UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
	)	CRIMINAL NO. 92-10396-Z
v.	)	
	)	
THOMAS A. SHAY	)	

MEMORANDUM IN SUPPORT OF MOTION FOR BIFURCATED TRIAL

The defendant, Thomas Shay, seeks a bifurcated trial, separating the guilt phase of the trial from the insanity phase, and either impaneling separate juries or permitting renewed voir dire of the same jury on the insanity issues following the merits trial.

I. THE COURT PLAINLY HAS THE AUTHORITY TO GRANT THE DEFENDANT'S REQUEST FOR A BIFURCATED TRIAL

There is no question but that the Court has the authority to grant the defendant's request for a bifurcated trial. United States v. Ahse, 427 F. 2d 626 (1970). In Holmes v. United States, 363 F. 2d 281, 282 (1966), the Court stated:

> "The court not only has broad discretion in considering bifurcation, but also in prescribing its procedure, the form of the charge, and submission of the questions to the jury, the admission of evidence in each stage, and even the impaneling of a second jury to hear the second stage if this appears necessary to eliminate prejudice."

Id. at 283.

II. A BIFURCATED TRIAL IS ESSENTIAL IN ORDER TO REMEDY THE SUBSTANTIAL PREJUDICE AND UNFAIRNESS OCCASIONED BY A UNITARY TRIAL.

In support of impaneling two juries the court in United States v. Bennet, 460 F. 2d 872 (D.C. Cir. 1972) recognized:

> "[A] jury may be reluctant to find a defendant not guilty by reason of insanity if the crime at issue is especially heinous. In some cases, therefore, the government's presentation of its case on the merits is indeed likely to prejudice an insanity defense. But bifurcation alone cannot prevent that result unless the two parts of the trial are presented to different juries."

See also, United States v. Taylor, 510 F. 2d 1283 (D.C. Cir. 1975); United States v. Ashe, 427 F. 2d 626 (D.C. Cir. 1970).

At the same time, the presence of the insanity defense could dramatically prejudice substantial defenses on the merits, as here. In Holmes v. United States, 363 F. 2d 281, 282 (1966), the Court stated:

> "This Court has recognized that substantial prejudice may result from the simultaneous trial on the pleas of insanity and not guilty. The former requires testimony that the crime charged was the product of the accused's mental illness. Ordinarily, this testimony will tend to make the jury believe he did the act. Also evidence of past anti-social behavior and the present antisocial propensities, which tend to support a defense of insanity, is highly prejudicial with respect to other defenses. Moreover, evidence that the defendant has a dangerous mental illness invites the jury to resolve doubts concerning the commission of the act by finding him not guilty by reason of insanity, instead of acquitting him, so as to assure his confinement in a mental hospital."

Quite apart from prejudice occasioned by the intermingling of the two defenses, in United States v. Greene, 489 F. 2d 1145

(D.C. Cir. 1973), the Court recognized prejudice and confusion occasioned by instructing the jury on two different standards of proof. It noted that "the obvious way to avoid confusion in instructing the jury on the standard of proof required of one interposing insanity as a defense, namely by a preponderance of the evidence, is to bifurcate the insanity defense." Id. at 1157.[1]

A central factor in each of these cases is the strength of the government's case. In United States v. Grimes, 421 F. 2d 1119 (D.CT. Cir. 1969), for example, the Court relied on the strength of the government's case to find that bifurcation was not necessary. In Grimes there was a positive identification of the defendant as the perpetrator of the alleged offense, and fingerprint evidence linking him to the offense. In fact, defense counsel assured the Court that there was no defense on the merits.

In the instant case, there are substantial defenses on the merits. The Government's case is entirely circumstantial. There are no witnesses to Shay's participation in the bombing. There is little or no physical evidence linking him to the event. The motive testimony is weak; other suspects may have had greater motive and/or opportunity.

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[1] The court specifically recognized that a defense may be prejudiced by "intermingling" the insanity defense with that on the merits and in particular, by admitting testimony of a psychiatrist concerning the defendant's rendition of the events charged.

III. BIFURCATION IS ESSENTIAL TO AN ORDERLY AND FAIR TRIAL.

The defendant faces a Hobson's choice in a unitary trial. Questioning jurors in an in depth fashion on the insanity defense could well prejudice them during the guilt phase. Moreover, it is difficult, if not impossible, to instruct a jury concerning the standards of proof on the defendant's two defenses, on the merits (where the standard is beyond a reasonable doubt) and the insanity defense (where the standard is a preponderance of the evidence.)

Respectfully submitted,

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Dated: June 24, 1993

CERTIFICATE OF SERVICE

I, Amy Baron-Evans, hereby certify that on this 24th day of June, 1993, a copy of the foregoing document was mailed, first class, postage prepaid to the all counsel of record:

Amy Baron-Evans

Amy Baron-Evans

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