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**ADDENDUM TO  
BRIEF OF APPELLEE**

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# Radio Shack®

A DIVISION OF TANDY CORPORATION

STORE NUMBER

DRA

197 MASS AVE

BOSTON

MA 02115

01-1021

000073

0177 500-4770

0110791 027859

CUSTOMER NAME

STREET OR ROUTE BOX

APT. #, SUITE

CITY

STATE

ZIP CODE

The card issuer identified hereon may apply the total amount on this slip to the appropriate account to be paid according to its current terms. All merchandise returned for refund or exchange must be in new and resalable condition, in original cartons with original packing accessories, guarantees and instructions, and must be accompanied by this sales slip. IN ADDITION, SALES AND RETURNS OF COMPUTER EQUIPMENT AND SOFTWARE LICENSED ARE SUBJECT TO THE TERMS AND CONDITIONS IDENTIFIED ON BACK.

CUSTOMER SIGNATURE X

STOCK NO.	DESCRIPTION	QTY.	PRICE	AMOUNT
204-081	4 AA BATTERY HLDR	1	1.29	1.29
208-001	DPST TOGGLE SW	1	1.29	1.29
272-1110	2ND 950 CUMPS	1	.99	.99
274-388	1/4" CASE HOLDER	1	.99	.99
278-020	BR HACKTYP	1	1.99	1.99
278-100	BR 5X3.125X1.64	1	2.99	2.99
			SUBTOTAL	8.44
			TAX	.47
			TOTAL	8.91
			CASH TENDERED	20.00
			CHANGE DUE	11.09

CONTROL COPY

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Specifically, Section 4241(a) provides, in pertinent part, that:

The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

18 U.S.C. §4241(a). Prior to any such hearing, the Court may order that a psychiatric or psychological examination of the defendant be conducted. 18 U.S.C. § 4241(b).

As we have previously made known to you, the government presently has no reasonable cause to believe that Shay Jr. is "suffering from a mental disease or defect" rendering him mentally incompetent to stand trial. To the contrary, and as was pointed out at the conclusion of last week's hearing, Shay Jr. has recently (October/November, 1992) been evaluated by a state court-appointed mental health professional and was subsequently determined competent to answer criminal charges in that forum.

As we understand it, you have either already concluded that, or are at least well into the process of determining whether, there exists such "reasonable cause" warranting a competency hearing. On the whole, it seems likely that you will ultimately file a motion for such a hearing, accompanied by a motion for court-ordered examination of Shay Jr. Given our mutual interests in keeping this matter on a predictable track for trial, we would much appreciate being advised as to your client's intentions in this regard. Should your client indeed intend to file such motions, and to permit the government an opportunity to assent to them (solely for purposes of expediting action), the government would request that you first provide us an informal understanding of the circumstances upon which the "reasonable cause" warranting a hearing under Section 4241(a) would be based.

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA )

v. )

THOMAS A. SHAY )

CRIMINAL NO. 92-10396-E

MOTION FOR LEAVE TO LATE FILE NOTICE OF INSANITY DEFENSE  
AND INTENTION TO INTRODUCE EXPERT TESTIMONY

Pursuant to Rules 12.2(a) and (b) of the Federal Rules of Criminal Procedure, defendant Thomas A. Shay ("Shay Jr.") hereby moves this Court to allow late filing of notice of his intention to raise the defense of insanity and of his intention to introduce expert testimony relating to a mental disease or defect or mental condition bearing upon the issue of guilt. Cause for late filing is as follows:

1. Shay Jr. could not give notice of his intention to raise the insanity defense before being informed whether there existed a basis for such defense by an expert in the field of psychiatry.
2. Undersigned counsel is successor counsel in this case.
3. Since Shay Jr. has been in custody at all times since before undersigned counsel was appointed, he could not be evaluated except at times convenient to the psychiatric expert, the incarcerating facility, and counsel.
4. As part of his evaluation, the psychiatric expert reviewed voluminous social history and mental health records.
5. Shay Jr. was preliminarily evaluated on April 9, 1993.

6. Counsel was informed by the evaluating expert on April 12, 1993, that there is a basis for raising the defense of insanity at trial.

For the foregoing reasons, Shay Jr. moves that this Court grant him leave to file the notices required by Rules 12.2(a) and (b) of the Federal Rules of Criminal Procedure on this date.

Respectfully submitted,

THOMAS A. SHAY  
By his attorneys

Amy Baron-Evans  
Nancy Gertner  
Amy Baron-Evans  
Dwyer, Collora & Gertner  
400 Atlantic Avenue  
Boston MA 02110  
(617) 357-9202

Jefferson Boone  
Jefferson Boone  
Boone & Henkoff  
138 Brighton Avenue  
Allston MA 02134  
(617) 782-8210

Dated: April 16, 1993

G:\CLIENT\SHAYTON\PLEADING\insan.not

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney or record for each other party by mail ~~by hand~~ on 4/16/93 AM FLX

4/16/93 Amy Baron-Evans

00006





U.S. Department of Justice

United States Attorney  
District of Massachusetts

1003 J.W. McCormack Post Office and Courthouse  
Boston, Massachusetts 02109

June 16, 1993

BY HAND

Frank Dello Russo, Clerk  
for the Honorable Rya W. Zobel  
United States District Judge  
U.S. Courthouse  
Boston, MA 02110

Re: United States v. Thomas A. Shay  
Criminal No. 92-10369-Z

Dear Mr. Dello Russo:

Enclosed for filing please find the Government's Motion To Compel Defendant Thomas A. Shay to Comply With Existing Discovery Order. Kindly bring this motion to the attention of Judge Zobel at her earliest convenience.

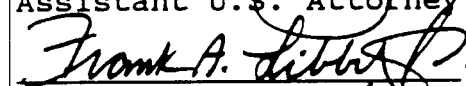
We appreciate your courtesy and cooperation.

Very truly yours,

A. JOHN PAPPALARDO  
United States Attorney

By:

  
PAUL V. KELLY  
Assistant U.S. Attorney

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

Enclosures

cc: Nancy A. Gertner, Esquire  
Jefferson Boone, Esquire

00008

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA )  
 )  
 v. )  
 )  
 THOMAS A. SHAY )

CRIMINAL NO. 92-10369-Z

**GOVERNMENT'S MOTION TO COMPEL  
DEFENDANT THOMAS A. SHAY TO COMPLY  
WITH EXISTING DISCOVERY ORDER**

The United States of America hereby moves the Court for an order directing counsel for defendant Thomas A. Shay ("Shay Jr.") to forthwith comply with this Court's discovery order of May 7, 1993 (copy attached as "Exhibit A") in three respects: that he produce (1) any and all results of psychological tests administered to Shay Jr., (2) any and all reports by Shay Jr.'s psychiatric expert(s), and (3) any and all reports by Shay Jr.'s explosives expert(s), together with the results of testing or experiments by the same.

In support of this motion, the government states:

1. Following entry of this Court's order of May 7, 1993, counsel for Shay Jr. confirmed that their psychiatric expert(s) had administered psychological tests on Shay Jr. The government's psychiatric experts have advised the undersigned that it is essential to their evaluation that they obtain and review the results of these tests before they can opine on the insanity issue raised by Shay Jr.<sup>1</sup>

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<sup>1</sup> It is apparently not possible to administer a second set of psychological tests so soon after the initial tests. Therefore, the government's psychiatric experts are not able to simply conduct tests of their own.

2. Government counsel has made several requests to counsel for Shay Jr. for copies of the psychological test results, including two requests in writing ("Exhibits B and C".) To date, counsel has not supplied the material, thereby necessitating this motion.

3. Moreover, we are now within ten (10) working days of trial and Shay Jr.'s counsel has failed to provide the government with two important pieces of reciprocal discovery to which the government is entitled under Fed. R. Crim. P. 16(b) and this Court's order of May 7, 1993, namely: (1) any and all reports by Shay Jr.'s psychiatric expert(s), and (2) any and all reports by Shay Jr.'s explosives expert(s), together with the results of testing or experiments by the same. Receipt of this mandated discovery material is essential to the government's trial preparation.


WHEREFORE, the government requests that this motion be allowed, and that the Court issue an order compelling counsel for Shay Jr. to produce the required documents and materials to the

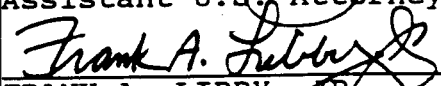
government forthwith.

Respectfully submitted,

A. JOHN PAPPALARDO  
United States Attorney

By:

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

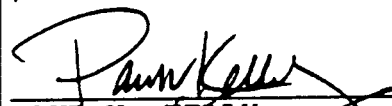
  
\_\_\_\_\_  
FRANK A. LIBBY, JR. *AK*  
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

Suffolk, ss.

Boston, Massachusetts  
June 16, 1993

I, Paul V. Kelly, Assistant U.S. Attorney, do hereby certify that I have served the copy of the foregoing by hand to Nancy Gertner, Esquire, 400 Atlantic Avenue, Boston, Massachusetts 02110, and by first-class mail to Jefferson Boone, Esquire, 138 Brighton Avenue, Suite 212, Allston, Massachusetts 02134.

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

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

THOMAS A. SHAY

Criminal No. 92-10369-Z

*DOCKET*

GOVERNMENT'S MOTION TO COMPEL  
DISCLOSURE OF IDENTITY OF DEFENDANT'S  
PSYCHIATRIC EXPERT AND PRODUCTION OF ANY EVALUATIVE REPORTS

The United States of America hereby moves for an order compelling defendant Thomas A. Shay to disclose the identity of the "psychiatric expert" referred to in his Motion for Leave to File Notice of Insanity Defense and Intention to Introduce Expert Testimony. The government requires this information in order that it may adequately prepare for trial, which is scheduled to commence on June 28, 1993.

The government further moves, pursuant to Fed. R. Crim. P. 16(b)(1)(B), that defense counsel for Shay, Jr. be required to produce to the government any and all "results or reports of physical or mental examinations or scientific tests or experiments made" in connection with this case.

Respectfully submitted,

A. JOHN PAPPALARDO  
United States Attorney

By:

*Paul V. Kelly*  
\_\_\_\_\_  
PAUL V. KELLY  
Assistant U.S. Attorney

*Frank A. Libby, Jr.*  
\_\_\_\_\_  
FRANK A. LIBBY, JR.  
Assistant U.S. Attorney *AVK*

*Allowed*  
*Ryan J. Zabel*  
*5/7/93*

*131*



U.S. Department of Justice

United States Attorney  
District of Massachusetts

COPY

1003 J.W. McCormack Post Office and Courthouse  
Boston, Massachusetts 02109

May 26, 1993

Nancy Gertner, Esquire  
Dwyer, Collora and Gertner  
400 Atlantic Avenue  
Boston, Massachusetts 02110

Jefferson Boone, Esquire  
Boone & Henkoff  
138 Brighton Avenue  
Allston, MA 02134

Re: United States v. Alfred W. Trenkler  
Criminal No. 92-10369-Z

Dear Counsel:

I note, per the enclosed, that Judge Zobel has allowed the government's motion for production of all "results or reports of physical or mental examinations or scientific tests or experiments made" in connection with this case. I would appreciate it if you would advise me whether any such "results or reports" exist, and if so, arrange for their production.

Very truly yours,

A. JOHN PAPPALARDO  
United States Attorney

By:

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

Enclosed  
cc: Frank A. Libby, Jr., AUSA

EXHIBIT "B"

00013



U.S. Department of Justice

United States Attorney

COPY

New England Drug Task Force

1009 J. W. McCormack POCH  
Boston, Massachusetts 02109

June 11, 1993

Nancy Gertner, Esq.  
Dwyer, Colora and Gertner  
400 Atlantic Avenue  
Boston, Massachusetts 02110

Re: United States v. Thomas A. Shay  
Criminal No. 92-10369-2

Dear Nancy:

In view of the Court's ruling in this regard and in following up Paul's recent request on this, kindly forward to us Dr. Ronald Cohen's report of examination of your client, Thomas A. Shay. Obviously, we would like to receive Dr. Cohen's results and corresponding report without delay so that we may pass them on to the government's experts for review.

Very truly yours,

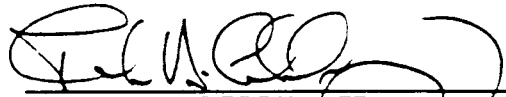
  
FRANK A. LIBBY, JR.  
Assistant U.S. Attorney

EXHIBIT "C"

00014

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA )  
 )  
 )  
 V. )  
 )  
 THOMAS A. SHAY )

CRIMINAL NO. 92-10369-Z

MOTION TO PRECLUDE EVIDENCE  
OF A FALSE BOMB THREAT IN NOVEMBER 1990

Defendant Thomas A. Shay ("Shay Jr.") hereby moves that this Court prohibit the introduction of evidence of a false bomb threat allegedly made by him on November 13, 1990, which the government has informed him it may seek to introduce at trial, as an exception to Rule 404(b)'s prohibition against character evidence. Shay Jr. objects to the introduction of an alleged bomb threat for the following reasons:

1. The alleged bomb threat one year prior to the explosion of a bomb which is the subject of this prosecution is another crime which is not admissible to show criminal propensity under Rule 404(b).

2. As an initial matter, the government's omnibus list of theories for introduction ("intent, plan, knowledge, identity, etc.") fails utterly to adequately particularize the relevance of the bomb threat evidence. "While admissible in some circumstances, [extrinsic act 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." United States v. Flores Perez, 849 F.2d 1, 8 (1st Cir. 1988).

3. A bomb threat one year earlier was in no way similar to and had no connection in time or other circumstances to the October 1991 bombing, and is therefore irrelevant to any legitimate issue in this case. See, e.g., United States v. Shackelford, 738 F.2d 776, 778 (7th Cir. 1984) (prior act offered for any purpose other than propensity must be "similar enough and close enough in time to be relevant to the matter in issue"). See also United States v. Philibert, 947 F.2d 1467, 1470-71 (11th Cir. 1991) (earlier purchase of firearms irrelevant to whether defendant made a threatening phone call where there was no connection between the two).

4. Shay Jr.'s defense will include, inter alia, that the government's evidence fails to prove that he received explosives, attempted to destroy an automobile, or conspired to do either. His lack of intent or knowledge are not in issue and cannot therefore be rebutted with prior acts. See, e.g., United States v. Rodriguez-Estrada, 877 F.2d 153, 155 (1st Cir. 1989) (other acts not admissible unless they go to a "controverted issue" in the case); United States v. Marvilla, 907 F.2d 216, 223 (1st Cir. 1990) (other acts admissible because defendant raised lack of knowledge and ability); United States v. Powell, 587 F.2d 443, 448 (9th Cir. 1978) (where defendant sought only to show that the source of the drugs was not him, intent was not in issue).

5. In any event, making a false bomb threat, which requires only knowledge of how to use a telephone, has no relevance to knowledge of how to receive explosives or destroy a

vehicle. See United States v. Welch, 1992 WL 58739 (D.Mass.) (that defendant rifled mail in an unrelated incident inadmissible to show knowledge of proper mail procedures in trial on charges of misappropriating postal funds).

6. Making a false bomb threat has no relevance to intent to kill or a plan to kill Shay Jr.'s father with a real bomb, where there is no connection in time or other circumstances between the two events. See, e.g., United States v. Lynn, 856 F.2d 430, 435 (1st Cir. 1988) (prior offense inadmissible where only connection was same illicit substance; other offense was remote in time, there was no evidence indicating a continuing scheme over time, the participants in the two events were completely different, and the two sales were dissimilar in quantity).

7. Evidence of a bomb threat in 1990 is inadmissible to show identity, since the two events share no characteristics, much less any that are "so idiosyncratic as to constitute a signature." Ingraham v. United States, 832 F.2d 229, 233 (1st Cir. 1987). The bomb threat is in no way "methodologically reminiscent of the crime charged as to earmark [the bombing] as the defendant's handiwork." Id. at 231. See also United States v. Wright, 901 F.2d 68 (7th Cir. 1990) (recorded telephone conversation in which defendant claimed he was a street dealer inadmissible to establish identity in prosecution for distribution of cocaine on wholesale level).

8. Use of a prior act to raise an inference that the defendant may have been disposed to commit an offense of the type with which he is presently charged is precisely what is forbidden by Rule 404(b) and the Due Process Clause.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(c), Shay requests that the Court schedule a hearing on this motion on the ground that oral argument will be of assistance to the court.

Respectfully submitted,

THOMAS A. SHAY  
By his attorneys

*Amy Baron-Evans*

Nancy Gertner (BBO #190140)  
Amy Baron-Evans (BBO #560312)  
Dwyer, Collora & Gertner  
400 Atlantic Avenue  
Boston MA 02110  
(617) 357-9202

Dated: June 24, 1993

*Jefferson Boone*

Jefferson Boone  
Boone & Henkoff  
138 Brighton Avenue  
Allston MA 02134  
(617) 782 8210

by ABE

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney or record for each other party by mail (by hand) on 6/24/93

*Amy Baron-Evans*

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA )  
 )  
 )  
 V. )  
 )  
 THOMAS A. SHAY )

CRIMINAL NO. 92-10369-Z

MOTION TO PRECLUDE EVIDENCE  
OF ALLEGED USE OF ALIASES

Defendant Thomas A. Shay ("Shay Jr.") hereby moves that this Court prohibit the introduction of evidence of his alleged knowledge and use of fictitious names and aliases, including altered variations of his last name, prior and subsequent to October 28, 1991, which the government has informed us it may seek to introduce at trial, as an exception to Rule 404(b)'s prohibition against character evidence.

Shay Jr. objects to the government's proposed introduction of evidence of alleged use of aliases for the following reasons:

1. Use of aliases in June 1989, January and April 1990, and January 1992, even if proved, are not admissible to show that Shay Jr. used an alias at Radio Shack on October 18, 1991. See Fed.R.Evid. 404(b).

2. As an initial matter, the government's omnibus list of theories for introduction ("intent, plan, knowledge, identity, etc.") fails utterly to adequately particularize the relevance of this evidence. "While admissible in some circumstances, [extrinsic act 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." United States v. Flores Perez, 849 F.2d 1, 8 (1st Cir. 1988).

3. Shay Jr.'s defense will simply be that the government's evidence fails to prove that he purchased anything at Radio Shack on October 18, 1991. Lack of intent or knowledge or absence of mistake or accident are not in issue and cannot therefore be rebutted with prior acts. See, e.g., United States v. Rodriguez-Estrada, 877 F.2d 153, 155 (1st Cir. 1989) (other acts not admissible unless they go to a "controverted issue" in the case); United States v. Marvilla, 907 F.2d 216, 223 (1st Cir. 1990) (other acts admissible because defendant raised lack of knowledge and ability); United States v. Powell, 587 F.2d 443, 448 (9th Cir. 1978) (where defendant sought only to show that the source of the drugs was not him, intent was not in issue).

4. Using an alias on other occasions has no relevance to intent to kill or a plan to kill Shay Jr.'s father, where there is no connection in time or other circumstances between the two events. See, e.g., United States v. Lynn, 856 F.2d 430, 435 (1st Cir. 1988) (prior offense inadmissible where there was no evidence indicating a continuing scheme over time, the participants in the two events were completely different, and the two sales were dissimilar in quantity).

5. Evidence of use of aliases on other occasions is inadmissible to show identity, since the other alleged aliases ("Ashay," "Mike Peters," "James Keough") and the alleged use of "Sahy" on October 18, 1991, do not share characteristics that are

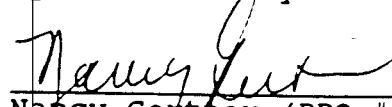
"so idiosyncratic as to constitute a signature." Ingraham v. United States, 832 F.2d 229, 233 (1st Cir. 1987).

6. That a prior act belongs to the same generic class as the act sought to be proved is not enough. See United States v. Pisari, 636 F.2d 855, 859 (1st Cir. 1981) ("fact that in committing a robbery, one invokes the threat of using a knife falls far short of a sufficient signature or trademark upon which to posit an inference of identity"); United States v. Garbett, 867 F.2d 1132, 1135 (8th Cir. 1989) (that both acts involved marijuana is not a "peculiar similarity" warranting admission of prior conviction); United States v. Benedetto, 571 F.2d at 1249 (since passing folded bills by way of a handshake "about as unique as using glassine envelopes to package heroin," evidence inadmissible to show identity); United States v. Miller, 883 F.2d 1540, 1543-44 (11th Cir. 1989) (evidence of other cocaine transaction inadmissible to prove identity where only similarities were the use of a beeper and delivery in a car, which were not shown to be unique).

7. Use of other aliases to raise an inference that Shay Jr. used an alias on October 18, 1991, is precisely what is forbidden by Rule 404(b) and the Due Process Clause.

Respectfully submitted,

THOMAS A. SHAY  
By his attorneys



Nancy Gertner (BBO #190140)  
Amy Baron-Evans (BBO #560312)  
Dwyer, Collora & Gertner  
400 Atlantic Avenue  
Boston MA 02110

(617) 357-9202

Dated: June 24, 1993

Jefferson Boone (by ABE)  
Jefferson Boone  
Boone & Henkoff  
138 Brighton Avenue  
Allston MA 02134  
(617) 782 8210

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney or record for each other party by mail (by filing) on 6/24/93

Amy Sharon Evans

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA )  
 )  
 )  
 v. )  
 )  
 THOMAS A. SHAY )

CRIMINAL NO. 92-10396-Z

MOTION FOR A BIFURCATED TRIAL

Defendant moves this Court to hold a bifurcated trial, separating the guilt phase of the trial from the insanity phase, and either impaneling separate juries or permitting renewed voir dire of the same jury on the insanity issues following the first trial.

Defendant cites as his reasons therefor the following:

1. The defendant is charged with conspiracy, receipt of explosives in interstate commerce resulting in death and injury to public safety officers, attempted malicious destruction of property used in and affecting interstate commerce by means of fire and explosives, resulting in death and injury to public safety officers, and aiding and abetting such offenses. The indictments stem from an explosion which occurred on October 28, 1991, and which resulted in the death of one police officer and the injuring of another.

2. The government's case against Mr. Shay is entirely circumstantial. There are no witnesses claiming to have seen him participate in the bombing. No meaningful physical evidence can be tied to him or to the places in which he lived at the time. Indeed, in its investigation of the case, the government has

investigated a number of different suspects, each with a motive to commit the offense. The government's investigation took over one and one half years and yielded virtually the same limited evidence at the end that it had at the beginning. In short, there are substantial defenses on the merits to the charges against Mr. Shay.

3. On April 16, 1993, the court was advised that in addition to raising the substantial factual defenses, Mr. Shay will raise an insanity defense.

4. It is difficult if not impossible to simultaneously defend the charges against Mr. Shay on the merits and to raise the insanity defense.

A. Evidence with respect to the latter necessarily opens the door to psychiatric and psychological history and statements which are highly prejudicial to Mr. Shay's other defenses.

B. The insanity defense, by focusing on the claim that the crime charged was the product of mental illness, necessarily makes the jury believe that the defendant was likely to have committed the act in question.

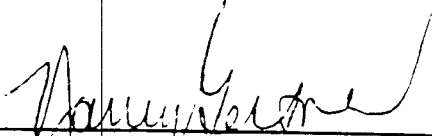
C. Evidence that the defendant has a mental illness, which would not otherwise be admissible in the case in chief, invites the jury to resolve doubts concerning the commission of the act by finding the defendant not guilty by reason of insanity, rather than acquitting him.

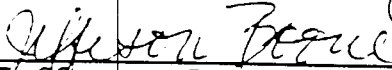
5. Bifurcation facilitates an orderly presentation of the issues in the trial, both in terms of explaining the burdens of proof and conducting voir dire. The burden of proof with respect to guilt or innocence is beyond a reasonable doubt, while the burden of proof with respect to the insanity defense is by a preponderance of the evidence.

For all of the above reasons, the defendant moves for a bifurcated trial.

Respectfully submitted,

THOMAS A. SHAY  
By his attorneys

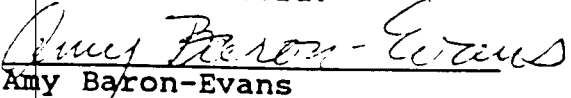
  
\_\_\_\_\_  
Nancy Gerthner (BBO #190140)  
Amy Baron-Evans (BBO #560312)  
DWYER, COLLORA & GERTNER  
400 Atlantic Avenue  
Boston MA 02110  
(617) 357-9202

  
\_\_\_\_\_  
Jefferson Boone  
BOONE & HENKOFF  
138 Brighton Avenue  
Allston MA 02134  
(617) 782-8210

Dated: June 24, 1993

CERTIFICATE OF SERVICE

I, Amy Baron-Evans, hereby certify that on this 24<sup>th</sup> day of June, 1993, a copy of the foregoing document was mailed, first class, postage prepaid to the all counsel of record:

  
\_\_\_\_\_  
Amy Baron-Evans

G:\CLIENT\SHAYTOM\PLEADING\BIFURCAT

DWYER, COLLORA & GERTNER  
ATTORNEYS AT LAW  
400 ATLANTIC AVENUE  
BOSTON, MASSACHUSETTS 02110

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THOMAS E. DWYER, JR.  
MICHAEL A. COLLORA  
NANCY GERTNER  
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WILLIAM H. KETTLEWELL  
JODY L. NEWMAN  
DAVID A. BUNIS  
PATRICIA CORREA  
MARIA R. DURANT  
AMY M. BARON-EVANS

Counsel  
THOMAS E. DWYER

Of Counsel  
CHERYL M. CRONIN

July 12, 1993

The Honorable Rya W. Zobel  
United States District Court  
J. W. McCormack Building, POCH  
Boston, MA 02109

Re: United States v. Thomas A. Shay, Jr.  
Criminal No. 92-10369-Z

Dear Judge Zobel:

This letter is to respond to the evidentiary issues concerning mental state which were raised today. Part I has to do with the voluntariness of Mr. Shay's statements which were taken by the police. Part II, having to do with the admissibility of Dr. Phillips' testimony, is preliminary. We intend to file a brief and a report by Dr. Phillips sometime later this week. Part III, regarding a possible diminished capacity defense, is also preliminary, and we will file a brief on it if and when the issue presents itself, or sooner if you prefer.

I. Voluntariness of Statements Made to Government

According to 18 U.S.C. § 3501(a), "if the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." See also Crane v. Kentucky, 476 U.S. 683 (1986) (where trial court had determined prior to trial that the confession was not involuntary, exclusion of testimony concerning the circumstances of the confession deprived petitioner of his constitutional right to present a defense).

The factors relevant to the voluntariness inquiry are Shay Jr.'s mental state and the extent to which his questioners knew about his mental state and took advantage of it. See, e.g., United States v. Barone, 968 F.2d 1378, 1384 (1992) (mental state is central to voluntariness inquiry); United States v. Jackson, 918 F.2d 236, 242 (1st Cir. 1990) (that defendant evidenced

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susceptibility to psychological pressure is relevant); Colorado v. Connelly, 479 U.S. 157 (1986) (mental state and police overreaching are relevant factors; Moran v. Burbine, 475 U.S. 412, 432-34 (1986); Schneekloth v. Bustamonte, 412 U.S. 218, 226 (1973) (resolution of voluntariness issue depends upon "both the characteristics of the accused and the details of the interrogation"); Miller v. Fenton, 474 U.S. 104, 116 (1985) ("admissibility . . . turns . . . on whether the techniques for extracting the statements, as applied to this suspect").<sup>1</sup>

Inquiring on cross examination into what the police knew at the time they questioned Shay Jr. will go no farther than it did during the suppression hearing. That is, we seek to determine to what extent the police were aware of Shay Jr.'s psychiatric history, such as the fact that he was in and out of institutions, without asking about any diagnoses from the psychiatric records.<sup>2</sup>

## II. Expert Testimony

After reviewing Shay Jr.'s voluminous social history and psychiatric records and conducting extensive interviews of Shay Jr. and his family, Dr. Phillips has diagnosed Shay Jr. with a pre-existing mental condition, recognized in accepted psychiatric journals, of which the jurors should be aware in order to assist them in evaluating Shay Jr.'s statements. This testimony is not a disguised effort to present an insanity defense. It is directly relevant to Shay Jr.'s ability to perceive and relate events.

Dr. Phillips' report will state, in essence, that Shay Jr.'s mental condition manifests itself in a need for attention that is so all-encompassing that it defines his personality and impacts

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<sup>1</sup> Shay Jr. will be requesting a jury instruction on this issue.

<sup>2</sup> We do not believe that testimony concerning what the police knew about Shay Jr.'s psychiatric history opens the door to every fact in his history any more than the government's questions of Shay Sr. about abuse opens that door. The defense and the government are simply eliciting the facts which are relevant.

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on his ability to perceive and relate events. Indeed, records which predate this case suggest that the condition is so serious that a reliable and accurate personal history cannot be obtained from Shay Jr.

Psychiatric testimony on the competency and reliability of a witness's testimony was first allowed in United States v. Hiss, 88 F.Supp. 559 (S.D.N.Y.), aff'd., 185 F.2d 822 (2d Cir. 1950), cert. denied, 340 U.S. 948 (1951). The defendant's psychiatrist was permitted to testify that the prosecution's chief witness, upon whose testimony the government's case was almost entirely based, was a psychopath disposed to making false accusations.

The First Circuit has recently stated the following with respect to the admissibility of expert testimony bearing on a witness's capacity to perceive and relate events:

For over forty years, federal courts have permitted the impeachment of government witnesses based on their mental condition at the time of the events testified to. See United States v. Hiss, 88 F.Supp. 559, 559-60 (S.D.N.Y. 1950). Evidence about a prior condition of mental instability that "provide[s] some significant help to the jury in its efforts to evaluate the witness's ability to perceive or to recall events or to testify accurately" is relevant.

United States v. Butt, 955 F.2d 77, 82 (1st Cir. 1992) (citations omitted).<sup>3</sup> See also United States v. Moore, 923 F.2d 910, 913 (1st Cir. 1991) ("Evidence about a prior condition of mental instability would be relevant here . . . if it were to provide some significant help to the jury in its efforts to evaluate the witness's ability to recall events or to testify accurately").

As the Fifth Circuit has stated,

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<sup>3</sup> The testimony was held to be properly excluded in Butts on the basis that the expert had never met or examined the witness, but based his diagnosis on one interview by someone else following a suicide attempt five years earlier. The expert had no opinion on the witness's current ability to perceive or report things truthfully. Id. at 82-83, 85. That is not the case here, where Dr. Phillips has interviewed Shay Jr. and his family extensively.

It is just as reasonable that a jury be informed of a witness's mental incapacity at a time about which he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or hearing. It all goes to the ability to comprehend, know, and correctly relate the truth."

United States v. Partin, 493 F.2d 750, 762 (5th Cir. 1974) (hospital records showing witness to be a schizophrenic admissible). See also United States v. Lindstrom, 698 F.2d 1154, 1165-66 (11th Cir. 1983) (reversible error to deny access to records showing witness was suffering from an ongoing mental illness "which caused her to misperceive and misinterpret the words and actions of others"); United States v. Society of Independent Gasoline Marketers of America, 624 F.2d 461 (4th Cir. 1979) (conviction reversed where defendants denied access to records revealing witness was "delusional and hallucinatory with poor judgment and insight").

This is an entirely different situation from that presented in United States v. Kepreos, 759 F.2d 961 (1st Cir. 1985), in which the First Circuit upheld this Court's exclusion of expert psychiatric testimony on the ground that it might confuse the jury. Id. at 965. Kepreos argued that the expert testimony was relevant on two theories: (1) as relevant to his intent, but he was not offering an insanity defense or a diminished capacity defense. Id. at 964. (2) as evidence of character or personality traits, to wit, avoidance, denial, repression, naivete, dependency and tunnel vision. Id. at 965.

Unlike Shay Jr.'s theory, Kepreos' theory on intent was indeed confusing. He offered it as relevant to intent based on no recognized theory of intent, no prior mental condition, and no recognized diagnostic category. The theory upon which Dr. Phillips' testimony is offered is entirely relevant to a central issue in a case --Shay Jr.'s capacity to perceive and relate events. The diagnosis is one accepted in the field of psychiatry, and is not, as in Kepreos, a statement of broad and vague psychological traits. Moreover, it concerns a preexisting and documented mental condition.

This case also differs from United States v. White, 766 F.2d 22 (1st Cir. 1985), in which the defendant sought to introduce evidence of motive under the aegis of a diminished capacity defense. The testimony was properly excluded because evidence of a "good" motive is irrelevant if the defendant is capable of forming specific criminal intent. Id. at 24. Unlike the expert testimony in White, Dr. Phillips' testimony is relevant to a material issue in this case, namely Shay Jr.'s ability to perceive and relate events.

Whereas credibility in general is an issue for the jury, the presence or absence of a preexisting mental condition of a sort recognized in the field, is an appropriate subject for expert

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testimony under the Federal Rules of Evidence. In that respect, it is no different from the testimony of an eye doctor, with respect to a preexisting eye condition of an identification witness, etc.

### III. Diminished Capacity

To extent made relevant by the facts, we may introduce expert testimony on diminished capacity as well. See, e.g., United States v. Saban-Gutierrez, 783 F.Supp. 1538, 1549 (D. Puerto Rico 1991), aff'd., 961 F.2d 1565; Hernandez-Hernandez v. United States, 904 F.2d 758, 761 (1st Cir. 1990); United States v. Lopez-Pena, 912 F.2d 1536 (1st Cir. 1989); United States v. Cameron, 907 F.2d 1051 (11th Cir. 1990); United States v. Twine, 853 F.2d 676, 678 - 79 (9th Cir. 1988); United States v. Pohlott, 827 F.2d 889, 903-07 (3d Cir. 1987); United States v. Frisbee, 623 F.Supp. 1217, 1221 and n.2 (N.D. Cal. 1985).

Sincerely,

Nancy Gertner

cc: Paul Kelly, Frank Libby



U.S. Department of Justice

United States Attorney  
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July 20, 1993

Honorable Rya W. Zobel  
U.S. District Judge  
U.S. District Court  
J.W. McCormack POCH  
Boston, MA 02109

Re: United States v. Thomas A. Shay, Cr. No. 92-10369-Z

Dear Judge Zobel:

The government respectfully submits the following response to those evidentiary arguments raised within Attorney Gertner's letter to you of July 12th:<sup>1</sup>

**I. Voluntariness of Statements Made to the Government**

Section 3501(a) of Title 18, U.S. Code permits, after denial of any motion to suppress on grounds of voluntariness, introduction at trial of both: (1) the fact of a defendant's "confession" (which the statute defines as "confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing"; see 18 U.S.C. § 3501(e)); and (2) "relevant evidence on the issue of voluntariness." (Emphasis supplied). Subsection (b) of § 3501 lists a variety of factors which the court "shall take into consideration" in making its threshold (i.e., suppression) determination as to voluntariness. None of the listed factors deal with the mental state of the defendant. Indeed, under applicable Supreme Court case law, mental state is never a relevant consideration unless the trial court first finds unconstitutional conduct on the part of the police, such that the suspect's "will to resist" can be said to have been "overborne." Colorado v. Connelly, 479 U.S. 157, 167

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<sup>1</sup> Shay Jr.'s Memorandum of Law In Support of Admissibility of Psychiatric Testimony, filed and served in court yesterday, effectively restates most of the language appearing in, and all of the arguments raised within, Attorney Gertner's letter of July 12th.

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(1986)"<sup>2</sup>

By its Order of June 15, 1993, this Court denied Defendant's Motion to Suppress Shay Jr.'s statements to the police of October 28th/29th and October 31st, 1991. As a consequence, the clinical details of Shay Jr.'s mental state cannot be and simply are not relevant to what remains of the "voluntariness" issue for the jury.

Notwithstanding the foregoing, the government has no objection to counsel's announced intentions of eliciting, on examination of government witnesses, the circumstances generally surrounding Shay Jr.'s self-incriminating statements made to any known law enforcement officer (that is, where it occurred, who was present, demeanor of the various parties', etc.), and, more particularly, the fact that some law officers were aware that Shay Jr. had had a troubled past and had been placed in foster

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<sup>2</sup> Shay Jr.'s "involuntary confession" arguments, which the Court ultimately rejected, have been extensively briefed and argued. As the government's Brief in Opposition pointed out, the law on this issue is plain: 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 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). 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). Accordingly, any allegation as to material vulnerability, due to age or mental capacity, for example, is relevant for due process purposes only if the court first finds unconstitutional official coercion. Colorado v. Connelly, 479 U.S. 157, 167 (1986) (coercive police activity 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).

homes and youth facilities while growing up.

The government will, however, object, as it has previously objected, to any line of questioning -- posed either to a government witness or any purported expert called by the defense -- as to the details of Shay Jr.'s mental state or condition at any time. Any testimony proffered along these lines, as shown above, would be relevant to no legitimate issue in this case. Defendant has disclaimed his once-noticed insanity defense; as such, Shay Jr. may not -- through the back ("voluntariness") door -- bring to the jury's attention psychiatric information which the defense has declined to present through the front (insanity defense) door.

## II. Expert Testimony

As with the above-restated "voluntariness" issue, Counsel's letter of July 12th again seeks to put before the jury Shay Jr.'s psychiatric history, arguing in this instance that such testimony will "assist [the jury] in evaluating Shay Jr.'s statements." (See Gertner letter, p. 2) Defendant claims that psychiatric testimony from one Dr. Phillips is admissible here on the "competency and reliability of a witness's testimony" as it is equivalent to the "testimony of an eye doctor, with respect to a preexisting eye condition of an identification witness, etc." (Gertner letter, p. 3).

This argument is wholly without merit and the government objects to the admission of any psychiatric testimony, from Dr. Phillips or any other psychiatrist or mental health expert, in this case. As the foregoing will show, the line of cases (i.e., Hiss; Butt; Moore, and Partin) cited by Defendant regarding admissibility of expert opinion as to the "competency and reliability of a witness" suffers from a fundamental, and fatal, deficiency: Shay Jr. has given no testimony in this matter and is simply not a witness (much less a government witness) in this case. Defendant's present posture (insanity defense disclaimed; defense nonetheless proffers "expert" testimony as to psychological condition of defendant) is, on the other hand, neatly aligned with the situation presented in United States v. Kepreos, 759 F.2d 961 (1st Cir. 1985), in which this Court (Zobel, J.) excluded the proffered expert psychiatric testimony as to that investment manager-defendant's claimed "lack of awareness" as to the charged "churning" scheme.

Briefly put, the state of the pertinent record now before the Court on this point is as follows:

The government has, under Fed. R. Evid. 801(d)(2)(A) ("Admissions of party-opponent"), adduced, and will hereafter adduce, in evidence a number of Shay Jr.'s statements. This

evidence takes numerous forms and has been, and will hereafter be, introduced as follows:

(1) As to Shay Jr.'s oral statements, government witnesses have, to date, included Detectives Thomas and Fogerty (Homicide Unit interviews); Russell Bonanno (Dartmouth, MA); Robert Evans, Chris Henry and Larry Plant (fellow prisoners); Nancy Shay; ATF Special Agents Dennis Leahy and Jeff Kerr; Fred Burke (San Francisco, CA) and Attorney Alan Pransky.

(2) As to Shay Jr.'s written statements (i.e., Shay Jr.'s notebook entry regarding Al Trenkler's Beeper number; note to his father on return from the dog track) the government's authentication witnesses have been Detective Fogerty and Shay Sr., respectively.

(3) As to Shay Jr.'s tape-recorded statements of February, 1992, during telephone conversation with Russell Bonanno, the government's authentication witness was Mr. Bonanno.;

(4) As to Shay Jr.'s videotaped statements made in the course of the October 31, 1991 Trailways press conference, the government's authentication witness was Detective Dennis Harris. Further, as a condition of its release, the parties have stipulated to the authenticity of the Shay Jr./Karen Marinella videotaped interview of October 17, 1992 given at the Plymouth House of Corrections.<sup>3</sup>

With respect to these assertions, Shay Jr. is, obviously, not a "witness" at all but, rather, the "declarant" (see Rule 801(b)(definition of "declarant"). Nevertheless, Ms. Gertner's letter notices her intention to call Dr. Phillips to give testimony as to Shay Jr.'s mental condition insofar as it "impacts on his ability to perceive and relate events." (Gertner letter, pp. 2-3). A review of the line of cases cited in Attorney Gertner's July 12th letter to the Court shows those "competence of government witness" cases to be plainly inapposite to the argument now raised in support of admission of Dr. Phillips' purported expert testimony. While the cited cases inform us that federal courts widely recognize the availability of cross-examination, through means including psychiatric testimony, on any legitimate issue of "witness competency and

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<sup>3</sup> Under Rule 1001 of the Federal Rules of Evidence ("Contents of Writings, Recordings and Photographs"), a "photograph" includes "video tapes" and "motion pictures." See Rule 1001(2).

reliability", each of the cases cited deals not with the alleged mental state of a declarant, but, rather, the alleged mental state of a witness (more particularly, a government witness) who appeared at trial and, on oath, gave testimony recalling the declarant's oral admissions. See, e.g., United States v. Hiss, 88 F. Supp. 559, 559 (S.D.N.Y. 1950) (existence of mental derangement admissible for purposes of discrediting witness).<sup>4</sup>

The distinction between declarant and witness in this respect, under the Rule and under case law, is a critical one: Shay Jr. would have an argument, under Hiss and its progeny, if it were discovered, for example, that (Heaven forbid) Detective Fogerty had suffered from some mental disorder in or about October and November, 1991 which arguably impaired Detective Fogerty's ability to perceive his surroundings. In such circumstances, Shay Jr. would (assuming all other circumstances as to sufficiency of psychiatric testimony to have been satisfied) be permitted to cross-examine Detective Fogerty as to Detective Fogerty's competency and as to the reliability of Detective Fogerty's testimony as Fogerty recalled, on the witness stand, Shay Jr.'s statements given during the October 31 interview at the Homicide Unit.

In United States v. Butt, 955 F.2d 77 (1st Cir. 1992), the First Circuit provided a concise survey of federal (to include First Circuit) case law on the admissibility of psychiatric evidence for purposes of impeachment of government witnesses. In Butt, a police corruption case, the district court precluded admission, by the defense on cross-examination, of a report of psychiatric hospitalization involving one Kevorkian (a prostitute), a witness for the government. Upholding the trial court's exclusion of this evidence (on grounds including tentativeness of psychiatrist's findings), the First Circuit nonetheless restated the rationale underlying the general rule permitting cross-examination, through evidence of sufficiently-established mental instability, of a witness' ability to recall

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<sup>4</sup> Not surprisingly, the line of cases cited by Defendant on this issue deal solely with instances where the government witness has testified as to the declarant's oral assertions and the defense then seeks to impeach -- on psychiatric grounds -- that witness' ability either to have initially perceived the assertion as testified at trial, or to recall the assertion before the jury. Of course, no such impeachment issue obtains where the declarant's statements are other than oral, and thus are not introduced by means of a percipient trial witness (whose mental competency may be at issue); statements introduced by means of tape-recording, videotape or writings speak for themselves.

events or to testify accurately:

The district court found Kevorkian's hospitalization report of 1987 not relevant to her credibility, despite the suggestion contained therein that she was mentally unstable at a time covering events about which she later testified. Defendants, relying on longstanding precedent that evidence of mental instability is relevant for purposes of impeaching a government witness argue that the court abused its discretion in deeming Kevorkian's medical history irrelevant.

For over forty years, federal courts have permitted the impeachment of government witnesses based on their mental condition at the time of the events testified to. See United States v. Hiss, 88 F. Supp. 559, 559-60 (S.D.N.Y. 1950). Evidence about a prior condition of mental instability that "provide[s] some significant help to the jury in its efforts to evaluate the witness's ability to perceive or to recall events or to testify accurately" is relevant. United States v. Moore, 923 F.2d 910, 913 (1st Cir. 1991). The readily apparent principle is that the jury should, within reason, be informed of all matters affecting a witness's credibility..." United States v. Partin, 493 F.2d 750, 762 (5th Cir. 1974). See also United States v. Lindstrom, 698 F.2d 1154, 1165-66 (11th Cir. 1983).

Despite this precedent, we are aware of no court to have found relevant an informally diagnosed depression or personality defect. Rather, federal courts appear to have found mental instability relevant to credibility only where, during the time frame of the events testified to, the witness exhibited a pronounced disposition to lie or hallucinate, or suffered from severe illness, such as schizophrenia, that dramatically impaired her ability to perceive and tell the truth. [Footnote omitted].

In United States v. Barrett, 766 G.2d 609, 615-16 (1st Cir. 1985), for example, the jury heard evidence that the government's star witness had once been "sufficiently agitated, psychotic, and delusional" to have been prescribed a dose of medication typically recommended for those who "confuse fact and fantasy," and that the witness had been taking this medication up until one or two weeks prior to trial. In Partin, where the exclusion of a government witness's psychiatric history produced reversible error, the witness had voluntarily committed himself to a

psychiatric hospital a few months prior to the events about which he testified, experiencing auditory hallucinations and believing himself to be another person. 493 F.2d at 764. Similarly, in Hiss, the government's key witness was allegedly a psychopathic personality disposed to "chronic, persistent and repetitive lying . . . acts of deception and misrepresentation . . . and attendance to make false accusations." In re Hiss, 542 F. Supp. 973 993 (S.D.N.Y. 1982) (describing mental condition of government witness in Hiss, 88 F. Supp. 669, aff'd without opinion, 722 F.2d 727 (2d Cir. 1983). And in Lindstrom, medical records showed that a government witness had manipulated the results of a medical test and woven an "intricate fabrication" to explain it, that the witness "chronically misinterpret[ed] the words and actions of others," and that she exhibited "pseudoneurotic schizophrenia with marked paranoid trends," 698 F.2d at 1164-65.

United States v. Butt, supra, 955 F.2d 77, 82-83 (emphasis supplied).

Here, Shay Jr. is not a government witness (or, for that matter, a witness of any kind), a circumstance which takes our case irretrievably beyond the reasoning central to the Hiss, Butt, Moore and Partin line of cases.<sup>5</sup>

Rather, the situation now presented to the Court by way of Counsel's continuing efforts to introduce expert testimony on Shay Jr.'s alleged psychological or psychiatric condition is akin to that found in United States v. Kepreos, supra. Kepreos, a co-owner of a commodities trading company, had been charged with, among others things, violations of federal mail fraud statutes. Kepreos, supra, 759 F.2d at 962. In that case, Kepreos "did not question his capacity to form intent but nonetheless was interested in having the jury receive psychiatric evidence" that he suffered from psychological difficulty, in turn said to be relevant to establishing his "lack of awareness as to the existence of schemes to defraud." Id. at 964. This Court excluded the proffered testimony, ruling that such evidence would -- under

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<sup>5</sup> Rule 608(a) of the Federal Rules of Evidence permits attacking a witness' credibility by means of opinion or reputation testimony but only by reference to the witness' character for truthfulness. Here, even if Shay Jr. were to take the witness stand (thus placing his credibility as to those matters as to which he testified at issue), the only form of evidence arguably admissible as to Shay Jr.'s character for truthfulness would be (non-expert) reputation or opinion testimony on the point.

Fed. R. Evid. 403 -- be both "misleading and of questionable utility", and on review, the First Circuit affirmed. Id. at 965.<sup>6</sup>

Nor would any expert evidence be admissible on any theory that Shay Jr.'s alleged condition (i.e., clinically-based propensity to be untruthful in his statements) constitutes a trait of character properly received under Fed. R. Evid. 404(a)(1) or 4055(a). As the Kepreos court put it:

There is no indication whatsoever that either the draftsmen or Congress had in mind admitting evidence of broad psychological traits or clinical states . . . about which [defendant's] experts proposed to testify . . . The trial judge excluded the testimony on the basis of her legitimate concern that it might confuse the jury, an opinion which we fully share.

United States v. Kepreos, supra, 759 F.2d at 965. Cf. Bastow v. General Motors Corp., 844 F.2d 506, 510-511 (8th Cir. 1988) (excluding proffered expert testimony as to testifying-plaintiff's "antisocial behavior disorder" and consequently-alleged character for untruthfulness; "Credibility . . . is for the jury - the jury is the lie detector in the courtroom . . .").

### III. Diminished Capacity

Consistent with several other circuits, the First Circuit recognizes no "diminished capacity" defense. E.g., United States

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<sup>6</sup> Couching its ruling under Rule 403 (probative value outweighed by danger of confusion, misleading jury and waste of time), the Kepreos court assumed -- without deciding -- that such evidence was relevant to some legitimate issue. As this letter shows, however, evidence as to Shay Jr.'s mental state is, absent an insanity defense, neither relevant nor, in any case, admissible on any issue before the jury.


<sup>7</sup> If, notwithstanding the foregoing, the Court were nonetheless inclined to admit Dr. Phillips' testimony as to Shay Jr.'s mental condition as it purportedly impacted his ability to tell the truth (i.e., the government expects that Dr. Philipps would testify as to some clinical basis for the untruthfulness of certain of Shay Jr.'s incriminating statements of record), the government would certainly be entitled to cross-examine as to whether each of Shay Jr.'s exculpatory statements of record were made under the same claimed disability, and are thus equally untrustworthy. Moreover, the government would be compelled to call an expert psychiatrist to give a detailed rebuttal.


v. White, 766 F.2d 22, 25 (1st Cir. 1985), citing 18 U.S.C. § 20(a) (Comprehensive Crime Control Act of 1984 abolishing "diminished capacity" as a defense).

Very truly yours,

A. JOHN PAPPALARDO  
United States Attorney

By:

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

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

cc: Attorney Gertner  
Attorney Boone