UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
vs.	)	Criminal No.: 92-10369-Z
THOMAS A. SHAY and ALFRED W. TRENKLER	)	

DEFENDANT, ALFRED W. TRENKLER'S, MEMORANDUM IN SUPPORT OF HIS MOTION FOR RELIEF FROM PREJUDICIAL JOINDER AND SEVERANCE

I. **BACKGROUND**.

Defendants Thomas A. Shay (hereinafter "Shay") and Alfred W. Trenkler (hereinafter "Trenkler") have been indicted for the crimes of (1) Conspiracy (18 U.S.C. § 371); (2) Receipt of explosives in interstate commerce resulting in death and injury to public safety officers (18 U.S.C. § 844(d)); (3) Attempted malicious destruction of property used in and affecting interstate commerce by means of fire and explosive resulting in death and injury to public safety officers (18 U.S.C. § 844(i)); and (4) Aiding and abetting (18 U.S.C. § 2). Based upon discovery obtained to date, Trenkler has learned that Shay has made incriminating statements naming Trenkler as a participant in the crimes alleged. See Affidavit of Scott P. Lopez attached to defendant's motion. If Shay and Trenkler are tried together, these statements will be admissible against Shay, but not admissible against

Trenkler.[1] If Shay chooses not testify, Trenkler will be deprived of his right to cross-examine Shay.[2] Under these circumstances, Trenkler will be deprived of his guaranteed rights under the Confrontation Clause of the Sixth Amendment of the United States Constitution. For this reason, as more specifically set forth below, Trenkler is entitled to a separate trial under the principles set forth in Bruton v. United States, 391 U.S. 123 (1968). Thus, Trenkler moves this Court for relief from prejudicial joinder and for an order of separate trials.

II. STANDARDS.

1. Severance.

Under Fed.R.Crim.P. 14, a defendant is entitled to a severance, despite the propriety of the original joinder, if it is needed to avoid prejudice. Fed.R.Crim.P. 14 provides:

> If it appears that a defendant is prejudiced by a joinder of ... defendants ... for trial together, the court may ... grant a severance of defendants or provide whatever other relief justice requires.

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[1]Trenkler notes that Shay's hearsay statements inculpating him are clearly inadmissible since they do not fall within one of the well-established exceptions to the hearsay rule. See Bruton v. United States, 391 U.S. 123, 128 n. 3, citing Krulewitch v. United States, 336 U.S. 440; compare Dutton v. Evans, 400 U.S. 74 (1969).

[2]For purposes of this motion, Trenkler assumes the government will seek to introduce the statements made by Shay incriminating Trenkler during its case-in-chief against Shay. Moreover, Trenkler further assumes that Shay will not testify, but will elect to assert his rights under the Fifth Amendment. Of course, if the government chooses not to introduce Shay's statements at all, or Shay decides to testify, Trenkler recognizes that the rights guaranteed to him under the Sixth Amendment's Confrontation Clause will not be violated.

It is well settled that a motion to sever under Fed.R.Crim.P. 14 is left to the sound discretion of the trial judge. United States v. Davis, 623 F.2d 188, 194 (1980). The trial judge must weigh the inconvenience and expense to the government and witnesses of separate trials against the prejudice to the defendants inherent in a joint trial. Id. at 194. A trial judge's decision will not be disturbed unless the denial of a severance deprives the defendants of a fair trial. Id.

2. **Confrontation Clause.**

The Confrontation Clause of the Sixth Amendment guarantees the right of a criminal defendant "to be confronted with the witnesses against him". The right of confrontation includes the right to cross-examine witnesses. See Pointer v. Texas, 380 U.S. 400, 404, 406-407 (1965).

3. **Bruton.**

In some cases, severance is the only alternative available to a trial judge to avoid depriving a defendant of a fair trial. One such case was Bruton v. United States, 391 U.S. 123, 126 (1968), where the Supreme Court held that a defendant is deprived of his rights guaranteed under the Confrontation Clause of the Sixth Amendment when his nontestifying codefendant's extrajudicial statements naming him as a participant in the crime are introduced at their joint trial, even if the jury is instructed to consider that

confession only against the codefendant. In Bruton the Court stated:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame to others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed. Id. at 135-136.

Based on this sound reasoning, the Supreme Court reversed Bruton's conviction and granted him a new trial. Id. at 126.

4. Richardson.

Subsequently, the Supreme Court clarified somewhat its holding in Bruton to permit joint trials where incriminating extrajudicial statements of a codefendant are effectively redacted to eliminate the prejudice to a defendant, and without prejudicing the declarant (codefendant) or the government, so long as the trial court gives proper limiting instructions. See Richardson v. Marsh, 481 U.S. 200, 211 (1987)(holding that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession

with a proper limiting instruction when the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence).

Applying the principles set forth in Bruton and Richardson, Trenkler submits that a joint trial in this case will deprive him of a fair trial. Thus, this Court should exercise its discretion in favor of Trenkler and order separate trials.

III. SEVERANCE IS NECESSARY TO ENSURE TRENKLER RECEIVES A FAIR TRIAL IN THIS CASE.

In Bruton, supra, the Supreme Court applied the Confrontation Clause where a nontestifying codefendant's confession implicating the defendant was admitted against the codefendant in a joint trial and the trial court gave limiting instructions to the jury that it was inadmissible hearsay as to the defendant. In Bruton the Court held that "because of the **substantial risk** that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, **admission of** [the nontestifying codefendant's] **confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.**" Id. at 126 (Emphasis added).

In Bruton, the joint trial of Bruton and his codefendant named Evans resulted in the conviction of both by a jury on a federal charge of armed postal robbery. At trial, a postal inspector testified that Evans orally confessed to him that Evans and Bruton committed the armed robbery. The trial judge instructed the jury that although Evans' confession was competent evidence against Evans it was inadmissible hearsay against Bruton and therefore had to be disregarded in determining Bruton's guilt or innocence.

One of the arguments rejected by the Court in Bruton was that joint trials should not have to be sacrificed by requiring separate trials in order to use the confession against the declarant. Although recognizing the benefits of joint trial the Court's response to this argument was the following: "[T]he answer to this argument was cogently stated by Judge Lehman of the New York Court of Appeals, dissenting in People v. Fisher, 249 N.Y. 419,432, 164 N.E. 336,341:

> We still adhere to the rule that an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them.... We destroy the age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence by a legalistic formula, required of the judge, that the jury may not consider any admissions against any party who did not join in them. We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high.

Bruton, supra 391 U.S. at 134-135.

Another argument advanced and rejected by the Court was that not every admission of inadmissible hearsay can be considered to be reversible error unavoidable through limiting instructions. In rejecting this argument, the Court stated that "there are **some contexts** in which the risk that the jury will not, or cannot follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Id. at 135 (Emphasis added). Reasoning that the admission of powerfully incriminating extrajudicial statements of a codefendant who stands accused **side-by-side** with the defendant in a joint trial before a jury presented such a context, the Court held that the admission of these statements posed such **a substantial threat** to the defendant's right to a fair trial that the Court could not ignore this hazard despite concededly clear instructions to the contrary. Id. at 135 - 136 (Emphasis added). Thus, in the context of a joint trial of two (2) codefendants, the Court unequivocally rejected the notion that limiting instructions were an adequate substitute for the defendant's constitutional right of cross-examination stating that "[t]he effect is the same as if there had been no instruction at all." Id. at 137.

Trenkler submits that the Bruton rule mandates severance in this case. This case, like Bruton, involves a joint trial of two (2) codefendants who will stand **side-by-side** accused of

the same crimes. This case, like Bruton, includes powerfully incriminating extrajudicial statements of Trenkler's codefendant Shay which will be admitted against Shay at trial by the government. In addition, like Bruton, Shay's statements will be introduced through the oral testimony of a government agent. See Bruton, supra at 144 (White, J. dissenting)(noting that oral statements present **special problems** for there is a risk that the witness in testifying will inadvertently exceed permissible limits). Assuming Shay elects not to testify, as Evans did in Bruton, Trenkler's rights under the Confrontation Clause will undoubtedly be violated. As Bruton teaches, no limiting instructions, no matter how clear, will remedy this violation. Id. at 137. If severance is not granted the government will receive "the windfall of having the jury be influenced by evidence against [Trenkler] which, as a matter of law, they should not consider but which they cannot put out of their minds." See Delli Paoli v. United States, 352 U.S. 232, 248 (1957)(dissenting opinion) overruled by Bruton supra at 126. Consequently, Trenkler will be deprived of his right to a fair trial and therefore substantially prejudiced. In short, this case presents the quintessential Bruton problem. Trenkler therefore submits that nothing short of separate trials can ensure that he receives a fair trial.

IV. EFFECTIVE REDACTION IS NOT POSSIBLE IN THIS CASE.

Trenkler anticipates that the government will argue that Shay's statements can be redacted to eliminate not only Trenkler's name, but any reference to his existence and that with a proper limiting instruction, the Confrontation Clause will not be violated citing Richardson v. Marsh, 481 U.S. 200, 211 (1987) in support of its argument. At first blush, this alternative may seem possible. However, Trenkler submits that effective redaction is not possible in this case.

In Richardson, three (3) defendants were charged with assaulting a victim named Cynthia Knighton, and murdering her 4-year-old son, and aunt. Two (2) of the three (3) defendants, Marsh and Williams, were tried jointly over the objection of defendant Marsh. The third defendant involved in the crime, Martin, was a fugitive at the time of trial. Id. at 202. During the joint trial, the victim, Knighton, testified to Marsh's participation in the crimes. Richardson supra at 202. Thereafter, Williams' confession, redacted to omit all indication that anyone other than Williams and the third defendant named Martin participated in the crime, was also admitted into evidence. Id. at 203. The confession corroborated Knighton's account of the activities of the persons other than Marsh. Id. at 203-4. In addition, the confession described a conversation Williams had with Martin as they drove to the scene of the crime in which Martin said

he would have to kill the victims after the robbery. Id. at 204. At the time the confession was admitted, the jury was instructed not to use it in any way against Marsh. Id. Williams did not testify but Marsh did. Marsh testified that although she was in the car with Martin and Williams as they drove to the scene of the crime, and she knew that Martin and Williams were talking, she could not hear the above-mentioned conversation because she was sitting in the backseat, the radio was on, and the speaker was right in her ear. Id. at 204.

The Sixth Circuit Court of Appeals, applying Bruton, reasoned that since Williams' account of the conversation in the car was the only "*direct* evidence" that Marsh knew before entering the victims' home that the victims would be robbed and killed, admission of Williams' confession "was powerfully incriminating to Marsh with respect to the critical element of intent" and thus, violated the Confrontation Clause.

Framing the question as whether Bruton required the same result when a codefendant's confession is redacted to omit any reference to a defendant, but a defendant is nonetheless linked to the confession by evidence properly admitted against her at trial, the Court held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the

defendant's name, but any reference to his or her existence." Id. at 211.

For purposes of this case, it is significant to note what Richardson did, and perhaps more importantly, what it did not do. Trenkler notes that in Bruton, Judge White in his dissent prophetically stated:

> Effective deletion will probably require not only omission of all direct and indirect inculpations of codefendants but also of any statements that could be employed against those defendants once their identity is otherwise established. Of course, the deletion must not be such that it will distort the statements to the substantial prejudice of either the declarant or the Government. If deletion is not feasible, then the Government will have to choose either not to use the confession at all or try the defendants separately. To save time, money, and effort, the Government might best seek a ruling at the earliest possible stage of the trial proceedings as to whether the confession is admissible once offending portions are deleted. *** Oral statements, such as that involved in the present case, will present special problems, for there is a risk that the witness testifying will inadvertently exceed permissible limits. Except for recommending that caution be used with regard to such oral statements, it is difficult to anticipate the issues which will arise in concrete factual situations. Bruton, supra at 143-144 (White, J. dissenting) (Emphasis added).

Trenkler submits in Richardson the Supreme Court merely declined to adopt the "evidentiary linkage" or "contextual implication" approach to Bruton questions employed by the Sixth Circuit. Id. at 206. This "evidentiary linkage" or "contextual implication" approach was based on Judge White's dissent above that, as a result of the rule established in Bruton, effective redaction required deletion of "any

statements that could be employed against ... defendants once their identity is otherwise established." Bruton, supra at 143-144. Finding this approach too broad an interpretation of Bruton to apply in Richardson, Judge Scalia, writing for the majority, refused to hold that a Bruton problem arose whenever a statement could be employed against a defendant once her identity is otherwise established. Thus, the Court in effect held that when the statement is redacted to omit all indication that *anyone* besides the other two codefendants participated in the crime, but the defendant is nonetheless linked to the confession or crime by other evidence properly admitted at trial, Bruton did not mandate reversal. Thus, in Richardson, the Court rejected the evidentiary linkage or contextual implication approach to Bruton problems.

Trenkler notes however that in Richardson, both a victim and the defendant Marsh testified to Marsh's presence during the crimes alleged and to the role Marsh played in said crimes. Moreover, even though the Williams' confession provided inadmissible evidence as to Marsh, it was clear from the other evidence in the case, that Marsh willfully participated in the crimes. Moreover, although the Williams' confession provided certain details of a discussion between Williams and Martin, but not Marsh, Marsh testified that she was in the car at the time of this discussion. Given this evidence, it was just as likely that the jury disbelieved

Marsh's testimony regarding the discussion as it was that the jury disregarded the judge's instructions that the confession was not admissible against Marsh and used the confession against her. As a result, under these specific facts, where the confession did not identify defendant, but the defendant's own testimony linked her to a critical aspect of the confession, the Supreme Court was unwilling to hold that Bruton had been violated, and that Marsh was deprived of a fair trial.

In a footnote, Judge Scalia clearly pointed out his disagreement with the dissenters. He stated:

> The dissent is mistaken in believing we "assum[e] that [Williams'] confession did not incriminate respondent." *Post*, at 215, n. 3. To the contrary, the very premise of our discussion is that respondent would have been harmed by Williams' confession *if* the jury had disobeyed its instructions. Our disagreement pertains not to whether the confession incriminated respondent, but to whether the trial court **could properly assume that the jury did not use it against her.** Richardson, supra at 208, n. 3 (Emphasis added).

Thus, unlike the situation in Bruton where the Court could not assume that the confession was not used against Bruton, under the facts in Richardson, the majority agreed that the trial court could "properly assume" that the jury did not use the confession against Marsh.

However, the Richardson Court did not reject the entire premise set forth in Judge White's dissent in Bruton above that effective redaction requires "omission of all direct and

indirect inculpations of codefendants". In fact, consistent with Judge White's dissent, the Court clearly stated: **"We express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or a neutral pronoun."** See Richardson supra at 211, n. 5 (Emphasis added); compare United States v. Payne, 923 F.2d 595, 597 (8th Cir. 1991) *cert. denied* 111 S. Ct. 2830 (1991)(codefendant's redacted confession indicating that he was planning to help "someone" escape held to be a Bruton violation). Consequently, whether the Bruton rule is violated is answered in part by whether effective redaction is possible in this case.

Applying Bruton and Richardson to the case at bar, Trenkler submits that **effective redaction** of Shay's extrajudicial statements is not possible in the context of this case. Specifically, like Bruton, the government alleges that only two (2) defendants committed the crimes at issue. Assuming both defendants are tried together and Trenkler's name is deleted or substituted with a neutral pronoun, there is no doubt that everyone in the Court room will know that Trenkler is the other person referred to in Shay's statements. See Payne supra at 597 (counsel for the government admitted at oral argument that everyone at the trial knew who the "someone" was).

Moreover, if the statements are redacted so as not to prejudice Shay, they will be statements that shift the majority of the blame for these crimes to Trenkler. Ironically, in Bruton this blame shifting was one of the major reasons for the rule established in the case. See Bruton supra at 136 (majority opinion) and 141 (dissenting opinion)(statements of codefendants traditionally viewed with special suspicion due to his strong motivation to shift blame to others).

In addition, like Bruton, which involved oral statements testified to by a government witness, Shay's statements are oral statements which also must be testified to by a government witness. Thus, even if redacted, there is a risk that the witness in testifying will exceed permissible limits. See Bruton supra at 144 (White, J)(noting that oral statements present special problems).

Furthermore, redacting the statements to indicate that Shay acted alone by substituting the terms "I" or "me" in place of "Trenkler" of "we" will unquestionably distort the statements as they apply to Shay. Specifically, since Shay's statements seem to assert that he played only a minimal role in the offense, and that Trenkler was the major participant, redacting the statements to read otherwise would distort the statements and be prejudice Shay. Id. at 143 (White, J.

dissenting), compare Richardson supra at 203, n. 1 (confession as redacted did not distort declarant's role).

Presumably, such a distortion of Shay's statements will prejudice the government particularly with respect to the conspiracy count against Shay. Compare Id. (confession as redacted did not prejudice government's case).

Thus, it is clear that effective non-prejudicial redaction is not possible in this case.

V. ADMISSION OF SHAY'S EXTRAJUDICIAL STATEMENTS AT A JOINT TRIAL WOULD BE PREJUDICIAL ERROR.

Trenkler further submits that admission of Shay's statements at a joint trial would be prejudicial error which would warrant a new trial.

Trenkler notes that in Chapman v. California, 386 U.S. 18, the Supreme Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. Id. at 24. In Harrington v. California, 395 U.S. 250, 252 (1969), the Court considered for the first time whether a Bruton violation could be harmless error and thus not warrant a new trial. Emphasizing "...on these special facts" the Court held that the error was harmless under Chapman. Id. at 252.

In Harrington four (4) men were tried jointly for attempted robbery and first-degree murder. Id. Harrington

was a caucasian and his three codefendants were black. Each of Harrington's three codefendants confessed and their confessions were introduced at trial with limiting instructions that the jury was to consider each confession only against the confessor. One of Harrington's codefendants took the stand and Harrington's counsel cross-examined him. The other codefendants did not take the stand. Id.

Harrington also made statements which fell short of a confession but which placed him at the scene of the crime. He further admitted which codefendant was the "trigger man", that he fled with the other three, and that after the murder he dyed his hair black and shaved off his mustache. Several eyewitnesses placed Harrington at the scene of the crime, but two of them previously told the police that four blacks had committed the crime. The codefendant who testified placed Harrington inside the store with a gun at the time of the crime. Id. at 252 - 253.

The confession of the first codefendant who did not testify did not refer to Harrington by name but instead referred to him as "the white boy" or "this white guy". This confession also described Harrington's age, height and weight. Id. at 253. The confession of the second codefendant who did not testify likewise did not refer to Harrington by name but as a "blond-headed fellow", "white guy" and "the Patty." Id.

Both confessions asserted that they did not see "the white guy" with a gun. Id.

Harrington argued, and the Court assumed, that the reference to "the white guy" in the confessions made it as clear "as pointing and shouting that the person referred to was the white man in the dock with the three Negroes." Id. Nevertheless, the Court held that on "these special facts" the lack of opportunity to cross-examine the nontestifying codefendants constituted harmless error under Chapman." Id. at 253.

Reasoning that the codefendant who testified placed Harrington in the store with a gun at the time of the murder, Harrington himself agreed he was present, others testified that he had a gun and was an active participant, and noting that the codefendants who did not testify placed him at the scene but did not put a gun in his hand, the Court concluded that the evidence supplied by the confessions was "of course cumulative". Id. at 254. The Court further reasoned that apart from the confessions "... the case against Harrington was **so overwhelming** that we conclude this violation of Bruton was **harmless beyond a reasonable doubt....**" Id. at 254. Finally, noting that its decision was based on the evidence in record the Court further stated: "The case against Harrington was not woven from **circumstantial evidence**. It is **so overwhelming that unless we say no violation of Bruton can**

constitute harmless error, we must leave this state conviction undisturbed. Id. (Emphasis added).

Applying Harrington to the case at bar, Trenkler submits that admitting Shay's statements would not be harmless error, but rather prejudicial error. Unlike Harrington, the government's case against Trenkler is entirely circumstantial. Unlike Harrington, the only evidence that places Trenkler at the scene of the crime is Shay's extrajudicial statements. Unlike Harrington, Trenkler has made no inculpatory statements. In fact, Trenkler has repeatedly and consistently maintained his innocence and total lack of involvement in this matter.

Unlike Harrington, there are no witnesses who place Trenkler at the scene of the crime. In fact, there are no witnesses who can state that he participated in the alleged crimes to any degree.

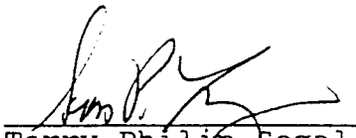
Thus, the government can neither assert nor maintain that Shay's statements are merely cumulative. The government also cannot assert that the case against Trenkler is anything other than circumstantial. The government must therefore concede that the case against Trenkler **is** "woven from circumstantial evidence" and **is not** "so overwhelming" that a violation of Bruton will not constitute prejudicial error. Therefore, in this case, the government should join in this motion and concede that admitting Shay's statements at a joint trial

would be prejudicial error and not harmless beyond a reasonable doubt.

VI. CONCLUSION.

In conclusion, defendant Alfred Trenkler submits that he is entitled to relief from prejudicial joinder when his nontestifying codefendant's extrajudicial statements can not be effectively redacted to prevent prejudice and preserve his right to a fair trial. Moreover, since admission of these statements at a joint trial would constitute prejudicial and reversible error, Trenkler further submits that he is entitled to a trial separate from defendant Shay. Therefore, defendant Trenkler requests this Court to exercise its discretion to avoid this certain prejudice to Trenkler, and enter an order granting him a separate trial.

Respectfully submitted,
For the Defendant,
ALFRED W. TRENKLER,
By his attorneys,



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Dated: February 12, 1993

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party by messenger on February 12, 1993.

Scott P. Lopez