

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)	
)	
)	
v.)	Criminal No. 92-10369-Z
)	
ALFRED W. TRENKLER)	
)	

**GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION
TO CALL ASSISTANT U.S. ATTORNEY PAUL KELLY
AS A DEFENSE WITNESS AT TRIAL**

Alfred W. Trenkler ("Trenkler") defendant, has moved to be granted authority by the Court to call Assistant U.S. Attorney ("AUSA") Paul Kelly as a witness at trial.¹ Trenkler asserts that AUSA Kelly is in a position to testify concerning prior inconsistent statements by Thomas A. Shay ("Shay Jr."), which may arguably be exculpatory to Trenkler.

I. FACTUAL BACKGROUND

Shay Jr. placed two unsolicited collect telephone calls to AUSA Kelly on April 15 and April 16. AUSA Kelly wrote to Attorney William McPhee, who was then representing Shay Jr. on an unrelated state court matter, and informed him of the two calls. See letter dated April 20, 1992 (attached to Defendant's motion). The only other telephone conversation which AUSA Kelly recalls having with Shay Jr. was on June 9, 1992, when Shay Jr. called to

¹ The defendant's motion does not seek AUSA Kelly's disqualification or withdrawal from prosecuting the case, and -- even if the Court were to permit Trenkler to call AUSA Kelly as a defense witness -- the disciplinary rules do not appear to require same. DR 5-102. The government has no reason to believe that, if called as a witness, AUSA Kelly's testimony "is or may be prejudicial" to the United States. DR 5-102(B).

say that Attorney McPhee was no longer his attorney. AUSA Kelly wrote to McPhee the following day, June 10, and informed him of this call. Exhibit "A". Contrary to Trenkler's suggestion, there were no other calls.

In early October, 1992, Shay Jr., through his successor counsel, Jefferson Boone, approached the U.S. Attorney's Office about giving a proffer. Since Trenkler's motion misstates the terms of the proffer letter that was executed at that time, a copy is attached hereto. Exhibit "B."

Shay Jr. provided information to the government during three proffer sessions, on October 6, October 9 and November 9, 1992. The October 6 and October 9 sessions were attended by AUSA Kelly, Attorney Jefferson Boone, and Special Agents Jeffrey Kerr and Thomas D'Ambrosio of ATF. The November 9 session was attended by AUSA Kelly, Attorney Frank O'Rourke (who was also representing Shay Jr. at the time) and Special Agent Jeffrey Kerr. AUSA Kelly memorialized the November 9 meeting in a written memorandum the following day. Exhibit "C".

AUSA Kelly wrote to Shay Jr.'s two attorneys, Boone and O'Rourke, on November 12, 1992 and informed them of his expectation that Shay Jr. would soon be indicted. See letter dated November 12, 1992 (attached to Defendant's motion).

On December 15, 1992, AUSA Kelly -- at the request of Shay Jr. -- met with Shay Jr. and his counsel, Mr. O'Rourke. Attorney O'Rourke was present throughout the entire meeting. AUSA Kelly memorialized this meeting in a brief memorandum a couple of weeks later, principally for the benefit of Attorney Nancy Gertner who

had only recently been appointed to represent Shay Jr. Exhibit "D".

II. ARGUMENT

There appear to be three insurmountable obstacles to Trenkler's motion. First, other than the three telephone calls (the substance of which may be stipulated to), other agents and/or defense attorneys attended all meetings between Shay Jr. and AUSA Kelly. These witnesses should be readily available to testify as to what transpired. Second, Shay Jr.'s alleged "prior inconsistent statements" are inadmissible hearsay unless Trenkler can point to an exception to the hearsay rule which otherwise controls. Third, AUSA Kelly's memorandum of November 10, 1992 is also hearsay, and is not admissible by the defense under Fed. R. Evid. 608(a) as opinion evidence concerning Shay Jr.'s character for truthfulness. See e.g., United States v. Dotson, 799 F.2d 189, 193-94 (5th Cir. 1986) (fact that one has investigated a defendant, has known the defendant, or has had minimal contact with defendant's witnesses, is not a sufficiently reliable basis for witness to offer an opinion concerning the defendant's character for untruthfulness).

In short, there is no basis in law in fact for an allowance of Trenkler's motion.

III. CONCLUSION

Defendant's motion to call AUSA Paul Kelly as a witness at trial should be denied.

Respectfully submitted,

A. JOHN PAPPALARDO
United States Attorney

By:



PAUL V. KELLY
Assistant U.S. Attorney



FRANK A. LIBBY, JR.
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

Suffolk, ss.

Boston, Massachusetts
September 17, 1993

I, PAUL V. KELLY, Assistant U.S. Attorney, do hereby certify that I have served the copy of the foregoing by first-class mail, to Terry P. Segal, Esq., Segal & Feinberg, 210 Commercial St., Boston, MA 02109.



PAUL V. KELLY
Assistant U.S. Attorney



United States Attorney
District of Massachusetts

1107 J.W. McCormack Post Office and Courthouse
Boston, Massachusetts 02109

June 10, 1992

By Telefax

William C. McPhee, Esquire
21 McGrath Highway, Suite 403
P.O. Box 229
Quincy, MA 02269

Re: Thomas A. Shay

Dear Bill:

Your client called me yesterday and informed me that you no longer represented him. Please confirm.

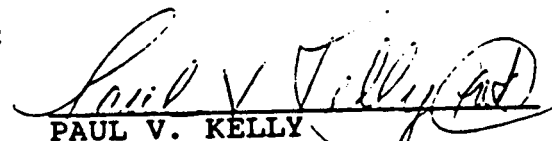
Obviously, some arrangement will need to be made to obtain court-appointed counsel for Mr. Shay on his pending matters.

Call me at your earliest convenience. Telephone 223-4274, pager 473-2417.

Very truly yours,

A. JOHN PAPPALARDO
United States Attorney

By:


PAUL V. KELLY
Assistant U.S. Attorney





U.S. Department of Justice

*United States Attorney
District of Massachusetts*

*1107 J.W. McCormack Post Office and Courthouse
Boston, Massachusetts 02109*

October 6, 1992

Jefferson W. Boone, Esquire
Boone & Henkoff
138 Brighton Avenue
Allston, MA 02134

Re: Thomas A. Shay

Dear Jeff:

This letter will confirm our telephone conversation of yesterday. It is my understanding that your client, Thomas A. Shay, has now expressed a willingness to speak with federal agents investigating the death of Boston Police Officer Jerry Hurley.

You explained to me that Mr. Shay, while possessing information which is relevant to our investigation, denies any criminal intent or direct knowledge of the activities leading up to officer Hurley's tragic death. You further explained that Mr. Shay recognizes that he may bear some responsibility as an accessory after the fact or for obstruction of justice, and that he desires an outcome of no more than three (3) years incarceration in a minimum security setting or hospital environment.

As I explained, the U.S. Attorney must approve all plea agreements. This office is unable to propose any final plea offers until after it has conducted a full proffer session with a defendant or subject and (1) is satisfied that the person is being truthful and candid, and (2) fully understands what role, if any, the person played in the alleged offense. If, after talking with Mr. Shay, we are satisfied that he has been entirely truthful and cooperative with us, and that his role is as you described, I believe that we will be able to arrange an outcome in or about the range desired by Mr. Shay. If, however, his role was greater and more involved than that described, we obviously will need to have further discussions with you concerning available sentencing options. Moreover, I have informed you, based on my ongoing discussions with representatives of the Suffolk County District Attorney's Office and the Boston Police Department, that in the event that federal charges are brought against him, there will be no state



prosecution of Mr. Shay arising out of the facts or circumstances surrounding the death of officer Hurley. A truthful proffer session is the required and essential starting point.

The terms under which the contemplated proffer will be received are as follows: No statements made or information provided by Mr. Shay will be used directly against him, except for purposes of cross-examination and impeachment should he be a witness in any proceeding and offer testimony or evidence materially different from any statements made or information provided during the proffer, or in a prosecution based on false statements made or false information provided during the proffer.


The foregoing reflects the present agreement between the government and Mr. Shay. It is understood that the government incurs no additional obligation as a result of the proffer; specifically, the government is not hereby agreeing that the defendant will not be prosecuted.

If you and your client agree that this letter accurately describes the agreement between your client and the government with regard to your client's proffer, please confirm this by signing in the appropriate spaces below.

Very truly yours,

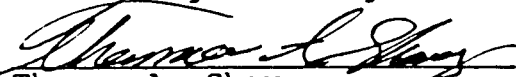
A. JOHN PAPPALARDO
United States Attorney

By:




PAUL V. KELLY
Assistant U.S. Attorney

Acknowledged and agreed to:



Thomas A. Shay

Date: 10-6-92



Jefferson W. Boone, Esquire
Counsel for Thomas A. Shay

Date: 10/6/92

Memorandum



Subject

Retraction by Thomas Shay, Jr.

Date

November 10, 1992

To

File

From

Paul V. Kelly

Yesterday I was summoned to the U.S. Marshal's lock-up by Attorney Frank O'Rourke to speak with his client, Tom Shay. I was joined by SA Jeff Kerr of ATF. My last contact with Shay was less than one week ago (in the lock-up with SA Jeff Kerr) when I advised Shay (1) we had been unable to corroborate any aspects of his "story", (2) we had received recent information from various sources indicating his involvement in the bombing, and (3) I expected to indict him for murder.

Shay stated that out of fear of being charged and spending the rest of his life in prison, he had lied to me and the agents in several significant respects. Those aspects of his "story" which he admitted were untrue are as follows:

1. He was not sexually abused by his father
2. He never went on a scuba diving trip with Trenkler
3. He fabricated the story about ^{"Jo Jo"} "Jo"; there is no such person
4. The whole story about Trenkler building him some unknown "surprise" was a hoax
5. He never accompanied Trenkler to the Quincy quarry, or participated with him in disposing of evidence
6. Trenkler never came to his house following the bombing on 10-28-91; he has not had face-to-face contact with Trenkler since before the bombing
7. He never saw a remote control car at Trenkler's apt.
8. There was no trip to Vermont and Canada with Trenkler to obtain munitions from some "Soldier of Fortune" camp
9. He and Trenkler never shopped together at the Dedham Mall



10. The tower he had told us about was not located in the Kingston/Marshfield area.

Shay then told us a new "story" which he claimed was truthful -- obviously we have a high degree of skepticism. His new story may be summarized as follows:

1. He has known Trenkler for 2-3 years and was involved with him during the 6-8 week period prior to the bombing
2. He told Trenkler that his father had sexually abused him (even though it wasn't true)
3. Trenkler told him that he had been sexually abused by his natural father
4. He told Trenkler about his dad's anticipated recovery of several hundred thousand dollars from a pending lawsuit.
5. Sometime in September, 1991, Shay, Trenkler and Rich Brown went on a boat trip on a small boat that Brown rented
6. He and Trenkler have been to Provincetown together
7. He asked Trenkler to build him a remote-controlled pick-up truck containing a bomb with magnets on it. Shay claims that he planned to go to a parking lot and get his "jollies" by attempting to blow-up an unoccupied car. (This is not a credible explanation)
8. He and Trenkler did visit Radio Shack on Massachusetts Ave. on 10-18-91
9. He and Trenkler purchased a remote control unit from a hobby store (name unknown) at the Braintree Mall (South Shore Plaza) sometime in September, 1991. He recalls the price was approximately \$300.
10. He and Trenkler visited other stores together (need more information)
11. Trenkler told him he obtained his dynamite from a guy in New Hampshire (name unknown)
12. He accompanied Trenkler on a ride to New Hampshire sometime in September - October, 1991. They visited a guy in the North Conway area who was somehow affiliated with or employed at a rock quarry.
13. Trenkler does know someone in New Hampshire who drives a red car named Cindy Mitchell.
14. Trenkler did come over to Shay's apartment sometime in early October, 1991 and was tossed-out by Ms. Shay.

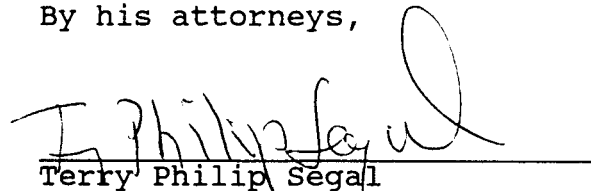
15. He has stayed over Trenkler's apartment and has had a sexual relationship with him.
16. Following the bombing, maybe the next day, Trenkler called him at his mother's house. During the call Trenkler told Shay not to worry because he had taken the remnants of the bomb and tossed them into the quarry in Quincy known as "Niggers Heaven" where a boy recently drown.
17. He saw Trenkler building the device inside a shack adjacent to an electrical tower somewhere in Weymouth. He recalls seeing the magnets, and described the remote control unit.

Finally, Shay told us that he had received a threatening telephone call last Friday. Another inmate handed him the telephone, whereupon a deep male voice said, in effect, "...if you say anything more about Trenkler, we'll have your throat slit (for a carton of cigarettes)." Shay refused to identify the inmate who handed him the phone.

4. Conclusion.

Given the defendant's legitimate and compelling need for Mr. Kelly's testimony, the fact that the defendant's need arises from Mr. Kelly's conduct, and the fact that the ethical and institutional policies protected by the advocate-witness rule dictate against a stipulation, defendant's constitutional rights under the confrontation and compulsory process clauses of the Sixth Amendment outweigh the government's desire to exempt Mr. Kelly from testifying in this case. For all of the above reasons, the defendant's motion should be allowed.

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

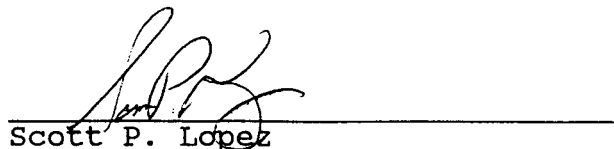


Terry Philip Segal
BBO # 450760
Scott P. Lopez
BBO # 549556
Segal & Feinberg
210 Commercial Street
Boston, MA 02109
(617) 720-4444

Dated: September 27, 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 September 27, 1993.



Scott P. Lopez