

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)

vs.)

ALFRED W. TRENKLER)

CRIMINAL NO.: 92-10369-Z

DEFENDANT'S MEMORANDUM IN OPPOSITION TO GOVERNMENT'S
MOTION *IN LIMINE* TO ADMIT EVIDENCE OF 1986 BOMBING

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

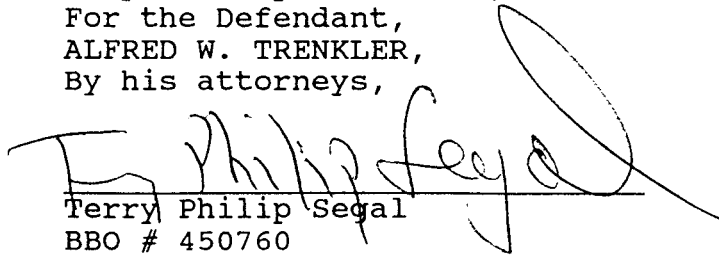

Terry Philip Segal
BBO # 450760
Scott P. Lopez
BBO # 549556
Segal & Feinberg
210 Commercial Street
Boston, MA 02109
(617) 720-4444

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UNITED STATES OF AMERICA)
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CRIMINAL NO.: 92-10369-Z

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

I. INTRODUCTION.

The government has moved *in limine*, under Fed. R. Evid. Rule 404(b), to introduce at trial evidence of a radio controlled device built by the defendant in 1986. The justifications asserted by the government for the admission of this evidence under Rule 404(b) are: 1) identity; 2) knowledge;¹ and 3) intent. See Memorandum Of Law In Support Of Government's Motion *In Limine* To Admit Evidence of 1986 Bombing (hereinafter Government's Memorandum") at p. 3.

Defendant notes that this Court has previously ruled in the Shay trial that the similarities between the 1986 device and the 1991 device were "not so unusual and distinctive as to be like a

¹Defendant notes that in addition to the "knowledge" justification, the government's memorandum asserts this evidence is also probative of his "experience and skill." However, whether categorized as "experience, knowledge and skill" or simply "knowledge" the analysis is the same under Rule 404(b).

signature" for purposes of establishing identity. See Transcript of Shay trial, p. 16-2, lines 22-23.²

Defendant further notes the government concedes "there is no eyewitness or other direct testimony regarding the planning, design, construction or placement of the 1991 Device...". Government's Memorandum at p. 32. Moreover, the government has no physical evidence linking defendant to the planning, design, construction or placement of the 1991 Device. Thus, the government's case against Alfred Trenkler is entirely circumstantial.

To remedy this lack of proof on the circumstances of the 1991 bombing, the government requests this Court to admit, under Rule 404(b), evidence relating to an incident which occurred seven (7) years ago, claiming that this evidence is not being introduced to establish the defendant's propensity to commit the 1991 crime. Rather, the government claims this evidence will be introduced for the "legitimate purposes" of showing defendant's identity, knowledge and intent in the 1991 incident. In other words, lacking direct or other circumstantial proof of the defendant's involvement in the 1991 bombing, the government requests this Court to allow it to "bootstrap" evidence of the planning, design, construction and placement of the 1986 device to prove circumstantially the planning, design, construction and

²Defendant notes that this Court's ruling as to the 404(b) issue in the Shay trial was not determinative as to admissibility in this trial because as this Court noted, defendant is "in a very different position than Mr. Shay."

placement of the 1991 device. See Government's Memorandum p. 32.

Defendant opposes the admission of the 1986 device, and the circumstances of its planning, design, construction and placement on both Rule 404(b) and fundamental fairness grounds.

First, defendant submits that the government has failed to identify sufficient "idiosyncracies" in the 1986 and 1991 devices to establish that they were both the handiwork of the defendant, and only the defendant. Thus, admission of the 1986 evidence to prove the defendant is the maker of the 1991 device is prohibited by Fed. R. Evid. 404(b). Compare Ingraham v. United States, 832 F.2d 229, 233 (1st Cir. 1987).

Second, the government's modus operandi evidence proffer relating to the 1986 device is internally inconsistent, indicates the 1986 device was not designed to kill or injure anyone, lacks the requisite foundation for its admission, and creates the risk of a mistrial.

Third, even if this Court were to accept the government's claim that knowledge and intent are "legitimate purposes" for the admission of this highly prejudicial evidence, the minimal probative value of the 1986 incident is substantially outweighed by the danger of unfair prejudice. See United States v. Lynn, 856 F.2d 430, 435 (1st Cir. 1988); United States v. Garcia-Rosa, 879 F.2d 209, 220 (1st Cir. 1989).

Fourth, admission of the 1986 incident on the issue of knowledge or intent will not only confuse the issues at trial, but also waste a substantial amount of time.

Finally, defendant will stipulate to the requisite knowledge to avoid the admission of this highly prejudicial evidence.

For these reasons, as more particularly set forth below, defendant submits that admission of the 1986 incident will effectively deprive him of a fair trial which no limiting instruction can remedy, see Garcia-Rosa, supra at 222.

II. STANDARDS.

It is well established that, under Fed. R. Evid. 404(b), evidence of a prior bad act is not admissible to show bad character or propensity to commit a crime, but may be admitted to prove, among other things, identity, intent or knowledge.³ See United States v. Simon, 842 U.S. 552, 553 (1st Cir. 1988). While logically relevant, "propensity" or "bad character" evidence is deemed to carry an unacceptable risk that the jury will convict the defendant for a crime other than those charged. See United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982); United States v. Rubio-Estrada, 857 F.2d 845, 846 (1st Cir. 1988). Such evidence is therefore inadmissible as a general rule. See United States v. Arias-Montoya, 967 F.2d 708, 709 (1st Cir. 1992).

The First Circuit has repeatedly "urge[d] the government and the district court[s] to be careful as to the admission of [extrinsic act evidence] under Rule 404(b)." See Garcia-Rosa

³Fed. R. Evid. 404(b) states that "[e]vidence 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,...."

supra at 221 (quoting United States v. Flores Perez, 849 F.2d 1, 8 (1st Cir. 1988); Arias-Montoya, supra at 713 (same). The First Circuit has cautioned that admission of 404(b) evidence "is by no means a routine exercise and should not be accepted unless the government articulates with suitable precision the 'special' ground for doing so." Id.

The First Circuit has established a two-part test for determining the admissibility of bad act evidence. This Court can admit such evidence "only if the evidence survives **two** related tests. United States v. Ferrer-Cruz, 899 F.2d 135, 137 (1st Cir. 1990). In Ferrer-Cruz the First Circuit stated the two-part test as follows:

First, it must overcome the "absolute bar" of Fed. R. Evid. 404(b), which excludes evidence of a past bad act where it is relevant *only* because it shows bad character (i.e., the proposed logical inference includes character as a *necessary* link). (cites omitted).

Second, it must also survive scrutiny under Fed. R. Evid. 403, which excludes even evidence that is relevant through allowable chains of inference where the probative value of that evidence is "substantially outweighed" by the risks of prejudice, confusion, or waste of time.

Fundamental to the first part of the test is that Rule 404(b) absolutely prohibits admission of the evidence if the proposed logical inference includes character as a necessary link in its chain. See Arias-Montoya, supra at 709 (ten-year old cocaine conviction held to have no "special relevance" to defendant's knowledge of charged act of knowingly and intentionally possessing cocaine at a later time because the logical inference drawn, i.e., whether someone having possessed

illegal drugs in the past would be more likely to possess them with an intent to distribute at a later time than someone without a record is "wholly propensity-based").; United States v. Lynn, 856 F.2d 430, 435 (1st Cir. 1988)(six-year old marijuana conviction held to have no "special relevance" to the issue of intent on the charged acts of conspiring to import and to possess with the intent to distribute marijuana and hashish, and of importation and possession of marijuana where the intent inference required a propensity-based inference); see also Garcia-Rosa supra at 220 (defendant's subsequent use of a quantity of cocaine held to have no "special relevance" on his knowledge of the purpose of a loan made to his co-defendant -- (i.e. to finance smuggling of large amounts of cocaine and heroin) -- where based on impermissible propensity inference even though defendant defended on grounds of lack of knowledge).⁴

Moreover, under the second part of this test, the danger of unfair prejudice is established where:

- 1) there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and
- 2) this risk is disproportionate to the probative value of the offered evidence.

See United States v. Zeuli, 735 F.2d 813, 817 (1st Cir. 1984) citing approvingly Fourth Circuit's test in United States v.

⁴Defendant also notes that unlike the cases cited above where the government sought to introduce a prior conviction in its case in chief, the 1986 incident which the government requests this Court to admit here was continued generally and ultimately dismissed. See Copies of docket sheet attached hereto as Exhibit A.

Masters, 622 F.2d 83, 87 (4th Cir. 1980).

Finally, the standard of review for the admission of a prior bad act is abuse of discretion. United States v. Latorre, 922 F.2d 1, 8 (1990). However, an evidentiary error under Rule 404(b) will be treated as harmless if it "is highly probable" that the error **did not contribute** to the verdict. Garcia-Rosa supra at 222. This inquiry is not merely whether there was enough other evidence to support the result apart from the prior act evidence. Id. Rather, it is whether the error itself had "substantial influence". If so, or if one is left in grave doubt, the error is not harmless and the conviction cannot stand. Id. Thus, even where the government's case against a defendant is strong (unlike this case), unless the government's case is "so overwhelming" that, in good conscience, it can be stated that it is "highly probable that the government would have prevailed even in the absence of the ...[prior act]... evidence,..." the error is not harmless. Id.

Applying these standards to the case at bar, we submit that the government's motion to admit evidence regarding the planning, design, construction and placement of the 1986 device is prohibited under Fed. R. Evid. 404(b), and the prejudicial impact of this evidence in this case, where the other evidence against the defendant is so weak, would constitute plain error.

III. ARGUMENT.

A. WHERE THE GOVERNMENT HAS FAILED TO ESTABLISH THAT THE 1986 DEVICE AND 1991 DEVICE WERE BOTH THE HANDIWORK OF THE DEFENDANT, AND ONLY THE DEFENDANT, ADMISSION OF THE 1986 DEVICE TO PROVE THE DEFENDANT IS THE MAKER OF THE 1991 DEVICE IS PROHIBITED BY FED. R. EVID. 404(b).

1. The Government's proffer does not allege facts sufficiently idiosyncratic to establish that the maker of the 1991 device and the maker of the 1986 device are the same person.

a. Idiosyncrasy Test.

The government alleges that the defendant built and detonated an explosive device in September, 1986 (hereinafter "1986 device") containing components and features "similar" to those present in the 1991 device. In support of this allegation, the government includes certain components of the 1991 device, and excludes others, and claims that the components selected are similar enough to establish that the 1986 incident is "methodologically so reminiscent of the charged crime as to earmark them as the defendant's handiwork." See Government's Memorandum pp. 17-20. Interestingly, the government does not rely exclusively on the purported similarities between the components of the 1986 device and the 1991 device. Rather, the government claims that there was a similar *modus operandi*⁵ in

⁵There is a serious dispute regarding the government's claim that a similar *modus operandi* is present in 1986 and 1991; this dispute will be explained in more detail below. See Section B. However, defendant notes at this point that the government's argument on this point is really circular in nature. Specifically, given the government's concession that it has no direct evidence regarding the planning, design, construction and placement of the 1991 device, its only evidence with regard to this issue is the 1986 incident. However, with the 1986 evidence the government can only prove the *modus operandi* in 1986, and not

1986 and 1991, and further, that a particular computer search identified only the 1986 device and 1991 device to be similar when certain factors were searched.⁶

First, defendant submits that from the government's attempt to buttress the so-called "similarities" between the circumstances of the 1991 bombing and the 1986 incident, it is reasonable to infer that a straightforward forensic comparison of the 1986 device and the 1991 device demonstrates that **the same person did not make both devices**. See Second Affidavit of Denny L. Kline (hereinafter "Kline Affidavit") p. 22 (Exhibit B). In fact, even the government's proffered opinion evidence on this issue requires, in addition to the components identified above, a "linking" of the "similarity in *modus operandi*" to conclude that the devices were made by the same person. See Government's Memorandum, at pp. 24-26. Thus, implicit in the government's approach to the identity issue is the inference that a straightforward forensic comparison of the 1986 device and the 1991 device does not support its claim that the same person made both.

the *modus operandi* in 1991. Thus, whether the government can prove its claim that the *modus operandi* in 1986 and 1991 are similar depends only on the 1986 incident. Therefore, even with the 1986 evidence, there is no factual basis for the conclusion that the *modus operandi* in both incidents is "similar".

⁶Defendant reserves the right to litigate the reliability and probativeness of the "EXIS" analysis cited by the government at such time he is given access to the database. In the event such access is not provided, defendant moves to strike the EXIS analysis to the extent it supports the government's motion.

Second, and more importantly, the test in this Circuit for establishing "identity" is not "similarity", but whether the crime is the trademark or signature of one - and only one - criminal. As stated by the Court in United States v. Ingraham, 832 F.2d 229, 233 (1987) "the **shared characteristics** [must be] so **idiosyncratic** as to constitute a signature". In other words, the test is not whether sufficient similarities exist; rather, the test is whether the "characteristics relied upon" are "sufficiently idiosyncratic" to permit the inference that both the charged crime and the prior act are the handiwork of the accused. Ingraham at 231-232. Stated another way, it is not the "quantity" of characteristics which exist which determine "signature", it is the "quality" of the characteristics. See Ingraham at 233 ("The more distinctive the identifiers, the fewer of them need be present to demonstrate the requisite signature.").

For example, in Ingraham, the First Circuit did not base its decision on the number of similarities between the thirty (30) letters admittedly written by the defendant to conclude that the identity of the anonymous phone caller was Ingraham. Rather, the Court based its decision on the singularly significant or idiosyncratic characteristics in both the defendant's letters and the anonymous phone call. Specifically, the Court stated:

The subject of both the letters and of X's call was Ingraham's litigation against the University of Maine, a topic which the jury could easily infer was of extremely limited interest to the public at large. **Indeed, the subject strays so far from the beaten path that the likelihood of pure coincidence is minuscule.** In addition,

the call captured the essence of the letters: it evidenced an obsession with the vindication of Ingraham's supposed rights through the pending civil litigation, and made demand specifically related to that litigation. The letters frequently discussed appellant's unstinting efforts to enlist the media in aiding and bringing publicity to his cause; the October 30 call - the avowed purpose of which was to coax the reporter into conveying certain demands to Governor Brennan -- was, it would seem, an attempt to accomplish that very goal. **Perhaps most significantly, X threatened the lives of precisely the same officials who had been targeted in the correspondence. And, X mentioned Ingraham's birth name - "MacKiel" - a datum which was not likely to be within the ken of a casual passerby.** Id. at 233 (Emphasis added).

Thus, it is clear from the Court's analysis in Ingraham, that it is not the number of shared characteristics which are determinative, but the uniqueness or quality of the characteristics.

By applying the proper test to the characteristics listed by the government, we submit that the characteristics are not "so idiosyncratic" that they support the claimed inference that the maker of the 1991 device was the defendant.⁷

b. The 1991 Device.

The government alleges that the 1991 device was determined to be a radio signal receiver powered by four (4) "AA" batteries. The device was activated by a remote control (transmitter) unit. When activated, the receiver would activate a servo motor which, in turn, would "throw" a single-pole toggle switch. The toggle switch initiated detonation of the device. See Government's

⁷Defendant notes the government's memorandum does mention the test this Court should apply. However, what is clear from Ingraham is that the test is not "similarities" but "idiosyncracies". See Copy of Ingraham case (Exhibit C).

Memorandum at pp. 3-4.

The government further alleges that the ends of "several" wires in the 1991 device were attached with solder instead of being clipped or twisted, and then taped. The government also claims that the 1991 device was held together, in part, by duct tape. Id. at 4.

Finally, the government alleges that the 1991 device was designed to receive a radio signal from a remote control transmitting unit by means of an antenna consisting of stranded wire with a range of up to one-half mile. Finally, the 1991 device was affixed to the undercarriage of a "motor vehicle" (a car) by "magnets". Id. at 4-5.

c. The 1986 Device.

The government alleges 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 (a truck) by means of a round magnet. Before the explosive material was inserted into this device, Trenkler utilized a small test bulb to determine the wiring circuitry was working properly. Id. at 7-8. Defendant notes no servo unit was utilized in the 1986 device.

2. **A forensic comparison of the 1991 device and the 1986 device clearly demonstrates that the idiosyncrasy test is not satisfied in this case.**

What the government does not mention in its proffer regarding the 1991 device or the 1986 device, presumably because it does not support its contention that the 1986 device is probative on the identity issue, is that a forensic comparison of these two devices clearly demonstrates that the idiosyncrasy test is not satisfied in this case.

For example, the main charge, or explosive material, in the 1986 device was apparently⁸ an M21 simulator, flash, artillery. **The M21 is used to simulate the acoustic (bang) and optical (flash and smoke) signature of a tank main gun.** See Two (2) page description of M-21 attached hereto (Exhibit D). The M21 contains a pyrotechnic charge identified as 3.5 ounces of flash powder. In 1986, the Bureau of Alcohol, Tobacco & Firearms (hereinafter "ATF") classified flash powder as a low explosive.

⁸As noted in the Government's memorandum, the 1986 incident occurred on September 1, 1986. However, debris from the incident was not forwarded to the Commonwealth's Department of Public Safety Crime Laboratory for analysis until October 17, 1986, some six (6) weeks after the debris was collected. Finally, the analysis on the 1986 device was not completed until November 20, 1986. See Government's memorandum, pp. 5, and 9 at fn. 7.

Defendant notes that Leo Voght, the state bomb technician who collected the debris, is no longer alive. Moreover, Voght's observations as more particularly described infra, Section B, are contrary to the government's allegation that an M21 simulator, or "Hoffman Device" was used in the 86' device. Nevertheless, for purposes of this memorandum, the defendant relies upon the reports remaining on this incident to detail the dissimilarities between the 1986 device and the 1991 device, even though, as discussed infra, the defendant disputes the introduction of this evidence on foundation and chain of custody grounds.

Today, however, flash powder is classified by ATF as a high explosive. Nevertheless, flash powder is still considered to be a low explosive among most of the commercial and forensic explosives communities because it deflagrates and does not detonate like high explosives. See Kline Affidavit at 8.

Conversely, the main charge in the '91 device consisted of two (2) to four (4) sticks of dynamite. Dynamite is a high explosive which is significantly more powerful than an M21, and which can, and did cause serious personal injury and death. Thus, the explosive main charges of the two devices are significantly different. Id. at pp. 8-9.

Second, the methods of initiation or detonation of the '86 device and the '91 device were also different. The M21 was electronically initiated by means of a "built-in" quick match. Id. at 9. No detonators, or blasting caps, were necessary. This differs from the '91 device which had a high explosive main charge, and which required the use of detonators or blasting caps. As a result, the '91 device contained two (2) blasting caps which detonated the device.⁹ Id.

Third, the fuzing system in the 1986 device was an inexpensive Tyco radio control system that was removed from a radio control car and modified by adding a circuit board with a

⁹As noted in Mr. Kline's affidavit, due to the unavailability of the physical evidence from the 86' device and the apparent discrepancy between the descriptions of the device (Mr. Voght's description and Examination Report), a positive identification of the components of the 86' device is difficult. See Kline Affidavit at pp. 9-10.

relay, power switch, and safe arming toggle switch. Conversely, the '91 device contained a complete and more expensive Futaba radio control system which included a receiver, battery pack, servo, horn, slide power switch, and antenna wire. Except for a toggle switch, which was added to serve as the system's trigger, nothing else was added to the Futaba system in the 1991 device.¹⁰ Id. at 10. Thus, we submit that when the three common components of the 1991 device and 1986 device are compared (main charge, initiator or detonator, and fuzing or firing system) there are

¹⁰The government alleges: "[c]ertain of the materials used in the [91'] device were consistent with those appearing on an October 18, 1991 receipt from Radio Shack, confirming sale of these items to one "SAHY JYT". Among the items purchased ... were a toggle switch, a "AA" battery holder, a small lamp (two to a package), and a lamp holder capable of testing circuitry." See Government's Memorandum, at p. 4.

Defendant notes, however, that other than the "toggle switch", which is not unique, is abundantly available, and has many other practical, legitimate uses, (See Kline Affidavit, at 20.) **no other item listed on the October 18th receipt has been identified as a part of the 91' device.** Moreover, it does not appear as though the other items on this receipt would have any purpose in the 91' device. For example, the battery holder was unnecessary because the Futaba system was equipped with a battery pack. In addition, two (2) different size project boxes, which also appear on this list, were not found in the 91' device either. Finally, although the government's expert opines that the small lamp and lamp holder, which appear on this receipt, were to test the circuitry in 91' device (See Government's Memorandum, p. 25, para. 7), it does not seem probable that a complete and functionally integrated Futaba radio control system would require any testing of the type described by the government's expert (i.e. with light bulb) when a volt ohmmeter (instrument for testing electrical current) would serve this purpose. Thus, although the government alleges that "certain materials" on this receipt were used in the 91' device, in fact the only item which may have been utilized was a generic toggle switch, and the other items listed, including the battery pack, two (2) project boxes, small lamp and lamp holder, have no connection to the 91' device.

distinct differences between the two. However, more importantly, there is nothing idiosyncratic in the fact that these two devices had three common components because every explosive device, even a firecracker¹¹, must have at least these three components to function.

We further submit that a forensic comparison of the design and assembly of these two devices provides further proof that the idiosyncratic or singularly unique characteristics of these two devices are very different, and not similar as alleged by the government.

Starting with the toggle switch, there is a singularly unique difference in the manner and method of the toggle switch's use, and also the type of toggle switch utilized. In the '91 device, according to ATF's Explosives Technology Branch, the receiver activated a servo motor which rotated the servo motor horn which turned the toggle switch to the "on" position which fired the system. See Explosives Technology Branch Report, p. 2, (Exhibit E); see also EOD Improvised Explosives Manual (Paladin Press) pp. 48-49 (noting the significant increase in use of radio controlled explosive devices and describing the design of a radio controlled device utilizing a servo unit and toggle switch) (Exhibit F). By turning the toggle switch on, an electrical current was sent to the blasting caps which had been inserted into the dynamite, and thus caused an explosion. See

¹¹In the case of a firecracker the main charge is a pyrotechnic mixture and the fuse is both the initiator and fuzing system.

Government's Memorandum at pp. 3-4. The toggle switch in the '86 device was simply used to allow the functioning of the remote control system. See Kline Affidavit at 11. In the '91 device, the toggle switch was used to fire the device. Id. Due to the absence of any physical evidence and sufficient information on the actual construction of the '86 device, it cannot be positively determined whether the toggle switch was placed in the fuzing circuit or the firing circuit. Id. However, Mr. Kline is of the opinion that the toggle switch was used either to test the '86 device or protect its maker by arming the system. Id. What is clear, however, is that the toggle switch in the '86 device required the user to turn it on or off manually and it did not fire the system. Finally, the type of toggle switch used in '86 was a double throw toggle switch, whereas in '91 the switch was a single throw toggle switch. Id. at pp. 11-12. In sum, the manner in which the toggle switch was used, the method used to turn it on, and the type of toggle switch used were all different. The singularly unique differences in the manner, method and type of toggle switch significantly diminish the signature value of the generic term "toggle switch" for purposes of establishing identity. Id.

Second, comparing the manner in which the components were assembled and connected also demonstrates singularly unique or idiosyncratic differences. In the '86 device, the wires utilized were wire scraps consisting of 22 and 26 gauge wire. Conversely, all the wires identified by ATF in the '91 device, with the

exception of one large red insulated multi-strand wire, were wires which were a part of the Futaba radio control system or lead wires from the battery snap connectors. Id. at 12. Even the wire antenna mentioned by the government was part of the Futaba system. Id. at 21. Conversely, in the '86 device a piece of scrap wire served as an antenna. Id. at 12 and 21.

More importantly for purposes of establishing identity, however, is the manner in which the wires were connected in the two devices. For example, a significant difference exists in the wire-to-wire connections in the firing circuits of the '86 device and '91 device. In the '91 device the detonator wires were connected into the firing circuit only by twisting and taping. Id. at 13. In the '86 device, the firing or lead wires of the M21 were connected into the firing circuit by twisting, soldering and taping. This is a clearly identifiable and idiosyncratic difference. Moreover, in the '86 device, wires were even soldered to the batteries contained within the system. In the '91 device, battery snap connectors were used, not solder. Id. Thus, there are identifiable and material differences in the type of wire used, the manner in which the wires were connected to other wires, and the manner in which the batteries were connected to the electrical circuit in these two devices.¹² Id. at 13-14.

¹²Defendant notes that in Mr. Kline's first two trips to Boston in March and June 1993, the wire connections of the '91 device evidence which he examined were twisted and taped, but not soldered. However, since June 1993, Mr. Kline has seen a photograph of government evidence which appears to reveal that one (1) wire-to-wire connection was twisted, soldered and taped. According to the government, this photograph represents a wire

Additional idiosyncratic differences between the '86 device and the '91 device include the fact that the '86 device was not concealed in a container whereas the '91 device was concealed within a plywood box, which was nailed, glued and painted black, and according to the government's expert's trial testimony in the Shay trial, took considerable skill to build and assemble.¹³

connection recovered at the crime scene. Nonetheless, during Mr. Kline's prior trips to Boston, he examined another wire-to-wire connection which was twisted and taped, but not soldered. Thus, although the presence of one wire-to-wire connection which appears to be twisted, soldered and taped reduces the strength of the dissimilarity, this type of wire-to-wire assembly is not "so unique" as to indicate a signature. Moreover, at best, the wire-to-wire connections in the '91 device demonstrate an inconsistent method of assembly. See Kline Affidavit at 13. As a result, this inconsistent method of assembly reduces the probative value of this evidence for purposes of establishing the device maker's identity.

¹³The government contends that the fact that the '91 device was housed in a custom-made box does not preclude a "signature" opinion, citing Ingraham in support of its position, and quoting the First Circuit's comment that an "exact match" is not necessary. See Government's Memorandum, fn. 16.

However, defendant submits that the government's reliance upon Ingraham on the issue of the custom-made box is misplaced. Although the Ingraham Court stated that an "exact replica" is not necessary, the Court further stated that **"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.'" Ingraham supra at 231.** Thus, the question under Ingraham is not whether the '86 device and '91 device are exact replicas, rather, the question is whether the custom-made box, which admittedly took considerable skill to build and assemble, is the type of "idiosyncratic" evidence the Ingraham Court had in mind. Since the Ingraham Court focused on idiosyncratic factors like the same "obscure" litigation, the same four public officials who were specifically named, the mistreatment of the same individual (Ingraham a/k/a MacKiel), and the mention of Ingraham's birth name (MacKiel) for its conclusion that the defendant's **thirty (30) letters** were probative on the identity issue, we submit that the custom-made box is clearly more probative on the identity issue when only **one (1) other device is compared** than the generic "facts" cited by the government (i.e., batteries, radio control system, magnets, etc.). Said generic "facts" presumably would be present in any remote control device attached to a metal surface.

Adhesives (crazy glue) were also used extensively in the '91 device, whereas none were used in the '86 device. Id. at 14.

With respect to the magnets, the government alleges that both devices had "round" magnets, but fails to mention the number or type of magnets. In fact, the '91 device had twelve (12) button magnets, and either one (1) or two (2) ring magnets. No identifiable speaker magnets were used in the '91 device. Conversely, the '86 device used one (1) speaker magnet. Id.

Finally, the '86 device utilized two (2) types of tape to construct the device - black plastic tape and silver duct tape. However, the '91 device had two (2) types of black plastic tape, silver duct tape, and white plastic tape to secure the connecting detonator wires. Id. at 14-15.

Given all of the above, it is clear that a forensic comparison of the '86 device and the '91 device, indicates that the items identified by the government are too generic to place any reliance upon them for purposes of making a "signature" analysis. Compare United States v. Benedetto, 571 F.2d 1246, 1249 (2d Cir. 1978) (passing folded bills by way of a handshake is as unique as using glassine envelopes to package heroin).

Moreover, a focused and fair examination of the components, design and assembly of the two subject devices clearly demonstrates that the factors which are indeed worthy of the label "idiosyncrasy" are all different. Compare Ingraham supra at 233 (where the Court commented "it beggars credulity to argue

that so striking a set of seldom seen similarities was but a strange coincidence" referring to the idiosyncratic characteristics of the thirty (30) letters and the anonymous phone call).

Finally, by considering the "totality of the comparison" and weighing the "disparities ... evenhandedly against the similarities" as required by Ingraham, supra at 233, there is only one conclusion that can be reached -- the actual "idiosyncracies" of each device are completely different.

Thus, we submit that Fed. R. Evid. 404(b) prohibits the introduction of evidence of the 1986 incident, because it does not have sufficient probative value on the issue of identity. Moreover, since the only other inference is the prohibited propensity inference, this Court need not consider the prejudicial effect of this evidence. See Arias-Montoya, supra p. 714, n. 10 (a finding that prior act evidence is barred under the first step of this Circuit's Rule 404(b) analysis, eliminates the need to weigh the probative value and prejudicial effect required under the second step).

B. THE GOVERNMENT'S MODUS OPERANDI EVIDENCE PROFFER RELATING TO THE 1986 DEVICE IS INTERNALLY INCONSISTENT, INDICATES THE 1986 DEVICE WAS NOT DESIGNED TO KILL OR INJURE ANYONE, AND LACKS A PROPER FOUNDATION. ADDITIONALLY, ADMISSION OF THE 1986 MODUS OPERANDI WITHOUT THE GOVERNMENT BEING ABLE TO PUT DEFENDANT AT OR NEAR THE RADIO SHACK AT 2:30 PM ON OCTOBER 18, 1991 COULD CAUSE A MISTRIAL.

1. The 1986 modus operandi evidence is internally inconsistent and indicates the '86 device was not designed to kill or injure anyone.

In its memorandum in support of its motion to admit evidence of the '86 device, the government (at page 2), states it is prepared to prove at trial:

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.);

In support of this statement (at pp. 5-6 of its memorandum) the government states that on September 1, 1986, Quincy 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." Attached hereto (Exhibit G) is the Quincy Police Department report of one of the first, if not the first, Quincy Police Department officer, Peter _____, Badge # 133, to arrive at the scene of the explosion on September 1, 1986. That report clearly states, "No visible damage to truck" (emphasis added).

This statement of Quincy Police Officer Peter _____, Badge 133 is consistent with the grand jury testimony (Exhibit H) of Robert Craig, defendant's former roommate and a key government proffer witness (see p. 7 of government memorandum) who stated

that defendant "just told me that it didn't do any damage; that it just was - just made a loud noise." (p. 27).

In his grand jury testimony (pp. 28-29), Mr. Craig goes on to state that defendant is "a passive guy" who had "no intention of hurting anybody:

Q. I see. Since you were living with him at that the time, did he express any remorse or hesitation about being involved in something like this?

A. Well, he was, you know, timid about doing it. It's not something that he was, you know, a regular at. But he didn't think that it was a big deal. He had no intention on hurting anybody or anything like that.

Q. How do you know that?

A. He's not -- he's a passive guy. He's not that type of person.

Detectives Lanergan and Tierney, two other key government proffer witnesses, (see pp. 8-10 of government memorandum) state (see p. 10 of government memorandum) Trenkler:

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.

Based on the facts and circumstances of 1986, it is clear (despite the government's attempt, at page 8 of its memorandum, to characterize the 1986 device as "lethal"), that the device was not designed to kill or injure anyone, was designed to simulate artillery fire, and in fact did not injure anyone and did not even do any visible damage to the fish truck -- a far different situation from the 1991 device which was designed to kill or seriously injure, and in fact killed one police officer and seriously wounded a second.

Petrozziello, 548 F.2d 20, 23, (1977) could cause a mistrial if the prosecution fails to meet its burden on the admission of co-conspirators' statements. See also U.S. v. Blanca-Rosa, 876 F.2d 209 (1st Cir. 1989); and U.S. v. Lynn, 856 F.2d 430 (1st Cir. 1988); where the First Circuit reversed two cases because of improper admission of Rule 404(b) material.

Defendant vigorously challenges the government's contention that he was at the Radio Shack on October 18, 1991 at 2:30 pm and has filed two responsive pleadings (Exhibits M & N) listing several witnesses who defendant expects will place him at or near the offices of his satellite communications company in Weymouth on October 18, 1991 at 2:30 pm. This fact is pivotal to the government's contention that the "bomb builder in this case utilized an individual, other than himself, to purchase electrical components." See Government's Memorandum at p. 26.

Thus, defendant submits that admitting evidence of the *modus operandi* of the 1986 device could result in a mistrial if the government cannot prove defendant was at the Radio Shack at 2:30 pm on October 18, 1991, just before Shay, Jr. allegedly purchased the toggle switch. Compare Petrozziello supra.

C. DEFENDANT HAS NOT PUT THE ISSUES OF KNOWLEDGE AND INTENT IN DISPUTE, THE PROBATIVE VALUE OF THE EVIDENCE IS PROPENSITY BASED, THE PROBATIVE VALUE OF THE EVIDENCE ON THESE ISSUES IS MINIMAL AND UNNECESSARY, AND ANY NON-PROPENSITY THREAD IS ATTENUATED BY A FIVE YEAR (5) GAP BETWEEN THE PRIOR ACT AND CHARGED ACTS. ACCORDINGLY, ADMISSION OF THE 1986 INCIDENT ON THESE ISSUES WOULD PERMIT THE VERY INFERENCE RULE 404(b) IS DESIGNED TO PROHIBIT.

1. The Defendant Has Not Placed The Issues of Knowledge and Intent In Dispute.

Defendant notes that the government has placed great reliance on the defendant's plea of not guilty to contend that the issues of intent and knowledge are in dispute. See Government's Memorandum, pp. 22-23. In support of this proposition, the Government cited a number of older cases which have been severely limited, if not implicitly overruled by more recent cases. See Garcia-Rosa, supra at 220 (1st Cir. 1989) (holding that bad act not admissible on defendant's knowledge at time of conspiracy where defendant did not raise knowledge issue) see also Lynn, supra at 436 n. 15 (1st Cir. 1988) (limiting the holding in United States v. Zeuli, 725 F.2d 813, 816 (1st Cir. 1983) by holding that Lynn's intent to participate in conspiracy was not really in issue even though he plead not guilty); Arias-Montoya, supra at 709-713 (1st Cir. 1992) (examining numerous First Circuit cases on the issues of intent and knowledge, and holding that a prior conviction which required a propensity inference for its probative value was inadmissible under 404(b) even where the defense was "no knowledge"). Thus, contrary to the government's contention that merely by pleading not guilty the defendant has placed the issues

of intent and knowledge in issue, it is clear that recent First Circuit case law does not support this view. See Garcia-Rosa supra at 220 (holding where defendant never put his knowledge of drugs at issue; admission of this evidence cannot be justified to rebut an issue that the defendant did not raise); see also Lynn supra at 436, n. 15 (distinguishing Zeuli, and noting that "intent, while technically at issue, [was] not really in dispute" citing United States v. Benedetto, 571 F.2d 1246, 1249 (2nd Cir. 1978)).¹⁴

2. **The probative value of the evidence on the issues of intent and knowledge is propensity based and inadmissible.**

We submit that where the probative value of the evidence on the issues of intent and knowledge depend upon a propensity-based link, the evidence is inadmissible. See Garcia-Rosa, supra at 220-221 (holding that inferential chain must not be propensity based).

For example, in Arias-Montoya, defendant's conviction for knowingly and intentionally possessing cocaine with intent to distribute was reversed where the government, to rebut defendant's "no knowledge" defense, introduced a prior conviction for cocaine possession to prove the defendant had the requisite

¹⁴In Lynn, supra at 436, n. 15, the First Circuit also recommended that when intent is really not in dispute, the better practice for a trial court is to defer its admissibility determination until after the defense presents its case, since the court will be in a better position to evaluate the government's need for the evidence.

knowledge and intent to commit the charged crime. After examining every case relied upon by the government in its memorandum and distinguishing them, the Court framed the 404(b) issue as follows:

The relevant test would appear to be whether someone with a past conviction for possessing twenty-eight grams of cocaine is more likely to know that there is a kilogram of cocaine in the trunk of a borrowed car he is driving than someone with no prior conviction. Id. at 711.

Noting that the "only connection we can draw between defendant's prior conviction and his state of mind at the time of his arrest is one based on character, i.e., defendant was more likely to know cocaine was in the car because he previously possessed cocaine", the First Circuit reversed the trial court. Id. at 711.

Similarly, in the present case, the only connection between the defendant's prior act and his state of mind at the time of the 1991 bombing is propensity based, i.e., defendant is more likely to know about the 1991 bombing because he was previously involved in a prior incident.¹⁵

¹⁵Defendant notes that the government has argued that because the 1986 incident and 1991 bombing are "strikingly similar" special relevance on the issues of intent and knowledge is established. What the government fails to mention is the fact that in 1986, the defendant's intent was not to injure or kill as alleged in this case. Moreover, where the government admits it has no direct evidence on the design, planning, construction, or placement of the 1991 bomb, it is difficult to imagine how it can then claim that the two incidents are "strikingly similar". Finally, unlike the situation in this case where the government has admitted that Shay, Jr. can not be linked to the 1986 incident, the First Circuit has generally found "strikingly similar" only in circumstances where the same co-conspirators are involved in both the prior act and charged act. See United States v. Rivera-Medina, 845 F.2d 12, 16 (1st Cir. 1988) (two

Moreover, even if knowledge or intent is truly at issue in this case, there must be "tighter logical link between the extrinsic act and the charged crime" than present in this case. See Arias-Montoya supra at 712 (citing Garcia-Rosa supra at 221). In Arias-Montoya, the Court explained that "[t]here was no evidence connecting defendant to the trunk of the car that would make the added fact of his past possession relevant to his knowledge on the instant charge." Id. at 711-712. The Court also noted that "had the car belonged to the defendant, or were there evidence that he had used it for an extended period of time or on more than one occasion, we might be willing to presume he would have had reason to open its trunk and, so, to know that a kilogram of cocaine was hidden there." These facts, the Court noted, "would align the case more closely with Ferrer-Cruz, Moccia, and Simon...."

Similarly, in this case, there is no evidence linking defendant to the charged crime which would make his prior knowledge or intent relevant. Thus, absent proof that the defendant is, in fact, linked to the 1991 bomb, the issues of knowledge and intent are irrelevant.

instances of extortionate activity "strikingly similar" to charged act involving same co-conspirators); United States v. Crocker, 788 F.2d 802, 804 (1st Cir. 1986) (same participants); United States v. Andiarena, 823 F.2d 673, 677 (1st Cir. 1977) (same participants); United States v. Gonzalez-Sanchez, 825 F.2d 572, 581 (1st Cir. 1987) (same participants).

3. The probative value of this evidence on the issues of intent and knowledge is minimal and unnecessary.

Defendant further submits that the probative value of the 1986 incident on the issues of defendant's intent and knowledge in 1991 is minimal, and, with respect to knowledge, unnecessary. In Lynn supra, the First Circuit, when considering the prior bad act of defendant commented: "The states of mind of someone who consummated a street sale to an undercover agent (prior act) and one who participated in an international smuggling conspiracy are connected primarily by the fact that both engage in criminal enterprises involving drugs. The ordinary inference here would seem very close to the inference [Rule 404(b)] was designed to avoid." Id. at 436. Similarly, defendant submits that in this case it is clear that the state of mind of someone who designed an explosive device that was not intended to harm person or property, and in fact did not harm any person or property (1986 incident) is very different from the mind of one who designs a bomb consisting of two (2) to four (4) sticks of dynamite and which is clearly intended to harm either persons or property, and in fact did harm persons and property. Thus, like the Lynn case, it would appear that the "ordinary" or "logical" inference here would ..[be].. very close to the inference [Rule 404(b)] was designed to avoid." Id. at 436.

Clearly, the government has more than enough evidence on the defendant's knowledge to make the 1986 evidence unnecessary. See Testimony of Dennis Leahy in Shay Trial Transcript, pp. 14-125 - 126 and 15-21-22, (Exhibit 0); see also Testimony of Thomas

D'Ambrosio (Exhibit P, pp 54-58) and Dennis Leahy (Exhibit Q, pp 60-61) during Trenkler suppression hearing; and ATF Reports (Exhibits R & S). In fact, if the Leahy-D'Ambrosio evidence of interviews with defendant does not clearly establish defendant's knowledge, defendant will stipulate that he possesses the requisite knowledge to construct the 1991 device.

We also submit that the circumstances of the 1991 bombing also provide more than sufficient proof of the intent of the bomb maker. See United States v. Ring, 513 F.2d 1001, 1007 (6th Cir. 1975) (intent is not in issue when it is "normally ... inferred from the criminal act, if proven"); but see Lynn, supra p. 436, n. 15 (noting that no First Circuit case has adopted the Sixth Circuit's approach). Moreover, intent can be inferred from the other circumstances in this case and defendant's knowledge. Nevertheless, if this Court decides intent is a "legitimate purpose" for the 1986 evidence, it should defer its determination on the admissibility of the 1986 incident until after the government establishes the defendant's identity as the 1991 bomb maker, and after the defense has presented its case, to better evaluate whether the government needs the evidence to prove the defendant's intent. See Lynn supra at 436, n. 15.

4. Any non-propensity thread is attenuated by the fact that the previous act took place five (5) years before the charged act.

It is well-settled that probative value must be considered in light of the remoteness in time of the prior act and the degree of resemblance to the crime charged. United States v.

Fields, 871 F.2d 188, 197 (1st Cir. 1989) citing M. Graham, Handbook of Federal Evidence, sec. 404.5, at 221-22 (2d ed. 1986). Although no hard and fast rule is applicable, it is generally accepted that the lapse of time weakens the probative value of the evidence and weighs in favor of exclusion. Id. This is particularly true with respect to the issue of intent because "[t]he passage of time and changing circumstances are more likely to significantly change one's intent". Fields supra at 198.

In the present case, defendant submits that any non-propensity thread (if there is one) of the 1986 incident is significantly weakened by the fact that the prior act took place five years before the charged act and involved different participants.¹⁶ See Lynn at 436. Specifically, like Lynn, which involved a six (6) year old prior conviction and different participants, the five (5) year gap in this case significantly weakens the probative value of the 1986 evidence. Add to this weakened probative value the fact that the 1986 incident was dismissed at the request of the Commonwealth and the fact that circumstances of the incident demonstrate an entirely different

¹⁶Defendant notes that another consideration here is the fact that the prior act occurred more than seven (7) years ago, and was ultimately dismissed at the request of the Commonwealth. Thus, a fairness question is whether the defendant should be made to defend this earlier act at such a remote time. Clearly, the defendant's defense to the issues presented by the 1986 incident (i.e., whether it was a crime under Massachusetts Law) has been prejudiced by the delay, not to mention the destruction or loss of the physical evidence. Therefore, defendant submits it is fundamentally unfair to require him to defend against a case that was dismissed long ago.

intent, and it is clear that the remoteness of this prior act weighs heavily in favor of exclusion. See Lynn at 436.

5. Admission of the 1986 incident on the issues of intent and knowledge would permit the very inference Rule 404(b) is designed to prohibit.

In the final analysis, the question this Court must ask itself on this issue is whether there is any other inference for a reasonable juror to draw from the 1986 incident other than the prohibited inference that defendant did it before so he must have done it again. Since there is no permissible probative inference which can be drawn without using the defendant's bad character as a link, we submit that admission of the 1986 incident would permit, if not compel, the very inference prohibited by Rule 404(b).

- D. ASSUMING ARGUENDO THE 1986 EVIDENCE HAS SOME PROBATIVE VALUE THE PREJUDICIAL IMPACT OF THIS EVIDENCE FAR OUTWEIGHS ITS PROBATIVE VALUE, WILL CONFUSE THE ISSUES AT TRIAL, WILL WASTE TIME, WILL DEPRIVE DEFENDANT OF A FAIR TRIAL, AND COULD CONSTITUTE PLAIN ERROR.

1. There is no doubt that the prejudicial impact of this evidence far outweighs its probative value.

The prejudicial effect of bad act evidence is obvious. See Garcia-Rosa supra at 221. The danger of unfair prejudice is established where: 1) there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and 2) this risk is disproportionate to the probative value of the offered evidence. See United States v. Zeuli, 735 F.2d 813, 817 (1st Cir. 1984) citing approvingly Fourth Circuit's test in United States v. Masters, 622 F.2d 83, 87 (4th Cir. 1980).

We submit there is no doubt that there is a great risk that the emotions of the jury will be excited to irrational behavior if this evidence is admitted. This case deals with the death of a police officer and serious injury of another police officer in the line of duty. There is no question that the jurors will be sympathetic to their plight. The government's case is premised on the fact that the defendant was the maker of the 1991 bomb. The material issue in dispute is whether the defendant was in fact the maker of this bomb. Under these circumstances, there is no doubt that admitting evidence of the 1986 incident, even with limiting instructions, will create the risk that the jury will convict the defendant for his past act, and not because the government sustained its burden in this case. See Arias-Montoya, supra at 714 ("bad character evidence ... particularly likely to **infect jury deliberations...**"); see also Garcia-Rosa supra at 222 ("if limiting instructions could remedy all [404(b)] errors, the government would easily be able to circumvent Rules 404(b) and 403").

The likelihood of the jury acting irrationally in this case is increased by the fact that the government's case against the defendant is relatively weak. In fact, given that the government has acknowledged that it has no direct evidence of the planning, design, construction, and placement of the 1991 bomb, and desires to utilize the 1986 device to prove these points, defendant

submits the jury will be invited to act irrationally in this case.¹⁷

Moreover, this risk is greatly disproportionate to the probative value of the offered evidence. Specifically, for the reasons stated above, since the defendant's involvement in the 1986 incident has minimal, if any, probative value on the issues of intent and knowledge, there is no doubt that the risk the jury will convict the defendant for his conduct in 1986 is disproportionate to the probative value of the evidence.

2. **Admission of the 1986 incident will confuse the issues at trial.**

Admission of this evidence at the defendant's trial will also confuse the issues at trial. Specifically, this case is technically complex. A great deal of evidence will be presented by the government and the defense as to the design and construction of the 1991 bomb. There will also be a tremendous amount of evidence as to the items found at the scene of the crime and how the bomb was reconstructed. To allow additional technical evidence on the 1986 incident will only confuse the jury as to which evidence is applicable to the 1991 bomb and which evidence is applicable to the 1986 device. Contributing to this confusion will be the fact that a few of the items in the 1986 device were also present in the 1991 bomb. At the end of the case, it will no doubt be confusing for the jurors to

¹⁷The government's need for the evidence does not minimize the prejudice. Rather, a weak case would only increase the prejudice.

segregate the evidence of the 1991 bomb from the evidence of the 1986 device.

3. Admission of the 1986 incident will waste time.

The admission of the 1986 evidence will also take a tremendous amount of time. Specifically, according to the government's proffer, at least fifteen (15) witnesses could be called to testify about the 1986 incident.¹⁸ Moreover, given the fact that many of the representations in the government's proffer regarding this incident are disputed, the defendant will be required to defend against the facts underlying the 1986 incident as if he was on trial for this incident. As a result, admission of this evidence, and the defendant's response to it, will add four(4) to five (5) days to the trial, and effectively have the tail (1986 device) wagging the dog (1991 bomb trial) in this case.¹⁹

¹⁸Defendant notes that the government could potentially call the following people to testify: ATF Explosives Expert Thomas Waskom, Explosives Expert Al Gleason, Donna Shea, John Shea, Owners of Capeway Fish Market, Quincy Police Detectives William Lanergan and Thomas Tierney, Assistant Chief of Massachusetts Crime Laboratory, Francis R. Hankard; Robert Craig, Todd Leach, and Steven Scheid. Defendant would also want to call a number of witnesses, i.e., the Quincy Police Officer, Badge #133, who wrote the 1986 incident report (Exhibit G), two experts, Denny Kline and Peter DeForest, and possibly others.

¹⁹Defendant also notes that there is a genuine danger that the amount of time devoted to this incident will artificially enhance its importance beyond the narrow purposes of Rule 404(b).

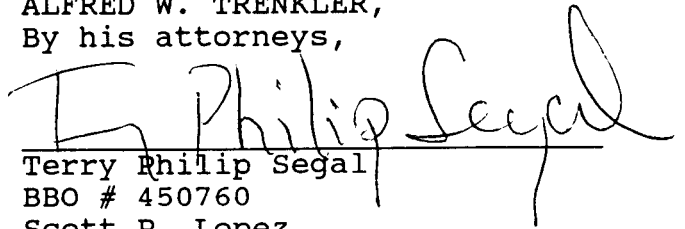
4. Admission of the 1986 incident will deprive the defendant of a fair trial, and could constitute plain error.

Admission of evidence under Rule 404(b) will be treated as harmless error only if it "is highly probable" that the error did not contribute to the verdict. Arias-Montoya supra at 714. If it is not highly probable, or if one is left in grave doubt, the error is not harmless and the conviction cannot stand. Garcia-Rosa supra at 222. Thus, even where the government's case against a defendant is strong (unlike this case), unless the government's case is "so overwhelming" that, in good conscience, it can be stated that it is "highly probable that the government would have prevailed even in the absence of the ...[prior act]... evidence,... the error is not harmless." Id. Given the government's paltry proof in this case, we submit that admission of the 1986 incident will deprive Alfred Trenkler of a fair trial, and could constitute plain error.

E. CONCLUSION.

For all of the foregoing reasons, we respectfully request this Court to deny the government's motion *in limine* and prohibit the government from introducing in its case in chief any evidence or reference to the defendant's involvement in the 1986 incident.

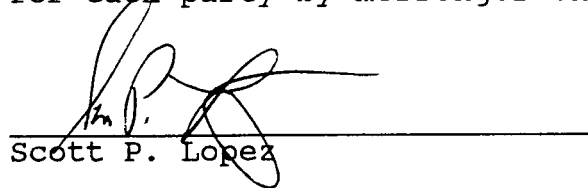
Respectfully submitted,
For the Defendant,
ALFRED W. TRENKLER,
By his attorneys,



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

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party by messenger on October 15, 1993.



Scott P. Lopez

LIST OF EXHIBITS

- A. Docket Sheets
- B. Second Affidavit of Denny L. Kline
- C. United States v. Ingraham, 832 F.2d 229, 233 (1987)
- D. M-21 Description
- E. ATF Explosive Technology Branch Report
- F. EOD Improvised Explosives Manual (Paladin Press) pp. 48-49
- G. Quincy Police Report
- H. Robert Craig's Selected Grand Jury Testimony
- I. Todd Leach's Selected Grand Jury Testimony
- J. Donna Shea's Selected Grand Jury Testimony, December 10, 1992
- K. Massachusetts Department of Public Safety Lab Report
- L. Government's Demand for Notice of Alibi
- M. Defendant's Alibi Response
- N. Defendant's Supplementary Alibi Response
- O. Selected Testimony of Dennis Leahy in United States v. Thomas Shay, Jr.
- P. Selected Testimony of Thomas D'Ambrosio in United States v. Alfred Trenkler (Suppression Hearing)
- Q. Selected Testimony of Dennis Leahy in United States v. Alfred Trenkler (Suppression Hearing)
- R. ATF Report of Dennis Leahy dated January 17, 1992
- S. ATF Report of Dennis Leahy dated February 1, 1992