

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)

v.)

THOMAS A. SHAY and)
ALFRED W. TRENKLER)

) CRIMINAL NO. 92-10369-Z
)
)
)
)
)
)
)
)

MOTION TO COMPEL DISCLOSURE OF INTENTION TO USE,
OR IN THE ALTERNATIVE TO EXCLUDE,
EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS

The defendants Thomas A. Shay ("Shay Jr.") and Alfred W. Trenkler ("Trenkler") hereby move that this Court order the government to disclose whether, how, and on what theory it intends to offer evidence of other crimes, wrongs or acts of themselves or others against them. The defendants move that the government be ordered to disclose the information now, in the interest of orderly procedure and in conformance with Rule 404(b) of the Federal Rules of Evidence and Rule 12 of the Federal Rules of Criminal Procedure, so that the issues relating to such evidence may be resolved, through briefing and argument, before trial. As reasons for this motion, the defendants state the following:

1. Trenkler and Shay Jr. filed motions for disclosure of bad acts on January 6 and March 2, 1993, respectively.¹ The

¹ The defendants moved for the following:

1. The existence of any prior or subsequent bad acts or convictions
 - a. of Thomas A. Shay
 - b. of co-defendants
 - c. of unindicted co-conspirators
2. statement of whether the government intends to offer, under Fed. R. Evid. 404(b), evidence of any such prior or subsequent bad acts against Shay or

effect of the magistrate's order was to deny or unreasonably delay response to the defendants' motions. The defendants objected for the reasons stated in Shay Jr.'s objections to the magistrate's memorandum and order on pretrial motions, and Trenkler's motion to reconsider portions of magistrate's memorandum and order.

2. If the government intends to offer evidence of other crimes, wrongs or acts of the defendants or others against them, the defendants have a right to know the particulars of any such evidence, including the theory upon which the government intends to rely to circumvent the prohibition against proof of a person's character or a trait of character in order to show action in conformity therewith, Fed.R.Evid. 404, so that they may defend against it.

3. Evidence of other crimes, wrongs or acts which the government hopes to introduce must be tested under Rules 104(b),

any co-defendant during trial, together with a description of the method or means by which the government intends to introduce such evidence, including but not limited to:

- a. providing the names and addresses of all witnesses which the government intends to call to offer such evidence.
 - b. the dates, times, places, and persons involved in said "other crimes, wrongs or acts"
 - c. any statements of any participant in "other crimes, wrongs or acts"
 - d. the issue or issues on which the government relies in its contention that such "other crimes, wrongs or acts" evidence is relevant and admissible under Fed. R. Evid. 404(b)
3. Any documents, reports or statements of any such witness relating to, referencing, or regarding such bad acts or convictions, including when the documents were prepared, who prepared the documents and who has possession of the documents.

403 and 404(b). Admissibility will hinge on, among other issues, the particular purposes cited by the government in support of admissibility, relevance, probative value, and prejudice.

4. Furthermore, such evidence must be excluded unless the government provides reasonable notice in advance of trial. Fed. R. Evid. 404(b).² The advisory committee notes to the amendment requiring reasonable notice make clear that its purpose is "to reduce surprise and promote early resolution on the issue of admissibility" and envisions pretrial resolution on a motion in limine. Fed. R. Evid. 404(b), 1991 amendment, advisory committee's notes. "Reasonable notice" therefore requires that the government disclose its intention to use evidence of other crimes, wrongs or acts, and the particulars of that evidence and its theory of admissibility now.

5. Fundamental fairness requires that the defendants have notice and an opportunity to review such evidence, so that they may assist the Court in its determination of admissibility.

6. In the alternative, any evidence of other crimes, wrongs or acts sought to be introduced by the government should be excluded because such evidence will be offered for nothing more than the prohibited purpose of proving "the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b).

Respectfully submitted,

² Notice in advance of trial may be excused for good cause shown. The defendants submit that the government has known since they were indicted what 404(b) evidence it would seek to use at trial. It has no cause to delay disclosure of 404(b) evidence any longer.

THOMAS A. SHAY
By his attorneys

Amy Baron-Evans
Nancy Gertner (BBO #190140)
Amy Baron-Evans (BBO #560312)
Dwyer, Collora & Gertner
400 Atlantic Avenue
Boston MA 02110
(617) 357-9202

Jefferson Boone
Jefferson Boone
Boone & Henkoff
138 Brighton Avenue
Allston MA 02134
(617) 782 8210

ALFRED W. TRENKLER
By his attorneys

Scott Lopez
Terry Philip Segal (BBO#450760)
Scott P. Lopez (BBO #549556)
Segal & Feinberg
210 Commercial Street
Boston, MA 02109
(617) 720-4444

Dated: June 4, 1993

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was
served upon the attorney or record for each other party
by mail (by hand) on 6/4/93

Gladys L. Leung