

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CR 92-10369-Z

ZOBEL, D. J.

UNITED STATES OF AMERICA

v.

ALFRED TRENKLER

Charge by the Court

APPEARANCES:

For the Government:

Paul V. Kelly, Esq., and Frank A. Libby, Jr., Esq.,
Assistant United States Attorneys, Federal Courthouse,
Boston MA 02109.

For the Defendant:

Terry Philip Segal, Esq., Scott Lopez, Esq.,
and Brenda R. Sharton, Esq., SEGAL & FEINBERG,
210 Commercial Street, Boston, MA. 02109.

Courtroom 3
Federal Courthouse
Boston, Massachusetts

November 22, 1993

Computer-Aided Transcription

1 [Whereupon, the jury entered the courtroom.]

2 THE COURT: Please be seated.

3 If there's anyone in the courtroom who wishes to
4 leave during the next half hour, 40 minutes, please do it now
5 because the courtroom will be closed, and you cannot go out or
6 come in.

7 Members of the jury, we traditionally close the
8 courtroom during the charge to the jury, or the instructions
9 to the jury, and --

10 Do we have a verdict slip?

11 [Pause.]

12 It has to do, I think, with the fact that what I have
13 to tell you tends to be complicated, and I want to -- we want
14 to minimize the distractions that, unfortunately, were so
15 apparent during counsels' argument. One of these days, we may
16 even close the courtroom while they argue but, then, their
17 late friends won't be able to hear them.

18

19

20

21

22

23

24

25

Charge to the Jury

1
2 You have now heard all of the witnesses, you have
3 received all of the evidence in the case, the next job will be
4 for you to find the facts and, ultimately, to determine your
5 verdict in this case and, specifically, to determine whether
6 the government has proven the defendant guilty beyond a
7 reasonable doubt on one or more of the charges that it has
8 made against him. In doing that, I ask you, please, to apply
9 the law as I shall give it to you and consider all of these
10 instructions as a whole. Do not pick one here and there and
11 leave the others behind. Do not be concerned about any errors
12 that I might make as I outline the law to you, and please
13 accept the law as I give it to you, even if you think it is
14 unwise. If I am in error, then, there is a higher court that
15 can, and will, reverse my interpretation of the law.

16 But understand, also, that just as I am a judge in
17 this case, so are you. I am the judge of the law, but you are
18 the judges of the facts, and you are the only judges of the
19 facts. There will not be a higher court that will review your
20 judgment of the facts in the case that has been presented to
21 you. It is your sworn duty to find the facts from the
22 evidence in the case, and I will explain to you in a moment
23 what I mean by the evidence, but you must do it in light of
24 the law that I'm about to explain to you.

25 You may not base your verdict on any feelings of bias

1 or prejudice or sympathy or emotion. You may not allow
2 personal feelings either about the defendant or about the
3 nature of this crime to interfere in any way with your duty
4 that you have sworn to uphold. Your verdict must be based
5 entirely on the evidence or the lack of evidence.

6 Now, the evidence in this case really is in three
7 parts. One, are the stipulations that the parties have made.
8 And I explained to you earlier in the case that a stipulation
9 is nothing more than an agreement that certain facts are not
10 in dispute. I don't remember what they all were, except I do
11 remember there was one about the date of the arrest of this
12 defendant, and there may be others. And to the extent that
13 the parties have stipulated that the facts are not in dispute
14 you may, of course, accept those facts that they have agreed
15 are not in dispute.

16 Second, the second part of the evidence are all of
17 the exhibits that have been offered and admitted into
18 evidence: the photographs, pieces of the device, some checks,
19 records, all of the evidence that has been admitted and
20 perhaps even some of the chalks that, we call them chalks,
21 these charts, really, will be with you in the jury room, and
22 you should consider them, use them, review them, and take from
23 them whatever assistance they can give you in reaching your
24 verdict.

25 The third and final part of the evidence is the

1 testimony of all of the witnesses who have appeared before
2 you.

3 Now, with respect to the witnesses' testimony, you
4 will need to decide whether you believe what they told you,
5 either in whole or in part. There is nothing mysterious about
6 it. You do it every day. Somebody tells you something, and
7 you make a judgment, probably almost instinctively, as to
8 whether you believe what the person told you. I ask you to
9 make a similar -- the same judgment with respect to each and
10 every one of the witnesses.

11 I will tell you some of the tests that we usually
12 tell jurors they may consider; indeed, Mr. Kelly, I think, had
13 mentioned some in his rebuttal. Understand, however, that any
14 test that you have found to be a reliable test in making this
15 judgment about whether the person who speaks to you is
16 believable, is a test that you may use in judging the
17 witnesses' testimony.

18 You may, for example, consider the demeanor of the
19 witness on the witness stand. You may consider the
20 relationship that the witness had either to the government or
21 the defendant or to the events in the case and how that
22 relationship may have colored the witness's testimony. You
23 may consider whether the witness has an interest in the
24 outcome of the case. You may consider the witness's ability
25 to observe the events about which the witness testified and,

1 then, that witness's ability to recall the events to you. You
2 may consider the witness's bias or hostility either against
3 the government or against the defendant.

4 In some cases, one or the other of the parties try to
5 show that the witness gave inconsistent testimony here and on
6 earlier occasions. There, you need to decide whether, in
7 fact, the testimony or the statements made were inconsistent;
8 and, if so, you may consider in judging the believability of
9 the witness, the fact that the witness told different stories
10 on different occasions.

11 You may consider the extent to which a witness's
12 testimony is either supported or contradicted by
13 uncontroverted facts or by facts that you find to have been
14 established.

15 Let me briefly recall to you some particular
16 witnesses and give you some particular cautions as to those
17 particular witnesses. First, the experts: Ms. Wallace,
18 Mr. Waskom, Mr. Shapley and Mr. Kline. I think they were the
19 only people who testified as experts.

20 You should judge their credibility as you judge the
21 credibility of anybody else. In deciding whether to give
22 credence to their opinions, however, you may take into account
23 their training, their education, their experience, their
24 expertise in the area in which they were offered as experts.

25 To the extent that their opinion was based on

1 assumptions they were asked to make, again, I remind you, be
2 sure that the assumptions are in accordance with the facts as
3 you find them. Because if they are not, then the opinion is
4 of absolutely no value to you in reaching your verdict.

5 You should give the expert testimony the weight that
6 you decide it deserves, and you do not have to accept it just
7 because a person is styled as "expert."

8 Law enforcement officials. As we discussed, I
9 believe when you were being impaneled a month ago, a person is
10 neither more nor less believable because a person works for a
11 law enforcement agency; that is, just because someone is a
12 police officer or an ATF agent, doesn't mean that the person
13 is more credible or less credible than anybody else.

14 There were a number of people who testified who have
15 admitted that they are convicted criminals: Mr. Evans,
16 Mr. Plant, Mr. Lindholm. With respect to them, you may in
17 judging their credibility take into account the fact that they
18 are convicted. It is a fact that you may take into account
19 only in judging their credibility.

20 There is some evidence in the case that I need to
21 explain to you more particularly. First, there was evidence
22 about statements that Mr. Trenkler made to various people.
23 With respect to that evidence, you need to decide, first,
24 whether you believe the witness's account of what Mr. Trenkler
25 said; that is: Did the witness hear correctly what he said?

1 Did the witness accurately report to you what, what he had
2 said? And this applies to the testimony by the inmates, as
3 well as to testimony by police officers, about what
4 Mr. Trenkler -- what they testified Mr. Trenkler said to them.

5 With respect to statements made to police, you have
6 also to determine whether the statements were made knowingly
7 and voluntarily. And in that connection, you should consider
8 all the circumstances surrounding the making of the statements
9 by Mr. Trenkler to any police officer. And if you find that
10 any statement was not made knowingly and voluntarily, then you
11 may not consider it at all in reaching your verdict. You
12 simply need to strike it from your minds and not pay any
13 attention to it whatsoever in reaching your verdict.

14 Now, once you have sorted out what statements you
15 believe the defendant did make, of both categories, that is,
16 to inmates or to police, then you must next determine whether
17 they indicate guilt or not; that is, you should, in this
18 connection, consider: Are these statements reliable? Have
19 they been in some way corroborated? And if you find that they
20 are reliable, then, you may consider the defendant's
21 statements with all the other evidence, to decide whether the
22 government has proven the defendant guilty beyond a reasonable
23 doubt.

24 The second category of evidence that requires
25 particular mention is that concerning the 1986 device. There

1 was evidence that in 1986, the defendant built another
2 explosive device, and there was evidence concerning the
3 circumstances surrounding its construction and placement.
4 Now, this evidence may be used by you for a limited purpose.
5 And the purpose depends on what you find, so listen carefully.

6 If you believe, and find, that the defendant built
7 that device in 1986, then you may consider that evidence in
8 determining the defendant's knowledge of electronics, remote
9 control, and explosive devices with remote control.

10 If you find and if you believe the evidence as to the
11 circumstances under which this device was built and its
12 purpose, then you may consider that evidence, also, in
13 deciding what if any intent the defendant may have had in
14 1991.

15 If you believe the so-called signature evidence, that
16 is, that the 1986 and 1991 devices were unusual and
17 distinctive or idiosyncratic, then you may use that evidence
18 in deciding the identity of the builder of the 1991 device;
19 that is, if you determine beyond a reasonable doubt that the
20 two bombings were sufficiently unusual and distinctive so as
21 to constitute the handiwork of one, and only one person, you
22 may, but you do not have to, infer that the 1991 bombing is
23 the defendant's handiwork.

24 It is up to you to decide what weight, if any, you
25 give to this evidence. You may not, however, simply decide

1 that the defendant did it once and, therefore, he must have
2 done it again; or, that the defendant is a bad person and,
3 therefore, he must be guilty of the charges that are now
4 before you.

5 Evidence may be direct or circumstantial. Direct
6 evidence is testimony by a witness about what the, what the
7 witness personally saw, heard or did. Circumstantial evidence
8 is indirect evidence; that is, it is proof of one or more
9 facts from which you may infer and find another fact.

10 Let me give you an example. In one scenario, the
11 witness testifies that he left some fish on the counter to
12 defrost, and he left the room for a while; and when he came
13 back into the room, there was the cat sitting on the counter,
14 eating the fish. That would be direct evidence of the fact
15 that the cat ate the fish.

16 Change that a little bit. The person leaves the fish
17 on the counter, leaves for a while; and when the person comes
18 back, he sees pieces of fish on the floor and he sees the cat
19 sitting in the corner, licking its whiskers and looking fat
20 and happy. That would be circumstantial evidence of the fact
21 that the cat ate the fish. And, contrary to Perry Mason,
22 circumstantial evidence is, in law, just as good as direct
23 evidence.

24 Note, however, that -- and circumstantial evidence
25 really means nothing more than drawing inferences from

1 evidence that you have.

2 Note, however, that the inferences must be
3 reasonable; they must be based on common sense. You must be
4 certain that the chain of inferences is not broken at any
5 point along the way to the ultimate fact that you infer.

6 And in a chain of circumstantial evidence, it is not
7 required that every one of your inferences or conclusions be
8 inevitable. But each must be reasonable, and they must be
9 consistent with the each other, and they must be based on
10 facts that have been proven by direct evidence. You may not
11 draw inferences, unless you are convinced of the truth of the
12 inference beyond a reasonable doubt.

13 So, you may consider both direct and indirect, that
14 is, circumstantial evidence; you may give both equal weight,
15 and it is for you to decide as to all of the evidence what
16 weight you give it.

17 And finally, consider all the evidence. Draw
18 reasonable inferences. But do not guess. Do not speculate.
19 That you may not do. And I urge you to use your common sense
20 as you go about sifting the evidence in reaching your verdict.

21 Let me very briefly outline to you what is not
22 evidence because much of what you heard, particularly today
23 and on the first day of trial, is not evidence.

24 The opening statements by counsel were simply their
25 outline of what they expected to present; the opening

1 statements are not evidence in and of themselves. The closing
2 arguments that you just heard are not evidence; they are
3 counsels' recollection and counsels' interpretation, as I told
4 you earlier, of the evidence. And you must now do your own
5 separate job of recalling and interpreting the evidence when
6 you're in the jury room.

7 Any testimony that was ordered stricken is not to be
8 considered by you in reaching your verdict.

9 There were times, and I think I explained this to you
10 during the trial, as well, there were times in the course of
11 the questioning when counsel would put a question to the
12 witness in the form of a statement, and the witness said no.
13 That is not evidence of the statement that counsel, perhaps,
14 had hoped that the witness would say yes to.

15 Anything you may have heard about this case outside
16 the courtroom is not to be considered by you in reaching your
17 verdict. And nothing that I have said is evidence, and I am
18 not in any way trying to influence your verdict one way or the
19 other.

20 There were, in the course of the trial, objections by
21 counsel. You should not hold that against them. They not
22 only have a right to object but, in fact, that's their duty.
23 Part of the job of the lawyer is to call to the attention of
24 the judge when the lawyer thinks that what the other lawyer is
25 offering is not in accordance with what you now know are very

1 complicated rules. Then, it is up to the judge to decide
2 whether the evidence comes before you or not.

3 To the extent that the objection was overruled, you
4 have heard the evidence, and you should consider it. To the
5 extent that the objection was sustained, I ask you, please,
6 not to speculate about what you didn't hear but simply decide
7 the case on the basis of what is, in fact, before you.

8 When you next leave the courtroom, take your
9 notebooks with you, and I hope that they will assist you in
10 reaching your verdict. One final caution on the notebooks,
11 sometimes when we take notes, we paraphrase. And it just may
12 be that one of you remembers more exactly what a witness said
13 than what another one wrote down. So, I ask you, please, in
14 your deliberations not to ignore the memory of one of you
15 about what may have occurred in the courtroom just because
16 somebody else wrote it down differently.

17 You will not be able to have transcripts of any of
18 the testimony, although it has been transcribed. I regard it
19 as unfair to highlight the testimony of any one witness. So,
20 besides, there is not much point in your spending hours and
21 hours rereading what you have already heard.

22 A transcript of this charge will be available later.
23 And if you feel that you must have it, then we will supply it
24 to you.

25 A defendant in a criminal case is presumed to be

1 innocent, which means really much more than that, it means
2 that the defendant is innocent. He is innocent until the
3 government proves him guilty. And that means that a defendant
4 does not have to prove his innocence, he does not have to
5 offer any evidence whatsoever, he does not have to take the
6 stand and testify in the trial. And you may draw no inference
7 of guilt from the fact that this defendant did not testify.
8 He did offer evidence, and the evidence is before you, and it
9 should be considered by you in reaching your verdict.

10 But there are many reasons why a defendant might
11 choose not to testify, including, very simply, that he can
12 just say to the government: You, Government, have accused
13 me. Now, you, Government, prove my guilty. But you may draw
14 no inference of guilt from the fact that this defendant chose
15 not to testify in this case.

16 Now, the government has to prove him guilty beyond a
17 reasonable doubt. Proof beyond a reasonable doubt is not, is
18 not, proof beyond all possible doubt. It is not proof to a
19 mathematical certainty. Proof beyond a reasonable doubt is
20 proof that leaves you firmly convinced of the defendant's
21 guilt.

22 A reasonable doubt is not a doubt in the mind of a
23 juror who is looking for doubt as an excuse to acquit. It is
24 doubt in the mind of a reasonable juror who is earnestly
25 seeking the truth. It is doubt based on reason and common

1 sense.

2 Note that a reasonable doubt may arise both from the
3 evidence adduced or from the lack of evidence. It's not
4 sufficient for the government to establish a probability, even
5 a strong one, that the defendant is guilty. And the defendant
6 may not be convicted on the basis of suspicion or conjecture.

7 If you view the evidence in the case as reasonably
8 leading to one of two conclusions, either that the defendant
9 is guilty or that the defendant is not guilty, then you cannot
10 convict. You must find the defendant not guilty.

11 If after examining all of the evidence as to a
12 particular count and drawing reasonable inferences therefrom,
13 you are left with a clear and settled conviction of the
14 defendant's guilt as to that count, then you may find the
15 defendant guilty on that charge. If, on the other hand, you
16 are left with a reasonable doubt about the defendant's guilt,
17 he is entitled to the benefit of that doubt, and you must find
18 him not guilty on that charge.

19 In reaching your verdict, do not consider what the
20 punishment might be, if you find the defendant guilty. I will
21 need to deal with that if you do find him guilty. Your only
22 job is to determine whether the government has proven him
23 guilty or not.

24 You will have with you in the jury room, a copy of
25 the indictment in the case. Understand that the indictment is

1 nothing more than a piece of paper that contains the
2 accusation. That's all it is, the accusation. It is not
3 evidence of guilt and it is not proof of guilt.

4 I need to tell you a little bit about some of the
5 conventions of drafting indictments which are different from
6 other documents. When an indictment says "on or about certain
7 dates," it means dates reasonably near the date that is set
8 forth therein. If the government says that something happened
9 on or about June 1st, it doesn't have to prove that it
10 happened exactly on June 1st between 12:01 a.m. and
11 11:59 p.m.

12 When an indictment says "and," it means "or." So,
13 when the indictment says the defendant did this and this and
14 this and this, it probably means, almost certainly, means the
15 defendant did this or this or this or this; that is, the
16 government has to prove one but not every one of the things,
17 and I will come back to that later on.

18 There are in this indictment three counts. You have
19 to consider each of them separately, and your verdict as to
20 each should not dictate the verdict as to each other one; that
21 is, the evidence is different, the elements are different as
22 to each of them, so you need to look at each of them
23 separately and consider the evidence as it applies to each of
24 the counts.

25 The indictment charges not only Mr. Trenkler but also

1 Mr. Shay, Jr. And as I told you, earlier, Shay, Jr., was
2 tried earlier; he was convicted on some but not all of the
3 counts. The fact that he was convicted is no evidence bearing
4 on the guilt of Mr. Trenkler. You will need to decide whether
5 he's guilty or not based entirely on the evidence that you
6 have heard in this trial and in no way based on the fact that
7 the co-defendant, Mr. Shay, was convicted on some of these
8 counts.

9 Let me review, now, the indictment by first giving
10 you an overview of the three counts.

11 Count 1 is the count that charges conspiracy. It
12 says that the defendant conspired with Mr. Shay to commit two
13 offenses: (1) to receive explosives in interstate commerce
14 with the knowledge and intent that these explosives would be
15 used to kill, injure or intimidate another person. I think
16 this is one of those -- yes, this is one of those "ands" --
17 kill, injure and, which means kill, injure or.

18 I don't know why they do that, but they always do
19 that.

20 And second, that they conspired to damage and
21 destroy -- that they conspired to attempt to destroy, by means
22 of an explosive, an automobile used in and affecting commerce.

23 Count 2 is what we call a substantive offense. And
24 it harkens back to the first of the objects of the
25 conspiracy. It charges that the defendant and Mr. Shay -- but

1 here, you need to be concerned about the defendant -- received
2 an explosive, an explosive material, with the knowledge and
3 intent that the explosive material would be used to kill,
4 injure and intimidate Shay, Sr., and cause damage and
5 destruction to his real and personal property. That's
6 count 2.

7 Count 3 says that the defendant attempted the
8 malicious destruction of property used in and affecting
9 interstate commerce, namely, a 1986 Buick, by means of an
10 explosive. And counts 2 and 3 also allege that the unlawful
11 conduct of the defendant caused the death of Mr. Hurley and
12 injuries to Mr. Foley, both public service officers,
13 performing their official duties.

14 Now, counts 2 and 3 do not say that Mr. Trenkler did
15 this alone or that Mr. Shay did it alone, but it says that
16 they did it together, that they aided and abetted each other.

17 One section of the Criminal Code says that an
18 individual may be found guilty of an offense, even though he
19 did not himself commit it, if, if, he either assists someone
20 else to commit the offense or gets somebody else to do it.
21 Then, if two or more persons do so associate in a criminal
22 venture, each is responsible for the acts of the other that
23 are part of that venture.

24 But the law imposes that responsibility for the acts
25 of another only if the defendant knowingly and willfully

1 associates himself with a venture, and it is not enough to
2 show that he was present or even that he knew what was going
3 on. The government has to prove that he knowingly became a
4 participant to some degree. It doesn't have to prove that he
5 was the prime mover, that -- if you find that the defendant
6 knowingly and willfully participated in the building and
7 placing of the bomb in some way, he may be found to be
8 responsible for the acts of any coventurer. And a person
9 cannot insulate himself from criminal responsibility by
10 leaving to others his dirty work.

11 Knowingly means voluntarily, with knowledge, and not
12 by mistake or accident. Willfully -- and these words will
13 recur throughout the rest of this -- means purposely, with the
14 intent to do something that the law forbids. It means
15 operating with the intent to disobey the law.

16 Now, intent and knowledge is a state of mind. You
17 need to infer that. It is the quintessential thing that is
18 proven by circumstantial evidence. You will need to look at
19 what the defendant did, what the defendant said, the
20 circumstances surrounding the defendant's conduct, and his
21 statements, and from all of that infer what was in his head,
22 what did he know, what was his intention.

23 There have been references in the course of the
24 trial, not only to intent but also to motive. Motive is
25 different from intent. Intent refers to a state of mind with

1 which an act is done. Motive is what prompts a person to act,
2 a reason a person acts. The government does not have to prove
3 the defendant's motive, although evidence as to the
4 defendant's motive may shed light on his intent, which the
5 government does have to prove.

6 Let me start by giving you the elements of count 2.
7 Because count 1, the conspiracy count, harkens back to
8 counts 2 and 3, I will start with count 2.

9 In count 2, the government has accused the defendant,
10 it says that on -- in or about October, 1991, Thomas Shay and
11 Alfred Trenkler did receive in interstate commerce certain
12 explosive materials, including dynamite and detonators, with
13 knowledge and intent that said explosive materials would be
14 used to kill, injure and intimidate Thomas L. Shay -- that's
15 senior -- and cause damage and destruction to his real and
16 personal property, including a 1986 Buick automobile. And
17 then it goes on about Mr. Hurley's death and Mr. Foley's
18 injuries.

19 There are three elements that the government has to
20 prove: (1) that the defendant actually or constructively
21 received or participated in receiving an explosive; (2) that
22 he did so with the knowledge and intent that it would be used
23 to kill, injure or intimidate Shay, Sr., and/or unlawfully
24 damage and destroy his property; (3) that the explosive has
25 been transported in interstate or foreign commerce. Those are

1 the three elements.

2 The first one, that the defendant actually or
3 constructively received or participated in receiving an
4 explosive, to receive something means to acquire control of
5 it. If you take physical control of an object, if you were to
6 take this pencil that I'm holding, you have actually received
7 it. If you have the power and the ability to control the
8 disposition of an object, that is, you would tell the store to
9 deliver the coffee pot to your house, for instance, you have
10 constructive receipt of that coffeepot. An object may be
11 received by one person, in which case, we talk about sole
12 receipt; or, it may be received by more than one person, then
13 we talk about joint receipt. The government has to show that
14 the defendant actually or constructively received an
15 explosive; that he did so either alone or jointly with
16 another.

17 And an explosive, you must understand, is defined by
18 the statute as a device or material that is designed to
19 explode. And it includes blasting caps, detonators, and high
20 explosives.

21 The second element, I told you, is that the defendant
22 received the explosive with knowledge and intent that it would
23 be used to kill and commit a -- or injure Shay, Sr. So after,
24 you if you find that the defendant did receive an explosive,
25 either actually or constructively, then you must next

1 determine his state of mind. The government has to prove that
2 he knew and intended that the explosive would be used to harm
3 Shay, Jr.'s, father.

4 I had explained to you earlier what knowledge and
5 intent means. You need to review the evidence of the
6 defendant's conduct, of his statements, and infer from his
7 conduct and statements and the surrounding circumstances, what
8 knowledge he had and what his intent was.

9 The government, as I told you a moment ago, does not
10 have to prove that he intended to kill and intimidate and
11 injure and to damage the property. Anyone of these is
12 sufficient. So, that is, "and" really does mean "or" in the
13 context of count 2.

14 The third element, that the explosive had traveled in
15 interstate or foreign commerce, is a jurisdictional one. The
16 Constitution assigns certain responsibilities to the states
17 and other responsibilities to the federal government. This is
18 a federal court, and it can only hear those matters that are
19 within the purview of the constitutional grant of authority to
20 the federal government. One of the authorities that the
21 United States, as opposed to the individual states, has, is
22 the power to regulate commerce between the states and between
23 the United States and foreign governments. Therefore, in
24 order for this case to be in this court at all, the government
25 has to prove that some interstate element exists with respect

1 to the events in question.

2 So here, what the government has to show is that the
3 explosive at some time moved from one state to another. It
4 doesn't have to prove that the defendant moved it. It doesn't
5 even have to prove that he knew it came from another state.
6 All it has to prove is that the explosive, either the dynamite
7 or the detonator caps, had at one time been outside of
8 Massachusetts and then came into the state. So, if you find
9 that the explosive or one element of the explosive was
10 manufactured outside of Massachusetts and was received or
11 possessed within the Commonwealth, then this element is
12 satisfied.

13 So, if you find that the government has proven each
14 one of the three elements beyond a reasonable doubt, then you
15 may find the defendant guilty of count 2. But if the
16 government has not proven every one of the three elements,
17 then you must find him not guilty on count 2.

18 Count 3 charges that the defendant and Mr. Shay
19 knowingly attempted to maliciously damage and destroy, by
20 means of fire and explosive, a 1986 Buick automobile which was
21 owned by Thomas L. Shay and used in interstate commerce and in
22 activities affecting interstate commerce. You will have, as I
23 told you, the indictment with you, so that you can review that
24 when you are in the jury room.

25 Again, there are three elements: (1) that the

1 defendant participated in using an explosive in an attempt to
2 damage or destroy Shay, Sr.'s, Buick; (2) that the Buick was
3 either used in interstate commerce or used in an activity
4 affecting interstate commerce; and (3) that the defendant
5 acted maliciously.

6 With respect to the first element, that the defendant
7 participated in using an explosive in an attempt to damage or
8 destroy Shay, Sr.'s, Buick, explosive has the same meaning
9 here as it does in count 2; it includes blasting caps,
10 detonators and dynamite.

11 To prove an attempt, the government has to show that
12 the defendant intended to commit the crime charged, namely,
13 destroy the Buick, and that he took some action that was a
14 substantial step to accomplish the crime. Merely planning an
15 offense does not constitute a substantial step. But some
16 preparation may. A substantial step is an act which
17 corroborates that the defendant did, in fact, intend to
18 destroy the car.

19 The second element, that the car was used in
20 interstate commerce or in an activity affecting interstate
21 commerce, you see here, the interstate element is somewhat
22 different. In the first count, the explosive had to be in
23 interstate commerce; here, it is the car that had to have been
24 used in interstate commerce.

25 The government has to show either that Shay, Sr. from

1 time to time drove out of state on some business-related
2 activity or that he used the car in the autobody business and
3 that that is a business that affects interstate commerce. Any
4 business, I can tell you, that uses materials manufactured in
5 other states is a business affecting interstate commerce.

6 And now, here, again, the government doesn't have to
7 prove that the defendant knew about the interstate commerce or
8 that he intended to affect it. All it has to prove is that
9 the car, in fact, was used in interstate commerce or in a
10 business affecting it.

11 The third element, I told you, is that the defendant
12 must have acted maliciously. Malicious, in this context,
13 means willful, which I've already defined to you, that is,
14 with a bad purpose to disobey, to violate the law. The
15 government does not have to prove that the defendant acted
16 with spite, hatred, or ill will, only that he acted purposely
17 with disregard for the practical certainty of damage and with
18 the intent to break the law.

19 Let me go back to count 1, which is the conspiracy
20 count. And here, the indictment says that in or about
21 September and October, 1991, the defendants did knowingly and
22 willfully combine, conspire and agree with one another --
23 which means "or," -- to commit certain offenses against the
24 United States, and then it lists the two that we have just
25 discussed.

1 The essence of conspiracy is agreement, an agreement
2 by two or more persons to commit a crime, here, to receive
3 explosives with intent to injure or kill or to destroy
4 property by means of explosives.

5 Because the charge of conspiracy is directed to the
6 agreement to commit a crime, the government doesn't have to
7 prove that the defendant actually committed or participated in
8 committing the underlying crime. It does have to prove,
9 again, three elements: (1) that there was an agreement about
10 the time alleged by Shay, Jr., and Mr. Trenkler to accomplish
11 some unlawful purpose, here, the two mentioned, to receive
12 explosives with intent to injure and/or to destroy the
13 property, the Buick; (2) that the defendant knowingly and
14 willfully entered into the agreement, the conspiracy; and (3)
15 that one of the conspirators, during the existence of the
16 conspiracy, willfully committed at least one overt act at
17 about the time alleged.

18 Go back to the first element, that there was an
19 agreement to accomplish these unlawful objectives.

20 The government doesn't have to prove that there was
21 some formal written contract. Conspiracy is established if
22 the evidence and the reasonable inferences drawn therefrom
23 show beyond a reasonable doubt that the conspirators in some
24 way either explicitly or tacitly came to an understanding to
25 achieve their unlawful plan.

1 Conspiracy is by nature usually secret. It may be
2 shown by the conduct of the alleged conspirators, conduct that
3 evidences a shared purpose to violate the law. It may be
4 inferred from the movements of the conspirators, what they
5 did, how they acted, how they interacted. It may be inferred
6 from their statements, what they said to each others and what
7 they have may have said to others, all in the context of the
8 circumstances surrounding their acts and their statements.

9 The government does not have to prove both
10 conspirators played an equal role, doesn't have to prove that
11 the defendant, Mr. Trenkler, initiated the conspiracy. It
12 does have to prove that there was some agreement between
13 Mr. Shay and Mr. Trenkler to achieve the object of the
14 conspiracy as set forth in the indictment.

15 If you find that -- now, we go to the second
16 element. If you find that the defendant and Mr. Shay had come
17 to some agreement, then the government must still prove that
18 the defendant joined in the unlawful plan knowingly and
19 willfully and with an understanding of its unlawful character.

20 Knowingly and willfully have, again, the same meaning
21 here that I explained earlier, that is, voluntarily,
22 intentionally, and with a bad purpose to disregard the law.

23 The government does not have to show that this
24 defendant knew all the details of the scheme, does not -- it
25 does have to prove that the defendant, knowing of the

1 existence and general outline of the unlawful plan,
2 intentionally joined in by advising, assisting, participating
3 with Mr. Shay, and that he did so with the intent to violate
4 the law.

5 Understand that a person does not become a member of
6 a conspiracy merely by associating with another person or
7 merely by knowing about an unlawful plan or merely by being
8 present at the scene of an alleged crime, or happening, even
9 happening, to do something that advances an unlawful plan or
10 assists someone who is planning a crime.

11 The government has to show that Mr. Trenkler
12 knowingly and willfully participated in the building of the
13 bomb and the placing of it under the car.

14 An overt act, the third element, is any act knowingly
15 and intentionally committed by one conspirator to achieve the
16 object of the conspiracy. It doesn't have to be a criminal
17 act, but it must be one that is designed to achieve the object
18 of the conspiracy.

19 Although the government has alleged five separate
20 overt acts, it need prove only one. And it doesn't have to
21 prove that this defendant committed it. It is enough if the
22 government proves that either Mr. Shay or Mr. Trenkler
23 committed at least one of the overt acts and that he did so
24 knowingly and willfully. And you will find the overt acts on
25 pages 2 and 3 -- well, really, mostly 3 of the indictment --

1 I mean -- well, you can read them. It says, as the
2 first one, that in or about September, 1991, Shay solicited
3 the assistance of Trenkler in a plan to kill his father,
4 Thomas L. Shay. The second one, in or about September , 1991,
5 Trenkler, who had a background in electronics, agreed to
6 construct a remote control explosive device, knowing the same
7 would be used by Shay in an attempt to kill his father, and so
8 on.

9 If you find that one of these was committed by one of
10 the two -- by either one of the two conspirators, alleged
11 conspirators, then this element has been satisfied.

12 Here again, if you find that the government has
13 proven each one of the three elements, then you may find the
14 defendant guilty of the count of conspiracy. But if you find
15 that it has not proven every one of the three, then you must
16 find him not guilty of count 1.

17 Your verdict must be unanimous. All twelve of you
18 must agree to your verdict as to each of the three counts.

19 And the first order business when you're in the jury
20 room should be to elect from among the twelve of you who will
21 deliberate, a foreperson, who would then be in charge, in
22 general charge, of the deliberations, make sure that you do
23 not come to blows. If you have any questions, I would ask you
24 to write them out, let the marshal know, your foreperson
25 should sign the question, and I will answer either in writing

1 or by calling you back down and explaining whatever you may
2 not have understood.

3 The marshal will take to you lunch when you leave
4 here. And you should not talk about the case while you are at
5 lunch but use that time to relax and get ready for the work of
6 the afternoon.

7 Once you are back in the jury room, then you should
8 begin your deliberations in earnest. And we will, in the
9 meantime, send up the exhibits so that you will have them all
10 ready and waiting for you when you are actually going to start
11 working.

12 Ms. Shippie, Mr. Woo, Ms. Walsh, and Mr. Corelle, you
13 will be excused when we finish now. Understand, that we are
14 all most appreciative for your presence here every day. We
15 needed you. We desperately needed you because we had to have
16 twelve people at the end of the case. We must have twelve
17 people during the deliberations. And the only way we could
18 assure -- be sure of having twelve, is by starting with more
19 than twelve. You were our very important safety valve, and
20 for that I thank you.

21 Don't go away quite yet because I need to talk to the
22 lawyers before I actually send you off to your deliberations.

23 [Conference at the bench not transcribed.]

24

25

CERTIFICATE

I certify that the foregoing is a correct transcription of my computer-aided stenographic notes of the proceedings in the above-entitled matter.

James E. McLaughlin

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25