

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 93-2141

THOMAS A. SHAY,

Defendant-Appellant

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee

On Appeal from a Judgment of the United States
District Court for the District of Massachusetts

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The government fails to rebut the fundamental unfairness of the trial afforded Defendant Thomas A. Shay ("Shay Jr."). Instead, it interposes unfounded procedural objections to many of Shay Jr.'s substantial challenges. Those challenges are not based on technical rules governing criminal trials. Rather, they go to the heart of this case: whether Shay Jr. was guilty or innocent of the charges against him. Although the government tries to minimize their significance, it is indisputable that Shay Jr. was convicted on the basis of his own words. As the trial court itself recognized, the evidence admitted at trial raised serious questions about the believability of Shay Jr.'s out-of-court statements. But Shay Jr. was prevented from developing his defense that the admissions were the product of a psychiatric disorder and the suggestions supplied by others (including federal law enforcement authorities), not an accurate reflection of reality. The absence of any instruction identifying the factors that the jury could consider in judging the credibility of Shay Jr.'s admissions compounded this error. And the court cut off entirely any demonstration by the defense that Shay Jr.'s psychiatric condition made it highly unlikely that he had the necessary intent to commit the crimes. A portrait of Shay Jr. was created for the jury, but it was incomplete. A real danger exists in this case that the jury judged Shay Jr. guilty on the basis of what it saw at trial, but convicted the wrong man.

ARGUMENT

I. THE COURT ERRED IN EXCLUDING PSYCHIATRIC TESTIMONY CONCERNING SHAY JR.'S ABILITY TO PERCEIVE AND RELATE THE TRUTH.

A. The Court Applied the Wrong Standard

The court's ruling that "the jury does not need" Dr. Phillips' proffered testimony was not, as the government claims, merely a matter of semantics in which the court used the words helpfulness and need interchangeably. Brief of Appellee ("Govt. Brief") at 23 n. 18. The court not only used the word "need" in explaining its decision, it applied a "necessity" standard in substance.¹ In concluding that other evidence of Shay Jr.'s "contradictory statements, indeed, his fantastic ones about tanks and bombers, and other things" obviated the need for expert testimony that Shay Jr. suffered from pseudologia fantastica,²

¹ The helpfulness standard under Rule 702 of the Federal Rules of Evidence "is one of admissibility rather than exclusion." Arcoren v. United States, 929 F.2d 1235, 1239 (8th Cir.), cert. denied, 112 S.Ct. 312 (1991). It "require[s] only relevancy." Weinstein, Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended, 138 F.R.D. 631, 636 (1991). In everyday usage, "helpful" means "useful." American Heritage Dictionary 604 (1982). On the other hand, "necessary" means "absolutely essential," "something that is indispensable." Id. at 834. This distinction is recognized elsewhere in the law. See, e.g., United States v. Matos-Peralta, 691 F.Supp. 780, 791 (S.D.N.Y. 1988) (whether a bill of particulars should be ordered depends on "whether the information sought is necessary, not whether it is helpful").

² The court stated as follows:

With respect to the psychiatric expert offered by the defendant, as I understand that, it is offered to show that the defendant has an uncontrollable need to draw attention to himself and will say anything to satisfy his need, and in particular, it is offered to explain away his inculpatory statement. [sic] Under 702

the court applied the wrong standard for analyzing whether to admit expert testimony under Fed. R. Evid. 702. The helpfulness standard under Rule 702 would be a nullity if expert testimony could be excluded whenever there was other evidence in the record from which counsel could argue. See 3 Weinstein & Berger, Weinstein's Evidence § 702[02], at 10-18 (1991); United States v. Angiulo, 897 F.2d 1169 (1st Cir.), cert. denied sub nom Granito v. U.S., 498 U.S. 845 (1990). This is especially true where, as here, the expert's explanation is beyond common experience.³

expert evidence is admissible to assist the jury to understand evidence or to determine a fact in issue. The record in this case is replete with the defendant's contradictory statements, indeed, his fantastic ones about tanks and bombers, and other things.

Under these circumstances, the jury does not need expert evidence on the issue of the defendant's credibility. And there is, with respect to this evidence, the additional danger that the expert will go beyond the brief references to -- I think it's called -- pseudologia fantastica in the [sic] areas that are in fact inadmissible such as diminished capacity, personality deficit, and so on.

The quintessential question is whether the jury will believe what the defendant says, and on that question, given this record, the jury does not need any additional expert or any expert evidence. Accordingly, I will rule out the defendant's proffer on that issue, and your objection is noted. (7/20:4-5)

³ As articulated by the court during Alfred Trenkler's trial, Shay Jr.'s propensity to make self-incriminating statements was the reverse of common experience. Addendum to Brief of Appellant ("Shay Jr. Brief") at 17. Where expert testimony adds something to the jury's understanding which is beyond common experience, this Court and every other court of appeals have held that it is admissible. See cases cited in Shay Jr.'s Brief at 32-38. The cases cited by the government are inapposite. Shay Jr. does not necessarily disagree that general conversational signals, United States v. Evans, 910 F.2d 790, 803 (11th Cir. 1990), what constitutes a lack of parenting skills, United States v. Lewis, 837 F.2d 415, 418 (9th Cir.), cert. denied, 488 U.S. 923 (1988), what a slot machine is, United States v. Cook, 922 F.2d 1026, 1036 (2d Cir. 1991), and the decrease in memory over time, Robertson v. McCloskey, 676 F.Supp.

Id. As interpreted in Daubert v. Merrell Dow Pharmaceuticals, Inc., ___ U.S. ___, 113 S. Ct. 2786, 2794-95 (1993), Rule 702 required a determination whether the proffered testimony about Shay Jr.'s psychiatric disorder would help the jury to understand the evidence at issue -- Shay Jr.'s inculpatory statements. The trial court never addressed that question. Its ruling, therefore, was erroneous as a matter of law.

B. The Reliability of a Non-Testifying Defendant's Admissions Is a Proper Subject of Expert Testimony.

The government's argument that Shay Jr. could not attack the reliability of his out-of-court statements because he was a declarant, not a government witness, plainly is wrong. The statements of a witness and those of a declarant are "precisely equivalent in respect to their nature as testimony." 7 J. Wigmore, Evidence in Trials at Common Law, §884 (Chadbourn rev. 1970). Consistent with the central concern of the Federal Rules of Evidence "that the truth may be ascertained," Fed. R. Evid. 102, a declarant's credibility should be tested as thoroughly as if he had testified. See Fed. R. Evid. 806, advisory committee's note.

Rule 607 of the Federal Rules of Evidence provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." The areas of attack are wide-ranging. They are limited only by general principles of relevance (Fed. R. Evid. 401, 402), and the exceptions expressly

351, 354 (D.D.C. 1988), are within common knowledge.

stated in the rules (Fed. R. Evid. 608, 609, 610). See United States v. Abel, 469 U.S. 45, 51-52 (1984) ("[t]he jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.") (citations omitted); see also Fed. R. Evid. 104(e) (rule providing that court decides preliminary questions of admissibility "does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility").

With the exception of cross-examination, the methods for contesting the credibility of witnesses apply wholesale to attacks on the reliability of a declarant's out-of-court statements. Rule 806 states:

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.

Fed. R. Evid. 806.⁴ The rule's silence about a party's own admissions does not create an exception to this general proposition. The contrary is true. The Senate Judiciary Committee, which added vicarious admissions to Rule 806, "considered it unnecessary to include statements contained in

⁴ See Brannon, "Successful Shadowboxing: The Art of Impeaching Hearsay Declarants," 13 Campbell L. Rev. 157 (1991) (areas of attack on a declarant's reliability include all those applicable to a witness, including perception, memory, recollection, and communication). Since a declarant's statements are not subject to cross-examination, other methods of attack are critical.

rule 801(d)(2)(A)... - the statement by the party-opponent himself ... - because the credibility of the party-opponent is always subject to an attack on his credibility [sic]."⁵ Fed. R. Evid. 806 Senate Reports Note (S.Rep. No. 1277, 93rd Cong.), reprinted in Fed. R. Evid. 806 advisory committee's note. See also 2 McCormick on Evidence, §324.2 at 370 n. 2 (4th ed. 1992) ("the legislative history makes clear that there was no intention to prohibit impeachment of declarants making admissions under subparagraphs (A) and (B) [of Rule 801(d)(2)]").

A defendant's right to contest the veracity of his own admissions in a criminal case is well-established. As a general matter, a defendant has a "traditional prerogative to challenge [his] confession's reliability during the course of trial." Crane v. Kentucky, 476 U.S. 683, 688 (1986). The jury is entitled to hear "any evidence relating to the accuracy or weight of confessions admitted into evidence." Id. at 688, quoting Lego v. Twomey, 404 U.S. 477, 485-86 (1972).⁶

The government itself concedes that "federal courts widely

⁵ The Judiciary Committee obviously was referring to instances in which, as here, the party-opponent is attacking the credibility of his own out-of-court statements, since the party offering it would seldom do so.

⁶ See also Rock v. Arkansas, 483 U.S. 44 (1987) (constitutional error to exclude defendant's hypnotically refreshed testimony offered to explain and rebut her initial statements); Stano v. Dugger, 901 F.2d 898, 899-903 (11th Cir. 1990) (reversible Brady error where evidence of falsity of other confessions and exploitation of defendant's mental vulnerability was not disclosed to the defendant, where the theory of the defense was that he confessed falsely because of an abnormal need for attention and delusions of grandeur).

recognize the introduction of psychiatric evidence on any legitimate issue of a witness' competency and ability to perceive and relate the truth at trial." Govt. Brief at 30. Its argument that psychiatric evidence is admissible only as to the credibility of government witnesses whose testimony was adverse to a defendant, Govt. Brief. at 30-31, includes this case. By introducing Shay Jr.'s self-incriminating statements, the government made Shay Jr. its own witness whose admissions clearly were adverse to him. Shay Jr. improperly was prevented from presenting evidence in his own behalf showing that his psychiatric disorder called into question the reliability of the government's principle evidence.

The government's attempt to distinguish cases affirming the right of a defendant to question the reliability of his admissions with psychiatric evidence is unavailing. See Govt. Brief at 32. n. 27. Contrary to the government's contention, the defendants sought to introduce psychiatric testimony in United States v. Roark, 753 F.2d 991, reh'g denied, 761 F.2d 698 (11th Cir. 1985), and did so in United States v. Miller, 28 M.J. 998 (1989), aff'd, 31 M.J. 247 (C.M.A. 1990), to attack the reliability of their confessions, not simply to establish the absence of voluntariness. In Miller, the defendant "neither moved to suppress his confession nor objected to its admission into evidence at the time it was offered." Id. at 1000. Rather, he offered the testimony of a toxicologist on the effects of LSD and that of a psychologist on the amenability of his personality

structure to suggestion for the purpose of "explaining away [his] confession as the product of [his] suggestibility and use of drugs." Id. at 999-1001. In Roark, the doctor's testimony that Roark suffered from compulsive compliance, which rendered it likely that she would create untrue stories pursuant to the suggestions of her questioners, was offered on the issues of both voluntariness and "what weight the jury should give Roark's incriminating statements." Id. at 994, 995. The second is precisely the issue Dr. Phillips would have addressed in this case.

C. The Proffered Expert Testimony Would Not Have Usurped the Jury's Role, But Would Have Assisted Its Deliberations.

Within pages of each other, the government argues on the one hand that the proffered expert testimony on Shay Jr.'s psychiatric condition would have unduly influenced the jury (Govt. Brief at 23-24) and on the other that the expert opinion lacked a sufficient "fit" with the facts of the case to be of any assistance to the jury whatsoever (Govt. Brief at 25-27). These contradictory positions are erroneous as a matter of law and fact.

First, the government invokes the old saw that credibility is not a proper subject of expert testimony because it invades the province of the jury. Govt. Brief at 23-24. This outmoded cliché has been roundly criticized by legal commentators for decades because it deprives triers of fact of valuable

information needed for sound adjudications.⁷ Article VII of the Federal Rules of Evidence on expert testimony was enacted in 1975 in recognition of these and similar criticisms.⁸ Under Rule 704, an opinion generally may not be excluded simply because it "embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704; see also advisory committee's note (rejecting as "empty rhetoric" the notion that expert testimony should be excluded on the basis that it would "usurp the province of the jury"). As the Supreme Court recognized in Daubert, supra, 113 S.Ct. at 2798, the jury is perfectly capable of evaluating expert testimony in the adversary system. See also United States v. Sessa, 806 F.Supp. 1063, 1067 (E.D.N.Y. 1992) ("[t]he view that an expert should not be permitted to 'usurp' a function of the jury in assessing credibility or otherwise is 'empty rhetoric'").

The cases cited by the government do not support its position. First, they recognize that expert testimony on the matter of credibility is admissible. In United States v. Rosales, No. 92-1732, slip op. (1st Cir., Mar. 31, 1994), while the Court recognized that it was the jury's function to assess credibility, it held that such evidence is admissible, subject to an analysis for undue prejudice under Rule 403. Id. at 6 & n. 4. The Court concluded that the testimony was not erroneously

⁷ See 4 J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law §§ 1917-21 (1904); C. McCormick, McCormick on Evidence §§ 14-16 (1954); Ladd, "Expert Testimony," 5 Vand. L. Rev. 414 (1952).

⁸ See Pratt, "A Judicial Perspective on Opinion Evidence Under the Federal Rules," 39 Wash. & Lee L. Rev. 313, 314 (1982).

admitted, since the defendant offered his own expert on the issue (as the government was fully prepared to do here), and the jury was instructed that it could accept or reject the expert's testimony. Id. at 6-7. See also Bachman v. Leapley, 953 F.2d 440, 441-42 (8th Cir. 1992) (court found expert's testimony had not invaded province of jury and cited a number of Eighth Circuit cases holding that expert testimony pertaining to credibility is admissible); United States v. Benson, 941 F.2d 598, 604-05 (7th Cir. 1991) (court found that tax expert had no special skill in assessing credibility and improperly "simply told the jury whom to believe"); United States v. Barnard, 490 F.2d 907, 913 (9th Cir. 1973) (even before Article VII of the Federal Rules of Evidence was enacted, court recognized that psychiatric testimony on issue of credibility is admissible in proper case), cert. denied, 416 U.S. 959 (1974).⁹ As this Court has observed, instructing the jury that it may accept or reject the expert testimony in whole or in part is sufficient to obviate any risk that an expert's testimony may be overly persuasive to the jury. Angiulo, supra, 897 F.2d at 1189-90.¹⁰ The vast number of cases

⁹ The notion in United States v. Awkard, 597 F.2d 667, 670 (9th Cir.) cert. denied, 444 U.S. 885 (1979), that, based on Rule 608(a), opinion evidence on credibility is limited to character evidence, was rejected by the Supreme Court in United States v. Abel, 469 U.S. 45, 49-56 (1984), which held that credibility can be attacked through all relevant evidence, whether specifically mentioned in Article VI or not.

¹⁰ "An expert cannot deprive a jury of its authority to determine facts because a jury always retains the power to reject the expert's view." Sessa, supra, 806 F.Supp. at 1067. See also Wigmore, supra, § 1920.

in which psychiatric evidence was held admissible to challenge the reliability of testimony belies the validity of the government's position that credibility is not a proper subject for expert testimony. See Shay Jr. Brief at 28-31, 37-38.

Second, to the extent the cases cited by the government express any hesitance about allowing expert testimony bearing on credibility, all but one of them did so where the evidence was introduced to bolster a government witness' credibility.¹¹ In this case Shay Jr., the defendant, sought to attack the credibility of the government's evidence -- his own incriminating statements. While there is no general right to bolster a witness' credibility unless it has first been attacked, a defendant always has the right to attack the reliability of the government's evidence.

The government's argument that the proffered testimony of Dr. Phillips does not "sufficiently fit" the significant evidence in this case also is mistaken. That evidence consisted largely of the statements of Shay Jr. to Karin Marinella of Channel 56

¹¹ See Rosales, supra, slip op. at 5 (psychiatrist's testimony offered by government sent an implicit message to the jury that the children had testified truthfully, and therefore might have interfered with the jury's function in assessing credibility); Benson, supra, 941 F.2d at 604-05 (Internal Revenue Agent recapitulated government's evidence -- much of which was disputed -- drawing inferences in favor of the government based on his assessment of credibility of the witnesses); Bachman v. Leapley, supra, 953 F.2d at 441 (expert's testimony that testimony and behavior of witnesses was consistent with that of victims of sexual abuse did not invade the province of the jury); Awkard, supra, 597 F.2d at 669-70 (court disapproved doctor's testimony that government witness' memory had been accurately refreshed through hypnosis).

and fellow inmate Lawrence Plant a year after the explosion. The incriminatory statements were not limited to the outright confessions of guilt made to Plant. They also included admissions by Shay Jr. to Marinella that formed the building blocks of the government's case against him: statements suggesting that Shay Jr. and Trenkler shared the "same feelings" since they were both victims of abuse; that accused Trenkler of planting the bomb; that speculated that Trenkler was motivated to do so as retaliation against Shay Sr. for abandoning Shay Jr. and maybe to collect money from Shay Sr.'s lawsuit; that admitted Shay Jr. had purchased the toggle switch that was used in the bomb. See Government Exhibit 46. The government's case depended on the jury's acceptance of these statements as truth.

Dr. Phillips' testimony would have "fit" the facts of this case because it had a "valid scientific connection to the pertinent inquiry" -- the reliability of Shay Jr.'s admissions. See Daubert, supra, 113 S.Ct. at 2796. Dr. Phillips' proffered opinion was not, as the government describes it, simply that Shay Jr.'s statements were "rambling," "boastful," and "obviously false." Rather, as Dr. Phillips' report (Shay Jr. Brief, Add. at 12-13) and testimony at sentencing (10/6:37-41, 43, 57, 59, 73, 77-88) indicate, he would have testified about a constellation of symptoms of Shay Jr.'s psychiatric and physical disorders that would have assisted the jury in deciding whether Shay Jr.'s admissions were believable. Among other things, Dr. Phillips would have testified that: (1) Shay Jr. had "an uncontrollable

urge to spin out webs of lies"; (2) those lies "serve to place him in the center of attention"; (3) Shay Jr. tailors his words to please his audience; (4) he creates "fantasies in which he is the central figure and through which he attempts to enlist his audience"; and (5) Shay Jr. was compelled to lie without regard to whether those lies hurt or helped him beyond the moment. Dr. Phillips would have explained that Shay Jr.'s genetic chromosomal disease was associated with "[t]alkativeness with little substance to the content of speech." (Shay Jr. Brief, Add. at 12-13) With the benefit of Dr. Phillips' testimony, the jury could have determined whether any statements of Shay Jr. fit these symptoms and, therefore, were unworthy of belief.¹² If the jury were unable to decide, in the absence of other persuasive evidence of guilt, Shay Jr. would have been acquitted. At the time of its ruling, the court well understood the connection between the psychiatric evidence and Shay Jr.'s out-of-court statements. (7/20:4; 7/12:88-89; 7/16:58-59) Indeed, after hearing Dr. Phillips' testimony at the sentencing hearing, the court concluded that it did not believe Shay Jr.'s statements to the witnesses in their entirety (10/8:99), and observed that even according to the government psychiatrist's testimony, "this

¹² For example, the testimony would have helped the jury to understand why, after being sent the Radio Shack receipt by his attorney and being talked to daily by "his friends," the federal authorities (7/15:59, 63, 76-77, 81-83), Shay Jr. may have stated that he purchased the toggle switch for Trenkler. It might have explained why Shay Jr. took credit for the bombing while incarcerated in a men's prison where he was not safe in general population. (7/15:90)

witness is absolutely and totally incredible." (Shay Jr. Brief, Add. at 16) The jury should not have been deprived of that useful information.

D. The Court Did Not Rule that the Expert Testimony Would Confuse the Jury.

Contrary to the government's assertion, the trial court did not rule, implicitly or otherwise, that Dr. Phillips' testimony should be excluded under Rule 403 of the Federal Rules of Evidence. Govt. Brief at 34. Although the government tries mightily to make it so, the court never concluded that Dr. Phillips' testimony risked confusing the jury. Rather, the court stated that "there is ... the additional danger that the expert will go beyond the brief references to -- I think it's called -- pseudologia fantastica in the [sic] areas that are in fact inadmissible such as diminished capacity, personality deficit, and so on." (7/20:4) The government is wrong that this Court could affirm on the basis that the jury would think that Shay Jr. was pursuing an insanity defense (Govt. Brief at 35), because there is nothing in the record to suggest that possibility. Indeed, as the government vociferously argues elsewhere, there was an "utter absence" of any reference in Dr. Phillips' report even to Shay Jr.'s diminished capacity. Govt. Brief at 64 n. 55. Particularly on this record, "it would seem anomalous to hold that the probative value of expert opinion offered to show the unreliability of ... testimony so wastes time or confuses the issue that it cannot be considered even when its putative effect is to vitiate the only ... evidence offered by the government."

United States v. Downing, 753 F.2d 1224, 1243 (3d Cir. 1985).

E. The Error Was Not Harmless.

Perhaps to obviate this and other errors in this case, the government attempts to minimize the importance of Shay Jr.'s admissions to its case. Govt. Brief at 16. n. 13. Recasting the facts is to no avail. The other evidence cited was not persuasive of guilt in the absence of Shay Jr.'s own inculpatory statements. As the government itself conceded in the trial of Trenkler, without Shay Jr.'s statements to Plant and Marinella, the evidence would have been insufficient to sustain the convictions. Opposition to Government's Motion for Order of Criminal Contempt, Exhibit C at 113-14 (Docket # 500).

For example, none of the parts or materials referenced in the government's lengthy recapitulation of the construction of the bomb was ever physically linked to Shay Jr. The Radio Shack receipt reflecting the purchase of a toggle switch was tied to him because he stated during the Channel 56 interview that he made it. Absent that admission, the receipt pointed to Thomas L. Shay ("Shay Sr."), if anyone, as it listed the transposed digits of his telephone number.¹³ (7/19:32) As another example, the

¹³ The toggle switch was not, as the government asserts, "the precise toggle switch found inside the bomb." Govt. Brief at 7, 9. A chemist testified that the contacts of the switch found in the bomb debris were like those of a switch manufactured by Radio Shack with the stock number of the switch listed on the receipt. (7/6:56, 61) In addition, the chemist "could not make a physical match" between the tape used in the bomb and Trenkler's duct tape. (7/6:85) Finally, the evidence of Shay Jr.'s early statements to the press about police questions concerning a remote control device was not compelling evidence of guilt. (7/23:23-24) Although the police denied that they raised the subject, the evidence

government's evidence of motive rested largely on Shay Jr.'s statements to Plant and others indicating that he (or Trenkler) had a personal or financial incentive to harm his father. Shay Sr. himself described a relationship at odds with the hostile one posited by the government.¹⁴ (7/7:106-07;, 115-12, 122-28, 130-31, 133) Finally, it is inescapable that the admissions of Shay Jr. tipped the balance against the otherwise equally plausible explanation that Shay Sr. was responsible for the bomb.¹⁵

The court was correct when it noted during the trial that the government's case "rests on [Shay Jr.'s] statements, and to a very large extent." (7/16:54) As the court observed, the government would have been "sunk" without them. (7/16:106) Failing to permit Shay Jr. to defend against those statements, when there was a clear basis for doing so, had disastrous

established that investigators suspected that the bomb was detonated by remote control within minutes of the investigation and began investigating that possibility immediately. (7/2:81-83; 7/16:133)

¹⁴ Plant never testified that Shay Jr. told him he "had been thinking of killing his father for several years." Govt. Brief at 20. Compare 7/15:59-60. The government cites only the testimony of Edward Carrion for the proposition that "the evidence was that by mid-October 1991 Shay Jr.'s behavior was becoming increasingly more bizzare, that he was expressing open hostility towards his father, and that he was more prone to angry outbursts." Govt. Brief at 14. Carrion had never seen Shay Jr. with his father. (7/13:68) It was Carrion who, in response to a prank played by Shay Jr., yelled and screamed at him, to which Shay Jr. reacted by yelling and screaming. (7/13:74, 106)

¹⁵ Shay Sr. knew something about dynamite, did very fine finishing work and some electrical work, and had power tools, paint, tape and other materials like those used to build the bomb. (7/1:111; 7/7:53; 7/8:7, 10-12, 28; 7/9:119; 7/12:101-03) He had a strong motive and acted extremely suspiciously at the time of the bombing. See Shay Jr. Brief at 20 n. 32

consequences for him. It can hardly be deemed harmless in this case.

II. THE COURT'S ERROR IN REFUSING TO INSTRUCT THE JURY ON THE DEFENSE THEORY WAS PRESERVED FOR APPEAL.

Through his requests for instructions, Shay Jr. attempted to focus the jury on (1) the absence of voluntariness and reliability of his statements to the police; and (2) the unreliability of all of his statements to whomever they were made.¹⁶ The defense requested one instruction on Shay Jr.'s statements to police (labeling it a "voluntariness" instruction), and another on all of his statements (labeling it a "reliability" instruction). The former dealt with reliability (in addition to coercion) by directing the jury to determine "whether the statement is worthy of belief and how much weight to give it," and listing factors relevant to that determination (state of mind, age, susceptibility to the suggestions of others, and impairment of Shay Jr.'s ability to judge the impact of his conversations). Defendant's Requested Instruction No. 9 (Shay Jr. Brief, Add. at 18-19). The latter listed similar factors to aid the jury's evaluation of all of Shay Jr.'s statements (inconsistent statements, reputation for truth-telling, suggestibility, tendency to fabricate, ability to observe and accurately recall and relate events). Defendant's Requested

¹⁶ If the jury concludes that admissions were not made voluntarily, it may not consider them at all. If the jury determines that they are unreliable, it may accord them little or no weight even if they did not result from coercion. Jackson v. Denno, 378 U.S. 368, 378 n. 8 (1964).

Instruction No. 10 (Shay Jr. Brief, Add. at 20-21).

Defense counsel objected to the court's failure to give the requested "voluntariness" instruction, and began to list the factors the trial court had omitted from its instruction ("state of mind, age"), but was cut off by the court: "No, I'm not going to do that." Counsel began again: "I'm afraid they will be confused by -- well, they don't know what the circumstances are in the law that they should look at." The court made clear to counsel that further objection on that basis would be unavailing: "What else?" (7/23:110) Accordingly, counsel moved on to the next subject.

Although defense counsel did not invoke the word "reliability" in its objection, it was clear from the words and their context that this was the focus of the objection. The trial court had acknowledged the defense theory challenging the believability of Shay Jr.'s admissions throughout the trial (7/16:53, 55; 7/20:4), and announced sua sponte that it would instruct the jury on that theory. (7/16:58-59) It was only later that the court changed course and decided to leave the defense theory entirely to the arguments of counsel. (7/22:73) Consequently, the jury was instructed to test the reliability of Shay Jr.'s statements only by looking at their context and whether they were corroborated by other evidence.¹⁷ (7/22:88) When defense counsel objected to the omission of factors such as

¹⁷ Given Shay Jr.'s propensity to build stories around what others told him, this was a self-fulfilling prophecy.

"state of mind" and "age," the court clearly understood the scope of Shay Jr.'s objection as it cut it short. Given the court's excellent understanding of the theory of the defense, it cannot be said that Shay Jr. failed to give the court an opportunity to rule on the matter. See United States v. Currier, 836 F.2d 11, 16-17 (1st Cir. 1987) (defense objection on the basis of Rule 403 was adequate even though it should have been based on Rule 404(b), since the two rules usually go hand in glove); Jerlyn Yacht Sales v. Roman Yacht Brokerage, 950 F.2d 60, 64-65 (1st Cir. 1991) (objection to instruction was adequate even though referenced by the wrong number where the substance of the correct instruction was partially articulated).

Contrary to the government's position here, "[t]he general rule requiring counsel to make clear to the trial court what action they wish taken should not be applied in a ritualistic fashion." C. Wright, Federal Practice and Procedure: Criminal 2d §842. When counsel attempted to bring the basis for Shay Jr.'s objection to the court's attention, she was cut off. The court stopped defense counsel from elaborating because it had already made up its mind. Any further objection would have been futile. Under these circumstances, the absence of further objection should not prejudice the defendant.¹⁸ Id. n. 14. When the court impatiently asked defense counsel "[w]hat else?", counsel

¹⁸ Rules 30 and 51 of the Federal Rules of Criminal Procedure require that the defendant be given an opportunity to object. Rule 51 provides that if a party has no opportunity to do so, "the absence of an objection does not thereafter prejudice that party."

was "entitled to believe that further objection would not be entertained." United States v. Bernal, 814 F.2d 175, 182-83 (5th Cir. 1987) (objection to the absence of an accomplice credibility instruction was adequate where trial court interrupted defense counsel in mid-sentence to state that it was aware of the content of the requested instruction and promptly refused it). See also Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 172-175 (1988) (objection on the basis of opinion, rather than relevance was adequate although mistaken where counsel was cut off from articulating his argument first by plaintiff's counsel and then by the court); United States v. Mathis, 535 F.2d 1303, 1306-07 (D.C. Cir. 1976) (failure to poll jury separately for two defendants preserved for appeal where defense counsel began requesting it, but court cut him off, stating "[w]e don't do that in this courtroom").¹⁹

Even if the objection was inadequate, the court's instructions constituted plain error requiring reversal because the error "undermine[d] the fundamental fairness of the trial and

¹⁹ This case is far different from United States v. Pulgarin, 955 F.2d 1 (1st Cir. 1992), where the defendant's appeal of the court's failure to follow the requirements of Batson v. Kentucky, 476 U.S. 79 (1986), after the government struck an Hispanic juror, was held not to have been adequately preserved. After the prosecutor offered a race-neutral explanation for the strike, defense counsel stated merely, "I only point out that Mr. Barros [the struck juror] is the only individual that my . . ." The court interrupted, stating, "[w]e have already pointed that out." Id. at 1. Since defense counsel had never alluded to Batson or its requirements, never sought to put on evidence to rebut the prosecutor's stated motives, and, most significant, the trial court never indicated in any way that its mind was closed to those issues, this Court held that the objection was inadequate.

contribute[d] to a miscarriage of justice." United States v. Georgacarakos, 988 F.2d 1289, 1294 (1st Cir. 1993). There is no question that Shay Jr.'s defense depended on the jury's determination that his admissions were unreliable. The factors which made them unreliable were different in kind and degree from those that might bear on the credibility of any other witness in this case. Indeed, the court acknowledged that those factors were supported by the evidence. (7/20:4-5) Even if the court had directed the jury to apply its instruction on the reliability of testifying witnesses to Shay Jr. (7/23:81-83), which it clearly did not (7/23:86-88), this direction would not have covered the defense theory adequately. See United States v. Bernal, supra 814 F.2d at 183 (specific instruction on accomplice credibility was required where general witness credibility instruction did not touch on "the specific concerns addressed by a cautionary instruction respecting accomplice testimony"). Instructions on a particular witness' or declarant's statements are not "argumentative," but are justified and necessary when there is evidence in the record indicating that that person's statements are suspect in a way that those of other witnesses are not. Failure to do so is plain error. United States v. Kakley, 741 F.2d 1, 4 (1st Cir.) (stating that failure to give cautionary instruction regarding informant's credibility would be plain error if informant's testimony was incredible or internally inconsistent), cert. denied, 469 U.S. 887 (1984); see also United States v. Hoffa, 385 U.S. 293, 312 and n. 12 (1966) (approving

trial court's specific instruction on defense theory that informant had an interest in fabricating evidence against defendant); United States v. Alfonso-Perez, 535 F.2d 1362, 1365 (2d Cir. 1976) (failure to instruct on theory of defense that government witnesses had lied was partial basis for reversible error where there was an evidentiary basis for the instruction).

An examination of "the instructions in the context of the entire charge," Georgacarakos, supra, 988 F.2d at 1294, further compels the conclusion that the court committed plain error -- the court did not just fail to instruct on the defense theory, its instructions as a whole were erroneous. The court explicitly instructed separately on Shay Jr.'s statements, narrowly focusing the jury's attention on the issue whether they were corroborated by other evidence alone. (7/23:88) The court did not explicitly or implicitly inform the jury to apply its more comprehensive instruction on the credibility of testifying witnesses to Shay Jr. In effect, the court turned the defense theory on its head by leading the jury to believe it could look less critically at Shay Jr.'s statements than those of any other witness.

III. SHAY JR. DID NOT WAIVE HIS RIGHT TO PRESENT PSYCHIATRIC EVIDENCE BEARING ON THE ABSENCE OF MENS REA.

An accurate reading of the record makes clear that Shay Jr. did not waive the right to present psychiatric evidence to negate specific intent. The clearest proof is the government's own words: When the defense reiterated by letter dated July 12, 1993, that "[t]o the extent made relevant by the facts, we may introduce expert testimony on diminished capacity" Govt. Brief,

Add. at 30), the government responded only that the defense was not legally recognized. Id. at 38-39. The government never contended that Shay Jr. had waived his right to introduce such evidence until it was forced to defend this clearly erroneous ruling in this appeal.

The government's rendition of the "factual background" pertinent to this issue is flawed in several critical respects:

First, the government neglects to mention that Shay Jr.'s notice of intention to introduce expert psychiatric testimony under Rule 12.2(b) of the Federal Rules of Criminal Procedure was not filed late. As a result of an excusable delay in obtaining a psychiatric evaluation, the trial court granted the defense Motion for Leave to Late File Notice of Insanity Defense and Intention to Introduce Expert Testimony on June 15, 1993. (Shay Jr. Brief, Add. at 31-32)

Second, the two defense motions cited for the proposition that Shay Jr.'s lack of intent was not at issue are described out of context. (Govt. Brief at 52) Shay Jr. filed the motions to preclude the introduction of two specific types of evidence under Rule 404(b) of the Federal Rules of Evidence in the guilt/innocence phase of a bifurcated trial for which he had moved that day. (Docket #s 195, 198, 190, 191) The statements in those motions say nothing about the defendant's intentions once the court refused to permit a separate phase of the trial on the insanity defense.

Third, while the colloquy on June 29, 1993, about the uses

to which psychiatric testimony would be put is confusing, the government quotes but fails to credit counsel's concluding statement. When the court inquired several times whether psychiatric testimony would be introduced on the issue of intent, defense counsel indicated finally that it would go to "all of the particulars of the crime going from intent to describing his actions." (6/29:7)

Fourth, defense counsel's belief that it was "not possible to defend on the merits and insanity at the same time" (6/28:15), did not constitute a waiver of the right to introduce psychiatric testimony to negate specific intent. In so arguing, the government sets up a conflict that simply did not exist. The diminished capacity defense, unlike an insanity defense, would have been entirely consistent with a defense on the merits in this case. Dr. Phillips would have testified that Shay Jr. suffers from a multi-faceted personality disorder and deficits in cognitive function which made it highly unlikely that he had the specific intent to maliciously destroy his father's automobile or intended to agree with Trenkler to pursue that end. (Shay Jr. Brief at 54-55) If the jury believed that Shay Jr. had discussed the bombing and/or antipathy toward his father with Trenkler at the outset (as reported by Plant and implied in the Channel 56 interview), the jury should have been free to consider that Shay Jr.'s words were an impulsive, meaningless gesture, and that his actual state of mind was inconsistent with the requisite elements of specific intent. The testimony would have called into

question whether the government had carried its burden of proving a conspiracy or willful and knowing attempt to do harm in the future.²⁰

Finally, the absence of a formal proffer is not fatal in the circumstances of this case. Dr. Phillips' report did not refer to Shay Jr.'s diminished capacity because it was offered on the issue of the reliability of Shay Jr.'s statements alone. When the court ruled that the right to introduce psychiatric evidence on Shay Jr.'s diminished capacity had been waived, the defense had not yet decided whether to offer Dr. Phillips' testimony on that subject. Rather, defense counsel informed the court that day that "to the extent made relevant by the facts" she would be offering such expert testimony and cited cases in support of the legal theory. (Govt. Brief, Add. at 30)²¹ The court was thereby made aware of the purpose for which the testimony would be offered and the legal basis for it.

A proponent of evidence may dispense with an offer of

²⁰ After hearing Dr. Phillips' testimony at sentencing, the court concluded that Shay Jr. was impaired, but that he had sufficient cognitive capacity and perception to have participated in the crime. (10/8:134-35) The fact that the court disagreed in part with Dr. Phillips' testimony on this issue is irrelevant to the question whether the jury should have been allowed to hear it.

²¹ The decision to offer the evidence depended on the impact of Shay Jr.'s admissions -- Plant's testimony on July 15 and the videotape of the Channel 56 interview played on July 20. As soon as the court excluded Dr. Phillips' testimony bearing on the issue of the reliability of those statements on July 20, Shay Jr.'s counsel reminded the court that it had given notice of the defense's intent to introduce evidence of Shay Jr.'s diminished capacity and had never waived it. The court summarily rejected the argument. (7/20:5)

evidence when it is clear that the court has decided to exclude it. 1 Wigmore, supra, § 17, at 766 and nn. 11, 12. This is particularly true where, as here, the court has ruled on a basis having nothing to do with the substance of the evidence. Such a ruling renders an offer of evidence needless. Id.; Garner v. Santoro, 865 F.2d 629, 636 (5th Cir. 1989) (no offer of evidence necessary where court excluded defense as a matter of law in advance of trial).²² On the other hand, an offer of proof exists so that the appellate court can evaluate whether any error below was harmless. 1 Wigmore, supra, § 20a, at 858; Earle v. Benoit, 850 F.2d 836, 848 (1st Cir. 1988) (offer of proof would have enabled trial court to analyze claim more precisely, but "more importantly" would have assisted appellate review); Rodriguez v. Banco Cent. Corp., 990 F.2d 7, 13 (1st Cir. 1993) ("ordinarily" a proffer must be in the record for the purpose of showing prejudice on appeal). In this case, the testimony of Dr. Phillips at sentencing serves that purpose. On that basis, this Court should determine that the trial court's procedural ruling

²² United States v. Bonneau, 970 F.2d 929 (1st Cir. 1992), does not support the government's position, as the court's disputed ruling depended upon the very substance of the evidence and there was nothing in the record to indicate what that substance was. Id. at 933. United States v. Olivier-Diaz, 13 F.3d 1 (1st Cir. 1993), is of no help to the government either. The defendant there, unlike Shay Jr., did not raise his objection below and was arguing plain error. Id. at 5. Moreover, the case actually makes the point asserted here: "Where the error defendant asserts on appeal depends upon a factual finding the defendant neglected to ask the district court to make, the error cannot be 'clear' or 'obvious' . . ." Id. (emphasis supplied). In contrast, the error asserted by Shay Jr. is a procedural finding, the facts of which are on the record.

was prejudicial error.

IV. THE COURT'S FAILURE TO GRANT A DOWNWARD ROLE ADJUSTMENT IN SENTENCING SHAY JR. WAS INCONSISTENT WITH ITS FINDINGS.

The government's attempt to bolster the trial court's decision not to adjust Shay Jr.'s offense level downward for his minimal or minor role in the offense is unavailing. At most, the facts cited by the government (Govt. Brief at 66-67) established Shay Jr.'s guilt of the offenses for which he was convicted -- conspiracy and aiding and abetting the attempted malicious destruction of an automobile by means of explosives. A conversation with Trenkler about antipathy towards his father, for example, was the bare minimum from which the jury could have inferred an agreement, an essential element of the crime of conspiracy.²³ The purchase of a toggle switch was necessary to establish an overt act in furtherance of that conspiracy and a substantial step in furtherance of the attempt, critical elements of those offenses.²⁴ Finally, the court's recognition that the jury had found that Shay Jr. acted intentionally in attempting to

²³ Contrary to the government's assertion (Govt. Brief at 66), the court did not find that Shay Jr. recruited Trenkler to the conspiracy. Paragraph 21 of the pre-sentence report originally stated that "Shay Jr. approached Trenkler and sought his assistance in a plot to kill his father." The court found that the only evidence of the assertions in Paragraph 21 were Shay Jr.'s statements to Plant, which the court did not credit as the truth. (10/6:6-8) Similarly, both the jury and the trial judge rejected the government's theory that Shay Jr. intended to kill his father. (7/27:3-4; 10/8:99, 103)

²⁴ The court found that Shay Jr.'s participation was limited to the purchase of the toggle switch, and that there was no evidence that he did so with knowledge of its purpose. (10/8:99; 10/6:11, 15)

destroy the automobile, and its own determination that he had the mental capacity to do so, established only that Shay Jr. had the mens rea to commit the crimes. (10/8:122, 134-35) Even as described by the government, the facts found by the trial court established the barebones minimum necessary to sustain the convictions.

The determination whether Shay Jr. is entitled to a decrease in offense level for his minimal or minor role in the offense under U.S.S.G. §3B1.2 calls for an entirely different analysis.²⁵ As described in Shay Jr.'s opening brief, the issues are whether Shay Jr. was substantially less culpable than the average participant in an explosives crime and whether he was substantially less culpable than Trenkler. Shay Jr. Brief at 63. The facts found by the court compel an answer in the affirmative on both counts. If Section 3B1.2 has any meaning, it should be applied in this case.²⁶

²⁵ The government also confuses the role adjustment analysis with the court's conclusion that Shay Jr. should be sentenced under the second degree murder guideline while Trenkler was sentenced under the first degree murder guideline. (Govt. Brief at 68 n.57). The court chose the appropriate homicide guideline by assessing Shay Jr.'s state of mind, as required. See U.S.S.G. §§ 2A1.1-2A1.4. That, too, bears no relationship to the question whether Shay Jr. played a minor or minimal role in the offense.

²⁶ The cases cited by the government are distinguishable from this case. See United States v. Balogun, 989 F.2d 20, 23 (1st Cir. 1993) (defendant remained an active member of the conspiracy directly involved in ten fraudulent claims for a year); United States v. Figueroa, 976 F.2d 1446 (1st Cir. 1992) (defendant helped deliver money for drug purchase, stating it was the correct amount); United States v. Daniel, 962 F.2d 100, 103 (1st Cir. 1992) (defendant made initial contacts to have cocaine brought into Florida, arranged its transportation, actively participated in several meetings, made arrangements to bring the cocaine to Puerto

V. **THE COURT MISTAKENLY BELIEVED IT WAS FORECLOSED FROM DEPARTING DOWNWARD IN SENTENCING SHAY JR. BASED ON HIS EXTRAORDINARY HISTORY OF ABUSE AND NEGLECT.**

The government's contention that the trial court declined to depart downward on the basis of Shay Jr.'s extraordinarily tragic history of abuse and neglect as a proper exercise of its discretion is unsupported by the record. As described in Shay Jr.'s opening brief, the extensive psychiatric and institutional record presented established the foundation for that departure. Shay Jr. Brief at 66 n. 77. The overwhelming evidence persuaded the court:

That the defendant experienced an unusually deprived and bitter childhood cannot be disputed. The record contains instance after instance of parental neglect, irresponsibility, and abuse. It includes many examples also of institutional incidents and maltreatment by those assigned to help him. I do not doubt for a moment that Mr. Shay has been in many ways affected, even impaired by his experiences.

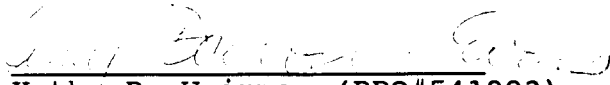
(10/8:134) The judge nevertheless concluded that the downward departure was neither "called for or appropriate" because, in essence, Shay Jr. was capable of acting knowingly and willfully in committing the offenses. (10/8:134-35) The unwillingness to consider its own findings taking this case "outside the heartland of typical cases" suggests that the court thought it lacked the authority to do so. Even if the judge's ruling was ambiguous, "the ends of justice are best served by giving appellant the benefit of any doubt." United States v. Tavano, 12 F.3d 301, 305 n. 5 (1st Cir. 1993).

Rico, and agreed to pay for it upon delivery).

The court's sentencing of Shay Jr. to the maximum term possible under the sentencing guidelines does not, as the government contends, indicate that the court would not have departed. Govt. Brief. at 69-70. The court did so on the basis of the horrific consequences of the explosion -- the death and serious injury of innocent people. (10/8:135-36) But that conclusion resulted from an analysis separate from -- and following in time -- the determination whether to depart to a lower range on the basis of Shay Jr.'s extraordinary history of abuse and neglect. The case should be remanded so that the court can make that determination. See United States v. Gifford, 17 F.3d 462, 475 (1st Cir. 1994) (Court remanded for resentencing where trial court viewed the circumstances as unusual, but believed itself without power to depart). Compare United States v. Rushby, 936 F.2d 41, 42 (1st Cir. 1991) (Court affirmed failure to depart regardless of whether trial court thought it had power to depart, since facts in record did not show unusual circumstances); United States v. Rivera, 994 F.2d 942, 953 (1st Cir. 1993) (Court would not order new proceeding if there was "no significant possibility that the facts and circumstances would permit the court lawfully to depart").

Respectfully submitted,

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Dated: May 25, 1993

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 mail (by hand) on _____