

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES)
Appellee)
v.) NO. 93-2141
THOMAS A. SHAY)
Appellant)

APPELLANT'S OPPOSITION TO APPELLEE'S MOTION TO SCHEDULE
ORAL ARGUMENTS ON THE SAME DAY BEFORE THE SAME PANEL

Appellant Thomas A. Shay ("Shay Jr.") hereby opposes the government's motion to schedule his and Alfred W. Trenkler's ("Trenkler's") oral arguments on the same date and before the same panel. As reasons therefor, Shay Jr. states the following:

1. On August 10, 1994, Shay Jr. filed a motion for oral argument in October, which motion was assented to by counsel for the government.

2. Shay Jr.'s reasons in support of his motion were, in summary, that (a) he has been in custody, excepting two months, since October 31, 1991, in connection with this case; (b) consolidated argument with Trenkler would not assist the Court because he and Trenkler were tried separately, their appeals raise distinct legal issues, the evidence upon which Shay Jr.'s appeal is based was not admitted or sought to be admitted in Trenkler's trial, and the evidence upon which Trenkler's appeal is based was not admitted in Shay Jr.'s trial.

3. On August 12, 1994, this Court granted Shay Jr.'s motion for oral argument in October. On information and belief, Shay Jr.'s oral argument has been scheduled for October 4, 1994.

4. On August 30, 1994, the government filed its motion for

oral arguments on the same date before the same panel, inexplicably contending that consolidated argument would "make good sense and conserve judicial resources," because "both cases arise out of the same underlying facts and are based on extensive common evidence."

5. The evidence that was the same in the separate trials was (1) the undisputed evidence that there was an explosion, and (2) the government's expert witnesses' testimony about how the device that caused the explosion was constructed.

6. Shay Jr. did not dispute that there was an explosion or challenge the construction of the device at trial. Nor do any of his appellate issues have anything to do with that evidence.

7. The principal evidence against Trenkler was prior use of an explosive device which the government contended proved Trenkler's identity as the person who built the explosive device at issue in this case. Trenkler's appeal therefore centers on the admission of that evidence. That evidence was not admitted in Shay Jr.'s trial.

8. Shay Jr. was convicted on the basis of his numerous statements to the police, other inmates, and the press. His defense at trial was that his statements were unreliable. He sought to attack the reliability of his statements by (a) introducing the testimony of a psychiatric expert in order to assist the jury in evaluating the reliability of his statements in light of a well-established mental disorder which directly affected his credibility; (b) offering a prior inconsistent statement about the only physical evidence arguably linked to Shay Jr. in order to show that his later statements about that piece of evidence were

false; (c) requesting instructions inviting the jury to look particularly critically at the reliability of Shay Jr.'s statements in accordance with the theory of the defense.

9. The trial court (a) excluded the expert psychiatric testimony regarding Shay Jr.'s mental disorder bearing on the reliability of his statements; (b) excluded the prior inconsistent statement; and (c) refused to instruct on the theory of the defense. Shay Jr. challenges these rulings on appeal.

10. Shay Jr.'s statements, with few exceptions, were not admitted at Trenkler's trial. Trenkler did not attempt to introduce expert psychiatric testimony regarding the reliability of Shay Jr.'s statements, did not attempt to introduce Shay Jr.'s prior inconsistent statement, and did not seek special instructions regarding the reliability of Shay Jr.'s statements. Accordingly, Trenkler's appeal has nothing to do with any of those issues.

11. Shay Jr. also sought to introduce expert psychiatric testimony in order to negate the specific intent elements of the charged offenses. The trial court excluded that testimony. Shay Jr. challenges that ruling on appeal. Shay Jr.'s state of mind, of course, was not at issue in Trenkler's trial, and is not an issue in Trenkler's appeal.

12. Entirely different evidence was introduced, and entirely different issues were raised, at the separate sentencing hearings of Shay Jr. and Trenkler. Shay Jr. raises two sentencing issues on appeal, while Trenkler raises none.

13. Through its motion, the government apparently hopes to be e to muddy the distinct evidence and issues in its oral

argument. For the reasons stated above, consolidated argument would not make good sense and would not conserve judicial resources.

For all of the foregoing reasons, Shay Jr. opposes the government's motion for oral argument on the same date before the same panel, and respectfully requests that he be heard in October, 1994, as previously ordered by this Court.

Respectfully submitted,

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