

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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No. 97-1239

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UNITED STATES OF AMERICA,  
Appellee,

v.

ALFRED W. TRENKLER,  
Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA - APPELLEE

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STATEMENT OF THE CASE

On June 24, 1993, a federal grand jury returned a three-count superseding indictment against Alfred W. Trenkler ("Trenkler") and Thomas A. Shay ("Shay Jr.") charging them for their respective roles in the bombing death of Boston Police Bomb Squad Officer Jeremiah Hurley and the maiming of his partner, Bomb Squad Officer Francis Foley. Trenkler and Shay Jr. were charged with conspiracy, in violation of 18 U.S.C. § 371 (Count One); with receipt of explosive materials in interstate commerce with knowledge and intent that the explosive materials would be used to kill, injure and intimidate Thomas L. Shay (Shay Jr.'s father, hereinafter "Shay Sr.") and cause damage and destruction to his real and personal property, including a 1986 Buick, in violation of 18 U.S.C. §§ 844(d) and 2 (Count Two); and with knowingly attempting to maliciously damage and destroy, by means of fire and explosive, a 1986 Buick owned by Shay Sr. and used in interstate commerce and in activities affecting interstate commerce, in violation of 18 U.S.C. §§ 844(I) and 2 (Count Three). The case was severed by the district court prior to trial on Trenkler's motion.<sup>1</sup>

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<sup>1</sup> The jury convicted Shay Jr. of Count One and Count Three. He was sentenced to 188 months' imprisonment on Count One and 60 months' imprisonment on Count Three, to be served concurrently. He appealed his conviction and sentence. United States v. Shay, 57 F.3d 126 (1st Cir. 1995). As discussed, *infra*, this Court remanded the case for further proceedings which are still pending in the district court.

Trenkler's trial began on October 25, 1993 (the Honorable Rya W. Zobel, presiding). After a 17-day trial, the jury convicted Trenkler on all counts. On March 8, 1994, the district court sentenced Trenkler to life imprisonment on Counts Two and Three, and 60 months' imprisonment on Count One, to be served concurrently.

Trenkler appealed his conviction. This Court held that the district court did not err in admitting evidence, pursuant to Fed. R. Evid. Rule 404(b), of Trenkler's design, construction and detonation of a similar bomb in 1986. The Court also held that the district court erred in admitting evidence derived from a Bureau of Alcohol, Tobacco and Firearms ("ATF") computer database ("EXIS") concerning the characteristics of other explosive devices and testimony based on that evidence that the 1986 bomb and the Shay bomb had unique, common characteristics to the exclusion of other bombs which made it likely that Trenkler built both bombs. However, the Court further held that this error was harmless in light of all of the other evidence establishing Trenkler's guilt. The Court also rejected Trenkler's claims of prosecutorial misconduct. United States v. Trenkler, 61 F.3d 45 (1st Cir. 1995).

This appeal is from the district court's February 4, 1997 order denying Trenkler's December 22, 1995 Motion for a New Trial or, in the alternative, for an Evidentiary Hearing, pursuant to

Fed. R. Crim. P. Rule 33, based on newly-discovered evidence, and from the district court's May 22, 1997 order denying Trenkler's November 19, 1996 Motion for Judicial Inquiry into Possible Juror Misconduct and for a New Trial. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.<sup>2</sup>

STATEMENT OF ISSUES

1. Whether the district court manifestly abused its discretion in denying, without a hearing, Trenkler's motion for a new trial based on his unsupported, speculative claim of juror misconduct.
2. Whether the district court manifestly abused its discretion in denying, without a hearing, Trenkler's motion for a new trial based on his unsupported claim that the government failed to disclose an allegedly secret deal with a government witness, David Lindholm.
3. Whether the district court manifestly abused its discretion in denying Trenkler's motion for a new trial on the ground of "newly available" expert psychiatric testimony, where that testimony was known to Trenkler prior to trial and where Trenkler waived the issue by failing to offer such testimony at trial.

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<sup>2</sup>A more detailed procedural history is set forth at pages 1-2 of Trenkler's Brief.

STATEMENT OF FACTS

A. The Trial

1. The Discovery of the Suspicious Device. On October 28, 1991, two members of the Boston Police Department ("BPD") Bomb Squad, Francis Foley and Jeremiah Hurley, were called to the scene of a suspicious object that was found lying in a driveway at 39 Eastbourne Street in Roslindale, Massachusetts. 10/26:42-43; 11/12:8-9.<sup>3</sup> While the officers were conducting a preliminary examination of the object, it suddenly exploded. 11/12:11-18. Officer Hurley, who was closest to the device, died several hours later from massive trauma. 11/12:19-21; Exs. 6, 7. Officer Foley survived, suffering the loss of an eye and severe injuries to his head, face and upper torso. 11/12:20-21.

The suspicious object had first been discovered by Shay Sr. the previous Sunday afternoon, October 27, 1997. 11/1:76. According to the ATF experts and an engineer retained by the government, the device was affixed to the undercarriage of Shay

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<sup>3</sup> References to "App." are to the Appendix in this case. However, the record appendix assembled by appellant does not contain several pertinent portions of the trial record. Rather than attempt to include the missing portions in a supplemental appendix and require the Court to scan different appendices, in the Statement of Facts and in certain sections of the Argument, the Appellee will cite directly to the trial record. FRAP 30(a). References to the trial record will be to the date of the trial or hearing, followed by a colon, followed by the page number(s) for the applicable pages of the record; *i.e.*, 10/25:3 would designate page three of the transcript of October 25, 1993.

Sr.'s 1986 Buick directly beneath the driver's seat. 10/28:54-56; 11/2:60-71. The bomb became dislodged when it twice made contact with the surface of Shay Sr.'s driveway on Sunday, October 27. Id. Had the bomb exploded as designed while Shay Sr. was seated in the driver's seat, it almost certainly would have killed him. 11/10:16-17.

The government offered testimony, inter alia, that the device was a high-powered remote controlled bomb which contained the equivalent of two to three sticks of repackaged dynamite, along with a remote control receiver, a power source, two blasting caps, a toggle switch and other necessary electrical components, contained within a well-crafted rectangular wooden box. 10/28:40-53; 10/29:82-130.

2. Evidence of Shay Jr.'s Involvement. The evidence established that Shay Jr. had both a personal and a financial motive to seek his father's death. Shay Jr. was the victim of years of neglect and abandonment by both of his natural parents, Shay Sr. and Nancy Shay, and was estranged from his father at the time of the bombing. 11/1:121; 11/3:67; 11/1:114-116.

One month before the bombing, Shay Jr. learned that his father could receive up to approximately \$300,000 or \$400,000 if a pending personal injury lawsuit was successful 11/3:136; that the lawsuit would survive even if his father were to die, and that any recovery

would go to Shay Sr.'s estate to be divided equally among his four children, including Shay Jr. 11/3:135-136. In the weeks prior to the bombing, Shay Jr. told a friend that he was very angry with his father, and felt abandoned by him, 11/3:135-136, that his father was terminally ill and was going to die soon, and that he expected to inherit a large amount of money when his father died. 11/5:38-39.

On October 31, Shay Jr. was arrested on an outstanding warrant for an unrelated charge. 11/3:72-73. The next day, during conversation with a fellow detainee, Paul Evans, Shay Jr. asked Evans how much time he would receive for a murder charge in Massachusetts. 11/3:113-116. When Evans responded that Shay Jr. could get 15 to 25 years, Shay Jr. said that he would kill himself or, if released on bail, he would flee. 11/3:117.<sup>4</sup> Shay Jr. also told Evans that his father had "disowned him five years previous." 11/3:118.

In October 1992, a year after the bombing, while being detained on unrelated charges at the Plymouth House of Correction, Shay Jr. befriended a fellow detainee, Lawrence Plant. 11/4:36-38. Shay Jr. told Plant about his role in the Roslindale bombing.

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<sup>4</sup> The evidence established that Shay Jr. did, in fact, flee Massachusetts shortly after he was released on bail -- as he had told Evans he would. Shay Jr. was apprehended sometime in March 1992 living in San Francisco under a false name. 11/8:74-75.

11/4:38-41. He first described his abusive childhood and how he hated his father. 11/4:42. Shay Jr. told Plant that he was involved in the bombing to try to "get even" with his father. 11/4:42, 44. He described how the bomb functioned, and how it was attached to his father's car with magnets. 11/4:42-43. He said that it was the officer's "own fault" that he had been killed. 11/4:44. He also mentioned that there were monetary considerations involved, specifically "some sort of life insurance policy" worth "around half a million dollars." Id.

Shay Jr. also gave an interview to a local television station (WLVI-TV) on October 17, 1992. 11/10:126, Ex. 37. Shay Jr. made the following incriminating statements on the portion of the videotape that was played at trial:

I, Tommy Shay, am guilty of something in that case [the Roslindale bombing], but do not know what...

...The Radio Shack clerk on Mass Ave. recognized me. I don't know really why he recognized me.

[I bought] a toggle switch, AA battery holder, wires, you know, electrical supplies . . . . I didn't buy no explosives.

There's only two things that I purchased that were inside that explosive device that killed Officer Hurley . . . . the toggle switch and the AA battery holder.

My guiltiness is knowing who did it or thinking about who did it after the bomb and then fleeing, not to tell anybody. That's my guiltiness.

The foregoing evidence established that Shay Jr. was a participant in a conspiracy to kill his father, and that he aided

and abetted the unlawful plan by purchasing certain essential device components. The evidence also established that Shay Jr. had no electronics background, and that he was not capable of designing or constructing a sophisticated remote control explosive device. 11/1:131; 11/5:73.

The ATF chemists identified the specific toggle switch used in the bomb as Model Number 275-602, a toggle switch which was custom manufactured for Radio Shack. 10/28:47-48. During the investigation, agents found a receipt for an October 18, 1991 purchase of the toggle switch at Radio Shack on Massachusetts Avenue in Boston. Ex. 33. The receipt showed that the toggle switch was purchased only 10 days before the bombing; the customer name on the receipt was "SAHY JYT," a possible transposition of the letters in the name "SHAY;" and the "ID" number, which reflected the last four digits of the customer's telephone number, was "3780." Shay Sr.'s home and business telephone ended with "7380," suggesting another transposition of digits. 11/1:48-49; Ex. 26.

The receipt reflected the purchase of several other components which, according to an ATF bomb expert, would be consistent with items used to check an electrical circuit, such as the one used in the Roslindale bomb. 11/10:23. Finally, the purchase was made at a Radio Shack store at 197 Massachusetts Avenue in Boston, located directly across the street from the Christian Science Church, where

Trenkler was installing a rooftop satellite dish for the church during the same time period. 11/4:146-148.

3. Trenkler's Relationship With Shay Jr. and His Bomb-Making Expertise.

The jury also heard evidence concerning a 1986 remote-control bomb that Trenkler had previously admitted constructing on September 1, 1986. 11/10:72. The device was placed under a truck belonging to the Capeway Fish Market causing it to sustain minor damage to its undercarriage. 11/10:74. Trenkler confessed to building the explosive device, and further admitted that he had constructed the device for a friend as a favor. 11/8:118-120.

When first questioned about his relationship with Shay Jr., Trenkler falsely claimed that he had known Shay Jr. for only six months, that he had only been with him on two occasions and that Shay Jr. had never been to his apartment. 11/5:144; 11/8:50. The evidence established that Shay Jr. and Trenkler were acquaintances dating back at least two years; that they were both homosexual; that Shay Jr. had in fact visited Trenkler's apartment; and that they had been in contact with one another on multiple occasions in the days and weeks prior to the bombing on October 28, 1991. 11/4:152-157; 11/5:31-37; 11/5-93. Shay Jr.'s address book had an entry which read "Al Trenkler, BPR #553-0778." Ex. 32. Trenkler's roommate, John Cates, confirmed that the number 553-0778 was the pager number used by Trenkler in the fall of 1991. 11/4:105. Mr.

Cates also testified that Shay Jr. was paging Trenkler and leaving voice mail messages in September and October 1991, right up until the few days prior to the explosion in Roslindale. Id.

The government offered evidence as to motive from which the jury could infer that Trenkler was willing to design and construct the explosive device to induce and cultivate a relationship with a younger male such as Shay Jr. 11/8:12-15. As stated, there was evidence of insurance money that may have become available upon Shay Sr.'s death. 11/3:136. There was also evidence that Trenkler had a very poor financial condition in the fall of 1991 and that he had invested in a string of failed businesses in the 1980s. 11/4:62-71; 144-150.

Trenkler had extensive training and experience in electronics, including satellite and microwave communications, 11/4:59-60; 71-72; 141-143, and there was also evidence that Trenkler had a long-standing interest in remote control vehicles and toys. 11/8:21; 11/4:72. Trenkler's latest electronic business, ARCOMM, was performing work for the aforementioned Christian Science Church located across from the Radio Shack store in October, 1991. 11/4:73. In fact, the Radio Shack clerk who handled the transaction in which the toggle switch had been purchased under the name "SAHY JYT" also testified to seeing Trenkler inside the store on two or three occasions in late September and October, 1991.

11/3:97; Ex. 34.

Trenkler later admitted that he had "forgotten" to tell the agents certain things about his relationship with Shay Jr. 11/8:63. He mentioned that he had given Shay Jr. rides on occasion, including to Shay Jr.'s father's house, and that he was aware that Shay Jr. hated his father. Id. Trenkler also acknowledged having visited the Radio Shack store near the Christian Science Church. Id. During one discussion, Trenkler said to an ATF agent, with an "arrogant" demeanor, "if we did it, then (sic) only we know about it ... how will you ever find out and (sic) if neither one of us talked (sic)?" 11/8:73.

There were several factual and circumstantial similarities between the 1986 and 1991 bombings. As with the 1991 incident, the 1986 incident was the product of a conspiracy wherein Trenkler agreed to assist a friend, Donna Shea, in an effort to take revenge against others. 11/8:137; 145-146. In 1986, Trenkler used a young male friend, Todd Leach, to acquire electrical components for him. 11/8:144-145; 11/9:27-28, just as the government suggested had occurred with Shay Jr. in 1991. There was also testimony that Trenkler tested the 1986 device before using it, utilizing two plastic boxes and a test lamp. 11/9:33-34.<sup>5</sup>

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<sup>5</sup> This fact was important since there was evidence, in the form of the Radio Shack receipt, Ex. 33, that Shay Jr. purchased two small plastic project boxes and a test lamp along with the toggle

Once all the forensic and factual evidence from the 1986 and 1991 incidents was admitted, the government called ATF Explosives Enforcement Officer Thomas Waskom to testify. 11/9:127. Mr. Waskom made a detailed "signature analysis" of the 1986 and 1991 devices and of the circumstances surrounding the two incidents. 11/9:127-129. He opined that "the person who designed and constructed the '86 device was the same person who designed and constructed the 1991 device." 11/10:19-26.<sup>6</sup>

4. Lindholm Testimony. David Lindholm, who was detained with Trenkler for three days in December 1992 at the Plymouth County Jail, testified to additional incriminating statements made by Trenkler. 11/10:83-86. Lindholm and Trenkler shared certain common life experiences, including the fact that they had both lived on Whitelawn Avenue in Milton. 11/10:88-89. They became  

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switch in October 1991.

<sup>6</sup> The government also called ATF Intelligence Research Specialist Stephen Scheid to testify. 11/9:52. Mr. Scheid maintained a computer database of all bombings and arsons in the United States dating back to 1975 (known as "EXIS"). 11/9:54-56. Mr. Scheid queried over 14,000 explosive incidents in the United States for a 12-year period (1979-1991) for bombings or attempted bombings involving certain common features. Scheid testified that this computer analysis produced two incidents bearing these common features: the 1991 Roslindale bombing and the 1986 Quincy bombing. 11/9:84. This Court held that the admission of this testimony was error but that the error was harmless in view of all of the other evidence establishing Trenkler's guilt.

familiar with each other and bonded together while in jail. Id. Thereafter, they talked privately about their present circumstances. Trenkler talked emotionally about his relationship with Shay Jr. 11/10:98. He also mentioned Shay Jr.'s lack of technical ability. Id. Lindholm also testified that, during their conversation, Trenkler made the following admissions: "well, even if I did build a bomb, I did not place it on the car;" "so, I built the bomb. I built the bomb. I don't deserve to die or spend the rest of my life in prison for building this device." According to Lindholm, Trenkler also stated that the two bomb squad officers were foolish and negligent for not wearing body armor at the time that they were examining this device; that it served them right for what happened to them; and that it was not his fault. 11/10:96-97.

Lindholm also testified that he had no agreements with the government, "none whatsoever," and that no one had offered him any promises, rewards or inducements for testifying. 11/1:99-100. On cross-examination, he stated: "I'll go on record to say that I'm not going to ask for any benefit, rewards, inducements any time in the future." 11/10: 123-124).<sup>7</sup>

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<sup>7</sup> Trenkler called witnesses to establish that he was a hard-working and highly skilled electrical engineer whose business was doing reasonably well in the fall of 1991 (see, for example, testimony on 11/12) and to establish that he was working at another location away from the Christian Science Church on October 18, 1991, the day that the toggle switch was purchased at Radio Shack by Shay Jr. 11/12:76-89; 11/12:167-171).

Based on the evidence at trial, the jury found Trenkler guilty.

B. Trenkler's Motion For A New Trial Or, In the Alternative, For an Evidentiary Hearing Concerning Newly-Discovered Evidence.

On December 22, 1995, Trenkler filed a motion, pursuant to Fed. R. Crim. P. 33, for a new trial or, in the alternative, for an evidentiary hearing on the grounds of newly-discovered evidence. Trenkler first argued that the expert testimony of a psychiatrist, Dr. Robert Phillips (the "Phillips evidence"), who was prepared to opine that Shay Jr. suffered from a recognized mental condition known as "psuedologia fantastica," which causes a sufferer to engage in pathological lying, including possibly falsely implicating himself in crimes that he did not commit, was new evidence not available to him at the time of the trial. Trenkler claimed that because the district court had previously excluded the Phillips testimony at the Shay Jr. trial, Trenkler's counsel did not offer it at his trial to undermine the credibility of certain admissions by Shay Jr. regarding his own involvement in the bombing, which were admitted at Trenkler's trial. Trenkler argued that, even though he was aware of the Phillips testimony before trial, it did not become "available" to him until after trial, when this Court issued its opinion in United States v. Thomas Shay, Jr., 57 F.3d 126, 134, 137 (1st Cir. 1995), in which it ruled that

the district court erred in excluding the Phillips testimony on the grounds stated and remanded the case for further proceedings, including a determination whether the Phillips testimony was nevertheless still properly excludable on other grounds.<sup>8</sup>

As a second ground for a new trial, Trenkler contended that the government had failed to disclose the existence of an agreement between the United States and Lindholm. In support of his motion, Trenkler noted that the government filed a Motion for a Reduction of Lindholm's Sentence on July 19, 1994, which motion was granted by the Honorable Douglas Woodlock, who reduced Lindholm's sentence from 97 months' imprisonment to 42 months' imprisonment on September 3, 1994. (App. 505). Trenkler argued that the government had agreed to move for a reduction in Lindholm's sentence in exchange for his trial testimony; that the government failed to disclose this agreement, in violation of its discovery obligations; and that Lindholm testified falsely at trial by

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<sup>8</sup> The Court held that the Phillips testimony was not excludable on the ground that it was opinion testimony relating to the credibility of Shea's Jr.'s admissions. However, the Court remanded the case, instructing the district court to determine whether the testimony was otherwise admissible under Fed. R. Evid. 702 and whether, if admissible under Rule 702, it was nevertheless inadmissible pursuant to Fed. R. Evid. 403. In its order dated December 27, 1995, this Court clarified its prior order by noting that the district court was to rule whether the Phillips testimony met all of the requirements of Rule 702, in addition to ruling

denying that any such agreement existed.

In response to this motion, the government submitted the affidavit of Paul Kelly, the government trial attorney who elicited Lindholm's testimony. In his affidavit, Kelly stated:

There was no agreement of any kind that existed between Lindholm and the government at the time he testified in the Trenkler trial . . . Lindholm's sworn testimony that he had no agreements with the government, and that he had not received any promises, rewards or inducements from the government in exchange for his testimony, was truthful, accurate, and consistent with the government's view of the same.

(App. 407-408).

Kelly's Affidavit also attached a letter, dated April 1, 1994, from Lindholm's attorney, Roger Cox, to Kelly in which Cox acknowledged that Lindholm did not have any agreement with the government but nevertheless requested that the government move for a reduction of Lindholm's sentence based on his cooperation in Trenkler's case. (App. 430-431). The affidavit also attached a copy of the government's one-page motion seeking at least a 24-month reduction in Lindholm's sentence. (App. 443). That motion, which was never sealed or impounded, included another affidavit of Paul V. Kelly in which he explicitly advised Lindholm's sentencing judge: (1) that Lindholm had no prior agreement with the government concerning his cooperation and had not been promised any rewards or inducements for his testimony (App. 445-447); and (2) that Lindholm had, in fact, testified that he would never ask for any benefit or

reward in the future as a result of his testimony. Kelly also attached Lindholm's trial testimony to the affidavit submitted to the sentencing judge. (App. 448-467).

Also attached to Kelly's affidavit was a letter which Lindholm had submitted to the judge who resentenced him, stating that he had suffered a number of "hardships and problems as a result of my testimony in the Trenkler trial, and my assistance to the Government." Lindholm noted that there were a number of newspaper articles and television and radio reports publicizing his cooperation in the Trenkler case and stated that he "was immediately ostracized from the general population and treated like a leper." After he received information that a number of inmates were going to threaten him, Lindholm was forced to enter protective custody. (App. 503-504).

On February 4, 1997, the district court denied Trenkler's Motion for a New Trial in its entirety without a hearing. The court rejected Trenkler's claim that the Phillips testimony constituted new evidence, noting that Trenkler's "attorney concedes that prior to trial he considered offering the Phillips testimony but did not, figuring that it would be 'futile' in light of this court's ruling in the Shay Jr. trial. The Phillips evidence fails to meet the first prong of the Ortiz test and, accordingly,

defendant's motion with respect to the Phillips evidence is denied."

The court also rejected Trenkler's contention that Lindholm's post-trial sentence reduction suggested the existence of an undisclosed "sweetheart deal" with the government at the time of Lindholm's testimony. The court held:

Based on the detailed written proffer submitted by the government and left unchallenged by Defendant, the record is devoid of any evidence to suggest that Lindholm's early release was the result of anything other than an arrangement made subsequent to the trial (by several months) between Lindholm and the government based on Lindholm's cooperation in the Trenkler trial. Defendant is not entitled to an evidentiary hearing simply to engage in a "fishing expedition" on this matter.

(App. 587-589).

C. Trenkler's Motion For a New Trial Based on Claim of Possible Juror Misconduct.

On November 1, 1996, Assistant U.S. Attorney Frank Libby notified the district court that an individual named Donna Shea, a former associate of Trenkler, had contacted the government and claimed that she was present during the early 1980's when a female acquaintance of Shea's, named Nancy Tolmie, accompanied by one of the jurors in the Trenkler trial, came to Shea's house to buy cocaine, allegedly supplied by Trenkler. (App. 506-511). Shea was the person who had asked Trenkler to build the 1986 explosive device. (App. 528). As set forth in the ATF case agent's report of interview with Shea, which was attached to the Libby letter,

Shea had initially contacted the ATF case agent in September 1996 after she had been arrested for possession of ten packets of cocaine. Shea claimed stated that she had been "set up" by the Weymouth Police and that she did not want to go to jail. On October 2, 1996, Shea contacted the same case agent by telephone and claimed that only two of the ten packets of cocaine were hers, that the rest had been planted by the Weymouth Police and that she would kill herself and the Weymouth Police Officer if she had to go to jail. Shea further stated that if she was going to have to go to jail, she would "go out with a bang" and claimed that she had information that a woman named "Ramona," who was known to her and to Trenkler, had sat on the Trenkler case and that she was going to call Trenkler's attorney and provide this information to him. Shea added that she was angry that no one had helped her get her husband out of jail after she had helped in the Trenkler investigation and that she would "pay people back." (App. 520). Trial records reflected that a Ramona M. Walsh was seated as an alternate juror but was excused, along with the other alternates, at the close of jury charge and never took part in deliberations. (11/22/93 Trial Transcript).

When Shea was interviewed by the government six days later, she stated that, approximately 12 years earlier, on three or four occasions, her friend Nancy Tolmie had arrived at Shea's house with

another woman called "Ramona" for the purpose of purchasing cocaine from Trenkler. However, Shea said that she had "no memory" of "Ramona" being present in the same room when Trenkler sold cocaine to Tolmie. Shea further stated that she did not remember "Ramona" ever talking with or referring to Trenkler by name, nor did she remember Trenkler referring to or directly addressing "Ramona" by either her first or last name. Shea also stated that she had never seen "Ramona" use drugs or purchase drugs from Trenkler or anyone else. In addition, Shea was unable to say whether, as of the time of the trial, "Ramona" ever knew Trenkler by name or sight. Shea added that it was unlikely that Trenkler knew who "Ramona" was during trial, because: "Trenkler didn't know or have any dealings with Ramona back then." (App. 520-521). During yet another interview, conducted ten days later, Shea stated that, on two or three occasions, Tolmie brought "Ramona" to her house to purchase drugs from Trenkler, and that "Ramona" was present in the room when the transactions occurred. (App. 521).

The ATF agent also interviewed Nancy Russell, formerly Nancy Tolmie, who admitted that she used powder cocaine regularly from approximately 1984 through a part of 1987; that she saw Ramona Walsh approximately once every three weeks during 1985 and 1986; that she bought cocaine from Donna Shea; that Walsh used cocaine and, on occasion, gave Russell money to purchase cocaine; that she

purchased cocaine more than fifty times and that these purchases were at Shea's residence. Russell stated that only Shea and her husband were at the house when she made these purchases. Russell further stated that she never brought Ramona Walsh with her to Donna Shea's house. Russell added that she had never met Trenkler. (App. 521-522).<sup>9</sup> In accordance with the mandate of United States v. Kepreos, 759 F.2d 961 (1st Cir. 1985), the government did not contact the alternate juror, Ramona Walsh, for purposes of interviewing her. (App. 506).

On November 19, 1996, Trenkler filed a Motion for Judicial Inquiry into Possible Juror Misconduct and for a New Trial. The sole basis for Trenkler's motion was the Shea allegation that "Ramona" was present when Russell purchased cocaine at Shea's house with Trenkler, the supplier of the cocaine. (App. 526-27). Trenkler did not provide any additional information or affidavits from any source to support Shea's allegation. Nor did Trenkler himself submit an affidavit in support of his motion either acknowledging that he knew Ramona Walsh or that he had ever met her or was ever present in Shea's residence when a drug transaction took place involving Russell and Walsh or, indeed, any female. (App. 523-536).

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<sup>9</sup> Russell stated that Walsh was only present on one occasion when Russell purchased cocaine from a third party and that neither Shea nor Trenkler were involved. (App. 522).

On May 22, 1997, the Honorable Rya W. Zobel denied Trenkler's motion in its entirety. (App. 595-598). In determining whether to conduct a judicial inquiry, the district court held that Shea's claim of possible juror misconduct was "speculative and incredible." (App. 598). The court first noted that Trenkler's claim was "based entirely on Shea's statement, wholly contradicted by Tolmie, that juror Walsh may have been in the same room with defendant on three or four occasions in the early 1980's, some twelve years prior to the trial." The court further noted that: "Shea does not claim that Walsh knew defendant's name, that defendant and Walsh spoke to one another, or that Walsh purchased cocaine directly from defendant." The court further noted that: "Shea claims no other facts, and the record is devoid of any other facts, that might lead one to believe that defendant and Walsh, other than being present in the same room on three or four occasions twelve years previously, actually knew one another or even that Walsh, some twelve years later, would recognize defendant by face." The court further noted that Shea herself placed "so little significance to the alleged contacts" that Shea opined that: "Trenkler didn't know or have dealings with [Walsh] back then, it is unlikely that Trenkler knew who she was during the trial." The district court held that: "Such speculative and incredible claims do not trigger a duty on the part of this Court to investigate the

alleged juror misconduct any further." (App. 595-598).

#### SUMMARY OF ARGUMENT

The district court did not manifestly abuse its discretion in denying, without a hearing, Trenkler's motion for a new trial on the ground of potential juror misconduct where the only evidence of potential juror misconduct was the claim of Donna Shea that an alternate, non-deliberating juror, Ramona Walsh, was present on several occasions twelve years previously when Trenkler sold drugs to Walsh's friend Nancy Tolmie. The district court was clearly entitled to reject this claim as "speculative and incredible" given that: a) Shea was a former criminal associate of Trenkler's who purchased drugs from him and for whom Trenkler had previously built an explosive device; b) Shea raised her claim after her arrest on drug charges for which she claimed she had been "set up" and for which she wanted to "pay people back;" c) Shea contradicted her own statement by subsequently stating that she had never seen Walsh purchase drugs from Trenkler or anyone else and had "no memory" as to whether Walsh was present when Trenkler sold drugs to Tolmie; and d) Tolmie flatly denied that she had ever brought Walsh to Shea's house and denied that she herself had ever met Trenkler.

Moreover, even if Walsh had been present when Trenkler sold drugs to Tolmie, there was no evidence that Walsh was ever introduced to Trenkler or that she remembered any such encounters

twelve years later. Most importantly, there was absolutely no evidence offered by Trenkler that Walsh made any comments whatsoever regarding Trenkler during the course of the trial. Given the absence of any non-speculative evidence of juror misconduct, the district court's decision not to recall the jurors or invade their privacy three years after the verdict was not a manifest abuse of discretion.

Similarly, it was not a manifest abuse of discretion for the district court to deny, without a hearing, Trenkler's motion for a new trial based on newly-discovered evidence, where Trenkler's conjectural claim that the government failed to disclose a cooperation agreement with a government witness, David Lindholm, was rebutted not only by the trial testimony of Lindholm that he had no agreement with the government, but where the government also submitted an affidavit of Assistant U.S. Attorney Paul Kelly explicitly stating that there was no agreement between Lindholm and the government at the time of the trial.

Finally, the district court did not manifestly abuse its discretion in denying Trenkler's motion for a new trial based on the allegedly newly-discovered evidence in the form of the Phillips testimony. Dr. Phillips' opinion that Shay Jr. suffered from a pathological illness that caused him to falsely incriminate himself was not newly discovered evidence entitling him to a new trial

where Trenkler's counsel acknowledged that he was aware of the Phillips testimony prior to Trenkler's trial but chose not to offer it because of his opinion that the trial court would exclude it. Trenkler's failure to at least offer the testimony and make an offer of proof as to its relevance and admissibility in this case constituted a waiver of this issue below. Moreover, Trenkler's counsel acknowledged, in his opening statement, essentially all of the incriminating statements made by Shay Jr. when counsel conceded that Shay Jr. had been found guilty of participating in the bombing.

I.

THE DISTRICT COURT DID NOT MANIFESTLY  
ABUSE ITS DISCRETION IN DENYING, WITHOUT  
A HEARING, TRENKLER'S MOTION FOR A NEW  
TRIAL BASED ON HIS SPECULATIVE  
ALLEGATION OF POSSIBLE JUROR MISCONDUCT

Trenkler argues on appeal that the district court manifestly abused its discretion in denying, without a hearing, his motion for a new trial based on possible juror misconduct (Brief at 13-17). As set forth in more detail below, the government respectfully submits that the district court did not manifestly abuse its discretion in denying Trenkler's motion without a hearing, given that the claim of possible juror misconduct was non-credible, speculative and, even if Shea's claims were true, fell far short of establishing sufficient evidence of actual juror

misconduct prejudicial to Trenkler to warrant further inquiry.<sup>10</sup>

The granting of a new trial is an extraordinary remedy. "Courts disfavor new trials, and exercise great caution in granting them." See United States v. Troatman, 814 F.2d 1428, 1455 (10th Cir. 1987). The decision as to whether a new trial is warranted is committed to the sound discretion of the district court. United States v. Soto-Alvarez, 958 F.2d 473, 479 (1st Cir. 1992). New trials are seldom granted, Soto-Alvarez, 958 F.2d at 479, and denial of a motion for such extraordinary relief is reversible only for "manifest abuse of discretion". United States v. Tilbot, 72 F.3d 965, 972 (1st Cir. 1995); United States v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980).

As stated by this Court in United States v. McAndrews, 12 F.3d 273, 280 (1st Cir. 1993), a case explicitly relied upon by the district court in denying Trenkler's motion:

A district court need not grant an evidentiary

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<sup>10</sup> In the district court, the parties apparently implicitly assumed that an allegation of juror misconduct would constitute "newly-discovered evidence" permitting application of Fed. R. Crim. P. Rule 33's two-year limitation period. This Court has not yet ruled that claims of jury misconduct fall within this category, raising the possibility that Fed. R. Crim. P. Rule 33's seven-day limitation period for non-newly-discovered evidence applies. Compare United States v. Medina, 118 F.3d 371, 373 (5th Cir. 1997); and United States v. Smith, 62 F.3d 641, 650 (4th Cir. 1995). This Court need not resolve this jurisdictional issue, however, because Trenkler's claim fails on the merits. See Norton v. Matthews, 427 U.S. 524, 532 (1976) (jurisdictional question may be passed over where ruling on merits would lead to same result).

hearing on a motion merely because a defendant's hopes spring eternal or because a defendant wishes to mount a fishing expedition . . . . [A] criminal defendant who seeks an evidentiary hearing on a motion must, at the very least, carry an entry-level burden by making 'a sufficient threshold showing that material facts' [are] in doubt or in dispute.' (Citations omitted).

With particular respect to any claim of juror misconduct based on nondisclosure during voir dire, a movant must meet the exacting requirements of demonstrating both (1) failure to give an honest answer; and (2) actual prejudice or bias to a defendant. As this Court has stated:

A party seeking a new trial because of nondisclosure by a juror during voir dire must do more than raise a speculative allegation that the juror's possible bias may have influenced the outcome of the trial. Rather, "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (further citations omitted) (1984). Further, we have held that a party seeking a new trial based on nondisclosure by a juror must "demonstrate actual prejudice or bias." United States v. Aponte-Suarez, 905 F.2d 483, 492 (1st Cir. 1990); Rivera-Sola, 713 F.2d at 874. This "burden of proof must be sustained not as a matter of speculation, but as a demonstrable reality." United States v. Vargas, 606 F.2d 341, 344 (1st Cir. 1979), quoting United States v. Whiting, 538 F.2d 220, 223 (8th Cir. 1976).

Dall v. Coffin, 970 F.2d 964, 969 (1st Cir. 1992) (emphasis supplied); see also United States v. Leach, 427 F.2d 1107, 1111 (1st Cir. 1970) (discussing applicable standard of review).

Under First Circuit law, "the burden is on a defendant to

provide at least a modicum of evidence sufficient to warrant an intrusion into the sphere of jury privacy." Neron v. Tierney, 841 F.2d 1197, 1205 (1st Cir. 1988). While granting a post-verdict hearing remains within the sound discretion of the court, such an extraordinary request "presumes a showing sufficient to undergird genuine doubts about impartiality." Id. At 1202.<sup>11</sup> More particularly, the First Circuit has restated the balance to be struck by trial courts in ruling upon such a motion as follows:

We have found no case which purports to lay down an ironclad rule necessitating post-trial interrogation upon demand of every juror in every circumstance. The Constitution, as we read it, imposes no such across the board requirement . . . . There are at one extreme situations where the evidence shows the well to be so heavily poisoned that the inference of taint is inescapable; in such straitened circumstances,

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<sup>11</sup> The Eleventh Circuit recently stated the threshold test for post-verdict hearing as follows:

No per se rule requires the trial court to investigate the internal workings of the jury whenever a defendant asserts juror misconduct. . . . "The duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality." (Citation omitted). To justify a post-trial hearing involving the trial jurors, the defendant must do more than speculate; he must show "clear, strong substantial and incontrovertible evidence. . . that a specific, nonspeculative impropriety has occurred."

United States v. Cuthel, 903 F.2d 1381, 1383 (11th Cir. 1990) (emphasis supplied) (district court's denial of post-verdict interrogation of juror upheld).

interrogating the juror would be an exercise in superfluity. On the other hand, there are situations where the evidence of impropriety may be so slight or conjectural as not to support any reasonable inference of prejudice, bias or misconduct. At this extremity, as at the other, interviewing the juror will not significantly decrease the risk of error.

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At the termini, . . . , the presumptive value [of direct juror inquiry] is low. The need for post-verdict interviewing is dubious at best, and ultimately depends on the nature and weight of the independent evidence underbracing the claim and on the trial justice's sound discretion.

Neron v. Tierney, 841 F.2d at 1202-03 (emphasis supplied). In Neron, this Court reversed a federal district court's finding of a due process violation, and upheld the state court's refusal to conduct a post-verdict juror interview, where a defendant's son testified that he had had a romantic relationship with one of the deliberating jurors who had not disclosed that she knew the defendant during voir dire. This Court characterized the defendant's claim that the juror would have recognized and remembered the defendant merely because she may have met him once while dating his son for a year some fourteen or fifteen months prior to trial as: "built not on any solid evidentiary foundation but on the shifting sands of conjecture, speculation and surmise." Id. at 1203.

The public's interests in avoidance of juror harassment and finality of verdicts militate heavily against post-verdict

interrogation of jurors and may be deemed outweighed only in the most limited circumstances. In a Third Circuit case, upholding the district court's denial of request for a hearing such as that sought here, the appeals court:

recognize[d] that sometimes judges are tempted to order hearings to put matters to rest even if strictly not required . . . . But this is not one of those circumstances for there are compelling reasons not to hold a hearing involving the recalling of discharged jurors.

United States v. Gilsean, 949 F.2d 90, 97 (3d Cir. 1991) (emphasis supplied). The trial jurors in Gilsean, a RICO case, had been said to have been exposed to information about failed plea discussions involving one of the defendants. The district court denied the request for a hearing; in affirming that decision, the Third Circuit ruled as follows:

Jurors who complete their service should rarely, if at all, be recalled for proceedings such as those appellants propose here. It is qualitatively a different thing to conduct a voir dire during an ongoing proceeding at which the jury is part of the adjudicative process than to recall a jury months or years later for that purpose. It is useful in this regard to recall the following germane words of the Supreme Court:

There is little doubt that post-verdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.

Gilsenan, 949 F.2d at 98, quoting Tanner v. United States, 483 U.S. 107, 120 (1987).

The corresponding interests in avoidance of juror harassment and certainty of verdicts, voiced by the U.S. Supreme Court in Tanner, obtained equally to the circumstances in this case and compelled the same result. As this Court reasoned in Neron, "the evidence of impropriety" here is "so . . . conjectural as not to support any reasonable inference of prejudice, bias or misconduct."

First, the claim of potential juror misconduct was advanced by Shea, a former admitted drug dealer and criminal associate of Trenkler's, whose credibility was suspect given her own criminal past, her pending drug charges, her bias against the government, including her stated intention to raise this claim to "pay people back," and her bias in favor of Trenkler, who had built a bomb for her in the past. Second, Shea contradicted her initial claim that "Ramona" Walsh was present when Trenkler sold cocaine when she stated, in a second interview, that she had never seen Walsh use drugs or purchase drugs from Trenkler or anyone else and that she had "no memory" as to whether Walsh was present some twelve years previously when Trenkler purportedly sold drugs to Tolmie at Shea's house. Shea also stated that it was "unlikely" that Trenkler recognized Walsh during trial because: "Trenkler didn't know or have any dealings with Ramona back then." Shea then contradicted

these statements ten days later when she stated that she could recall Walsh being present when Trenkler sold cocaine at Shea's house on two or three occasions.

The district court was clearly entitled to reject Shea's claims outright given her prior criminal history, her current bias against the government and her dealings and bias in favor of Trenkler and further given her self-contradictory claims as to whether Walsh had even met Trenkler twelve years earlier. Moreover, even assuming that Walsh was indeed present on one or more occasions twelve years prior to trial during two or three passing drug exchanges involving Trenkler, it would be pure speculation to then conclude: 1) that Walsh ever knew Trenkler by name; 2) that she recognized him twelve years later based on any such brief encounters; and 3) that she shared this knowledge with one or more other deliberating jurors. Moreover, Shea herself acknowledged that she was unable to say that Walsh knew Trenkler by name or sight at the time of the trial and, indeed, based on the evidence before the court, a conclusion that she did would be contrary to common sense.

Furthermore, the court's decision to reject Shea's claims without a hearing was buttressed by the statements of Tolmie who flatly contradicted Shea on every relevant point. Tolmie, who forthrightly acknowledged her own prior drug experience, and who

had no evident bias for or against any party, stated that she knew Walsh and had bought drugs for her in the past. However, she further stated that she had never taken Walsh to Shea's house and that she herself had never met Trenkler at Shea's house.

Finally, even assuming, arguendo, that Walsh indeed knew Trenkler at the time of voir dire and failed to disclose that knowledge, Walsh's utter lack of participation in deliberations precludes any claim of actual prejudice or bias to Trenkler absent any showing that she disclosed evidence of Trenkler's drug dealing to other jurors prior to jury deliberations. Of course, neither Shea nor anyone else advanced such a claim in support of Trenkler's motion and it is significant that no juror ever stepped forward either during the trial or afterwards to claim that Walsh had made any such comments. The burden, therefore, of establishing the "demonstrable reality" of prejudice or bias in these circumstances was not, a fortiori, met.<sup>12</sup>

Accordingly, the district court clearly did not manifestly

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<sup>12</sup> Finally, even if Trenkler were to now allege that he and Walsh knew each other at the time of voir dire, he would be deemed to have waived any claim of juror bias allegedly arising therefrom. See, e.g., United States v. Uribe, 890 F.2d 554, 560 (1st Cir. 1989) ("A sentient defendant, knowledgeable of a possible claim of juror bias, waives the claim if he elects not to raise it promptly"). Of course, the fact that Trenkler failed to raise such a claim buttresses the conclusion that either Trenkler never met Walsh or, if he did, that the meeting was so fleeting as to have been forgotten by both of them.

abuse its discretion in denying Trenkler's motion for a new trial based on potential juror misconduct without a hearing, given that Shea's claims were self-contradictory, biased, non-credible, contradicted by other credible evidence and, even if true, fell far short of establishing actual, non-speculative, juror misconduct.

The cases relied upon by Trenkler are unavailing. As Trenkler himself concedes, the district court has broad discretion to determine the type of investigation which must be mounted when a colorable claim of juror misconduct has been made. (Trenkler Brief at 13, citing United States v. Boylan, 898 F.2d 230, 258 (1st Cir. 1990). Boylan is clearly distinguishable. In Boylan, a juror telephoned defense counsel three days after the verdict and informed him that the jurors had discussed the case during the trial and were predisposed to find the defendant guilty before deliberations even began. The court interviewed the juror who initially raised the claim and then all of the other jurors, including the alternates, in the presence of counsel. In approving the procedure, this Court held that: "the inquiry was commensurate to the gravity of the charge and the seriousness of the task." Id. at 259. In contrast to Boylan, where there was a direct claim by an actual juror that misconduct had occurred in the jury room, here, the only claim was mere speculation by a friend of the defendant, who had contradicted herself and who was flatly

contradicted by a more credible source, raised years after the verdict, under questionable circumstances, that an alternate juror may have fleetingly been present with the defendant during several drug deals some twelve years prior to trial. The district court below was clearly entitled to engage in a less searching inquiry than that which occurred in Boylan.

The other cases relied upon by Trenkler are equally unavailing. In United States v. Pion, 25 F.3d 18, 21 (1st Cir. 1994), where the court conducted an in camera juror interview to resolve a report of improper juror contact, the claim apparently arose during trial, where concerns regarding the finality of verdict and juror privacy are not of such paramount concern as in a post-verdict setting. Smith v. Philips, 455 U.S. 209, 212 (1982), involved direct evidence presented by the prosecuting District Attorney's Office that a juror had applied for employment as an investigator with the office during trial and that the prosecutors had learned of the juror's application during trial. The claim of juror bias in that case obviously was far more direct and compelling than that advanced in the instant case and warranted a more searching inquiry. In United States v. Gaston-Brito, 64 F.3d 11 (1st Cir. 1995), this Court remanded the case for a hearing where, during trial, defense counsel immediately brought to the trial court's attention his observation that the government case

agent, sitting at counsel table, had gestured toward the defendant when a witness was asked who had taken money from his wife, and where the trial court had denied defense counsel's motion for a mistrial without any further inquiry. The court noted that while the court has "broad, though not unlimited, discretion to determine the extent and nature of its inquiry into allegations of juror bias," citing Corbin, 590 F.2d at 400: "The circumstances of this case invoke a more stringent standard, however, because the appellants alleged an ex parte communication by a government agent with jurors." Id. at 13. There was no such claim warranting a more stringent standard in this case.

Finally, United States v. Howard, 506 F.2d 865, 866 (5th Cir. 1975), involved an affidavit submitted by one of the deliberating jurors alleging that, during jury deliberations, one juror "stated that the defendant had been in trouble two or three times" and that this fact was used to pressure the affiant and another juror to vote guilty; while Downey v. Peyton, 451 F.2d 236 (4th Cir. 1971), involved testimony of jurors at the defendant's coram nobis hearing that the defendant's rumored beating of a jail guard and his wife's defense testimony in another criminal case were discussed during jury deliberations, and that the son of the beaten guard was one of the jurors. Id. at 240. Obviously, the claim advanced by Trenkler was far less direct and compelling than that in Howard and Downey.

Trenkler's criticism of the court for relying upon a government agent's report of interview with Shea and Tolmie is also misplaced. (Brief at 15). Clearly, where the government was the party who first brought Shea's claim of possible juror misconduct to the attention of the district court and defense counsel, and where the ATF agent prepared a written report memorializing his conversations with Shea and Tolmie, which the agent would reasonably have anticipated would be disclosed and subject to attack if incorrect, the court was entitled to rely upon the good faith of the agent in accurately recording the statements of Shea and Tolmie, particularly where Trenkler failed to present any evidence contradicting the accuracy of the report and, indeed, relied entirely upon the report in support of his motion.

Accordingly, the lack of any credible factual predicate to support the claim of potential juror misconduct, combined with the additional, substantial policy concerns of finality, certainty of verdicts and avoidance of jury harassment, all militated firmly against any juror inquiry in these circumstances. Accordingly, the district court did not manifestly abuse its discretion in denying, without a hearing, Trenkler's motion for a new trial based on potential juror misconduct.<sup>13</sup>

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<sup>13</sup> The fact that, in her voir dire, Walsh forthrightly acknowledged knowing Thomas Shay, Jr., Donna Shea and another potential witnesses was further evidence that Walsh did not

II.

THE DISTRICT COURT DID NOT MANIFESTLY  
ABUSE ITS DISCRETION IN DENYING  
TRENKLER'S MOTION FOR A NEW TRIAL  
BASED ON NEWLY-DISCOVERED EVIDENCE

Trenkler contends that the district court manifestly abused its discretion in denying, without an evidentiary hearing, his motion for a new trial based on allegedly newly-discovered evidence of an agreement between David Lindholm and the government that was not disclosed prior to trial. (Brief at 19-23). Trenkler also contends that the district court manifestly abused its discretion in denying, without a hearing, his motion for a new trial on the ground that the testimony of Dr. Phillips regarding Shay Jr.'s alleged psychiatric condition was newly-discovered evidence warranting a new trial. (Brief at 23-27). As set forth below, the district court was well within its discretion in denying Trenkler's motion for a new trial based on newly-discovered evidence.

A motion for a new trial based on newly discovered evidence will not be allowed unless the movant establishes that the evidence was (1) unknown or unavailable at the time of trial, (2) despite due diligence, (3) material, and (4) likely to result in an acquittal upon retrial. Tibolt, 72 F.3d at 971; United States v.

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intentionally lie when she did not acknowledge knowing Trenkler. (App. 541, 545-546). Indeed, at one point during voir dire, the court was prompted to note: "Ms. Walsh? You know everybody." (App. 546).

Ortiz, 23 F.3d 21, 27 (1st Cir. 1994); United States v. Natanel, 938 F.2d 302, 313 (1st Cir. 1991).

1. There Was Insufficient Evidence of Any Government Agreement With Lindholm to Warrant A Hearing.

Trenkler's sole evidence in support of his claim that the government had an undisclosed agreement with Lindholm which it failed to disclose prior to trial was the fact that, several months following Trenkler's trial, the government submitted a motion on behalf of Lindholm requesting a downward departure in his sentence. In response to this claim, the government called the court's attention to the fact that, at trial, Lindholm stated, under oath and without equivocation, that he did not have any agreement whatsoever with the government. The government also submitted the affidavit of Assistant U.S. Attorney Paul Kelly, who also unequivocally stated that the government had no agreement whatsoever with Lindholm at the time of Lindholm's trial testimony.

Kelly also set out for the court the chronology of events that occurred after trial, which resulted in Lindholm requesting that the government file a motion for a reduction of his sentence based on his cooperation in the Trenkler case. Attached to Kelly's affidavit was a letter from Lindholm's counsel also acknowledging that the government had no agreement with Lindholm at the time of trial and further acknowledging that the government had no legal obligation to file any motion on Lindholm's behalf. Also attached

to that affidavit was a letter from Lindholm, previously submitted to the judge who sentenced him, explaining the reasons that had led him to initially offer his testimony at the Trenkler trial without a plea agreement and then, based on the harassment and threats which he had suffered in jail as a result of his testimony, to request a reduction in his sentence following the trial. The government also noted that its motion for a downward departure was not filed under seal, thereby rebutting any claim of a secret deal, and that the government explicitly called the sentencing judge's attention to the fact that not only did it have no cooperation agreement with Lindholm but that Lindholm had explicitly stated at Trenkler's trial that he would not subsequently request that a motion be filed on his behalf.

Based on this evidence, which included the affidavit of an Assistant U.S. Attorney explicitly and unequivocally stating that "there was no agreement of any kind between Lindholm and the government at the time he testified at trial," the district court was entitled to conclude, not just that Trenkler had failed to sustain his burden of producing non-speculative evidence of such an undisclosed cooperation agreement, but that all credible evidence demonstrated that there was no such deal. Accordingly, the court did not manifestly abuse its discretion in denying this portion of Trenkler's motion without an evidentiary hearing.

Trenkler contends that a lesser standard of review applies when there is an allegation that a witness perjured himself (Brief at 20), and that a new trial should be granted if the court is "reasonably well-satisfied" that the testimony was false and that, without the false testimony, the jury "might have reached a different result," citing Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1928).<sup>14</sup> However, given the district court's explicit finding, based on the government's "detailed written proffer" which was "left unchallenged by the Defendant" that the "record is devoid of any evidence to suggest that Lindholm's early release was the result of anything other than an arrangement made subsequent to the trial," it was clear that there was no perjury and that, in any event, under any standard of review the district court did not abuse its discretion in denying Trenkler's motion for a new trial without a hearing.

The cases cited by Trenkler are inapposite. In United States v. Douglas, 874 F.2d 1145 (7th Cir. 1989), the district court held a hearing to address a motion for a new trial based upon a claim that a government witness had perjured himself at trial when he denied any agreement with the government. In support of the

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<sup>14</sup> See also, United States v. Stern, 13 F.3d 489, 495 (1st Cir. 1994) and United States v. Carbone, 880 F.2d 1500 (1st Cir. 1989) (in which Court stated that the "applicable analysis is arguably the test described in Larrison" when defendant claims testimony was perjured).

motion, defense counsel submitted an affidavit stating that, after trial, the witness admitted to the defense counsel that he had, in fact, been promised immunity by the government. In the instant case, in contrast, Lindholm has repeatedly denied having an agreement with the government and Trenkler has failed to present anything more than mere surmise to support his claim.<sup>15</sup>

In United States v. Quimette, 798 F.2d 47 (2nd Cir. 1986), the Second Circuit held that it was error for the district court to dismiss a defendant's motion for a new trial without a hearing where the defendant submitted a sworn affidavit of an exculpatory eyewitness who averred that the police had intimidated him into leaving the jurisdiction before he could testify on behalf of the defendant at trial. Again, there was no such direct, sworn evidence submitted by Trenkler in this case. In United States v. Kelly, 790 F.2d 130 (D.C. Cir. 1986), the court held that the district court abused its discretion in denying defendant's motion for a new trial without a hearing where defendant supported his motion with an affidavit from a former FBI confidential informant who alleged that he had obtained access to the defendant's office under false pretense, obtained significant information regarding

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<sup>15</sup> United States v. Saade, 652 F.2d 1126, 1134-1135 (1st Cir. 1981) also fails to support defendant's claim that a hearing should have been held given that, in that case, this Court upheld the district court's denial, without a hearing, of a motion to dismiss an information based on selective prosecution.

the defendant's trial strategy and stolen certain legal documents from the defendant's office, and where the prosecutors responded by filing an opposition denying that the informant had been acting as a government agent and denying that they had seen the stolen papers, but did not submit any affidavits to support their opposition. The Court stated: "In the absence of countervailing sworn evidence from the government, Kelly's allegations are -- as explained below -- sufficient to warrant further factual inquiry." Id. At 134. In contrast, Trenkler submitted no sworn affidavit directly supporting a claim of a secret, undisclosed agreement, while the government submitted the sworn affidavit of Assistant U.S. Attorney Kelly unequivocally denying any such agreement.<sup>16</sup>

Accordingly, the court did not manifestly abuse its discretion in denying Trenkler's motion without a hearing given that there was no credible, non-speculative claim of newly-discovered evidence of any undisclosed agreement advanced by Trenkler below.

2. The Proffered Testimony of Dr. Phillips was not Newly-Discovered Evidence.

Trenkler's claim that Dr. Phillips' testimony regarding Shay Jr.'s alleged condition of "psuedologia fantastica" constituted

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<sup>16</sup> Finally, United States v. Espinosa-Hernandez, 918 F.2d 911 (11th Cir. 1990), a case cited by Trenkler without comment, is clearly distinguishable given that it involved a motion for a new trial raised after the government case agent who had been a witness at trial was indicted by a federal grand jury for making false statements on a federal job application.

"newly-discovered" evidence must also be rejected.

Trenkler does not dispute the fact that his trial counsel was aware of Dr. Phillips' opinion at the time of the Trenkler trial. [See affidavit of Attorney Terry Segal, App. 305 ("Before Trenkler's trial began, I considered calling Dr. Robert Phillips as an expert psychiatric witness to testify that Shay Jr.'s statements were the unreliable product of a recognized mental disorder known as "pseudologia fantastica")]. He claims, rather, that his trial attorney made a decision not to proffer that testimony at Trenkler's trial because the district court had previously excluded it at Shea's trial. App.305. Trenkler contends, accordingly, that this Court's Shea opinion remanding the issue of the testimony to the district court for further consideration rendered the Phillips testimony "newly-discovered" evidence, i.e., evidence unavailable at the time of the trial.

Trenkler was, of course, required to offer the testimony at his trial to preserve the issue for appellate review. He was not excused from making an offer of proof simply because the district court excluded the evidence at Shay Jr.'s trial; the requirement of making a offer (or objection) ensures both that the district court has the opportunity to consider the appropriateness of the proposed testimony in the context of the case before it, and that the appellate court has a full record upon which to reach its

decision.<sup>17</sup> Trenkler failed to make the requisite offer, and he failed to raise the issue on appeal (when, as a result of the forfeiture, the standard of review would have been "plain error"). That failure is a procedural default. See, e.g., United States v. Hernandez, 995 F.2d 307, 312 (1st Cir. 1993) (failure to make proffer results in plain error review); see generally United States v. Olano, 507 U.S. 725 (1993).

A defendant may attempt to excuse a procedural default such as the one which occurred here through a claim of ineffective assistance of counsel under 28 U.S.C. §2255.<sup>18</sup> Such a petition might spawn an inquiry into counsel's reasons for failing to present the issue. Although in support of Trenkler's new trial motion, Attorney Segal stated that he decided not to seek the introduction of Dr. Phillips' testimony "[b]ecause of this Court's prior exclusion," full development of the issue in the context of the factual §2255 inquiry may have revealed that Attorney Segal also questioned the admissibility of the evidence, for example, its

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<sup>17</sup> As a theoretical matter, at least, the district court may have reached a different result in Trenkler's case. With the benefit of prior counsel's experience, Trenkler may have pointed out the "errors" in the district court's reasoning at the time of the Shay trial. Moreover, the district court's weighing of factors may have been different.

<sup>18</sup> A claim of ineffective assistance of counsel is not "newly discovered evidence" within the meaning of FRCP 33. United States v. Lema, 909 F.2d 561, 565 (1st Cir. 1990).

scientific foundation. Furthermore, a developed record may have revealed that Attorney Segal decided that it would be wiser strategically to allow the introduction of Shay's admissions and blame Shay for the bombing, than to argue that Shay's statements were unreliable and therefore a conspiracy between Shay and Trenkler could not be proved. Lema, 987 F.2d at 54 (noting that "decision whether to call a particular witness is almost always strategic"). Recognition of an ineffective-assistance-of-counsel claim also would require a showing prejudice which, under §2255, is a considerable hurdle.

The new trial claim may be a novel attempt at circumventing the procedural default and the rigors of a §2255 petition. But, it must fail. The new trial motion is not a mechanism for asserting claims forfeited during the course of a trial; otherwise, principles of finality and appellate review would be wholly defeated. At best, claims concerning something other than "newly-discovered evidence" made within the requisite seven-day period are subject to "plain error" review. Cf. United States v. Walsh, 75 F.3d 1, 6 and n.2 (1st Cir. 1996) (defendant's claim that juror should not have been excused raised by defendant in post-verdict motion for new trial subject to plain error review; "the usual rule is that an objection must be made known at the time that the court is making its decision to act"). Compare United States v.

Chandler, 996 F.2d 1073, 1102 (11th Cir. 1993) (even if new trial motion is filed within seven days, claims raised therein may be considered waived and not reviewable at all). Claims of "newly-discovered evidence" which could have been, but were not, timely brought at trial are barred completely under the first two prongs of the "new trial" analysis. Trenkler's so-called "newly-discovered evidence" claim is really a complaint that the court should have allowed testimony to be introduced sua sponte (that is, it is really a claim regarding the district court's "failure" to rule in the defendant's favor on a piece of evidence); at best, under Walsh, FRCP 33's availability was limited to seven days after verdict and the claim reviewable only for plain error. In short, FRCP 33 does not revive Trenkler's procedural default.

Trenkler's claim also fails even assuming, for the sake of argument, that a new trial analysis is appropriate. Dr. Phillips' testimony did not suddenly become available by virtue of this Court's Shay opinion. The testimony was known to Trenkler at the time of trial; most importantly, Trenkler's opportunity to proffer the testimony to the district court was known to and available to Trenkler at the time of trial. This case, then, is unlike the situation in the recently-decided United States v. Montilla-Rivera, 115 F.3d 1060, 1066 (1st Cir. 1997), in which the Court held that two codefendants' testimony, previously "unavailable" because they

exercised their Fifth Amendment privileges, became available after they were sentenced. Here, Dr. Phillips' testimony was always "available" and, at the least "available" to proffer to the court; Trenkler simply chose not to do so. For similar reasons, Trenkler cannot establish that he acted with "due diligence"--the second prong of the new trial test--in getting the testimony before the court. In Montilla-Rivera, for example, the trial lawyer filed a motion to have the Marshal Service produce the witnesses. Here, Trenkler did nothing to have the court rule on the admissibility of the testimony in the context of his case.

Trenkler's new trial claim also fails on the last two prongs. Indeed, he does not even attempt to show in his brief why the testimony would be admissible. He simply assumes--wrongly--that it will be. Aside from Trenkler's argument that he would have proffered Dr. Phillips' testimony if he had known of the result in the Shay case, there are no facts in the record of this case to resolve the questions of admissibility which had not been resolved in Shay. This dearth of information should preclude Trenkler's claim that the evidence was material and would result in an acquittal. Cf. United States v. Olivier-Diaz, 13 F.3d 1, 5 (1st Cir. 1993) ("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' unless the

desired factual finding is the only one rationally supported by the record below." ). Moreover, although the Shay Court found that the district court erred in ruling as it did, it explicitly did not find that Dr. Phillips' testimony should have been admitted at trial. Rather, the matter was remanded to the district court to consider a number of questions regarding the admissibility of the testimony, including whether "pseudologia fantastica" is in fact a diagnosable mental disorder. App. 412-416; App. 410-411. Thus, the issue of admissibility of that testimony is still undecided in Shay and, even if it was decided, would not necessarily be dispositive of the question of its admissibility in this case.

Finally, Trenkler's trial counsel admitted in his opening statement, even before the court ruled on the admissibility of Shay Jr.'s statements, the key facts contained in Shay Jr.'s admissions. Counsel stated:

.... It [the evidence] will show Alfred Trenkler knew Thomas Shay, Jr. a bizzare, gay, male who had a love-hate relationship with his father, Thomas Shay, Sr. (10/26:27);

There'll be evidence about Thomas Shay, Jr., Mr. Kelly referred to him often in this opening. It's clear that he wanted to kill his father. He was convicted of doing that. An (sic) it's also clear that he knew Alfred Trenkler. That's not in dispute in this case, ladies and gentlemen, but I submit to you, there will be no, and I repeat the word, no evidence that Alfred Trenkler was involved in any way, shape or manner with any scheme of Thomas Shay to get rid of his father. (11/10:35).

While Trenkler may now argue that trial counsel's decision to concede Shay Jr.'s role in the bombing was based on the prior ruling regarding the Phillips testimony in the Shay case, it may alternatively have been based on a trial strategy that assumed that Shay Jr. was involved in the bombing and that his admissions to that effect were true, but which took the position that Trenkler had nothing to do with the bombing. Moreover, Shay Jr.'s statements did not directly implicate Trenkler in the bombing and extensive evidence at trial, independent of these statements, linked Trenkler to Shay Jr. and established Trenkler's bomb-making expertise. Thus, Shay Jr.'s statements played a far less central role in Trenkler's case and Trenkler has failed to carry his burden of establishing that exclusion of Dr. Phillips' testimony, even if offered below, would have been error, far less reversible error.

CONCLUSION

For the foregoing reasons, this Court should affirm the orders and conviction below.

Respectfully submitted,

DONALD K. STERN  
United States Attorney

By:

  
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KEVIN P. MCGRATH  
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

Suffolk, ss.

Boston, Massachusetts  
September 17, 1997

I, Kevin P. McGRATH , Assistant U.S. Attorney, do hereby certify that I have served two copies of the foregoing, by first-class mail, to Morris M. Goldings and Amy J. Axelrod, Esquires, Mahoney, Hawkes & Goldings, The Heritage On The Garden, 75 Park Plaza, Boston, Massachusetts 02116.

  
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