UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. ALFRED W. TRENKLER, Defendant.	CRIMINAL NO. 92-10369-Z (FILED UNDER SEAL)

MEMORANDUM IN SUPPORT OF DEFENDANT
ALFRED W. TRENKLER'S MOTION FOR JUDICIAL INQUIRY
INTO POSSIBLE JUROR MISCONDUCT AND FOR A NEW TRIAL

INTRODUCTION

Information has surfaced that raises the very real specter of highly prejudicial juror misconduct in a trial that resulted in a conviction and life sentence for the Defendant Alfred W. Trenkler.

The government, as outlined in a letter to the Court dated November 1, 1996, has received information that an alternate juror who sat on the jury during Trenkler's month-long trial failed to disclose during the voir dire that she knew Alfred Trenkler. Clearly, such an allegation implicates the Defendant's Sixth Amendment right to a trial by an impartial jury and his right to a trial that comports with fundamental notions of due process. Therefore, this Court, at a minimum, must undertake an inquiry to determine 1) the nature and the extent of the alternate juror's pretrial knowledge of and

connection to Trenkler; 2) whether and to what extent the alternate juror publicized her knowledge to the deliberating jurors; and 3) whether such extrinsic information ultimately tainted the jury deliberations so that Trenkler is entitled to a new trial.

FACTS

On October 15, 1996, counsel for the Defendant Alfred W. Trenkler learned that a woman named Donna Shea had contacted the Government alleging that a juror in Trenkler's trial named "Ramona" knew Trenkler and that "Ramona" had failed to reveal that fact during the voir dire. Indeed, "Ramona Walsh" served for over four weeks as an alternate juror in the Trenkler trial. While Ramona Walsh admitted during voir dire that she knew various potential witnesses in the case, including Donna Shea, she did not admit that she knew Trenkler.

The Government, as it describes in its letter to the Court, undertook its own investigation of Shea's allegations which culminated in an Alcohol, Tobacco and Firearms Report of Investigation ("ATF Report"). Shea's compelling allegation of juror misconduct is corroborated in significant ways both by the trial record and the ATF Report itself:

1. The Source of The Allegation

Donna Shea. The record demonstrates that Donna Shea had been connected to this action since 1986, five years before the bombing incident in Roslindale. Shea, who lives in Weymouth,

was on the original list of witnesses for the Trenkler trial. **Exhibit** A, Transcript of First Day of Trial, p. 21. Prior to trial, Shea testified before the grand jury on December 10, 1992. Although she did not testify at trial, the evidence established that Shea was the person for whom Trenkler was charged with making the artillery flash simulator that was placed under a commercial truck in 1986 ("the 1986 incident"). **Exhibit** B, Transcript of Thirteenth Day of Trial, 13-72 - 13-75; **Exhibit C**, Government's Trial Exhibit 12; **Exhibit D**, Government's Trial Exhibit. The 1986 incident formed the basis for the much-disputed Fed.R.Evid. 404(b) evidence.

Shea alleged, in two separate interviews with the ATF agents, that on several occasions "Ramona" arrived at Shea's house with a friend of Shea's named Nancy Tolmie (currently Nancy Russell, and referred to as "Tolmie/Russell") when Tolmie/Russell bought cocaine from Shea. She further alleged that the cocaine had been supplied by Trenkler and that Trenkler had been present, and that Ramona Walsh and Trenkler had been present in the same room when Tolmie/Russell purchased cocaine.[1]

2. The Juror

Ramona Walsh. Ramona Walsh, identified as "Ramona" by Shea, was indeed an alternate juror, Juror 38. During the voir dire she admitted that she knew many of the witnesses,

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[1] Although Shea first stated that she had "no memory" of Ramona's presence in the room when Tolmie/Russell bought cocaine from Trenkler, she later stated that "Ramona was present in the room when the transactions were conducted."

including Donna Shea.[2] Like Donna Shea, Walsh lives in Weymouth. During the voir dire, Walsh stated that she was employed by the Quincy District Court, where she had worked for ten years, initially in the criminal clerk's office. **Exhibit E**, Second Day of Trial, p. 2-53.[3]

3. The Friend

Nancy Tolmie/Russell. During her interview with ATF Agent Kerr, Tolmie/Russell admitted 1) that she knew Donna Shea; 2) that she knew Ramona Walsh, having seen her once every three weeks between 1985 and 1986 and having travelled with her on two weekends; 3) that she (Tolmie/Russell) regularly used cocaine, approximately three times per week, from 1984 to 1987; 4) that she purchased cocaine from Donna Shea forty to fifty

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[2] Walsh also admitted during voir dire that she knew Thomas Shay, Jr., and a Quincy police officer (Exhibit A, p. 17, Exhibit E, p. 52), and that she "may know Lawrence Plant," (Exhibit A, p. 21).

[3] Perhaps coincidentally, Donna Shea was also at Quincy District Court in connection with this case. When Quincy police officers attempted to questions Shea about the 1986 incident on September 2, 1986, they were told that she "was not at home but was up in Quincy at the District Courthouse." They located her at the courthouse and observed her leaving the courthouse. After informing her of her Miranda rights, the Quincy police officers spoke with her in the parking lot of the Quincy District Court. Exhibit C, Government's Trial Exhibit 12, p.1.

times (in a subsequent interview Tolmie/Russell stated that the purchases occurred more than fifty times); 5) that Ramona Walsh also used cocaine; and 6) that Ramona Walsh gave Tolmie/Russell money to purchase cocaine. Tolmie/Russell denied that Ramona Walsh was present at any time when Tolmie/Russell purchased cocaine from Shea.

ARGUMENT

I. THE COURT MUST UNDERTAKE AN ADEQUATE INQUIRY INTO THE NON-FRIVOLOUS SUGGESTION THAT JUROR MISCONDUCT OCCURRED DURING TRENKLER'S TRIAL.

The Sixth Amendment guarantees defendants the right to a trial by an impartial jury. Neron v. Tierney, 841 F.2d 1194 (1st Cir. 1988). The failure to accord the accused a fair hearing by a "panel of impartial, 'indifferent' jurors" also violates the minimum standards of due process. United States v. Boylan, 698 F.Supp. 376, 384 (D.Mass 19088), aff'd 898 F.2d 230 (1st Cir. 199) quoting Irvin v. Dowd, 366 U.S. 717, 722 (1966); Neron, 841 F.2d at 1200. Voir dire protects the right to an impartial jury "'by exposing possible biases, both known and unknown, on the part of potential jurors.'" U.S. v. Perkins, 748 F.2d 1519, 1531 (11th Cir. 1984) quoting McDonough Power Equipment Inc. v. Greenwood, 104 S.Ct. 845, 849 (1984).

The Government has received, investigated and reported on significant information containing colorable allegations of juror bias and misconduct. In its letter to the Court, however, the Government leaps to the self-serving conclusion

that because the allegations involve an alternate juror who did not deliberate, "no further action on the matter is necessary or warranted." Government Letter, p. 1. To the contrary, the mere fact that the initial allegation relates to an alternate juror is not the end of the inquiry. The issue before this Court becomes whether the extraneous information, regardless of its source, infected the jury deliberations. See United States v. Howard, 506 F.2d 865, 866 (5th Cir. 1975) ("the danger to fair trials is most acute when facts which have not been tested by the fair trial process have been intentionally communicated directly to the jurors.").

Where, as here, "a non-frivolous suggestion is made that a jury may be biased or tainted, the District Court must undertake an adequate inquiry into whether the alleged tainting incident occurred and whether it was prejudicial." Boylan, 698 F.Supp. at 387 quoting United States v. Corbin, 590 F.2d 398, 400 (1st Cir. 1979).[4] While the trial court has broad, though not unlimited, discretion to determine the extent and nature of its inquiry, United States v. Gaston-Brito, 64 F.3d 11, 12 (1st Cir. 1995), the First Circuit has made clear that the trial

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[4] An inquiry into the validity of a jury verdict is permitted in situations like the present one in which an "extraneous influence" is alleged to have prejudiced the jury. U.S. v. Boylan, 698 F.Supp. at 385 quoting Mattox v. United States, 146 U.S. 140, 148-149 (1892).

court should

> erect[], and employ[], a suitable framework for investigating the allegation and gauging its effects, and thereafter spell[] out [its] findings with adequate specificity to permit informed appellate review.

Boylan, 898 F.2d at 258.[5]

While the ATF Report raises the colorable possibility of juror misconduct, the Report itself, containing only inadmissible, unsworn out-of-court statements, cannot be deemed conclusive. Relying solely on its own "investigation" and pure conjecture, the government illogically and summarily conclusion

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[5] The trial court's discretion to determine the extent and nature of its inquiry is circumscribed by Fed.R.Evid. 606(b), which provides that:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that an juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence or any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. (emphasis added).

that, as an alternate, Ramona Walsh cannot have "actually influenced the outcome of the trial." Government Letter, p. 5. Such a position ignores the day-to-day reality of the jury dynamic. From the beginning of the trial, jurors are in "close and isolated daily contact with each other during the trial." Boylan, 698 F.Supp. at 379. The "thought processes" of jurors begin from the opening of the trial.... Indeed, jury tampering often occurs before any deliberations take place. An individual juror begins his or her own consideration of the case from its beginning." Bushkin Associates, Inc. v. Raytheon Co., 121 F.R.D., 7-8 (D.Mass. 1988), aff'd, 864 F.2d 241 (1989).

The question in this case, then, is whether Ramona Walsh, the alternate juror, failed to disclose during the voir dire that she knew Trenkler, whether she communicated that fact (and possibly other information) to the deliberating jurors and whether that extraneous information affected the deliberating jurors to such an extent that they failed to keep an open mind and render a verdict based solely on the evidence. The evidence demonstrates that Trenkler has made the threshold showing of partiality or misconduct by a juror, and he is entitled to a judicial inquiry and development of the relevant facts on the record relating to those issues. Due process requires that this Court conduct an adequate inquiry into the possible taint caused by Ramona Walsh's knowledge of Trenkler. See Smith v. Philips, 455 U.S. 209, 212 (1982) (district

court's failure to conduct sufficient inquiry deprived appellants of due process right to jury capable and willing to decide case solely on evidence before it); Gaston-Brito, 64 F.3d at 11 (district court has obligation to develop facts on the record, not merely presume them); Neron, 841 F.2d at 1202 n.6 1988)("claim of bias or misconduct on the part of a juror need satisfy a rather low threshold of significance to ignite a due process requirement of adequate inquiry"); United States v. Howard, 506 F.2d 865, 866 (5th Cir. 1975)(remand to district court for hearing to determine accuracy of allegation that juror disclosed to other jurors that defendant had been in trouble previously); Downey v. Peyton, 451 F.2d 236 (4th Cir. 1971)(remand to district court for hearing to determine whether prejudicial matters not in evidence actually discussed in jury room as alleged by some jurors).

> Modern day trials are factually presented in open court before the iron curtain descends upon the jury room. We cannot tolerate prejudicial factual intrusion into that sanctum lest our courts return to darker days of our jurisprudential history. The dagger of hidden evidence must not be taken from its scabbard for the first time in the jury room to wound the defendant; and unless its piercing effect is only skin deep and without prejudice to the anatomy of the trial, we must apply a constitutional salve.

Howard, 506 F.2d at 866

II. IF A JUDICIAL INQUIRY INTO THE ALLEGATIONS OF JUROR MISCONDUCT REVEALS THAT THE VERDICT WAS TAINTED, THIS COURT MUST GRANT A NEW TRIAL.

A party seeking a new trial must demonstrate 1) that a juror failed on voir dire to answer a material question honestly, 2) that a correct response would have provided a valid basis for cause and 3) that the nondisclosure resulted in actual prejudice or bias. Dall v. Coffin, 970 F.2d 964, 9696 (1st Cir. 1992) citing McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984). Although a non-frivolous suggestion of juror misconduct during voir dire has been put forth, the prejudicial impact of Ramona Walsh's alleged knowledge of Trenkler cannot be fairly assessed without a judicial inquiry into what extrinsic information was injected into the deliberative process. The Defendant should not be forced to rely upon the superficial, self-serving investigation of the government as the basis for his motion for a new trial. The Defendant, therefore, respectfully reserves his right to supplement his motion for a new trial after this Court conducts its own inquiry and makes its own findings with respect to Donna Shea's very serious and troubling allegations of juror misconduct in a trial that resulted in his life imprisonment.

CONCLUSION

By reason of the foregoing, this Court must conduct an adequate inquiry to determine whether Ramona Walsh, the alternate juror, failed to disclose during the voir dire that

she knew Trenkler, whether she communicated that fact (and possibly other information) to the deliberating jurors and whether that extraneous information affected the deliberating jurors to such an extent that they failed to keep an open mind and render a verdict based solely on the evidence. If, after such hearing, the Court determines that the Defendant suffered actual prejudice, this Court must grant a new trial.

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DATED: November 19, 1996
T:609

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 11/19/96