UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal No. 10-1729

ALFRED W. TRENKLER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

GOVERNMENT'S RESPONSE TO PETITIONER'S APPLICATION FOR LEAVE TO FILE SECOND OR SUCCESSIVE MOTION UNDER 28 U.S.C. §2255

On June 14, 2010, the petitioner, Alfred W. Trenkler filed an application for leave to file a second or successive motion under 28 U.S.C. §2255 based on alleged newly discovered evidence establishing his actual innocence. Trenkler's application follows numerous prior efforts by Trenkler to obtain collateral review of his conviction and sentence, including, most recently, another second or successive §2255 motion alleging new evidence showing that he was innocent. That motion was denied by the district court and the denial was affirmed by this Court on June 8, 2010.

The Court has asked the government to respond to Trenkler's latest application. As set forth below, the application should be denied, because several of Trenkler's claims duplicate claims that were or could have been made in the prior application

and because Trenkler's claims do not make a prima facie showing that Trenkler could meet the standard for the filing of a second or successive motion.

RELEVANT BACKGROUND

Trenkler was convicted in 1993 for his role in a bombing in Roslindale, Massachusetts that resulted in the death of Boston police officer Jeremiah Hurley and permanent injury to Boston police officer Francis Foley. *United States v. Trenkler ("Trenkler I")*, 61 F.3d 5, 47-48 (1st Cir. 1995). Trenkler was later sentenced to life imprisonment. *Id.* at 51. The government's theory at trial was that Trenkler constructed the bomb for Thomas A. Shay ("Shay Jr.") to use against his father, Thomas L. Shay ("Shay Sr."). *Id.* at 48-49. After it was constructed, the bomb was attached to the underside of Shay Sr.'s car with magnets, but later became detached and was found by Shay Sr. on his driveway. *Id.* at 47-49. Members of the Boston Police Department Bomb Squad were called to examine the device and it exploded while they were handling it. *Id.* at 47-48.

Trenkler appealed his conviction and this Court affirmed. *Id.* at 62. Thereafter, Trenkler unsuccessfully sought to challenge his conviction and sentence on a variety of grounds using a number of procedural vehicles, including a motion for a new trial, *see United States v. Trenkler ("Trenkler II")*, 1998 WL 10265 (1st Cir. Jan. 6, 2008)(unpublished), a motion under 28 U.S.C. §2255, *see Trenkler v. United States*

("Trenkler III"), 268 F.3d 16 (1st Cir. 2001), a habeas corpus petition under 28 U.S.C. §2241, *see Trenkler v. Pugh*, 83 Fed.Appx. 468 (3rd Cir. Dec. 18, 2003)(unpublished), and a petition for a writ of *coram nobis*. *See Trenkler v. United States ("Trenkler V")*, 536 F.3d 85 (1st Cir. 2008).

1. Trenkler's 2007 second or successive §2255 motion.

In July 2007, Trenkler filed an application for leave to file a second or successive motion under §2255 based on newly-discovered evidence. In his application, Trenkler alleged that newly-discovered evidence showed that:

- A fingerprint had been observed on a piece of electrical tape associated with the bomb that was not disclosed to Trenkler personally prior to trial (although his expert was aware of it).

- The government had not disclosed to Trenkler the results of tests of fingerprints taken from the undercarriage of Shay Sr.'s car.

- Switch contacts found at the scene did not match those of a Radio Shack switch the government claimed at trial was purchased for the bomb.

- The radio-controlled transmitter associated with the bomb would have run out of power sooner than the government's trial testimony indicated.

- Shay Jr. had recanted earlier statements, introduced at trial, that implicated Trenkler and now claimed that Trenkler was innocent.

[G.Add.5-6].[1] In an order dated September 6, 2007, this Court certified the application, but stated that it did so "without prejudice to summary resolution by the district court." [G.Add.5].

In his filings in the district court, Trenkler advanced a number of additional claims beyond those presented in his application, including:

- A claim that a government witness, Michael Cody, had admitted to lying in certain of his testimony. [D.5, pp.11-12].
- A claim that the government had failed to reveal inducements given to the husband of a government witness, Donna Shea. [D.14, p.6].
- A claim that another government witness, David Lindholm, had lied to the court by seeking a sentence reduction based on assistance in Trenkler's case after testifying at trial that he would not do so. [D.17, pp.5-6].
- A claim that Trenkler had not been informed of the existence of large speed bumps in a road along the route Shay Sr. allegedly traveled while the bomb was attached to his car. [D.21].

[G.Add.6-7].

In a memorandum and order dated March 16, 2009, the district court (Zobel, J.) denied Trenkler's motion. The court bypassed the question of whether Trenkler

[1]The citation "[G.App._]" refers to the government's supplemental appendix. Other citations are as follows. The citation "[Application _]" refers to Trenkler's June 14, 2010 application for leave to file a second or successive motion under §2255. The citation "[D._]" refers to a docket entry in the civil docket created for Trenkler's prior second or successive motion, Civ. No. 07-11823.

could raise claims in the district court that Trenkler had not presented to this Court in his application, finding that, even if properly presented, Trenkler's claims were untimely and/or failed to establish constitutional violations. [*See, e.g.*, G.Add.16-17]. The district court also found that Trenkler's claims failed to make a showing of actual innocence that could excuse Trenkler's procedural default. [G.Add.19-22].

Trenkler appealed and, in a judgment dated June 8, 2010, this Court affirmed. [G.Add.23-24]. The judgment briefly addressed and rejected Trenkler's arguments in favor of his claims. The Court held that evidence of the existence of a fingerprint on electrical tape did not establish a cognizable violation, because Trenkler had not shown the fingerprint would have been exculpatory and "the only obvious constitutional basis for a claim . . . is *Brady v. Maryland*, 373 U.S. 83 (1963), which requires a showing of evidence substantially favorable to the defendant." [G.Add.23]. The Court went on to reject Trenkler's other claims, stating:

> The remaining issues are also of little help to Trenkler. The existence of fingerprint evidence on the alleged target vehicle was known to Trenkler's counsel and is thus imputable. The prosecution's mere silence cannot be reasonably construed as a deceptive or misleading representation about the nature or import of the unidentified prints. Discrepancies in the evidence about technical features of the explosive device were discoverable by the defense at the time of trial, so new realizations on the part of Trenkler as a result of post hoc review of the litigation files will not satisfy §2255(h)(1).

> Trenkler's impugnment of testimonial trial evidence, based on doubtful claims of recantation and uncorroborated suspicions of inducement, can fare no better. Finally, whatever significance might attach to evidence of speed bumps in the travel path of the alleged target vehicle, it, too, was a matter discoverable at the time of trial, and is not amenable to §2255(h)(1).

[G.Add.24].

2. Trenkler's 2010 application for leave to file a second or successive motion under 28 U.S.C. §2255.

On June 14, 2010, Trenkler filed another application for leave to file a second or successive motion under 28 U.S.C. §2255 based on alleged newly-discovered evidence. The application presents eight claims that Trenkler contends are supported by evidence that was previously unavailable:

- The government failed to provide Trenkler at the time of trial with a fingerprint report containing test results of prints taken from Shay Sr.'s car.
- The government failed to provide Trenkler at the time of trial with a report concerning a re-enactment of the trip taken by Shay Sr.'s car, during which the mock bomb did not fall off the car.
- The government failed to provide Trenkler at the time of trial with a videotape that was made of the foregoing re-enactment.
- The government did not disclose to Trenkler at the time of trial information about government witness Shay Sr. (including, among other things, a sealed criminal record, the fact that Shay Sr. owned a firearm and liked to hunt, and Shay Sr.'s involvement in a lawsuit) that allegedly would have had impeachment value.

- The government did not disclose to Trenkler evidence relating to Dennis Owen, an individual who had been suspected of involvement in the Roslindale bombing at an early stage in the investigation.

- The government presented expert testimony at trial supporting the government's theory regarding the placement of the bomb on Shay Sr.'s car that it knew to be incorrect based on other undisclosed evidence.

- The government misrepresented at trial that there were no fingerprints on the electrical tape used to wrap the bomb, although government agents had been informed (by Trenkler's expert) that there was a fingerprint.

- The government presented at trial statements by Shay Jr. that it "knew" to be false.

This Court has asked the government to respond to Trenkler's latest application.

ARGUMENT

I. TRENKLER'S APPLICATION DOES NOT PRESENT ANY CLAIMS JUSTIFYING FURTHER COLLATERAL REVIEW.

More than a decade and a half after he was convicted, Trenkler again attempts to obtain collateral review of his conviction, alleging (as he did in his last second or successive §2255 motion) that certain evidence that he contends was in the government's possession at the time of trial was not disclosed to him and would show that he was innocent. Trenkler's attempt to obtain review at such a late date, based on trial-era documents and references that he claims to have just now discovered in

lawyer's files and through public document requests, is wholly at odds with the interests of judicial efficiency and finality reflected in §2255's statute of limitations and gatekeeping provisions. *See United States v. Barrett*, 178 F.3d 34, 38 (1st Cir. 1999)(explaining that "the various applicable gatekeeping mechanisms [in §2255] . . . augment society's interests in finality of criminal convictions"); *cf. Acosta v. Artuz*, 221 F.3d 117, 123 (2nd Cir. 2000)("The [one-year §2254] statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time.")(quoted with approval in *Day v. McDonough*, 547 U.S. 198, 205-206 (2006)).

Indeed, if claims such as these could justify the filing of a second or successive motion under §2255, it is difficult to imagine that proceedings in this case would ever end. It will always be possible for Trenkler to find an additional piece of information relevant to his trial of which he was not previously aware and claim that it was not or may not have been disclosed. In the government's view, Trenkler's application should be rejected at the threshold, because Trenkler has not provided any adequate justification for his decade-and-a-half-long delay in pursuing the alleged errors, all of which relate to evidence that (if Trenkler is correct) existed at the time of his trial.

In the alternative, Trenkler's application should be rejected because, even assuming that Trenkler's factual allegations are correct regarding the existence and non-disclosure of evidence (neither of which the government concedes, but which the government assumes solely for purposes of argument),[2] Trenkler has not made the prima facie showing that would entitle him to further proceedings. Pursuant to 28 U.S.C. §2255(h), Trenkler's application for leave to file a second or successive motion must be denied unless it is "certified as provided in section 2244 by a panel of the appropriate court of appeals to contain . . . newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." By its cross-reference to §2244, §2255(h) incorporates the requirement of 28 U.S.C. §2244(a)(3)(C) that an applicant must "make[] a prima facie showing that the applicant satisfies the requirements" for a second or successive motion – *i.e.* newly discovered evidence capable of establishing "by clear and convincing evidence that no reasonable factfinder would have found the movant guilty." *See, e.g.*, *In Re Zambrano*, 433 F.3d 886, 887 (D.C. Cir. 2006); *In*

[2]Voluminous discovery was produced to Trenkler's counsel during the pendency of this case. Without review of the government's discovery files – which is inappropriate at this stage – the government has no basis for determining whether Trenkler's claims of non-disclosure are plausible.

Re Olopade, 403 F.3d 159, 162 (3rd Cir. 2005); *Bell v. United States*, 296 F.3d 127, 128 (2nd Cir. 2002); *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997).

In *Rodriguez v. Bay State Correctional Center*, this Court adopted the Seventh Circuit's formulation in *Bennett v. United States* that a "prima facie showing" means "a sufficient showing of possible merit to warrant a fuller exploration by the district court" and is met when, "in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition." *See Rodriguez*, 139 F.3d 270, 273 (1st Cir. 1998)(quoting *Bennett*, 119 F.3d at 469-70)). In doing so, this Court "emphasize[d] that despite its superficially lenient language, the standard erects a high hurdle," explaining that these provisions were enacted as part of Congress's effort "to curb the abuse of the statutory writ of habeas corpus." *Id.*

Under this standard, Trenkler's application must be denied. Three of the claims repeat claims already raised and rejected in Trenkler's prior application. Trenkler's remaining claims do not justify further proceedings because, on the basis of the evidence presented, it is not "reasonably likely" that Trenkler can meet the stringent requirements for a second or successive motion.

A. Trenkler's first, seventh and eighth claims duplicate claims already raised and rejected in his prior second or successive §2255 motion.

Three of Trenkler's claims simply repeat, with minor variations, claims Trenkler made in his earlier second or successive motion. The Court should not allow Trenkler to relitigate these claims.

Trenkler's first claim – that the government failed to disclose a report discussing fingerprints taken from the underside of Shay Sr.'s car – is substantively identical to a claim made in the earlier motion, only this time Trenkler includes a copy of the allegedly withheld report, which was presented only on appeal from the denial of his previous second or successive §2255. [Application 1-3, Exhs.1-4]. The addition of this document does not provide a basis for allowing Trenkler to relitigate the issue. The district court found, and this Court affirmed, that Trenkler was on notice of the existence of the prints at the time of trial and therefore a claim based on the government's alleged failure to provide a report on the prints was time-barred. [G.Add.11-12]. This Court also found that the government had not engaged in any deceptive or misleading representations regarding the prints. [G.Add.24]. Neither conclusion is altered by the fact that Trenkler now has the document.

Nor do the contents of the document provide any basis for reconsidering this Court's conclusions. The document reports only that the identifiable prints on Shay

Sr.'s car all belonged to investigators [Application, Exhs.1-4], hardly a fact tending to exonerate Trenkler. *Cf. Myatt v. United States*, 875 F.2d 8, 12-13 (1st Cir. 1989)(concluding that analysis of fingerprints from robbery scene showing no match with defendant's accomplices was properly deemed non-material where robbery was in public place and thus presence of other prints was not surprising).

Trenkler's seventh and eighth claims repackage prior claims under new legal theories. Trenkler's seventh claim is that the government misrepresented at trial that there was no fingerprint on the electrical tape even though the government "knew" (because it had been told by Trenkler's expert) that there was, in fact, a fingerprint. [Application 15-16]. This is nothing more than a reframing of the claim in his prior §2255 motion that the government failed to disclose the existence of the same fingerprint. [*See* D.5, pp.1-3]. Similarly, Trenkler's eighth claim – that the government presented statements of Shay Jr. that it "knew" to be false [Application 16-22] – repackages his prior claim that Shay Jr. has recanted his prior inculpatory statements and that the statements used at trial were not true. [*See* D.5, pp.9-10].

Trenkler cannot obtain multiple bites at the collateral review apple by constructing new legal claims based on the same underlying evidence – he must point to new evidence. *See Barreto-Barreto v. United States*, 551 F.3d 95, 100 n.4 (1st Cir. 2008)(explaining that the "discovery of a new legal theory" does not constitute the

discovery of facts supporting a claim of newly discovered evidence for purposes of §2255). Because the foregoing claims rely on the same essential facts and evidence[3] as the prior claims, they should be dismissed as violative of statutory limitations on §2255, *see* 28 U.S.C. §2244(b)(1)(explaining that a claim in a second or successive application under §2254 "that was presented in a prior application shall be dismissed"); *Charles v. Chandler*, 180 F.3d 753, 758 (6th Cir. 1999)(finding this limitation applicable to §2255 through §2255(h)'s incorporation of §2244 procedures), or because Trenkler has cannot show any "cause" that would excuse his failure to make these claims as part of his first motion, *see Saahir v. Collins*, 956 F.2d 115, 118 (5th Cir. 1992)(holding that the "inadequacy of [a pro se petitioner's] own legal research" cannot establish cause for failing to raise a claim earlier); *Rodriguez v. Maynard*, 948 F.2d 684, 687 (10th Cir. 1991)(similar), or simply because he cannot make a prima facie showing with respect to a claim that has already been reviewed and found inadequate.

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[3]Trenkler suggests that his electrical tape claim relies on new evidence because he now has an affidavit from his trial expert, Dennis Kline, which allegedly clarifies that Trenkler's lawyer was not present when Kline allegedly observed the fingerprint on the tape and communicated this observation to the government. [Application, 15-16]. Trenkler fails to show how this is relevant. The essence of his current claim is that the government knew about the print and then misrepresented it, a claim that was available to be made whether or not Trenkler's lawyer was present when the government was allegedly informed about the print.

C. Trenkler's second, third, fourth, and sixth claims fail to make a prima facie showing of errors that would preclude a reasonable juror from finding Trenkler guilty.

Trenkler's second, third, fourth and sixth claims all relate to the government's theory that the bomb Trenkler built was attached to the bottom of Shay Sr.'s car prior to the day it exploded and that Shay Sr. drove the car with the bomb attached for some time before it became dislodged in his driveway. Trenkler's second and third claims allege that the government did not disclose a police report addressing, and a (now unavailable) videotape recording, a re-enactment of Shay Sr.'s drive on the morning the bomb was discovered, using a mockup of the bomb, during which the bomb stayed attached to the car even when the car entered Shay Sr.'s driveway. [Application 4-7]. Trenkler's sixth claim alleges that, in light of this re-enactment evidence, the government acted improperly in allowing its expert to testify that the bomb, once attached, could have become dislodged in the driveway. [Application 11-14]. Trenkler's fourth claim is facially broader – arguing that the government failed to disclose impeachment evidence for Shay Sr. – but Trenkler's statements regarding the relevance of Shay Sr.'s testimony establish that this claim also relates to the question of when the bomb was attached and how it was discovered. [*See* Application 7-9].

These claims should be rejected, because Trenkler does not identify any error

or omission with respect to the foregoing evidence that could establish "by clear and convincing evidence" that no reasonable juror would have found him guilty in light of all the evidence. At trial, the government provided substantial evidence, beyond Shay Sr.'s testimony, for its theory that the bomb was attached to Shay Sr.'s car before it was found. The bomb fragments recovered from the scene established – and Trenkler has not disputed – that the bomb was built with two large magnets and a number of smaller magnets on one side, suggesting that it was designed to be attached to metal. [*See* Application, Exh.72]; *Trenkler I*, 61 F.3d at 49. The government also presented evidence of scrape marks on the bottom of Shay Sr.'s car that were consistent with the device having been placed there and dragged along, perhaps while it was in the process of being dislodged. [Application 12-13; Application, Exhs.70-81]. In addition, there was evidence that a bomb Trenkler admitted building for a friend in 1986 was made with a large speaker magnet and was attached by this means to the bottom of a truck before it was detonated. *Trenkler I*, 61 F.3d at 48. The foregoing evidence was supplemented by expert testimony that identified the holding strength of the magnets used in the Roslindale bomb and concluded, based on information about Shay Sr.'s car, the bomb's dimensions, and the driveway contours that the government's theory was supportable. [Application 13; Application, Exhs.70-81].

Given this context, any failure by the government to disclose the report and videotape regarding a re-enactment in which the bomb did not dislodge (assuming they were not disclosed) would not constitute "clear and convincing evidence" that would preclude a reasonable juror from finding Trenkler guilty under the government's theory. As Trenkler's application appears to acknowledge, there are numerous variables that could affect whether or where the bomb might dislodge, including the particular condition of the vehicle to which it was attached, where the bomb had been placed, and details of how and where the car was driven. [*See* Application 13-14]. Thus, the failure of the bomb to dislodge during a particular re-enactment would hardly refute the government's theory; it would merely have some impeachment value. The value of this evidence to the defendant would have been weakened, moreover, by the fact that the government performed – and disclosed to the defense – a second videotaped re-enactment showed that the bomb *did* make contact with the driveway when attached to Shay Sr.'s car and was "crushed." [Application 5-6].

Because the report and videotape did not refute the government's theory, Trenkler's claim that the government improperly allowed its expert to testify to the theory is a non-starter. Trenkler points to no principle of law that precludes an expert from testifying to a theory based on valid evidence simply because other evidence

exists that conceivably could be used to challenge that theory.

Trenkler also fails to show that any failure to provide impeachment evidence regarding Shay Sr. could meet the "high hurdle" that would justify further proceedings. Even assuming that the government improperly failed to disclose Shay Sr.'s sealed criminal record or evidence of a prior lawsuit in which Shay Sr. was involved, Trenkler fails to show how these omissions would establish by "clear and convincing evidence" that he would not have been found guilty.[4] As Trenkler acknowledges, his defense team already had information regarding other lawsuits in which Shay Sr. had been involved that could have been used for impeachment purposes. [Application 8]. With respect to Shay Sr.'s criminal history, Trenkler provides no basis for concluding that this evidence would have been admissible at trial to impeach Shay Sr.,[5] much less that it would have precluded a jury from accepting Shay Sr.'s testimony, when viewed in the context of the physical and expert

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[4]Trenkler also claims that the government improperly failed to disclose that Shay Sr. had a firearm permit and was a game hunter. [Application 7-8]. Assuming this is true, Trenkler fails to show how this could have had any bearing on whether the jury would have credited Shay Sr.'s testimony.

[5]The Federal Rules of Evidence place limits on the admissibility of prior convictions for impeachment purposes if the prior conviction was not for a crime involving "dishonesty or false statements" or if the conviction is for a crime more than ten years old. *See* Fed.R.Evid. 609(a-b). From the information identified by Trenkler, which refers only to a "sealed criminal record" [Application, Exh.14], it is impossible to tell whether Shay Sr.'s history would have been found admissible.

evidence tending to support Shay Sr.'s account of how the bomb was discovered.

D. Trenkler's claim that the government withheld evidence regarding another suspect rests on evidence that is facially implausible and addresses an issue that was known to Trenkler at the time of trial.

Trenkler's fifth claim is that newly-discovered evidence shows that the government improperly withheld information regarding its investigation of Dennis Owen, a person initially suspected of being involved in the bombing. [Application 9-11]. In support of this claim, Trenkler attaches a transcript of an interview between investigators and Derrick Massey, during which Massey tells a rambling and at times frankly implausible story of mistreatment at the hands of Owen and others[6] and also claims that Owen was involved with explosives and claimed responsibility for the Roslindale bombing. [Application, Exhs.42-64].

Given the implausible contents of the transcript, this evidence, assuming it should have been disclosed but was not, would not satisfy the prima facie standard. *Cf. David v. United States*, 134 F.3d 470, 478 (1st Cir. 1998)(explaining that a district court may summarily dismiss §2255 claims based on allegations that are "vague, conclusory, or palpably incredible"). This claim also fails on a more straightforward

[6]Among other things, Massey's account includes a claim that Owen stated he made bombs for the mafia and that, at one point, Massey was attacked by five gentlemen in suits and told to keep quiet about the Roslindale bombing. [Application, Exhs.52, 60].

ground. As Trenkler acknowledges, the initial focus on Owen was well-known to the public prior to the time of Trenkler's trial. [Application 9 (noting that there was "extensive coverage" of Owen during July 1992)]. In light of this, Trenkler cannot possibly establish that his presentation of the issue is timely. While Trenkler argues that he could not have known that evidence about Owen existed at any earlier time, that claim is untenable. If Owen was a known focus of the investigation in 1992, Trenkler and his attorneys were on notice that the police would have investigative materials related to him.

CONCLUSION

For the foregoing reasons, this Court should deny Trenkler's application.

Respectfully submitted,

CARMEN M. ORTIZ
United States Attorney

By: /s/ Randall E. Kromm
RANDALL E. KROMM
Assistant U.S. Attorney

Certificate of Service

I, Randall E. Kromm, AUSA, certify that I caused this opposition to be served by first-class mail on the pro se defendant, Alfred W. Trenkler, Reg. No. 19377-038, MDC Brooklyn PO Box 329002, Brooklyn, NY 11232, on August 2, 2010.

/s/ Randall E. Kromm
RANDALL E. KROMM

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Addendum Table of Contents

1. Docket entries, Civ. No. 07-11823. . . . . G.Add.1

2. Memorandum of Decision and Order, dated March 16, 2009 [D.22]. G.Add.4

3. Judgment in Appeal No. 09-1559. . . . . G.Add.23

APPEAL, MULTI–VICTIM

United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:07–cv–11823–RWZ

Trenkler v. USA
Assigned to: Judge Rya W. Zobel
Related Case: 1:92–cr–10369–RWZ–2
Case in other court: First Circuit, 09–01559
Cause: 28:2255 Motion to Vacate / Correct Illegal Sentenc

Date Filed: 09/26/2007
Date Terminated: 03/19/2009
Jury Demand: None
Nature of Suit: 510 Prisoner: Vacate Sentence
Jurisdiction: U.S. Government Defendant

Petitioner

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TERMINATED: 05/28/2008
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
09/26/2007	1	Judge Rya W. Zobel : ORDER entered. Within 20 days of the date of this order, petitioner may file a proper motion to vacate sentence on the form provided therefore. The goverment shall file any responsive pleading within 45 days after petitioner's pleading is due.(Urso, Lisa) (Entered: 09/26/2007)
10/15/2007	2	MOTION for Extension of Time to 11/6/07 to File proper motion to vacate by Alfred W. Trenkler.(Johnson, Jay) (Entered: 10/16/2007)
10/16/2007		Judge Rya W. Zobel : Electronic ORDER entered granting 2 Motion for Extension of Time to File to 11/6/07 (Urso, Lisa) (Entered: 10/16/2007)
10/18/2007	3	MOTION for 2255 Relief to Vacate Set Aside or Correct Sentence 1 Order, by Alfred W. Trenkler. (Attachments: # 1 Exhibit part 1# 2 Exhibit Part 2)(Johnson, Jay) (Entered: 10/19/2007)

10/22/2007	4	NOTICE of Appearance by Timothy Q. Feeley on behalf of USA (Feeley, Timothy) (Entered: 10/22/2007)
11/08/2007	5	AMENDED/SUPPLEMENTAL DOCUMENT by Alfred W. Trenkler. Amendment to 3 MOTION to Vacate 1 Order,. (Attachments: # 1 Part 2# 2 Part 3# 3 Part 4)(Johnson, Jay) (Entered: 11/08/2007)
12/04/2007	6	MOTION for Extension of Time to December 14, 2007 *To File Response to Section 2255 Motion* by USA.(Feeley, Timothy) (Entered: 12/04/2007)
12/05/2007		Judge Rya W. Zobel : Electronic ORDER entered granting 6 Motion for Extension of Time to 12/14/07. (Urso, Lisa) (Entered: 12/05/2007)
12/14/2007	7	MOTION for Leave to File Excess Pages by USA.(Feeley, Timothy) (Entered: 12/14/2007)
12/14/2007	8	RESPONSE to *Petitioner's Section 2255 Motion* by USA. (Feeley, Timothy) (Entered: 12/14/2007)
12/18/2007		Notice of correction to docket made by Court staff. Correction: #8 Response to 2255 Motion corrected because: PREMATURE FILING the motion for leave has NOT been granted. E−mail sent describing the fix. (Johnson, Jay) (Entered: 12/18/2007)
12/20/2007		Judge Rya W. Zobel: Electronic ORDER entered granting 7 Motion for Leave to File Excess Pages (Urso, Lisa) (Entered: 12/20/2007)
12/21/2007	9	MOTION for Extension of Time to 1/15/07 to File Response/Reply to Governments response to petitioners 2255 motion to vacate by Alfred W. Trenkler.(Johnson, Jay) (Entered: 12/27/2007)
01/09/2008		Judge Rya W. Zobel: Electronic ORDER entered granting 9 Motion for Extension of Time to 1/15/08 to file rebuttal to Gov'ts response.... (Johnson, Jay) Modified on 1/9/2008 (Johnson, Jay). (Entered: 01/09/2008)
01/16/2008	10	REPLY to Response to Motion re 3 MOTION to Vacate 1 Order, filed by Alfred W. Trenkler. (Attachments: # 1 Appendix)(Johnson, Jay) (Entered: 01/17/2008)
02/05/2008	11	Letter/request (non−motion) from John Wallace regarding motion to review evidence. (Johnson, Jay) (Entered: 02/05/2008)
02/26/2008	12	NOTICE of Change of Address or Firm Name by Alfred W. Trenkler (Johnson, Jay) (Entered: 02/26/2008)
05/27/2008	13	NOTICE of Withdrawal of Appearance by Timothy Q. Feeley (Feeley, Timothy) (Entered: 05/27/2008)
07/23/2008	15	Letter/request (non−motion) from K. Kenney regarding "details recently revealed"(Johnson, Jay) (Entered: 07/25/2008)
07/24/2008	14	ADDENDUM re 3 MOTION to Vacate 1 Order, by Alfred W. Trenkler. (Attachments: # 1 ExhibitS A−K)(Johnson, Jay) (Entered: 07/25/2008)
08/08/2008	16	Letter/request (non−motion) from Alfred Trenkler. (Attachments: # 1 Attachments)(Johnson, Jay) (Entered: 08/12/2008)
08/14/2008	17	Letter/request (non−motion) from Alfred Trenkler w/attachment. (Johnson, Jay) (Entered: 08/15/2008)
10/10/2008	18	Letter/request (non−motion) from Theresa Spinelli regarding Alfred Trenkler. (Johnson, Jay) (Entered: 10/10/2008)
10/23/2008	19	ADDENDUM re 3 MOTION to Vacate 1 Order, filed by Alfred W. Trenkler. (Attachments: # 1 Exhibit 1)(Johnson, Jay) (Entered: 10/24/2008)
11/18/2008	20	Letter/request (non−motion) from Alfred Trenkler. (Johnson, Jay) (Entered: 11/18/2008)
12/04/2008	21	ADDENDUM re 3 MOTION to Vacate 1 Order, filed by Alfred W. Trenkler. (Attachments: # 1 Exhibit 2−10)(Johnson, Jay) (Entered: 12/05/2008)

03/16/2009	22	Judge Rya W. Zobel: MEMORANDUM OF DECISION AND ORDER entered denying the petition for relief under 28 U.S.C. 2255 (Diblasi, Lily) (Entered: 03/16/2009)
03/17/2009	23	Letter from Judge Zobel responding to 18 Letter. (Johnson, Jay) (Entered: 03/17/2009)
03/19/2009	24	Judge Rya W. Zobel: ORDER entered. JUDGMENT entered dismissing the petition.(Urso, Lisa) (Entered: 03/19/2009)
04/17/2009	25	NOTICE OF APPEAL as to 22 Order on Motion to Vacate, 24 Judgment by Alfred W. Trenkler NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov/clerks/transcript.htm MUST be completed and submitted to the Court of Appeals. Appeal Record due by 5/7/2009. (Johnson, Jay) (Entered: 04/20/2009)
04/27/2009	26	Certified and Transmitted Record on Appeal to US Court of Appeals re 25 Notice of Appeal, (Attachments: # 1 docket sheet)(Ramos, Jeanette) (Entered: 04/27/2009)
04/28/2009		USCA Case Number 09–1559 for 25 Notice of Appeal, filed by Alfred W. Trenkler. (Ramos, Jeanette) (Entered: 04/28/2009)
05/14/2009	27	MOTION for Extension of Time to 7/12/09 to File Certificate of Appealability by Alfred W. Trenkler.(Johnson, Jay) (Entered: 05/15/2009)
05/22/2009		Judge Rya W. Zobel: Electronic ORDER entered granting 27 Motion for Extension of Time to File by 7/12/09; (Urso, Lisa) (Entered: 05/26/2009)
06/12/2009		Filing fee/payment: $ 455.00, receipt number BST011165 for 25 Notice of Appeal, (Russo, Patricia) (Entered: 06/12/2009)
07/09/2009	28	MOTION for Certificate of Appealability by Alfred W. Trenkler. (Attachments: # 1 Part 2)(Johnson, Jay) (Entered: 07/10/2009)
07/15/2009		Judge Rya W. Zobel: endorsedORDER entered granting 28 Motion for Certificate of Appealability as to all issues raised. (Urso, Lisa) (Entered: 07/15/2009)
07/15/2009	29	Supplemental Record on Appeal transmitted to US Court of Appeals re 25 Notice of Appeal, Documents included: 28 &Electronic Order (Ramos, Jeanette) (Entered: 07/15/2009)
11/19/2009	30	Letter/request (non–motion) from Morrison M. Bonpasse. (Attachments: # 1 Attachments)(Johnson, Jay) (Entered: 11/19/2009)
01/08/2010	31	Letter/request (non–motion) from Morrison M. Bonpasse. (Attachments: # 1 Attachment 1, # 2 Attachment 2, # 3 Attachment 3)(Johnson, Jay) (Entered: 01/08/2010)
06/09/2010	32	USCA Judgment as to 25 Notice of Appeal, filed by Alfred W. Trenkler. The district court's estimate of Trenkler's "actual innocence" claim is also sound. The judgment is AFFIRMED. Judgment issued in the USCA 6/8/2010 (Ramos, Jeanette) (Entered: 06/09/2010)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 07-11823-RWZ

ALFRED W. TRENKLER

v.

UNITED STATES OF AMERICA

MEMORANDUM OF DECISION AND ORDER

March 16, 2009

ZOBEL, D.J.

On November 29, 1993, a jury convicted Alfred Trenkler ("Trenkler") of violating 18 U.S.C. §§ 844(d) and (I), receipt of explosives and attempted destruction of property by explosives (counts 2 and 3), as well as conspiracy in violation of 18 U.S.C. § 371 (count 1), for his role in the construction and placement of a bomb under the car of Thomas L. Shay ("Shay Sr.") in Roslindale, Massachusetts, which exploded and killed one Boston Police Officer and maimed another. (See Docket 92-cr-10369-RWZ # 487.) On March 8, 1994, he was sentenced to life imprisonment on counts 2 and 3, along with a 60-month sentence on count 1, the conspiracy charge, all to be served concurrently.

The First Circuit affirmed the convictions on July 18, 1995. United States v. Trenkler, 61 F.3d 45, 48 (1st Cir. 1995). Since then Trenkler has unsuccessfully challenged the convictions and sentence through two motions for a new trial under Rule 33 (1995 and 2004), a petition under 28 U.S.C. § 2241 (2002), a petition for

mandamus (2004), a petition for a writ of error coram nobis (2006), and an earlier petition under 28 U.S.C. § 2255 (1999). In mid-2007, Trenkler filed, pro se, an application to the Court of Appeals for the First Circuit for leave to file a second petition for a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1996[1] ("AEDPA"), in which he alleges newly discovered evidence as a basis for relief. See 28 U.S.C. § 2255(h). The First Circuit allowed the application, albeit with reservations concerning Trenkler's ability to show that the evidence is newly discovered or that its prior unavailability reflects a constitutional violation. Because petitioner has failed to show that the evidence he offers was not previously known to him or his counsel, or that his sentence was imposed in violation of the Constitution of the United States, the petition is denied.

I. This Petition

In his application to the First Circuit, Trenkler asserted that there was "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." 28 U.S.C. § 2255(h)(1). In particular, he stated that: (1) a defense expert told members of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") that black electrical tape recovered from the bomb remnants contained a visible fingerprint; (2) the government had in its possession exculpatory fingerprints recovered from the black electrical tape used to

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[1] Pub. L. 104-132, Tit. I, § 105, 110 Stat. 1214, 1220 (codified in relevant part at 28 U.S.C. §§ 2255 and 2244).

construct the bomb and the undercarriage of the car where the bomb had been placed that were not provided to the defense; (3) the toggle switch used to construct the bomb was not purchased from Radio Shack as alleged by the government; (4) the remote control receiver used in the bomb had insufficient battery power to set off the bomb if armed under the scenario proposed by the government; all of which petitioner alleges was not known to him at the time of trial. In addition, he alleges that (5) co-defendant Thomas A. Shay ("Shay Jr.") recanted his prior statements and now says that Trenkler was not involved in any way with the bomb found under Shay Sr.'s car. The court of appeals granted certification "without prejudice to summary resolution by the district court if further information . . . so warrants." (Docket No. 92-cr-10369-RWZ # 708.)

Upon receiving certification, Trenkler filed the petition in this court. He relies on the five grounds presented to the court of appeals and added a sixth: (6) that an adverse witness at his trial stated in 2001 that significant portions of the witness' testimony were untrue. (Docket # 5, 11-12.) In several addenda to his petition, he seeks to incorporate further additional grounds that: (7) two adverse witnesses were rewarded by the government despite assurances that there was no agreement to do so; and (8) evidence of speed bumps in a parking lot that Shay Sr. traversed prior to the bomb detaching itself from the underside of his car was not disclosed by the government. (See Docket # 14, 21.) He also complains about the government's destruction of the evidence in the case in 2005. (See Docket # 14.) Finally, he references letters from several jurors in his 1993 trial who now say that they either believe Trenkler is not guilty or that he deserves a new trial. (See, e.g., Docket ## 19,

21.) He argues that these letters support his contention that had this evidence been available at his trial, no reasonable factfinder would have found him guilty of the offenses. (See Docket # 19.)

II. Legal Standard - Requirements of 28 U.S.C. § 2255

A federal prisoner "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). In addition, the statute requires that any such petition be filed within a one-year period of limitation which, insofar as relevant to this case, runs from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." Id. at § 2255(f)(4).

The government opposes the petition on two grounds: (1) that Trenkler fails to allege any constitutional violations; and (2) that he fails to meet the limitations requirements of the statute. (See Docket # 8.)

A. Necessity of a Constitutional Violation

The government properly notes that, absent allegations of a constitutional violation, claims of newly discovered evidence, even "[p]owerful new evidence of innocence," are not cognizable under section 2255. Conley v. United States, 323 F.3d 7, 13-14 (1st Cir. 2003); accord Herrera v. Collins, 506 U.S. 390, 400 (1993); see also 28 U.S.C. § 2255(a). However, it is incorrect in its assertion that Trenkler advances no

constitutional claim in his petition. In grounds two and three of the petition he either implicitly or explicitly claims that the government withheld exculpatory evidence in violation of Brady v. Maryland. 373 U.S. 83, 87 (1963) (holding that suppression of material evidence favorable to an accused by the prosecution violates due process). In his reply brief, he explicitly cites Brady, which adequately alleges a violation of his right to due process and is sufficient to sustain his petition.[2] See, e.g., Tomkins v. Missouri, 323 U.S. 485, 487 (1945) (liberally interpreting prisoner's pro se petition for habeas corpus).

B. Limitations Period on Section 2255 Motions

Trenkler fares less well against the government's contention that he has failed to meet the one-year statute of limitations on newly discovered evidence.

The First Circuit does not appear to have decided whether this bar is to be considered on a claim-by-claim basis or to the petition as a whole. However, the United States Supreme Court has suggested the former. See Pace v. DiGuglielmo, 544 U.S. 408, 416 n.6 (2005) (dicta) (referring to the time limitations applicable to a habeas petition brought under 28 U.S.C. § 2244). While other circuit courts are split on the issue, the Third Circuit's approach, which is congruent with the Supreme Court's dicta in Pace, is most persuasive. I therefore examine each ground advanced by

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[2] I do not decide whether any Brady violation actually occurred because, as discussed infra, each of Trenkler's grounds alleging such a violation is time-barred and even assuming a constitutional violation, Trenkler has failed to establish actual innocence necessary to overcome his procedural default.

Trenkler individually for timeliness.[3] See Fielder v. Varner, 379 F.3d 113, 118 (3d Cir. 2004) (Alito, J.) (concluding that "the statute of limitations set out in § 2244(d)(1) should be applied on a claim-by-claim basis"); Bachman v. Bagley, 487 F.3d 979, 984 (6th Cir. 2007) (adopting the reasoning in Fielder); but see Walker v. Crosby, 341 F.3d 1240, 1246 (11th Cir. 2003) (holding that where a habeas petitioner brings multiple claims, a single timely claim "resurrect[s] what seem to be time-barred claims tagging along . . .").

Given that: (1) Trenkler's conviction was affirmed and became final on September 5, 1995;[4] (2) there is no allegation that the government prevented or impeded Trenkler's filing this petition earlier; and (3) he does not invoke a right newly recognized by the Supreme Court, the only part of the statute relevant to the grounds alleged in the instant petition is subsection (f)(4). Therefore, the question is whether the facts asserted for each ground are indeed new or whether they could have been discovered through the exercise of due diligence more than one year prior to his application to the First Circuit. See Libby v. Magnusson, 177 F.3d 43, 49 (1st Cir. 1999). On this issue petitioner has the burden of proof. See David v. United States,

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[3] While the cases relied on refer to the time limits applicable to a state prisoner filing a habeas petition under 28 U.S.C. § 2244, the structure of this subsection of the statute is identical to that of 28 U.S.C. § 2255, and the limitations themselves are very similar. Compare 28 U.S.C. § 2244(d)(1), with 28 U.S.C. § 2255(f). Therefore, it would be inconsistent for subsection 2244(d)(1), but not subsection 2255(f) to require a claim-by-claim analysis. See, e.g., Brackett v. United States, 270 F.3d 60, 66 (1st Cir. 2001) (abrogated on other grounds) (noting that "[t]he Supreme Court commonly interprets § 2255 and § 2254 in light of each other"); Sustache-Rivera v. United States, 221 F.3d 8, 16 (1st Cir. 2000).

[4] Indeed, the First Circuit affirmed this court's denial of Trenkler's first habeas petition, filed on January 5, 1999, as time barred under 28 U.S.C. § 2255. See Trenkler v. United States, 268 F.3d 16, 27 (1st Cir. 2001).

134 F.3d 470, 474 (1st Cir. 1998). "The test of due diligence . . . is objective, not subjective." Wood v. Spencer, 487 F.3d 1, 5 (1st Cir. 2007).

Knowledge of counsel is attributed to petitioner in determining when facts became known to him. See id. at 5. Similarly, "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence" (28 U.S.C. § 2255(f)(4)) includes efforts conducted or which could have been conducted by counsel as well as petitioner. Id. Finally, contrary to petitioner's argument that the government's failure to disclose fingerprint information in violation of Brady prevented him from filing this motion earlier, when he finally did file it, he had no more information than he had at the time of trial. Accordingly, subsection (f)(2) does not operate to toll the statute of limitations.

III. Bases for Trenkler's 28 U.S.C. § 2255 Petition

A. Grounds One and Two: Fingerprint Evidence

For his first ground Trenkler claims that he has recently become aware that the black electrical tape recovered from the bomb remnants contained a fingerprint that he believes will show that another person constructed or at least handled the bomb. Ground two alleges that the government's failure to provide access to both this fingerprint evidence and fingerprints taken from Shay Sr.'s car "amounts to the withholding of exculpatory as well as factual evidence favorable to defendant Trenkler." (Docket # 5, ASF 2.)[5] Thus, only ground two alleges a constitutional violation.

[5] "ASF _" refers to page _ in the Amended Statement of Facts attached to Trenkler's amended section 2255 petition (Docket # 5).

As to ground one, Trenkler asserts that "[i]n 1993 [his] bomb expert Denny L. Kline . . . observed traces of fingerprints on black electrical tape that had been used to construct the bomb" and "told B.A.T.F. agents present of [sic] what he had observed." (Docket # 5, ASF 1.) He avers that he did not become aware of this evidence until a proponent of his innocence interviewed Kline in July 2007. However, in his application for leave to file to the First Circuit he states that "neither defense counsel [n]or expert divulged this fingerprint evidence to defendant Trenkler," implying that this information is only new to him personally. As discussed supra, and as he correctly acknowledges, under the law "Trenkler and his defense team are one and the same." (Docket # 10, 8.) Therefore, the existence of the fingerprint observed by Trenkler's expert has been known or should have been known by Trenkler's counsel, and thus by Trenkler, since 1993. That is the date on which this claim accrued and that is why it is time-barred. See Wood, 487 F.3d at 5.

As to the fingerprints lifted from the underside of Shay Sr.'s car, Trenkler acknowledges that both he "and his defense team were aware of the print 'lifts' from a November 2, 1991, report from the Boston Police" prior to his trial. (Docket # 10, 8-9; see also Docket # 5, App. at 3 (Nov. 2, 1991 Boston Police Report).) However, he argues that this constitutes newly discovered evidence because he has never been granted access to it. (Docket # 5, 3; see also Docket # 10, App. ¶ 16.) Nevertheless, by his own admission, Trenkler was aware prior to his trial that five fingerprints had been lifted from the undercarriage of the car and that he had not been provided with the results of any tests that may or may not have been conducted on those fingerprints.

Therefore, none of his assertions now can negate Trenkler's knowledge before trial, directly or through his counsel, of the existence of this evidence and the results of any testing. And nothing the government did then, or has done since then, has prevented him from making an earlier motion. Now it is too late.

B. Ground Three: Switch Used to Construct Bomb

Trenkler's third ground, that the government knew, but did not disclose, that the remnants of the toggle switch from the bomb remains did not match a switch from Radio Shack, is barred because it is not new and the government did not prevent his discovery of the information. Trenkler attaches to his petition a letter written in March 1993 from his trial counsel to counsel for his co-defendant which stated that "the [Radio Shack] switch does not match the remants [sic] of the toggle switch ATF has as part of the physical evidence in this case." (Docket # 5, App. at 9.) Thus, there is no question that Trenkler, through his counsel, was aware of this evidence prior to his November 1993 trial. That petitioner's step-father recently rediscovered this letter in his "search through [] 40 boxes of legal documents" does not reset the limitations period.[6]

C. Ground Four: Operating Time of Futaba Receiver

In his fourth ground, Trenkler asserts that new evidence shows that the power

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[6] Trenkler describes the "40 boxes of legal materials," the source of much of the evidence presented in his current petition, as having "been in possession of the various attorneys throughout the years." (Docket # 10, 3.) Therefore, even if Trenkler was diligent in reviewing these materials promptly upon receiving them, a fact on which the court makes no judgment, the prior possession of these materials by his counsel dooms his contention that evidence within these boxes is "newly discovered." See Wood, 487 F.3d at 5 ("[W]e are concerned less with what [petitioner's] counsel believed and more with what knowledge fairly may be imputed to him.").

requirements of the receiver and servo[7] used to construct the 1991 bomb would have exhausted the batteries used in the bomb in less than ten hours, thus impeaching the government's theory that Trenkler was responsible for placing and arming the bomb at a time well in excess of ten hours before it exploded. This ground fails for a number of reasons. First, Trenkler's counsel presented a version of this theory at trial, eliciting testimony from Trenkler's bomb expert that testing of similar components showed an operating time of 22 hours. (See Docket # 5, App. at 40-41; see also id. at 43-44 (cross-examination of ATF forensic chemist suggesting that the government had no explanation for how the bomb could have been armed as the government proposed without the batteries running down).) Second, the information that Trenkler describes as newly discovered by him, the operating current required by the Futaba receiver and servo and the capacity of the Duracell AA size alkaline batteries was discoverable through due diligence at the time of his trial. (See Docket # 5, ASF 8) ("Trenkler's trial counsel made no effort to inquire with Futaba on either the operating time of the Futaba receiver or the technical specifications to determine the operating window of the receiver.") Even if counsel's failure to obtain this information is not attributed to Trenkler, a delay of fourteen years in contacting Futaba does not meet the due diligence requirement of 28 U.S.C. § 2255(f)(4). Third, Trenkler's new calculations establishing a 9.375 hour operating window are incorrect. He erroneously subtracts the operating current of the servo at full load in milliamperes ("milliamps") from battery

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[7] In the context of this case, "servo" refers to an electro-mechanical device used to convert electrical commands to rotary or linear motion. See http://www.futaba-rc.com/servos/servos.html.

capacity measured in milliamp-hours.[8] While the servo apparently draws 660 milliamps at full load, it only need operate at full load long enough to trigger the bomb, a matter of a few seconds at most.[9] Trenkler's calculations subtract 660 milliamps from the battery's 960 milliamp-hour capacity, implicitly assuming that the servo operated at full load for a full hour before triggering the bomb. In actuality, even if the servo needed as long as five seconds to trigger the bomb, the battery would have required a remaining capacity of less than one milliamp-hour.[10] Thus, the operating window of the bomb was almost entirely set by the idle current draw of the receiver and servo. Using Trenkler's figures for both, the 960 milliamp-hour battery could operate the receiver and servo, drawing a total of 32 milliamps of idle current, for approximately 30 hours. This calculation is reasonably close to the 22 hours experimentally determined by Trenkler's bomb expert, particularly taking the battery's end-of-life discharge characteristics into

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[8] In order to properly subtract two physical quantities, the units of the items must match. Thus, one cannot subtract 60 seconds from 100 minutes to get a result of 40 minutes; rather, the 60 seconds must be converted to one minute by multiplying by the unit quantity (1 min / 60 sec) to get the proper result of 99 minutes. See generally The Free High School Science Texts: A Textbook for High School Students Studying Physics ¶¶ 1.5-1.8 (2003) (available at http://www.nongnu.org/fhsst/fhsstphy.pdf); Jonathan Cooper & Steve McKeever, A Model-driven Approach to Automatic Conversion of Physical Units, 39 Software Practice & Experience 4, 337-359 (2007). (Cf. Docket # 5, App. at 33 ¶ 2 (Trenkler's calculations multiplying hours times milliamps and incorrectly showing a result in milliamps rather than milliamp-hours).)

[9] When actuated, the servo tripped a toggle switch to trigger the bomb. The Futaba S148 model servo, identified by the ATF from the bomb remnants, rotates 60 degrees in less than a third of a second. See http://www.gpdealera.com/cgi-bin/wgainf100p.pgm?I=FUTM0710 (last visited Mar. 9, 2009). The servo only needed to operate long enough to move the toggle switch from the OFF to the ON position.

[10] 660 milliamps * 5 sec * (1 hour / 3600 sec) = .917 milliamp-hours

account.[11] Therefore, not only is the evidence of the power requirements of the receiver and servo not new, it adds nothing to the theory Trenkler presented to the jury in 1993 -- that he could not have placed and armed the bomb based on his expert's tests.

D. Ground Five: Recantation of Testimony by Shay Jr.

In the final ground presented to the First Circuit in his application for leave to file, Trenkler offers evidence that in 2006 his co-defendant, Shay Jr., recanted his former statements and now suggests that Trenkler had nothing to do with the bomb placed under Shay Sr.'s car. While this evidence is arguably new, it does not allege a constitutional violation and is not, therefore, a basis for vacating a sentence under 28 U.S.C. § 2255.

E. Ground Six: Recantation of Testimony by Coady

The final ground in his petition to this court, but not included in his application to the First Circuit, concerns Michael Coady ("Coady"), who testified at Trenkler's 1993 trial. Trenkler includes affidavits from his step-father and half-brother describing two conversations with Coady in 2001, in which Coady is claimed to have stated that "his trial testimony was substantially false and that, if he could be given immunity from prosecution for perjury, he would tell the truth about his acquaintance with Alfred

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[11] A battery's voltage drops over time as it discharges, with the 960 milliamp-hour capacity calculated at an end voltage of 0.8 volts per cell, down from an initial voltage of 1.5 volts. Therefore, the actual operating time would likely be shorter than 30 hours since, at some point, the voltage available would be too low to operate the receiver and/or the servo even if some current was still available at the lower voltage. See, e.g., Duracell Alkaline-Manganese Dioxide Technical Bulletin ¶ 5.1 (graph of discharge profile) (available at http://www.duracell.com/oem/Pdf/others/ATB-full.pdf).

Trenkler." (Docket # 5, App. 71; accord id. at 70.) It is unclear whether a federal petitioner who receives certification to file a second or successive motion is prohibited from advancing in support of the section 2255 motion additional grounds not presented to the court of appeals. The First Circuit's application for leave to file a second or successive petition instructs the applicant to "[s]tate concisely every ground on which you now claim that you are being held unlawfully."[12] But see Hazel v. United States, 303 F. Supp. 2d 753, 758 (E.D. Va. 2004) (concluding additional claims not certified by the circuit court may be addressed by the district court). Assuming, without deciding, that Trenkler may add grounds discovered after his application was certified, this ground was known long before Trenkler filed his application. Furthermore, his inability to obtain an affidavit from Coady recanting his trial testimony does not save the day. He still has not obtained such an affidavit. Trenkler may not rely on the lack of an affidavit in order to avoid the limitations period set by subsection 2255(f)(4), but then argue that the hearsay evidence he has possessed since 2001 is now adequate to state a habeas claim based on newly discovered evidence.

F. Previously Unasserted Claims: Failure to Disclose Witness Inducements and Speed Bumps at Chelsea Naval Hospital

In supplemental papers filed in this court after certification, Trenkler seeks to

[12] Application for Leave to File a Second or Successive Motion to Vacate, Set Aside or Correct Sentence by a Prisoner in Federal Custody, United States Court of Appeals for the First Circuit ¶ 10 (Rev. 11/02) (emphasis in original) (available at http://www.ca1.uscourts.gov/files/forms/2255ap.pdf).

add two more claims.[13] First, he contends that two government witnesses were rewarded for their testimony even though he claims the government stated that one witness would receive "no assistance" and that there was no "pre-existing deal" with the other. (Docket # 14, 5, 8.) In its automatic pretrial disclosures the government stated that the first witness, Donna Shea ("Shea"), could "have her husband's attorney call AUSA Kelly or Libby if she desired, but advised her that it was unlikely that her [incarcerated] husband would derive any benefit from her testifying before the grand jury." (Docket # 14, Ex. J, 3.) While it appears from the evidence provided by Trenkler that, after his trial, AUSA Kelly did contact the state court concerning Shea's husband with favorable results, this is not in conflict with the information given Trenkler. As to the second witness, William David Lindholm ("Lindholm"), Trenkler does not dispute that there was no pre-existing deal; he does contend that the witness testified he would not seek a deal in the future but promptly filed a Rule 35(b) motion for reduction of time on sentence after he testified. This, too, is evidence petitioner could have discovered through due diligence many years ago.[14] Thus, these new grounds are not only

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[13] Trenkler also complains in submissions to this court that the government destroyed the evidence in his case in late 2005, while, in his opinion, incorrectly asserting that "no collateral attack on Trenkler's judgment [was] pending or reasonably anticipated." (Docket # 8, 20.) In particular, he argues that the government was on notice at the time that he intended to challenge his life sentences as illegal under the law in force at the time he was sentenced. (See Docket # 14, 2.) While destruction of the evidence was likely improvident, given Trenkler's continuing and well-publicized fight against his conviction, the government's assertion that no collateral attack on the judgment was pending or anticipated was not factually incorrect.

[14] Indeed, Trenkler raised the issue of Lindholm's release a decade ago with this court in a motion for a new trial. In an unpublished 1998 opinion, the First Circuit concluded that "[t]he district court rightly observed that nothing in the record indicates

procedurally deficient as they were not presented for certification, but they are time-barred as well. However, I do consider these claims as part of the totality of the evidence under an "actual innocence" analysis, infra.

Finally, Trenkler asserts that the government failed to disclose the existence in October 1991 of speed bumps at the Chelsea Naval Hospital ("Hospital"). According to Trenkler, disclosure of these bumps would have impeached the testimony of Shay Sr. who claimed to have visited his uncle at the Hospital on that day, but that he did not "have a recollection of driving over any heavy bumps or railroad tracks" or "hitting any speed bumps at high speeds that morning." (Docket # 21, Ex. 3.) This, he argues, would have called into question the government's theory that the bomb, which it says was dislodged from the underside of Shay Sr.'s car as he drove into his driveway after the trip to the Hospital, had been attached to the car prior to that trip. While Trenkler describes this evidence as "recently discovered," there is no question that this claim is time-barred. (Docket # 21, 1.) A visit to the Hospital at the time of the trial would have revealed the existence of the speed bumps. See Wood, 487 F.3d at 5. Assuming the government was even aware of this evidence, its failure to provide it to Trenkler did not prevent him from discovering it on his own. Id. at 7.

Although these late added reasons are not properly before me, I examine them as part of the totality of the evidence for consideration of petitioner's actual innocence.

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that Lindholm perjured himself or that his early release from prison was the result of a deal made prior to the trial that the government failed to disclose." United States v. Trenkler, 134 F.3d 361, 1998 WL 10265, at * 4 (1st Cir. 1998) (unpublished).

IV. "Actual Innocence"

The First Circuit has not foreclosed the possibility that a petitioner who can show actual innocence "may have his otherwise barred constitutional claim considered on the merits." Barreto-Barreto v. United States, 551 F.3d 95, 102 (1st Cir. 2008) (internal quotation marks and citations omitted). To show actual innocence, a petitioner must "show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Gunter v. Maloney, 291 F.3d 74, 83 (1st Cir. 2002) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)). In evaluating this standard, the habeas court must "consider all the evidence old and new, incriminating and exculpatory" and "make a probabilistic determination about what reasonable, properly instructed jurors would do." House v. Bell, 547 U.S. 518, 538 (2006) (internal quotation marks and citation omitted). "The Supreme Court has emphasized that the actual innocence exception is very narrow, reserved for truly exceptional cases." Walker v. Russo, 506 F.3d 19, 21 (1st Cir. 2007). Trenkler has failed to make the requisite showing.

Even if the fingerprint evidence matched someone other than Trenkler, that does not rule him out as the source of the bomb. The identification of Radio Shack as the source of the toggle switch tied Shay Jr. to the parts used to construct the bomb and thus, according to Trenkler, formed the overt act necessary to charge Shay Jr. with conspiracy. Trenkler argues that without an overt act by Shay Jr., his co-conspirator could not have been convicted of conspiracy putting his conviction in doubt. This argument fails on two grounds. First, the conspiracy statute only requires any one of

the co-conspirators to commit an overt act in furtherance of the conspiracy (see 18 U.S.C. § 371 (1993)) and, second, "'actual innocence' requires the petitioner to show 'factual innocence, not mere legal insufficiency.'" Barreto-Barreto, 551 F.3d at 100 (quoting Bousley v. United States, 523 U.S. 614, 623 (1998)). Whether Shay Jr. would have been convicted on the new evidence is immaterial to Trenkler's innocence.

In addition, even if Trenkler proved that the switch used to construct the bomb was not from Radio Shack, it would not foreclose the jury from concluding that Trenkler built the bomb. Similarly, even if the evidence of speed bumps had been presented, the jury could still have concluded that the bomb had been placed under Shay Sr.'s car before he drove to the Hospital, but that it was not dislodged during the drive. Finally, as discussed supra, the operating time of the bomb was previously presented and considered by the jury at Trenkler's 1993 trial.

As to the witness testimony, even if Coady was lying at trial, his testimony only reinforced the government's contention that Trenkler had built remote controlled bombs in the past. Coady testified that he saw a toy car remote control and magnets in Trenkler's car and that Trenkler exploded a device in the Blue Hills area of Massachusetts. Even without this evidence, Trenkler stipulated to having built and exploded a remote controlled bomb for Shea in 1986. See Trenkler, 61 F.3d at 48. Thus, there was evidence that the Roslindale bomb had been constructed by Trenkler, even without Coady's testimony. See id. at 55-56. The alleged failure of the government to disclose deals with the two other witnesses goes only to their credibility. The fact that they received benefits from testifying, even if disclosed to the jury, is not

enough to conclude that no reasonable jury would believe their testimony.

That leaves Shay Jr.'s recantation that Trenkler had nothing to do with the Roslindale bomb. Here, Trenkler is hampered not only by the general skepticism accorded recanted testimony, but by the unreliability of this specific witness as well. See, e.g., United States v. Connolly, 504 F.3d 206, 214 (1st Cir. 2007); United States v. Grey Bear, 116 F.3d 349, 350 (8th Cir. 1997). The basis for Trenkler's first section 2255 petition was his counsel's failure to offer expert testimony "that Shay [Jr.] suffered from a mental disorder that caused him to tell self-aggrandizing lies, making his various incriminating statements unreliable." Trenkler v. United States, 268 F.3d 16, 18 (1st Cir. 2001). Indeed, Shay Jr. himself refers to "[his] lying disorder" in a 2007 affidavit now claiming that he and Trenkler are innocent, despite his 1998 guilty plea. (Docket # 5, App. at 53.) Thus, Shay Jr.'s current recantation possesses little credibility. (See also Docket No. 92-cr-10369-RWZ # 708 (judgment of the First Circuit allowing the instant petition and noting "if established, [the forensic evidence] could be substantial ([the] exculpatory statements by a co-defendant are less impressive)".)

Finally, as the First Circuit noted in Trenkler's direct appeal:

> substantial evidence, beyond Trenkler's participation in the [1986] bombing, supported a finding that he had built the Roslindale bomb. Principally, David Lindholm convincingly testified that, in fact, Trenkler had actually admitted building the Roslindale bomb. Other admissions by Trenkler made to various law enforcement officers inferentially corroborated Lindholm's testimony, specifically Trenkler's sketch of the Roslindale bomb, drawn shortly after the explosion and conspicuously featuring two electrical blasting caps. Moreover, Trenkler's arrogant assertion to Agent Leahy that, "if we did it, then only we know about it ... how will you ever find out ... if neither one of us talk [ ]?" provided further corroboration. Additional support could be inferred from the ample evidence the government adduced establishing

> Trenkler's relationship with Shay Jr. and his knowledge of both electronics and explosives.

Trenkler, 61 F.3d at 60. With the exception of the possible impeachment of Lindholm's testimony, none of the evidence Trenkler advances here directly negates any of these facts, cf. House, 547 U.S. at 554, and it is inadequate to show that, more likely than not, "no reasonable juror would have convicted him in the light of the new evidence." Schlup, 513 U.S. at 327.

V. Conclusion

As discussed supra, with the exception of Shay Jr.'s recantation, each of the grounds proffered by Trenkler in the instant petition is barred by the one-year period of limitations of 28 U.S.C. § 2255(f) and is therefore subject to dismissal. Shay Jr.'s recantation, while not barred by the limitations period, does not allege a "violation of the Constitution or laws of the United States" and thus cannot form the basis for relief under the statute. 28 U.S.C. § 2255(a). Therefore, because Trenkler's procedural default is not otherwise excused, his petition must be denied. See Fielder, 379 F.3d at 122.

Accordingly, the petition for relief under 28 U.S.C. § 2255 is denied. Judgment may be entered accordingly.

March 16, 2009
DATE

/s/Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
For the First Circuit

No. 09-1559

ALFRED W. TRENKLER

Petitioner - Appellant

v.

UNITED STATES

Respondent - Appellee

Before

Boudin, Lipez and Thompson,
Circuit Judges.

JUDGMENT

Entered: June 8, 2010

Appellant Alfred Trenkler challenges the district court's denial of his request for relief under a second § 2255 petition. Trenkler was convicted for his part in a fatal bombing with a device intended for the vehicle of a co-conspirator's father. He claims that newly-discovered evidence entitles him to exoneration or a new trial. The district court disagreed, and we conclude that its reasoning was sound. New evidence does not by itself permit a new trial; rather, a showing of very powerful new evidence meeting the standard of section 2255(h) can permit a second petition which must then itself establish a violation of law, typically, one of the constitutional errors that is cognizable on habeas.

The district court took the view that the existence of fingerprint evidence on adhesive tape was known to Trenkler's defense expert at the time of trial, so it is imputable to Trenkler and his counsel regardless of Trenkler's actual or subjective awareness. We need not resolve this interesting question because even if we assume that a fingerprint did exist on the tape, nothing whatsoever indicates that it would tend to exculpate Trenkler, and the only obvious constitutional basis for a claim--even assuming a second petition were permissible under section 2255(h)--is Brady v. Maryland, 373 U.S. 83 (1963), which requires a showing of evidence substantially favorable to the defendant. United States v. Bagley, 473 U.S. 667, 682 (1985) (Brady claimant must show "a

reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

The remaining issues are also of little help to Trenkler. The existence of fingerprint evidence on the alleged target vehicle was known to Trenkler's counsel and is thus imputable. The prosecution's mere silence cannot be reasonably construed as a deceptive or misleading representation about the nature or import of the unidentified prints. Discrepancies in the evidence about technical features of the explosive device were discoverable by the defense at the time of trial, so new realizations on the part of Trenkler as a result of *post hoc* review of the litigation files will not satisfy § 2255(h)(1). Trenkler's impugnment of testimonial trial evidence, based on doubtful claims of recantation and uncorroborated suspicions of inducement, can fare no better. Finally, whatever significance might attach to evidence of speed bumps in the travel path of the alleged target vehicle, it, too, was a matter discoverable at the time of trial, and is not amenable to § 2255(h)(1).

The district court's estimate of Trenkler's "actual innocence" claim is also sound.

The judgment is **affirmed**.

By the Court:

/s/ Margaret Carter, Clerk

cc:

Alfred W. Trenkler
Randall E. Kromm
James Francis Lang