

To: Amy

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CRIMINAL ACTION NO. 92-10369-2

UNITED STATES OF AMERICA

v.

ALFRED W. TRENKLER

MEMORANDUM OF DECISION

**BOCKETED**

February 4, 1997

ZOBEL, D.J.

Alfred W. Trenkler ("Trenkler" or "Defendant") was convicted on November 29, 1993 of violations of 18 U.S.C. §§ 371 and 844 arising from the detonation, on October 28, 1991, of an explosive device that had been planted under an automobile in Roslindale, Massachusetts. Pending before this Court is Defendant's Motion for a New Trial pursuant to Fed. R. Crim. P. 33 on the grounds of newly discovered evidence, or, in the alternative, for an Evidentiary Hearing.

"A motion for new trial based on newly discovered evidence will not be allowed unless the movant establishes that the evidence was: (i) unknown or unavailable at the time of trial, (ii) despite due diligence, (iii) material, and (iv) likely to result in an acquittal upon retrial." United States v. Tibolt, 72 F.3d 965, 971 (1st Cir. 1995) (citing United States v. Ortiz, 23 F.3d 21, 27 (1st Cir. 1994)), cert. denied, 116 S. Ct. 2554 (1996). Defendant maintains that two matters constitute "newly discovered evidence" entitling him to a new trial. First, Defendant argues that the expert psychiatric testimony of Dr. Robert Phillips (the "Phillips

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evidence") which this Court had already precluded in the related Thomas Shay, Jr. trial constitutes new evidence.<sup>1</sup> The Phillips evidence was not unknown or unavailable at the time of Defendant's trial.<sup>2</sup> In fact, Defendant's attorney concedes that prior to trial he considered offering the Phillips evidence but did not, figuring that it would be "futile" in light of this Court's ruling in the Shay, Jr. trial. The Phillips evidence clearly fails to satisfy the first prong of the Ortiz test and, accordingly, Defendant's motion with respect to the Phillips evidence is denied. See Tibolt, 72 F.3d at 972-73 (failure to establish any of the four Ortiz factors defeats motion for new trial) (citations omitted).

Next, Defendant argues that the early release from a federal prison sentence of William David Lindholm ("Lindholm"), a government witness who testified against Trenkler, indicated evidence of a "sweetheart deal" between Lindholm and the government at the time of Lindholm's testimony which was not disclosed to Defendant. Based on the detailed written proffer submitted by the government and left unchallenged by Defendant, the record is devoid of any evidence to suggest that Lindholm's early release was the result of anything other than an arrangement made subsequent to the

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<sup>1</sup> The United States Court of Appeals for the First Circuit in United States v. Thomas Shay, Jr., 57 F.3d 126, 134, 137 (1st Cir. 1995), ruled that this Court erred in excluding Dr. Phillips' testimony on the grounds stated and remanded the case for further proceedings.

<sup>2</sup> Nor does the First Circuit's opinion in Shay, Jr. constitute "new evidence." Defendant never offered or attempted to offer the Phillips evidence into evidence at trial and is therefore foreclosed from relying on the First Circuit's opinion in Shay, Jr. as grounds for a new trial.

trial (by several months) between Lindholm and the government based on Lindholm's cooperation in the Trenkler trial. Defendant is not entitled to an evidentiary hearing simply to engage in a "fishing expedition" on this matter. United States v. McAndrews, 12 F.3d 273, 280 (1st Cir. 1993) ("A district court need not grant an evidentiary hearing on a motion merely because a defendant's hopes spring eternal or because a defendant wishes to mount a fishing expedition . . . . [A] criminal defendant who seeks an evidentiary hearing on a motion must, at the very least, carry an entry-level burden by making 'a sufficient threshold showing that material facts [are] in doubt or in dispute.'" (citations omitted). Lacking any "new evidence" (or any evidence at all) of an agreement between Lindholm and the government at the time of Lindholm's testimony, Defendant's motion for a new trial is denied.

For all the reasons set forth above, Defendant's Motion for a New Trial or, in the alternative, for an Evidentiary Hearing is hereby denied.

February 4, 1997  
DATE

W. J. Zobel  
DISTRICT JUDGE