



UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

United States of America,
Plaintiff

v.

Thomas A. Shay,
Alfred W. Trenkler,
Defendants

Criminal No.: 92-10369-Z

AFFIDAVIT OF TERRY PHILIP SEGAL IN SUPPORT OF
DEFENDANT'S MOTION FOR SPECIFIC EXCULPATORY EVIDENCE
AND/OR EVIDENCE "MATERIAL TO THE PREPARATION OF THE DEFENSE"
PURSUANT TO RULES 16(a)(1)(C) AND 16(a)(1)(D)

I, Terry Philip Segal, hereby depose and say as follows:

1. In my judgment, the below specific material which I have requested and the Magistrate has denied me is exculpatory and/or "material to the preparation of the defense" within the meaning of Rule 16(a)(1)(C) and 16(a)(1)(D).

2. Specifically, I list why each specific request should be granted:

Request 3: (Jan. 6th Motion): All the reports, notes and writings of Larry McCune, an explosives enforcement expert with ATF, made in connection with the investigation of this case. More particularly, any writings or material of Mr. McCune which relate in any way to the material discussed by Special Agent Jeff S. Kerr at paragraphs 33-35 of his "Second Affidavit" executed before the United States District Court on March 12, 1992.

To date, all the prosecution has shown me is an empty box with a toggle switch. Mr. McCune is an ATF explosive bomb technician who visited the scene, and reconstructed a device to determine the

kind of bomb, how the 1991 bomb functioned, etc. It is my understanding Mr. McCune, pursuant to ATF policy, has written or will write a report on how he reconstructed the 1991 bomb, the components used in said bomb, and how it functioned. As is clear from paragraphs 33-35 of Agent Kerr's wire tap application (Exhibit C), Mr. McCune will also attempt to testify on the similarities between the 1991 bomb and the 1986 artillery simulator Mr. Trenkler placed under a truck. Clearly, the 1991 device contains a number of items not used in the 1986 device. Additionally, in order to not only compare the two devices, but also adequately prepare a defense relating to the 1991 bomb, I am entitled to a written report from Mr. McCune on how he reconstructed the device, how it functioned, components used, etc.

Request 6: All ATF profiling reports, including said reports involving Thomas Shay, Jr., defendant, and Thomas Shay, Sr.

These reports would show whether the government believed Thomas Shay, Jr. and/or Sr. are capable of making the 1991 bomb.

Request 12: All diagrams of circuits and photos of the explosive device which were circulated to members of the International Association of Bomb Technicians and Investigators.

This material would show how the 1991 bomb worked electronically in contrast to the 1986 non-electric device which the prosecution will try to bring in under Rule 404(b). Such material is clearly exculpatory on the 404(b) issue. ATF sent a flyer describing the 1991 device to members of the International Association of Bomb Technicians and Investigators. I believe said flyer indicated how the 1991 bomb functioned, how it went off, how it was wired. Particularly in light of the Rule 404(b) issue here,

this material is essential so I can adequately prepare for the Rule 404(b) hearing to show dissimilarities between the 1986 and 1991 devices.

Request 18: The specific efforts the government and BPD made to corroborate Shay's "proffer" of October 6 and 9, 1992. More particularly, what aspects was ATF or BPD able to corroborate and what aspects were determined to be untrue.

Request 19: Whether ATF or the BPD was able to corroborate any aspects of the Shay "proffer" as it related to implicating Trenkler, what efforts were made to attempt to corroborate said aspects, with what results.

Request 20: The basis for the statement in the November 12, 1992, letter to Shay's counsel that, "I am unable to conclude he has been entirely truthful and cooperative concerning the offense under investigation."

According to Paul Kelly's memorandum of October 14, 1992, on October 6 and 9, 1992, co-defendant Thomas Shay, Jr. gave the government a detailed proffer which deeply implicated defendant Trenkler in the making of the bomb which killed Officer Hurley. At a hearing, I would request the opportunity to submit, in camera, said proffer to the Court. In his memo of November 14, 1992, Mr. Kelly states he advised Shay "we had been unable to corroborate any aspects of his 'story'".

Clearly, every unsuccessful government effort to corroborate Shay's Oct. 6, 9, 1992 proffer is exculpatory, and not neutral or inculpatory evidence,¹ or evidence available to the defense from

¹See U.S. v. Polowichak, 783 F.2d 410, 414 (4th Cir. 1986).

other sources,² or evidence the defendant already possesses³ or evidence the prosecutor does not possess.⁴

Request 24: The dates on the reports turned over pursuant to the Automatic Discovery Order.

When the government learned the information and when the reports were written is important to the defense in connection, inter alia, with its motions challenging the probable cause relating to search warrants and wire tap authorization in this case.

Request 26: Names and addresses of all witnesses listed in the 6300 pages of automatic discovery.

Defendant is detained pending trial, and there has never been an issue of witness intimidation. Each side is entitled to equal access to witnesses. Failure to provide this information deprives defendant of an opportunity to speak to witnesses who help his case.

Request 28: The grand jury testimony and interview notes, statements, etc., of all persons who were either interviewed or testified before the grand jury and whom the government does not plan to call to testify at trial.

The prosecution should not be the judge of what material is exculpatory. According to the press, the government spent 20,000 man hours on this case, and conducted 500 interviews. Defense counsel should have the opportunity to review this material so he,

²Morgan v. Salamack, 735 F.2d 354, 358 (2d Cir. 1984).

³See U.S. v. Hicks, 848 F.2d 1, 3-4 (1st Cir. 1988).

⁴See U.S. v. Kraemer, 810 F.2d 173, 178 (8th Cir. 1987).

not the prosecutor, can determine what is exculpatory and/or material to his defense.

Request 36: The identification of any witness who was interviewed by the government in the course of its investigation of this case, but whom the government chose not to present before the grand jury, for any reason, including but not limited to the reason that the information provided by the witness did not comport with other information in the government's possession.

The prosecution should not be the judge of what material is exculpatory. According to the press, the government spent 20,000 man hours on this case, and conducted 500 interviews. Defense counsel should have the opportunity to review this material so he, not the prosecutor, can determine what is exculpatory and/or material to his defense.

Request 38: Any information which may show or tend to show that the defendant was not involved in the allegedly illegal activity that is charged in the indictment in this case or that may assist in the preparation or presentation of his defense to the charges:

- a. any statements Alfred W. Trenkler made to others consistent with his claim of innocence; and
- b. information concerning the circumstances that led any government witness to become a government witness, including but not limited to information as to whether or not he was confronted with evidence of his criminal conduct, when and under what circumstances he decided to cooperate, correspondence between the witnesses (or their attorneys) and the government, memoranda on the subject, and the like.

Clearly, defendant is entitled under Brady to all statements he made to others consistent with his claim of innocence.

Terry Philip Segal
Terry Philip Segal

Signed and sworn to, before me, this 2nd day of February,
1993.

Robert B Edwards
Notary Public
mce 11-12-94