UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. ALFRED W. TRENKLER, Defendant.	CRIMINAL NO. 92-10369-Z

MEMORANDUM IN SUPPORT OF DEFENDANT ALFRED W. TRENKLER'S MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR AN EVIDENTIARY HEARING

INTRODUCTION

With no physical evidence and no eyewitnesses linking the Defendant Alfred W. Trenkler ["Trenkler"] to the the crimes for which he was charged and convicted, the Government (and ultimately the First Circuit Court of Appeals) relied primarily upon the testimony of a convicted felon who testified that while they were in jail together Trenkler admitting building the bomb that exploded in Roslindale, Massachusetts, in 1991. Almost two years after the trial, Trenkler discovered that the convicted felon had been released three years into an eight-year prison term despite his testimony that he had no agreements with the Government for his testimony. If that material evidence, as well as material evidence demonstrating the unreliability of out-of-court statements by a previously convicted co-conspirator introduced by the Government to

establish that Trenkler was part of a two-person conspiracy, had been received at trial it would probably have resulted in an acquittal. Therefore, a new trial is warranted.

BACKGROUND

In late October and November 1993, the Defendant Alfred W. Trenkler ["Trenkler"] was tried by a jury for conspiracy under 18 U.S.C. §371, receipt of explosive material under 18 U.S.C. §844(d), and attempted malicious destruction of property by means of explosive under 18 U.S.C. §844(i) arising out of an explosion in Roslindale, Massachusetts, on October 28, 1991, which killed a Boston Police officer and seriously injured a second Boston Police officer.

The hallmark question in the case against Trenkler was the identity of the creator of the Roslindale bomb. Exhibit A, Trial Transcript, pp. 229, 162.[1] Because there was no direct physical evidence linking Trenkler to the 1991 bomb (Exhibit A, Trial Transcript, pp. 910, 944-945), the Government sought to admit evidence, including evidence from a Bureau of Alcohol, Tobacco & Firearms computerized database, relating to Trenkler's participation five years earlier in an explosive incident in Quincy to prove that the Quincy device and the

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[1] Unless otherwise noted, the Exhibit references throughout refer to the Exhibits that are attached to the Defendant's Motion for A New Trial Or, In The Alternative, For An Evidentiary Hearing.

Roslindale bomb were so similar that Trenkler must have built the Roslindale bomb. At trial, this Court admitted the computer-derived evidence.

Trenkler was convicted on November 29, 1993, and sentenced to concurrent terms of imprisonment for life on the counts of receipt of explosive materials and attempted malicious destruction of property by means of explosives and for sixty months on the count of conspiracy by a judgment of conviction entered on March 8, 1994.

On March 15, 1994, the Defendant filed his Notice of Appeal pursuant to Fed.R.Civ.P. 4(b). On appeal, the Defendant alleged error, inter alia, in the admission of the computer-derived evidence.

The First Circuit Court of Appeals Court rendered its decision in United States v. Alfred Trenkler, No. 94-1301, on July 18, 1995, affirming Trenkler's conviction (Torruella, C.J., dissenting). The First Circuit found that this Court erred in admitting the computer-derived evidence under the residual exception to the hearsay rule to prove the identity of the creator of the Roslindale bomb, but nonetheless found the error harmless beyond a reasonable doubt. In so doing the First Circuit relied upon other evidence that it found supported a finding that Trenkler had built the Roslindale bomb.

The First Circuit "principally" relied upon the testimony of William David Lindholm ["Lindholm"] in finding the erroneous admission of the computer-generated evidence nonetheless to be

harmless beyond a reasonable doubt. Specifically, the First Circuit found that Lindholm, a convicted felon, "convincingly testified that Trenkler actually admitted building the Roslindale bomb." Exhibit B, First Circuit Court of Appeals Opinion in United States v. Trenkler, at p.39. In further support of its determination that the computer-derived evidence although erroneously admitted was harmless beyond a reasonable doubt, the First Circuit found support in "the ample evidence the Government adduced establishing Trenkler's relationship with Shay Jr." Exhibit B, First Circuit Opinion of United States v. Trenkler, at p. 39.

Whether Trenkler conspired with Shay Jr. as part of a two-person conspirarcy in the Roslindale explosion was a central contested issue in the case against Trenkler. The Government sought to introduce out-of-court statements of Shay Jr., who refused to testify despite an immunity order, to prove Trenkler's involvement in a two-person conspiracy. In fact, the Government argued at Trenkler's trial that Shay Jr.'s statements were the key to showing that a conspiracy between Trenkler and Shay Jr. existed. Affidavit of Terry Philip Segal, Esquire, ["Segal Affidavit"] at ¶5.

In asserting that Shay Jr.'s out-of-court statements should be admitted at Trenkler's trial, the Government argued that Shay Jr.'s out-of-court statements were reliable. Over the course of three days of the trial, a colloquy ensued between the Court, the Government and the defense counsel as to

the reliability of Shay Jr.'s out-of-court statements which the Government wanted to admit as exceptions to the hearsay rule through three separate witnesses to establish the existence of a two-person conspiracy between Trenkler and Shay Jr. Segal Affidavit, at ¶4.

In grappling with its decision to admit Shay Jr.'s out-of-court statements, this Court itself acknowledged the reliability problems associated with the testimony of Shay Jr. and even referred to evidence from Shay Jr.'s trial some months earlier.

> A hearsay exception is an indication of the reliability of the statement, a statement against penal interests. Obviously, the idea is that a person wouldn't say I did something wrong if in fact I didn't do something wrong. The fact of the matter is that we have evidence in the Shay case from the Government that Mr. Shay precisely and repeatedly did just that. He brags about things. He called attention to himself. He does it time and time and time again, and that is what Dr. Kelly [the Government's expert] told us. He's a chronic liar. That's what he said. And under those circumstances, whatever may be the general rule about the reliability of a statement against penal interests, sort of loses all reliability, the case is (sic) interpreting also say that the more crucial the evidence is that the Government wants to put into evidence against, by a declarant, an unavailable declarant, the more vigilant the Court has to be and the more difficult it becomes for the Government. If it were just something that corroborated something else, it would be one thing by your own

> statement it is highly crucial evidence. It is the evidence on the issue of conspiracy. Exhibit A, Trial Transcript pp. 762-763 (emphasis added).

Segal Affidavit, at ¶6. Despite its own concerns about Shay Jr.'s reliability, this Court admitted through three witnesses nine (9) out-of-court statements by Shay Jr., as well as a portion of a videotaped interview with Channel 56 reporter Karen Marinella, as statements against penal interest and state of mind. Exhibit A, Trial Transcript, pp. 748-93, 795-828, 845-849, 855-858, 866-868, 871-875, 879-880, 883-887, 1540; Segal Affidavit, at ¶7.

Because this Court precluded Shay Jr. from introducing at his own trial expert psychiatric testimony by Dr. Robert Phillips that Shay Jr.'s statements were the unreliable product of a recognized mental disorder called "pseudologia fantastica," Trenkler's trial counsel concluded that it would be futile to seek the introduction of Dr. Phillips' testimony. His trial counsel, therefore, decided not to seek the introduction of Dr. Phillip's testimony. Segal Affidavit, at ¶¶8-9.

NEWLY DISCOVERED EVIDENCE

The Defendant was not aware at the time of the trial of this action in October and November 1993, of the newly discovered evidence which relates to Lindholm's testimony ["the Lindholm evidence"] which the Government introduced to

establish the identity of the creator of the Roslindale bomb, nor was the Defendant aware of certain newly discovered evidence which relates to out-of-court statements by Shay Jr., a convicted co-conspirator ["the Shay Jr." evidence], which the Government introduced to establish the existence of a conspiracy between Trenkler and Shay Jr.

At the trial, Lindholm testified that he had no agreements with the Government and that he did not receive any promises or inducements for his testimony. Lindholm also testified that he knew that the only way his ninety-seven month sentence could be reduced was if he supplied new information to the Government. Exhibit A, Trial Transcript, pp. 1171, 1175.

Almost two years after the trial of this action, new and material evidence relating to Lindholm's testimony came to light when an article appeared in The Boston Globe on August 1, 1995, indicating that "Lindholm was reportedly released from federal prison 37 months into an 8-year sentence and testified against convicted bomb builder Alfred Trenkler in the Roslindale bombing case in which a Boston police officer was killed." Exhibit C, Article from The Boston Globe. Moreover the Schuylkill Federal Prison in Minersville, Pennsylvania, confirmed that William David Lindholm had been incarcerated on September 9, 1991, for a ninety-seven month sentence, and was released on September 30, 1994, approximately five years before his scheduled release date. Affidavit of Michael Z. Burnett, at ¶3.

In addition, on June 22, 1995, more than a year and a half after Trenkler's trial, the First Circuit in United States v. Thomas Shay, Jr., No. 93-2141, held that it was a "clear error in judgment" for this Court to exclude the testimony of Shay Jr.'s psychiatric expert, Dr. Robert Phillips, that Shay Jr.'s statements were the unreliable product of a recognized mental disorder. Exhibit F, First Circuit Court of Appeals in United States v. Thomas Shay, Jr.

Had this Court permitted Shay Jr. to introduce Dr. Phillip's testimony at his trial, Trenkler's trial counsel would have sought to introduce Dr. Phillip's testimony at Trenkler's trial as it related to the unreliability of Shay Jr.'s out-of-court statements. However, in light of this Court's prior ruling in the Shay Jr. trial, Trenkler's trial counsel concluded it would be futile to do so. Segal Affidavit, at ¶9.

ARGUMENT

IN LIGHT OF THE MATERIAL NEWLY DISCOVERED LINDHOLM AND SHAY JR. EVIDENCE WHICH WILL PROBABLY RESULT IN AN ACQUITTAL, TRENKLER IS ENTITLED TO A NEW TRIAL.

Newly discovered evidence warrants a new trial in a criminal case where (1) the evidence was unknown or unavailable to the defendant at the time of trial; (2) the failure to learn of it was not a result of the defendant's poor diligence; (3) the new evidence is material, and not merely cumulative or impeaching; and (4) the impact of the new evidence is so strong

that it will probably result in an acquittal upon retrial of the defendant. United States v. Slade, 980 F.2d 27, 29 (1st Cir. 1992); United States v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980). As this memorndum demonstrates, the Lindholm and Shay Jr. evidence fit squarely within the criteria for granting a new trial based on newly discovered evidence.

A. The Newly Discovered Evidence Was Unavailable to Trenkler At the Time of Trial And The Failure to Learn of Such Evidence Was Not Due to Any Lack of Diligence by Trenkler.

In the instant case, Lindholm was not given his early release from prison until September 30, 1994, ten months after Trenkler's trial. Under no set of circumstances could Trenkler have learned at the time of his trial, unless the Government so informed him, that Lindholm was to be released five years before his scheduled release date of September 1998. In fact, it was only through a chance reading of an article in The Boston Globe that Trenkler became aware that Lindholm served less than one half of his eight-year sentence despite Lindholm's testimony that he had no agreements with the Government for his testimony, and that the only way his ninety-seven month sentence could be reduced was by supplying new information to the Government.

As soon as Trenkler learned of Lindholm's release from prison approximately five years early, he filed a Motion to

Remand with the First Circuit on August 8, 1995.[2] Exhibit D, Motion to Remand. On August 25, 1995, the First Circuit denied the Motion to Remand, but in so doing asserted the following:

> Defendant's Motion raises issues of concern, which could merit a hearing. However, the proper forum for such a hearing is before the district court upon motion of a new trial.

Exhibit E, First Circuit's Order on Motion to Remand.

In addition, more than a year and a half after his trial, Trenkler learned that the First Circuit in United States v. Thomas Shay, Jr., No. 93-2141, held that this Court committed a clear error in judgment" by precluding Shay Jr.'s psychiatric expert from testifying that Shay Jr.'s statements were the unreliable product of a recognized mental disorder. Obviously, the First Circuit's decision was unavailable to Trenkler at the time of his trial when Trenkler's trial counsel determined that given this Court's prior decision precluding Shay Jr. from offering Dr. Phillips' testimony at his trial, it would be futile to seek to introduce at Trenkler's trial Dr. Phillips' testimony as to the unreliability of Shay Jr.'s statements.

B. The Lindholm and Shay Jr. Evidence is Material and Not Merely Cumulative or Impeaching.

The Sixth Amendment right of a criminal defendant to be

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[2] At the time, Trenkler's Petition for Rehearing and Suggestion for Rehearing En Banc, which was filed on August 1, 1995, was pending before the First Circuit.

confronted with the witnesses against him entitles the defendant to explore a witness' bias or motivation for testifying. United States v. Tracey, 675 F.2d 433, 437; United States v. Lynn, 856 F.2d 430, 432 (1st Cir. 1988).[3] The First Circuit has distinguished the exploration of potential bias from impeaching the credibility of witnesses as a "current continuing motivation to testify falsely (the bias factor)" and "prior conduct and behavior suggesting a witness may be lying (the credibility factor)." Lynn, 856 F.2d at 432. The nature of any agreement that a witness has with the government or any expectation or hope that he will be treated leniently in exchange for his cooperation does not only impeach prior statements, but could also reveal any present or continuing reasons for the witness to fabricate his testimony in return for future prosecutorial favors. Id.

In the instant case, there is no question that Lindholm's release three years into an eight-year prison term strikes at the heart of his motivation to testify against Trenkler. See Lynn, 856 F.2d at 432 ("bias is always relevant as discrediting a witness and affecting the weight of his testimony"). It is

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[3] Bias is "the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." Id. at n. 3 quoting United States v. Abel, 469 U.S. 45, 52 (1984).

dramatic and probative new evidence that Lindholm had a continuing reason to lie in order to curry favor with the Government. The newly discovered evidence of Lindholm's early release from prison would have demonstrated to the jury that Lindholm was not a disinterested witness, but that the Government wielded significant power over him. Without the knowledge of Lindholm's early release, which happened ten months after Trenkler's trial, Trenkler was foreclosed from exposing at trial Lindholm's sweetheart deal with the Government, which would have had the tendency to make Lindholm's testimony less probable in the eyes of the jury. Id. at 432 n.3. Without such material evidence, Trenkler's constitutional right to confront and cross examine witnesses against him was effectively eviscerated. See Lynn, 856 F.2d at 437 (defendant's constitutional right to confront and cross examine witnesses impaired by court's foreclosure of full cross examination on issue of witness' bias as it pertained to agreement with government).

In addition, Dr. Phillips' testimony as to Shay Jr.'s mental disorder and the ultimate unreliability of Shay Jr.'s statements undermine the only evidence the Government introduced to prove that a two-person conspiracy existed between Trenkler and Shay Jr. Because Shay Jr. did not testify at Trenkler's trial, the "key", as the Government characterized it, to establishing a two-person conspiracy was Shay Jr.'s nine

(9) out-of-court statements. That those statements were the product of "psuedologia fantastica," a recognized mental disorder, was material to the jury's assessment of the reliability of the only evidence upon which the Government relied to establish a conspiracy.

C. The Impact of the Lindholm and Shay Jr. Evidence Is So Strong That It will Probably Result in An Acquittal Upon Retrial.

While generally the moving party in a motion for a new trial must establish, inter alia, that the new evidence will probably result in an acquittal upon retrial, where there is an allegation that a witness's testimony was perjured, a less stringent "probability of reversal test" is applicable. The First Circuit has adopted the rule set forth in Larrison v. United States, 24 F.2d 82 (7th Cir. 1928). United States v. Wright, 625 F.2d 1017, 1020 (1st Cir. 1980). In Larrison, the Seventh Circuit held that when a motion for a new trial is based upon the allegation that a material witness testified falsely at trial, a new trial should be granted if:

> (1) The court is 'reasonably well-satisfied' that the testimony was false, and (2) without the false testimony the jury 'might have reached a different conclusion'

Wright, 625 F.2d at 1020 quoting Larrison, 24 F.2d at 87 (emphasis in original). In the instant case, Lindholm testified that he had no agreements with the Government and that he did not receive any promises or inducements from the

Government for his testimony. Clearly, now, in light of his early release from prison, it is reasonably likely that the testimony was false. However, even under the more stringent "probability of reversal test," the introduction of the new evidence would probably result in an acquittal.

A review of the record demonstrates that the case against Trenkler was hardly overwhelming. There was no physical evidence linking Trenkler to the Roslindale explosion nor were there any eye witnessess who testified that they saw Trenkler at or near the crime scene. The Government relied primarily upon Lindholm's testimony that Trenkler admitted making the Roslindale bomb and the out-of-court statements by Shay Jr. to prove Trenkler entered into a two-person conspiracy with Shay Jr. At the trial, the jury had to determine whether to believe Lindholm and whether to accept as reliable the out-of-court statments by Shay Jr., a non-testifying convicted co-conspirator.

Lindholm's testimony was of significant importance to the ultimate issue of guilt or innocence. Lindholm's early release provides persuasive evidence that he possessed a material bias such that the jury would have viewed his testimony with at least significant skepticism and more probably a reasonable doubt. If a jury is now apprised of the agreement between Lindholm and the Government, it will probably result in Trenkler's acquittal on retrial.

In addition, there is a sufficient probability that a jury would reach a judgment of acquittal if if the expert psychiatric evidence that Shay Jr.'s statements were the unreliable product of a recognized mental disorder were introduced. If the jury heard testimony from Dr. Phillips that Shay Jr. suffered from "pseudologia fantastica," it is highly likely that they would have been convinced that Shay Jr. was a liar and a braggart whose out-of-court statements could not be given credence. Given the high probability of acquittal upon retrial with the Lindholm and the Shay Jr. evidence, a new trial is warranted.

CONCLUSION

By reason of the foregoing, this Court should grant the Defendant's Motion for a New Trial Or, In The Alternative, For An Evidentiary Hearing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by hand/mail on 12/22/95