

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Dec 3 2

UNITED STATES OF AMERICA)

vs.)

ALFRED W. TRENKLER)

Criminal No.:
92-10369-Z

DEFENDANT'S MOTION FOR NEW TRIAL

Now comes defendant, Alfred W. Trenkler, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, and moves that this Court grant him a new trial. As grounds therefore, defendant states the following:

1. Defendant was substantially prejudiced and deprived of a fair trial by the Court's erroneous admission of the evidence relating to the 1986 incident under Rule 404 (b), particularly with respect to the signature issue under the rules established in United States v. Ingraham, 832 F.2d 229 (1st Cir. 1987) and United States v. Williams, 985 F.2d 634 (1st Cir. 1993), where the Court heard the same government experts in the Shay trial, specifically found in Shay, under Ingraham and Williams, that the 1986 device was "not so unusual and distinctive as to be like a signature", and nevertheless admitted this evidence in defendant's case on the signature issue. See Shay Transcript, pp. 15-143 - 15- 260; 16-2 - 16-5 (Exhibit A); see also Boston Globe Article dated 11/30/93 re: juror interview and prejudice resulting from admission of this evidence (Exhibit B) compare Trenkler Transcript, pp. 2-5 (Exhibit

Denied
Tha W. Sobel,
1/21/94

LAH

C)). Moreover, the government's need for this evidence was minimal in light of David Lindholm's testimony that defendant allegedly admitted he was the builder of the bomb in this case.

In addition, admitting this evidence on the issues of skill, knowledge and intent was also error where these issues were "technically at issue, [but] not really in dispute", see United States v. Lynn, 856 F.2d 430, 436, fn. 15 (1988), there was a five-year lapse between incidents, and in the event this evidence was offered only on these issues, the evidence could have been tailored to avoid the unfair prejudice which occurred in this case by admitting this evidence on the signature issue. In effect, admission of the 1986 evidence on the signature issue permitted the jury to draw the improper propensity inference, and resulted in the deprivation of defendant's constitutional right to a fair trial. See Defendant's previously filed Memorandum In Opposition To Government's Motion *In Limine* To Admit Evidence of 1986 Bombing; see also United States v. Arias-Montoya, 967 F.2d 708 (1992); United States v. Garcia-Rosa, 876 F.2d 209, 221 (1989).

2. The Court erred by failing to strike the opinion testimony of Thomas Waskom on the signature issue where an insufficient foundation and no chain of custody was shown to establish that the evidence delivered to Francis Hankard by the late Leo Voght on October 17, 1986 was in fact the same debris recovered from the Capeway Fish Truck on September 1, 1986. Moreover, this error was compounded by the fact that Mr. Waskom's

forensic analysis and signature opinion was based primarily upon Mr. Hankard's examination of this debris. See Defendant's Motion To Strike Signature Testimony Of Thomas Waskom (Exhibit D).

3. The Court erred by failing to exclude and strike the testimony of Michael Coady after the Court had excluded similar proffered testimony under Rule 404(b) where the testimony admitted was simply an end run around the Court's 404(b) ruling as demonstrated by the government's argument in its closing (rebuttal) relating to Mr. Coady's testimony and the probative value of this evidence was substantially outweighed by its prejudicial effect. See Fed. R. Evid. 403; Defendant's Motion *In Limine* To Exclude 404(b) Evidence At Trial (Exhibit E); Defendant's Motion *In Limine* To Exclude Any Testimony By Michael Coady Which Relates To The 404(b) Evidence Previously Excluded By This Court (Exhibit F); and Defendant's Motion To Strike Testimony of Michael Coady (Exhibit G).

4. The Court erred by failing to grant a mistrial after opening statements based on Mr. Kelly's reference to statements by Thomas Shay, Jr. which clearly violated the rules set forth in Bruton and which the Court subsequently refused to admit at trial. See Defendant's Motion To Preclude The Government From Mentioning Any Statements By Thomas Shay, Jr. In Its Opening (Exhibit H); and Trenkler Transcript, pp. 2-15 - 2-16 (Exhibit I); compare United States v. Wallace, 453 F.2d 420 (8th Cir. 1972) *cert. denied*, 406 U.S. 961 (1972).

The Court erred by failing to preclude the government's remote control bomb demonstration during the testimony of Thomas Waskom as highly prejudicial when coupled with the testimony of Thomas McKernan because it gave rise to the improper inference that defendant could have detonated the bomb from a nearby location while the bomb squad officers were examining the device. The Court further erred by failing to give a limiting instruction regarding this demonstration when requested. See Defendant's Motion To Preclude Thomas Waskom From Demonstrating The Manner In Which The 1991 Bomb Was Designed To Explode (Exhibit J); Trenkler Transcript, pp. 5-67 - 5-72; 5-112 - 5-114 (Exhibit K).

6. The Court erred by failing to sustain defendant's numerous and continuing objections, and permitting the admission of each and every statement by Thomas Shay, Jr. at trial where this Court excluded other statements by Thomas Shay, Jr. as "inherently unreliable" by quoting the government's own expert at Thomas Shay, Jr.'s sentencing hearing that Shay was not to be believed. See Trenkler Transcript pp. 7-89 - 7-134 (Exhibit L). Moreover, the statements of Shay, Jr. which were admitted were irrelevant and unfairly prejudicial, and therefore not admissible under Fed. R. Evid. 801(c), because they were made after the alleged conspiracy had ended. Compare Fed. R. Evid. 803(3) (statements of "then existing state of mind").

7. The Court erred by failing to sustain defendant's objection, and permitting the admission of a video-tape concerning a M-21 Flash Simulator during Thomas Waskom's testimony, where the

uncontradicted testimony regarding the M-21 Flash Simulator in 1986 was that it caused no damage. See Trenkler Transcript pp. 13-9 - 13-15 (Exhibit M).

8. The defendant was substantially prejudiced and deprived of a fair trial by the Court's erroneous admission of the EXIS computer evidence where an adequate foundation was not established, and where the evidence should have been ruled inadmissible pursuant to the hearsay rule, best evidence rule, and authentication rules. See Defendant's Motion In Limine To Exclude Admission Of Exis Computer Evidence (Exhibit N); Trenkler Transcript pp. 12-44 - 12-49. Moreover, the Court's reliance on Fed. R. Evid. 803(24) where the government did not provide defendant with a fair opportunity to meet these statements because the names and addresses of the numerous declarants were not provided as required by Rule 803(24) as a condition precedent to admission was also error. See Fed. R. Evid. 803(24); compare United States v. Barrett, 598 F. Supp. 469, aff'd 766 F.2d 609 (1st Cir. 1984) (Rule 803(24) cannot provide basis for admitting testimony specifically addressed in another exception).

9. The Court erred by prohibiting defendant from calling Maurice Flynn to testify to prior inconsistent statements by the government's witness, Richard Brown, where Mr. Brown's testimony was material to the government's circumstantial case. See Defendant's Motion For Leave To Present Testimony of Maurice R. Flynn Pursuant To Fed. R. Evid. 613(b) (Exhibit O).

10. The Court erred by prohibiting defendant access to the lab notes of Ms. Cynthia Wallace relative to her forensic identification of dynamite. Trenkler Transcript pp. 4-130 - 4-134 (Exhibit P).


11. The Court erred by prohibiting defendant from calling Mr. Kelly as a witness to testify to statements by Shay, Jr. which were inconsistent with guilt pursuant to defendant's timely motion before trial where the Court admitted into evidence statements by Shay, Jr. consistent with guilt.

12. The Court erred by refusing to give the jury an instruction, in response to the jury's question on circumstantial evidence, that if the circumstantial evidence and the inferences therefrom were consistent with both guilt and innocence, the defendant was entitled to an acquittal.

13. The Court erred in denying defendant's motion for acquittal made at the conclusion of the government's case and at the conclusion of the evidence.

WHEREFORE, for all the reasons set forth above, defendant respectfully requests that this Court grant him a new trial.

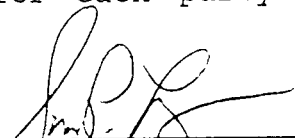
Respectfully submitted,
For the Defendant,
ALFRED W. TRENKLER,
By his attorneys,



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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 mail on December 6, 1993.



Scott P. Lopez