officers permission to search the house. Wilkinson's duffle bag was in the basement. Wilkinson then specifically told the officers he could search his duffle bag. The record also shows that the officers had entered the house with guns drawn. There was considerable commotion, they had handcuffed and frisked Wilkinson, he repeatedly asked them to leave Mrs. Wilkes alone, he initially denied having any guns or drugs in the house. One of the officers then threatened they would "tear the place apart" unless he told them more and he had taken drugs earlier in the evening.

Id. at 24.

The District Court (Zobel, J.) found that Wilkinson's "cognitive abilities were not compromised" by his earlier use of drugs; that the officers had "lowered their weapons" once Wilkinson was "was secured"; that Wilkinson "appeared to understand his options clearly"; that he was "embarrassed" that the officers had found him in the home of his "good friends"; and that he explicitly said the officers could search his bag; "he told the officers where the bag could be found, and he pointed out the location of the guns in the bag." Id. at 24-25. The First Circuit upheld the district court's finding that Wilkinson's consent had not been coerced:

That is to say, Wilkinson consented "voluntarily," in the sense that neither drugs nor any other circumstances made him unaware of, or mistaken about any key fact or unable physically to decide or to chose whether or not to agree to the search. (Citation

omitted). Moreover, the agents did not coerce his voluntary decision by improperly placing before him an impermissible choice; they did not, for example, threaten him with a gun in order to elicit an otherwise "voluntary" consent. (Citation omitted). One of the officers did "threaten to tear the place apart," but the district court could reasonably find that this statement, in light of Mrs. Wilkes' consent to a search of the house amounted (in rather strong terms) to no more than a permissible promise to search the house thoroughly and (likely) find the guns eventually anyway.

Id. at 25.

Having determined no constitutional violation, the First Circuit upheld the admission of the evidence in that case. Id. at 25.

Nothing on our record facts even approaches the far more highly-charged circumstances presented to the court in Wilkinson, and ultimately deemed -- under Fourth Amendment case law -- to constitute voluntary consent. See also United States v. Durades, 929 F.2d 1160, 1166 (7th Cir. 1991) (consent to search apartment voluntary despite presence of three agents, handcuffed arrestee and fact that agents wore guns and gained entry to secured building without difficulty); United States v. Martin, 960 F.2d 59, 62 (8th Cir. 1992) (consent to search voluntary even though defendant in presence of several police officers). At the significant juncture where Trenkler met the law officers at the doorway, there was no "small army" standing before him, but instead, four law officers;<sup>15</sup> these officers knocked once or

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<sup>15</sup> The presence of any other officers, either standing in the basement stairwell or out on the street -- out of Trenkler's line of sight -- simply has no bearing, from the critical viewpoint of the subject, as to the "coercion" assessment.

twice and clearly announced themselves at the outset. These officers took no further action (other than requesting that the barking dog be put away) and waited for approximately two minutes for someone to come to the door. When Trenkler came to the door, Detective McCarthy and Special Agent Leahy -- the first two officers in the doorway -- fully identified themselves and then clearly requested permission to enter. Equally straightforwardly, Trenkler gave his consent to that request.<sup>16</sup> None of the officers drew or otherwise brandished any weapon. No officer touched or "crowded" Trenkler at any time that evening.

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<sup>16</sup> Because Trenkler chose not to testify during these proceedings, there is nothing in the record from Trenkler supporting or contradicting this point. Trenkler's roommate, John Cates, did testify, claiming among other things, that he heard no "request to enter" from any law officer. Tr. 4-21. The government unhesitatingly submits, however, that Cates' testimony in this respect is heavily circumspect and should be totally discredited. Cates was clearly hostile to the government and unafraid to lie under oath for the benefit of his companion, an attitude plainly reflected by two segments of his later testimony given during the hearing. First, Cates testified that while in the apartment on the evening of November 5th and after Trenkler had left for ARCOMM, the detectives had sought information on Trenkler by enticing him with a "\$65,000 reward" -- a reward that would not come into existence until November 12th (see Boston Police Patrolmen's Ass'n press release dated November 12, 1991 (Gov't. Ex. 27); Boston Globe and Boston Herald article, dated November 13, 1991, Gov't Ex. 28).

Cates further testified that on November 5th, the officers: 1) entered the apartment; 2) began searching the apartment; 3) abruptly stopped their search and (incongruously) asked Cates if they could search the apartment; 4) to which Cates responded by asking if the officers had a search warrant; and when the officers replied: "No", 5) nonetheless resumed the search.

By his overreaching on these points, Cates has demonstrated -- as he has testified under oath, previously -- that he would "lie" for his companion.

To the contrary, the officers conducted themselves in a thoroughly professional manner. To be sure, no written consent was obtained and Trenkler was not specifically advised of his constitutional right to refuse, but neither of these are required to establish valid consent. Schneckloth v. Bustamonte, supra; United States v. Castillo, supra.<sup>17</sup>

The voluntariness of Trenkler's consent, given initially at the doorway to the basement apartment and at each point thereafter (i.e., ARCOMM, the garage at 7 Whitelawn and his automobile) is borne out by the repeated and uncontroverted testimony by each testifying law officer as to Trenkler's invariably amiable, outgoing and cooperative manner. This cooperative attitude is clearly consistent with the understandable desire to be looked upon as having nothing to hide. See United States v. Guzman, 852 F.2d 1117, (9th Cir. 1988) (consent to search voluntary when defendant's wife, lessee of shared apartment, cooperated with and invited police in, welcomed search, and gave keys to police); United States v. Rivera, 867 F.2d 1261, 1265-66 (10th Cir. 1989) (consent to search voluntary when defendant cooperated by opening trunk for officers). The record reflects that at all points throughout the evening of November 5th-6th -- and later -- Trenkler maintained an outgoing, conversational attitude with law enforcement. Trenkler exhibited

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<sup>17</sup> As of November 5, 1991, ATF was assisting Boston Police in the investigation; accordingly, Trenkler's argument as to the absence as to any endorsed ATF consent form resulting from the November 5, 1991 visit with Trenkler is of no moment.

this outgoing friendly demeanor not only during the evening of November 5-6, when he: chatted with Detectives Mahoney and Tierney on route to ARCOMM; grabbed Agent Leahy by the arm before proceeding into ARCOMM's office space; and requested to stop for a pack of cigarettes on the way home at the end of the evening; but also at the driveway of 7 Whitelawn Avenue, (during the January 31, 1992 execution of a federal search warrant) as well as his visit to ATF's office on February 4, 1992.

Trenkler was perfectly competent and capable of giving his consent to the officers throughout the evening on November 5-6, 1991. He did so without hesitation and not as the result of police coercion but voluntarily as that term has meaning under governing Fourth Amendment principles. Schneckloth v. Bustamonte, supra; United States v. Wilkinson, supra. Trenkler's Motion to Suppress on these grounds should therefore be denied.

**B. Trenkler's Statements To Investigators November 5-6, 1991 Were Voluntarily Made, And Were Not The Result Of A Custodial Interrogation**

**1. Trenkler was not in custody during the evening of November 5-6, 1991**

Trenkler seeks to suppress all statements made to the officers on November 5-6, 1991, on grounds that his statements were made while in custody but without Miranda warnings. As the following will show, this argument is without merit on the facts and law.

A custodial situation calling for Miranda warnings comes about only where "there is a "formal arrest or restraint on

'freedom of movement' of the degree associated with a formal arrest." See United States v. Masse, 816 F.2d 805, 809 (1st Cir. 1987), quoting California v. Beheler, 463 U.S. 1121, 1125 (1983); see also Fisher v. Scafati, 439 F.2d 307, 310 (1st Cir.), cert. denied, 403 U.S. 939 (1971) ("custody, in the Miranda sense, must require at least some objective manifestation that the defendant was "deprived of his freedom of action in [a] significant way"). Moreover, Miranda warnings are not triggered simply because an individual under questioning by law enforcement officers is a suspect or is the focus of a criminal investigation. Oregon v. Mathiason, 429 U.S. 492, 495 (1977). In making the determination as to whether an individual is "in custody", the reviewing court uses an objective standard (United States v. McDowell, 918 F.2d 1004, 1008 (1st Cir. 1990)); stated otherwise, a police officer's subjective intent "is relevant to an assessment of the [constitutional] implications of police conduct only to the extent that intent has been conveyed to the person confronted." Michigan v. Chesternut, 486 U.S. 567, 575 n.7 (1988). As the First Circuit has aptly put it:

... custody from a suspect's standpoint, has a subjective component; at a bare minimum, before getting to the objective reasonableness of the suspect's belief that he is being deprived of his freedom of action in some significant way, the suspect must show that such a belief in fact existed.

United States v. McDowell, supra, 918 F.2d at 1008. Only in that case, therefore, where the Court first finds that the individual actually believed himself to be in custody does the question even

arise as to whether a reasonable man could have believed himself to be in custody. Id.

Of course, any evidence as to Trenkler's beliefs at any time during the evening of November 5-6, 1991 can come only from Trenkler himself. Because Trenkler chose not to testify, there is no evidence as to Trenkler's subjective state of mind at any point that evening. Trenkler's claim as to "custodial interrogation" thus goes no farther than the first prong of this analysis. United States v. McDowell, supra.<sup>18</sup>

2. Trenkler's statements made during the evening of November 5-6 1991 were not involuntary

Nor was there any police overreaching during the evening of November 5-6, 1991 such to permit the conclusion that any statement made by Trenkler that evening was involuntary and thus in violation of the Fifth Amendment. Generally, the due process clause of the Constitution proscribes involuntary confessions, Jackson v. Denno, 378 U.S. 368, 376, (1964), and the voluntariness of an admission depends on "whether the will of the defendant [was] overborne so that the statement was not his free

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<sup>18</sup> On September 1, 1993, the fourth day of hearing on Trenkler's Motion to Suppress, the government learned that the defense would not be calling Trenkler as a witness. Tr. 4-127. Accordingly, the government's attorney immediately made known the government's position that "the Court should not consider the affidavit filed by the defendant." Id. The Court unhesitatingly agreed, stating in response:

I cannot. I will not. If he doesn't subject himself to cross-examination as to the matters asserted in the affidavit, I will not consider the affidavit.

Id.

and voluntary act, and that question [is] to be resolved in light of the totality of the circumstances." Bryant v. Vose, 785 F.2d 364, 367-68 (1st Cir. 1986), citing Procunier v. Atchley, 400 U.S. 446, 453 (1971).<sup>19</sup> Moreover, "in contrast to the presumption of coercion that attends statements given during custodial interrogation in the absence of Miranda warnings, statements made during a non-custodial interrogation are not viewed with suspicion." United States v. Serlin, 707 F.2d 953, 958 (7th Cir. 1983) (emphasis supplied).

The record -- addressed above -- plainly shows that the events of November 5-6, 1991 were non-custodial. Nonetheless, the Supreme Court has recognized that a non-custodial interrogation "might possibly in some situations, by virtue of some special circumstances, be characterized as one where the behavior of... law enforcement officials was such as to overbear [a suspect's] will to resist and bring about confessions not freely self-determined". Beckwith v. United States, 425 U.S. 341, 347-48 (1976). In passing upon such a case, the threshold inquiry becomes "whether the police's conduct was constitutionally acceptable" (Derrick v. Peterson, 924 F.2d 813, 819 (9th Cir. 1990)); stated otherwise, the reviewing court will undertake this due process analysis only if the court first finds unconstitutional official coercion. Colorado v. Connelly, 479

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<sup>19</sup> The government must show voluntariness by a preponderance of the evidence, Lego v. Twomey, 404 U.S. 477, 489 (1972) and the trial court must make this determination based upon a review of the entire record. United States v. Bienvenue, 632 F.2d 910, 913 (1st Cir. 1980).

U.S. 157, 167 (1986) (coercive police activity is necessary predicate to finding involuntary confession); 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).

The record here fails to show any coercive conduct on the part of the investigative officers, much less conduct "so offensive to a civilized system of justice that they must be condemned." Miller v. Fenton, 474 U.S. 104, 109 (1985); see United States v. Levy, 955 F.2d 1098, 1104 (7th Cir. 1992) (rejecting claim of involuntariness, where interview conducted in non-threatening environment, in civil manner free of displays of force, intimidation or strong-arm tactics).

Even if the Court were to deem it appropriate on these facts to go beyond the threshold question of unconstitutional police conduct, Colorado v. Connelly, supra, the record nevertheless shows that Trenkler's statements were in fact not the product of having his "will to resist" overborne by the police, but rather, were voluntary. In determining whether any declarant's will to resist was overborne, and applying the "totality of the circumstances" test as prescribed by the Supreme Court (see United States v. Watson, 423 U.S. 411 (1976)), the factors to be considered include: the defendant's prior experience with the criminal justice system (United States v. Cahill, 920 F.2d 421, 427 (7th Cir. 1990)); and whether any promises or threats were

made by the police or the prosecution to the individual. See Bryant v. Vose, 785 F.2d 364, 367-68 (1st Cir. 1986).

In this respect, Trenkler was no stranger to the criminal justice system: Quincy Police Detectives Tierney and Lanergan conducted several investigative interviews with Trenkler in September, 1986 (reading him his Miranda rights each time) and later placed him under arrest for the Capeway Fish truck bombing. The record further shows that neither promises nor threats of any kind were conveyed to Trenkler at any time that evening.<sup>20</sup>

In sum, nothing in the record suggests that Trenkler failed to or was otherwise unable to understand his circumstances at any time during the evening of November 5-6. Nor was there any heavy handedness or "strong arm" conduct on the part of any detective, on the evening in question. Trenkler's statements on this occasion were simply not the product of any constitutionally deficient official coercion but were made of his own volition. Having had a full opportunity to inquire into the circumstances of these interviews, Trenkler has been wholly unable to point to any official coercion at all, much less coercion rising to constitutional proportions. The statements were not involuntarily made and thus should not be suppressed.

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<sup>20</sup> The scenario of November 5-6, 1991 surely falls far short of that behavior, deemed coercive, used against the defendant-mothers in Lynumn v. Illinois, 372 U.S. 528 (1963) and United States v. Tingle, 658 F.2d 1332 (9th Cir. 1981), which were ultimately deemed unconstitutional. In those cases, the police extracted statements from the defendant-mothers after having threatened to take their children away. Lynumn, supra, at 534; Tingle, supra, at 1334.

**C. Trenkler's Statement To Investigators  
On January 31 And February 4, 1992 Were  
Knowingly And Voluntarily Made, In Clearly  
Non-Custodial Environments, And Are  
Admissible Against Him At Trial**

**1. Trenkler Had No Sixth Amendment Right To  
Counsel On January 31 Or February 4**

In his efforts to suppress his incriminating statements on January 31 and February 4, Trenkler claims that Attorney Martin Cosgrove's call to law enforcement on November 6, 1991 constituted a "clear invocation of defendant's Sixth Amendment right to counsel." Defendant's Brief at pg. 21. This argument is fundamentally flawed.

The Sixth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings -- "whether by way of formal charge, preliminary hearing, indictment, information or arraignment" -- have been initiated against a defendant. Kirby v. Illinois, 406 U.S. 682, 689 (1972); see Moore v. Illinois, 434 U.S. 220, 231 (1977); Brewer v. Williams, 430 U.S. 387, 401 (1977). The Sixth Amendment right to counsel is aimed at protecting a criminal defendant, "during perhaps the most critical period of the proceedings ... from the time of arraignment until the beginning of trial", Powell v. Alabama, 287 U.S. 45, 57 (1932), from having government agents deliberately eliciting statements from him in the absence of his attorney. Brewer, supra 430 U.S. at 400. Once a defendant who has been formally charged invokes his right to counsel, police may not initiate any questioning of the defendant or attempt to induce

him to waive his Sixth Amendment right, unless counsel is first provided. Michigan v. Jackson, 475 U.S. 625, 635-36 (1986).

Trenkler was not formally charged in this case until December, 1992. Therefore, his right to counsel under the Sixth Amendment did not vest until that time.

2. Trenkler Had No Fifth Amendment  
Right To Counsel On January 31  
Or February 4

In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court determined that the Fifth Amendment's prohibition against compelled self-incrimination required that "custodial interrogation" be preceded by an advice of rights to the putative defendant. Id. at 479. The Miranda Court declared that an accused enjoyed a right under the Fifth Amendment to have counsel present during any "custodial interrogation." Id. at 474. Once a defendant, who has been placed in custody, invokes his right to counsel, interrogation must cease and the police may not initiate further questioning without the presence of defense counsel. Edwards v. Arizona, 451 U.S. 477, 482 (1981). As this Court stated in an earlier order in this case, "this is a prophylactic rule, designed to prevent those in custody from being 'badgered' into waiving their rights." United States v. Shay, No. 92-10396-Z at pg. 17 (D. Mass. decided June 29, 1993) (Zobel, J.) (emphasis added).

Trenkler was not arrested or in custody on January 31 or February 4, 1992. He has not argued that he was in a "custodial situation" on either occasion, and the record would not support

such a finding in any event. Accordingly, Trenkler had no Fifth Amendment right to counsel when he spoke to investigators on January 31 or February 4.

3. There Was No Ethical Violation  
By Investigators Which Requires  
Suppression Of Trenkler's Statements  
On January 31 And February 4, 1992

Without the benefit of any legal analysis, Trenkler cites two cases -- United States v. Thomas, 474 F.2d 110 (10th Cir.), cert. denied 412 U.S. 932 (1973) and United States v. Masulo, 489 F.2d 217 (2d Cir. 1973) -- for the proposition that the interaction between government investigators and Trenkler on January 31 and February 4 "in the absence of counsel, and in defiance of Attorney Cosgrove's instructions was a clear violation of [Trenkler's Sixth Amendment right to counsel]." **Defendant's Brief at pg. 21.** Trenkler misapprehends the holdings of Thomas and Masulo, which are not Sixth Amendment cases, and fails to appreciate how obviously distinguishable these cases are from the present facts.

In Thomas, supra, a criminal complaint was filed against the defendant for drug violations, and an attorney was appointed by the Court the following day. A few weeks later, at the request of the defendant, a government agent visited the defendant in jail, where he was being detained (unable to make bail), without the knowledge of defendant's attorney. During the visit, the defendant made incriminating statements to the officer which were later offered in evidence at his trial. On appeal, the Court, although condemning the act of an agent conferring with a

defendant known to be represented by counsel, affirmed the conviction. Relying upon "the letter and spirit of the Canons of Ethics",<sup>21</sup> the Court held that:

. . . once a criminal defendant has either retained an attorney or had an attorney appointed for him by the court, any statement obtained by interview from such defendant may not be offered in evidence for any purpose unless the accused's attorney was notified of the interview. . . and was given a reasonable opportunity to be present.

474 F.2d at 112 (emphasis added). As indicated, on the face of the court's holding, a key factor in this factual equation, as it is in the Sixth Amendment cases, is that Thomas had been formally charged -- and was a "criminal defendant" -- at the time he invited the officer to visit him in jail.

Similarly, in United States v. Masulo, supra, the defendant made incriminating statements following his federal arrest on drug charges. Defendant, who was pending trial on state drug charges, argued that investigators had a duty to contact his retained attorney (on the state case) before questioning him. The Second Circuit disagreed; it held that the giving of Miranda

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<sup>21</sup> The Court was obviously referring to Disciplinary Rule 7-104 of the ABA Code of Professional Responsibility, which provides that a lawyer may not:

Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

See Rule 3 :07 of the Rules of the Supreme Judicial Court of Massachusetts (Canon Seven, D.R. 7-104(A)(1)).

warnings to defendants in custody "adequately protects their rights." 489 F.2d at 224. Again, a key factor in Masulo, as it was in Thomas, was that the defendant was in police custody (following the initiation of formal charges), when he made statements to federal agents.<sup>22</sup>

The government's research has uncovered four cases, more closely analogous to the present, in which a defendant sought to suppress his pre-indictment, non-custodial statements to police officials on DR 7-104 grounds. In each case, the court declined to suppress the statements simply because the defendant had previously retained or appointed counsel. Each of these cases post-dates Masulo and Thomas.

In Nai Cheng Chen v. I.N.S., 537 F.2d 566 (1st Cir. 1976), preliminary to the initiation of deportation proceedings, an INS agent interviewed a defendant, who, as the agent was aware, had an attorney who had represented the defendant in immigration matters in the past. The First Circuit observed that DR 7-104(A)(1)'s prohibition on an attorney's communicating with a represented party is relaxed if the attorney has "prior consent of the lawyer" or "is authorized by law to do so." The court found that the INS agent was specifically authorized by law to interrogate aliens, and hence found no violation. The court went on to distinguish Thomas, by stating that "the preliminary

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<sup>22</sup> The Masulo Court also cautioned against the use of so-called "house counsel" by criminals and criminal suspects as a means of frustrating legitimate law enforcement efforts. 489 F.2d at 223-24.

interview which occurred here . . . is not analogous to interrogating or obtaining a statement from a criminal defendant after a formal compliant has been filed" (citing Thomas). 537 F.2d at 566 (emphasis added).

Similarly, in United States v. Kenny, 645 F.2d 1323 (9th Cir.), cert. denied, 452 U.S. 920 (1981), a government informant, acting at the direction of the FBI, tape-recorded a suspect of a grand jury investigation, who had retained counsel in the matter. In affirming the trial court's denial of a motion to suppress, the Ninth Circuit observed:

We again emphasize the factual setting of the tape recording: A non-custodial environment, prior to Kenny's charge, arrest, or indictment. In our view, the government's use of such investigative techniques at this stage of a criminal matter does not implicate the sorts of ethical problems addressed by the Code.

645 F.2d at 1339; accord. United States v. Lemonakis, 485 F.2d 941, 955-56 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974) (finding no DR 7-104 violation in preindictment interception of represented suspect's incriminating statements to a government informant).<sup>23</sup>

Finally, in United States v. Jamil, 707 F.2d 638 (2d Cir. 1983), which also involved pre-indictment, pre-arrest contact

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<sup>23</sup> The Lemonakis Court observed that in the "investigatory stage of the case" -- which is what we are concerned with here -- "the contours of the 'subject matter of the representation' by appellants' attorneys, concerning which the Code bars 'communication,' were less certain and thus even less susceptible to the damage of 'artful' legal questions the Code provisions appear designed in part to avoid." 485 F.2d at 956.

with a represented party, the Second Circuit rejected the claim that under DR 7-104(A)(1) a blanket rule should be established suppressing all evidence obtained from represented defendants (post-indictment) and represented suspects (pre-indictment). The Jamil Court held that DR 7-104(A)(1) is not violated unless a defendant can show that the investigative agents were acting as the "alter ego" of the prosecutor in contacting a represented person. Since the prosecutor in Jamil was not privy to the electronic interception of the defendant by an informant, and did not learn about the taping until after it had been completed, the court found no violation or basis for suppression.<sup>24</sup>

In sum, Trenkler's reliance upon Thomas and Masulo falls short due to several critical distinguishing facts: (1) Trenkler was not under indictment or in custody on January 31 or February 4; (2) the scope and contours of Attorney Cosgrove's criminal representation -- the very existence of which is suspect -- was certainly unclear to investigators; (3) the officers were "authorized by law" to be at 7 Whitelawn Avenue on January 31st to conduct the federal search warrant; and (4) Trenkler has not, and can not, make any factual showing that the investigators were acting as the "alter ego" of the undersigned prosecutors in having contact with Trenkler on January 31 or February 4.

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<sup>24</sup> DR 7-104(A)(1), on its face, requires that the prosecutor "cause another to communicate" with a represented defendant, or do so himself, in order to find that there has been a disciplinary rule violation.

4. Trenkler's Interaction With Investigators  
On January 31 And February 4 Was Knowing,  
Intelligent And Voluntary

Trenkler did not testify at the suppression hearing. The only evidence before the court as to the events of January 31 comes from Special Agent Dennis Leahy and Sergeant William Fogerty, and the only evidence in the record as to what transpired on February 4 derives from the testimony of Special Agent Leahy and Special Agent Thomas D'Ambrosio. This uncontroverted evidence, which is summarized previously, supra, establishes that on each occasion it was Trenkler who initiated the contact, and it was Trenkler who, by his statements, questions and conduct, expressed a willingness to have a generalized discussion with the officers about the ongoing investigation.

Even if Trenkler was entitled to the "right to counsel" protections of the Fifth and Sixth Amendments on January 31 and February 4 -- which he is not -- the factual record here would compel a finding that he legally waived such rights. In other words, following the First Circuit's two-step analysis in Judd v. Vose, 813 F.2d 494, 497 (1st Cir. 1987), (1) Trenkler initiated the conversation with investigators and thereby indicated a willingness to engage in a generalized discussion about the investigation, on both occasions, see United States v. Fontana, 948 F.2d 796, 805-806 (1st Cir. 1991), and (2) Trenkler, who is intelligent and well-educated, acted knowingly and voluntarily in reopening a dialogue with the authorities, apparently contrary to

his attorney's advice. Accord, United States v. Stewart, 770 F. Supp. 872, 879 (S.D.N.Y. 1991). The record here indicates that the investigators conducted themselves properly and within all legal bounds, even to the point of repeatedly cautioning Trenkler to listen to his attorney and refrain from speaking with them. Short of forcibly removing Trenkler from their presence, the officers did all that was constitutionally or ethically required.

**D. Trenkler Has Not Shown That The Government Has Illegally Obtained Fruit From A "Poisonous Tree"**

Trenkler seeks to suppress "the fruit of the January 31, 1992 searches," arguing that the affidavit for the search warrants was tainted by ill-gotten information on November 5-6, 1991.<sup>25</sup> Again, Trenkler has failed to make a sufficient showing to justify suppression of the physical items seized by authorities on January 31st.

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<sup>25</sup> Trenkler fails to specify what "fruit" he is referring to in this section of his brief. The only physical piece of evidence seized on January 31, 1992 which the government may consider offering at trial is a roll of silver duct tape found within Trenkler's parents' garage.

Trenkler is not, by this "fruit of the poisonous tree" argument, seeking to suppress his own statements to authorities on January 31 and February 4, 1991. As noted previously, supra, these statements were knowingly, intelligently and voluntarily made by Trenkler, to officers who were lawfully entitled to be present at the two locations (7 Whitelawn Avenue and ATF's offices). Moreover, as a matter of law, any such argument by Trenkler to suppress his own statements must fail. See United States v. Ceccolini, 435 U.S. 268, 276-77 (1977) ("the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence.")

As argued previously, supra, there was no constitutional illegality in the conduct of law enforcement officials on the evening of November 5-6, 1991. All physical items obtained were pursuant to consensual searches authorized by Trenkler. Trenkler's statements to the officers, in these non-custodial settings, were knowing and voluntary.

Moreover, even if the court were to discern some problem with the searches on November 5-6, the Court may still find the federal search warrants executed on January 31, 1992 to be valid. Where a search warrant affidavit includes reference to illegally acquired evidence, as well as evidence derived from independent and lawful sources, "a valid search warrant may issue if the lawfully obtained evidence, considered by itself, established probable cause to issue the warrant." Grimaldi v. United States, 606 F.2d 332, 336 (1st Cir. 1979); United States v. Plotkin, 550 F.2d 963, 697 (1st Cir.), cert. denied, 434 U.S. 820 (1977).

The affidavit for the federal search warrant is in evidence as Exhibit 14. Trenkler argues that paragraphs 17-21 should be disregarded, as constituting the ill-gotten evidence, and when this is done, the probable cause is lacking. However, paragraph 17, reciting information learned from an interview of John Cates, has nothing to do with physical items seized or observations made on November 5-6. Agents would definitely have interviewed Cates, whether it was on November 5th or thereafter, and learned the same information.

Accordingly, when the Court reviews paragraphs 1-17 and 22-26 of the affidavit, it will be apparent that probable cause to issue the search warrants still existed. The affidavit, even with paragraphs 18-21 omitted, still contains information concerning the incident on October 28, 1991, the explosive device, Shay, Jr., the association between Shay, Jr. and Trenkler, Trenkler's background and expertise, Trenkler's construction of a similar bomb -- using similar components -- in 1986, and Trenkler's relation to each of the locations to be searched.

Finally, given the intensive nature of this police-homicide investigation, the court should further conclude that even if police had not visited Trenkler on November 5-6, they would have subsequently sought and obtained search warrants for his home, office, and other pertinent storage locations, and therefore would have inevitably discovered the same evidence through independent, lawful means. See United States v. Buchanan, 910 F.2d 1571, 1573-74 (7th Cir. 1990) (evidence discovered when police illegally searched defendant's hotel room admissible when proper and predictable course of conduct would have been to obtain search warrant for defendant's hotel room following his arrest, and magistrate would have found probable cause and evidence would have been inevitably discovered); see also United States v. Ivey, 915 F.2d 380, 385 (8th Cir. 1990).

III. CONCLUSION

For the foregoing reasons, Trenkler's various Motions to Suppress should be DENIED.

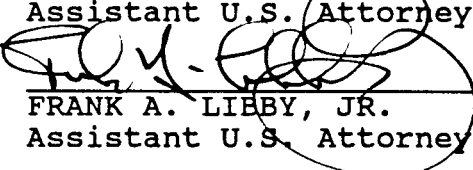
Respectfully submitted,

By its attorneys,

A. JOHN PAPPALARDO  
United States Attorney

By:

  
\_\_\_\_\_  
PAUL V. KELLY  
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FRANK A. LIEBY, JR.  
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

Suffolk, ss.

Boston, Massachusetts  
October 4, 1993

I, PAUL V. KELLY, Assistant U.S. Attorney, do hereby certify that I have served the copy of the foregoing, by first-class mail, to Terry P. Segal, Esquire, Segal & Feinberg, 210 Commercial Street, Boston, Massachusetts 02110.

  
\_\_\_\_\_  
PAUL V. KELLY  
Assistant U.S. Attorney