



UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 92-10369-Z

UNITED STATES OF AMERICA

V.

THOMAS A. SHAY
ALFRED W. TRENKLER

ORDER RE:
MOTION FOR RECONSIDERATION OF SELECTED PORTIONS OF
THIS COURT'S JANUARY 26, 1993, DISCOVERY ORDERS
(NO DOCKET ENTRY NUMBER ASSIGNED)

February 15, 1993

BOWLER, U.S.M.J.

Defendant Alfred W. Trenkler ("defendant") moves for partial reconsideration of this court's Order of January 26, 1993. The government filed a response and, on February 12, 1993, this court held a hearing on the motion for reconsideration.

Defendant seeks production of certain material identified in Exhibits A and B of the motion for reconsideration. Defendant asserts that the requested material is exculpatory and/or material with respect to the preparation of his defense within the meaning of Rules 16(a)(1)(C) and (a)(1)(D), Fed. R. Crim. P. Turning to the particular requests noted in Exhibits A and B, this court makes the following rulings.

EXHIBIT A

1. Request 3: Defendant seeks all reports, notes and writings of Larry McCune, an explosives enforcement expert with

ATF. The government represents there are no such reports. When and if Larry McCune prepares a report, the government is **ORDERED** to provide the report in accordance with Rule 16(a)(1)(C), Fed. R. Crim. P., regarding documents and tangible things and with Rule 16(a)(1)(D), Fed. R. Crim. P., regarding scientific reports or experiments. See Rule 16(c). Fed. R. Crim. P.

2. Request 6: Defendant seeks all ATF profiling reports of likely suspects and, in particular, any personal histories. The government represents that the requested profile reports do not exist and that it already provided defendant with a government memorandum requesting notification from ATF in the event defendant Thomas Shay, Jr. and/or Thomas Shay, Sr. leave the country.

As stated in open court, the government is **ORDERED** to inquire further as to whether any personal histories exist and, if so, produce such histories in accordance with Rule 16(a)(1)(C), Fed. R. Crim. P. The government is further directed to disclose all exculpatory material within the meaning of LR. 116.1(A)(5) and the cases cited therein.

3. Request 12: Defendant seeks all diagrams of circuits and photographs of the explosive device circulated to members of the International Association of Bomb Technicians and Investigators. The request is **MOOT** inasmuch as the government represents it has provided the requested material. To the extent

it has not provided any such circuits or photographs, it is ORDERED to provide defendant with the requested circuits or photographs as required under Rule 16(a)(1)(C), Fed. R. Crim. P. To the extent such material is exculpatory within the meaning of LR. 116.1(A)(5) and the cases cited therein, the government is ORDERED to produce the requested material.

4. Requests 18, 19 and 20: Defendant seeks certain allegedly exculpatory documents reflecting efforts made by the government to corroborate a proffer made by defendant Thomas Shay, Jr. on October 6 and 9, 1992. The proffer allegedly implicates defendant in the making of the explosive device. Defendant seeks the requested materials as either exculpatory material and/or impeachment material with respect to defendant Thomas Shay, Jr.

To the extent the government intends to use the requested material as evidence, it is ORDERED to produce the requested material as required under Rule 16(a)(1)(C), Fed. R. Crim. P. The government is further ORDERED to comply with Rule 16(a)(1)(C), Fed. R. Crim. P., to the extent it has not already done so.

The government is also ORDERED to produce the materials to the extent such materials are exculpatory within the meaning of LR. 116.1(A)(5) and the cases cited therein. See Brady v. Maryland, 373 U.S. 83 (1963); Napue v. Illinois, 360 U.S. 264, 269 (1959) (false testimony regarding witness' credibility);

Quimette v. Moran, 942 F.2d 1, 9 (1st Cir. 1991) (discussing Brady and its progeny and finding due process violation by prosecutor's failure to disclose criminal record of key witness); United States v. Barshov, 733 F.2d 842, 848 (11th Cir. 1984) (discussing tax returns of key witness as exculpatory information). Having heard the arguments of counsel, however, it is the opinion of this court that the requested information is not exculpatory at this point in time.

The requests are otherwise **ALLOWED** to the extent that the requested information concerns prospective trial witnesses and is admissible pursuant to Fed. R. Evid. 608, 609 or other applicable rule of law. Such information need not be produced unless and until defendant Thomas Shay, Jr., testifies at trial.

5. Request 24: Defendant seeks information with respect to a notation crossed out on the top right hand corner of an ATF report which the government has already supplied to defendant. Defendant waives his request with respect to the notations crossed out on the bottom right hand corner of the ATF report at issue.

As indicated at the February 12, 1993, hearing, the pertinent notation reflects an internal numbering system utilized by the government and, consequently, is not relevant to the case at bar. Moreover, Rule 16(a)(2), Fed. R. Crim. P., generally prohibits disclosure of "internal government documents made by the attorney for the government or other government agents in

connection with the investigation or prosecution of the case."
The request is therefore DENIED.

6. Request 26: DENIED as to names and addresses of witnesses. See United States v. Reis, 788 F.2d 54, 58 (1st Cir. 1986); United States v. Pelton, 578 F.2d 701, 708 (8th Cir. 1978) ("Discovery of prospective witnesses is not required under Fed. R. Crim. P. 16(a)"). To the extent the request concerns prospective trial witnesses, that information is governed by the Jencks Act and shall be produced in accordance therewith. In addition, the government is not obligated to disclose names and addresses of persons that have knowledge of the case without a showing of materiality and reasonableness. United States v. Leta, 60 F.R.D. 127, 130-31 (M.D. Pa. 1973). However, to the extent that the defendant seeks names and addresses of individuals who, to the knowledge of the government, possess relevant knowledge which may be exculpatory under controlling law, the motion is ALLOWED. See generally, Brady v. Maryland, 373 U.S. 83 (1963); United States v. Agurs, 427 U.S. 97 (1976); and Giglio v. United States, 405 U.S. 150 (1972); see also Quimette v. Moran, 942 F.2d 1 (1st Cir. 1991) and LR. 116.1. In the alternative, the government may make the person available for an interview rather than providing the address.

To the extent the request concerns expert witnesses, it is ALLOWED but only to the extent it concerns expert reports pursuant to Fed. R. Crim. P. 16(a)(1)(D). The request is

otherwise DENIED.

7. Requests 28, 36 and 38: Defendant seeks: (1) grand jury testimony and interview notes of persons who testified before the grand jury but whom the government does not intend to call as witnesses at trial; (2) identification of individuals whose testimony was not presented to the grand jury but who the government nevertheless interviewed in connection with this case; and (3) information which may tend to show defendant's noninvolvement in the alleged illegal activity charged in the Indictment.

The requests are DENIED inasmuch as defendant has made no showing of a particularized need for disclosure of this information at this time. Rule 6(e)(2), Fed. R. Crim. P., generally prohibits disclosure of matters occurring before the grand jury. Defendant is, however, entitled to review "grand jury testimony once the government has used [the transcript] to cross-examine" a witness. United States v. McMahon, 938 F.2d 1501 (1st Cir. 1991) (government's decision to use transcript to impeach witness created particularized need).

To the extent that statements made to persons not known to be government agents are not required to be produced under Fed. R. Crim. P. 16(a)(1)(A), the request is DENIED. To the extent the information is exculpatory in nature, it shall be produced pursuant to LR. 116.1 and the cases cited therein.

EXHIBIT B

1. Requests 1 and 2: Defendant seeks certain reports generated within the ATF Explosive Technical Branch and mockup charts with respect to the functioning of the explosive device. The government is **ORDERED** to make the requested material available to the extent it exists as required under Rule 16(a)(1)(C), Fed. R. Crim. P. In the event such reports and/or charts are prepared at a future point in time, the government is under a continuing obligation to disclose previously requested material under Rule 16(c), Fed. R. Crim. P. The government is directed to disclose all exculpatory evidence as required under LR. 116.1(A)(5) and the cases cited therein.

3. Request 3: **MOOT**.

4. Requests 6 and 7: **ALLOWED** to the extent detailed in Requests 18, 19 and 20 supra. Defendant requests allegedly exculpatory material with respect to defendant's whereabouts on October 18, 1991. According to the October 6 and 9, 1992, proffer by defendant Thomas A. Shay, Jr., defendant purportedly purchased certain items at a Radio Shack store in connection with the explosive device. Having heard the arguments made by respective counsel, this court is of the opinion that such information is not exculpatory within the meaning of LR. 116.1(A)(5) and the cases cited therein. Moreover, as stated in its response, the government fully understands its obligation to

produce all exculpatory material.

5. Request 8: Defendant seeks material "in the possession of BPD, ATF or U.S. Attorney reflecting Radio Shack . . . purchases by defendant from 1988-1991." The government represents it does not have possession, custody or control of the requested material. The request is therefore DENIED. The government, however, is under a continuing duty to provide the requested information in the event such material comes within its possession, custody or control in the future as required under Rule 16(c), Fed. R. Crim. P.


MARIANNE B. BOWLER
United States Magistrate Judge