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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CR 92-10369-Z

ZOBEL, D. J.

UNITED STATES OF AMERICA

v.

ALFRED TRENKLER

Various Motions

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., and Scott Lopez, Esq.
SEGAL & FEINBERG, 210 Commercial Street,
Boston, MA. 02109.

Courtroom 3
Federal Courthouse
Boston, Massachusetts

September 29, 1993

Computer-Aided Transcription

1 THE COURT: Let's see, Mr. Kelly and Mr. Libby for
2 the government. Mr. Segal and?

3 MR. LOPEZ: Scott Lopez, your Honor.

4 THE COURT: Mr. Lopez for the defendant.

5 I asked for this hearing because I frankly am not
6 altogether sure what we're talking about in the motion and
7 response. So maybe counsel can enlighten me.

8 MR. SEGAL: May it please the Court, it is my
9 motion.

10 THE COURT: That much I know.

11 MR. SEGAL: Thank you.

12 To me it's a narrow issue. What I really say in all
13 those pages is that I would be prejudiced if I was not able to
14 use the best evidence. The best evidence simply is
15 Mr. Kelly's testimony about two letters -- I'm sorry, strike
16 that -- would be his testimony about two conversations,
17 telephone conversations, he had with Mr. Shay, Jr., in which
18 Shay, Jr., says: My father did this.

19 I have to assume the Government in its case, based
20 upon the case that has been tried, will put in evidence
21 hearsay statements from Mr. Shay saying: I did it. They put
22 that in in the first case. He becomes a declarant even if
23 he's not physically here.

24 And to me, that is impeaching testimony that is
25 crucial, your Honor, because it's inconsistent, and it's a

1 prior inconsistency with the trial testimony to be elicited by
2 the Government.

3 So, I want to call him as the best evidence. And I
4 do not want to stipulate because I think a stipulation
5 deprives me of compulsory process. And it also puts Mr. Kelly
6 in the advocate witness problem, where, on the one hand, he
7 stipulates and says, Mr. Shay called me on those two times and
8 said this, and then goes to the jury, and says: Don't believe
9 anything Mr. Shay said to me; believe my side of the case.

10 I submit Mr. Kelly is a very credible witness. He
11 was the lead prosecutor in this case when he was called by
12 Mr. Shay.

13 THE COURT: Excuse me, one second. I want to find
14 out what statements are we talking about?

15 First, what's the government planning to offer as to
16 whatever it is Mr. Segal wants in rebuttal would be rebuttal?

17 MR. LIBBY: Your Honor, we plan to offer none of it,
18 none of those two telephone calls to which Mr. Segal is making
19 reference.

20 MR. SEGAL: Oh, I understand that. Maybe I haven't
21 been clear.

22 If the government is making a representation, your
23 Honor, that they are not going to offer hearsay statements of
24 Mr. Shay, Jr., inculcating himself, there is nothing to talk
25 about here.

1 I assumed, reading the first trial transcript, and I
2 attached to the motion, different statements that they put in
3 from various --

4 THE COURT: Until we know that they are going to do
5 that, the motion is premature, isn't it?

6 MR. SEGAL: I'm also -- I feel constrained because
7 when you talk about the cases, they say, you can't wait until
8 trial and raise this issue.

9 THE COURT: That's true.

10 MR. SEGAL: I feel some obligation to raise it now.
11 So if my motion is granted and Mr. Libby needs help, he can
12 get one of eighty people downstairs to help him.

13 THE COURT: Mr. Libby could do it quite by himself.
14 What statements, if any, of Mr. Shay is the
15 government proposing to offer into evidence?

16 MR. LIBBY: Your Honor, at the moment, I can tell the
17 Court that we intend to introduce some portions of the Channel
18 56 videotape, and perhaps one or two other witnesses.

19 THE COURT: Is LaPlante going to testify?

20 MR. LIBBY: I believe --

21 THE COURT: About B-26 bombers and stuff?

22 MR. LIBBY: Well, we're looking at that very closely,
23 your Honor. We don't want to commit just yet. But with
24 respect to these telephone calls, we have no intention.

25 THE COURT: His point is that if statements of Shay

1 are offered, then he wants to do, similar to, I guess, what
2 Shay's counsel wanted to do, offer other statements to show
3 that nothing Shay says is reliable.

4 I think that's what he's saying. Yes?

5 MR. SEGAL: That's it, basically, your Honor, or that
6 what Mr. Shay told Mr. Kelly is more reliable than what he
7 told Mr. LaPlante, Channel 56, and the other 57 varieties of
8 Heinz.

9 MR. LIBBY: If I may, your Honor, I'll cut right to
10 the chase of it. This entire proceeding has virtually nothing
11 to do with the merits of this case and everything to do with
12 the defense team's fervent wish to knock Mr. Kelly out of this
13 case.

14 After all, Mr. Segal sat through most of the first
15 trial and saw how Mr. Kelly put on his case, put on his
16 witnesses, elicited the evidence, made his arguments, and then
17 convicted his client's co-defendant.

18 So, let there be no mistake what's afoot here today,
19 under the law, what we're talking about are two very brief
20 phone calls which have been inaccurately characterized as
21 phone calls which Mr. Kelly intentionally decided to accept.

22 Your Honor, the government would proffer that in each
23 of those two instances, those phone calls were initiated by
24 Mr. Shay, that is, Shay, Jr., and Mr. Kelly had no idea, in
25 each instance, the 15th of April and the 16th of April 1992,

1 that Shay, Jr., was calling in.

2 Under the law, the case law we have here, your Honor,
3 I have copies for you, the overriding principles here with
4 respect to calling a prosecutor as a witness, have to do with
5 availability of other witnesses to those situations, in the
6 first instance, as a threshold matter, and the Court has to
7 determine what's material here. Secondly, it has to -- they
8 have to show a legitimate and compelling need for that
9 information vital to the defense.

10 So, what are we talking about? We're talking about
11 two telephone calls, each of which lasted roughly two minutes,
12 initiated by Mr. Shay, Jr., each of which dealt with Mr. Shay
13 reading from portions of letters, the first of which purported
14 to be a letter from Mr. Kelly, Mr. Kelly all the while telling
15 Shay, Jr.: You've got an attorney, go through your attorney.
16 He was insistent that Mr. Kelly listen to him.

17 The first phone call on the 15th of April, the
18 government proffers, your Honor, dealt with a letter
19 purportedly to go to Mr. Kelly. We never got any such letter,
20 basically implicating the father.

21 The second phone call, the next day, dealt with Shay,
22 Jr., reading from a letter purporting to go to the father,
23 which, in fact, went to the father. In fact, we have a copy
24 of that letter, and it bears out the telephone conversation
25 that Mr. Kelly very briefly listened to. We have that.

1 What we are dealing with, at bottom here, is false
2 exculpatory evidence. One of the arguments that the defense
3 is raising here, in addition to this notion that somehow
4 Mr. Kelly is vital to their needs to establish his opinion as
5 to the credibility of Mr. Shay, which, of course, cuts to the
6 fundamental process of the government's attorney. We do that
7 every time we take a proffer: we have to pass on the
8 credibility of these witnesses.

9 Now, with respect to the second of the two phone
10 calls, the 16th of April, we have the letter. The letter is
11 the best evidence of what transpired during that two-minute
12 process.

13 We have a prepared stipulation, your Honor, which has
14 appended to it, a letter. We're happy to have that go in,
15 explains the situation. It is indicative, characteristic of
16 the preceding phone call which Shay, Jr., placed to
17 Mr. Kelly. Mr. Kelly simply picks up the phone, no indication
18 that it's Shay, Jr.; in fact, told to him, it's Tom Shay on
19 the phone. Mr. Kelly thinking it's the father, he takes the
20 phone call.

21 THE COURT: Let me just see if I'm following this.
22 The government proposes to offer into evidence, a portion of
23 the Channel 56 tape and possibly statements by Mr. Shay to
24 LaPlante inculcating himself. Right?

25 MR. LIBBY: I believe, in part, that's right, your

1 Honor.

2 THE COURT: Well, in any event, the government is
3 offering some statements of Mr. Shay that either inculcate
4 himself or somebody else other than Mr. Trenkler?

5 MR. LIBBY: That's correct.

6 THE COURT: That's the substance of it, right?

7 MR. LIBBY: Yes.

8 THE COURT: Now, it is the defendant's position that
9 the defendant wants to offer into evidence, for whatever
10 reason, the substance of two telephone conversations, and only
11 those two telephone conversations?

12 MR. SEGAL: That's the main thrust of my motion, yes.

13 THE COURT: Just the two telephone conversations?

14 MR. SEGAL: Well, I have a motion on the documents
15 relating to Mr. Kelly's opinion of Mr. Shay's credibility, but
16 the thrust of it goes to --

17 THE COURT: Mr. Kelly's opinion of Mr. Shay's
18 credibility is absolutely not admissible. So, it is the
19 substance --

20 MR. SEGAL: We're down to the two telephone
21 conversations, yes.

22 THE COURT: The substance of the two telephone
23 conversations, and that's it?

24 MR. SEGAL: The two telephone conversations. When we
25 say "substance," I want to put Mr. Kelly on as a credible

1 witness.

2 THE COURT: I just want to find out what it is. I
3 understand you want to put Mr. Kelly on. But the reason you
4 want to put him on is to get from Mr. Kelly the substance of
5 two telephone conversations?

6 MR. SEGAL: Yes.

7 THE COURT: Now, that substance you can certainly get
8 without putting Mr. Kelly on, can you not?

9 MR. SEGAL: I do not believe, without waiving certain
10 rights, I can get that, your Honor.

11 THE COURT: I am not going to disqualify counsel who
12 is familiar with the case, has worked with the case for a
13 period of over, I think, two years now, in order to testify
14 about those two telephone conversations, in a situation where
15 counsel is prepared to stipulate the substance of those two
16 telephone conversations and make available to the defendant
17 the text of the letter that formed the basis of one of those.

18 So, if that's all that's at issue, then the motion is
19 denied insofar as you are seeking to disqualify Mr. Kelly or,
20 as you put it more gently, to have him testify. But I will do
21 that on condition that the government, in fact, provides the
22 defendant with the letter and a memorandum of what was said,
23 in a form that may be admissible in evidence.

24 MR. LIBBY: Your Honor, if I may --

25 THE COURT: At the defendant's motion, not the

1 government's.

2 MR. SEGAL: May I just be heard on one point, your
3 Honor?

4 I understand what you say, and while I respectfully
5 disagree, I think that the result of that, assuming I would
6 stipulate, and I'm not sure I'm prepared to stipulate.

7 THE COURT: You don't have to.

8 MR. SEGAL: I understand.

9 It's simply that Mr. Kelly, who is a very effective
10 advocate, is going to be arguing to the jury that, ladies and
11 gentlemen, don't believe a word of what Mr. Thomas
12 Shay, Jr., said to me in those two phone conversations, as
13 listed in the stipulation; believe the rest of the
14 government's case. And that violates the witness advocate
15 rule because he's wearing two hats. And the jury is likely to
16 give him more credibility than they already will, which is a
17 high level of the credibility because he's very effective.

18 THE COURT: It may very well be that Mr. Libby makes
19 the final argument, in any event, and to the extent that
20 Mr. Kelly does, he will not make that argument.

21 MR. SEGAL: Respectfully, based on the cases that I
22 submit, such a stipulation would violate the witness advocate
23 rule and does not -- it deprives me of compulsory process,
24 your Honor, the testimony.

25 MR. LIBBY: If the Court please, we've prepared a

1 stipulation, a copy of which I've just given to counsel, I
2 hand it up to the Court. And it speaks to those issues,
3 as well as the actual letter which was the subject of the
4 16 April telephone call.

5 THE COURT: All right.

6 So, the defendant's motion for leave to file a
7 response is allowed. The defendant's motion for authority to
8 call the Assistant United States Attorney Paul Kelly is
9 denied. And the stipulation is filed, for the defendant to do
10 with as he pleases, within limits.

11 MR. SEGAL: I understand.

12 MR. LIBBY: There are some remaining matters, your
13 Honor, if I may.

14 THE COURT: There are?

15 MR. LIBBY: Yes. Well, there are some discovery
16 issues and some other housekeeping matters that we would like
17 to just briefly touch on.

18 One is, as the Court may know, the government has
19 filed its motion in limine under Rule 404(b) to admit evidence
20 of an earlier incident, and understanding that counsel has a
21 response, briefing time, I would like to set a date for that
22 hearing.

23 THE COURT: Why do I have to have a hearing on it?

24 MR. LIBBY: Well, we have, as we did in the
25 earlier --

1 THE COURT: Now it is 404(b) evidence, in this case,
2 it is; in the other case, it really wasn't. Not only wasn't
3 it really, it just wasn't.

4 MR. LIBBY: Well, while we may disagree on that
5 point, your Honor, clearly in this case, it is.

6 THE COURT: It is 404(b), isn't it?

7 MR. SEGAL: Your Honor, I got 35 pages today, I would
8 like some time to respond.

9 THE COURT: Sure.

10 MR. SEGAL: And the issues that the government raises
11 are many of the issues that were raised previously about
12 signature. And if that's the issue, I would like to have a
13 hearing because that becomes a very important issue. And they
14 have an expert and I have an expert on the signature issue
15 which goes into this 404(b).

16 THE COURT: Same experts we had before?

17 MR. SEGAL: No. I have Mr. Kline who filed an
18 affidavit the first time but will be testifying this time,
19 your Honor.

20 MR. LIBBY: On that point, your Honor, we have a
21 related discovery matter where we've had, on two occasions
22 now, six months ago and two months ago, filed motions for
23 reciprocal discovery, and we've received nothing other than
24 that affidavit which was filed in the context of the Shay
25 case. We've received, nothing from this defense counsel with

1 respect to experts and opinions.

2 MR. SEGAL: I will be filing appropriate responses on
3 that, your Honor, in a timely manner.

4 THE COURT: When?

5 MR. SEGAL: Probably within the next five to seven
6 days. Mr. Kline's report came in recently, and I'll be happy
7 to send it along.

8 THE COURT: Are there any other experts that you
9 expect to call?

10 MR. SEGAL: Yes, and I will file that. One is
11 Mr. DeForest, who was the person that the government knows
12 about in the first case.

13 MR. LIBBY: We don't know that this fellow is going
14 to play any role in this case, your Honor.

15 THE COURT: Who's Mr. DeForest?

16 MR. SEGAL: Mr. DeForest is a forensic chemist hired
17 by Ms. Gertner in the first case, and who will be involved in
18 this --

19 THE COURT: He didn't testify, did he?

20 MR. SEGAL: No.

21 MR. LIBBY: He did not.

22 MR. SEGAL: Ms. Gertner, I believe, submitted the
23 resume and background, and I'll submit the same material.

24 THE COURT: Can we agree on a deadline by which
25 you'll let the government have whatever reciprocal discovery

1 they are entitled to have, preferably not October 24th?

2 MR. SEGAL: I would think within the next ten days I
3 can do that. There are some outstanding motions that you
4 still have, your Honor, on discovery.

5 THE COURT: I have a motion to suppress, there's a
6 bunch of motions to suppress.

7 What else do I have?

8 MR. SEGAL: Appeals from the Magistrate's decision on
9 discovery, failing to turn over grand jury material, early
10 turnover of Jencks Act material and things like that.

11 THE COURT: Well, early turnover of Jencks Act is not
12 something I can order the government. I can ask them to do
13 it. Right?

14 MR. KELLY: Your Honor, as to that point, my
15 understanding is that all of the Jencks material which we
16 provided to Ms. Gertner many months ago was just copied and
17 turned over to Mr. Segal, and if he wants it again, we'll send
18 it over again in the next week or two.

19 MR. SEGAL: I think they have other witnesses, your
20 Honor, that weren't in the first trial. And it seems to me, I
21 should have some chance to look at that material.

22 MR. LIBBY: To the extent there are additional
23 witnesses, clearly, that kicks in.

24 THE COURT: What day of the week is October 10th?

25 How about if reciprocal discovery takes place on

1 October 13th, and the government will turn over by
2 October 13th any additional Jencks Act and other such
3 materials?

4 MR. LIBBY: That's fine, your Honor.

5 THE COURT: What else?

6 MR. SEGAL: That's fine.

7 THE COURT: Are there still real appeals from
8 discovery motions that I need to deal with?

9 MR. SEGAL: I believe so.

10 THE COURT: Okay. Make a note of that.

11 MR. SEGAL: Such as grand jury minutes of witnesses
12 who aren't testifying, et cetera. There are a whole bunch. I
13 think we sent your clerk a letter with the list of what's
14 outstanding.

15 THE COURT: I'll take care of that.

16 MR. SEGAL: The issue Mr. Libby raises is important,
17 though, in terms of -- my sense is that there probably would
18 be a need for a hearing on this '86 device, because there is a
19 clash of opinion on signature, et cetera. And perhaps we
20 should consider some date convenient to the Court.

21 THE COURT: Some of this evidence I've already
22 heard. Am I going to have to hear the same evidence again? I
23 realize that you weren't the counsel at the time.

24 MR. SEGAL: I am not going to bring in Mr. Hansen who
25 is the expert hired by Ms. Gertner. I'm going to bring in

1 Mr. Kline, the expert I hired, who is, I think, is uniquely
2 qualified in this field. I'm not planning to duplicate her
3 efforts.

4 THE COURT: What is your best estimate as to how long
5 case will take to try?

6 MR. LIBBY: The case will take probably about three
7 weeks.

8 MR. KELLY: Your Honor, I understand that a great
9 number of subpoenas have been served by the defense. The
10 government's case can be put in in two and a half weeks. We
11 can't speak for Mr. Segal.

12 THE COURT: So, you would be done by Armistice Day,
13 November 11th, which is a holiday?

14 MR. LIBBY: Within a day there or two, I think so.

15 THE COURT: How long does the defense anticipate
16 taking?

17 MR. SEGAL: Five to eight days, your Honor, with a
18 good wind, less, but I want to err on the side of caution.

19 THE COURT: And what hearing do I need to hold? How
20 long will the hearing take on the 404(b)?

21 MR. SEGAL: I think that --

22 THE COURT: There is an initial issue, isn't there,
23 as to whether there has to be signature for 4704(b) purposes
24 to the extent that it was necessary for the government to show
25 signature for the purposes of admitting this evidence against

1 Mr. Shay? Is that not correct? They don't have to show
2 absolute identity the way they did with respect to Mr. Shay?

3 MR. SEGAL: I submit my reading of the cases is
4 signature equals identity; so, there is a signature hearing.
5 Yes.

6 THE COURT: They have to show that for 404(b)
7 purposes?

8 MR. SEGAL: I believe so, the way I read the cases,
9 your Honor.

10 THE COURT: I would like to see the law on that.
11 Because if, in fact, such identity is not necessary for 404(b)
12 purposes, then is it the government's view that it is?

13 MR. LIBBY: Well, your Honor, it has to be
14 sufficiently similar to the earlier incident to be probative.

15 THE COURT: Right.

16 MR. LIBBY: But it also comes in under other 404(b)
17 purposes, as well, perfectly legitimate, intent, experience,
18 ability --

19 THE COURT: Knowledge.

20 MR. LIBBY: -- skill, all of which is the heart, the
21 guts of this case.

22 THE COURT: With respect to which, identity is not
23 important. I mean, on understanding, knowledge and ability to
24 build such a thing, you don't need to have absolute identity,
25 do you?

1 MR. LIBBY: You don't under Abraham or any of the
2 First Circuit law. Not absolute identity, just enough to make
3 a link, a meaningful link. That's the standard.

4 MR. SEGAL: The point is, this is -- the government,
5 I read their brief, which is a very thorough brief, very
6 briefly before coming over, but this --

7 THE COURT: That's the brief filed during the trial?

8 MR. SEGAL: No, no. They --

9 MR. LIBBY: We have filed a 404(b) motion in this
10 case, your Honor.

11 THE COURT: That hasn't reached me yet.

12 MR. LIBBY: Which expands the other legitimate
13 purposes.

14 MR. SEGAL: I think they filed it two days ago. I
15 got it today and looked at it briefly. But, it's -- they
16 describe that as a centerpiece of their case. So the point
17 is, this is a hearing that is important, and I think we should
18 ask you to block out sufficient time so Mr. Libby can put on
19 the appropriate experts, I can put on the appropriate experts,
20 and you can make a decision.

21 THE COURT: What is sufficient time?

22 MR. SEGAL: I guess I would have to talk to him and
23 see how many witnesses he has and how many I have, and we can
24 report to Mrs. Dello Russo.

25 THE COURT: The only time I can do it is

1 October 22nd.

2 MR. LIBBY: Well, your Honor, I think the concern
3 here is that we simply have to have a ruling on the motion
4 before the jury is sworn. I think we're talking --

5 THE COURT: You will.

6 MR. LIBBY: It is that close to -- just so the Court
7 is alerted and aware of that scenario.

8 I think we can do it in a day. The government's case
9 would be essentially along the lines as the Court heard that
10 afternoon, a couple of government experts and proffer as to
11 the civilian witnesses' testimony. Following the proffer laid
12 out in the government more recently filed brief.

13 MR. KELLY: With all due respect, your Honor, the
14 other way to do it, scheduling wise, would be to select a
15 jury, send the jury away for one day, conduct that hearing,
16 say on a Tuesday or whatever, and then bring the jury back.

17 The government does want to make reference to this in
18 its opening and is quite emphatic about the desire to have a
19 ruling prior to this jury being sworn.

20 THE COURT: I don't see what difference it makes
21 whether we have hearing on the 22nd or whether we have it on
22 the 25th.

23 MR. KELLY: It makes no difference to us. I'm just
24 offering an alternate scheduling opportunity, if the Court
25 desires.

1 THE COURT: We will schedule this on Friday to start
2 at 9, we will finish it on Friday. So I would ask counsel
3 please to cooperate in ensuring that we finish the evidence in
4 time enough so that I can make a ruling on it, too.

5 MR. LIBBY: What day --

6 THE COURT: Friday, the 22nd.

7 MR. LIBBY: Thank you, your Honor.

8 MR. SEGAL: May we have until maybe three or four
9 days before that to file our brief, file it in advance of that
10 hearing?

11 MR. LIBBY: Your Honor, if your Honor please, we've
12 had all this time now, they have our brief. It seems to me
13 that they can comply within a two-week period of time so we'll
14 have an opportunity to understand their position.

15 THE COURT: Any reason you can't do that by the 13th,
16 also?

17 MR. SEGAL: I would like until the 15th, if I might.
18 There's a lot of issues that we're dealing with here.

19 THE COURT: You have until the 15th.

20 What else?

21 MR. SEGAL: One of the other motions that is
22 outstanding is a motion to suppress an identification of a
23 witness named Carrion. I just list that as motions that are
24 still pending, your Honor.

25 THE COURT: That's not one that I heard.

1 MR. SEGAL: No, but you asked me what's still
2 floating around, and I give you that.

3 MR. LIBBY: This is filed. The government's opposed,
4 your Honor. There's no need for any hearing. It has to do
5 simply with respect to the weight of Mr. Carrion's testimony
6 regarding his identification. It's actually Mr. Kelly's
7 motion, Mr. Kelly's opposition to the motion. The Court has
8 it on paper and can deal with it.

9 THE COURT: What else?

10 MR. LIBBY: That's it.

11 MR. SEGAL: If there are others, we'll be happy to
12 inform the clerk. There were some kicking around, and I think
13 we've listed most, but we'll go through a voluminous file and
14 check.

15 Thank you.

16 THE COURT: Thank you.

17 May I see counsel for a moment.

18 [Discussion off the record.]

19 [Whereupon, the hearing was concluded.]

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CERTIFICATE

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

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James E. McLaughlin