



the "square holes" describing the categories of murder. Cases of this nature -- where the crime charged and tried is different from the crime for which the Government seeks a sentence -- are not in the "heartland" of the cases covered by the guidelines. And this case -- given the facts adduced at trial, the testimony we seek to offer at sentencing, the life history and mental state of the offender -- is so a fortiori.

While there may have been a homicide theory, no state homicide charges were brought and no federal homicide crime applied. Had the trial been brought in state court, the jury would have been required to find the appropriate degree of homicide, subject to proof beyond a reasonable doubt. Trying the same issues in the context of a sentencing proceeding, with fewer procedural safeguards, raises substantial due process concerns. Accordingly, before addressing the appropriate sentence, section I describes the legal standards which we believe govern this hearing and the guidelines interpretation.

Section II reviews the facts--both those adduced at trial (IIA) and those which will be adduced at the hearing (IIB)--subject to the appropriate standards. The trial of the crime the Government charged and of which the jury found Shay Jr. guilty--malicious destruction of property--did not oblige the Government to prove the elements of first or second degree murder. The crime as charged would have supported a number of theories of homicide, including an involuntary manslaughter theory. Nor is there any way of gleaning from the jury's decision which category of

homicide is most analogous to Shay Jr.'s conduct and state of mind. Indeed, to the extent that the jury's verdict is any guidance, it suggests that the jury rejected a murder theory. The jury found Thomas Shay not guilty of the specific crime which involved an intent to kill, injure and intimidate another, namely, receiving explosives with the intent to kill.

Finally, section III addresses the issue of departure. Thomas A. Shay's personal history could not have been more tragic. His was the prototype of the dysfunctional family-- alcoholism, abuse, severe neglect--leading to a suicide attempt at age five. And, perhaps even worse, his story is also the prototypical story of the state not only failing to rescue him, but dramatically multiplying his pain--he was exposed to sexual abuse in state institutions at an early age, infected with a sexually transmitted disease at the age of eleven. Shay Jr. consistently showed improvement from proper treatment, but the treatment would be discontinued and the doctors' recommendations rarely followed. Every fact, every document, every record including the recommendation of the Probation office, cries out for a departure in the instant case.

- I. **SHAY JR.'S CONDUCT AND STATE OF MIND MUST BE DETERMINED IN THE CONTEXT OF THE FULL PANOPLY OF PROCEDURAL PROTECTIONS, BASED ON ADMISSIBLE EVIDENCE AND SUBJECT TO PROOF BEYOND A REASONABLE DOUBT.**

Federal and state law enforcement agencies have worked hand in hand in the investigation and prosecution of this case from the very beginning. At some point, a decision was made to indict and try Shay Jr. for violations of the federal explosives statute, rather than for murder in state court. If Shay Jr. had been tried in state court for murder, a jury would have been instructed on the lesser included offenses including manslaughter and on the states of mind central to this court's determination: malice aforethought, intent to kill, premeditation, deliberation, and recklessness. The jury would have been allowed to consider evidence concerning Shay Jr.'s mental state at the time of the offense. It would have determined on the basis of admissible evidence, subject to the reasonable doubt standard, whether his conduct and state of mind amounted to first or second degree murder, or voluntary or involuntary manslaughter. No jury has done so.

To sentence Shay Jr. according to the first degree murder guideline, based on the jury's verdict in this case, without careful de novo analysis of evidence that would be admissible at trial and subject to the reasonable doubt standard, would violate Shay Jr.'s right to due process of law.

Several courts have now held or indicated that heightened procedural protections and a more stringent burden of proof is necessary where the sentencing process involves characterizing the offense at issue as a different one than the one for which the defendant was tried.

United States v. Kikumura, 918 F.2d 1084 (3rd Cir. 1990), involved an analogous situation. The defendant was charged with transporting explosives with the intent that they would be used to kill, injure and intimidate one or more individuals in violation of 18 U.S.C. § 844 (d). Kikumura waived his right to a jury trial. Before the bench trial, the government deleted the intent to kill language from the indictment, and Kikumura stipulated to the facts of the remaining charges, the most serious of which involved knowledge and intent to destroy property. At sentencing, the government then sought a substantial departure based on intent to kill, which had not been litigated or determined at trial. Id. at 1094, 1097.<sup>1</sup>

The Kikumura court stated that the departure of a 22-level increase in offense level based on an issue not litigated at trial was "perhaps the most dramatic example imaginable of a sentencing hearing that functions as 'a tail which wags the dog of the substantive offense.'" Id. at 1100-01. The court therefore held that the prosecution had to prove Kikumura's intent to murder by clear and convincing evidence and that hearsay statements could not be considered unless other evidence corroborated those statements. Id. at 1103.

Since Kikumura had not argued on appeal that consideration of intent to murder without the full panoply of procedural

---

<sup>1</sup> A death did not result. Since the government failed to object to the probation officer's application of a guideline which did not cross refer to the guideline for attempt to commit murder, intent to murder was treated as a basis for departure rather than an attribute of a cross-referenced guideline.

protections that apply at trial had violated his right to due process, the court therefore did not consider it. Id. at 1101. The concurring judge wrote separately to make clear that, had Kikumura raised the issue, he would hold that his sentencing violated his due process "right to have the most serious crime specifically charged and proven at a trial which included the full panoply of procedural protection." Id. at 1121 (Rosenn, J., concurring). The extreme departure for a separate offense of attempted murder showed that attempt to kill with the requisite intent to murder was not collateral, but primary. Therefore, Kikumura should have either been tried for that offense or the government should have been precluded from relying on it as a basis for enhancement of the sentence. Id. at 1120.

The instant case is even more troubling. In Kikumura, intent to kill was sought to be used at sentencing as the basis for departure, although it had not been litigated at trial. In this case, malice aforethought, intent to kill, premeditation and deliberation, are sought to be used to define a separate offense for which Shay Jr. may be sentenced. One of those mens rea elements, intent to kill, was litigated at trial. The Court instructed the jury on the mens rea element of Count Two as follows: "The Government has to prove that he knew and intended that the explosive would be used to harm his father." (T.p. 19-100) What guidance the verdict provides is to indicate that the government failed to prove intent to harm or kill his father, and

that the issue has therefore been resolved in Shay Jr.'s favor, precluding a finding of first or second degree murder.

At the very least, this Court should determine the facts based on evidence that would be admissible at trial, subject to the reasonable doubt standard. See, e.g., United States v. Townley, 929 F.2d 365, 370 (8th Cir. 1991) (18-level increase may require clear and convincing evidence); United States v. Restrepo, 946 F.2d 654, 660-61 & n. 12 (holding that the preponderance standard is generally adequate to satisfy due process, but noting that an extreme effect on the sentence such as that in Kikumura would require a higher standard of proof); United States v. St. Julian, 922 F.2d 563, 569 n. 1 (10th Cir. 1990) (where difference between guideline range and departure sentence is great, trial court should adjust standard of proof accordingly); United States v. McDowell, 888 F.2d 285, 290-91 (3d Cir. 1989) (holding that preponderance standard was sufficient for an adjustment based on obstruction of justice but explicitly not addressing the burden of proof "in cases where a sentencing adjustment constitutes more than a simple enhancement but a new and separate offense"). See also Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L.Rev. 1, 9 (1988) (the more facts the sentencing court must find informally without the procedural protections of a trial, the less fair the process appears to be).

Like no other reported case, this sentencing is "the tail that wags the dog of the substantive offense." It involves the

question whether Shay Jr. is guilty of murder or manslaughter in the first instance. Central to that determination is Shay Jr.'s state of mind, which is constitutionally required to be proved by the government beyond a reasonable doubt.

Apart from precedent under the sentencing guidelines, Mullaney v. Wilbur, 421 U.S. 684 (1975), and Specht v. Patterson, 386 U.S. 605 (1967) control. In Mullaney, defendants had been tried under Maine law for homicide, which provided that if the prosecution proved the homicide was intentional and unlawful, malice aforethought, which distinguished murder from manslaughter, was to be conclusively implied unless the defendant proved by a preponderance of the evidence that he acted in the heat of passion on sudden provocation. Id. at 1883. Analogous to the unusual guidelines situation presented in this case, the state of mind (absence of heat of passion) was not an element of the crime of felonious homicide, but a factor bearing on punishment. Id. at 691-92. The Court noted the extreme difference between murder and manslaughter in terms of punishment and stigma, and rejected the state's argument that since the defendant had already been found guilty and could be punished at least for manslaughter, absence of heat of passion, a mere punishment enhancer, need not be proved by the state beyond a reasonable doubt:

This analysis fails to recognize that the criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. Maine has chosen to distinguish those who kill in the heat in of passion from those who kill in the absence of this factor. Because the former are

less blameworthy, they are subject to substantially less severe penalties. By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in Winship.

Id. at 697-98 (citations omitted). The Court held that the due process clause requires the prosecution to prove beyond a reasonable doubt the absence of heat of passion. Id. at 704.

In Specht v. Patterson, 386 U.S. 605 (1967), the petitioner challenged a sentencing system which provided that once a defendant was convicted of a sexual offense otherwise carrying a maximum penalty of ten years, he could be sentenced under another statute exposing him to life imprisonment if the sentencing judge made a post-trial finding that the defendant "posed a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." Id. at 607. Since this was a new finding of fact that was not an element of the crime charged, exposing such defendants to an extreme increase in punishment, the Court held that due process required "the full panoply of the relevant protections which due process guarantees," including the right to counsel, the opportunity to be heard, to confront and cross-examine witnesses, and to offer evidence. Id. at 608-610.<sup>2</sup>

More recently, in McMillan v. Pennsylvania, 477 U.S. 79 (1986), the Court made it unmistakably clear that Shay Jr.'s state of mind and the resulting type of homicide for which he can

---

<sup>2</sup> In re Winship, 397 U.S. 358 (1970), had not yet been decided at the time Specht was decided. As indicated in McMillan, infra, at 85, it is likely the Court would also have required that the burden of proof be beyond a reasonable doubt.

be sentenced must be determined with full procedural protections, based on admissible evidence and subject to the reasonable doubt standard. Petitioners, whose sentences had been enhanced post-trial for visible possession of a firearm under Pennsylvania law, argued that that fact must be proved beyond a reasonable doubt. The Court rejected their argument, holding that the case failed to meet certain criteria under Mullaney and Specht --each of which are present in the instant case. The Pennsylvania scheme (1) did not discard the presumption of innocence; (2) did not relieve the prosecution of its burden of proving the elements of the crime for which the defendant would be sentenced; (3) did not expose defendants to additional punishment, but merely raised the minimum to five years; and (4) visible possession of a firearm had not been historically treated as requiring proof beyond a reasonable doubt. Id. at 86-90. The statute therefore did not permit the visible possession finding "to be a tail which wags the dog of the substantive offense." Id. at 88.

To assume that the jury's verdict establishes murder, and to fail to determine Shay Jr.'s state of mind and the resulting crime for which he may be punished, based on admissible evidence, with full trial-like procedural protections, and subject to the reasonable doubt standard, would clearly contravene all the principles enunciated in Mullaney, Specht, and McMillan.

## II. THE OFFENSE

Shay Jr. disputes the Probation Department's guideline calculation on several grounds. First, it not only misinterprets

the jury's verdict, but accords it meaning and weight which is inappropriate in a case of this nature. Homicide is always sui generis. Since the jury was not asked to and did not determine whether Shay Jr. committed any type of homicide, its verdict cannot dictate what the sentence should be. To the extent the verdict provides any guidance, it indicates the government failed to prove Shay Jr. had the intent to kill. Second, to the extent it is based on the government's version of facts in the draft PSR, it rests on an inaccurate version of Shay Jr.'s conduct. Third, although the Probation Department recounted much of Shay Jr.'s tragic history of abuse and neglect, and his mental and emotional disorders, its guideline calculation takes no account of Shay Jr.'s background, state of mind, and other personal characteristics which are present in unusual kind and degree.<sup>3</sup>

A. The Record Does Not Support a Finding Beyond a Reasonable Doubt That Shay Jr. Is Guilty of Murder.

There was no credible evidence that Shay Jr. intentionally premeditated Officer Hurley's or his father's death with malice aforethought. In spite of the reward offered in this case and the evidence that Shay Jr. was incapable of keeping a secret,

---

<sup>3</sup> On September 24, 1993, Shay Jr. set forth his objections and additions to substantive and factual material contained in the Pre-Sentence Report ("PSR") disclosed to him on September 15, 1993. While much of Shay Jr.'s background was set forth in the PSR, so that by and large only additions were necessary to his "Personal and Family Data," Shay Jr. strongly objected to the Offense Conduct and other matters as recounted in the PSR. At the time this sentencing memorandum is filed, Shay Jr. is unaware whether changes were made to the PSR as a result of his objections. He therefore sets forth his proposed changes and additions herein.

much less of acting in his own best interests, the government produced no statement by Shay Jr. before the explosion suggesting he was even aware the bombing was about to happen, much less showing he intended or deliberately premeditated a murder.

The only evidence indicating knowledge were Shay Jr.'s statements to Lawrence Plant one year after the explosion. Plant testified that Shay Jr. said that Trenkler told him he had a surprise for him, would not tell him what it was at first, but later told him it was a bomb, and that he would help him get back at his father for his childhood abuse by DSS workers and officials. (T.p. 13-60-61)

There was reason for the jury to believe that the story Shay Jr. told Plant exaggerated the state of his knowledge before the bombing. First of all, Shay Jr. told Plant many obvious lies in the course of their conversations, which Plant described as "ranting and raving in a quiet kind of way." (T.p. 13-73) He said that Trenkler was in hiding in California, and that he was afraid the authorities would find Trenkler and find out the whole truth (T.p. 13-64, 77), but Trenkler was never in hiding. He also told Plant that he bought and sold tanks and F16 fighter planes, etc. (T.p. 13-73-74, 83)<sup>4</sup> There was no evidence other

---

<sup>4</sup> Shay Jr. has been victimized on a number of occasions by other inmates since he has been incarcerated. See PSR, Summary of correctional records regarding health and safety of defendant while incarcerated. Plant testified that he met Shay Jr. in the OEU, where Shay Jr. had been placed because "he couldn't stay in population because people didn't respect him out there, and they brought him in there to protect him." (T.p. 13-90) Just after being moved due to victimization by other inmates is precisely when Shay Jr. told his story, as "Boom Boom." This in combination with

than Shay Jr.'s unreliable statements to Plant of anything beyond recklessness.<sup>5</sup>

In contrast to Shay Jr.'s statements to Plant is the considerable direct evidence that Shay Jr.'s feelings for his father at the time of the bombing were inconsistent with an intent to kill or malice aforethought. After residing in institutions for most of his life, Shay Jr. went to live with his father in October of 1987 at the age of fifteen. Seven months later, in May of 1988, Shay Sr. and Shay Jr. moved in with Shay Sr.'s female companion, Mary Flanagan, at her home at 39 Eastbourne Street in Roslindale, MA.

Shay Jr. was more content and more stable than he had ever been while living alone with his father. His theft from Mary Flanagan was Shay Jr.'s childishly disturbed way of acting out his disappointment at having to share his father's long-awaited companionship and attention with Mary Flanagan. Shay Jr. expressed remorse to his father, his sister Nancy, and other

---

a mental illness which manifests itself in fabrications for the purpose of gaining attention and approval explains Shay Jr.'s exaggeration of the extent of his knowledge.

<sup>5</sup> When asked by the government at trial whether Shay Jr. had told him who the bomb was meant for, inmate Robert Evans stated, "not so much directly." (T.p. 11-145) The most Evans could say was that, in answer to his question whether his father would bail him out, Shay Jr. said, "what are you crazy after what happened." Id.

Christopher Henry was in the same cell with Evans during Evans' entire conversation with Shay Jr. and returned in the van to the Dedham House of Corrections with Evans and Shay Jr. It was Henry's testimony that all Shay Jr. said about his father was that "he didn't think his father would bail him out." (T.p. 12-132)

family members, and more recently to the representative of the Probation Department, about taking Mary Flanagan's sentimental belongings.

Shay Sr. specifically testified at trial that he did not tell Shay Jr. that he would never be able to forgive him for this incident, but that he told him that Mary would never be able to forgive him, and indicated that he did forgive him. (T.p. 7-119-120) This incident did not end the relationship between Shay Sr. and Shay Jr. They communicated by telephone and saw each other when Shay Jr. was in the area. (T.p. 7-120)

In August of 1991, Shay Jr. returned from New York where he had been living in order to give a deposition in his father's lawsuit against the owners of the Dedham Service Center. Shay Sr. testified that he saw his son approximately four times between Shay Jr.'s return in August of 1991 and October 28, 1991. (T.p. 7-133) There were two unremarkable incidents during which Shay Sr. became upset with Shay Jr. One involved a late phone call, after which the two met and Shay Sr. gave Shay Jr. \$120 for dental work. (T.p. 7-130-131) The other involved Shay Jr. running out of a club after a car and Shay Sr. yelling at him because he was worried that Shay Jr. might get into trouble and wasn't paying attention to him. (T.p. 7-122-123) These incidents hardly support a theory of intentional premeditated murder.

The evidence showed that Shay Jr. became quite hopeful about rebuilding a stable and more regular relationship with his father in the weeks before the bombing. On October 12, 1991, Shay Jr.

went with his father to the race track and to the Franklin Cafe. When he left the Franklin Cafe later that night, Shay Jr. handed his father a note which said:

Dad, thanks for a real fun time. I hope that we can do this much more often. It's like old times being here with the guys and you. I will go over a friend's house tonight and go home tomorrow. I can walk from here. Dad thanks (for being my dad again). I will call about David's car tomorrow and I will see you Tuesday or Wednesday, see you, love, Tommy.

**(T.p. 7-124-128; Government Exhibit 25)** Nancy Shay testified that Shay Jr. was very happy about this outing with his father and that father and son were getting along well. **(T.p. 14-39)**

Shay Jr.'s behavior after the explosion was inconsistent with a premeditated design to kill his father, or even with knowledge. Nancy Shay and David Shillalis testified that Shay Jr. was surprised and shocked when he learned about the explosion and was worried about his father and wanted to see him. **(T.p. 14-44; 18-62)** Detective Miller Thomas testified that on October 29, Shay Jr. came to talk to the detectives in order to see his father. Shay Jr. was concerned about his father's well-being, upset and agitated, what Detective Thomas considered "a normal reaction." **(T.p. 10-19-20, 28)**

Shay Jr. was aware that his father was the primary suspect, and he attempted to defend his father during interviews by the media and the police. **(T.p. 12-65, 99; 10-79); see also** videotapes of 10/29 and 10/31/91 press conferences. On the night of October 31, Shay Jr. spoke to his father from the police station and told his father he loved him. Shay Sr. told his son

he loved him and would stand by him. (T.p. 15-136) When the detectives falsely told him that his father had called to say he still loved him, Shay Jr. said his father thought he had something to do with the bombing and began to cry. (T.p. 10-59) Shay Jr. told Karen Marinella one year later that his relationship with his father was good until his father thought he could do something like this. See Videotape of Channel 56 Interview.

The government's money motive was discredited at trial. Alan Pransky testified that after the deposition, Shay Jr. asked him if he was aware that his father thought the owners of the Dedham Service Center might kill him. Pransky stated his opinion at trial that it seemed to him that Shay Jr. "was asking out of concern for his father." (T.p. 16-63) Pransky testified that he then informed Shay Jr. that he was not concerned about it, since the lawsuit would continue in the event of his father's death.

The theory that Shay Jr. believed he would collect a large sum of money, or any sum of money, from the lawsuit in the event of his father's death is not credible. Pransky testified that Shay Jr. told him his father thought there was \$300,000 worth of insurance coverage, but that he explained to Shay Jr. that the value of the coverage was not the value of the lawsuit. (T.p. 15-123-126) He testified that he informed Shay Jr. that the money would go to Shay Sr.'s heirs through a will or to his four children if there was no will. He did not tell Shay Jr. whether or not there was a will. (T.p. 15-126) If there was a will, it

was unlikely that Shay Jr. would be included in it. Shay Jr. said during the Channel 56 interview that it was his belief that the only type of lawsuit which survives the death of the victim is one involving a car accident.<sup>6</sup>

Shay Jr. showed no interest in the lawsuit, except to placate his father by giving a deposition. Although he had some injury from the explosion at Dedham Service Center, and Pransky invited him to join the lawsuit as a plaintiff, Shay Jr. declined. (T.p. 16-22) It required a number of phone calls to get Shay Jr. back from New York for the deposition, and even then he failed to show for at least one of them. (T.p. 16-119-121; 13-151-53)

There was no credible evidence that Shay Jr. told Trenkler he would split insurance proceeds with him or that money was Trenkler's motive. The evidence showed that Trenkler's business was successful before the bombing. Trenkler's business partner Richard Brown testified that the business was "lucrative," and that "this investigation is what actually caused the company a nose dive." (T.p. 13-103, 113)

Shay Jr. stated during the Channel 56 interview that he met Trenkler in a bar in late 1989 or early 1990. He said that Trenkler was "an acquaintance, not like a very good friend." There was no evidence that there was a "love" relationship

---

<sup>6</sup> Pransky did not relay this purported conversation to the police until four days into an intensive investigation of Shay Sr., during most of which he was present. Pransky had an interest in the lawsuit, which would fail if Shay Sr. were to be charged with the bombing. (T.p. 16-53, 55, 59-62)

between them. The testimony of John Cates, John and Josephine Wallace and Russ Bonanno showed that the relationship between Shay Jr. and Trenkler was a casual acquaintanceship. (T.p. 13-15-17; 11-65; 17-31, 41, 42; 12-82-84)

Shay Jr. stated during the Channel 56 interview that he had talked to Trenkler at length about his background of abuse and neglect while in institutions under the care of the DSS. He said he thought Trenkler built the bomb as retaliation against his father for allowing this to happen and because Trenkler couldn't retaliate against his own father for abusing him.<sup>7</sup>

The only evidence that Shay Jr. performed any act which advanced the scheme was the Radio Shack receipt and Shay Jr.'s statements during the Channel 56 interview about the Radio Shack purchase. He stated that he had purchased electronic parts for Trenkler, but did not know at the time what Trenkler meant to use the items for and thought they were intended for Trenkler's work. He stated that Trenkler had told him he was building him a surprise, but that he thought it was a remote control car. Shay Jr. stated that he did not know that Trenkler had built and placed a bomb until after the fact.

---

<sup>7</sup> Shay Jr. did not know about the device Trenkler built in 1986 at any time before the October 1991 explosion. During the fierce controversy before and during trial over the admissibility of Trenkler's 1986 device against Shay Jr., the government could not produce a shred of evidence indicating Shay Jr. knew about the 1986 device at any time before the explosion, in spite of the importance of such evidence to establishing relevance in Shay Jr.'s case.

He stated that he had not seen Trenkler build the bomb, but that since the toggle switch and the AA battery holder which he bought for Trenkler were in the bomb, "Al Trenkler must have built it." Government witnesses testified that the AA battery holder listed on the same receipt with the toggle switch was not in the bomb. (T.p. 6-48)

There was no evidence that Shay Jr. placed the bomb or knew that it was being placed. During the three days prior to the explosion Shay Jr. was with Scott Critcher, Drew Starkey, and other friends or acquaintances at the Store 24 in Quincy and at Critcher's Halloween party, or was at home sleeping or watching television. (T.p. 14-40-43, 17-80-85, 17-101-104, 17-105-108, 18-57-61) The government produced no statement by Shay Jr. during this time period indicating he was even aware that the bomb was being affixed to the undercarriage of the automobile.

Fred Burke's testimony indicated how little Shay Jr. knew. He testified that while Shay Jr. was in custody in San Francisco in March of 1992, when he asked Shay Jr. if he thought Trenkler had anything to do with the bombing, Shay Jr. "said I don't know, very sadly, very resolutely, very quietly . . . I got the impression that he was fearful of this Alfred Trenkler person." (T.p. 15-67)

Shay Jr. did not intend, premeditate or deliberate the murder of Officer Hurley or his father. Shay Jr. did not participate in building the device, did not know it was being built, and did not understand what Trenkler was doing, or

discuss, understand or absorb any details of the scheme. Nor is there a shred of evidence of malice in Shay Jr.'s acts vis a vis his father.

Two conclusions follow. Shay Jr. acted recklessly in communicating his history of abuse and neglect to Trenkler and purchasing a toggle switch, unknowingly where an ordinary person under the same circumstances would have realized the consequences, or at most with recklessness as to consequences of which he was aware, which is consistent with involuntary manslaughter. In the alternative, if this Court concludes that there is no evidence of malice, the highest category of homicide for which Shay Jr. can be sentenced is voluntary manslaughter.

**B. Shay Jr.'s Background and Testimony to be Presented at the Sentencing Hearing Further Supports Recklessness as Shay Jr.'s State of Mind.**

By virtue of the fact that he was not tried for homicide, Shay Jr. was prevented from presenting psychiatric evidence relevant to the particular states of mind necessary for various degrees of homicide, which are different from the state of mind for the crimes for which he was charged. The Court instructed that the state of mind necessary to find Shay Jr. guilty of aiding and abetting was willfulness. (T.p. 19-96) However, the state of mind necessary for first degree murder is intent to kill, premeditation and malice aforethought; that for second degree murder is malice aforethought.<sup>8</sup> "The significance of the

---

<sup>8</sup> Malice is not implied from the mere fact of a death or even a cruel act. Malice is a "depraved state of mind" which must be independently proved. Hill v. Maloney, 927 F.2d 646, 653 (1st Cir.

difference between willfulness on the one hand and premeditation and malice aforethought on the other is obvious." United States v. Harrelson, 754 F.2d 1153, 1173 (5th Cir. 1985) (reversible error to substitute willfulness as criminal intent required for first degree murder). No evidence was presented nor instructions given on recklessness. Because state of mind is central to the Court's determination of the analogous level of homicide, mental health issues bear directly on that determination. While consideration of mental or emotional conditions is "not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range", §5H1.3, consideration of Shay Jr.'s background and resulting mental and emotional condition in determining the applicable guideline range in the first instance is neither discouraged nor prohibited. In fact, the guidelines clearly encourage consideration of Shay Jr.'s background and mental state in determining the most analogous guideline from Chapter Two, Part A:

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.

U.S.S.G. § 1B1.4. Congress commanded generally that

The court, in determining the particular sentence to be imposed, shall consider-(1) the nature and circumstances of the offense and the history and characteristics of the defendant.

---

1990).

18 U.S.C. § 3553(a). Particularly in a case where the sentence is to be based on a choice among crimes whose primary difference is the state of mind with which they were committed, state of mind must be considered without question.

**1. Psychiatric evidence**

Dr. Phillips and other witnesses will testify regarding Shay Jr.'s extraordinary history of mental and emotional problems and the unlikelihood, given that history, that he acted with malice aforethought, intended to kill, or deliberately premeditated a murder.

Shay Jr. was prevented at trial from presenting information on his state of mind and mental condition in the form of a diminished capacity defense and on the reliability of his statements. Dr. Phillips' testimony concerning state of mind is surely required in what amounts now to a murder trial. To deny Shay Jr. the opportunity now to present evidence relevant to the state of mind for which he will be sentenced would be a denial of due process of law.

**2. Shay Jr.'s Background.**

Shortly after Nancy Shay obtained a restraining order against Shay Sr. due to a particularly brutal beating, Shay Jr., at the age of five, accidentally set the house on fire while playing with matches.<sup>9</sup> His mother brought him to the Gaebler Unit at Metropolitan State Hospital where, upon admission, Shay Jr. immediately told the doctor that he wanted to die and showed

---

<sup>9</sup> Childhood preoccupation with fire is a red marker for abuse.

him scratches on his arm which he had inflicted with a razor. Among his other problems at this time was the extraction of fifteen teeth, obviously due to neglect, which resulted in harassment by other children and caused a drooling problem of long duration. Shay Jr. was considered a suicide risk. He was experiencing parental neglect, maturational lags, and emotional and developmental immaturity. He was kept at the Gaebler Unit for six months, at the end of which he had improved markedly. Hospital officials recommended residential placement in light of Nancy Shay's mental instability, but Shay Jr. was returned home instead. See PSR; Exhibit 1, Met. State Hospital Records.

After his return home, Shay Jr.'s mental problems and behavior again worsened. At the age of seven, he was referred to Dr. Casey Dorman for a psychological evaluation by the Milton public school system. On March 15, 1979, Dr. Dorman noted that the effect on Shay Jr. of his belief that he had burned down the family home was both guilt and fear. He had poor control of his impulses and an unusual need for attention, whether positive or negative. He tested well below average on a conceptual reasoning task. By November 28, 1980, Shay Jr. was doing much more poorly. He had been knocked unconscious twice by other children in the neighborhood, due to his tendency to put himself in danger purposely so that he might get hurt. He had been stealing money from his mother regularly, in an effort to get attention from his father. Psychological testing indicated Shay Jr. felt ineffectual and vulnerable, but there was little indication of

anger or aggression. Dr. Dorman noted that Shay Jr. sought punishment and injury in order to alleviate guilty and negative feelings about himself and to secure the center of attention. Because of his very poor judgment and self-destructive impulses, Dr. Dorman recommended residential treatment. Shay Jr.'s parents ignored the recommendation and denied the seriousness of his problems. See PSR; Exhibit 2, Dr. Dorman's Reports.

The next few years in the family home were marked by violence and severe neglect. Nancy Shay was incapable of caring for the children, leaving them alone for long periods of time without food or heat. Shay Sr. was not living in the home for most of this period and, while he was aware of the situation, did nothing about it. Shay Jr.'s behavior continued to be marked by cries for attention. At age nine, he falsely reported that he saw a boy fall through the ice at Wollaston Beach. At age ten, when Shay Jr. was found asleep outside in a snow bank in sub-freezing weather, probably with mononucleosis, he was removed from the home and placed in the Nazareth Home in Jamaica Plain. See PSR; Exhibit 3, 51A Reports.

Shay Jr. stayed at Nazareth from February 1982 until May 1984 when he was twelve years old. During this period, Shay Jr. was sexually abused and contracted gonorrhoea. He ran away often and once falsely reported he had been hit by a car. He was on Thorazine for "calming effect," and Milltown for consistent nightmares. Psychological testing showed dramatically

deteriorated thought processes and reality testing. Dr. Kruger wrote:

The extent of this deterioration is even evident in his grammatical usage which sometimes clearly reflects the difficulty he has in organizing his thoughts. . . The antecedents to this burgeoning thought disorder are not entirely clear and an organic component is a strong possibility. Psychodynamic factors that closely interface with this thought disturbance cluster around ambivalence around growing up and overwhelming depression and anxiety. Unmet needs for nurturance and psychological safety seem to be prime movers of these issues. There were signs that the potentially traumatic incidents of losing his teeth and setting his house on fire have not been resolved and may be only a part of the larger picture of a very traumatic childhood. . . [E]motion often seems to dominate cognition.

Dr. Kruger noted Shay Jr.'s "weak self-observation skills," and difficulty in anticipating the consequences of his and other people's actions." On March 28, 1984, Dr. Woicik noted that all of Shay Jr.'s interest in fire had dropped out by December of 1983. On May 14, 1984, wrote a report in which he stated that "Tommy's fantasy life is so rich that he can't effectively differentiate fantasy from the real world and because of it, his judgment can be very poor." See PSR; Exhibit 4, Nazareth Records; Exhibit 5, DSS Court Updates.

Shay Jr. was then institutionalized at the Bournemouth Hospital from May until October of 1984. A neurological evaluation indicated there may be a neurological basis to his "behavioral discontrol." His diagnosis at discharge was: atypical pervasive developmental disorder, conduct disorder, undersocialized, nonaggressive. He had attention deficit disorder and an abnormal EEG. Bournemouth Hospital officials

believed Shay Jr. was helped by his stay there and Dr. Jackson recommended to DSS long term treatment in a hospital setting and medication (Tegratol and Lithium or Ritalin), "given the severity and multiple nature of this patient's problems." DSS instead placed him at Spaulding Youth Center, which was eventually determined not to be the appropriate placement. See PSR; Exhibit 6; Bournemouth Records.

Shay Jr. remained at Spaulding from November of 1984 until July of 1986 (ages 13-14). The positive effects of Bournemouth apparently lasted until December of 1985, when his behavior became marked by suicidal gestures, stealing and running away. Dr. Sack noted confusion over sexual identity, and his strong belief that Shay Jr. had been sexually abused very early in life and had lived a very deprived and stressful life. He displayed an abnormal EEG which showed "spike and wave complexes indicative of a lower seizure threshold." Dr. Sack diagnosed Shay Jr. with: atypical pervasive developmental disorder, indicated by a delay in his milestones, a great deal of soft sign neurologic evidence and family history that indicates an inborn neurological problem, and conduct disorder - undersocialized, non-aggressive with a very chaotic relationship between patient and parents, having had difficulties since he was conceived. Dr. Sack recommended a setting in which re-parenting could take place in a setting with a focus on children who have been sexually abused. The staff at Spaulding was concerned for Shay Jr.'s safety due to incidents

including a hanging incident, tearing up and ingesting tile, and refusal to eat. See PSR.

In July of 1986, Shay Jr. was sent to the Gaebler Unit for evaluation, then to Fuller Memorial Hospital. Diagnostic testing at Fuller indicated a "low average" IQ, a slightly abnormal EEG, and an extra Y chromosome. A letter from Dr. Dowling at Fuller to the DSS caseworker, dated 10/22/86, notes that the effects of an extra Y chromosome are poorly understood, but that a study by Hook in 1973 indicated behavioral problems among those with the extra chromosome are due to increased impulsiveness rather than greater aggressivity. Dr. Dowling noted Shay Jr.'s problems with impulsivity, but that he had not been aggressive during his stay at Fuller and had demonstrated a beginning ability for warm compassionate relationships. His response to treatment for poor impulse control and judgment was excellent. Dr. Dowling noted that Shay Jr.'s father had been extensively involved in his treatment and clearly had his best interests at heart. Dr. Dowling recommended long term residential treatment, with the ultimate goal to return to live with his father. See PSR; Exhibit 7, Fuller Mem. Records.

Shay Jr. was then placed at the Baird Center. Reports noted his extreme need for attention, fantasy life and gross exaggerations, operation on a much younger developmental level, lack of friends, low self-esteem, and his belief that his mother abandoned him due to his own defectiveness. While at Baird, Shay Jr. made a false accusation of sexual abuse against a staff

member (which he admitted), falsely reported a peer carrying a gun and bullets on the ground (investigation by Plymouth police proved accusation false), believed he could run for mayor of Boston, and sexual acting out increased. Because of a chromosomal imbalance, Shay Jr. was thought to be at risk of harming himself. He was also believed to have a "degenerative mental illness, possibly a schizophrenic process occurring." Staff believed he was anxious about leaving the program since he had not lived in a real home for over ten years, and recommended continued residential care. However, after release from Baird, he went directly to live with his father, who by this time had become very involved with his life. Reports noted that "Mr. Shay and Tom appear to have a very close relationship," and that "Mr. Shay has been very involved with Tommy's program." See PSR; Exhibit 8, Baird Center Records.

Shay Jr. attended the Compass School, while living with his father, from December of 1987 until July of 1988. Records note his lack of trust, immaturity, failure to make friends, extreme need for attention, excessive fabricating, and increased emotional difficulties. See PSR.

In June of 1988, Shay Jr. was evaluated at the West-Ros-Park Mental Health Center. The report noted his history of abandonment and abuse, tendency to fantasize with grandiose thinking which borders on psychotic process, need for attention, and chromosomal imbalance which contributes to his sexual identity problems. See PSR.

After leaving his father's home, Shay Jr. lived as a homeless person and/or transient in the Boston area and around the country. On August 29, 1988, Shay Jr. called the Needham police, reporting that he was frightened of a man he was staying with at the time. The Needham police picked him up. Sgt. Edward Callahan, in a letter dated August 30, 1988, to Linda Silva at DSS, stated that Shay Jr. was "most definitely a child at risk and should be by no stretch of the imagination be without supervision and living on his own." Sgt. Callahan expressed outrage at the fact that he had made every effort to get help from the DSS with the situation but was told the situation was not subject to DSS investigation. See Exhibit 3, 51A Reports.

Shay Jr. was diagnosed at Bridgewater State Hospital in December of 1991 with a significant personality disorder, accompanied by prominent histrionic and borderline traits. Dr. DiCataldo stated in his report regarding psychological testing:

He tends to respond spontaneously and impulsively to environmental stimuli and does not approach problems in a more deliberating or analytical fashion. He does not break down stimuli into component parts to achieve easier and more effective problem-solving. Instead, he approaches situations in a more global and undifferentiated fashion, responding to its more obvious and easily perceived aspects. Typically, he appears to act reflexively with a cursory scanning of the possible dimensions within a problem.

Dr. Paul Nestor stated that Shay Jr.'s difficulties did not fulfill the criteria for mental illness, but cautioned that the clinical evidence he relied on was limited, and that a more definitive opinion would require a review of past records and

Shay Jr.'s willingness to discuss the charge in greater detail.

He also wrote:

The patient, as will be discussed below, is a poor historian and the reader is cautioned that the following is based on his own self-report. . . He has yet to earn his high school diploma. . . . He also reports he has worked on a volunteer basis for an ambulance company. He describes his sexual orientation as "gay but not proud." He reports that he witnessed the death of his lover in what he describes as a gay bashing incident in 1989. He is a recent father of a baby girl.

He often responds to specific questions about his past by referring to newspaper clipping about himself, which he brings to the evaluation.

Notwithstanding his apparent disdain for much of the evaluation, Mr. Shay presents as a likeable young man, who clearly appears to enjoy and crave the attention inherent in the one-on-one clinical interviews. In fact, he seems to relish attention and publicity.

His mood . . . is elevated and inappropriate, particularly in light of his claim that he is a suspect in the death of a Boston Police officer in a bomb explosion. Indeed, he seems childish, self-centered, and egocentric, almost as if he were basking in the limelight of a tragic event.

See PSR; Exhibit 9, Bridgewater Records.

### **C. Guideline Calculation**

Shay Jr. objects to the Probation Department's guideline calculation. First, it assumes the jury found Shay Jr. guilty of conspiring to commit the substantive offense of which it acquitted him. The jury found Shay Jr. guilty of Count Three, which does not contain as an element the intent to kill. The jury found Shay Jr. not guilty of Count Two, which does contain as a possible element the intent to kill. The least reasonable way to interpret the conspiracy verdict is to assume that the jury found Shay Jr. guilty of conspiring to commit the

substantive offense of which it found him not guilty. The most reasonable interpretation of the conspiracy verdict is that the jury found Shay Jr. guilty only of conspiring to commit the substantive offense of which it found him guilty, that is, Count Three, which requires only an intent to destroy an automobile.

Shay Jr. also objects to the Probation Department's guideline calculation to the extent it rests on inaccurate or misleading "facts." Shay Jr. did not act with malice aforethought or participate in a premeditated design to kill his father. The evidence did not prove intent to kill, premeditation and deliberation, or malice aforethought. There was no evidence that Shay Jr. made or placed the bomb. The evidence showed that he recklessly told Trenkler about his history of abuse and neglect, purchased a toggle switch for Trenkler, and failed to ascertain or understand the gravity of the situation. As the Third Circuit has stated:

[I]n most cases, there is a meaningful distinction between a defendant who intends to cause a harm himself and a defendant who acts with the knowledge or intent that someone else cause the same harm. Moreover, each of these two mental states can be further trifurcated according to whether the harm was specifically intended, knowingly caused, or consciously and unjustifiably risked. . . . [T]he most culpable of the six mental states (acting oneself with specific intent to cause a harm) is significantly more culpable than the least culpable (acting with reckless disregard for whether someone else will cause the same harm).

Kikumura, 918 F.2d at 1107. The Probation Department failed to make any distinction based on Shay Jr.'s particular conduct and state of mind.<sup>10</sup>

**1. The most analogous guideline is that for involuntary manslaughter.**

The most analogous guideline from Chapter Two, Part A is U.S.S.G. § 2A1.4, Involuntary Manslaughter, which defines the state of mind necessary for involuntary manslaughter as follows:

"Reckless" refers to a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted gross deviation from the standard of care that a reasonable person would exercise in such a situation.

U.S.S.G. § 2A1.4 comment. (n.1). While the term "includes all, or nearly all, convictions for involuntary manslaughter under 18 U.S.C. § 1112," it does not exclude other kinds of reckless conduct which result in death.<sup>11</sup>

---

<sup>10</sup> Shay Jr.'s limited participation and state of mind are simply not analogous to first or second degree murder. For example, in United States v. Sides, 944 F.2d 1554 (10th Cir. 1991), there was sufficient evidence of malice aforethought, premeditation and deliberation to support a first degree murder conviction, where the defendant admitted to participating in the robbery even though he knew the victims would be killed if they recognized his accomplice, he continued to rob them even though he believed they recognized his accomplice, and continued with the robbery after the killing began. Id. at 1558. In United States v. Phillips, 948 F.2d 241 (6th Cir. 1991), the defendant was convicted of second degree murder. He beat his son daily, in the morning before he left for work, during lunch breaks and when he came home in the evening, until the child's wounds became so severely infected that he became ill and lethargic. While the child was in this state, the defendant beat him to death.

<sup>11</sup> Shay Jr. objects to the notion that any particular statute listed in Chapter 2, Part A under "Statutory Provisions" automatically provides the definition of the possible levels of homicide at issue in this sentencing. A list of "Statutory Provisions" under a guideline refers to the statutes "covered by

Alternatively, the most analogous guideline is U.S.S.G. § 2A1.3, Voluntary Manslaughter, as there was absolutely no evidence of malice aforethought.

**2. Shay Jr. is entitled to a three-level reduction based on his limited role in the offense.**

Because Shay Jr. was "substantially less culpable than the average participant," and lacked knowledge or understanding of Trenkler's activities, his offense level should be decreased by three levels for being between a minimal and a minor participant. U.S.S.G. § 3B1.2, comment. (backg'd.); U.S.S.G. § 3B1.2, comment. (n.1). See United States v. Westerman, 973 F.2d 1422, 1428 (8th Cir. 1992) (defendant entitled to reduction for being a minimal participant given he was not involved in planning, acted merely as lookout, and had no knowledge of underlying insurance fraud scheme); United States v. Ocasio, 914 F.2d 330, 333 (1st Cir. 1990) (factors bearing on whether defendant was entitled to minor role reduction are whether crime could have been committed without the defendant's assistance, his role in comparison to persons jointly engaged in criminal activity, and whether he "had

---

that guideline," see U.S.S.G. § 1B1.1, comment. (n.3), and does not mean that those statutes supply substantive definitions of an offense in a situation like that presented here. Since neither the guideline for the offense of conviction nor the homicide guidelines specify that any particular statutes should supply the definitions of the various categories, a defendant found guilty of a violation of the explosives statute must be sentenced for his particular conduct and state of mind in light of whatever guidance the homicide guidelines and commentary provide. See United States v. Weston, 960 F.2d 212, 219 (1st Cir. 1992) (where language of guideline not fully illuminating, court should look to application notes and commentary).

a hand in each of the elements of the offense of conviction."). Shay Jr. contributed almost nothing to the scheme. He did not personally commit each of the elements of the offense--he neither built nor placed the bomb. At most, he purchased a toggle switch without knowledge. Cf. United States v. Swapp, 719 F.Supp. 1015, 1024 (downward departure where defendant was not present during the commission of the offense and was convicted as an aider and abettor).

**3. Defendant's offense level computation**

The Base Offense Level for U.S.S.G. § 2A1.4 is 14. The Base Offense Level for the crime of which Shay Jr. was convicted is 6, with 14 levels added for the specific offense characteristic of recklessly endangering the safety of another. U.S.S.G. § 2K1.4(b)(2). Since the resulting offense level of 20 under U.S.S.G. § 2K1.4 is greater than that for involuntary manslaughter, the Base Offense Level should be 20. U.S.S.G. § 2K1.4(c)(1).

Base Offense Level	
U.S.S.G. § 2K1.4(a)	.....+ 6
Specific Offense Characteristic	
U.S.S.G. § 2K1.4(b)(2)	.....+14
Role in the Offense	
U.S.S.G. § 3B1.2	.....-3
Total Offense Level	.....17

The alternative calculation, for the Voluntary Manslaughter guideline, is as follows:

Base Offense Level	
U.S.S.G. § 2A1.3	.....+25

Role in the Offense	
U.S.S.G. § 3B1.2.....	-3
Total Offense Level.....	22

**III. DEPARTURE IS WARRANTED.**

Particularly if the Court does not find that either the Involuntary or Voluntary Manslaughter guideline is the most analogous guideline, Shay Jr. states that his case warrants departure on a number of grounds. His case is a highly unusual case, and the "the Commission itself has explicitly said that (with a few exceptions) it did not 'adequately' take unusual cases 'into consideration.'" United States v. Rivera, 994 F.2d 942, 947 (1st Cir. 1993). His case presents mitigating circumstances of a kind and to a degree not adequately taken into consideration by the United States Sentencing Commission in formulating the guidelines, in addition to mitigating circumstances which are considered in the guidelines. U.S.S.G. § 5K2.0, p.s.; Rivera, 994 F.2d at 947-48.

The Introduction to the Sentencing Guidelines states that

The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. [With a few stated exceptions], the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.

U.S.S.G. Ch. 1, Pt. A, intro. comment. (4)(b) (1990). In an unusual case, the "court may go on to consider, in light of the sentencing system's purposes, see 18 U.S.C. § 3553(a), (and the

Guidelines themselves) whether or not the 'unusual' features of the case require departure." United States v. Rivera, 994 F.2d 942, 947 (1st Cir. 1993). If any case is "out of the heartland" of typical cases of its kind, it is this.

A. Shay Jr. is Entitled to a Departure Because He Did Not Cause the Death Intentionally or Knowingly.

The guideline for first degree murder specifically encourages a downward departure "[i]f the defendant did not cause the death intentionally or knowingly." U.S.S.G. § 2A1.1, comment. (n.1). This departure is permitted whenever "the defendant is convicted under a statute that expressly authorizes a sentence of less than life imprisonment." U.S.S.G. § 2A1.1, comment. (backg'd.) (emphasis added). The statute under which Shay Jr. was convicted, 18 U.S.C. § 844 (i), authorizes a sentence of death, life, or any term of years when the offense results in death.

The extent of the departure depends upon "the defendant's state of mind (e.g., recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct." His conduct consisted of talking to Trenkler about his father's responsibility for his abuse and neglect as a child, and of buying a toggle switch without knowledge. He was reckless in failing to ascertain or pay attention to the likelihood that Trenkler was carrying out a dangerous scheme, to which he only contributed a toggle switch.

Although the guidelines state that "the Commission does not envision that departure below that specified in §2A1.2 (Second

Degree Murder) is likely to be appropriate," U.S.S.G. §2A1.1, comment. (n.1) (emphasis added), a departure to that extent is not forbidden. See Rivera, 994 F.2d at 948. Shay Jr.'s involvement and knowledge were so limited in comparison to first and second degree murderers, that his case warrants a departure below that specified for second degree murder.

**B. A Departure Based on Shay Jr.'s Extraordinary Mental and Emotional Condition and History of Abuse and Neglect is Warranted.**

This Court may consider "without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." U.S.S.G. section 1B1.4 (emphasis added). While mental and emotional conditions are "not ordinarily relevant," U.S.S.G. § 5H1.3, a departure based on a particular defendant's mental and emotional condition is not precluded if it "is present to a degree substantially in excess of that which is ordinarily involved in the offense of conviction." United States v. Studley, 907 F.2d 254, 258 (1st Cir. 1990), quoting U.S.S.G. § 5K2.0. The First Circuit has stated:

In view of § 5H1.3, the Commission obviously foresaw that departure might be bottomed upon the mental or emotional condition of a defendant . . . [if such condition] is atypical.

Studley, 907 F.2d at 258. See also Rivera, 994 F.2d at 948 (factors which are "not ordinarily relevant" may remove a case

from the heartland if they are present in a manner or to a degree that is unusual or special, rather than ordinary).<sup>12</sup>

Shay Jr.'s tragic history of abuse, neglect and mental illness is clearly extraordinary, and clearly distinguishes him from the purposeful terrorists the explosives statute was primarily designed to deal with. Kikumura, 918 F.2d at 1099 (self-evident that an internationally trained terrorist bent on murdering scores of innocent civilians should be sentenced far more severely than an explosives merchant who knows that a customer intends to blow up a warehouse in order to commit insurance fraud).

Shay Jr.'s history of abuse, neglect, and mental illness distinguish him generally from those who violate the law without such a background. A departure is therefore warranted. See, e.g., United States v. Roe, 976 F.2d 1216, 1218 (9th Cir. 1992) (district court erred in failing to depart on the basis of the psychological effects of child abuse where defendant was raped, sodomized and beaten by mother's boyfriend); United States v. Brown, 985 F.2d 478 (9th Cir. 1993) (court had discretion to

---

<sup>12</sup> Childhood abuse and neglect are not specifically addressed by the guidelines. The Sentencing Commission has acknowledged that "[c]ircumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance." U.S.S.G. §5K2.0, p.s. In such a situation, the Court must examine the "unusual" nature of the circumstance in order to determine whether departure is appropriate. Rivera, 994 F.2d at 949. Factors deemed relevant to sentencing by Congress which should inform that determination are "'the nature and circumstances of the offense,' the 'history and characteristics of the defendant,' and the basic purposes of sentencing, namely, just punishment, deterrence, incapacitation and rehabilitation." Id.

depart on the basis of severe abuse and neglect and report stating that resulting psychological trauma was cause of criminal behavior); United States v. Lopez, 938 F.2d 1293, 1298 (D.C. Cir. 1991) (remanding for consideration of whether effects of defendant's exposure to domestic violence warranted departure); United States v. Deigert, 916 F.2d 916, 918 (4th Cir. 1990) (extraordinarily tragic personal background and abusive upbringing proper grounds for departure).

C. **A Departure Based on Shay Jr.'s Lack of Sophistication in Committing a Bombing and Unlikelihood of Future Similar Offenses is Warranted.**

An "utter lack of the sophistication usually shown by persons" committing a particular offense is a proper ground for departure. United States v. Jagmohan, 909 F.2d 61, 65 (2d Cir. 1990). Shay Jr.'s participation in this offense is surely atypical of that of a terrorist or murderer. Shay Jr. wholly lacked the capacity to build or detonate a bomb or to acquire explosives. After the bombing, Shay Jr. placed himself directly in the spotlight and opened himself to suspicion. Shay Jr.'s capabilities and behavior are hardly typical of a terrorist or murderer.

"Particular crimes may be committed in different ways, which in the past have made, and still should make, an important difference in terms of the punishment imposed." Breyer, supra, 17 Hofstra L.Rev. at 9. A departure is therefore warranted. Cf. United States v. Swapp, 719 F.Supp. 1015, 1024 (D.Utah 1989)

(departure based on peripheral involvement, atypical of explosives offenders).

Moreover, although the instant offense is not Shay Jr.'s first offense, it is his first violent offense and is entirely dissimilar in kind and degree from the stolen property offense. In that sense it is an aberrant act and does not predict future violence. The guidelines state that the fact that an offense was "a single act of aberrant behavior" was not considered by the Sentencing Commission when formulating the guidelines. U.S.S.G., Ch. 1, Pt. A, 4(d), p.s. (departure permitted for "single acts of aberrant behavior"). Departure on that basis is warranted here. See, e.g., United States v. Russell, 870 F.2d 18 (1st Cir. 1989) (single aberrant act proper ground for departure); United States v. Glick, 946 F.2d 335, 338 (4th Cir. 1991) (same).

**D. A Departure Based on Shay Jr.'s Extreme Vulnerability in Prison is Warranted.**

Shay Jr. has been regularly victimized by other inmates while incarcerated. See, e.g., PSR, Summary of Correctional Records. It is well-known among the prison population that Shay Jr. is a homosexual, and, largely due to the manifestations of his mental problems, has always been particularly vulnerable to being harmed by others. See, e.g., Exhibit 2, Report of Dr. Casey Dorman. The correctional facilities have responded by placing Shay Jr. in protective custody, or "lockdown," for his protection, for significant periods of time.

Courts have departed downward in exactly analogous situations. For example, in United States v. Lara, 905 F.2d 599

(2d Cir. 1990), the Second Circuit held that the defendant's extreme vulnerability in prison had not been adequately considered in the guidelines, and was therefore a proper ground for departure. The young man was admittedly bisexual and had an immature appearance. Defense counsel presented only one incident of assault, after which the defendant was placed in solitary confinement, which the court found exacerbated the severity of his prison term. Id. at 602-05. See also United States v. Gonzales, 945 F.2d 525 (2d Cir. 1991) (departure to ensure minimum security facility and shorter period of incarceration, thereby diminishing likelihood of assault, was proper); United States v. Koon, 53 Cr.L. 1452 (1993) (departure for unusual susceptibility to prison abuse).

The record is absolutely clear that Shay Jr. is likely to be assaulted and placed in solitary confinement in any prison setting, and may very well not survive in some of them. A departure is warranted for Shay Jr.'s safety and protection.

**E. Shay Jr. Requests Placement at a Facility Where He will Be Treated, and a Departure if Necessary to Receive Treatment.**

One of the primary purposes of the sentencing system is to provide the defendant with needed treatment. See 18 U.S.C. § 3553(a)(2)(D). Shay Jr.'s psychiatric history clearly shows that he needs treatment and has responded positively to it in the past. In the event this Court sets a sentence at a level which would place Shay Jr. in a facility without proper treatment available, the Court should depart downward. See United States v.

Studley, 907 F.2d 254, 259 (1st Cir. 1990) (U.S.S.G. § 5H1.3 provides support under the guidelines to depart based on the defendant's special need for, and receptiveness to, treatment, if such treatment is unavailable under the sentence which would otherwise be imposed).

**F. Shay Jr.'s Criminal History Category Over-Represents the Seriousness of His Criminal History.**

Shay Jr.'s criminal history category of II results from one incident which occurred in 1989, when he was seventeen years old, in which he took an automobile from a person he knew. This person claimed not to be able to identify Shay Jr. in the videotape of his arrest or in a photo array. Shay Jr. pled guilty to knowingly receiving stolen property, and received as a sentence the 36 days already served while being evaluated at Bridgewater State Hospital following his arrest. Shay Jr. was also placed on probation until 6/26/90, which he violated while living as a transient. A probation violation warrant issued on 9/13/89 and again on 3/12/91. Shay Jr. received one point for this conviction and an additional two points for being "under criminal justice supervision" in connection with this offense at the time of the instant offense.

The guidelines encourage departure where "a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes." U.S.S.G. § 4A1.3, p.s. This stolen property offense, which apparently arose out of a personal dispute, and was committed when Shay Jr. was a

juvenile, is entirely different in kind from the offenses of which he has been convicted in this case. The 1989 offense was relatively minor, as reflected by the 36-day sentence received, and does not indicate that Shay Jr. will commit serious crimes in the future. A departure is warranted in this situation. See, e.g., United States v. Brown, 985 F.2d 478, (9th Cir. 1993) (departure where half of criminal history points for DUI and one prior conviction at age 18); United States v. Rodriguez, 741 F.Supp. 12, 14 (D.D.C. 1990) (downward departure justified where instant offense was possession with intent to distribute, prior was possession of stolen property, and it occurred when the defendant, who began using drugs at age 9 and lived in shelters for abused children, was 17 years old); United States v. Smith, 909 F.2d 1164, 1169 (8th Cir. 1990) (relatively minor nature of offenses and age at the time justify departure); United States v. Senior, 935 F.2d 149, 150-51 (8th Cir. 1991) (departure proper based on age when committed prior offenses and state's assessment of seriousness of crimes as reflected by sentence).

#### **IV. CREDIT FOR TIME SERVED**

Shay Jr. objects to the statement in the PSR that he has been detained only since 12/17/92. Shay Jr. should receive credit for all the time he has served as a result of the joint investigation of this case by the Boston police and the ATF. Although Shay Jr. was not formally indicted in this case until December 17, 1992, he was first placed in custody in connection with this case on October 31, 1991, where he remained until

January 3, 1992. Since March 24, 1992, he has been in continuous custody as a direct result of the investigation and indictment of this case.

The ATF and Boston Homicide cooperated in planning and effecting Shay Jr.'s arrest on a probation violation warrant on October 31, 1991. The purpose of the arrest was to detain Shay Jr. for questioning about this case. During that questioning, Shay Jr. stated that he had once called in a false bomb threat from an MBTA station because some men were hassling him. He was charged by the Commonwealth of Massachusetts on November 1 with communicating a false bomb threat. He was released on bail on or about January 3, 1992 and was on probation as a condition of release, with strict daily reporting requirements which were imposed because of his status as a suspect in the bombing. Shay Jr. failed to meet with or call his probation officer on two occasions, between January 10 and January 17, 1992 and left the Commonwealth sometime between then and February 1, 1992.

On March 24, 1992, Shay Jr. was arrested in San Francisco on a federal unlawful flight to avoid prosecution ("UFAP") warrant, by the very ATF agents investigating this case. The investigation of Shay Jr. in connection with the bombing case was featured prominently in the affidavit submitted in support of the UFAP warrant.

Shay Jr. was then held in state custody at the Nashua Street Jail. On April 5, 1992, a false bomb threat was made from the Nashua Street Jail, which Shay Jr. contended was made by another

inmate Mark Means. Shay Jr. was charged for the threat in Brighton District Court on April 7, 1992. The charge was dismissed on July 3, 1992.

On September 18, 1992, the state charge of communicating a false bomb threat from the MBTA station was dismissed, and a federal complaint and detainer based on the false threat from Nashua Street Jail issued the same day. A bail hearing was held at which bail was denied, based in large part on Shay Jr.'s status as a suspect in the bombing case. At that time, Shay Jr. was transferred to the Plymouth County Jail, and has been held as a federal prisoner since then.

Shay Jr. should get credit for all time served since October 31, 1991, or March 24, 1992, at the latest.

V. FINES AND FINANCIAL RESTITUTION ARE NOT APPROPRIATE IN THIS CASE.

Shay Jr. is unable to pay fines or restitution, as he has no savings or income, and little prospect of either at the present time.



CONCLUSION

For the reasons stated above, Shay Jr. respectfully requests that this Court sentence him according to the guideline for involuntary manslaughter. Alternatively, he requests that the Court depart downward on all of the grounds stated herein.

Respectfully submitted,

**THOMAS A. SHAY**  
By his attorneys

---

Nancy Gertner (BBO #190140)  
Amy Baron-Evans (BBO #560312)  
**DWYER, COLLORA & GERTNER**  
400 Atlantic Avenue  
Boston MA 02110  
(617) 357-9202

---

Jefferson Boone  
**BOONE & HENKOFF**  
138 Brighton Avenue  
Allston MA 02134  
(617) 782-8210

Dated: October 1, 1993

G:\CLIENT\SHAYTOM\PLEADING\SENTENCI