



U.S. Department of Justice

United States Attorney
District of Massachusetts

1003 J.W. McCormack Post Office and Courthouse
Boston, Massachusetts 02109

November 1, 1996

FILED UNDER SEAL

Honorable Rya W. Zobel
U.S. District Judge
U.S. District Court
J.W. McCormack POCH
Boston, MA 02109

Re: United States v. Alfred W. Trenkler, Cr. 92-10369-Z
(Allegation of Possible Misconduct on Part of Alternate
Juror)

Dear Judge Zobel:

This will advise the Court that an individual named Donna Shea (a former associate of defendant Alfred Trenkler) has contacted the government and has alleged, implicitly, that a Trenkler trial juror failed on voir dire to disclose prior, out of court contact with Trenkler. The government notified Trenkler's counsel of the somewhat sketchy allegations some weeks ago and has recently completed interviews on the matter (the juror in question has purposely been left alone). The results of these interviews, earlier discussed with counsel, are attached.

Accepting Shea's allegations regarding out of court contact at face value, the juror in question was determined to have been an alternate juror who was excused after jury charge and thus played no part in deliberations or in returning the Trenkler verdict. As is discussed below, that circumstance conclusively precludes any showing of actual prejudice or bias to Trenkler. The government correspondingly submits that no further action on the matter is either necessary or warranted.

Shea's Allegations and the Government's Actions in Response

Shea initially alleged that she was present during the early 1980's when a female acquaintance of Shea's, accompanied by "one of the jurors" in the Trenkler trial, came to Shea's house to buy cocaine, allegedly supplied by Trenkler. Shea stated that the female acquaintance was one Nancy Tolmie. Shea alleged that the juror, whom Shea identified only as "Ramona," was known to both Trenkler and Shea during that time.

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During a later interview, Shea was unable to say whether, as of time of trial, "Ramona" ever knew Trenkler -- by name or sight. Shea went on to say that she did not remember "Ramona" ever talking with or referring to Trenkler by name. Shea stated that she -- Shea -- (1) had never seen "Ramona" use drugs or purchase drugs from Trenkler or anyone else; and (2) had "no memory" as to whether "Ramona" was present some twelve years ago, when Trenkler purportedly sold drugs to Shea's female acquaintance at Shea's house. In addition, Shea stated that it was unlikely that Trenkler knew who "Ramona" was during trial, because "Trenkler didn't know or have dealings with Ramona back then."¹

Trial records reflect that one Ramona M. Walsh, of Willard St., Quincy, Massachusetts (see Trenkler Jury List, p. 8, Ex. "A," attached), was seated as Alternate Juror No. 3. Ms. Walsh was excused, however, along with the other alternates, at the close of jury charge and thus never took part in deliberations (See excerpt of transcript (dated 11/22/93) at 17-128, Ex. "B," attached).

Notwithstanding that Ms. Walsh took no part in returning the Trenkler verdict (thus obviating any potential for actual prejudice or bias to defendant; see below), the government sought to determine the particulars of, and purported bases of knowledge for, Shea's allegations before bringing them to the attention of the Court.² In the course of doing that, the undersigned contacted Trenkler's counsel, Attorney Amy Axelrod, and apprised her of Shea's allegations.

More particularly, some two weeks ago, I telephoned and spoke with Attorney Axelrod regarding what was then known about Shea's allegations. We agreed that the government should question Shea further. We also agreed that, in accordance with the First Circuit proscription against attorney-initiated, post-

¹ During yet another interview, conducted ten days later, Shea stated that she could recall "Ramona" as having been present when Trenkler sold cocaine at Shea's house.

² The only claim of juror misconduct even remotely cognizable from Shea's (contradictory) allegations is failure, on the part of Ms. Walsh, to disclose prior knowledge of Trenkler. The record reflects that on the first morning of trial, the Clerk called for the defendant to stand and be identified, after which the Court inquired of the venire as to whether anyone "kn[ew] Mr. Trenkler, the defendant in this case?" See excerpt of trial transcript dated 10/25/93 at pp. 14-16, attached, Ex. "C." Neither Ms. Walsh nor any of the other venire answered in the affirmative. Id.

trial contact with jurors, Ms. Walsh should not be contacted. To my knowledge, neither party has approached Ms. Walsh for any reason.

I further advised Ms. Axelrod that the government would prepare a written report, relating the results of interviews conducted in the course of investigating this matter, and would submit a copy of that report, under seal, to the Court, with a copy to counsel. To date, both Shea and Ms. Nancy (Tolmie) Russell, the "other female" allegedly present during the transactions in question, have been interviewed by the government. The results of those interviews are set out in the Report of Investigation (ATF Form 3270, 3 pp.), attached hereto, Ex. "D."

In the last few days, I spoke again with Attorney Axelrod and summarized for her the results of the interviews conducted with both Shea and Ms. (Tolmie) Russell since our telephone conversation of some two weeks ago. I informed Attorney Axelrod of both: Shea's more recent (and contradictory) allegation that "Ramona" had been present with Ms. (Tolmie) Russell when Trenkler sold cocaine at Shea's house; and Ms. (Tolmie) Russell's denial of same.

I also informed Attorney Axelrod of the government's position (discussed below) that while the Court should certainly be fully apprised of the matter, no evidentiary hearing or other action on the part of the Court was either necessary or warranted in these circumstances. I further advised Attorney Axelrod that I would be submitting this letter and attached Report of Investigation, to the Court, together with the government's recommendation of no action.

Legal Discussion/Government's Position

In the First Circuit, as elsewhere, motions for a new trial are directed to the trial court's discretion (United States v. Rivera-Sola, 713 F.2d 866, 874 (1st Cir. 1983)), and a trial court's denial of such a motion is subject only to review for abuse of discretion. Id. With particular respect to any claim of juror misconduct based on nondisclosure during voir dire, a movant must meet the exacting requirements of demonstrating both (1) failure to give an honest answer; and (2) actual prejudice or bias to a defendant. As the First Circuit has recently put it:

A party seeking a new trial because of nondisclosure by a juror during voir dire must do more than raise a speculative allegation that the juror's possible bias may have influenced the outcome of the trial. Rather, "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and

then further show that a correct response would have provided a valid basis for a challenge for cause." McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (further citations omitted) (1984). Further, we have held that a party seeking a new trial based on nondisclosure by a juror must "demonstrate actual prejudice or bias." United States v. Aponte-Suarez, 905 F.2d 483, 492 (1st Cir. 1990); Rivera-Sola, 713 F.2d at 874. This "burden of proof must be sustained not as a matter of speculation, but as a demonstrable reality." United States v. Vargas, 606 F.2d 341, 344 (1st Cir. 1979), quoting United States v. Whiting, 538 F.2d 220, 223 (8th Cir. 1976).

Dall v. Coffin, 970 F.2d 964, 969 (1st Cir. 1992) (emphasis supplied); see also United States v. Leach, 427 F.2d 1107, 1111 (1st Cir.), cert. denied, 400 U.S. 829, 91 S.Ct. 95, 27 L.Ed.2d 59 (1970) (discussing applicable standard of review).

Even assuming arguendo that Ms. Walsh indeed knew of Trenkler at time of voir dire and failed to disclose that knowledge³, Ms. Walsh's utter lack of participation in deliberations precludes any claim of actual prejudice or bias to defendant.⁴ The record establishes that -- as an alternate --

³ Shea does not specifically allege that "Ramona" knew Trenkler at time of voir dire. Rather, Shea has only made (contradictory) allegations -- flatly denied by (Tolmie) Russell -- regarding "Ramona" having been present when Trenkler sold drugs to (Tolmie) Russell.

The question as to whether Trenkler may have known Ms. Walsh from the circumstances alleged, or otherwise, is, of course, immaterial on the issue of prejudice or bias on the part of Ms. Walsh. E.g., United States v. Aponte, supra. Indeed, even if Trenkler were to now allege that he and Ms. Walsh knew each other at time of voir dire, Trenkler would be deemed to have waived any claim of juror bias allegedly arising therefrom. See, e.g., United States v. Uribe, 890 F.2d 554, 560 (1st Cir. 1989) ("A sentient defendant, knowledgeable of a possible claim of juror bias, waives the claim if he elects not to raise it promptly").

⁴ Assuming, for purposes of the instant analysis, the truth of Shea's allegation that "Ramona" was present with Trenkler at Shea's house (a point on which Shea earlier stated she had "no memory"), no showing of actual prejudice or bias can yet be made; this is so because the juror in question took no part in the verdict. As a result, the Court simply need not address, much less resolve, any fact issue having to do with Shea's contradictory allegations.

Ms. Walsh: was excused before the regular jurors retired to begin their deliberations; never took part in those deliberations; played no role in the verdict ultimately returned by the jury; and thus cannot in any way be said to have actually influenced the outcome of the trial. The burden, therefore, of establishing the "demonstrable reality" of prejudice or bias in these circumstances cannot, a fortiori, be met.⁵

Where Ms. Walsh had no hand in the outcome of the trial, the government submits that no action on the part of the Court (i.e., evidentiary hearing), is either necessary or warranted here. Indeed, the additional, substantial policy concerns of finality, certainty of verdicts and avoidance of jury harassment militate firmly against any such inquiry in these circumstances. See, e.g., United States v. Procaro, 356 F.2d 614, 619 (2d Cir. 1966) ("[T]he same policy considerations prevent inquiry here, or the

⁵ Other courts considering, and denying, motions for a new trial on grounds involving alternate jurors have focussed upon the conclusive absence of any prejudice to defendant due to their non-deliberating roles. For example, in United States v. Morrone, 502 F.Supp. 983 (E.D. Pa. 1980), the district court denied defendant's motion for a new trial brought on grounds that, during jury selection, one of the jury venire commented (audibly) "It looks like the Mafia is here." Id. at 1003. In this respect, the district court ruled that a non-deliberating juror was to be excluded as a potential source of prejudice:

I denied the defendant's motions [to excuse the entire jury venire] but did excuse the juror who had made the offending remark. In addition, each member of the panel was immediately questioned separately to see if any of them had heard it. Only two had - and there was no motion to excuse either. One was struck by the government; the other served as an alternate juror but did not participate in the deliberations that lead to the verdicts....

502 F.Supp. at 1003 (emphasis supplied).

alternate juror will become an unending source of uncertain verdicts").⁶

Respectfully submitted,

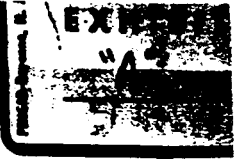
DONALD K. STERN
United States Attorney

By:


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

cc: Attorney Amy Axelrod

⁶ Having been advised of the government's foregoing position on the matter, Attorney Axelrod requested that I advise the Court -- within this filing -- that she takes a contrary view and, further, that she intends to apprise the Court of that view by way of a separate filing, also under seal.



UNITED STATES DISTRICT COURT
EASTERN DIVISION OF MASSACHUSETTS

IMPANELED FOR COURTROOM - 3 Date: 10/25/93

PRESIDING HONORABLE RYA W. ZOBEL DISTRICT JUDGE
Case Number: 92CR10369-01

USA
vs.
ALFRED TRENKLER

JUROR NO. JUROR ID. NO. OCCUPATION

ADDRESS SPOUSE OCCUPATION

78- WALSH	RAMONA M	332233	MAIL HANDLER/U.S. POSTAL SERVICE	780 WILLLARD STREET QUINCY 381 MORAINIE ST BROCKTON 10 OLIVE ROAD WESTFORD	MA MA MA MA MA	02169 02401 01806	TEACHER
79- KIMBALL	CHARLES W	311336					
80- WELCH	DAVID M	332689					

PLAINTIFFS DEFENDANT COURT EXCUSE