pleadings / 404.b

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
	)	CRIMINAL NO. 92-10369-Z
v.	)	
	)	
THOMAS A. SHAY	)	

MEMORANDUM IN OPPOSITION TO GOVERNMENT'S MOTION IN LIMINE TO ADMIT EVIDENCE OF 1986 BOMBING

I. INTRODUCTION

The government has moved to introduce into evidence, at the trial of defendant Thomas A. Shay ("Shay Jr."), a device allegedly built by Alfred W. Trenkler ("Trenkler") in 1986, long before Shay Jr. and Trenkler ever met. The government concedes it has no evidence of any link between the 1986 device and Shay Jr. Its stated justifications for admission of the alleged 1986 device are (1) that it amounts to "signature type" evidence admissible to prove Trenkler's capacity and identity as the builder of the 1991 bomb and (2) that it would establish the existence of a conspiracy.

Shay Jr. challenges the admissibility of the 1986 device on several grounds. First, the evidence the government proposes to use regarding the 1986 device would violate Shay Jr.'s confrontation rights under the Sixth Amendment, the very result this Court sought to avoid by severing the trials. Second, evidence of Trenkler's acts in 1986 and his statements to others about them are inadmissible as hearsay. Third, the 1986 device is irrelevant and inadmissible to show the existence of a conspiracy. Finally, the 1986 device is so distinctively

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dissimilar to the 1991 bomb that it shows two different people built the two devices, so that it is not probative of Trenkler's identity as the person who built the 1991 bomb.

The government's proposed use of the 1986 device against Shay Jr. is even further attenuated, amounting to an attempt to convict him of "guilt by association."

II. FACTS

A. Issues in Shay Jr.'s Case

Shay Jr.'s defense in this case will simply be that the government's evidence fails to prove that he conspired with Trenkler to kill, injure or intimidate his father. There is no evidence that Shay Jr. solicited Trenkler in a plan to kill his father. The government concedes it has no evidence linking Shay Jr. to the 1986 bombing and no evidence of who designed, constructed or placed the 1991 bomb. Government's Memorandum in Support of Motion in Limine to Admit 1986 Bombing ("G.Mem.") at 20, 26.

The only evidence cited by the government is an alleged social relationship between Shay Jr. and Trenkler and an alleged visit by Shay Jr. to Radio Shack. G.Mem. at 26. As Shay Jr. has argued in support of his motion to suppress Armbrister's identification, the government's evidence, if any, that Shay Jr. purchased a toggle switch, is not credible.[1] Furthermore, there

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[1] The government contends in its memorandum that Shay Jr. has publicly admitted having "'helped purchase'" certain electronic equipment used in the 1991 device." G.Mem. at 4. This is a gross mischaracterization of Shay Jr.'s denial that he had helped purchase equipment to be used in a bomb. Memorandum of Law in Support of Government's Motion for Order Directing WLVI-TV (Channel 56) To Produce Videotaped Interview with Defendant

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is no evidence that the items on the Radio Shack receipt of October 18, 1991, have any connection to the 1991 bomb.[2]

Most importantly, the government's evidence fails utterly to link Shay Jr. and Trenkler in a conspiracy. Trenkler's capacity to build the 1991 device cannot therefore be legitimately in issue in Shay Jr.'s trial.

B. Comparison of 1986 and 1991 Devices

Even if Trenkler's capacity or identity was in issue in Shay Jr.'s case, the 1991 bomb was so dissimilar from the device allegedly built by Trenkler in 1986 that it indicates a different person built it. MATT DOING[3]

III. ARGUMENT

A. Admission of Evidence Regarding the 1986 Device Would Violate Shay Jr.'s Right of Cross-Examination Guaranteed by the Sixth Amendment and Is Inadmissible as Hearsay.

The government proposes to introduce evidence regarding the circumstances and construction of the 1986 device through

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Thomas A. Shay at 4-5.

[2] Toggle switches of the sort listed on the Radio Shack receipt are used for numerous purposes other than as components of bombs. A "AA" battery holder was not in the 1991 bomb--the "AA" batteries were part of the pre-manufactured Futaba system. Small lamps of the sort listed on the receipt are also used for many purposes other than testing the circuitry of bombs. And no such lamp was recovered from the premises inhabited by Shay Jr. or Trenkler.

[3] Shay Jr. has attached the affidavits of his experts regarding the identity issue. However, he reserves his right to fully respond to the government's factual allegations regarding comparison of the two devices, particularly the EXIS computer-based analysis. Shay Jr. filed, on June 14, 1993, an Emergency Motion for Further Discovery requesting the Rule 16 materials he has still not been given and needs in order to adequately respond to the government's "identity" arguments.

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witnesses testifying about Trenkler's statements to them about the device and admitting that he built it. G.Mem. at 7-9. Every case cited in support of the government's motion involves testifying co-defendants or coconspirators. That is not this case. Because Trenkler will not be testifying in Shay Jr.' trial, admission of those statements would violate Shay Jr.'s Sixth Amendment right to cross examine witnesses against him. <u>See Bruton v. United States</u>, 391 U.S. 123 (1968); <u>Douglas v. State of Alabama</u>, 380 U.S. 415, 419 (1965).

Furthermore, evidence of Trenkler's acts and statements are inadmissible as hearsay. The government has charged a conspiracy "in or about September and October 1991." <u>Indictment</u> at 1. The alleged building of the 1986 device and any alleged admissions by Trenkler about it, since they were not "in the course of and in furtherance of the [charged] conspiracy," are inadmissible as hearsay. Fed.R.Evid. 801(d)(2)(E). <u>See</u> <u>United States v. Fields</u>, 871 F.2d 188, 193 (1st Cir. 1989) (verbal <u>and</u> physical acts excluded against co-conspirators as hearsay unless "within the time frame" and "advancing the objects of the conspiracy"), <u>cert. denied</u>, 110 S.Ct. 369 (1989).

This Court severed the trials of Shay Jr. and Trenkler to avoid these very results against Trenkler in a joint trial.

B. The 1986 Device is Irrelevant to Any Legitimate Issue in Shay Jr.'s Case.

Under Rule 404(b) of the Federal Rules of Evidence, evidence of other acts is not admissible to show the defendant's bad character, or that the defendant, having committed another similar act, probably committed the crime charged. Such evidence

"may" be admissible for purposes other than propensity, if they are legitimately in issue in the case. Whether to admit prior acts is left to the sound discretion of the trial judge, who must first determine whether the evidence has any "special" probative value other than to show the defendant had a propensity to commit the crime charged. "Ersatz" theories of relevance must be rejected. Wright & Graham, Federal Rules of Evidence, § 5249. If the evidence has legitimate probative value, the trial court must decide whether unfair prejudice outweighs that value. United States v. Oppen, 863 F.2d 141, 146 (1st Cir. 1988).

1. The 1986 Device is Not Probative of Trenkler's Capacity to Build the 1991 Bomb or of His Identity as the Person Who Built It.

The government proposes to use the 1986 device for the purpose of showing that Trenkler had the capacity to build the 1991 device and that he was in fact the same individual who participated in the charged conspiracy. G.Mem. at 13. A prior act offered for any purpose other than propensity must be "similar enough and close enough in time to be relevant to the matter in issue." United States v. Shackleford, 738 F.2d 776, 778 (7th Cir. 1984). In order to show identity through a prior act, the shared characteristics must be "so idiosyncratic as to constitute a signature." Ingraham v. United States, 832 F.2d 229, 233 (1st Cir. 1987). The prior act must be "methodologically so reminiscent of the crime charged as to earmark [it] as the defendant's handiwork." Id. at 231. See also United States v. Williams, 985 F.2d 634, 637 n. 5 (1st Cir. 1993) (for conduct to

be characterized as modus operandi, it must be "so unusual and distinctive as to be like a signature").

That the prior act belongs to the same generic class of crimes as the charged offense is not enough. See United States v. Benedetto, 571 F.2d 1246, 1249 (2d Cir. 1978) (much more is demanded to show identity than repeated commission of crimes of the same class, such as repeated burglaries or thefts); United States v. Garbett, 867 F.2d 1132, 1135 (8th Cir. 1989) (that both acts involved marijuana is not a "peculiar similarity" warranting admission of prior conviction); United States v. Wright, 901 F.2d 68 (7th Cir. 1990) (evidence regarding prior sale of cocaine on wholesale level inadmissible on the issue of identity where crime charged was street sale).[4] Furthermore, that two crimes of the same general class have other similar characteristics is not enough--"the common characteristic[s] must be the significant one[s] for the purpose of the inquiry at hand." United States v. Guerrero, 650 F.2d 728, 733 (5th Cir. 1981).

The few similarities between the 1986 and the 1991 devices do not meet the exacting test for prior acts offered to show identity. The only similarities are generic and therefore

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[4] This is so even if the type of crime, i.e., bombing, is less common than others, i.e., robbery. For example, in United States v. Fawbush, 900 F.2d 150 (8th Cir. 1990), where the charge was aggravated sexual abuse of children, the testimony of the defendant's adult daughters that he had sexually abused them was excluded for the purpose of showing identity. The government's argument for admissibility, based on the rareness of sexual abuse, was rejected, because, "[a]ssuming the government's premise to be true, to admit evidence of such acts would be for the sole purpose of proving the character of the person to show that he acted in conformity therewith." Id. at 151 n.3. While the example is admittedly offensive, the court's reasoning is equally applicable here.

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provide no assistance in identifying who built the 1991 bomb. Use of a remote control device, a toggle switch, duct tape and magnets, and attachment to the undercarriage of a vehcle are not significant factors for the purposes of identifying a "signature" and are therefore irrelevant to the identity issue. *See*, *e.g.*, *United States v. Pisari*, 636 F.2d 855, 859 (1st Cir. 1981) ("fact that in committing a robbery, one invokes the threat of using a knife falls far short of a sufficient signature or trademark upon which to posit an inference of identity"); *United States v. Benedetto*, 571 F.2d at 1249 (since passing folded bills by way of a handshake "about as unique as using glassine envelopes to package heroin," evidence inadmissible to show identity); *United States v. Miller*, 883 F.2d 1540, 1543-44 (11th Cir. 1989) (evidence of other cocaine transaction inadmissible to prove identity where only similarities were the use of a beeper and delivery in a car, which were not shown to be unique).

On the other hand, the numerous and singularly unique dissimilarities in the aspects of the two devices which *are* important to identifying a "signature" affirmatively indicate that *two different people built the two devices*. The 1986 device could therefore only tend to show that Trenkler had a criminal propensity and that he acted in conformity therewith on this occasion, which is exactly the evil Rule 404(b) prohibits. It must therefore be excluded from both trials. *See United States v. Johnston*, 784 F.2d 416, 424 (1st Cir. 1986) (evidence of other offloads of drugs to show the defendant was involved in the offload at issue inadmissible); *United States v. Ramon Rivera*,

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872 F.2d 507, 512 (1st Cir. 1989) (questioning admission of small sales as probative of larger ones, but finding harmless error).

And clearly this evidence cannot be used to show a common scheme or plan. In United States v. Lynn, 856 F.2d 430 (1st Cir. 1988), the First Circuit found that the trial court had abused its discretion in admitting evidence of a conviction for the sale of 100 pounds of marijuana six years earlier in a trial concerning a conspiracy to ship millions of dollars worth of marijuana from the Far East to the United States. The prior offense was remote in time, there was no evidence indicating a continuing scheme over time, the participants in the two events were completely different, and the two sales were dissimilar in quantity. Other than involving the same illicit substance, the two episodes were unrelated and therefore the earlier conviction should not have been admitted. Id. at 435.

The government stresses lack of other evidence that Trenkler built the 1991 bomb as a reason in favor of admission, G.Mem. at 26.

> [B]ut this argument misses the point. Rule 404(b) limits the admission of evidence of extrinsic acts, regardless of probativeness. Without the requirement of proving a distinctive modus operandi, all extrinsic evidence would be admitted whenever it was likely to prove guilt. . . . The extrinsic act must be a "signature" crime, and the defendant must have used a modus operandi that is uniquely his.

United States v. Miller, 959 F.2d 1535, 1540 (11th Cir. 1992) (Kravitch, J., concurring) (emphasis in original). The "signature" aspects of the 1991 bomb are uniquely not Trenkler's. Because the similarities that do exist are not "signature" factors, but are only deceptively similar from a layperson's

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point of view, the probative value of the 1986 device is substantially outweighed by unfair prejudice and the risk of confusing the jury. See, e.g., United States v. Church, 955 F.2d 688, 701-03 (11th Cir. 1992) (evidence of offer to help murder a prosecutor four years prior inadmissible against defendant on trial for conspiracy to commit murder because not proximate in time and risk of inciting jury to irrational decision). The 1986 device is precisely the kind of evidence 404(b) prohibits.

2. The 1986 Device is Irrelevant and Inadmissible to Show the Existence of a Conspiracy Between Trenkler and Shay Jr.

The government's argument that the 1986 device is relevant to the existence of a conspiracy depends initially on its probativeness as to the identity of Trenkler as the person who built the bomb in 1991. United States v. Anderson, 933 F.2d 1261, 1268 (5th Cir. 1991) (in order to be relevant to any issue other than character, an extrinsic offense must be similar to the offense charged). Since it is not probative of Trenkler's identity, it could not be probative of the charged conspiracy.

Furthermore, it is not necessary for Shay Jr. to dispute Trenkler's identity absent some evidence of a conspiracy between Trenkler and Shay Jr. See United States v. Williams, 985 F.2d 634, 637 (1st Cir. 1993) (evidence of modus operandi not admissible to show identity where identity not disputed in the case); United States v. Rodriguez-Estrada, 877 F.2d 153, 155 (1st Cir. 1989) (other act must be offered to prove some "controverted issue" other than propensity). However, even aside from whether Trenkler's identity will be a "controverted issue" in Shay Jr.'s

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case, the 1986 device is irrelevant to and inadmissible to establish the existence of a conspiracy in his case.

The government cites as its only evidence of the existence of a conspiracy a social relationship between Shay Jr. and Trenkler and Shay Jr.'s alleged visit to Radio Shack on October 18, 1991. G.Mem. at 26. As an initial matter, the government may not introduce the 1986 device against Shay Jr. unless it first establishes a conspiracy between Shay Jr. and Trenkler by other evidence. Imwinkelied, Uncharged Misconduct Evidence, § 2.05. A social relationship between Shay Jr. and Trenkler and a visit to Radio Shack by Shay Jr., if proved, is not sufficient evidence of a conspiracy to kill Shay Sr. The government cannot use the 1986 device to establish the conspiracy, which is a predicate to its introduction. This kind of bootstrapping is entirely improper.

That practical issue aside, the government proposes to add to the alleged social relationship and visit to Radio Shack, the 1986 device which it concedes is entirely unconnected to Shay Jr., and thereby establish the existence of a conspiracy. The government fails to specify the chain of inferences it would ask the jury to draw. However, "[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Huddleston v. United States, 485 U.S. 681, 687 (1988) (citations omitted).

The government's bald assertion that the 1986 device is relevant to establish the existence of a conspiracy does not make it so. United States v. Sullivan, 919 F.2d 1403, 1416 (9th Cir.

1990)(prosecutor's statement that a remote "cook" of amphetamine was part of the history of a drug conspiracy insufficient to establish any proper purpose). "While admissible in some circumstances, [extrinsic act evidence] is by no means a routine exercise and should not be accepted unless the government articulates with suitable precision the 'special' ground for doing so." United States v. Flores Perez, 849 F.2d 1, 8 (1st Cir. 1988).

Even where the prior act sought to be introduced is that of the defendant, it must be "closely intertwined" in time and circumstances with the charged offense. United States v. Currier, 821 F.2d 52, 55 (1st Cir. 1987). For example, evidence of a contemporaneous conspiracy between defendant and same persons as those involved in the charged conspiracy is admissible. United States v. Zeuil, 725 F.2d 813, 815-16 (1st Cir. 1984). See also United States v. Hadfield, 918 F.2d 987, 994 (1st Cir. 1990) (other narcotics violations admissible to show intent and prior working relationship where both acts involved the same participants, and was proximate in time).

The requirement of a close relationship between the prior act and the crime charged is heightened when the prior act is that of another. For example, in United States v. Fields, 871 F.2d 188 (1st Cir. 1989), the coconspirator's statements and actions for the purpose of proving his worth to carry out the aim of the conspiracy were "in furtherance of that conspiracy and intended to promote its objectives." The requirement that prior

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acts of another must be "inextricably linked" in "time and circumstance" was therefore fulfilled. Id. at 193.

In contrast, Shay Jr. and Trenkler did not even know one another at the time of Trenkler's alleged prior act and the government has no evidence of any connection between Shay Jr. and that act. The 1986 device is therefore inadmissible, as "there must be a tighter logical link between the extrinsic act and the charged crime" than is presented here. United States v. Blanca Garcia-Rosa, 876 F.2d 209, 221 (1st Cir. 1989); United States v. Bailey, 1987 U.S. App. LEXIS 15727 (1st Cir. 1987) (district court correctly excluded other acts where connection between the act and the theory for admission too attenuated); United States v. Flores Perez, 849 F.2d 1, 7 (1st Cir. 1988) (prior bad acts unrelated to crime charged not admissible to show context of crime charged).

It is difficult to imagine, assuming arguendo that the government could prove a social relationship, a visit to Radio Shack and the 1986 device, how a jury could conclude that a conspiracy existed without filling in the gaps with the assumptions (1) that Trenkler must have built the 1991 bomb because he built a (very different) explosive device in the past, and (2) that Shay Jr. must be guilty by association with Trenkler. Those assumptions would be irrational and amount to "rank speculation once propensity is set aside." United States v. Blanca Garcia-Rosa, 876 F.2d 209 (1st Cir. 1989) (evidence that defendant possessed cocaine in the past inadmissible to show he knew purpose of loan was to finance drug import). See also

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United States v. Shepherd, 739 F.2d 510, 513 (10th Cir. 1984) (evidence of other crimes should have been excluded as it was "fraught with the possibility of diverting the jury's attention from the crucial issue").

In United States v. St. Michael's Credit Union, 880 FR.2d 579 (1st Cir. 1989), prior bad acts of another were held to have been erroneously admitted where there was no nexus between the acts and the defendant. In a case involving charges of willful violation of the currency reporting act, the government was permitted to introduce evidence regarding the defendant's father's gambling activities on the theory that it was relevant to show her intent and motive in failing to file the CTRs. Id. at 600. The evidence showed that the defendant was not present at and had nothing to do with her father's gambling activities. Nor did the familial relationship support an inference that she must have known about his gambling activities. Id. at 599-601. The court stated:

> Absent some nexus between Szczawinski's alleged gambling activities and the defendants in this case, the gambling evidence was irrelevant. We find, therefore, that the admission of that evidence constituted an abuse of discretion on relevancy grounds.

Id. at 601. See also United States v. Rios Ruiz, 579 F.2d 670, 674 (1st Cir. 1978)(evidence irrelevant where government failed to link it to defendants); United States v. Mann, 590 F.2d 361, 369-70 (1st Cir. 1978) (evidence that prior acquaintance had been carrying cocaine irrelevant where no evidence defendant was involved or knew about the cocaine); United States v. Cunningham, 804 F.2d 58, 60-61 (6th Cir. 1986)(evidence irrelevant where

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government failed to prove defendant had been aware of it); United States v. Norton, 755 F.2d 1428, 1431 (11th Cir. 1985)(discussion by coconspirator of his efforts to import marijuana, unkown to defendant and unrelated to the charged conspiracy, properly excluded); Dudley v. Duckworth, 854 F.2d 967 (7th Cir. 1988) (admission of threats not connected to defendant amounted to denial of due process and required reversal).

The court went on to find that, even if it were to afford the evidence some minimal probative value, that "value (if any) [was] substantially outweighed by the danger of unfair prejudice." Id.

> The prejudicial danger in the instant action was that the jury may have convicted Sacharczyk on a theory of guilt by association. . . . Despite the fact that the government conceded that Sacharczyk was not involved in the gambling operation, and there was no connection between that operation and her, we believe the testimony implicitly and impermissibly linked the two.

Id. at 602. See also United States v. Rivera-Medina, 845 F.2d 12, 16-17 (1st Cir. 1988) (government's attempt to convict of guilt by association improper); United States v. Roark, 924 F.2d 1426, 1434 (8th Cir. 1991) (government's attempt to prove defendant's guilt by his association with Hell's Angels reversible error); United States v. Hays, 872 F.2d 582, 588 (5th Cir. 1989) (evidence of prior similar acts of one defendant inadmissible where it "served merely to assassinate [his] character, and in so doing, indirectly assassinate the character of [two other defendants]").

The 1986 device has no bearing on any essential element of an alleged conspiracy in 1991 because there is no link between

that device and Shay Jr. Rather, because the 1986 device is "remote in time, unrelated to the charged offenses, and the act of other persons entirely," it must not be admitted. United States v. Rodriguez-Cardona, 924 F.2d 1148, 1153 (1st Cir. 1991).[5]

C. Admission of the 1986 Device Would Offend the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

The government concedes it has no evidence that Trenkler built the 1991 bomb and no evidence of any link between Shay Jr. and the 1986 device. G.Mem. at 20, 26. This lack of evidence is offered up as the reason that the 1986 bomb should be admitted.

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[5] The government's heavy reliance on United States v. Passarella, 788 F.2d 377 (6th Cir. 1986), is misplaced. Counterfeit obligations seized from an unindicted coconspirator's trailer were relevant to show the charged conspiracy because they had the very same serial numbers as those on the currency seized from the defendant, Id. at 382, and were therefore part of the very same course of conduct charged in the indictment. Evidence of coconspirators' arrests for counterfeiting just before and just after they met the defendant, and which they discussed with the defendant, were relevant to show the conspirators' "ongoing relationship" and the defendant's "knowledgeable participation in the conspiracy." Id. at 383. Conversely, Trenkler's prior act occurred years before he and Shay Jr. ever met and there is no evidence that he discussed it with Shay Jr.

United States v. Coiro, 922 F.2d 1008 (2d Cir. 1991), is equally unavailing. The coconspirators' drug arrests were admitted to show the existence of a conspiracy already in existence when the defendant joined it. Id. 1015. No such pre-existing conspiracy could be alleged here.

Likewise, United States v. Fields, 871 F.2d 188 (1st Cir. 1989), does not support the government's contention that Trenkler's act should be admissible against Shay Jr. as evidence of a conspiracy, as the other act at issue in Fields was that of the defendant. Id. at 195.

United States v. Crocker, 788 F.2d 802 (1st Cir. 1986), does not help the government in this case because the coconspirators' acts took place in the month just prior to the month alleged in the indictment for the onset of the conspiracy. The evidence was allowed explicitly on the basis of the closeness in time. Id. at 806.

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While it is true that some courts have taken into consideration the government's need for prior bad acts evidence, this does not mean that the government is permitted to convict a person on the basis of other crimes and little else. "Where the evidence of other crimes is the foundation of the prosecution's case, rather than a buttress to that case, the defendant may be deprived of due process." Hargrave v. Landon, 584 F.Supp. 302, 310 (E.D.Va. 1984). See also Foster v. Watkins, 423 F.Supp. 53, 55 (W.D.N.C. 1976) (due process violated where conviction rested on evidence of other crimes and questionable proof of a latent fingerprint). Introduction of prior acts evidence for the improper purpose of showing conduct in conformance with criminal propensity may also violate due process. Gill v. Duckworth, 653 F.Supp. 877, 879 (N.D.Ind. 1987), aff'd., 836 F.2d 552 (1987). As the Seventh Circuit has stated:

> [E]manations from evidence of a defendant's propensity to commit other bad acts are almost always suggestive of a defendant's propensity to commit other bad or criminal acts . . . and errors in admitting such evidence consequently go to the fundamental fairness of the trial. Unless there is other evidence that overwhelmingly establishes the defendant's guilt, we think evidence of other acts or crimes will reasonably play a substantial role in swaying the jury. Because this is not a case in which there was an overwhelming amount of other evidence, although it was substantial, from which the government's case was completely proved without reference to the evidence of defendant's alleged involvement in a prior extortionate act, we think the defendant's conviction . . . must be reversed.

Id. at 783. Surely introduction of Trenkler's alleged prior bombing against Shay Jr., with the effect, even if not for the purpose, of showing guilt by association, would deprive Shay Jr. of a fair trial.

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