UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALFRED TRENKLER,	)	
Petitioner,	)	
V	)	**Case No: 99-CV-10074 -RWZ**
UNITED STATES OF AMERICA	)	
	)	**Hon> R. Zobel, District Judge**
Respondent.	)	

MOTION FOR LEAVE TO FILE TRAVERSE, INSTANTUR

COMES NOW, Alfred Trenkler, Petitioner pro se, who respectfully asks this Court to allow him to file his TRAVERSE to the Government's Response instantur for the following reasons:

(1) Petitioner has been assisted throughout these proceedings by the law firm of Michael B. Cohen, 2725 North Thatcher, Suite 409, River Grove, Illinois, 60171, for the researching and document preparation of this TRAVERSE;

(2) that difficulties in the staff at Mr. Cohen's office made it impossible to submit this TRAVERSE to the Court as planned in mid June;

(3) that the TRAVERSE was only printed on July 12, 1999 and sent immediately to this Court and all required parties:

(4) that the delay was not the fault of Petitioner and should not be held against him;

THEREFORE, Petitioner prays that this Court will allow him to file the TRAVERSE instantur.

Michael B. Cohen,

I affirm under the pains of perjury that the foregoing is true and correct to the best of my knowledge.

Michael R Cohen

SUBSCRIBED AND SWORN BEFORE ME THIS 12TH DAY OF JULY 1999 AT RIVER GROVE, ILLINOIS.

Deamonda C Smith

NOTARY PUBLIC

OFFICIAL SEAL
DEAMONDA C SMITH
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES:01/23/02

TO: UNITED STATES ATTORNEY
Mr. Kevin McGrath
U.S. Courthouse
Suite 9200
1 Courthouse Way
Boston, MA 02210

CERTIFICATE OF SERVICE

I do hereby certify that I have caused a copy of the foregoing motion(s) to be served upon the above named counsel, by mailing them a copy, with proper first class postage prepaid, to the above listed address, by placing a copy of same in the U.S. Post Office at River Grove, Illinois on or before 4:30 p.m. on this 3RD day of June 1999

Michael B Cohen

Michael B. Cohen, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALFRED TRENKLER,	)	
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V	)	**Case No: 99-CV-10074 -RWZ**
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UNITED STATES OF AMERICA	)	
	)	
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PETITIONERS TRAVERSE TO THE
GOVERNMENT'S MEMORANDUM OF LAW
IN OPPOSITION TO ALFRED TRENKLER'S
28 USC 2255 PETITION TO VACATE SENTENCE

COMES NOW, Alfred Trenkler, Petitioner Pro Se who files this TRAVERSE to the Government's Response to his Petition for relief pursuant to 28 U.S.C. 2255, dated January 5,1999.

In support of his motion to vacate his conviction, Trenkler argues that his trial counsel rendered ineffective assistance by not attempting to introduce the expert testimony of Dr. Robert Phillips, who was prepared to testify that certain statements made by Trenkler's co-defendant, Thomas Shay, Jr., who was tried separately, were consistent with a mental disorder known as "pseudologia fantastica."

The government contends that Trenklers petition is time barred by "AEDPA", the Anti Terrorist and Effective Death Penalty Act of 1986, The government is in error. Trenkler timely filed his 2255 petition on January 5, 1999. (See: LEWIS VS RICHMOND CITY POLICE DEPARTMENT, 947 F.2d

733 (4th Cir 1991) (Petition is deemed filed when delivered to prison mail box for forwarding to the Court).

PROCEDURAL BACKGROUND

On June 24, 1993, a federal grand jury returned a three-count superseding indictment against Albert Trenkler and Thomas A. Shay ("Shay Jr.") charging them for their respective roles in the bombing death of Boston Police Bomb Squad Officer Jeremiah Hurley and the maiming of his partner, Bomb Squad Officer Francis Foley. Trenkler and Shay Jr. were charged with conspiracy, in violation of 18 U.S.C. 371 (Count One); with receipt of explosive materials in interstate commerce. The trial began on October 25, 1993, and after a seventeen day trial, the jury returned a verdict of guilty on all counts. On March 8, 1994, the District Court sentenced Trenkler to a term of life imprisonment.

Trenkler appealed his conviction. In its opinion dated July 18, 1995, the First Circuit held that the district court did not err in admitting evidence, pursuant to Fed. R. Evid. Rule 404(b), of Trenkler's design, construction and detonation of a similar bomb in 1986. The Court also held that the district court erred in admitting evidence derived from a Bureau of Alcohol, Tobacco and Firearms (ATF) computer database ("EXIS") concerning the characteristics of other explosive devices and testimony based on that evidence that the 1986 bomb and the Shay bomb had unique, common characteristics to the exclusion of other bombs which made it likely that Trenkler built both bombs. However, the Court further held that this error was harmless in light of all of the other evidence establishing

Trenkler's guilt. The Court also rejected Trenkler's claims of prosecutorial misconduct. UNITED STATES V. TRENKLER, 61 F.3d 45 (1st Cir. 1995). Trenkler did not seek a writ of certiorari.

On December 22, 1995, Trenkler filed a motion, pursuant to Fed. R. Crim. P. 33, for a new trial or, in the alternative, for an evidentiary hearing on the grounds of newly-discovered evidence. Trenkler first argued that the expert testimony of Dr. Robert Phillips, who was prepared to opine that Shay Jr. suffered from a mental condition known as "psuedologia fantastica," which allegedly causes a sufferer to engage in pathological lying.

As a second ground for a new trial, Trenkler contended that the government had failed to disclose the existence of an alleged agreement for leniency in exchange for testimony between the United States and a government witness, David Lindholm.

On February 4, 1997, the district court denied Trenklers Motion in its entirety.

On November 19, 1996, Trenkler filed a Motion for Judicial Inquiry into Possible Juror Misconduct and for a New Trial, based upon an allegation that one of the alternate jurors may have been present at a home where drugs were sold in Trenkler's presence twelve years prior to his trial. On May 22, 1997, the district court denied Trenkler's motion in its entirety.

Trenkler appealed the denial of both motions. On January 6, 1998, the First Circuit issued its decision affirming the district court's denial of both of Trenkler's motions for a new trial. In accordance with the provisions of AEDPA, Trenklers' conviction became final when the First Circuit denied his appeal from his Motions for a New Trial. The District Court retained jurisdiction over the case, even after the first Direct Appeal had been decided, thus it was not until after the denial of the Appeal of the

Motions for a New Trial on January 6, 1998 that the conviction became final in the Court of Appeals and was ripe for a 2255 petition.

ISSUE ONE: THE GOVERNMENT CONTENDS THAT THE 2255 PETITION IS TIME BARRED

The facts listed above clearly demonstrate that the district court entertained the motion for a new trial and motion for judicial inquiry after the First Circuit had accepted the case on direct appeal. The Court did not dismiss those actions as time barred. The government never contended that those motions were time barred. They should not be allowed to raise the issue at this juncture. The reason that the Court entertained the motions was that the matter had just been decided by the First Circuit and effected both defendants. The matter was not ripe for considerations. No record had been made in the district court and none could be made until after the First Circuit had rendered its decision in the Shay appeal. Trenkler filed his petition pursuant to 28 U.S.C. 2255 within one year after the denial of his appeal of the denial of his motions. His petition is not time-barred.

ISSUE TWO: THE QUESTION OF INEFFECTIVENESS

The government contends that Trenkler did not specify why the record was not complete on the issue of ineffectiveness and thus had to await 2255 proceedings in accordance with First Circuit precedent. See: UNITED STATES VS MARTINEZ-MARTINEZ, 7 F.3d 1215 (1st Cir 1995) and UNITED STATES VS MALA, 7 F.3d 1058 (1st Cir 1993).

The question of ineffectiveness revolves on whether trial counsel , Terry Segal was ineffective in not presenting the defense that Shay suffered from "pseudologia fantastica" to the court, simply

because Judge Zobel had refused to admit the testimony in the Shea trial. Any competent attorney would have submitted the evidence to the court for the record.

Only at an evidentiary hearing will the Court be able to determine whether this failure on the part of Segal was ineffective assistance of counsel. It is a fact that the district court acknowledged the importance of Shay's statements at a side bar conference on the fourteenth day of trial when it observed that **without Shay's statements "the government would be sunk".** Absent these statements, the government had no case. If the jury would have heard that Shay suffered from a mental disease that rendered his testimony "questionable" the verdict may well have been different, especially in light of the weak case that the government presented. The First Circuit addressed the importance of the testimony and its effect on the verdict in the opinion of UNITED STATES VS SHAY, 57 F.3d 126 (1st Cir 1995) in that opinion overturning Shay's conviction , the Court stated:

> Finally, we note that if the district court determines on remand that Dr. Phillips should have been permitted to testify, the exclusion of the testimony cannot be considered "harmless error." Although not all erroneous exclusions of evidence are harmful, where the exclusion "results in actual prejudice because it had a substantial and injurious effect or influence in determining the jury's verdict," reversal is required. UNITED STATES V. LECARDA, 17 F.3d 496, 499 (lst Cir.) (internal quotations and citations omitted), cert. denied, 115 S. Ct. 81 (1994). Here, the statements at issue were vital to the government's case.[7]
>
> Given the importance of the statements to the government's case and the severe restriction placed on Shay Jr.'s ability to challenge them, we cannot say that the exclusion of Dr. Phillips's testimony did not substantially influence the jury's verdict. See id.; United States v. Versaint, 849 F.2d 827, 832 (3d Cir. 1988) (error not harmless where improperly excluded evidence went to heart of the defense); United States v. Ouimette, 753 F.2d 188, 193 (lst Cir. 1985) (error not harmless because excluded testimony was "the core of the defendant's case")

ISSUE THREE THE GOVERNMENT CONTENDS THAT THE EVIDENCE AGAINST TRENLKER WAS OVERWHELMING AND THUS THE FAILURE TO PRESENT THE PSYCHOLOGICAL EVIDENCE WAS HARMLESS.

The government contends that any error in the failure of defense counsel to properly present evidence of Shay's psychological disorder is harmless because the evidence against Trenkler was "overwhelming". Chief Judge of the United States Court of Appeals for the First Circuit addressed this issue in his opinion in the TRENKLER Direct Appeal. Judge Torruella stated, in part: (Slip Opinion Page 45...)

"The third reason that admission of the EXIS evidence is not harmless beyond a reasonable doubt is that the other evidence against Trenkler was not "overwhelming." See CLARK, 942 F.2d at 27. The majority points to a conglomeration of other testimony in support of its conclusion that there was "substantial evidence" of Trenkler's guilt, independent of the Quincy incident. The test, of course, is not whether there is "substantial evidence" of Trenkler's guilt but whether there is "overwhelming evidence" of Trenkler's guilt. The two standards are qualitatively and quantitatively different. In any case,

I will begin by addressing Trenkler's "statements" to government agents,

ATF Agent D'Ambrosio testified that he asked Trenkler to draw a sketch of the Quincy device, which Trenkler did. D'Ambrosio then told Trenkler that the Roslindale bomb also used remote control,

but that, rather than a firecracker type device, it used dynamite. D'Ambrosio asked Trenkler how, in light of these facts, the wiring diagram he had just drawn for the Quincy device would have been different for the Roslindale bomb. D'Ambrosio testified that Trenkler then drew a diagram which showed two blasting caps inserted into two sticks of dynamite. The majority considers this significant evidence of Trenkler's guilt because the fact that the Roslindale bomb used blasting caps had not been publicly disclosed. The majority fails to note, however, that D'Ambrosio actually testified that at least two blasting caps were used in the Roslindale bombing. Thus, Trenkler's drawing of only two blasting caps was not an exact match. Moreover, the jury heard evidence that Trenkler had extensive knowledge of both electronics and explosives, so it is not necessarily significant that Trenkler was able to reconstruct an aspect of the Roslindale bomb, particularly considering the information concerning the bomb provided to Trenkler by D'Ambrosio. Trenkler merely identified that blasting caps were a likely way in which a bomb of this size and power would be constructed. In the absence of any testimony that the use of blasting caps is unusual or unique (a proposition which is highly unlikely), the jury could only speculate as to the significance of the drawing. The majority also finds significance in ATF Agent Leahy's testimony that Trenkler said to him: "If we did it, then only we know about it how will you ever find out if neither one of us talk?" The majority paints this statement in a confessional light. This testimony may or may not have been of some circumstantial relevance to the jury (although standing alone, of course, it would not be sufficient to sustain a conviction). But, upon review, when the court is looking for "overwhelming evidence of guilt," one would think the court would not have to resort to this sort of an ambiguous, taunting statement. [Footnote 1] Similarly, the court notes that

there was evidence that Trenkler and Shay knew each other, and that Trenkler had knowledge of both electronics land explosives. While the jury might consider this type of circumstantial evidence relevant, it can hardly be said that it does much in the way of providing "overwhelming evidence "of defendant's guilt. Cf. UNITED STATES V. INNAMORATI, 996 F.2d 456, 476 (1st Cir. 1993) (holding that the erroneous admission of inculpatory grand jury testimony was harmless beyond a reasonable doubt when seven people testified at trial that defendant was engaged in marijuana and cocaine dealing, and drugs and money were found in defendant's constructive possession).

The majority relies most heavily on the testimony of David Lindholm, who testified that Trenkler confessed to building the Roslindale bomb. But Lindholm had some serious credibility problems which make his testimony "shaky," Ito say the least. Lindholm testified that he met Trenkler! while Lindholm was serving a 97-month sentence for conspiracy to distribute marijuana and tax evasion. He further testified that he was in the marijuana business from approximately 1969 through 1988, and that he did not pay any income taxes during that time. Lindholm also testified that, in order to secure bank loans to purchase property during that period, he showed several banks false income tax returns. On the basis of Lindholm's shady past alone, the jury might have completely disregarded his testimony. But Lindholm also had some less obvious credibility problems. The circumstances of his meeting Trenkler strike me as a little too coincidental.

On December 17, 1992, after a year and a half incarceration in Texas, Lindholm is brought back to Boston concerning certain unspecified charges related to his conviction. He is then placed in the orientation unit at the Plymouth House of Correction where he meets Alfred Trenkler, who is being

held in connection with the Roslindale bombing. The two subsequently discover that they have an extraordinary amount in common. First, they are both from the town of Milton, Massachusetts. Second, Trenkler attended Thayer Academy and Milton Academy, and Lindholm's father also attended Thayer Academy and Milton Academy. Third, they both lived – for a time – Overlapping by one year – on White Lawn Avenue in Milton. Based on these commonalities, and Lindholm's generosity in sharing his knowledge of the criminal justice system with Trenkler, they form a friendship. Trenkler then, allegedly, confesses to Lindholm that he built the bomb.

In my view, a reasonable juror might question whether Lindholm was placed in the orientation unit by the government for the purpose of obtaining a confession from Trenkler. If so, that juror would likely wonder what Lindholm got in return. Not surprisingly, Lindholm testified that he had no agreements with the government and that he did not receive any promises or inducements for his testimony. [Footnote 2] He did testify on cross-examination, however, that he knew, when he provided the information about Trenkler to the government, that the only way his 97-month sentence could be reduced was if he supplied new information to the government. [Footnote 3] We do not know how much weight the jury gave Lindholm's testimony, but we do know that, at least on paper -- for we did not observe his demeanor at trial -- Lindholm had some significant credibility problems. Consequently, I cannot conclude beyond a reasonable doubt that the jury would have believed his testimony, particularly in a case such as this where there is absolutely no physical evidence tying Trenkler to the bombing. Cf. COPPOLA, 878 F.2d at 1571 (discounting inculpatory testimony of three jail inmates because it "raises serious questions of credibility" and noting the absence of any conclusive

physical evidence tying the defendant to the crime). The only evidence coming near that level of reliability was the improperly admitted EXIS evidence. Absent the EXIS-derived evidence, the government's case against Trenkler consists of a smorgasbord of nconclusive circumstantial evidence and an inherently unreliable/alleged jailhouse confession.

Faced with this sort of evidence, a reasonable jury would probably look for some sort of tangible evidence upon which to hang its hat. The EXIS-derived evidence was just that. Because it was the only ostensibly conclusive evidence tying Trenkler to the crime, it may have been the clincher for the jury. See COPPOLA, 878 F.2d at 1571.1 It was therefore not harmless beyond a reasonable doubt.

A horrible crime was committed in which one police officer was killed and another seriously injured.

Society rightfully demands that the guilty be apprehended, tried, and punished. But the distinguishing feature of our legal system is that even those charged with grotesque crimes are guaranteed certain constitutional rights intended to ensure that they receive a fair trial. Unfortunately, and with all due respect to my brethren, I believe the defendant's right to a fair trial was violated when the government was permitted to Introduce the highly prejudicial evidence derived from the EXIS computer database. Because this error so severely violated defendant's Sixth Amendment right to confront the witnesses against him, and because the remainder of the evidence against him was not "overwhelming, „ I dissent. '

CONCLUSION

There is no doubt that the admittance of the EXIS evidence was error. The majority panel

felt that the error was harmless. Over the dissenting opinion of the Chief Judge they affirmed the conviction. Now Trenkler has another issue of constitutional magnitude, that is the failure of his attorney to present the defense of Shay's psychological illness to the jury. It is well established that Shay's testimony was the keystone of Trenkler's conviction. Yet, the government contends that this too was harmless.

A conviction based upon harmless error, upon harmless error is not a conviction at all and must be overturned. The First Circuit remanded, and this Court dismissed Shay's case based upon the failure of the jury to hear Dr. Phillip's testimony. This Court must determine whether this failure, lumped together on top of the EXIS testimony caused Albert Trenkler to be illegally convicted. Trenkler was not entitled to a perfect trial, but he was entitled to a fair trial. The decisions of the Court of Appeals, and the decisions of this Court clearly demonstrate that Trenkler did not receive that fair trial.

This Court should set this matter for an evidentiary hearing on the question of ineffective assistance of counsel, or in the alternative, grant Albert Trenkler a new trial where the "errors" can be corrected. Fundamental Fairness demands no less.

Respectfully submitted,

Albert Trenkler, Pro Se

FOOTNOTES:

[Footnote 1] 42. In Coppola, for example, we lent little weight! to defendant's statement to another inmate .... What did I have to lose? .... in response to a question whether he had committed the rape. See 878 F.2d at 1569-70.

[Footnote 2] 43. If the government makes an explicit promise to a witness, of course, this will come out at trial and likely decrease the witness's credibility in the eyes of the jury. But if the government lawyers explain to the witness why they do not want to make any explicit promises, leaving the inference that one good deed begets another, the witness can testify that he has no agreement. I note, in this regard, that this court has previously questioned the validity of these "no agreement" statements by criminal defendants. See, e.g., CoDDola, 878 F.2d at 1569-70.

[Footnote 3] 44. When asked on direct examination why he Lindholm stated:

> Since I have been incarcerated, I have come to realize that the sole function of prison is not just punishment. I think rehabilitation is important for an individual.
> And I think, when I talk about rehabilitation, I mean rehabilitation of a person's values in terms of how they live one's life and the decisions they make, knowing the decisions they make, knowing the difference between what's wrong and what's right, what's illegal and legal.