

NO. 97-1239

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UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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UNITED STATES OF AMERICA,  
Appellee,

v.

ALFRED W. TRENKLER,  
Defendant-Appellant.

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ON APPEAL FROM DECISIONS OF  
THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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**BRIEF FOR THE DEFENDANT-APPELLANT**

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**BRIEF FOR THE DEFENDANT-APPELLANT**

STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION

On June 24, 1993, the Defendant-Appellant Alfred W. Trenkler was indicted and charged with conspiracy under 18 U.S.C. §371, receipt of explosive materials under 18 U.S.C. §844(d), and attempted malicious destruction of property by means of explosive under 18 U.S.C. §844(i). The district court had subject matter jurisdiction over this matter pursuant to 18 U.S.C. §3231. Trenkler was tried by a jury in the District of Massachusetts and convicted on all counts of the Superseding Indictment on November 29, 1993. Trenkler was sentenced to life imprisonment by

a judgment entered on March 5, 1994. On March 15, 1994, pursuant to Fed.R.Civ.P. 4(b), Trenkler filed a Notice of Appeal from the judgment of conviction entered on March 8, 1994. Pursuant to 28 U.S.C. §1291, this Court heard the appeal, and on July 18, 1995 affirmed Trenkler's conviction.

On December 22, 1995, Trenkler filed, pursuant to Fed. R. Crim. P. 33, a Motion for a New Trial or, in the Alternative, for an Evidentiary Hearing on the grounds of newly discovered evidence. On November 19, 1996, while the first motion for new trial was pending, Trenkler filed a Motion for Judicial Inquiry into Possible Juror Misconduct and For A New Trial. On February 4, 1997, the district court issued its Memorandum of Decision denying the Motion for New Trial or, in the Alternative, for an Evidentiary Hearing. On February 13, 1997, Trenkler filed a Notice of Appeal pursuant to Fed. R. Civ. P. 4(b), from the Memorandum of Decision denying the Motion.

On March 5, 1997, Trenkler filed with this Court a Motion to Suspend Processing of Appeal seeking to stay the appeal until the disposition by the district court of the Defendant's Motion for Judicial Inquiry into Possible Juror Misconduct, which had been pending then for four months. On April 3, 1997, this Court granted Trenkler's Motion for Stay. On May 22, 1997, the district court issued its Memorandum of Decision denying the Defendant's Motion for Judicial Inquiry Into Possible Juror Misconduct and For a New Trial. On June 4, 1997, Trenkler filed a Supplemental Notice of Appeal.

This appeal is from the district court's denial of the two post-trial motions on February 2, 1997 and May 22, 1997, respectively. This Court has jurisdiction of the appeal of these two final orders pursuant to 28 U.S.C. §1291.

## STATEMENT OF ISSUES

1. Whether the district court erred by failing to conduct an inquiry of any kind into the colorable allegations of juror misconduct and by failing to grant a new trial.
2. Whether the district court erred by failing to conduct an inquiry of any kind into allegations that the government failed to disclose a secret deal it had with a key government witness and by failing to grant a new trial.
3. Whether the district court erred by denying Trenkler's motion for a new trial on the grounds of newly available expert psychiatric testimony.

## STATEMENT OF THE CASE

On December 16, 1992, the Grand Jury returned a five-count indictment charging Thomas A. Shay ("Shay Jr.") and Trenkler with conspiracy, receipt of explosive materials, and attempted malicious destruction of property by means of explosive stemming from an explosion in Roslindale, Massachusetts on October 28, 1991. On December 18, 1992, Trenkler entered a plea of not guilty on all counts.

On June 24, 1993, the Grand Jury returned a Superseding Indictment charging Shay Jr. and Trenkler with conspiracy, 18 U.S.C. §371 (Count I); receipt of explosive materials, 18 U.S.C. §844(d) (Count II); and attempted malicious destruction of property by means of explosive, 18 U.S.C. §844(i) (Count III).

Shay Jr. and Trenkler were tried separately,<sup>1</sup> and Trenkler's trial began on October 25, 1993. On November 29, 1993, the jury returned a verdict of guilty on all three counts of the Superseding Indictment. On January 21, 1994, the district court denied Trenkler's motions for

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<sup>1</sup> The district court had granted Trenkler's motion for relief from prejudicial joinder and severance on March 17, 1993. Shay Jr.'s trial began on June 28, 1993, and on July 27, 1993, he was found guilty of conspiracy and attempted malicious destruction of property by means of explosive. On October 8, 1993, Shay Jr. was sentenced to a term of imprisonment for 188 months on the charge of attempted malicious destruction of property by means of explosive and 60 months on the charge of conspiracy, to be served concurrently. Record Appendix ("R.A.") 48.

judgment of acquittal and new trial. On March 8, 1994, Trenkler was sentenced to concurrent terms of imprisonment for life on the counts of receipt of explosive materials and attempted malicious destruction of property by means of explosives and for sixty months on the count of conspiracy.<sup>2</sup> Trenkler filed a notice of appeal from the judgment of conviction on March 15, 1994. On July 18, 1995, this Court affirmed Trenkler's conviction.

In affirming Trenkler's conviction, the majority of a panel of this Court relied principally upon William David Lindholm, a key government witness, who "convincingly testified that, in fact, Trenkler had actually admitted building the Roslindale bomb." *U.S. v. Trenkler*, 61 F.3d 45, 60 (1<sup>st</sup> Cir. 1995) (Torruella, C.J., dissenting). Shortly after this Court's decision, Trenkler learned that Lindholm, a convicted felon who testified at trial that Trenkler admitted to building the Roslindale bomb, had been released 37 months into an 8-year prison term. On August 8, 1995, Trenkler filed a Motion to Remand the action for an inquiry into and determination of certain issues that related to a possible undisclosed deal between Lindholm and the government. On August 25, 1995, this Court issued the following Order in response to the Motion to Remand:

Defendant's motion raises issues of concern, which could merit a hearing. However, the proper forum for such a hearing is before the district court upon motion of a new trial. The motion is therefore denied. R.A. 80.

On December 22, 1995, Trenkler filed, pursuant to Fed. R. Crim. P. 33, a Motion for a New Trial or, In The Alternative, For An Evidentiary Hearing arising out of the possible secret deal between Lindholm and the government ("the Lindholm motion"). While the Lindholm motion was still pending before the district court, the government informed Trenkler's counsel

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<sup>2</sup> Referring to the disparity between the sentence it imposed on Shay Jr. and the one it imposed on Trenkler, the district court stated that, "[t]he fact that there is a difference or there will be a difference in the sentences between the two defendants in the result of the differences in their conduct and their state of mind as I have found it to be." Transcript of Disposition, p.6-60. The district court had already found that it "did not believe that Shay Jr. intended to kill his father ...." *Id.* 6-24.

about an allegation of juror misconduct. On November 19, 1996, Trenkler filed a Motion for Judicial Inquiry into Possible Juror Misconduct and For A New Trial. On February 4, 1994, the district court issued its Memorandum of Decision denying the Lindholm motion. On February 13, 1997, Trenkler filed a Notice of Appeal pursuant to Fed. R. Civ. P. 4(b), from the Memorandum of Decision denying the Lindholm motion. On March 5, 1997, Trenkler filed a Motion to Suspend Processing of Appeal until the disposition of the Defendant's Motion for Judicial Inquiry into Possible Juror Misconduct, which had been pending then for four months. On April 3, 1997, this Court granted Trenkler's Motion for Stay. On May 22, 1997, the district court issued its Memorandum of Decision denying the Defendant's Motion for Judicial Inquiry Into Possible Juror Misconduct and for a New Trial. On June 4, 1997, Trenkler filed a Supplemental Notice of Appeal.

#### STATEMENT OF THE FACTS

##### Newly Discovered Evidence

##### 1. Undisclosed Agreement Between The Government And Lindholm

In late October and November 1993, Trenkler was tried by a jury for conspiracy under 18 U.S.C. §371, receipt of explosive material under 18 U.S.C. §844(d), and attempted malicious destruction of property by means of explosive under 18 U.S.C. §844(i) arising out of an explosion in Roslindale, Massachusetts, on October 28, 1991, which killed a Boston Police officer and seriously injured a second Boston Police officer.

The hallmark question in the case against Trenkler was the identity of the creator of the Roslindale bomb. R.A. 88, 91. Because there was no direct physical evidence linking Trenkler to the 1991 bomb (R.A. 198), the government sought to admit evidence, including evidence from a Bureau of Alcohol, Tobacco & Firearms computerized database, relating to Trenkler's

participation five years earlier in an explosive incident in Quincy to prove that the Quincy device and the Roslindale bomb were so similar that Trenkler must have built the Roslindale bomb. At trial, the district court admitted the computer-derived evidence. Trenkler was convicted on November 29, 1993, and on appeal, he alleged error, *inter alia*, in the admission of the computer-derived evidence.

This Court, in *U.S. v. Trenkler*, 61 F.3d 45, affirmed Trenkler's conviction. This Court found that the district court erred in admitting the computer-derived evidence under the residual exception to the hearsay rule to prove the identity of the creator of the Roslindale bomb, but nonetheless found the error harmless beyond a reasonable doubt. In so doing, this Court relied upon other evidence that it found supported a finding that Trenkler had built the Roslindale bomb. This Court "principally" relied upon the testimony of Lindholm in finding the erroneous admission of the computer-generated evidence nonetheless to be harmless beyond a reasonable doubt. Specifically, this Court found that Lindholm, a convicted felon, "convincingly testified that, in fact, Trenkler had actually admitted building the Roslindale bomb." *Trenkler*, 61 F.3d at 60.

At Trenkler's trial, Lindholm had testified that he had no agreements with the government and that he did not receive any promises or inducements for his testimony. Lindholm also testified that he knew that the only way his ninety-seven month sentence could be reduced was if he supplied new information to the Government. R.A. 203-204.

Almost two years after Trenkler's trial, new and material evidence relating to Lindholm's testimony came to light when an article appeared in The Boston Globe on August 1, 1995, indicating that "Lindholm was reportedly released from federal prison 37 months into an 8-year sentence and testified against convicted bomb builder Alfred Trenkler in the Roslindale bombing case in which a Boston police officer was killed." R.A. 271. Moreover,

the Schuylkill Federal Prison in Minersville, Pennsylvania, confirmed that William David Lindholm had been incarcerated on September 9, 1991, for a ninety-seven month sentence, and was released on September 30, 1994, approximately five years before his scheduled release date. R.A. 394, ¶3.

2. Expert Psychiatric Testimony of Dr. Robert Phillips

In further support of its determination that the computer-derived evidence, although erroneously admitted, was harmless beyond a reasonable doubt, this Court found support in “the ample evidence the government adduced establishing Trenkler’s relationship with Shay Jr.” *Trenkler*, 61 F.3d at 60.

Whether Trenkler conspired with Shay Jr. as part of a two-person conspiracy in the Roslindale explosion was a central contested issue in the case against Trenkler. The government sought to introduce out-of-court statements of Shay Jr., who refused to testify despite an immunity order, to prove Trenkler’s involvement in a two-person conspiracy. In fact, the government argued at Trenkler’s trial that Shay Jr.’s statements were the key to showing that a conspiracy between Trenkler and Shay Jr. existed. R.A. 303, ¶5.

The government wanted to admit the statements as exceptions to the hearsay rule through three separate witnesses to establish the existence of a two-person conspiracy between Trenkler and Shay Jr. R.A. 303, ¶4. In asserting that Shay Jr.’s out-of-court statements should be admitted at Trenkler’s trial, the government argued that Shay Jr.’s out-of-court statements were reliable. Over the course of three days of the trial, a colloquy ensued among the district court, the government and the defense counsel as to the reliability of Shay Jr.’s out-of-court statements.

In grappling with its decision to admit Shay Jr.’s out-of-court statements, the district court acknowledged the reliability problems associated with the testimony of Shay Jr. and even referred to evidence from Shay Jr.’s trial some months earlier.

A hearsay exception is an indication of the reliability of the statement, a statement against penal interests. Obviously, the idea is that a person wouldn't say I did something wrong if in fact I didn't do something wrong. The fact of the matter is that we have evidence in the Shay case from the Government that Mr. Shay precisely and repeatedly did just that. He brags about things. He called attention to himself. He does it time and time and time again, and that is what Dr. Kelly [the Government's expert] told us. He's a chronic liar. That's what he said. And under those circumstances, whatever may be the general rule about the reliability of a statement against penal interests, sort of loses all reliability, the case is (sic) interpreting also say that the more crucial the evidence is that the Government wants to put into evidence against, by a declarant, an unavailable declarant, the more vigilant the Court has to be and the more difficult it becomes for the Government. If it were just something that corroborated something else, it would be one thing by your own statement it is highly crucial evidence. It is the evidence on the issue of conspiracy. R.A. 107-108 (emphasis added).

R.A. 303, ¶6. Despite its own concerns about Shay Jr.'s reliability, the district court admitted through three witnesses nine (9) out-of-court statements by Shay Jr., as well as a portion of a videotaped interview with Channel 56 reporter Karen Marinella, as statements against penal interest and state of mind. R.A. 93-138, 140-196, 205; R.A. 303 ¶7.

Because this Court precluded Shay Jr. from introducing at his own trial expert psychiatric testimony by Dr. Robert Phillips that Shay Jr.'s statements were the unreliable product of a recognized mental disorder called "pseudologia fantastica," Trenkler's trial counsel concluded that it would be futile to seek the introduction of Dr. Phillips' testimony. His trial counsel, therefore, decided not to seek the introduction of Dr. Phillip's testimony. R.A. 303, ¶8-9.

On June 22, 1995, more than a year and a half after Trenkler's trial, this Court, in *U.S. v. Shay*, 57 F.3d 126 (1<sup>st</sup> Cir. 1995), held that it was a "clear error in judgment" for the district

court to exclude the testimony of Shay Jr.'s psychiatric expert, Dr. Robert Phillips, that Shay Jr.'s statements were the unreliable product of a recognized mental disorder. *Id.* at 133-34.

Had the district court permitted Shay Jr. to introduce Dr. Phillip's testimony at his trial, Trenkler's trial counsel would have sought to introduce Dr. Phillip's testimony at Trenkler's trial as it related to the unreliability of Shay Jr.'s out-of-court statements. However, in light of the district court's prior ruling in the Shay Jr. trial, Trenkler's trial counsel concluded it would be futile to do so. R.A. 303, ¶9.

#### Colorable Allegations of Juror Misconduct

On October 15, 1996, counsel for Trenkler learned from then-Assistant United States Attorney Frank Libby that a woman named Donna Shea had contacted the government alleging that a juror named "Ramona" who sat on Trenkler's trial knew Trenkler and that "Ramona" had failed to reveal that fact to the district court or anyone else during the *voir dire*. R.A. 507, 523. Indeed, a woman named "Ramona Walsh" had served for over four weeks as an alternate juror in the Trenkler trial. While Ramona Walsh admitted during *voir dire* that she knew various potential witnesses in the case, including Donna Shea, she did not admit that she knew Trenkler.

In response to the receipt of that information, the government unilaterally initiated and undertook its own investigation of Shea's allegations. R.A. 520-522. The government's "investigation" consisted of two telephone conversations and one in-person interview with Donna Shea, the source of the allegation, and one telephone conversation and one in-person interview with Nancy Tolmie Russell, a friend of the alternate juror, and culminated in an Alcohol, Tobacco and Firearms Report of Investigation ("ATF Report"). R.A. 520-522. The district court conducted no independent inquiry into Shea's compelling allegation of juror misconduct, which was corroborated in significant ways both by the trial record and the ATF Report itself:

## 1. The Source of The Allegation of Juror Misconduct

**Donna Shea.** The record demonstrates that Donna Shea had been connected to this action since 1986, five years before the bombing incident in Roslindale. Shea, who lives in Weymouth, was on the original list of witnesses for the Trenkler trial. R.A. 545. Prior to trial, Shea testified before the grand jury on December 10, 1992. Although she did not testify at trial, the evidence established that Shea was the person for whom Trenkler was charged with making the artillery flash simulator that was placed under a commercial truck in Quincy in 1986 ("the 1986 incident"). R.A. 549; 552-563. The 1986 incident formed the basis for the much-disputed Fed.R.Evid. 404(b) evidence.

According to the government, on October 2, 1996, Shea informed the government, that, *inter alia*, "a women (sic) by the name of Ramona 'LNU', who sat on the jury that heard the Trenkler case, was known to her as well as to Trenkler." R.A. 520-523. Thereafter, Shea alleged, in two separate interviews with the ATF agents, that on several occasions "Ramona" arrived at Shea's house with a friend of Shea named Nancy Tolmie (currently Nancy Russell, and referred to as "Tolmie/Russell"), who arrived at Shea's house to buy cocaine. Shea further alleged that the cocaine had been supplied by Trenkler, that Trenkler conducted the cocaine sales at Shea's house, and that Ramona Walsh and Trenkler had been present in the same room when Tolmie/Russell purchased cocaine.<sup>3</sup> R.A. 520-523.

## 2. The Juror

**Ramona Walsh.** Ramona Walsh, identified as "Ramona" by Shea, was indeed an alternate juror, Juror 38, who sat on the jury during Trenkler's four-week trial. During the *voir*

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<sup>3</sup> Although Shea first stated to the government agent that she had "no memory" of Ramona's presence in the room when Tolmie/Russell bought cocaine from Trenkler, she later told the government agent that "Ramona was present in the room when the transactions were conducted." R.A. 520-523.

*dire* she admitted that she knew many of the witnesses, including Donna Shea.<sup>4</sup> Like Donna Shea, Walsh lives in Weymouth. During the *voir dire*, Walsh stated that she was employed by the Quincy District Court, where she had worked for ten years, initially in the criminal clerk's office. R.A. 567.<sup>5</sup>

### 3. The Juror's Friend

**Nancy Tolmie/Russell.** During her interview with the government agent, Tolmie/Russell admitted 1) that she knew Donna Shea; 2) that she knew Ramona Walsh, having seen her once every three weeks between 1985 and 1986 and having traveled with her on two weekends; 3) that she (Tolmie/Russell) regularly used cocaine, approximately three times per week, from 1984 to 1987; 4) that she purchased cocaine from Donna Shea forty to fifty times (in a subsequent interview with the government agent Tolmie/Russell stated that the purchases occurred more than fifty times); 5) that Ramona Walsh also used cocaine; and 6) that Ramona Walsh gave Tolmie/Russell money to purchase cocaine. Tolmie/Russell denied that Ramona Walsh was present at any time when Tolmie/Russell purchased cocaine from Shea. R.A. 520-523.

### SUMMARY OF ARGUMENT

Although Trenkler presented the district court with serious allegations of juror misconduct, the district court abused its discretion by unreasonably disregarding Trenkler's claim and by failing to responsibly ascertain whether the misconduct actually occurred, and, in so doing, violated Trenkler's sixth amendment right to an impartial jury.

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<sup>4</sup> Walsh also admitted during *voir dire* that she knew Thomas Shay, Jr., Trenkler's co-conspirator, and a Quincy police officer (R.A. 541, 566), and that she "may know Lawrence Plant." R.A. 545.

<sup>5</sup> Perhaps coincidentally, Donna Shea was also at Quincy District Court in connection with this case. When Quincy police officers attempted to question Shea about the 1986 incident on September 2, 1986, they were told that she "was not at home but was up in Quincy at the District Courthouse." They located her at the courthouse and observed her leaving the courthouse. After informing her of her Miranda rights, the Quincy police officers spoke with her in the parking lot of the Quincy District Court. R.A. 553.

Although Trenkler presented the district court with newly discovered material evidence of a possible secret agreement between the government and its key witness, the district court failed to use the appropriate legal standard to consider that evidence and abused its discretion by failing to conduct an evidentiary hearing or grant a new trial.

The district court abused its discretion by summarily denying Trenkler's motion for a new trial on the basis of newly available expert psychiatric testimony, which this Court had ruled was erroneously excluded from the trial of Trenkler's alleged co-conspirator.

### ARGUMENT

I. THE DISTRICT COURT COMMITTED A PATENT ABUSE OF DISCRETION BY FAILING TO CONDUCT ANY INQUIRY INTO A COLORABLE ALLEGATION OF JUROR MISCONDUCT AND BY FAILING TO GRANT A NEW TRIAL.

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A. Standard of Review

"The determination that no juror misconduct occurred will be overturned only on a showing that the trial court committed a 'patent' abuse of discretion." *U.S. v. Newman*, 982 F.2d 665 (1<sup>st</sup> Cir. 1992), citing *United States v. Hunnewell*, 891 F.2d 955, 961 (1<sup>st</sup> Cir. 1989).

Similarly, the denial of a motion for new trial is reviewed for abuse of discretion. *Newman*, 982 F.2d at 670.

B. The District Court Violated The Defendant's Sixth Amendment Right to An Impartial Jury By Unreasonably Disregarding The Claim Of Juror Misconduct

The Sixth Amendment guarantees defendants the right to a trial by an impartial jury. *Neron v. Tierney*, 841 F.2d 1194 (1<sup>st</sup> Cir. 1988). The failure to accord the accused a fair hearing by a “panel of impartial, ‘indifferent’ jurors” also violates the minimum standards of due process. *United States v. Boylan*, 698 F.Supp. 376, 384 (D.Mass 1988), *aff'd*, 898 F.2d 230 (1<sup>st</sup> Cir. 1990) quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1966); *Neron*, 841 F.2d at 1200. “To preserve the integrity of the process, trial courts must jealously safeguard jurors’ impartiality.” *Neron*, 841 F.2d at 1201.

In this case, the district trial court committed reversible error (1) by failing to conduct adequate—or any—inquiry into the allegation of juror misconduct and (2) by denying a new trial based upon the alleged misconduct. This Court has made clear that “a court must satisfactorily probe nonfrivolous charges of jury spoilage.” *Id.* While the district court has broad discretion to determine the type of investigation which must be mounted when a colorable claim of jury misconduct has been made, *U.S. v. Boylan*, 898 F.2d 230, 258 (1<sup>st</sup> Cir.), *cert. denied*, 498 U.S. 849 (1990), it is the trial court’s “primary obligation ... to fashion a responsible procedure for ascertaining whether misconduct actually occurred and, if so, whether it was prejudicial.” *Id.* This Court, in rejecting the imposition of a rigid model for the conduct of inquiries, made clear that at a minimum the district court should erect [], and employ[], a suitable framework for investigating the allegation and gauging its effects, and thereafter spell [] out (its) findings with adequate specificity to permit informed appellate review.” *Id.*, citing *United States v. Doe*, 513 F.2d 709, 711-12 (1<sup>st</sup> Cir. 1975).

In *Boylan*, after the jury returned guilty verdicts on fifty-six of fifty-seven counts against seven defendants following an eleven week trial, a juror telephoned one of the defense counsel

and informed him that “the jurors had discussed the case during the trial and were predisposed to find the defendants guilty before deliberations.” *Boylan*, 698 F. Supp. at 377. Defense counsel informed the court of the telephone call, and the trial court interviewed the juror in the presence of all counsel. At the hearing, the juror reiterated the statement that he had made to defense counsel and stated that a magazine and newspapers had circulated among jurors in the jury room. *Id.* The trial court conducted an inquiry of the remaining panel, including the alternates. That inquiry “consisted of on-the record interviews of all twelve jurors and four alternates during a two day period, in the presence of but without direct participation of counsel” to determine whether the jurors were predisposed or influenced by extraneous information. *Id.* at 386, 388. The defendants filed various motions for new trial based on juror misconduct contending, *inter alia*, that the inquiry was inadequate and that the trial court employed the wrong legal standard in evaluating the taint. *Boylan*, 898 F. 2d. At 258. The trial court denied the defendants’ motions.

In holding the trial court’s inquiry adequate and affirming the trial court’s decision, this Court stated the following:

[T]he inquiry was commensurate to the gravity of the charge and the seriousness of the task: patient, careful, searching, thorough, methodologically sound. From the start, the court and counsel engaged in an ongoing dialogue regarding both procedure and substance. All jurors and alternates were interviewed individually. All counsel were present (or afforded the opportunity to be present) throughout the interrogation. Although the court refused to allow direct attorney participation in the questioning, the lawyers were not shut out of the process. On at least six occasions, defense counsel suggested supplementary questions which were then put to jurors.

*Id.* at 259.

In this case, Trenkler presented the court with the probability of “intolerably great” jury prejudice in that one of the alternate jurors may have failed to disclose during the *voir dire* that she knew Trenkler. *See id.* at 261, citing *U.S v. Perkins*, 748 F.2d 1519, 1534 (11<sup>th</sup> Cir. 1984)

(juror's remarks during deliberations to the effect that he knew defendant). In the face of such presumptively prejudicial information, the district court failed to conduct a responsible procedure or independent inquiry of any kind to ascertain the existence and scope of juror misconduct. Instead, the district court based its scant findings entirely upon unsworn, out-of-court statements obtained for the government by ATF Special Agent Jeff S. Kerr, one of the case agents involved from the outset in the investigation and prosecution of Trenkler. Solely on the basis of those inadmissible, out-of-court interviews conducted by Special Agent Kerr, the district court, without the "patient, careful, searching, thorough, methodologically sound" (*see Boylan, supra*) process as envisioned by this Court, summarily concluded that Trenkler's claim of juror misconduct was "speculative and incredible" and there was no "duty on the part of this Court to investigate further." R.A. 598.

In reaching its unsupported conclusion, the district court failed to conduct any direct inquiry, *in camera* or otherwise, of the juror herself.<sup>6</sup> The district court, therefore, had no "first-hand insight into the juror's frame of mind." *See Neron*, 841 F.2d at 1202. *Compare U.S. v. Pion*, 25 F.3d 18 (1<sup>st</sup> Cir. 1994) (district court's decision to conduct an *in camera* inquiry directly discussing with a juror whether he had been approached and whether he could be impartial held within district court's discretion.) The district court had no way of knowing how the government agents conducted the interview, what questions the government agents posed, the demeanor of the government agents or the general aura of any of the interviews.<sup>7</sup> By blindly accepting and adopting the government's "investigation" into the serious allegations that a juror knew Trenkler,

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<sup>6</sup> There is no evidence in the record to suggest that the district court's decision not to interview the juror was based upon a balancing of the government's interest in protecting the deliberative process against the defendant's right to an unsullied jury. *See Neron*, 841 F.2d at 1204.

<sup>7</sup> Furthermore, the government concedes that the interview was conducted without any inquiry of the alternate juror in accordance with the mandates of *United States v. Kepreos*, 759 F.2d 961 (1st Cir. 1985).

the district court blatantly disregarded this Court's mandate to employ a responsible procedure for "investigating the allegation and gauging its effects." *Boylan*, 898 F.2d at 258. This clearly was not the "prompt, careful, searching, and thorough" inquiry envisioned by this court. *See Hunnewell*, 891 F.2d at 961.

The record demonstrates that Trenkler made the threshold showing of partiality or misconduct by a juror, and that he was entitled to a judicial inquiry and development of the relevant facts on the record relating to those issues. At a minimum, the district court should have established a framework for determining whether Ramona Walsh, the alternate juror, failed to disclose during the voir dire that she knew Trenkler, whether she communicated that fact (and possible other information) to the deliberating jurors and whether that extraneous information affected the deliberating jurors to such an extent that they failed to keep an open mind and render a verdict based solely on the evidence.<sup>8</sup> Without any independent exploration, the district court anchored its conclusions only to an investigation conducted by the very agents involved with Trenkler's prosecution. The district court improperly allowed the government to determine the framework for investigating the juror misconduct and to conduct the interviews. The district court's failure to fashion any appropriate and responsible procedure to determine whether juror misconduct actually occurred and its blind reliance upon the government's own self-serving investigation is a patent abuse of discretion and violated Trenkler's constitutional right to an impartial jury. *See Boylan*, 898 F.2d at 258. *See also Smith v. Philips*, 455 U.S. 209, 212 (1982) (district court's failure to conduct sufficient inquiry deprived appellants of due process right to jury capable and willing to decide case solely on evidence before it); *U.S. v. Gaston-Brito*, 64 F.3d 11 (1<sup>st</sup> Cir. 1995) (district court has obligation to develop facts on the record, not merely

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<sup>8</sup> Voir dire protects the right to an impartial jury "by exposing possible biases, both known and unknown, on the part of potential jurors." *Perkins*, 748 F.2d at 1531, quoting *McDonough Power Equipment Inc. v. Greenwood*, 104 S.Ct. 845, 849 (1984).

presume them); *Neron*, 841 F.2d at 1202 n.6 1988) (“claim of bias or misconduct on the part of a juror need satisfy a rather low threshold of significance to ignite a due process requirement of adequate inquiry”); *United States v. Howard*, 506 F.2d 865, 866 (5<sup>th</sup> Cir. 1975) (remand to district court for hearing to determine accuracy of allegation that juror disclosed to other jurors that defendant had been in trouble previously); *Downey v. Peyton*, 451 F.2d 236 (4<sup>th</sup> Cir. 1971) (remand to district court for hearing to determine whether prejudicial matters not in evidence actually discussed in jury room as alleged by some jurors).

Modern day trials are factually presented in open court before the iron curtain descends upon the jury room. We cannot tolerate prejudicial factual intrusion into that sanctum lest our courts return to darker days of our jurisprudentially history. The dagger of hidden evidence must not be taken from its scabbard for the first time in the jury room to wound the defendant; and unless its piercing effect is only skin deep and without prejudice to the anatomy of the trial, we must apply a constitutional salve.

Howard, 506 F.2d at 866.

## II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED TRENKLER’S MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, FOR AN EVIDENTIARY HEARING

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On December 22, 1995, Trenkler asked the district court to grant a new trial, or, in the alternative, to hold an evidentiary hearing, on the grounds of newly discovered evidence. As Trenkler asserted in his Motion for New Trial, new and material evidence relating to the testimony of William David Lindholm came to light almost two years after Trenkler’s trial when an article in The Boston Globe reported that Lindholm had been released from prison almost five years early. Lindholm had been a key witness for the government against Trenkler,<sup>9</sup> who, although he testified that he had no agreements with the government to induce his testimony,

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<sup>9</sup> Indeed, this Court “principally” relied upon Lindholm’s testimony in finding that the district court’s errors were harmless beyond a reasonable doubt. *Trenkler*, 61 F.3d at 60.

testified that he knew the only way his ninety-seven month sentence could be reduced was if he supplied new information to the government.<sup>10</sup>

The government, and this Court in its decision on Trenkler's appeal, also relied heavily on out-of-court statements made by Thomas Shay, Jr., Trenkler's alleged co-conspirator. Almost two years after Trenkler's trial ended, this court held that it was a "clear error in judgment" for the district court to exclude, in Shay, Jr.'s trial, the testimony of Dr. Robert Phillips, Shay, Jr.'s expert witness, that Shay, Jr.'s statements were the unreliable product of a recognized mental disorder. Because of the district court's earlier preclusion of the expert psychiatric testimony in Shay, Jr.'s trial, Trenkler's trial attorney had deemed it futile to seek to introduce similar expert psychiatric testimony to challenge the introduction of Shay, Jr.'s statements in Trenkler's trial. Only after the decision by this Court in *U.S. v. Shay*, 57 F.3d 126, did the evidence become available for use by Trenkler.

On February 4, 1997, the district court denied Trenkler's Motion for New Trial, or, in the alternative, for an Evidentiary Hearing. The district court held (1) that the expert psychiatric testimony of Dr. Phillips was not unknown or unavailable at the time of trial, and therefore could not give rise to a new trial as newly discovered evidence, and (2) that the record failed to contain any evidence of an agreement between the government and Lindholm at the time of Trenkler's trial. In making its determination on the Lindholm evidence, the district court relied solely on an affidavit filed by then Assistant U. S. Attorney Paul V. Kelly which baldly stated, without further support, that "[t]here was no agreement of any kind that existed between Lindholm and the government at the time he testified in the Trenkler trial."<sup>11</sup> R.A. 404.

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<sup>10</sup> After Trenkler learned of Lindholm's release, he filed a Motion to Remand with this Court, who denied the motion, but asserted "Defendant's Motion raises issues of concern, which could merit a hearing. However, the proper forum for such a hearing is before the district court upon motion of a new trial."

<sup>11</sup> Kelly, in his affidavit, also refers to Lindholm's testimony at trial, as well as post-trial communications between Kelly

A. Standard of Review.

“The denial of a motion for new trial is reviewed only for manifest abuse of discretion.” *U.S. v. Tibolt*, 72 F.3d 965, 971 (1<sup>st</sup> Cir. 1995). Similarly, this Court reviews “the district court’s rulings granting or denying evidentiary hearings under an abuse-of-discretion rubric.” *U.S. v. McAndrews*, 12 F.3d 273, 279 (1<sup>st</sup> Cir. 1993).

B. The District Court Failed To Use The Appropriate Legal Standards When It Considered The Newly Discovered Lindholm Evidence, And Erred When It Denied Both A New Trial And An Evidentiary Hearing.

The district court reviewed both bases for Trenkler’s request for a new trial under the standard that “[a] motion for new trial based on newly discovered evidence will not be allowed unless the movant establishes that the evidence was: (i) unknown or unavailable at the time of trial, (ii) despite due diligence, (iii) material, and (iv) likely to result in an acquittal upon retrial.” *Tibolt*, 72 F.3d at 971, citing *United States v. Ortiz*, 23 F.3d 21, 27 (1<sup>st</sup> Cir. 1994).

Different, less stringent, standards apply, however, in this case. First, in the context of an agreement between the government and Lindholm, “the ‘new’ evidence was within the

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and Lindholm’s attorney pertaining to the reduction of Lindholm’s sentence. Kelly did not provide any contemporaneous evidence of the lack of an agreement with Lindholm.

government's control and its disclosure was withheld." *Tibolt*, 72 F.3d at 971.<sup>12</sup> Under those circumstances,

[t]he usual locution, taken from Justice Blackmun's opinion in [*United States v.*] *Bagley*, [473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)], is that the nondisclosure justifies a new trial if it is "material," it is "material" only if there is a "reasonable probability" that the evidence would have changed the result, and a "reasonable probability" is "a probability sufficient to undermine the confidence in the outcome." *Id.* at 682 [105 S.Ct. at 3383].... This somewhat delphic "undermine confidence" formula suggests that [a] reversal [and a remand for new trial] might be warranted in some cases even if there is less than an even chance that the evidence would produce an acquittal. ...

*Tibolt*, 72 F.3d at 971-72, quoting *United States v. Sepulveda*, 15 F.3d 1216, 1220 (1<sup>st</sup> Cir. 1993), *cert. denied*, --- U.S. ---, 114 S.Ct. 2714 (1994). Second, where there is an allegation that a witness's testimony was perjured, a less stringent test is applicable. The First Circuit has adopted the rule set forth in *Larrison v. United States*, 24 F.2d 82, 87 (7<sup>th</sup> Cir. 1928). *United States v. Wright*, 625 F.2d 1017, 1020 (1<sup>st</sup> Cir. 1980). In *Larrison*, the Seventh Circuit held that when a motion for new trial is based upon the allegation that a material witness testified falsely at trial, a new trial should be granted if "(1) The court is 'reasonably well-satisfied' that the testimony was false, and (2) without the false testimony the jury 'might have reached a different conclusion.'" *Id.* (emphasis in original).

The district court must first ascertain, then, whether the government did indeed fail to disclose evidence it should have revealed to Trenkler or that Lindholm's testimony was false. The district court, relying on the government's "detailed written proffer,"

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<sup>12</sup> "Failure of the Government to reveal evidence of an understanding with a witness that the witness will receive lenient treatment for his offenses in return for his testimony will violate due process and result in the need for a new trial." *United States v. Feola*, 651 F.Supp. 1068, 1135 (S.D.N.Y. 1987), citing *United States v. Pfingst*, 477 F.2d 177, 191 (2d Cir. 1973), *cert. denied*, 412 U.S. 941 (1973).

summarily denied Trenkler's Motion for New Trial, asserting that his Motion "[l]ack[ed] any 'new evidence' (or any evidence at all) of an agreement between Lindholm and the government at the time of Lindholm's testimony." R.A. 589. The "detailed written proffer submitted by the government" on which the district court relied for its finding, however, cannot bear the weight of that reliance. The "proffer" is an affidavit submitted by then Assistant U.S. Attorney Paul V. Kelly. The district court apparently found the basis for its assertion that there was no agreement between the government and Lindholm based on (1) Kelly's avowal that there was no agreement at the time Lindholm testified in the Trenkler case, (2) Lindholm's testimony at trial that there was no agreement,<sup>13</sup> and (3) correspondence and motions commencing some four months after the conclusion of Trenkler's trial which contain unsubstantiated, and self-serving, declarations that no agreement existed. The correspondence between Kelly and Lindholm's attorney culminated in the government's request that Lindholm's sentence be reduced and the ultimate reduction in Lindholm's sentence.

It is not enough that the government asserts that "there was no agreement of any kind between Lindholm and the government at the time he testified at trial." "While it is clear that an explicit agreement would have to be disclosed ..., it is equally clear that facts which imply an agreement would also bear on ... credibility and would have to be disclosed." *United States v. Shaffer*, 789 F.2d 682, 690 (9<sup>th</sup> Cir. 1986). The government neither disclosed nor refuted those facts. In fact, the government based its request for a reduction in Lindholm's sentence "on grounds that he has provided 'substantial assistance' in the investigation and prosecution of [Trenkler]". R.A. 443.

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<sup>13</sup> "[T]his court has previously questioned the validity of these 'no agreement' statements by criminal defendants."

Although the district court characterized Trenkler's motion as a "fishing expedition" unworthy of an evidentiary hearing, Trenkler "need not ... present a *prima facie* case in order to justify an evidentiary hearing. So long as [he] alleges some facts [tending to support his claim], a district court, in the absence of countervailing reasons, should grant a request for a hearing." *United States v. Saade*, 652 F.2d 1126, 1135 (1<sup>st</sup> Cir. 1981) (evidentiary hearing on motion to dismiss because of invidious selective prosecution). It was the "countervailing reasons," and not Trenkler's newly discovered evidence, which was absent in this case. Faced with the curious coincidence of Lindholm's release and Trenkler's description of the likely undisclosed agreement, the government did no more than counter, "Not so!" *Contrast McAndrews*, 12 F.3d at 280 (where "government made a detailed written proffer ..., spelling out the facts referable to its sentence reduction motion"). Trenkler, then, clearly met his "entry level burden by making 'a sufficient threshold showing that material facts [are] in doubt or in dispute.'" *McAndrews*, 12 F.3d at 280. With no more thought to these troubling allegations, the district court refused a new trial and refused to gain any more information – from either side – by refusing to hold an evidentiary hearing.

Given the underlying circumstances, Trenkler's allegations and the lack of evidence presented by the government in response, the district court abused its discretion in denying the motion for an evidentiary hearing and ignoring its responsibility of making

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*Trenkler*, 61 F.3d at 69 n. 43 (Torruella, C.J., dissenting).

an appropriately informed decision on the threshold question of nondisclosure.<sup>14</sup> See *U.S. v. Douglas*, 874 F.2d 1145, 1160-61 (7<sup>th</sup> Cir. 1989) (“Faced with the dilemma of choosing between two exactly opposite versions of the facts,” trial court held evidentiary hearing on motion for new trial based on prosecution’s failure to reveal promise of leniency even after prosecution denied such a promise and witness testified that there was no promise); *United States v. Ouimette*, 798 F.2d 47, 52 (2<sup>nd</sup> Cir. 1986) (“Though some of these matters, if fairly disputed, might be issues for a jury on retrial, findings by the District Court are needed in order to make and review a determination of whether a new trial is required”); *United States v. Kelly*, 790 F.2d 130, 134 (D.C. Cir. 1986) (“The District Court abused its discretion by failing to hold an evidentiary hearing or to otherwise resolve the critical factual disputes raised by [the informant’s] affidavits and the government’s negative responses to them”). See also *U. S. v. Espinosa-Hernandez*, 918 F.2d 911, 913-14 (11<sup>th</sup> Cir. 1990).

C. The District Court Erred When It Failed To Recognize The Phillips Psychiatric Evidence As “Unavailable,” And Denied Both A New Trial And An Evidentiary Hearing

More than a year and a half after his trial, Trenkler learned that this Court, in *U. S. v. Shay*, 57 F.3d 126, held that the district court committed a “clear error in judgment” by precluding Shay Jr.’s psychiatric expert from testifying that Shay Jr.’s statements were the unreliable product of a recognized mental disorder. Obviously, this Court’s decision was unavailable to Trenkler at the time of his trial when Trenkler’s trial counsel determined that given the district court’s prior decision precluding Shay Jr. from offering Dr. Phillips’

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<sup>14</sup> If the district court had gleaned sufficient evidence to show that the government and Lindholm had failed to disclose their agreement, there is no question that the evidence of the agreement is “material.” With no physical evidence and no eyewitness linking Trenkler to the crimes for which he was charged and convicted, the government (and ultimately this Court) relied primarily on Lindholm’s testimony. If the jury had heard evidence of Lindholm’s agreement with the government and the inherent material bias resulting from such an arrangement, it likely would have viewed his testimony

testimony at his trial, it would be futile to seek to introduce at Trenkler's trial Dr. Phillips' testimony as to the unreliability of Shay Jr.'s statements.

The District of Columbia Appeals Court reversed the trial court under analogous circumstances in *Coates v. United States*, 174 F.2d 959, 960 (D.C. Cir. 1949). In *Coates*, the complaining witness, and robbery victim, testified that a police officer was present the night of the robbery. The government did not produce the police officer, and Coates' inquiries at the police precinct station as to the officer's identity were initially unavailing. Only after trial, and after Coates' repeated inquiries at the precinct station, did personnel there locate the record of the incident and identify the officer at the scene of the robbery. The district court refused to hear the officer, and the appeals court remanded for a hearing. "[T]he interests of justice require that the court know what [the witness only identified and available after trial] would say about the critical feature of the case, to which he was a witness." *Id.*

Similarly, the district court had precluded during Shay, Jr.'s trial the psychiatric testimony with respect to the same statements by Shay, Jr. that were ultimately admitted in Trenkler's trial. It was only after this Court's decision that the district court's error become apparent, and the psychiatric testimony critical to an evaluation of the veracity of the Shay, Jr. statements became available. *See also United States v. Massa*, 804 F.2d 1020, 1022 (8<sup>th</sup> Cir. 1986) (allowing newly discovered evidence since "[a]lthough the factual details underlying [the psychiatrist's] affidavit were known to Massa prior to trial, he did not know that an expert would opine that those details of his life had so affected his mental state as to render him incapable of committing the crimes with which he was charged"). The interests of justice require that the court be apprised of this newly

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with, at least, significant skepticism and, more probably, a reasonable doubt.

available evidence, so that it may know what Dr. Phillips would say about Shay, Jr. and can properly evaluate the information and its credibility. *See id.*

D. In Light Of The Material Newly Discovered Lindholm And Psychiatric Evidence, Trenkler Is Entitled To A New Trial.

The Sixth Amendment right of a criminal defendant to be confronted with the witnesses against him entitles the defendant to explore a witness' bias or motivation for testifying. *United States v. Tracey*, 675 F.2d 433, 437 (1<sup>st</sup> Cir. 1982); *United States v. Lynn*, 856 F.2d 430, 432 (1st Cir. 1988).<sup>15</sup> This Court has distinguished the exploration of potential bias from impeaching the credibility of witnesses as a "current continuing motivation to testify falsely (the bias factor)" and "prior conduct and behavior suggesting a witness may be lying (the credibility factor)." *Lynn*, 856 F.2d at 432. The nature of any agreement that a witness has with the government or any expectation or hope that he will be treated leniently in exchange for his cooperation does not only impeach prior statements, but could also reveal any present or continuing reasons for the witness to fabricate his testimony in return for future prosecutorial favors. *Id.*

In this case, there is no question that Lindholm's release three years into an eight-year prison term strikes at the heart of his motivation to testify against Trenkler. *See id.* ("bias is always relevant as discrediting a witness and affecting the weight of his testimony"). It is dramatic and probative new evidence that Lindholm had a continuing reason to lie in order to curry favor with the government. The newly discovered evidence of Lindholm's early release from prison would have demonstrated to the jury that Lindholm was not a disinterested witness, but a witness with his own personal interest in the outcome of the trial over whom the government wielded significant power. Without the knowledge of Lindholm's early release,

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<sup>15</sup> Bias is "the relationship between a party and a witness which might lead the witness to slant, unconsciously or

which happened ten months after Trenkler's trial, Trenkler was foreclosed from exposing at trial Lindholm's sweetheart deal with the government, which would have had the tendency to make Lindholm's testimony less probable in the eyes of the jury. *Id.* at 432 n.3. Without such material evidence, Trenkler's constitutional right to confront and cross examine witnesses against him was effectively eviscerated. *See id.* at 437 (defendant's constitutional right to confront and cross examine witnesses impaired by court's foreclosure of full cross examination on issue of witness' bias as it pertained to agreement with government).

In addition, Dr. Phillips' testimony as to Shay Jr.'s mental disorder and the ultimate unreliability of Shay Jr.'s statements undermine the only evidence the government introduced to prove that a two-person conspiracy existed between Trenkler and Shay Jr. Because Shay Jr. did not testify at Trenkler's trial, the "key", as the government characterized it, to establishing a two-person conspiracy was Shay Jr.'s nine (9) out-of-court statements. That those statements were the product of "psuedologia fantastica," a recognized mental disorder, was material to the jury's assessment of the reliability of the only evidence upon which the government relied to establish a conspiracy.

A review of the record demonstrates that the case against Trenkler was hardly overwhelming. There was no physical evidence linking Trenkler to the Roslindale explosion nor were there any eye witnesses who testified that they saw Trenkler at or near the crime scene. The government relied primarily upon Lindholm's testimony that Trenkler admitted making the Roslindale bomb and the out-of-court statements by Shay Jr. to prove Trenkler entered into a two-person conspiracy with Shay Jr. At the trial, the jury had to determine

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otherwise, his testimony in favor of or against a party." *Lynn*, 856 F.2d at 432 n.3, quoting *United States v. Abel*, 469 U.S. 45, 52 (1984).

whether to believe Lindholm and whether to accept as reliable the out-of-court statements by Shay Jr., a non-testifying convicted co-conspirator.

Lindholm's testimony was of significant importance to the ultimate issue of guilt or innocence. Lindholm's early release provides persuasive evidence that he possessed a material bias such that the jury would have viewed his testimony with at least significant skepticism and more probably a reasonable doubt. If a jury is now apprised of the agreement between Lindholm and the government, it will probably result in Trenkler's acquittal on retrial.

In addition, there is a sufficient probability that a jury would reach a judgment of acquittal if the expert psychiatric evidence that Shay Jr.'s statements were the unreliable product of a recognized mental disorder were introduced. If the jury heard testimony from Dr. Phillips that Shay Jr. suffered from "pseudologia fantastica," it is highly likely that they would have been convinced that Shay Jr. was a liar and a braggart whose out-of-court statements could not be given credence. Given the high probability of acquittal upon retrial with the Lindholm and the Shay Jr. evidence, a new trial is warranted.

#### CONCLUSION

For the foregoing reasons, The Defendant-Appellant Alfred W. Trenkler respectfully requests that this Court remand the case to the district court and order the district court:

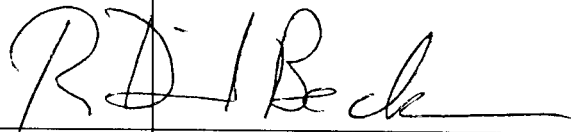
- (1) to conduct an evidentiary hearing to determine whether a secret agreement existed between William David Lindholm and the government and, if the district court finds that such an agreement existed, to vacate Trenkler's conviction as such a finding undermines this Court's determination of harmless error in the original appeal and order such further proceedings as are then appropriate;

- (2) if Trenkler's conviction is not vacated as requested in (1), to conduct an inquiry into the allegation of juror misconduct, and order such further proceedings as are then appropriate; and
- (3) if Trenkler's conviction is not vacated as requested in (1), to vacate Trenkler's conviction for failure to allow into evidence expert psychiatric testimony pertaining to statements made by Thomas Shay, Jr. and order a new trial at which such testimony shall be admissible.

Respectfully Submitted,

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