

NO. 94-1301

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

ALFRED W. TRENKLER,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR THE DEFENDANT-APPELLANT

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ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY ADMITTING
EVIDENCE OF THE 1986 INCIDENT.

A. The Government's Brief Relies on Misleading
Characterizations of the Record.

The Government attempts to overcome the inadequacy of its legal and factual argument in support of the admission of evidence of the 1986 incident with an array of misleading characterizations of the record and of the evidence. Although

the Appellant will not repeat here arguments or record citations from his Brief, certain misrepresentations by the Government which are central to an objective review of the district court's abuse of discretion require clarification.¹

1. The Government cursorily addresses, in a footnote, Trenkler's argument that evidence of the 1986 device was not relevant to show intent in the 1991 bombing. The circumstances of the 1986 incident simply are not probative of the intent required under 18 U.S.C. §844(d) that the explosive "will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any ... real or personal property." The 1986 device, detonated during the night when the commercial vehicle was not in use or likely to be occupied, caused no visible damage to the truck. R.A. 329. Moreover, Waskom testified that, compared to the 1991 bomb, "[t]he 1986 device was ... much smaller, ... would do much less

¹ The Government's irrelevant comment in its Statement of Facts that "[t]he evidence established that Shay Jr. and Trenkler ... shared a common sexual orientation," cannot go unmentioned as it typifies the way this case has been tried against Trenkler. Appellee's Brief at 12. The Government, in an effort to bolster its circumstantial case, relied upon innuendo and repeated references to Trenkler's sexual orientation in an attempt to discredit him and to discredit witnesses in his defense. Such tactics are inappropriate and unwarranted especially where the district court expressly found that "in this case the defendant's homosexuality is not a central issue in the case." R.A. 735-36.

damage, would not normally be used to blow a car up. ... It would cause some excitement. And I don't know if intimidating people would be the thing" R.A. 378.

From the evidence in the record and before the district court, then, the intent to "make quite a bit of commotion" with the Hoffman simulator, *id.*, does not imply an intent to "kill, injure, or intimidate ... or ... damage or destroy." The Government sought to introduce the evidence solely to imply that Trenkler had bad character, and the district court clearly erred in allowing its admission. See United States v. Lynn, 856 F.2d 430, 436 (1st Cir. 1988).

2. The Court should not be misled by the Government's characterization of the purported similarity in modus operandi between the two incidents. The Government disingenuously fails to reveal that Waskom's opinion on the issue of modus operandi is based in its entirety upon hypothetical facts posed to him by the Government. The premise of Waskom's opinion, therefore, is seriously flawed as it is unsupported by any citations to the record.

In referring to the truck involved in the 1986 incident and the car involved in the 1991 incident, the Government asserts that "each such vehicle was operated by a person with ties to another individual in the underlying conspiracy." Appellee's Brief at 27. Absent from the record is any charge or finding of conspiracy in the 1986

incident. Similarly, no direct evidence linked the purchase of certain items at the Radio Shack to Trenkler, or to the builder of the 1991 device.

3. The Government, "[t]o illustrate the material shortcomings underlying Trenkler's ... argument," chastises Trenkler for the "imprecise description" of the placement of the 1986 device. Every report describing the incident was an exhibit introduced at the evidentiary hearing before the district court, and the Government's bluster cannot obscure the fact that the vastly different placements of the two devices, in 1991 under the driver's seat and in 1986 at the rear of the vehicle, illustrate totally distinct purposes for the two devices.

The Government also seeks to minimize the disparity between the uses of toggle switches in the two devices by quoting Waskom's testimony that "you could have switched the switch in '91 and put it in '86, it would have worked the same way." Appellee's Brief at 39 n.34. Such an approach to assessing "signature" fails to show either similarity or idiosyncrasy, and, if adopted, would obviate the need for any signature analysis. Waskom's method, as adopted by the district court, provides that generic components of any devices can be swapped. Under that view, then, all devices are basically interchangeable, and

a purported "signature" is deceptively simple to demonstrate.²

B. The Government Fails To Show That The District Court Did Not Abuse Its Discretion.

" ... [T]he district court had a responsibility to focus on the totality of the comparison" Appellee's Brief at 37 n.31, citing United States v. Ingraham, 832 F.2d 299, 233 (1st Cir. 1987), cert. denied, 486 U.S. 1009 (1988).

"As Waskom testified, ... in forming an opinion as to any 'signature' between two devices, the expert looks not simply to the components used, but to any distinctive configuration and methods of 'how they are linked together.'" Appellee's Brief at 39.

The Government, in its attempt to explain away the district court's erroneous admission of the 1986 incident,

² Throughout its brief, the Government takes license with the factual record before this Court. For example, the Radio Shack clerk, responding to questions posed by the Government, testified that he recalled seeing Trenkler inside the store two or three times in the Fall of 1991 (Transcript, Eighth Day of Trial, November 3, 1993, p. 97-98) not "in late September and October, 1991" as the Government has mischaracterized the testimony.

Also, although the Government's forensic chemist testified that the duct tape found in Trenkler's parents' garage and duct tape used in the 1991 bomb were "similar in composition and construction," the Government neglects to mention that the duct tape in the 1991 bomb was narrower than the strip missing from the roll of tape found in the garage. Transcript, Fourth Day of Trial (October 28, 1993) pp. 61-62.

The Government, misleadingly, also fails to mention that, although Trenkler and his roommate John Cates received voice mail messages from Shay Jr., Appellee's Brief at 12, Trenkler never returned Shay Jr.'s telephone calls. Transcript, Ninth Day of Trial (November 4, 1993) pp. 124-25.

relies solely on obfuscatory language and an avoidance of the central theses of Trenkler's argument. Indeed, one of the Government's less subtle diversions consists of a complaint with the number of pages allowed by this Court in which it could present its argument, bemoaning that

a point by point rejoinder, taking issue with either the claim of some difference or showing the ultimate unimportance of any undisputed difference ... would not only require far more space than is allotted, but would presume to transform this appeal from a review of the district court's discretion into a rehearing of the evidence adduced at voir dire.

Id. at 37. As is clear from Trenkler's Brief, however, his argument only begins with a delineation of the differences between the two devices. The heart of Trenkler's argument, which the Government tries to avoid by its repetition of this Court's admonition that the district court not "flyspeck the call in search of differences," id., n.31, is that the district court abdicated its responsibility to "focus on the totality of the comparison." Ingraham, 832 F.2d at 233.

Moreover, even as the Government takes Trenkler to task for a "'point by point' argument," it repeats its own "point by point" flyspecking in search of similarities which the district court erroneously adopted to admit the evidence of the 1986 device. If this Court, as the Government is not wont to do, looks beyond the individual "trees" of the superficial

similarities between the two devices, and focuses, as Ingraham requires, on the forest, then it will see two very different woods here. For example, the Government spends much of its allotted space recounting Denny Kline's testimony on the manner in which the wires were connected in the two devices. Even if twisting, soldering and taping a wire is "singularly unique," that should not obscure the fact that Trenkler connected each wire in the 1986 device in exactly the same way.³ The person who made the 1991 bomb used a variety of methods to connect the wires in that device. The "totality of the comparison" simply does not show a distinguishing idiosyncrasy.

Finally, the presumption that Trenkler would ask this Court to make a de novo review of the evidence is too facile a diversion. An appropriate understanding of the facts, however, is necessary to analyze cogently the district court's decision and recognize its abuse of discretion. The Government's

³ In spite of the Government's focus on "twisted, soldered and then taped" wire ends, Appellee's Brief at 28 n.20, there is no evidence that the 1986 device contained any twisted wires. R.A. 161. In fact, evidence of twisted wires in the 1991 device did not appear until after Kline submitted his first affidavit on the issue of signature. After Kline's first affidavit mentioned the existence of twisted wires in 1986, the Government produced a photograph showing twisted wires in the 1991 device even though Kline had not seen any twisted wires during his two examinations of the actual physical evidence from the 1991 device. R.A. 421; S.A. 47-48.

argument, in its essence, may be stated as "the district court's findings do not constitute an abuse of discretion because the district court made findings," or "the district court is right because the district court is right." Even if the district court did indeed find the Government's expert more compelling, the district court still had a responsibility to evaluate the facts and make its own decision. The decision reached by the district court, however, has no support in the record since, as the applicable case law requires, no "distinguishing" similarities were present.

The Government's persistent characterization of the district court's findings as "meticulous," "detailed" and "lengthy" does not transform that court's rather cursory paragraph addressing the two devices into supportable findings and a proper decision. Indeed, although the district court correctly restated the governing law, it ultimately relied upon an erroneous standard to admit the evidence of the 1986 incident. The district court plainly stated that "[a]dding to this evidence, the statistical evidence from the EXIS system, I am persuaded that the two devices are sufficiently similar to prove that the same person built them, and thus relevant to the issues in the case." R.A. 440 (emphasis added). In order to show "identity," however, this Court unequivocally stated in Ingraham that the characteristics must be "sufficiently

idiosyncratic," Ingraham, 832 F.2d at 232, and not merely sufficiently similar.⁴

An analysis of the "totality of the comparison," applying the appropriate tests for admission of 404(b) evidence set forth by this Court, shows that the district court's decision was unreasonable, in spite of Waskom's opinion to the contrary. It is to avoid such grave errors that Ingraham requires not only a weighing of the similarities and the differences, but ultimately a decision based on the comparison of the whole. The district court abused its discretion by "flyspecking" the similarities, and this Court should vacate Trenkler's conviction.

II. THE GOVERNMENT FAILS TO ADDRESS THE SYLLOGISTIC REASONING AND CLEARLY ERRONEOUS DECISION BY THE DISTRICT COURT TO ADMIT THE HARMFUL EXIS EVIDENCE.

The case law is unequivocal that hearsay not falling within one of the firmly rooted hearsay exceptions is admissible under the Confrontation Clause only if it is supported by a "showing of particularized guarantees of trustworthiness." Lee v. Illinois, 476 U.S. 530, 543 (1986)

⁴ The requirement that evidence have a "sufficient similarity" was set forth in United States v. Scelzo, 810 F.2d 25 (1st Cir. 1987), which dealt with "knowledge," to which Trenkler was prepared to stipulate, R.A. 228-29, and not with "identity." Moreover, the Government's reliance on Huddleston v. United States, 485 U.S. 681 (1988) is puzzling, since there was no contention that Trenkler did not commit the "conditional fact," i.e. the prior act. That issue, then, was not before the jury.

(quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)). The touchstone of admissibility under the residual hearsay exception is not, contrary to the argument of the Government and the clearly erroneous decision by the district court, whether the "materials are used...by law enforcement authorities on a regular basis" or whether the law enforcement authorities "rely on them." R.A. 983. Incredibly, the district court's decision on admissibility amounts to a syllogistic determination that the EXIS information is reliable because it is relied upon by law enforcement authorities. R.A. 982-83.

The government's argument does not even provide post hoc justification for the district court's clearly erroneous decision admitting the EXIS evidence. The Government ignores the highly suspect circumstances surrounding the entry of the EXIS data and the retrieval of the EXIS "results", and without authority argues that such information is admissible because law enforcement officers regularly use it for "investigative leads" and "investigative purposes." Appellee's Brief at 46 and 47. The Government then simply presupposes the accuracy of the information by merely describing the action Scheid took to create a match between the 1986 and 1991 incidents. The EXIS results are neither accurate nor admissible, and the Government's argument is unavailing as a matter of law and contrary to the evidence presented to the district court.

The record demonstrates that the procedures contrived by the Government to obtain the "match" between the 1986 device

and the 1991 bomb fall far outside the Government's stated standard of practice. Although the EXIS database is a compilation of reports submitted to ATF, R.A. 990-94, 1021, the Quincy Police Department did not report the 1986 incident at the time, and the Government, some five years later and after the 1991 incident, obtained, encoded and entered information relating to the 1986 incident. R.A. 1010-11, 1057. Scheid, who had already entered the 1991 data into EXIS, then reviewed the 1986 reports for entry in connection with the 1991 investigation. The Government, having just created EXIS records for the two incidents in connection with the same investigation, manufactured five queries which contained key features of explosive devices that were recognizable by the computer. The seven incidents which resulted, not surprisingly, included both the 1986 and the 1991 incidents. R.A. 1003-7, 1537-38.

Then, in a further departure from its usual practice, the Government abandoned its analysis of the computer database and contrived "manual" queries to whittle the seven incidents down to two - the 1986 Quincy incident and the 1991 Roslindale incident. R.A. 1018.

It bears repeating that, notwithstanding the Government's unsupported protestations, Scheid's actions on their face were designed to produce a match between the 1986 and 1991 incidents. He entered the two reports within the same investigation, manufactured queries to take advantage of the

common EXIS elements, and then reviewed the underlying data from reports to devise additional queries reflecting any possible commonality. An objective analysis of the process cannot help but show that an unbiased use of EXIS queries, assuming the 1986 data had been reported timely, would almost certainly fail to generate a list of incidents which contained both the 1986 and 1991 devices. That none of the five additional features queried in this manual process exists as a possible feature in the EXIS code book (R.A. 1511-24) and that the entire database of 14,252 incidents is not analyzed using those five additional features underscore the artificiality and subjectivity of the predetermined result. For the Government to argue now the "objectivity" of the results strains common sense.

The district court not only failed to make the required finding of trustworthiness, but it ignored its obligation under F.R.E 803(24) to determine whether the EXIS information was "more probative on the point for which it [was] offered than any other evidence which the [Government could] procure through reasonable efforts." United States v. Ellis, 935 F.2d 385, 394 n.7 (1st Cir. 1991); Polansky v. CNA Insurance, 852 F.2d 626, 631 (1st Cir. 1988). In a footnote, the Government summarily dismisses the district court's error and the harmfulness of admitting such fabricated evidence. Arguing that Waskom had testified that the same person designed and constructed the 1986 device and the 1991 device, the Government concluded

"thus, there was sufficient evidence linking the two bombings without the EXIS data." Appellee's Brief at 48 n.44. The district court clearly erred in admitting such evidence where the Government conceded that the EXIS evidence was not more probative than any other evidence on the issue of identity. Ellis, supra; Polansky, supra. The district court did not make the required finding, and, indeed, the Government's brief shows that the EXIS evidence was not necessary or used by Waskom to identify the makers of the devices. Because the EXIS evidence was not more probative evidence, the only reason for its admission was to further inflame the jury against Trenkler.

The presentation of the only two matches from over 14,000 bombing incidents lures the jury into embracing what appears to be objective, scientific evidence. The process is another reminder that the trappings of the computer age should not replace simple common sense and due process. The district court committed grave error in admitting such flagrantly untrustworthy evidence.

III. THE DISTRICT COURT ERRED IN ADMITTING POWERFULLY INCRIMINATING EXTRAJUDICIAL STATEMENTS OF A CONVICTED COCONSPIRATOR AGAINST TRENKLER.

The Government misapprehends the constitutional significance of the district court's error in admitting Shay Jr.'s statements in Trenkler's trial. Trenkler is not arguing, as the Government contends, that "admission of such statements from a nontestifying codefendant deprived him of his right of confrontation." Appellee's Brief at 49 (emphasis added).

Rather, in violation of the Confrontation Clause and in stark contrast to the facts before the United States Supreme Court in Richardson v. Marsh, 481 U.S. 200 (1987), the district court committed an error of constitutional dimension when it admitted the statements of Shay Jr., the already convicted coconspirator, against Trenkler, the only remaining defendant on trial in the alleged two-person conspiracy.

In Richardson, the United States Supreme Court upheld the introduction of a nontestifying codefendant's confession against that codefendant in a joint trial where the confession was redacted to omit any reference to the defendant notwithstanding the fact that the defendant was "linked" to the confession by other evidence. In ruling that the admission of such a confession did not violate Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court determined that the confession did not on its face incriminate the defendant, but became incriminating only when linked with evidence introduced later at trial. Richardson, 481 U.S. at 208.

Shay Jr.'s statements, however, introduced only against Trenkler, did not require later evidentiary linkage. Although the statements did not mention Trenkler by name, powerfully incriminating statements of the convicted coconspirator were spread before the jury, and Trenkler was left deprived of the opportunity to confront the maker of the insidious statements. At that point, the damage was done as the jury heard the convicted coconspirator's admissions of guilt in this severed

trial of the only other alleged conspirator. The immediate "guilt by association" effect of such statements exceeded those found constitutionally infirm in Bruton, where the extrajudicial statements come from a codefendant who "stands accused side-by-side with the defendant." Bruton, 391 U.S. at 135-36. The risk was overwhelming that the jury relied on Shay Jr.'s damaging admissions to convict Trenkler in the two-person conspiracy. There was no other defendant on trial to whom the jury could assign the blame. It strains credibility to argue that any limiting instruction could remove such taint.

IV. THE GOVERNMENT'S OPENING STATEMENT INTENTIONALLY CONTAINED IMPROPER AND UNDULY PREJUDICIAL REMARKS.

Upon an examination of the record before this Court, the Government's argument that its deliberate use of Shay Jr.'s inflammatory statements was in "good faith" rings hollow. As the Government points out, one of the specific issues before the district court when it made its preliminary ruling that "the government will not make any reference to any of these matters in its opening statement" was "the motion to quash the subpoena to Mr. Shay." Appellee's Brief at 55. The district court did allow the motion to quash, R.A. 440, but gave leave for the Government to move for reconsideration, a step the Government was prepared to take. R.A. 441; Transcript, First Day of Trial (October 25, 1993) pp. 6-7. At that point, then, it was likely that Shay Jr. would not testify or make any statements, so that the Government can hardly claim a good faith basis for repeating his statements in its Opening.

Moreover, in light of the Government's request for reconsideration and the Court's willingness to hear its argument, the Government can hardly claim that it, "in good faith, believed that SA Leahy would be permitted to testify" as to Shay Jr.'s statements. Appellee's Brief at 57. The uncertainty surrounding Shay Jr.'s testimony at Trenkler's trial made the likelihood of the admission of Leahy's recollection of those statements doubly uncertain. Indeed, the inherent lack of credibility surrounding Shay Jr.'s self-exculpatory statements made it highly unlikely that they would have been admitted in any case. See Lee, 476 U.S. at 541; Bruton, 391 U.S. at 136; Dutton v. Evans, 400 U.S. 74, 98 (1970) (Harlan, J., concurring in result).

Finally, the Government's attempt to put before this Court discussions which do not appear in the record, Appellee's Brief at 55 n. 53, fails to support its claim of "good faith." Even if Trenkler's Motion To Preclude The Government From Mentioning Any Statements By Thomas Shay, Jr. was not among the matters before the district court when it made its preliminary ruling with respect to the Opening, the Government was aware of the impropriety of mentioning those statements. When, during the seventh day of trial, the Government complained that "we have now made remarks in opening for which the Government's denied the ability to offer evidence which it reasonably believed would be available," R.A. 773-74, the district court replied, "[t]he Government did that at its peril. There was [a] motion

not to have those statements made, and we talked about it before the Government made them. So that one, I'm afraid that's the Government's problem and not the Court's problem." R.A. 774.

The Government, then, intentionally mentioned Shay Jr.'s statements in its Opening, with no reasonable basis to believe that the statements would eventually be admitted. Those statements, deliberately used to exaggerate the tenuous connection between Trenkler and Shay Jr., improperly influenced the jury's consideration of the circumstantial evidence and unfairly prejudiced Alfred Trenkler. See United States v. Capone, 683 F.2d 582, 585-86 (1st Cir. 1982).

CONCLUSION

For the foregoing reasons and authorities, this Court must vacate the conviction of the Defendant-Appellant Alfred W. Trenkler, and order a new trial.

Respectfully Submitted,

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DATED: October 12, 1994
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