

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

vs.

THOMAS A. SHAY and  
ALFRED W. TRENKLER

Criminal No.:  
92-10369-Z

MEMORANDUM IN SUPPORT OF DEFENDANT, ALFRED W. TRENKLER'S,  
MOTION TO REQUIRE THE GOVERNMENT TO PRESENT A  
PROFFER OF PROOF ON CO-CONSPIRATOR DECLARATIONS

Defendant, Alfred W. Trenkler, requests this Court to require the government to present a proffer of proof on the co-conspirator declarations and conspiracy evidence it intends to offer at trial. The advantage of requiring the government to present a proffer in this case is two-fold. First, it will avoid a mistrial if this Court rules against the government when making its Petrozziello ruling, and second, it will promote judicial economy.

It is anticipated that the government will argue that the use of this procedure will not promote judicial economy and therefore is unwarranted in this case. However, as will be explained further below, it is within this Court's discretion to permit such a proffer, and requiring the government to present a proffer on the co-conspirator declarations and conspiracy evidence in this case will likely either avoid a trial altogether, or at least avoid a mistrial should the trial go forward.

In United States v. Andrus, 775 F.2d 825, 835 (1985) (Marshall, J., sitting by designation), the Seventh Circuit discussed favorably an alternative procedure to the procedure set forth in United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977) and United States v. Ciampaglia, 628 F.2d 632, 638 (1980) to determine preliminarily whether the government can meet its burden under these cases.<sup>1</sup> The Seventh Circuit authorized requiring the government to present a proffer of proof on the co-conspirator declarations and the conspiracy evidence it will offer at trial prior to trial.

In Andrus the Seventh Circuit noted that this procedure has the advantage of economy in that witnesses will not be required and the court does not have to spend an excessive amount of time making its determination. More importantly, if the government fails in its burden, this Court can avoid declaring a mistrial following the completion of an estimated six (6) week trial.

The use of this proffer procedure is within this Court's discretion. See Fed. R. Evid. 104(a); Ciampaglia supra at 638, n. 3 (permitting judges to use alternative procedures pursuant to Rule 104 to determine admissibility under Rule 801). By utilizing the procedure permitted in Andrus in this case, this Court can decide

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<sup>1</sup>In the Seventh Circuit the case of United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978) established the standard for admission of statements under Fed. R. E. 801(d)(2)(E) by quoting and adopting the standard set forth in Petrozziello. Id. at 1134.

preliminarily whether the requirements of Petrozziello and Ciampaglia will be met if the government proves at trial what it proffers.

There is precedent in this Circuit permitting this procedure. See United States v. Bernal, 884 F.2d 1518, 1522 (1989) (before the trial began, the court required the government to make an offer of proof and the court made the required Petrozziello ruling). See also United States v. Anguilo, 897 F.2d 1169, 1202 (1990) (to expedite the trial, the government drafted a list of statements it was seeking to introduce against defendant and after argument, the court issued a written Petrozziello ruling).

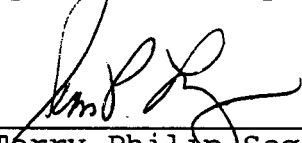
This proffer procedure is particularly appropriate in this case where 1) the defendants' trials have been severed, 2) there is no direct evidence that either defendant was a member of the conspiracy charged, and 3) the government is required to prove by a preponderance of the evidence that a conspiracy existed, that the defendants were members of the conspiracy at the time of any statement to be introduced was made, and that the declaration was in furtherance of the purposes of the conspiracy prior to the introduction of any co-conspirator statements. See Ciampaglia supra at 638.

Moreover, in the event the government can not sustain its burden under Petrozziello by means of a proffer, it is highly unlikely that it will be able to do so at trial. Thus, before beginning an estimated six (6) week trial, the policy of judicial economy strongly supports a proffer and preliminary determination

at the outset on whether the government can meet its burden. Clearly, this procedure is preferable to a mistrial declared after a lengthy and protracted trial.

For these reasons, Defendant Alfred W. Trenkler respectfully requests this Court to require the government to present a proffer of proof on the co-conspirator declarations and the conspiracy evidence it intends to offer at trial prior to the trial of this case.

Respectfully submitted,  
For the Defendant,  
ALFRED W. TRENKLER,  
By his attorneys,



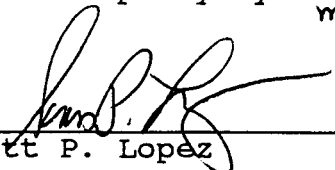
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Dated: June 23, 1993

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the above document was served upon the attorney of record for each party by messenger on June , 1993. MAIL SL



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Scott P. Lopez