

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

THOMAS A. SHAY

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CRIMINAL NO. 92-10396-2

FURTHER MOTION TO QUASH THE SUBPOENA OF THOMAS A. SHAY

Defendant makes this further motion to quash the subpoena of Thomas A. Shay on the following grounds:

1. On October 18, 1993, the defendant Thomas A. Shay filed a motion to quash the subpoena directing him to testify in Trenkler's trial, based on his Fifth Amendment right to remain silent.

2. Furthermore, the subpoena of Thomas Shay is gratuitous and serves no appropriate or lawful purpose in Trenkler's trial.

A. First, AUSA Kelly may not ethically offer a witness whom he has reason to believe will not tell the truth. AUSA Kelly has admitted in open court (during the sentencing proceeding), and in correspondence with counsel, that he believes many, if not most, of Mr. Shay's statements are not credible. He has made such statements in particular with respect to the proffer statements which he apparently hopes to introduce.

B. Nor may AUSA Kelly seek to place Thomas Shay on the witness stand for the purpose of setting up a perjury charge, given his psychological problems, or risk contempt, if he decided not to testify in the face of immunity.

C. Furthermore, on information and belief, Mr. Kelly is seeking information concerning the statements made by Mr. Shay during proffer sessions in November and December of 1992. These statements are inadmissible hearsay--they are neither coconspirator statements (since they were made after the alleged conspiracy ended), nor declarations against penal interest (since they were immunized under a proffer agreement).

D. AUSA Kelly cannot seek to have Mr. Shay testify solely so that he may impeach him with the proffer statements or other statements made by him, as a means of introducing these statements through the back door.

Respectfully submitted,

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

Dated: October 19, 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 10/19/93

Amy Baron-Evans

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

THOMAS A. SHAY

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CRIMINAL NO. 92-10369-Z

MOTION TO QUASH SUBPOENA OF FRANCIS O'ROURKE

Defendant, Thomas A. Shay ("Shay Jr."), hereby moves to quash the subpoena of Francis O'Rourke on the following grounds:

1. First, the subpoena fails to comply with the terms of Massachusetts Disciplinary Rule PF-15.
2. Mr. O'Rourke formerly represented Thomas Shay, pursuant to an order of this Court. On information and belief, the Government has not sought the approval of the Court prior to subpoenaing an attorney to testify with respect to matters having to do with his client. While PF 15 refers by its terms to grand jury subpoenas, the rationale of the rule applies as well to trial subpoenas.
3. Furthermore, there is absolutely no admissible evidence that Mr. O'Rourke can provide in this trial. On information and belief, Mr. O'Rourke has been subpoenaed to testify concerning several meetings between O'Rourke, Mr. Shay and representatives of the ATF and the United States Attorney's office at which Mr. Shay proffered certain evidence under a standard "proffer agreement." Testimony on this subject is inadmissible hearsay in the trial of codefendant Trenkler. It fits under no exception to the hearsay rule as it is after the alleged conspiracy had ended

(and thus not coconspirator statement), and immunized under a proffer agreement (and thus not a declaration against penal interest).

4. As such, the subpoenaing of Mr. O'Rourke is completely gratuitous, runs the risk of the disclosure of privileged information, and of undermining the attorney client relationship, without any justification that passes legal or ethical muster.

5. Even assuming arguendo that this evidence was admissible, it can be obtained from other sources, namely the ATF agents or the Assistant United States Attorneys who were present at the proffer sessions.

6. Without prior judicial approval there is a substantial risk that the testimony of Mr. O'Rourke will tread impermissibly on areas protected by the attorney client privilege. Moreover, the spectacle of the Government forcing an attorney to testify concerning his representation of a client runs the risk of undermining the attorney client relationship in this case. Thomas Shay in particular would have reasonable grounds to fear that his current counsel will be subpoenaed at a future proceeding. The danger and offensiveness of a subpoena of a former attorney is particularly pronounced with respect to court-appointed counsel, whose clients always suspect that their lawyers' true loyalty lies with the government which pays them.

7. Second, Mr. O'Rourke has also been asked to voluntarily cooperate with the Government by agreeing to be interviewed in advance of any testimony at trial compelled by subpoena. On information and belief, Mr. O'Rourke has agreed to do so at 4:00

P.M. Thursday, October 21, 1993. The defendant moves that Mr. O'Rourke be ordered not to participate in an interview, until this court has an opportunity to review the legality and appropriateness of the subpoena.

Respectfully submitted,

THOMAS A. SHAY
By his attorneys

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October 19, 1993

BY HAND DELIVERY

Catherine Dello Russo
Clerk for Judge Zobel
United States District Court
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J. W. McCormack Building, POCH
Boston, MA 02109

Re: United States of America v. Thomas A. Shay, Jr.
Criminal No. 92-10396-Z

Dear Cathy:

Enclosed please find Further Motion to Quash the Subpoena of Thomas A. Shay and Motion to Quash Subpoena of Francis O'Rourke in the above-referenced matter. As these motions are of a time sensitive nature, I would appreciate your bringing it to Judge Zobel's attention as soon as possible.

Thank you very much for your attention to this matter.

Very truly yours,

Amy Baron-Evans
Amy Baron-Evans *smt*

ABE:smt
Enclosures