UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
vs.	)	**Criminal No.: 92-10369-Z**
	)	
ALFRED W. TRENKLER	)	

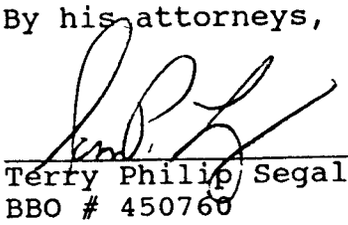
DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE ALL STATEMENTS OF THOMAS SHAY, JR. AT TRIAL

Now comes defendant, Alfred W. Trenkler, and moves this Court *in limine* to exclude all statements by Thomas A. Shay, Jr. during his trial.

In support of this motion, defendant states that none of Shay, Jr.'s statements are admissible because they either fall under the principles set forth in Bruton, or they do not qualify as declarations against penal interest, or as any other "firmly rooted" exception to the hearsay rule.

WHEREFORE, as more particularly set forth in defendant's memorandum attached hereto, defendant respectfully requests this Court to exclude all of Thomas Shay's hearsay statements at defendant's trial.

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



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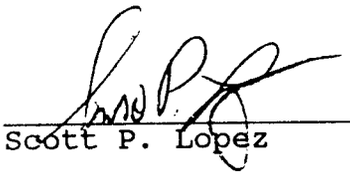
Dated: October 29, 1993

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 hand on October 29, 1993.



Scott P. Lopez

UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA	)	
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vs.	)	**Criminal No.: 92-10369-Z**
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ALFRED W. TRENKLER	)	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION *IN LIMINE* TO EXCLUDE ALL STATEMENTS OF THOMAS SHAY, JR. AT TRIAL

Defendant, Alfred W. Trenkler, submits this memorandum in support of his motion *in limine* to exclude all statements by Thomas Shay, Jr. (hereinafter "Shay, Jr.") during his trial.

Defendant submits that none of Shay, Jr.'s statements are admissible because they either fall under the principles set forth in Bruton, or they do not qualify as declarations against penal interest, or as any other "firmly rooted" exception to the hearsay rule.

BACKGROUND.

Based on the government's opening statement, defendant anticipates the government will attempt to admit certain statements by Shay, Jr. as substantive evidence of defendant's guilt during his trial. Defendant's motion for a mistrial after the government's opening on this issue was denied. Defendant submits this memorandum to assert his position on the inadmissibility of all of Shay, Jr.'s statements.

1. All Bruton statements by Shay, Jr., which either directly or indirectly incriminate the defendant are inadmissible.

In this case, the government alleges a two-person conspiracy. Clearly any statement by Shay Jr. which directly or indirectly inculpates defendant is inadmissible under Bruton. See Bruton v. United States, 391 U.S. 123 (1968); Cruz v. New York, 481 U.S. 186 (1987)(admission of co-defendant's confession implicating defendant reversible error even where defendant confessed).

Moreover, "effective" redaction is not possible in this case because the government has alleged a two-person conspiracy. Compare Richardson v. Marsh, 481 U.S. 200, 208 (1987)(where three defendants are charged with murder, robbery and assault, trial court could properly assume that the jury did not use redacted confession against unnamed defendant).

In addition, the case against defendant is entirely circumstantial. The identity of Shay Jr.'s co-conspirator is one of the disputed issues. Thus, any statement by Shay, Jr. which lends credence to the government's theory indirectly incriminates defendant because it tends to prove defendant's identity as the second conspirator as alleged in the indictment. Since defendant will not have the opportunity to cross-examine Shay, Jr., admission of his statements as substantive evidence of defendant's guilt will violate defendant's Confrontation Clause rights. Compare Douglas v. Alabama, 380 U.S. 415 (1965)(confession purportedly made by defendant's accomplice read to the jury by prosecutor after accomplice invoked Fifth Amendment rights); Lee v. Illinois, 476

U.S. 530 (1985)(rejecting government's categorization of co-defendant's confession as a statement against penal interest and holding that the concept of "declaration against penal interest" is a concept that "defines too large a class for meaningful Confrontation Clause analysis"). Thus, in this case, any statement by Shay, Jr. will indirectly incriminate defendant and is therefore inadmissible under Bruton.

2. Since none of Shay, Jr.'s statements qualify as statements against penal interest, or as any other "firmly rooted" exception to the hearsay rule, all his statements are inadmissible as rank hearsay.

In this case none of Shay, Jr.'s statements qualify as statements against penal interest as this exception has been defined. Rule 804(b)(3) only excepts hearsay statements from the general proscription against hearsay if, **when the declaration was made, it "so far tended to subject the declarant to ... criminal liability ... that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."**

The underlying rationale for this exception, as well as any hearsay exception is reliability. See Ohio v. Roberts, 448 U.S. 56, 66 (1980)(Constitution forbids a court to admit a hearsay statement of an unavailable declarant unless it bears adequate "indicia of reliability"). Whether a statement is in fact against penal interest must be determined from the circumstances of each case. See United States v. Fields, 871 F.2d 188, 193 (1st Cir. 1989). Each statement must "solidly inculpate" the declarant and

be one that a reasonable person in the declarant's position would not have made unless it were true. See Fed. R. Evid. 804(b)(3); United States v. Monaco, 735 F.2d 1173, 1176 (9th Cir. 1984).

The circumstances of the present case indicate that none of Shay Jr.'s statements qualify as statements against penal interest. Specifically, in the advisory committee's notes to Rule 804(b)(3), the committee states that "a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest."

In the present case, all of Shay, Jr.'s inculpatory statements were made while in custody. Second, almost all of Shay, Jr.'s statements were made after he had entered into a proffer agreement with the government and were based on his understanding that he would receive favorable treatment from the government if his "story" was corroborated. These statements include, but are not limited to, Shay, Jr.'s statements to Karen Marinella during the Channel 56 Interview.

What is particularly noteworthy about Shay, Jr.'s statements is that he repeatedly attempted to minimize his role at Alfred Trenkler's expense. See United States v. Innamorati, 996 F.2d 456 (1st Cir. 1993)("...co-defendant who confesses to the authorities and inculpates another may be seeking to curry favor and cast blame upon another. Thus, the statement as a whole may be very much in the interests of the confessing party who is minimizing his role.") It is further noted that this approach is typical of a person who

is trying to cut a deal with the government. These statements are further consistent with the government's reason for offering Shay, Jr. the opportunity to make a proffer which was the belief that he was allegedly the less culpable party. Presented with the opportunity to cut himself a deal, it is clear that Shay, Jr.'s statements were likely motivated by a desire to curry favor with the government rather than a desire to speak the truth. Thus, we submit that all of Shay Jr.'s statements after the first proffer agreement were **in his interest** because they were Shay's attempts to cooperate with the government and corroborate the stories he was telling the government. See United States v. Magana-Olvera, 917 F.2d 401, 407 (1990)(statements by co-conspirator not sufficiently against his interest because they were made in custody, they were made in an attempt to curry favor from the federal authorities, the government encouraged his cooperation by suggesting it could cut his prison sentence, and the statements trivialized co-conspirator's involvement).

With respect to the statements made prior to the first proffer agreement, we further submit that these statements were not "so far contrary to his penal interest" as to fall within the purview of the penal interest exception. See Innamorati supra. Specifically, at the time these statements were made, they did not **"so far tend to subject [Shay, Jr.] to ... criminal liability ... that a reasonable person in [his] position would not have made [these] statement[s] unless believing [them] to be true."** For example, his statements to Robert Evans "What are you crazy, after

what happened" and "there's no way [I] could make a sophisticated bomb like that" (Shay Transcript, pp. 11-145-11-146) were not so contrary to his penal interest that he would not have made them unless he believed them to be true. The same is true of his statements to Shay, Sr. ("Where did you go Saturday night?"), and Officer Bridgeforth ("I wish I could turn back the hands of time"). Thus, it is difficult to conclude that at the time these statements were made they were so far contrary to his penal interest that he "must have known" they were against his interest. See Filesi v. United States, 352 F.2d 339, 343 (4th Cir. 1965) cited in Innamorati supra (Emphasis added).

In addition, we submit that in Lee supra, which involved **a two person** crime, the government specifically argued that a co-defendant's confession which named defendant Lee (who also confessed) was a declaration against interest and therefore admissible. The Supreme Court, however, specifically rejected the government's argument by stating: "[w]e reject [the government's] categorization of the hearsay involved in this case as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis." Lee supra at 544, n. 5.

Thus, we submit that in a two-person conspiracy, the confrontation clause requires more than a "simple statement against penal interest". Rather, the confrontation clause requires circumstances which clearly and unambiguously establish that the statement is "reliable." Compare Fields supra at 192-193

(statements of co-conspirator "indisputably against [his] interest" where made during the planning stages of the crime, and which were later corroborated by independent witness testimony, identification testimony, and other direct and circumstantial evidence deemed admissible against three co-defendants during a joint trial).

In the present case, unlike in Fields, there is a serious question regarding Shay, Jr.'s reliability in general. In fact, as the testimony presented by Shay, Jr.'s counsel at sentencing amply demonstrates, Shay, Jr. may be incapable of telling the truth. Since Shay, Jr.'s state of mind is clearly suspect, the reliability or trustworthiness of his statements is similarly suspect.

Moreover, it is unclear which statements of Shay, Jr. are based on personal knowledge, and which statements are the result of information received by Shay, Jr. from the government and thereafter regurgitated by Shay, Jr. If Shay, Jr. merely repeated what the government told him, his statements are nothing more than totem pole hearsay even if against his penal interest.

We submit that before any statement by Shay, Jr. is deemed reliable and thus admissible, the government must show that Shay, Jr.'s statements are based on his personal knowledge. If they are not based on his personal knowledge he would not be competent to testify to these statements. See Fed. Rule Evid. 602. If Shay, Jr. would not be competent to testify these statements because they are not based on his personal knowledge, it is fundamentally unfair for the government to be permitted to use these incompetent statements as substantive evidence against Mr. Trenkler under the

guise of the penal interest exception when this exception is premised on the "reliability" of the statements.

It is also noted that Shay, Jr.'s statements were not corroborated by the government **after** he made them. In fact, the only statement that the government has arguably corroborated was the purchase of the toggle switch at Radio Shack. However, Shay, Jr. admitted he made this purchase **after** his attorney was informed by the government that this receipt was in its possession. Moreover, this inculpatory statement by Shay, Jr. was first made pursuant to a proffer agreement with the government. Thus, this is not a situation where Shay, Jr.'s inculpatory statements are **later** corroborated independently by the government as in Fields. Rather, this is a situation where Shay, Jr. made an admission to cut a deal with the government. Besides this inculpatory statement, no other statement by Shay, Jr. has been corroborated by the government to date. Thus, not one statement by Shay, Jr. has been corroborated **after** it was made during the entire investigation in this case. Compare Fields supra.

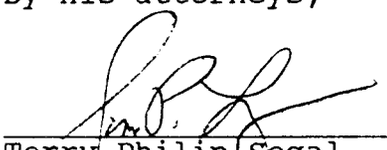
It appears this case squarely presents the issue expressly left open by the First Circuit in the Fields case (i.e. whether admission of inculpatory statements against penal interest must be conditioned upon corroboration). See Fields supra at 192. However, the total absence of any corroboration of Shay, Jr.'s inculpatory statements is a compelling reason for this Court to conclude that Shay, Jr.'s statements are not reliable. If his statements are not reliable, we submit that Shay, Jr.'s statements

do not qualify as "statements against penal interest" and should not be admitted on this basis.

Finally, none of Shay, Jr.'s statements qualify under any other "firmly rooted" exception to the hearsay rule.

For these reasons, we submit that all of Shay, Jr.'s statements should be excluded.

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



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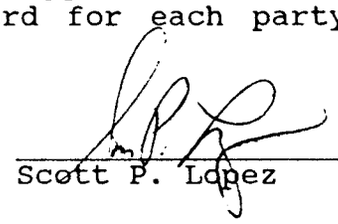
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party by hand on October 29, 1993.



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