

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CASE NO: 07-2764

THOMAS A. SHAY

Appellant/Petitioner

vs.

UNITED STATES OF AMERICA.

Appellate/Respondent

MOTION REQUESTING PERMISSION TO FILE A SECOND AMENDMENT
TO APPELLANT'S CERTIFICATE OF APPEALABILITY
ON THE GROUNDS OF NEWLY DISCOVERED EVIDENCE

THOMAS A. SHAY
REG. NO: 19193-038
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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

THOMAS A. SHAY.

Appellant

vs.

Case No: 07-2764

UNITED STATES OF AMERICA.

Appellee

-----/

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AMENDMENT TO APPELLANT'S CERTIFICATE OF APPEALABILITY
ON THE GROUNDS OF NEWLY DISCOVERED EVIDENCE

COMES NOW. the Appellant Thomas A. Shay in propria persona acting as his own counsel. respectfully files this Motion Requesting this Court's Permission to file a Second Amendment to his Certificate of Appealability that is pending before this Honorable Court.

GROUND IN SUPPORT THEREOF Appellant contends that he just came into possession of documentation that in light had this document been produced during trial or sentencing a different outcome of the proceedings would have or could have been different. This evidence falls within the provisions of Newly Discovered Evidence.

The judgment in Appellant's case was issued on November 9. 1998 the attached Affidavit of Robert W. Blair was not submitted until September 8. 1999. 11 months "after" Appellant's judgment. Appellant contends that the factual basis for this new claim could not have been discovered previously through the exercise of due diligence.

Appellant contends that the evidence that connected bomb remains to a particular type and model toggle switch sold exclusively by Radio Shack was not accurate. During Appellant's co-defendant's trial, co-defendant Alfred W. Trenkler contends that his defense bomb expert informed his trial counsel (prior to trial) that the bomb remains do not match the Radio Shack switch that the government contended at trial was part of the bomb.

As submitted as (Exhibit-A) the Affidavit of Robert W. Blair, who is the Associate General Counsel for Tandy Corporation states that upon his examination of the enclosed documents other than the store address and store number, none of the information on "sales receipt No; 096973 matches..any information contained in Radio Shacks general journal for store No: 01-1021 on October 18, 1991.

Appellant's claim is simply that this newly discovered evidence could have established his innocence, and a possibly different verdict had Appellant proceeded to trial.

It is further clear that the receipt is clearly a counterfeit, which was made in similitude to a genuine receipt and purporting on its face to be such; It is further clear that on May 28, 1993 Nancy Gertner filed a memorandum in support of the motion to suppress in Alfred Trenkler trial the identification by Radio Shack sales person Dwayne Armbrister of Appellant Thomas Shay as the person who purchased items from his Store on October 18. It was argued that at the first visit by the ATF agents to Mr. Armbrister in February, he did not recognize a photograph of Appellant Thomas Shay in a photo array, but after several more ATF visits, and by the time of his April 1992 grand jury testimony, he remembered Appellant Thomas Shay as being the 18 October 1991 purchaser of six items on the receipt. Mr. Armbrister also said at the hearing

on the Motion that he remembered that Appellant Thomas Shay had a scar on his upper lip. Appellant contends that this was nothing more than a false accusation. that Appellant Thomas Shay does not now..or back in 1991 ever have a scar on his upper lip.

It is clear that this testimony was nothing more than a fraudulent intent to deceive with the intention to submit falsely documentation that was falsely made to arrest, convict, and imprison an innocent person, that being Appellant Thomas Shay.

Appellant contends that the Affidavit from Robert W. Blair proves beyond a reasonable doubt that the Appellant Thomas Shay, and co-defendant Alfred Trenkler are actual innocent of the crime that they were convicted of. The Radio Shack switch was the basis for a conspiracy between co-defendant Alfred Trenkler and Appellant Thomas Shay. It is further clear that the District Court's real concern was that the toggle switch was highly crucial evidence. the court stated that it was the evidence on the issue of the conspiracy.

Furthermore, the evidence also shows that Cynthia Wallace, ATF forensic Chemist, incorrectly identified the two contacts found in the bomb debris as coming from a switch exclusively made for Radio Shack, Model No: 275-602. The incorrect identification of the toggle switch caused other members of the prosecution team to offer testimony or statements that were to be untrue, and intended to deceive the court.

Thomas H. Waskom ATF Explosive Enforcement Officer, stated he knows it is a Radio Shack toggle switch from reading Ms. Wallace's report and from going and seeing the item at Radio Shack. He also observed that the packing said that it was exclusively made for Radio Shack.

Appellant does not dispute that the toggle switch that Mr. Waskom was looking at, at Radio Shack was a toggle switch that was made exclusively for Radio SHack. what the Appellant is disputing is that this type of

toggle switch was never purchased by the Appellant nor any of the other items listed on the Radio Shack receipt due to the fact this receipt never existed as a true sale. that the receipt was intentionally. and/or knowingly was falsely made. or caused to be made. with the intent to deceive.

Dennis Leahy. ATF Special Agent. stated that he had received information that a toggle switch from Radio Shack was found in the bomb device. Again. another false statement because only the two unmarked contacts were found.

Furthermore. the agents contacted Radio Shack and obtained a computer print out which showed a toggle switch No: 275-602 being sold by the store at 197 Massachusetts Avenue in Boston. There was no address or telephone number on the print out to trace the purchase to Appellant Thomas Shay or anybody else. Dennis Leahy states that he discovered a receipt at the store which Radio Shack headquarters had no record of.

The receipt furthermore was improperly made out. plus none of the six (6) items listed in the receipt were found in the debris with the exception of the two contacts.

Paul V Kelly. the Assistant United States Attorney who prosecuted both cases Trenkler and Appellant's Thomas Shay. The chemist was able to identify the toggle switch from the bomb as model no 275-602.

The main question here is how can all these individuals identify a toggle switch that never existed. That the Affidavit clearly shows that Appellant Thomas Shay is and was actually innocent of a crime that he did not commit.

The Supreme Court has defined the term "miscarriage of justice" as encompassing only those "extraordinary instances when a constitutional violation has caused the conviction of one innocent of the crime. See. McCleskey v. Zant. 499 U.S. 467. 494 (1991) .

Appellant contends that by the Receipt from Radio Shack being false. it is further clear that the statements from Dwayne Armbrister was clearly made with the false intent to deceive the grand jury into believing that Appellant Thomas Shay was the individual that came into the Radio Shack store on October 18, 1991 and purchased not only a phantom toggle switch but six (6) other phantom items that did not exist.

RELIEF REQUESTED

Appellant contends that the Affidavit from Robert W. Blair should be submitted as newly discovered evidence. that had this document been made available during Appellant's entering of his plea of guilty the Appellant would have assisted in pleading not guilty and proceeded to trial with this evidence. It is further requested that if the court finds that Appellant's 28 U.S.C. §2255 Motion should be time barred Appellant is respectfully requesting that this Honorable Court properly construe this Amendment as a Second and Successive 28 U.S.C. §2255 Motion and Remand that this Motion be referred back to the District Court to entitle the Government the chance to properly respond to the facts and arguments that the Appellant's has submitted in this Second Amendment.

Appellant has clearly shown that he is actual innocent of the crime charged. that it's further clear that a jurist of reasons would find the Appellant not guilty had this evidence been found at the time of Appellant's original trial.

Appellant further contends that is clear that this Honorable Court should find that Appellan't attorney should be rendered ineffective by failing to investigate that counsel had an obligation to over turn every rock in his clients case even the samllest rock. this was not done in Appellant's case.

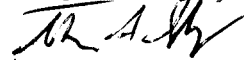
CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion/Amendment is true and correct and was forwarded by U S. Mail postage prepaid to the below following parties.

David Apfel
AUSA
1 Courthouse Way Ste: 9200
Boston. MA 02210

Executed on this the 7th day of August 2008.

Respectfully submitted.



THOMAS A. SHAY
REG. NO. 19193-038
FCI MEMPHIS
POST OFFICE BOX 34550
MEMPHIS TN 38184-0550

cc: DA/AUSA
jdb paralegal.

EXHIBIT-A

E X H I B I T - A

AFFIDAVIT OF ROBERT W. BLAIR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA
Plaintiff,

v.

ALFRED W. TRENKLER
Defendant.

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CRIMINAL NO. 92-10369-2

AFFIDAVIT OF ROBERT W. BLAIR

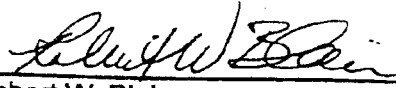
I, Robert W. Blair, being duly sworn depose and state the following:

1. I am Associate General Counsel – Litigation for Tandy Corporation which owns and operates over 5,000 RadioShack stores throughout the United States.
2. I have cause to be made a search for and examination of certain business records of the RadioShack Division, specifically the general journal printout for RadioShack store No. 01-1021 located at 197 Massachusetts Avenue, Boston, Massachusetts for the date of October 18, 1991.
3. I have also examined sales receipt No. 098973 a copy of which is attached to this Affidavit.
4. Based upon my examination of these documents and my knowledge of the business practices of RadioShack stores, other than the store address and store number, none of the information on sales receipt No. 098973 matches any information contained in RadioShack's general journal for store No. 01-1021 on October 18, 1991.

FURTHER THE AFFIANT SAYETH NOT.

SIGNED AND SWORN TO UNDER THE PAINS AND PENALTIES OF PERJURY THIS

8th DAY OF SEPTEMBER, 1999.



Robert W. Blair

RADIO Shack

A DIVISION OF TANDY CORPORATION

ORA

197 MASS AVE
BOSTON

MA 02115

01-1021

098973

CUSTOMER NAME		10-5700
STREET OR ROUTE - BOX		
APT. #, SUITE		
BOSTON	MA	02115

The most current version of this form may apply. This form is the property of Radio Shack and is loaned to the customer. All merchandise returned for reasons of exchange must be in its original condition. All computer equipment and software licenses are subject to the terms and conditions identified on back.

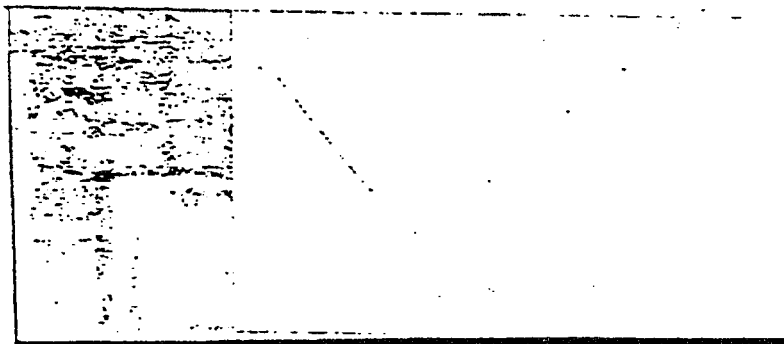
CUSTOMER SIGNATURE: *X*

270-391	4 AA BATTERY REGR	1	1.29	1.29
275-602	SPST TOGGLE SW	1	1.29	1.29
272-1133	PK2-150 LAMPS	1	.99	.99
272-356	PLAS LAMP HOLDER	1	.99	.99
270-226	BT 412XT/A	1	1.89	1.89
270-227	BT 413-15X1.04	1	2.99	2.99
SUBTOTAL				9.44
TAX				.47
				9.91
CASH TENDERED				20.00
CHANGE DUE				10.09

Thank you

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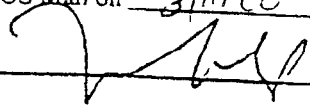


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document(s)
was served upon the attorney of record for each other party by hand-

delivery - US Mail on 3/11/00



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