

no motion request
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Cr. No. 92-10369-Z

ZOBEL, D. J.

UNITED STATES OF AMERICA

V.

THOMAS SHAY, JR.

Motions
First Day of Trial

APPEARANCES:

Paul V. Kelly and Frank A. Libby, Jr., Assistant United States Attorneys, 1003 U.S.P.O. & Courthouse, Boston, MA 02109, on behalf of the Government.

Dwyer, Collora & Gertner (by Nancy Gertner, Esq. and Amy M. Baron-Evans, Esq.), 400 Atlantic Avenue, Boston, MA 02110, on behalf of the Defendant.

Courtroom No. 3
Federal Building
Boston, MA 02109
9:00 a.m., Monday
June 28, 1993

Marie L. Cloonan
Federal Court Reporter
1690 U.S.P.O. & Courthouse
Boston, MA 02109 - 426-7086
Mechanical Steno - Transcript by Computer

1 THE CLERK: Criminal Action No. 92-10369, United
2 States of America versus Thomas Shay.

3 THE COURT: The jurors are almost ready. So we
4 need to deal with the motion to continue. I see no reason
5 why this trial should be continued.

6 MS. GERTNER: We filed the motion, your Honor, in
7 the light of the Herald article and in the light of the
8 recent arrests in New York and New Haven and California with
9 respect to bombs. We fear there will be a jury that will
10 fear there is something in the air.

11 THE COURT: We can inquire about that.

12 MS. GERTNER: Pardon?

13 THE COURT: We can inquire of the jurors about
14 that.

15 MS. GERTNER: Good.

16 THE COURT: Let me return to the government the
17 exhibits that were left over from the Motion to Suppress.
18 You may need them, and I don't anymore.

19 There will be an opinion on the Motions to
20 Suppress. Parts of it I have made available to counsel just
21 so that they should know the final version will be done, I
22 hope, sometime today.

23 I have also allowed the motion for an in camera
24 inspection of the Channel 56 tape; that is, I will allow it.
25 Channel 56 doesn't know it yet, but I will allow it, and the

1 opinion on that also will, hopefully, come out today.

2 There are a number of other motions. The Motion to
3 Continue the Trial and the further Motion to Continue are
4 denied.

5 I had all of this neatly arranged until I got the
6 pile of other papers today.

7 And I invite counsel to tell me what additional
8 questions, if any, you want me to ask of the jurors beyond
9 those that I intend to ask anyway, and I will tell you what
10 those are in a moment.

11 There is a Motion for a Bifurcated Trial. That is
12 denied.

13 Oh, I just realized the defendant isn't here. He's
14 changing?

15 MS. GERTNER: Yes.

16 MR. KELLY: Your Honor, if I might, you mentioned
17 that the Court has issued an order with respect to the in
18 camera view of --

19 THE COURT: I think it's the first step. It's the
20 way it should go.

21 MR. KELLY: We have filed a withdrawal, among the
22 materials which I submitted this morning.

23 THE COURT: Do you no longer want the tape?

24 MR. KELLY: We filed a withdrawal of our motion to
25 produce the tape.

1 THE COURT: Well, if that's the case, I won't even
2 rule on it.

3 MR. KELLY: I just want to bring the Court's
4 attention to that document and pleading on that issue. It
5 is in the pile of materials.

6 MS. GERTNER: Your Honor, we want to reconsider it.
7 Just one second, your Honor.

8 (Defense counsel caucus off the record.)

9 MS. GERTNER: Your Honor, we have taken no position
10 with respect to the Channel 56 tape. But I think we would
11 want to see it in camera. I would like to change my
12 position. I'd like to view it.

13 THE COURT: You have no motion. To the extent that
14 the only motion before me has been withdrawn, it is
15 withdrawn, I have no intention of ruling on a motion that is
16 not before me.

17 MS. GERTNER: Fine, your Honor. Will you accept an
18 oral motion or only a written one? If you will accept an
19 oral motion, I will make it.

20 THE COURT: Well, the problem is that the
21 considerations that pertain to your getting the tape are
22 quite different from those that pertain to the government's
23 getting the tape. At the moment, what I have considered is
24 the government's right and not yours.

25 MS. GERTNER: Well, since it's not something that

1 needs to be resolved today, your Honor, let's reflect on it
2 and then we will do a pleading for tomorrow.

3 THE COURT: Maybe you'll decide you don't need it
4 after all.

5 There are a number of motions having to do with
6 evidence. Except for the 404(b) motion pertaining to
7 Trenkler's 1986 bomb, is there anything that I must deal
8 with before the opening statement?

9 MR. KELLY: Yes, your Honor. We would ask --

10 THE COURT: Which ones?

11 MR. KELLY: If you look at the letter that I
12 submitted to the Court this morning, we would ask -- and I
13 think they can be dealt with very speedily, your Honor -- I
14 think they're not anything that requires the taking of
15 evidence, perhaps just a couple of minutes of discussion on
16 either side. Numbers 8, 9 and 10, your Honor.

17 THE COURT: Let me just go through them one by one.
18 The Motion to Bifurcate, I've dealt with Shay's motion for
19 voir dire questions, jury questionnaire and other relief,
20 here's what I have done with that. I will not allow
21 individual lawyer voir dire in general. What I will do is
22 ask the jurors the questions that I propose to ask en masse.
23 Anybody who answers yes, we will talk to further at the side
24 bar, and at that point counsel will have an opportunity to
25 follow up my questions. Not, you know, "What is your

1 background," and all that. But you will have an opportunity
2 to talk to the juror at that point.

3 There was a second part for individual voir dire.
4 We will have it to the extent that anybody who answers yes
5 to any question will be talked to.

6 We will not use a struck system. We will use the
7 system we ordinarily use. The defendant will have ten
8 challenges, and the government six, as permitted by the
9 rule.

10 With respect to questions asked -- I don't know.
11 Where is Mr. Shay? Is he still changing?

12 THE CLERK: Yes, he is.

13 THE COURT: Do we need him for this?

14 MS. GERTNER: Your Honor, I think he's about to
15 come in.

16 (Whereupon the defendant entered the courtroom.)

17 THE COURT: Mr. Shay, I had made a number of
18 rulings before I realized that you were gone and then
19 realized you were gone but continued to make rulings because
20 I forgot.

21 The rulings I made were, No. 1, I denied your
22 counsel's Motion to Continue the trial. I denied your
23 counsel's further Motion to Continue the trial. I denied
24 your motion to bifurcate the trial, that is, to try
25 separately the issue of whether or not you are guilty on the

1 merits and the insanity defense.

2 I am about to deal with the question of the various
3 motions dealing with the questions to be asked of the
4 jurors, and I have denied the various parts of your
5 counsel's request, namely, for individual questioning of the
6 jurors by the lawyers, by Miss Gertner and the government.
7 The request that the jurors be questioned individually,
8 period, except that they will be questioned individually to
9 the extent that they answer yes to any of the questions that
10 I will ask them en masse.

11 I have denied the motion for a struck system; and
12 with respect to the particular questions to be asked, I
13 don't know what questions -- I have dealt with the questions
14 in Exhibit A, but I don't know what particular questions you
15 wanted me to ask about homosexuality because those were not
16 in Exhibit A.

17 MS. GERTNER: They should be, your Honor. First,
18 your Honor, may I just back up for a moment? In previous
19 trials that I've had before the Court, you conducted voir
20 dire in your lobby, which was an individual voir dire, and
21 the reason why that was a very good system, because in
22 United States versus Bailey, which was a case that had far
23 less publicity than this one had. The advantage of that is
24 one, there's no risk that anyone will overhear anything at
25 side bar. It means that you can reflect on the answers.

1 You have notes in front of you, rather than scurrying up at
2 side bar. It is an entirely different procedure.

3 My request would be that we do this in your lobby.
4 I also think that it suggests to the jurors that they should
5 reflect on their answers, rather than hurriedly whispered
6 during side bar. There are a lot of --

7 THE COURT: Well, I don't have the impression that
8 we hurriedly whisper to each other. I'm thinking about it.
9 I'll think about that.

10 MS. GERTNER: Okay.

11 THE COURT: With respect to the questions, let me
12 tell you what I propose to ask the jurors. They do not at
13 the moment include any questions about homosexuality because
14 I wasn't sure what you wanted me to ask.

15 MS. GERTNER: Your Honor, that is absolutely an
16 error. They should have been included.

17 THE COURT: However, here is what I do propose to
18 ask them. I will ask them whether they know any of the
19 lawyers in the case, whether they know Mr. Shay, whether
20 they know Mr. Trenkler, whether they know Mr. Foley, or Mr.
21 Hurley. I suppose we should include Shay, Sr. as well;
22 should we not?

23 I will ask them whether they know anything about
24 this case, which I will describe to them. I will tell them
25 that the defendant has been charged with conspiring to and,

1 in essence, participating in a bombing that occurred in
2 August of 1991. I will put it to them in terms of the
3 indictment, if you want me to, but the indictment is sort of
4 technical and the essence of it all really is whether Mr.
5 Shay in any way participated in or agreed to participate in
6 the planting of a bomb that ultimately exploded and
7 allegedly killed Mr. Hurley and maimed Mr. Foley. Right?

8 MS. GERTNER: That's fine, your Honor.

9 MR. KELLY: Just to clarify, October of '91 and not
10 August.

11 THE COURT: What did I say?

12 MR. KELLY: August.

13 THE COURT: I'm sorry. October of '91.

14 I will ask them whether any of them have been
15 victims of crime, whether any of them have a relationship to
16 law enforcement, including -- particularly in the United
17 States Attorney's Office, whether any of them have ever been
18 members of the 100 Club -- and when I say "any of them," I
19 will include in that members of their immediate family,
20 defined as spouses, children, parents, siblings.

21 I will ask them whether any of them have ever made
22 contributions to funds supporting widows or widowers of
23 slain police officers, although I have never heard of a fund
24 for a widower.

25 I will ask them whether any of them have worked

1 with police to address crime problems as, for example, as
2 part of a neighborhood crime watch organization or
3 otherwise.

4 Whether any of them have had any training in the
5 use of weapons and/or explosives.

6 I will explain to them the presumption of
7 innocence; the burden of proof; that a defendant doesn't
8 have to take the stand; and inquire whether any of them have
9 any problem accepting that principle.

10 I neglected to add: I will also ask them -- I will
11 explain to them that law enforcement personnel are no more
12 or less credible than anybody else, and ensure that none of
13 them have a problem with that.

14 I will ask them if any of them have any difficulty
15 seeing or hearing such that it would interfere with their
16 ability to participate in the trial as jurors.

17 And then whether there is any other reason that I
18 may not have specifically addressed why any of them feel
19 they cannot be fair or impartial jurors.

20 I will tell them about the schedule. And I need to
21 know how long counsel anticipate the trial will be.

22 MR. KELLY: Keeping in mind the Fourth of July
23 holiday, we will lose a day, I would say that the government
24 has always anticipated that this was going to be about a
25 four-week trial and perhaps with some direct case from the

1 defense, maybe as long as a five-week trial.

2 THE COURT: Do you agree?

3 MS. GERTNER: I think to be on the fair side, your
4 Honor, on the safe side, we should say six.

5 MR. KELLY: I would have no objection to that,
6 although we will try to keep it under that.

7 MS. GERTNER: It's better to say --

8 THE COURT: I will say five to six weeks.

9 And when does that end us up, Frank?

10 (Discussion off the record between the Court and
11 the Clerk.)

12 THE COURT: The last week of July I have to be in
13 Washington. I'm not sure whether the 29th and 30th or the
14 28th and 29th. I will check that. But there will be a
15 couple of days that I have to go to a Budget Committee
16 meeting and I won't be here.

17 I hope we will finish before August 6th, because
18 then I will be away again for about three or four days.

19 MR. KELLY: Your Honor, the schedule, is there any
20 possibility that as we go, the Court might occasionally toss
21 in a couple of full days? Because I think if we do that, we
22 would finish substantially quicker.

23 THE COURT: It's very hard because I'm scheduled
24 every afternoon. Now that we have to put dispositions on on
25 separate days --

1 MR. KELLY: If there becomes an opening and we have
2 a couple of days' notice, we will fill it.

3 THE COURT: All right.

4 I will tell the jurors that we will normally sit
5 nine to one. And if I have time in the afternoon, I will
6 let them know ahead of time and make sure that it's
7 agreeable to them. But I don't see, looking at the
8 calendar, I just don't see any afternoons that we are not
9 already doing stuff.

10 So those are in essence the questions that I would
11 ask based on the questions that you asked me to ask.

12 I wasn't clear what to ask on the issue of
13 psychiatry. And I'm reluctant to ask in general how people
14 feel about psychiatry, because I don't know what the
15 question is.

16 MS. GERTNER: Well, your Honor, I asked a couple of
17 questions. I put down, one is if you heard testimony from
18 one psychiatrist and another psychiatrist disagreed, how
19 would you decide which one to believe? And then No. 5 --

20 THE COURT: That's not the sort of question that I
21 could ask en masse.

22 MS. GERTNER: But that's my point.

23 THE COURT: I understand. I understand. But I'm
24 not sure that I will ask it anyway.

25 MS. GERTNER: If I might, just for the record --

1 THE COURT: I mean there will be other experts who
2 will disagree, as I understand it. Certainly, at the
3 moment, at least, there's some dispute between explosive
4 experts.

5 MS. GERTNER: But, your Honor, this is a
6 disagreement with respect to a central part of our defense,
7 I mean with respect to the insanity defense. Is it
8 available or is it not available? And, essentially, this
9 is not a question the jurors will say: Well, here's what I
10 think. That is, the answer will be an answer that not
11 necessarily disqualifies them for cause, but it will
12 certainly reflect on whether they are jurors that will
13 listen and will listen to one psychiatrist or the other.

14 In addition, I had the question --

15 THE COURT: I don't see how psychiatric expert
16 evidence is any different from other expert evidence,
17 frankly.

18 MS. GERTNER: It's not different in the usual case,
19 where it's one part of the overall picture, but where it is
20 central to a particular defense, we think it should be
21 asked.

22 Moreover, No. 5, Would you agree or disagree with
23 this statement: Insanity is a loophole that allows too many
24 guilty people to go free? I have studies which I refer to
25 in the body of the motion that that is, in fact, the way

1 people think.

2 THE COURT: What's the government's view of that
3 question or something like it?

4 MR. KELLY: I don't like the question as phrased,
5 your Honor.

6 THE COURT: Well, I suppose the way I would put it
7 is to say to them that -- Is it certain that the defendant
8 will have an insanity defense?

9 MS. GERTNER: Yes.

10 THE COURT: I will tell them that the defendant has
11 denied the allegations and that, therefore, the government
12 has to prove that he, in fact, did it.

13 In addition to that, the defendant says that he was
14 insane at the time.

15 MS. GERTNER: Your Honor, in that case, we would
16 withdraw the request. Because you're putting it that way is
17 exactly the dilemma of a unitary trial. And if that's the
18 case, then we would rather orchestrate -- if I might, your
19 Honor --

20 THE COURT: Well, I don't know how else to put it
21 to them.

22 MS. GERTNER: But that's the point of why we wanted
23 to bifurcate the trial.

24 THE COURT: Yes, but we will not have a bifurcated
25 trial. In that case, you don't want me to ask the question?

1 MS. GERTNER: That's right. In the light of your
2 ruling then, we will go -- frankly, in the light of your
3 ruling with respect to the bifurcated trial, we will
4 withdraw any questions about insanity and we will consider
5 whether or not to press the insanity plea, because I believe
6 quite clearly that it is not possible to defend on the
7 merits and insanity at the same time.

8 THE COURT: All right.

9 Now, what about the questions on homosexuality
10 which are not here? What do you wish me to ask?

11 MS. GERTNER: Your Honor, that was an error. In
12 the body of the motion I refer to those questions.

13 THE COURT: I understand. But I didn't know what
14 questions you wanted me to ask.

15 MS. GERTNER: I have three questions. Do you have
16 any feelings about homosexuality? What are your feelings
17 about them? Do you believe that a man who is a homosexual
18 is likely to be guilty of the crime charged?

19 THE COURT: Well, I think the way I would ask the
20 jurors -- and, again, I need your advice on this -- is to
21 explain to them that Mr. Shay is homosexual. Will that in
22 any way affect their ability to be fair and impartial jurors
23 in the trial in which he is the defendant.

24 MS. GERTNER: Your Honor, I object to questions
25 like that because jurors understand from the question that

1 the answer is supposed to be no.

2 THE COURT: How do you want me to put it?

3 MR. KELLY: Your Honor, I would suggest -- the
4 government has filed some requested voir dire questions.
5 The last page of that, we have five requested questions.
6 Question No. 2 deals with the question of sexual
7 orientation.

8 THE COURT: Just a moment. I need to find it. Oh,
9 here it is. Your Exhibit A?

10 MR. KELLY: That's correct.

11 THE COURT: Any problem with the government's
12 version?

13 MS. GERTNER: Yes, your Honor. Because any
14 questions that are close-ended and require the juror just to
15 say -- we're in a society that purports to be fair. If you
16 ask someone, do you have this prejudice, do you think you
17 could set it aside for this trial, the answer will be yes --

18 THE COURT: For all we know, there may be some
19 homosexuals among the venire.

20 MS. GERTNER: Yes. But what I'm saying is this is
21 not necessarily going to get people's real impediments, as
22 to the way people see homosexuals. Where if you ask them
23 what they feel about it, and whether they think people like
24 that are more likely to be guilty of the crime charged, then
25 you get out whether or not -- what their real feelings are,

1 not after they have been tutored by a question that says:
2 Would you be able to set that aside? In order to be fair,
3 would your ability to fairly and impartially judge the
4 credibility the effect if you were to learn that the witness
5 or the defendant was a homosexual.

6 What I'm saying is once you put the "fair and
7 impartial" into the question, they know what the answer is
8 supposed to be and you don't get real answers.

9 So I believe that the better question is one that
10 says: Do you believe that a man who is a homosexual is
11 likely to be guilty of the crime charged? -- is a better
12 question because it will get out the prejudice.

13 Then you also add the question --

14 THE COURT: Do any of you believe -- the question
15 is: Do any of you believe --

16 MS. GERTNER: -- that a man who may be a homosexual
17 is likely to be guilty of the crime charged?

18 THE COURT: Is more likely to be guilty?

19 MS. GERTNER: That's right.

20 THE COURT: You don't object to that, do you?

21 MR. KELLY: I don't think it's a good question, but
22 I don't object to it. The government will have witnesses
23 who are themselves homosexual. That is the reason I phrased
24 my question in the form that I did.

25 MS. GERTNER: The difference is the government's

1 witnesses are not the defendant. My client also tells me,
2 he wants me to make it clear to the Court that there will be
3 evidence that he is homosexual, but that it's, in fact,
4 wrong to describe him as such.

5 THE COURT: So I will use your question: Who may
6 be.

7 MS. GERTNER: Who may be. That's right. He would
8 describe himself as bisexual.

9 Your Honor, I may have read the rules wrong, but on
10 Rule 24 of the Rules of Criminal Procedure, it says that if
11 the offense is punishable by death, each side is entitled to
12 20 peremptory challenges. The question is: What is the
13 meaning of "punishable by death"? That is something we were
14 debating in another setting. Is this an offense that is
15 punishable, even though --

16 THE COURT: May I see counsel at the side bar,
17 please?

18
19 (CONFERENCE AT THE BENCH AS FOLLOWS:

20 THE COURT: I have had some -- I have had
21 additional discussions with the administrative office about
22 this other issue and have received from them a large number
23 of cases on the question of whether or not this is, in fact,
24 a death penalty case.

25 There are at least two problems with my perception

1 that it is a death penalty case. One is the government
2 isn't seeking the death penalty. The other is this statute
3 is a pre-firma statute and it may be that it is in any event
4 unconstitutional as a death penalty.

5 There may be some serious difficulties on the other
6 question. I have put off ruling on it because it seemed to
7 me, although important to you, extraneous to the main issue
8 of the trial, and I really didn't want to do the research
9 when we had all this other stuff going on.

10 MS. GERTNER: Your Honor, the statute that we
11 applied for the fees on is a recent statute.

12 THE COURT: I understand, but that is not the
13 statute under which he was indicted. I mean, I understand
14 there is an argument to be made, but it may not be as strong
15 as I thought it was. I really want to look at the law. I
16 haven't done it.

17 MS. GERTNER: Okay.

18 THE COURT: The question is whether right now that
19 same issue as pertaining to jury selection should obtain.

20 What is your view, Mr. Kelly?

21 MR. KELLY: As a practical matter, the offense is
22 not punishable by death. There is no conceivable way that
23 death is a possibility here. It is our view that the
24 statute as written is unconstitutional. That was part of
25 the --

1 THE COURT: It's not Rule 24?

2 MS. GERTNER: 24(b).

3 MR. KELLY: Our views about the nature of the
4 status are factored into our decision in announcing that we
5 would in no way seek the death penalty.

6 MS. GERTNER: Your Honor, the only thing is that
7 Rule 24 categorizes peremptory challenge in terms of the
8 genre of the case, so it is in terms of felonies,
9 misdemeanors; and what I'm saying the categories of this
10 case is a capital case. In other words, that's why we
11 believe that "punishable by death" at least within the
12 meaning of peremptory challenges, should be 20.

13 In addition --

14 THE COURT: Why don't we agree that I will give
15 each of you 15 challenges. I have the right to increase the
16 number, so I will give each of you 15.

17 MS. GERTNER: I want to press for 20 for the
18 record.

19 THE COURT: You may press for 20. Each of you will
20 have 15. I will trust you will be sparing in using them.

21 Let me also tell you that Judy Cook, the jury
22 clerk, earlier said she had 102 jurors available. I asked
23 her to weed out all those who had fixed vacation plans for
24 the next month. We are down to around 80. Those will be
25 ready for us as soon as we are ready for them.

1 MS. GERTNER: I want to say a few more things on
2 the record.

3 THE COURT: We are on the record.

4 MS. GERTNER: Okay.

5 THE COURT: The other thing is will you please
6 inquire of your client whether he insists on participating
7 in side bar conferences, including if we decide to do the
8 jury here, you know, his presence at the side bar, because,
9 among other things, I need to tell the marshals about that.

10 MS. GERTNER: I will ask for a motion to sequester
11 the jury.

12 THE COURT: No. We will not sequester the jury.
13 That motion is denied.

14 MS. GERTNER: My objection.

15 THE COURT: I will not sequester the jury and I
16 will not start now.

17 Are there any other questions, Mr. Kelly, you are
18 pressing? I have not had a chance to study your
19 submissions. The vacation plans.

20 MR. KELLY: You covered, I think.

21 THE COURT: I think we need to cover it again,
22 because I said four weeks.

23 MR. KELLY: Sexual orientation.

24 THE COURT: The psychiatrist is out.

25 The degree of parenting.

1 MR. KELLY: I don't feel strongly about that. I'm
2 not pressing any further questions, your Honor.

3 MS. GERTNER: The question we want is the question
4 about the battle of experts question, not the insanity
5 defense question.

6 THE COURT: I will not ask them that, either. Ask
7 them how they are going to decide?

8 MS. GERTNER: Your Honor, if I might, this is a
9 case that has high publicity.

10 THE COURT: Whoever is more credible.

11 MS. GERTNER: Homosexual allegations and
12 possibility of involving a bombing, you are going to have
13 jurors who go off in one direction or another that we will
14 not be able to monitor and now is the time to find out about
15 it.

16 THE COURT: I don't see how you can monitor.

17 MS. GERTNER: A more careful voir dire that is the
18 monitor. The reason for the sequestration, who knows with
19 what is going to happen with other bombing cases, if you sit
20 here with a jury, wondering if they are going to be under
21 threat.

22 THE COURT: Why is there a threat to the jurors in
23 the other cases?

24 MS. GERTNER: One doesn't know how people are going
25 to interpret a bombing case and whether they will

1 distinguish this from the others.

2 THE COURT: You never know that about any case,
3 even Medicare fraud.

4 MS. GERTNER: But we put before you the affidavit
5 listing all the publicity in this case which I think puts it
6 in a category of very few cases in the past ten years with
7 this kind of intense publicity and likelihood of continuing.
8 That calls for special measures and sequestration.

9 THE COURT: The bombing case that has had the major
10 publicity is the terrorist bombing in New York and it is so
11 different from this.

12 MS. GERTNER: It is only different if you believe
13 the government's theory. That is to say, if you believe
14 this is linked to family relationship.

15 THE COURT: That is the government's theory. You
16 are not suggesting this is a terrorist bombing?

17 MS. GERTNER: Random act of violence is a
18 possibility to which the jurors might find themselves
19 subject as well.

20 THE COURT: We will see. I will ask the questions
21 I said I would.

22 . . . END OF CONFERENCE AT THE BENCH.)

23

24 THE COURT: We have approximately 80 jurors that
25 are coming. I will ask everybody except marshals to move

1 away or at least to make room for the jurors when they come.

2 MS. GERTNER: Excuse me, your Honor. I want to ask
3 the defendant the question you asked me.

4 THE COURT: Yes. It will take the jurors a while
5 to get here.

6 The 15 challenges are for the 12. We will empanel
7 -- What is your suggestion with respect to alternates? I
8 guess in the light of the length of the trial, four
9 alternates.

10 MR. KELLY: I would say four, your Honor.

11 THE COURT: So each of you will have two challenges
12 to the alternates.

13 MS. GERTNER: The defendant wishes to be present
14 during the questioning of the jurors.

15 THE COURT: Mr. Marshal, what will happen is that
16 -- I'm not sure yet. It depends on how many jurors we'll
17 need to interrogate. If we do it at the side bar, the
18 defendant wishes to be present, just for your information.

19 THE MARSHAL: All right.

20 THE COURT: We will empanel and then we will allow
21 the jurors to -- I don't know how long this will take, but I
22 will deal with all of the motions, including the 404(b)
23 motion, after we have empanelled the jury.

24 MR. KELLY: Your Honor, just for the record, we
25 have passed up a witness list to Mr. Dello Russo.

1 THE COURT: Do you want me to inquire of the jurors
2 whether they know any of the witnesses?

3 MR. KELLY: If the defense does not wish that to
4 happen, the government has no strong views on it, your
5 Honor.

6 MS. GERTNER: I think it is the only safe way to
7 proceed so that no one gets to find out they know a witness
8 in the middle of a six-week trial.

9 THE COURT: All of these witnesses are going to be
10 witnesses?

11 MS. GERTNER: Your Honor, these are possible
12 witnesses. It depends upon the government's case.

13 (Whereupon the jury venire entered the courtroom.)

14 * * *

CERTIFICATE

I, Marie L. Cloonan, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript, from Page 1 to Page 25, constitutes to the best of my skill and ability a true and accurate transcription of my stenotype notes taken in the matter of Criminal No. 92-10369-Z, United States of America Vs. Thomas Shay, Jr.

Marie L. Cloonan
