

**STATEMENT OF FACTS
AND
MEMORANDUM OF LAW**

On November 29, 1993, Alfred W. Trenkler was convicted of conspiracy under 18 USC 371, receipt of explosive materials under 18 USC 844d), and attempted malicious destruction of property by means of an explosive under 18 USC 844(i), after a jury trial, for his role in creating a pipe bomb that resulted in the death of a police officer and the serious injury of another.

Petitioner was represented throughout the trial proceedings by Boston attorney, Terry Philip Segal, Esq., 210 Commercial Street., Boston, Massachusetts 02109. On direct appeal of the conviction and life sentence, Petitioner was represented by Morris M. Goldings, MAHONEY, HAWKES & GOLDINGS, 75 Park Plaza, Boston, Massachusetts, 02116.

In the direct appeal, counsel raised several issues. The First Circuit affirmed the conviction holding that it was harmless error to admit evidence from the ATF database to establish the identity of the bomber. The Court of Appeals held that the introduction of this evidence was harmless because it had before it the testimony of William David Lindholm that the defendant had built the bomb, and also upon the "out of court" statements of alleged co-conspirator, Thomas Shay Jr.

On June 22, 1995, the First Circuit Court of Appeals rendered a decision in 93-2141, USA VS THOMAS A SHAY, 57 F.3d 126, 134 (1st Cir 1995) in which the Court of Appeals reversed the district court's decision to exclude the expert testimony of Dr. Robert Phillips, who was prepared to testify that incriminating statements made by Shay in the wake of the bombing were consistent with a mental disorder called "pseudologia fantastica". That mental disorder compelled Shay to spin out webs of lies in order to attract attention to himself. The Court held that expert testimony could not be excluded solely because it concerned credibility.

The government appealed the SHAY decision, and on April 1, 1998, the Court of Appeals affirmed the Decision of the District Court to admit the testimony of Dr. Phillips and ordered a new trial for Shay. Shay subsequently entered into a plea of guilty for a lesser sentence.

The Court of Appeals for the First Circuit took further notice of its' decision in the SHAY case, when it stated in the denial of the direct appeal of Petitioner, Alfred W. Trenkler by stating:

"The result of Shay Jr.'s appeal are relevant to defendant Trenkler because, on the basis of the district court's original exclusion of the statements in Shay Jr.'s trial, defendant's trial counsel concluded that it would be futile to seek to introduce the doctor's testimony in defendant's trial and thus did not attempt to do so.

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Counsel for Petitioner filed a motion for a new trial, claiming as one error that the decision in the SHAY case made the expert testimony of Dr. Phillips "newly discovered evidence". In a written opinion on January 6, 1998, the Court of Appeals rejected the argument that the testimony of Dr. Phillips constituted "newly discovered evidence". The Court of Appeals offered several reasons why trial counsel may not have attempted to introduce the testimony.

Petitioner, Alfred W. Trenkler, contends that the failure of trial counsel, Terry Segal, to attempt to introduce the expert testimony of Dr. Phillips was an act of ineffective assistance of counsel, which denied him his constitutional rights under the Sixth Amendment. Further, this act of ineffectiveness prejudiced Trenkler as the jury may well have been influenced to reject the statements of SHAY if they would have known of the mental disorder from which SHAY suffered and the effects of that disorder upon his statements.¹

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Petitioner was barred from alleging ineffective assistance of counsel prior to this juncture as a record had not been made in the District Court regarding the facts. See: US V MARTINEZ-MARTINEZ, 69 F.3d 1215, 1225 (1st Cir 1995), US V MALA, 7 F.3d 1058 (1st Cir 1993).

ISSUE ONE PETITIONERS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT WAS DENIED BY THE ACTIONS OF HIS TRIAL ATTORNEY.

After remand by the First Circuit, in UNITED STATES VS THOMAS A. SHAY, 57 F.3d 126, Judge D.J. Zobel issued a Memorandum of Decision on September 24, 1997 relative to the admissibility of the expert testimony of Dr. Robert Phillips, which had been proffered by Shay to explain statements made by him to police, press, and others. This Court ruled that the testimony is admissible.

At the time of Petitioner's trial, the testimony of Dr. Phillips was available to counsel for Petitioner. This testimony, if presented to the jury, would have explained many of Shay's statements and would have deprecated them. The jury may well have relied upon Shay's statements to convict Trenkler. Trial counsel may well have assumed that because the Trial Judge refused to admit the testimony of Dr. Phillips in the Shay trial, he would not admit it in the trial of Trenkler. No competent attorney should have made this assumption. Subsequent to the decision by the Court of Appeals, the District Judge admitted the testimony of Dr. Phillips. She may well have done so in the Trenkler trial, if Trenkler's trial attorney would have offered the testimony. Trial counsel assumption that the testimony would not be admissible was not based upon any fact and deprived his client of the best defense in his case.

Alfred Trenkler had the constitutional right to be represented by competent counsel. The failure to offer the testimony of Dr. Phillips, on the assumption that it would not be admitted, was an

act of ineffectiveness that prejudiced Trenkler. The jury heard of many incriminating statements made by Shay. The testimony of Dr. Phillips would have explained away these statements and reduced the credibility of Shay. The verdict may well have been different and the outcome of the trial different, had Trenkler's trial attorney not made the "assumption" that the Trial Judge would not admit the testimony. In light of the decision of the Court of Appeals and the verdict, the prejudice is manifest and this Court should grant Petitioner an evidentiary hearing in order to make a record of the ineffectiveness of trial counsel.

Ineffective-Assistance-of-Counsel Standards

Trenkler claims that Terry Segal's performance at trial was so deficient that it violated his Sixth Amendment right to the effective assistance of counsel. To establish such a violation, Strickland v. Washington, 466 U.S. 668, 687-96 (1984) requires that Trenkler demonstrate (1) that Segals' performance fell below an objective standard of reasonableness and (2) that prejudice resulted.

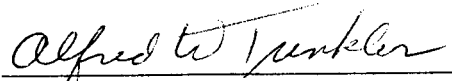
In evaluating Strickland's first component, the Court must review Segals' actions with the strong presumption "that, under the circumstances, the challenged action 'might be considered sound trial strategy'" (id. at 689, quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). Accordingly, Trenkler must show that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance" (id. at 690).

As for the second element--prejudice flowing from Segals' substandard performance--Trenkler must demonstrate that there was a reasonable probability that but for Segals' errors the outcome of the trial would have been different (id. at 694). For that purpose a reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome" (id.). And in that respect the Court's analysis is not limited to outcome determination--it must also contemplate "whether the result

be guided and grant Petitioner an evidentiary hearing on the question of ineffective assistance of counsel.

Finally, Petitioner prays that this Court will grant his petition and find that he received ineffective assistance of trial counsel; vacate the conviction in this case and grant him a new trial.

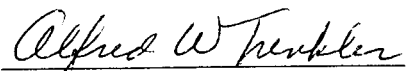
Respectfully submitted,



Alfred W. Trenkler, Pro Se

CERTIFICATE OF SERVICE

I do hereby certify that I have caused a copy of this petition to be served upon the United States Attorney for the District of Massachusetts by mailing him a copy, first class mail, with proper postage prepaid to his office on this 5th day of January 1999.



Alfred W. Trenkler