UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 07-11823-RWZ

ALFRED W. TRENKLER

v.

UNITED STATES OF AMERICA

MEMORANDUM OF DECISION AND ORDER

March 16, 2009

ZOBEL, D.J.

On November 29, 1993, a jury convicted Alfred Trenkler ("Trenkler") of violating 18 U.S.C. §§ 844(d) and (I), receipt of explosives and attempted destruction of property by explosives (counts 2 and 3), as well as conspiracy in violation of 18 U.S.C. § 371 (count 1), for his role in the construction and placement of a bomb under the car of Thomas L. Shay ("Shay Sr.") in Roslindale, Massachusetts, which exploded and killed one Boston Police Officer and maimed another. (See Docket 92-cr-10369-RWZ # 487.) On March 8, 1994, he was sentenced to life imprisonment on counts 2 and 3, along with a 60-month sentence on count 1, the conspiracy charge, all to be served concurrently.

The First Circuit affirmed the convictions on July 18, 1995. United States v. Trenkler, 61 F.3d 45, 48 (1st Cir. 1995). Since then Trenkler has unsuccessfully challenged the convictions and sentence through two motions for a new trial under Rule 33 (1995 and 2004), a petition under 28 U.S.C. § 2241 (2002), a petition for

mandamus (2004), a petition for a writ of error coram nobis (2006), and an earlier petition under 28 U.S.C. § 2255 (1999). In mid-2007, Trenkler filed, pro se, an application to the Court of Appeals for the First Circuit for leave to file a second petition for a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1996[1] ("AEDPA"), in which he alleges newly discovered evidence as a basis for relief. See 28 U.S.C. § 2255(h). The First Circuit allowed the application, albeit with reservations concerning Trenkler's ability to show that the evidence is newly discovered or that its prior unavailability reflects a constitutional violation. Because petitioner has failed to show that the evidence he offers was not previously known to him or his counsel, or that his sentence was imposed in violation of the Constitution of the United States, the petition is denied.

I. This Petition

In his application to the First Circuit, Trenkler asserted that there was "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." 28 U.S.C. § 2255(h)(1). In particular, he stated that: (1) a defense expert told members of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") that black electrical tape recovered from the bomb remnants contained a visible fingerprint; (2) the government had in its possession exculpatory fingerprints recovered from the black electrical tape used to

[1] Pub. L. 104-132, Tit. I, § 105, 110 Stat. 1214, 1220 (codified in relevant part at 28 U.S.C. §§ 2255 and 2244).

construct the bomb and the undercarriage of the car where the bomb had been placed that were not provided to the defense; (3) the toggle switch used to construct the bomb was not purchased from Radio Shack as alleged by the government; (4) the remote control receiver used in the bomb had insufficient battery power to set off the bomb if armed under the scenario proposed by the government; all of which petitioner alleges was not known to him at the time of trial. In addition, he alleges that (5) co-defendant Thomas A. Shay ("Shay Jr.") recanted his prior statements and now says that Trenkler was not involved in any way with the bomb found under Shay Sr.'s car. The court of appeals granted certification "without prejudice to summary resolution by the district court if further information . . . so warrants." (Docket No. 92-cr-10369-RWZ # 708.)

Upon receiving certification, Trenkler filed the petition in this court. He relies on the five grounds presented to the court of appeals and added a sixth: (6) that an adverse witness at his trial stated in 2001 that significant portions of the witness' testimony were untrue. (Docket # 5, 11-12.) In several addenda to his petition, he seeks to incorporate further additional grounds that: (7) two adverse witnesses were rewarded by the government despite assurances that there was no agreement to do so; and (8) evidence of speed bumps in a parking lot that Shay Sr. traversed prior to the bomb detaching itself from the underside of his car was not disclosed by the government. (See Docket # 14, 21.) He also complains about the government's destruction of the evidence in the case in 2005. (See Docket # 14.) Finally, he references letters from several jurors in his 1993 trial who now say that they either believe Trenkler is not guilty or that he deserves a new trial. (See, e.g., Docket ## 19,

21.) He argues that these letters support his contention that had this evidence been available at his trial, no reasonable factfinder would have found him guilty of the offenses. (See Docket # 19.)

II. Legal Standard - Requirements of 28 U.S.C. § 2255

A federal prisoner "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). In addition, the statute requires that any such petition be filed within a one-year period of limitation which, insofar as relevant to this case, runs from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." Id. at § 2255(f)(4).

The government opposes the petition on two grounds: (1) that Trenkler fails to allege any constitutional violations; and (2) that he fails to meet the limitations requirements of the statute. (See Docket # 8.)

A. Necessity of a Constitutional Violation

The government properly notes that, absent allegations of a constitutional violation, claims of newly discovered evidence, even "[p]owerful new evidence of innocence," are not cognizable under section 2255. Conley v. United States, 323 F.3d 7, 13-14 (1st Cir. 2003); accord Herrera v. Collins, 506 U.S. 390, 400 (1993); see also 28 U.S.C. § 2255(a). However, it is incorrect in its assertion that Trenkler advances no

constitutional claim in his petition. In grounds two and three of the petition he either implicitly or explicitly claims that the government withheld exculpatory evidence in violation of Brady v. Maryland. 373 U.S. 83, 87 (1963) (holding that suppression of material evidence favorable to an accused by the prosecution violates due process). In his reply brief, he explicitly cites Brady, which adequately alleges a violation of his right to due process and is sufficient to sustain his petition.[2] See, e.g., Tomkins v. Missouri, 323 U.S. 485, 487 (1945) (liberally interpreting prisoner's pro se petition for habeas corpus).

B. Limitations Period on Section 2255 Motions

Trenkler fares less well against the government's contention that he has failed to meet the one-year statute of limitations on newly discovered evidence.

The First Circuit does not appear to have decided whether this bar is to be considered on a claim-by-claim basis or to the petition as a whole. However, the United States Supreme Court has suggested the former. See Pace v. DiGuglielmo, 544 U.S. 408, 416 n.6 (2005) (dicta) (referring to the time limitations applicable to a habeas petition brought under 28 U.S.C. § 2244). While other circuit courts are split on the issue, the Third Circuit's approach, which is congruent with the Supreme Court's dicta in Pace, is most persuasive. I therefore examine each ground advanced by

[2] I do not decide whether any Brady violation actually occurred because, as discussed infra, each of Trenkler's grounds alleging such a violation is time-barred and even assuming a constitutional violation, Trenkler has failed to establish actual innocence necessary to overcome his procedural default.

Trenkler individually for timeliness.[3] See Fielder v. Varner, 379 F.3d 113, 118 (3d Cir. 2004) (Alito, J.) (concluding that "the statute of limitations set out in § 2244(d)(1) should be applied on a claim-by-claim basis"); Bachman v. Bagley, 487 F.3d 979, 984 (6th Cir. 2007) (adopting the reasoning in Fielder); but see Walker v. Crosby, 341 F.3d 1240, 1246 (11th Cir. 2003) (holding that where a habeas petitioner brings multiple claims, a single timely claim "resurrect[s] what seem to be time-barred claims tagging along . . .").

Given that: (1) Trenkler's conviction was affirmed and became final on September 5, 1995;[4] (2) there is no allegation that the government prevented or impeded Trenkler's filing this petition earlier; and (3) he does not invoke a right newly recognized by the Supreme Court, the only part of the statute relevant to the grounds alleged in the instant petition is subsection (f)(4). Therefore, the question is whether the facts asserted for each ground are indeed new or whether they could have been discovered through the exercise of due diligence more than one year prior to his application to the First Circuit. See Libby v. Magnusson, 177 F.3d 43, 49 (1st Cir. 1999). On this issue petitioner has the burden of proof. See David v. United States,

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[3] While the cases relied on refer to the time limits applicable to a state prisoner filing a habeas petition under 28 U.S.C. § 2244, the structure of this subsection of the statute is identical to that of 28 U.S.C. § 2255, and the limitations themselves are very similar. Compare 28 U.S.C. § 2244(d)(1), with 28 U.S.C. § 2255(f). Therefore, it would be inconsistent for subsection 2244(d)(1), but not subsection 2255(f) to require a claim-by-claim analysis. See, e.g., Brackett v. United States, 270 F.3d 60, 66 (1st Cir. 2001) (abrogated on other grounds) (noting that "[t]he Supreme Court commonly interprets § 2255 and § 2254 in light of each other"); Sustache-Rivera v. United States, 221 F.3d 8, 16 (1st Cir. 2000).

[4] Indeed, the First Circuit affirmed this court's denial of Trenkler's first habeas petition, filed on January 5, 1999, as time barred under 28 U.S.C. § 2255. See Trenkler v. United States, 268 F.3d 16, 27 (1st Cir. 2001).

134 F.3d 470, 474 (1st Cir. 1998). "The test of due diligence . . . is objective, not subjective." Wood v. Spencer, 487 F.3d 1, 5 (1st Cir. 2007).

Knowledge of counsel is attributed to petitioner in determining when facts became known to him. See id. at 5. Similarly, "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence" (28 U.S.C. § 2255(f)(4)) includes efforts conducted or which could have been conducted by counsel as well as petitioner. Id. Finally, contrary to petitioner's argument that the government's failure to disclose fingerprint information in violation of Brady prevented him from filing this motion earlier, when he finally did file it, he had no more information than he had at the time of trial. Accordingly, subsection (f)(2) does not operate to toll the statute of limitations.

III. Bases for Trenkler's 28 U.S.C. § 2255 Petition

A. Grounds One and Two: Fingerprint Evidence

For his first ground Trenkler claims that he has recently become aware that the black electrical tape recovered from the bomb remnants contained a fingerprint that he believes will show that another person constructed or at least handled the bomb. Ground two alleges that the government's failure to provide access to both this fingerprint evidence and fingerprints taken from Shay Sr.'s car "amounts to the withholding of exculpatory as well as factual evidence favorable to defendant Trenkler." (Docket # 5, ASF 2.)[5] Thus, only ground two alleges a constitutional violation.

[5] "ASF _" refers to page _ in the Amended Statement of Facts attached to Trenkler's amended section 2255 petition (Docket # 5).

As to ground one, Trenkler asserts that "[i]n 1993 [his] bomb expert Denny L. Kline . . . observed traces of fingerprints on black electrical tape that had been used to construct the bomb" and "told B.A.T.F. agents present of [sic] what he had observed." (Docket # 5, ASF 1.) He avers that he did not become aware of this evidence until a proponent of his innocence interviewed Kline in July 2007. However, in his application for leave to file to the First Circuit he states that "neither defense counsel [n]or expert divulged this fingerprint evidence to defendant Trenkler," implying that this information is only new to him personally. As discussed supra, and as he correctly acknowledges, under the law "Trenkler and his defense team are one and the same." (Docket # 10, 8.) Therefore, the existence of the fingerprint observed by Trenkler's expert has been known or should have been known by Trenkler's counsel, and thus by Trenkler, since 1993. That is the date on which this claim accrued and that is why it is time-barred. See Wood, 487 F.3d at 5.

As to the fingerprints lifted from the underside of Shay Sr.'s car, Trenkler acknowledges that both he "and his defense team were aware of the print 'lifts' from a November 2, 1991, report from the Boston Police" prior to his trial. (Docket # 10, 8-9; see also Docket # 5, App. at 3 (Nov. 2, 1991 Boston Police Report).) However, he argues that this constitutes newly discovered evidence because he has never been granted access to it. (Docket # 5, 3; see also Docket # 10, App. ¶ 16.) Nevertheless, by his own admission, Trenkler was aware prior to his trial that five fingerprints had been lifted from the undercarriage of the car and that he had not been provided with the results of any tests that may or may not have been conducted on those fingerprints.

Therefore, none of his assertions now can negate Trenkler's knowledge before trial, directly or through his counsel, of the existence of this evidence and the results of any testing. And nothing the government did then, or has done since then, has prevented him from making an earlier motion. Now it is too late.

B. Ground Three: Switch Used to Construct Bomb

Trenkler's third ground, that the government knew, but did not disclose, that the remnants of the toggle switch from the bomb remains did not match a switch from Radio Shack, is barred because it is not new and the government did not prevent his discovery of the information. Trenkler attaches to his petition a letter written in March 1993 from his trial counsel to counsel for his co-defendant which stated that "the [Radio Shack] switch does not match the remants [sic] of the toggle switch ATF has as part of the physical evidence in this case." (Docket # 5, App. at 9.) Thus, there is no question that Trenkler, through his counsel, was aware of this evidence prior to his November 1993 trial. That petitioner's step-father recently rediscovered this letter in his "search through [] 40 boxes of legal documents" does not reset the limitations period.[6]

C. Ground Four: Operating Time of Futaba Receiver

In his fourth ground, Trenkler asserts that new evidence shows that the power

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[6] Trenkler describes the "40 boxes of legal materials," the source of much of the evidence presented in his current petition, as having "been in possession of the various attorneys throughout the years." (Docket # 10, 3.) Therefore, even if Trenkler was diligent in reviewing these materials promptly upon receiving them, a fact on which the court makes no judgment, the prior possession of these materials by his counsel dooms his contention that evidence within these boxes is "newly discovered." See Wood, 487 F.3d at 5 ("[W]e are concerned less with what [petitioner's] counsel believed and more with what knowledge fairly may be imputed to him.").

requirements of the receiver and servo[7] used to construct the 1991 bomb would have exhausted the batteries used in the bomb in less than ten hours, thus impeaching the government's theory that Trenkler was responsible for placing and arming the bomb at a time well in excess of ten hours before it exploded. This ground fails for a number of reasons. First, Trenkler's counsel presented a version of this theory at trial, eliciting testimony from Trenkler's bomb expert that testing of similar components showed an operating time of 22 hours. (See Docket # 5, App. at 40-41; see also id. at 43-44 (cross-examination of ATF forensic chemist suggesting that the government had no explanation for how the bomb could have been armed as the government proposed without the batteries running down).) Second, the information that Trenkler describes as newly discovered by him, the operating current required by the Futaba receiver and servo and the capacity of the Duracell AA size alkaline batteries was discoverable through due diligence at the time of his trial. (See Docket # 5, ASF 8) ("Trenkler's trial counsel made no effort to inquire with Futaba on either the operating time of the Futaba receiver or the technical specifications to determine the operating window of the receiver.") Even if counsel's failure to obtain this information is not attributed to Trenkler, a delay of fourteen years in contacting Futaba does not meet the due diligence requirement of 28 U.S.C. § 2255(f)(4). Third, Trenkler's new calculations establishing a 9.375 hour operating window are incorrect. He erroneously subtracts the operating current of the servo at full load in milliamperes ("milliamps") from battery

[7] In the context of this case, "servo" refers to an electro-mechanical device used to convert electrical commands to rotary or linear motion. See http://www.futaba-rc.com/servos/servos.html.

capacity measured in milliamp-hours.[8] While the servo apparently draws 660 milliamps at full load, it only need operate at full load long enough to trigger the bomb, a matter of a few seconds at most.[9] Trenkler's calculations subtract 660 milliamps from the battery's 960 milliamp-hour capacity, implicitly assuming that the servo operated at full load for a full hour before triggering the bomb. In actuality, even if the servo needed as long as five seconds to trigger the bomb, the battery would have required a remaining capacity of less than one milliamp-hour.[10] Thus, the operating window of the bomb was almost entirely set by the idle current draw of the receiver and servo. Using Trenkler's figures for both, the 960 milliamp-hour battery could operate the receiver and servo, drawing a total of 32 milliamps of idle current, for approximately 30 hours. This calculation is reasonably close to the 22 hours experimentally determined by Trenkler's bomb expert, particularly taking the battery's end-of-life discharge characteristics into

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[8] In order to properly subtract two physical quantities, the units of the items must match. Thus, one cannot subtract 60 seconds from 100 minutes to get a result of 40 minutes; rather, the 60 seconds must be converted to one minute by multiplying by the unit quantity (1 min / 60 sec) to get the proper result of 99 minutes. See generally The Free High School Science Texts: A Textbook for High School Students Studying Physics ¶¶ 1.5-1.8 (2003) (available at http://www.nongnu.org/fhsst/fhsstphy.pdf); Jonathan Cooper & Steve McKeever, A Model-driven Approach to Automatic Conversion of Physical Units, 39 Software Practice & Experience 4, 337-359 (2007). (Cf. Docket # 5, App. at 33 ¶ 2 (Trenkler's calculations multiplying hours times milliamps and incorrectly showing a result in milliamps rather than milliamp-hours).)

[9] When actuated, the servo tripped a toggle switch to trigger the bomb. The Futaba S148 model servo, identified by the ATF from the bomb remnants, rotates 60 degrees in less than a third of a second. See http://www.gpdealera.com/cgi-bin/wgainf100p.pgm?I=FUTM0710 (last visited Mar. 9, 2009). The servo only needed to operate long enough to move the toggle switch from the OFF to the ON position.

[10] 660 milliamps * 5 sec * (1 hour / 3600 sec) = .917 milliamp-hours

account.[11] Therefore, not only is the evidence of the power requirements of the receiver and servo not new, it adds nothing to the theory Trenkler presented to the jury in 1993 -- that he could not have placed and armed the bomb based on his expert's tests.

D. Ground Five: Recantation of Testimony by Shay Jr.

In the final ground presented to the First Circuit in his application for leave to file, Trenkler offers evidence that in 2006 his co-defendant, Shay Jr., recanted his former statements and now suggests that Trenkler had nothing to do with the bomb placed under Shay Sr.'s car. While this evidence is arguably new, it does not allege a constitutional violation and is not, therefore, a basis for vacating a sentence under 28 U.S.C. § 2255.

E. Ground Six: Recantation of Testimony by Coady

The final ground in his petition to this court, but not included in his application to the First Circuit, concerns Michael Coady ("Coady"), who testified at Trenkler's 1993 trial. Trenkler includes affidavits from his step-father and half-brother describing two conversations with Coady in 2001, in which Coady is claimed to have stated that "his trial testimony was substantially false and that, if he could be given immunity from prosecution for perjury, he would tell the truth about his acquaintance with Alfred

[11] A battery's voltage drops over time as it discharges, with the 960 milliamp-hour capacity calculated at an end voltage of 0.8 volts per cell, down from an initial voltage of 1.5 volts. Therefore, the actual operating time would likely be shorter than 30 hours since, at some point, the voltage available would be too low to operate the receiver and/or the servo even if some current was still available at the lower voltage. See, e.g., Duracell Alkaline-Manganese Dioxide Technical Bulletin ¶ 5.1 (graph of discharge profile) (available at http://www.duracell.com/oem/Pdf/others/ATB-full.pdf).

Trenkler." (Docket # 5, App. 71; accord id. at 70.) It is unclear whether a federal petitioner who receives certification to file a second or successive motion is prohibited from advancing in support of the section 2255 motion additional grounds not presented to the court of appeals. The First Circuit's application for leave to file a second or successive petition instructs the applicant to "[s]tate concisely every ground on which you now claim that you are being held unlawfully."[12] But see Hazel v. United States, 303 F. Supp. 2d 753, 758 (E.D. Va. 2004) (concluding additional claims not certified by the circuit court may be addressed by the district court). Assuming, without deciding, that Trenkler may add grounds discovered after his application was certified, this ground was known long before Trenkler filed his application. Furthermore, his inability to obtain an affidavit from Coady recanting his trial testimony does not save the day. He still has not obtained such an affidavit. Trenkler may not rely on the lack of an affidavit in order to avoid the limitations period set by subsection 2255(f)(4), but then argue that the hearsay evidence he has possessed since 2001 is now adequate to state a habeas claim based on newly discovered evidence.

F. Previously Unasserted Claims: Failure to Disclose Witness Inducements and Speed Bumps at Chelsea Naval Hospital

In supplemental papers filed in this court after certification, Trenkler seeks to

[12] Application for Leave to File a Second or Successive Motion to Vacate, Set Aside or Correct Sentence by a Prisoner in Federal Custody, United States Court of Appeals for the First Circuit ¶ 10 (Rev. 11/02) (emphasis in original) (available at http://www.ca1.uscourts.gov/files/forms/2255ap.pdf).

add two more claims.[13] First, he contends that two government witnesses were rewarded for their testimony even though he claims the government stated that one witness would receive "no assistance" and that there was no "pre-existing deal" with the other. (Docket # 14, 5, 8.) In its automatic pretrial disclosures the government stated that the first witness, Donna Shea ("Shea"), could "have her husband's attorney call AUSA Kelly or Libby if she desired, but advised her that it was unlikely that her [incarcerated] husband would derive any benefit from her testifying before the grand jury." (Docket # 14, Ex. J, 3.) While it appears from the evidence provided by Trenkler that, after his trial, AUSA Kelly did contact the state court concerning Shea's husband with favorable results, this is not in conflict with the information given Trenkler. As to the second witness, William David Lindholm ("Lindholm"), Trenkler does not dispute that there was no pre-existing deal; he does contend that the witness testified he would not seek a deal in the future but promptly filed a Rule 35(b) motion for reduction of time on sentence after he testified. This, too, is evidence petitioner could have discovered through due diligence many years ago.[14] Thus, these new grounds are not only

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[13] Trenkler also complains in submissions to this court that the government destroyed the evidence in his case in late 2005, while, in his opinion, incorrectly asserting that "no collateral attack on Trenkler's judgment [was] pending or reasonably anticipated." (Docket # 8, 20.) In particular, he argues that the government was on notice at the time that he intended to challenge his life sentences as illegal under the law in force at the time he was sentenced. (See Docket # 14, 2.) While destruction of the evidence was likely improvident, given Trenkler's continuing and well-publicized fight against his conviction, the government's assertion that no collateral attack on the judgment was pending or anticipated was not factually incorrect.

[14] Indeed, Trenkler raised the issue of Lindholm's release a decade ago with this court in a motion for a new trial. In an unpublished 1998 opinion, the First Circuit concluded that "[t]he district court rightly observed that nothing in the record indicates

procedurally deficient as they were not presented for certification, but they are time-barred as well. However, I do consider these claims as part of the totality of the evidence under an "actual innocence" analysis, infra.

Finally, Trenkler asserts that the government failed to disclose the existence in October 1991 of speed bumps at the Chelsea Naval Hospital ("Hospital"). According to Trenkler, disclosure of these bumps would have impeached the testimony of Shay Sr. who claimed to have visited his uncle at the Hospital on that day, but that he did not "have a recollection of driving over any heavy bumps or railroad tracks" or "hitting any speed bumps at high speeds that morning." (Docket # 21, Ex. 3.) This, he argues, would have called into question the government's theory that the bomb, which it says was dislodged from the underside of Shay Sr.'s car as he drove into his driveway after the trip to the Hospital, had been attached to the car prior to that trip. While Trenkler describes this evidence as "recently discovered," there is no question that this claim is time-barred. (Docket # 21, 1.) A visit to the Hospital at the time of the trial would have revealed the existence of the speed bumps. See Wood, 487 F.3d at 5. Assuming the government was even aware of this evidence, its failure to provide it to Trenkler did not prevent him from discovering it on his own. Id. at 7.

Although these late added reasons are not properly before me, I examine them as part of the totality of the evidence for consideration of petitioner's actual innocence.

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that Lindholm perjured himself or that his early release from prison was the result of a deal made prior to the trial that the government failed to disclose." United States v. Trenkler, 134 F.3d 361, 1998 WL 10265, at * 4 (1st Cir. 1998) (unpublished).

IV. "Actual Innocence"

The First Circuit has not foreclosed the possibility that a petitioner who can show actual innocence "may have his otherwise barred constitutional claim considered on the merits." Barreto-Barreto v. United States, 551 F.3d 95, 102 (1st Cir. 2008) (internal quotation marks and citations omitted). To show actual innocence, a petitioner must "show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Gunter v. Maloney, 291 F.3d 74, 83 (1st Cir. 2002) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)). In evaluating this standard, the habeas court must "consider all the evidence old and new, incriminating and exculpatory" and "make a probabilistic determination about what reasonable, properly instructed jurors would do." House v. Bell, 547 U.S. 518, 538 (2006) (internal quotation marks and citation omitted). "The Supreme Court has emphasized that the actual innocence exception is very narrow, reserved for truly exceptional cases." Walker v. Russo, 506 F.3d 19, 21 (1st Cir. 2007). Trenkler has failed to make the requisite showing.

Even if the fingerprint evidence matched someone other than Trenkler, that does not rule him out as the source of the bomb. The identification of Radio Shack as the source of the toggle switch tied Shay Jr. to the parts used to construct the bomb and thus, according to Trenkler, formed the overt act necessary to charge Shay Jr. with conspiracy. Trenkler argues that without an overt act by Shay Jr., his co-conspirator could not have been convicted of conspiracy putting his conviction in doubt. This argument fails on two grounds. First, the conspiracy statute only requires any one of

the co-conspirators to commit an overt act in furtherance of the conspiracy (see 18 U.S.C. § 371 (1993)) and, second, "'actual innocence' requires the petitioner to show 'factual innocence, not mere legal insufficiency.'" Barreto-Barreto, 551 F.3d at 100 (quoting Bousley v. United States, 523 U.S. 614, 623 (1998)). Whether Shay Jr. would have been convicted on the new evidence is immaterial to Trenkler's innocence.

In addition, even if Trenkler proved that the switch used to construct the bomb was not from Radio Shack, it would not foreclose the jury from concluding that Trenkler built the bomb. Similarly, even if the evidence of speed bumps had been presented, the jury could still have concluded that the bomb had been placed under Shay Sr.'s car before he drove to the Hospital, but that it was not dislodged during the drive. Finally, as discussed supra, the operating time of the bomb was previously presented and considered by the jury at Trenkler's 1993 trial.

As to the witness testimony, even if Coady was lying at trial, his testimony only reinforced the government's contention that Trenkler had built remote controlled bombs in the past. Coady testified that he saw a toy car remote control and magnets in Trenkler's car and that Trenkler exploded a device in the Blue Hills area of Massachusetts. Even without this evidence, Trenkler stipulated to having built and exploded a remote controlled bomb for Shea in 1986. See Trenkler, 61 F.3d at 48. Thus, there was evidence that the Roslindale bomb had been constructed by Trenkler, even without Coady's testimony. See id. at 55-56. The alleged failure of the government to disclose deals with the two other witnesses goes only to their credibility. The fact that they received benefits from testifying, even if disclosed to the jury, is not

enough to conclude that no reasonable jury would believe their testimony.

That leaves Shay Jr.'s recantation that Trenkler had nothing to do with the Roslindale bomb. Here, Trenkler is hampered not only by the general skepticism accorded recanted testimony, but by the unreliability of this specific witness as well. See, e.g., United States v. Connolly, 504 F.3d 206, 214 (1st Cir. 2007); United States v. Grey Bear, 116 F.3d 349, 350 (8th Cir. 1997). The basis for Trenkler's first section 2255 petition was his counsel's failure to offer expert testimony "that Shay [Jr.] suffered from a mental disorder that caused him to tell self-aggrandizing lies, making his various incriminating statements unreliable." Trenkler v. United States, 268 F.3d 16, 18 (1st Cir. 2001). Indeed, Shay Jr. himself refers to "[his] lying disorder" in a 2007 affidavit now claiming that he and Trenkler are innocent, despite his 1998 guilty plea. (Docket # 5, App. at 53.) Thus, Shay Jr.'s current recantation possesses little credibility. (See also Docket No. 92-cr-10369-RWZ # 708 (judgment of the First Circuit allowing the instant petition and noting "if established, [the forensic evidence] could be substantial ([the] exculpatory statements by a co-defendant are less impressive)".)

Finally, as the First Circuit noted in Trenkler's direct appeal:

> substantial evidence, beyond Trenkler's participation in the [1986] bombing, supported a finding that he had built the Roslindale bomb. Principally, David Lindholm convincingly testified that, in fact, Trenkler had actually admitted building the Roslindale bomb. Other admissions by Trenkler made to various law enforcement officers inferentially corroborated Lindholm's testimony, specifically Trenkler's sketch of the Roslindale bomb, drawn shortly after the explosion and conspicuously featuring two electrical blasting caps. Moreover, Trenkler's arrogant assertion to Agent Leahy that, "if we did it, then only we know about it ... how will you ever find out ... if neither one of us talk [ ]?" provided further corroboration. Additional support could be inferred from the ample evidence the government adduced establishing

> Trenkler's relationship with Shay Jr. and his knowledge of both electronics and explosives.

Trenkler, 61 F.3d at 60. With the exception of the possible impeachment of Lindholm's testimony, none of the evidence Trenkler advances here directly negates any of these facts, cf. House, 547 U.S. at 554, and it is inadequate to show that, more likely than not, "no reasonable juror would have convicted him in the light of the new evidence." Schlup, 513 U.S. at 327.

V. Conclusion

As discussed supra, with the exception of Shay Jr.'s recantation, each of the grounds proffered by Trenkler in the instant petition is barred by the one-year period of limitations of 28 U.S.C. § 2255(f) and is therefore subject to dismissal. Shay Jr.'s recantation, while not barred by the limitations period, does not allege a "violation of the Constitution or laws of the United States" and thus cannot form the basis for relief under the statute. 28 U.S.C. § 2255(a). Therefore, because Trenkler's procedural default is not otherwise excused, his petition must be denied. See Fielder, 379 F.3d at 122.

Accordingly, the petition for relief under 28 U.S.C. § 2255 is denied. Judgment may be entered accordingly.

March 16, 2009
DATE

/s/Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE