

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ALFRED W. TRENKLER, :
 :
 Petitioner, :
 v. :
 : CIVIL ACTION NO. 3:02-CV-1736
MICHAEL PUGH, Warden, :
 USP-Allenwood, : (JUDGE CONABOY)
 Respondent. :

GOVERNMENT'S MEMORANDUM OF LAW
IN OPPOSITION TO ALFRED TRENKLER'S PETITION FOR WRIT
OF HABEAS CORPUS BY A PERSON IN FEDERAL CUSTODY

INTRODUCTION

The United States of America, by its undersigned counsel, respectfully submits this Memorandum of Law in opposition to Alfred Trenkler's Petition for Writ of Habeas Corpus By a Person in Federal Custody, filed pursuant to 28, United States Code, Section 2241.

In 1993, Trenkler was convicted in the District of Massachusetts, after a jury trial, of one count of attempted destruction of a car used in an activity affecting interstate or foreign commerce by means of an explosive, in violation of Title 18 U.S.C. § 844(i) ("844(i)"), one count of receipt, in interstate or foreign commerce, of explosive materials with the knowledge or intent that they would be used to kill, injure or intimidate an individual or unlawfully to damage a vehicle, in violation of Title



destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," shall be punished.

Jones did not even attempt to address the scope or constitutionality of 844(d) which provides, in relevant part, that: "[w]hoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property" shall be punished.

Thus, Trenkler's claim that Jones requires that his conviction under 844(d) be overturned is baseless. Trenkler fails to cite a single case subsequent to Jones in which a defendant has even attempted to argue that Jones has any bearing on the scope of 844(d) and no court has so held. Indeed, a number of cases decided subsequent to Jones, including United States v. Singletary, 268 F.3d 196 (3rd Cir. 2001), have made clear that the framework for analyzing statutes such as 844(i), which seek to regulate activities "affecting interstate or foreign commerce," is quite distinct from that used to analyze statutes which seek only to regulate the use of the channels of interstate commerce or the

employed a functional analysis to conclude that a truck the defendants conspired to blow up was not actively used in interstate commerce, resulting in a dismissal of the charges. *Monholland*, 607 F.2d at 1316. We also recognized the propriety of the "de minimis" standard in jury instructions on § 844(i), but we essentially employed the same approach as that in *Jones* in holding that when no connection at all is made between actual use and interstate commerce, the de minimis standard approved by this circuit is not met. We did not invalidate the standard and we do not believe *Jones* did.

Id. at 1208.

Thus, *Trenkler's* claim that *Jones* requires a more than de minimis showing is fatally flawed.

Finally, although *Jones* did not impose any requirement that where the property is actively involved in an activity affecting interstate commerce, the activity must be more than de minimis, *Shay Sr's* use of the car in connection with his auto body repair business clearly was more than de minimis, as discussed above. Thus, *Trenkler's* attack on his 844(i) conviction is both procedurally barred under 2241 and substantively meritless, as he is not "actually innocent" of the 844(i) offense for which he was convicted.

Jones is clearly distinguishable from the instant case and has no relevance to the defendant's conviction under 844(i) for arson of a car used in commerce and in an activity affecting commerce.

Finally, Trenkler is also barred from raising this claim in a petition pursuant to 2241, as he does not qualify under the savings clause of 2255, given that, among other grounds: 1) he is not actually innocent of the charges under 844(i) or 844(d) based on the facts of his case; and 2) he has failed to demonstrate cause and prejudice for his failure to previously raise this claim at any time in the district court, on direct appeal, pursuant to his numerous post-conviction motions and pursuant to his 2255 petitions.

For these reasons, as discussed in more detail below, the government respectfully requests that the court dismiss Trenkler's Petition in its entirety.

PROCEDURAL BACKGROUND

On June 24, 1993, a federal grand jury returned a three-count superseding indictment against Trenkler and Thomas A. Shay ("Shay Jr.") charging them for their respective roles in the bombing death of Boston Police Bomb Squad Officer Jeremiah Hurley and the maiming of his partner, Bomb Squad Officer Francis Foley. Trenkler and Shay Jr. were charged with conspiracy, in violation of 18 U.S.C. § 371 (Count One); with receipt of explosive materials in interstate

manufactured in Florida in the trunk. In McGuire, the government relied only upon the juice bottle to support federal jurisdiction; the Court noted that "the only evidence the government introduced at trial of the effect the catering business had on interstate commerce pertained to the production, transportation and distribution of the orange juice." Id. at 206. In contrast, here, the government introduced extensive evidence regarding the significant, integral, on-going use of the car in Shay Sr's auto body repair business as well as evidence regarding the affect of that business on interstate and foreign commerce, including the purchase of parts from out of state vendors and the servicing of cars from out of state customers.

One post-Jones case most directly on point is United States v. Grassie, 237 F.3d 1199 (10th Cir. 2001), which involved an arson of a truck. The truck was owned by Jensen, a part-time student who lived in a dwelling owned by a Ruth Jones and rented to Jensen in exchange for services he performed for her on and in connection with her property. Those services included gardening, handyman work, general upkeep, cleaning ditches, and hauling limbs and other materials associated with the eighteen to twenty pecan trees on the property. For the previous four to five years, Jensen's duties included hauling the entire annual harvest of pecans to a broker who sold them in interstate commerce,

Trenkler appealed his conviction. In its opinion dated July 18, 1995, the First Circuit held that the district court did not err in admitting evidence, pursuant to Fed. R. Evid. Rule 404(b), of Trenkler's design, construction and detonation of a similar bomb in 1986. The Court also held that the district court erred in admitting evidence derived from a Bureau of Alcohol, Tobacco and Firearms ("ATF") computer database ("EXIS") concerning the characteristics of other explosive devices and testimony based on that evidence that the 1986 bomb and the Shay bomb had unique, common characteristics to the exclusion of other bombs which made it likely that Trenkler built both bombs. However, the Court further held that this error was harmless in light of all of the other evidence establishing Trenkler's guilt. The Court also rejected Trenkler's claims of prosecutorial misconduct. United States v. Trenkler, 61 F.3d 45 (1st Cir. 1995). Trenkler did not seek a writ of certiorari.

On December 22, 1995, Trenkler filed a motion, pursuant to Fed. R. Crim. P. 33, for a new trial or, in the alternative, for an evidentiary hearing on the grounds of newly-discovered evidence. Trenkler first argued that the expert testimony of Dr. Robert Phillips, who was prepared to opine that Shay Jr. suffered from a mental condition known as "psuedologia fantastica," which allegedly causes a sufferer to engage in pathological lying, including

States v. Laton, 180 F.Supp 948 (W.D. Tenn. 2002) (arson of fire station not actively employed in commercial activity); United States v. Rayborn, 138 F.Supp. 2d 1029 (W.D. Tenn. 2001) (arson of church not actively employed for commercial purposes).

In contrast, as Trenkler acknowledges, where the property is actively employed in commercial activity, the interstate commerce element is met. See United States v. Terry, 257 F.3d 366 (4th Cir. 2001) (arson of church operating non-profit day care center subject to 844(i); no holding that effect need not be more than *de minimis*); United States v. Russell, 471 U.S. 858, 861-862, 105 S.Ct. 2455 (1985) (844(i) applies to a two-unit apartment building used as rental property; "In sum, the legislative history suggests that Congress at least intended to protect all business property, as well as some additional property that might not fit that description, but perhaps not every private home."); United States v. Williams, 2002 WL 1752293, 4-5 (3rd Cir. 2002) (rental building advertised for lease covered by 844(i)).

In United States v. Williams, 299 F.3d 250, 257 (3rd Cir. 2002), the Third Circuit upheld the application of 844(i) to arson of a vacant building available for rent but not actually leased at the time of fire. Significantly, in rejecting a claim that the jury instruction was defective in that required the government to establish only that the activity "affected

On January 5, 1999, Trenkler filed a Motion Pursuant to 28 U.S.C. Section 2255 to Vacate, Set Aside, or Correct Sentence. In support of his motion, Trenkler argued that his trial counsel rendered ineffective assistance by not attempting to introduce expert testimony of Dr. Robert Phillips, who was prepared to testify that certain statements made by Trenkler's co-defendant, Thomas Shay, Jr., tried separately, were consistent with a mental disorder known as "pseudologia fantastica."

By Memorandum of Decision dated April 18, 2000, Judge Nobel denied Trenkler's motion on the ground that it was time-barred given that it was not filed within one year of the effective date of the Anti-terrorism and Effective Death Penalty Act. On May 16, 2000, Trenkler filed his Notice of Appeal. On October 16, 2001, The First Circuit denied Trenkler's appeal in its entirety.

On August 10, 2000, Trenkler filed a Motion For a New Trial or, in the Alternative, for an Evidentiary Hearing, pursuant to Fed. R. Crim P. Rule 33. Trenkler argued: 1) that a Radio Shack receipt introduced at trial, reflecting the purchase of the toggle switch used to build the bomb that killed Boston Police Bomb Squad Officer Jeremiah Hurley, was fraudulent; 2) that an interview of Thomas Shay "has resulted in statements by Shay that the testimony by the Radio Shack employee concerning the purchaser of the items was false and biased;" and that Shay also allegedly stated that

petition seeking to vacate Count Three should also be dismissed as moot.⁸

POINT THREE

JONES DOES NOT INVALIDATE TRENKLER'S 844(i)
CONVICTION GIVEN THAT THE CAR WAS ACTIVELY USED
IN COMMERCIAL ACTIVITY AFFECTING INTERSTATE COMMERCE
AT THE TIME OF THE BOMBING

Jones is clearly distinguishable from the instant case given that the house in Jones was not actively used for any commercial purpose, whereas there was uncontradicted evidence in this case that Shay Sr.'s car was actively employed for commercial purposes at the time of the bombing. In particular, Shay actively used the car in his part-time auto body repair business to drive to shops to purchase automobile parts manufactured out of state to be used to repair cars; he also used it to drive to customers houses to give quotes and advice regarding auto body repair. Shay Sr. also used the car as a loaner to his customers while their cars were being repaired. Some of Trenkler's customers were from out of state and he repaired both domestic and foreign cars. Indeed, the car had been loaned to a customer whose car Shay Sr. was repairing during the two weeks immediately before the week-end when the bomb was discovered; and Shay Sr. used the

⁸Trenkler's claim with respect to 844(d) is also barred under Section 2255 as it is actually an unsupported constitutional claim, i.e., that Congress exceeded its authority by criminalizing the conduct referenced in 844(d) without requiring a greater showing of affect upon interstate commerce; which has not been made retroactive.

11/12:8-9.² While the officers were conducting a preliminary examination of the object, it suddenly exploded. 11/12:11-18. Officer Hurley, who was closest to the device, died several hours later from massive trauma. 11/12:19-21; Exs. 6, 7. Officer Foley survived, suffering the loss of an eye and severe injuries to his head, face and upper torso. 11/12:20-21.

The suspicious object had first been discovered by Shay Sr. the previous Sunday afternoon, October 27, 1997. 11/1:76. According to the ATF experts and an engineer retained by the government, the device was affixed to the undercarriage of Shay Sr.'s 1986 Buick directly beneath the driver's seat. 10/28:54-56; 11/2:60-71. The bomb became dislodged when it twice made contact with the surface of Shay Sr.'s driveway on Sunday, October 27. Id. Had the bomb exploded as designed while Shay Sr. was seated in the driver's seat, it almost certainly would have killed him. 11/10:16-17.

The government offered testimony, inter alia, that the device was a high-powered remote controlled bomb which contained the equivalent of two to three sticks of repackaged dynamite, along with a remote control receiver, a power source, two blasting caps,

² References to the trial record will be to the date of the trial or hearing, followed by a colon, followed by the page number(s) for the applicable pages of the record; i.e., 10/25:3 would designate page three of the transcript of October 25, 1993.

storage facilities to distribute to its customers. Up until October, 1991, Austin Powder's detonator caps were simply manufactured in Austria and shipped out in component form and were assembled in MacArthur, Ohio and Brownsville, Texas. Typical annual sales of detonator caps in just New England was 600,000 at \$3.00 each, retail. Mr. Adams was shown Government Exhibit 17C, a photograph depicting the detonator cap recovered from the bomb, and identified the detonator cap as an Austin Rock Star electronic detonator cap, which was distinctive from the detonator caps of its three competitors in the area because of its red and yellow color, and the delay timing sequence stamped at the base of the aluminum shell of the detonator. He also identified the item depicted in a photograph designated Government's Exhibit 12-1, depicting another recovered component of the bomb, as an Austin Powder Rock Star electronic detonator. Finally, he testified that Austin Powder never had any manufacturing facilities in Massachusetts. (Trial Tr. 4:4-11).

Trenkler did not introduce any evidence at trial to contradict this testimony, nor did he even attempt to argue that the government failed to satisfy its burden of proof with respect to the interstate commerce element of § 844 in his closing argument. Nor has he ever attacked this proof in any of his numerous post-trial motions and appeals.

Evans how much time he would receive for a murder charge in Massachusetts. 11/3:113-116. When Evans responded that Shay Jr. could get 15 to 25 years, Shay Jr. said that he would kill himself or, if released on bail, he would flee. 11/3:117.³ Shay Jr. also told Evans that his father had "disowned him five years previous." 11/3:118.

In October 1992, a year after the bombing, while being detained on unrelated charges at the Plymouth House of Correction, Shay Jr. befriended a fellow detainee, Lawrence Plant. 11/4:36-38. Shay Jr. told Plant about his role in the Roslindale bombing. 11/4:38-41. He first described his abusive childhood and how he hated his father. 11/4:42. Shay Jr. told Plant that he was involved in the bombing to try to "get even" with his father. 11/4:42, 44. He described how the bomb functioned, and how it was attached to his father's car with magnets. 11/4:42-43. He said that it was the officer's "own fault" that he had been killed. 11/4:44. He also mentioned that there were monetary considerations involved, specifically "some sort of life insurance policy" worth "around half a million dollars." Id.

³ The evidence established that Shay Jr. did, in fact, flee Massachusetts shortly after he was released on bail -- as he had told Evans he would. Shay Jr. was apprehended sometime in March 1992 living in San Francisco under a false name. 11/8:74-75.

Jones provides no further insight for us. While the law challenged in Jones did have a jurisdictional element, the challenge there involved the alleged use of a residence in activities affecting interstate commerce. The rationale used by the Jones Court to hold that the federal arson statute only encompassed "property currently used in commerce or in an activity affecting commerce" has little impact on the assessment of whether firearms moved through interstate commerce are subject to congressional regulation. The analogy urged by Singletary is made even more incongruous because the Jones Court neither expressly overruled Scarborough nor rejected its directly applicable proposition relevant to interpreting the gun possession statutes.

Id. at 204.

Thus, the Third Circuit has already rejected the argument advanced by Trenkler, and held that it is improper to extend the holdings of Jones, Lopez and Morrison to cases dealing with statutes that merely regulate the shipment of goods in interstate commerce, such as 922(g)(1). Section 844(d) is precisely such a statute and Trenkler's argument fails for the reasons set forth in Singletary.⁷ See also United States v. Disanto, 86 F.3d 1238, 1245 (1st Cir. 1996) ("After Lopez the Court explained in United States v. Robertson, 514 U.S. 669, 115 S.Ct. 1732, 1733, 131 L.Ed.2d 714 (1995) (per curia), that these three bases of congressional authority are analytically distinct, reaffirming

⁷Trenkler's reliance upon United States v. Morrison, 529 U.S. 598, 613, 120 S.Ct. 1740 (2000) (Brief at p.35, fn 11), which dealt with the Violence Against Women Act, is also misplaced, as Morrison did not regulate any type of economic activity, nor did the Act even contain a jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce.).

investigation, agents found a receipt for an October 18, 1991 purchase of the toggle switch at Radio Shack on Massachusetts Avenue in Boston. Ex. 33. The receipt showed that the toggle switch was purchased only 10 days before the bombing; the customer name on the receipt was "SAHY JYT," a possible transposition of the letters in the name "SHAY;" and the "ID" number, which reflected the last four digits of the customer's telephone number, was "3780." Shay Sr.'s home and business telephone ended with "7380," suggesting another transposition of digits. 11/1:48-49; Ex. 26.

The receipt reflected the purchase of several other components which, according to an ATF bomb expert, would be consistent with items used to check an electrical circuit, such as the one used in the Roslindale bomb. 11/10:23. Finally, the purchase was made at

3. Trenkler's Relationship With Shay Jr. and His Bomb-Making Expertise.

Most significantly, Shay purchased the toggle switch used in constructing the bomb, as well as other items which could be used to check an electric circuit, at a Radio Shack store at 197 Massachusetts Avenue in Boston, located directly across the street from the Christian Science Church, where Trenkler was installing a rooftop satellite dish for the church during the same time period. 11/4:146-148. The jury also heard evidence concerning a 1986 remote-control bomb that Trenkler had previously admitted

defendant, a convicted felon, was arrested in Pennsylvania in 1999 after being observed shooting a gun into the air. The gun was manufactured in Brazil, imported into the United States through Georgia, and eventually sent to a dealer in Texas in 1973. No further evidence regarding the guns movement was available, including when it came into Pennsylvania. The government also presented no evidence concerning any effect the gun had on interstate commerce. Id. at 197-198.

The Court noted that, in Scarborough v. United States, 431 U.S. 563, 97 S.Ct. 1963, 52 L.Ed.2d 582 (1977), the Supreme Court had previously held that "the transport of a weapon in interstate commerce, however remote in the distant past, gives its present intrastate possession a sufficient nexus to interstate commerce to fall within the ambit of the statute." Singletary, 268 F.3d 200. The Court then stated that the issue before it was whether the holding of Scarborough survived in the wake of Lopez, Morrison and Jones. Indeed, Singletary raised essentially the same arguments attacking the interstate commerce aspect of the felon-in-possession statute as raised by Trenkler in attacking 844(d). Specifically, Singletary argued that: 1) the felon-in-possession statute was facially defective because the conduct it proscribed - intrastate possession of a firearm - does not have a substantial affect upon interstate commerce and, thus, does not

The government offered evidence as to motive from which the jury could infer that Trenkler was willing to design and construct the explosive device to induce and cultivate a relationship with a younger male such as Shay Jr. 11/8:12-15. As stated, there was evidence of insurance money that may have become available upon Shay Sr.'s death. 11/3:136. There was also evidence that Trenkler had a very poor financial condition in the fall of 1991 and that he had invested in a string of failed businesses in the 1980s. 11/4:62-71; 144-150.

Trenkler had extensive training and experience in electronics, including satellite and microwave communications, 11/4:59-60; 71-72; 141-143, and there was also evidence that Trenkler had a long-standing interest in remote control vehicles and toys. 11/8:21; 11/4:72. Trenkler's latest electronic business, ARCOMM, was performing work for the aforementioned Christian Science Church located across from the Radio Shack store in October, 1991. 11/4:73. In fact, the Radio Shack clerk who handled the transaction in which the toggle switch had been purchased under the name "SAHY JYT" also testified to seeing Trenkler inside the store on two or three occasions in late September and October, 1991. 11/3:97; Ex. 34.

Trenkler later admitted that he had "forgotten" to tell the agents certain things about his relationship with Shay Jr. 11/8:63.

order to be within Congress' power to regulate it under the Commerce Clause. . . . We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." Id. at 559.

The Court then stated:

We now turn to consider the power of Congress, in the light of this framework, to enact § 922(q). The first two categories of authority may be quickly disposed of: § 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

Id. at 558.

The Court then went on to hold the statute unconstitutional because "§ 922(q) is a criminal statute that by its terms had nothing to do with 'commerce' or any sort of economic enterprise, however criminal broadly one might define those terms" Id. at 561; and because "it contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce" Id.

Thus, it is clear that the Court's holding in Lopez has no relevance to statutes such as 844(d) which regulate the shipment

Enforcement Officer Thomas Waskom to testify. 11/9:127. Mr. Waskom made a detailed "signature analysis" of the 1986 and 1991 devices and of the circumstances surrounding the two incidents. 11/9:127-129. He opined that "the person who designed and constructed the '86 device was the same person who designed and constructed the 1991 device." 11/10:19-26.⁵

4. Lindholm Testimony. David Lindholm, who was detained with Trenkler for three days in December 1992 at the Plymouth County Jail, testified to additional incriminating statements made by Trenkler. 11/10:83-86. Lindholm and Trenkler shared certain common life experiences, including the fact that they had both lived on Whitelawn Avenue in Milton. 11/10:88-89. They became familiar with each other and bonded together while in jail. Id. Thereafter, they talked privately about their present circumstances. Trenkler talked emotionally about his relationship

⁵ The government also called ATF Intelligence Research Specialist Stephen Scheid to testify. 11/9:52. Mr. Scheid maintained a computer database of all bombings and arsons in the United States dating back to 1975 (known as "EXIS"). 11/9:54-56. Mr. Scheid queried over 14,000 explosive incidents in the United States for a 12-year period (1979-1991) for bombings or attempted bombings involving certain common features. Scheid testified that this computer analysis produced two incidents bearing these common features: the 1991 Roslindale bombing and the 1986 Quincy bombing. 11/9:84. The First Circuit held that the admission of this testimony was error but that the error was harmless in view of all of the other evidence establishing Trenkler's guilt.

traveled across state lines at some time in the past would raise serious questions as to the limits of Congress's power under the Commerce Clause under the principles set forth in Jones. Trenkler Brief at 37.

However, Trenkler's attempt to expand the holding of Jones by reference to Lopez fails for several obvious reasons. First, neither Jones nor Lopez involved property actively used in a commercial activity as the car was used in Trenkler's case. Second, neither case dealt with 844(d), which involves significantly different statutory language and is designed to address significantly different interstate commerce concerns. Indeed, most significantly, the Lopez Court distinguished the statute in that case from other statutes which deal with goods actually in interstate commerce and which the Court acknowledged Congress had the right to regulate.

In particular, Lopez involved the constitutionality of the Gun-Free Zones Act of 1990, in which Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V). The Court held that: [t]he Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the

of the larger manufacturing outfits in the business, that it manufactures commercial explosives and detonators, that its customers were primarily drilling and blasting contractors, sewer contractors and rock quarries, that it had storage facilities and offices in Vermont, Maine, New Hampshire and Massachusetts, and that it was licensed and inspected on a periodic basis by the Bureau of Alcohol, Tobacco and Firearms. (Trial Tr. 4:2-4).

He further testified that Austin Powder's detonator caps had been manufactured in Austria, were shipped to MacArthur, Ohio, and from MacArthur, Ohio were distributed to Austin's storage facilities to distribute to its customers. Up until October, 1991, Austin Powder's detonator caps were simply manufactured in Austria and shipped out in component form and were assembled in MacArthur, Ohio and Brownsville, Texas. Typical annual sales of detonator caps in just New England was 600,000 at \$3.00 each, retail. Mr. Adams was shown Government Exhibit 17C, a photograph depicting the detonator cap recovered from the bomb, and identified it as an Austin Rock Star electronic detonator cap, which was distinctive from the detonator caps of its three competitors in the area because of its red and yellow color, and the delay timing sequence stamped at the base of the aluminum shell of the detonator. He also identified the item depicted in a photograph designated Government's Exhibit 12-1, depicting another recovered component of

actors nor their conduct has a commercial character." 514 U.S. at 580. Noting the concerns raised in Lopez, the Jones Court stated that "it is appropriate to avoid the constitutional question that would arise were we to read § 844(i) to render the 'traditionally local criminal conduct' in which petitioner Jones engaged 'a matter for federal enforcement'" citing United States v. Bass, 404 U.S. 336, 350, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971).

Finally, the Court noted that its interpretation of 844(i) was "additionally reinforced by other interpretative guides," including the rule of leniety, and the rule that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes," citing Bass, 404 U.S. at 349, 92 S.Ct. 515. Id. at 858.

Thus, Jones is clearly distinguishable from the instant case on a variety of grounds. First, Jones involved a private residence as to which there was no evidence of it being actively used for even the most minimal of commercial activities. In contrast, in this case, it was uncontroverted that the car was used in Shay, Sr.'s car repair business and that the car was used to purchase parts shipped in interstate commerce, and used as a loaner by his customers, including out-of-state customers. Thus, the car was clearly used in an activity affecting interstate commerce, namely Shay Sr's on-going autobody repair business.

For a period of approximately three months, Shay, Sr. also performed some autobody repair work at a garage in West Roxbury, at which he subleased some space and he applied to the City of Boston for a certificate to conduct business at that location. The certificate authorized him to conduct autobody work at that location up until March 1995. (Trial Tr. at 6:49-51)

Shay Sr. purchased the Buick Century in 1986, and used the vehicle in connection with his business. In particular, he "used it to pick up parts, go to different insurance companies to do business, sometimes I would give it out as a loaner." (Trial Tr. at 6-53). His customers came from the Boston area and surrounding towns and from out of state; the parts he used in his autobody repair business were manufactured "throughout the country." Id. He used the car to purchase the parts from different auto distributors, and he also worked on foreign cars, the parts for which "could have been made probably inside the country or even outside the country." When he was working on a customer's car, if they needed a replacement car, he would allow the customer to use his 1986 Buick as a "loaner," with no restrictions on where they could go or how they could use it. (Trial Tr. 6:53-54).

Shay, Sr. kept an uninsured van in his driveway to store all his equipment after he moved out of the garage in West Roxbury. As of October 28, 1991, the date of the explosion, the most recent

The Court rejected the government's argument that the insertion of the phrase "affecting . . . commerce," when unqualified, signal's Congress' intent to invoke its full authority under the Commerce Clause. The Court stated that the qualifying words "used in" a commerce-affecting activity indicated that "Congress "require[d] that the damaged or destroyed property must itself have been used in commerce or in an activity affecting commerce." Id. at 854, citing United States v. Menuti, 639 F.2d 107, 110 (C.A.2 1981) (Friendly, J.) The Court further stated: "The proper inquiry, we agree, 'is into the function of the building itself, and then a determination of whether that function affects interstate commerce.' Unites States v. Ryan, 9 F.3d 660, 675 (C.A. 8 1993) (Arnold, C.J., concurring in part and dissenting in part). Id. at 854-855.

The Court rejected the government's argument that the home was "used" in at least three activities affecting commerce: 1) the homeowner "used" the dwelling as collateral to obtain a mortgage from an out-of-state lender; 2) the homeowner "used" the residence to obtain a casualty insurance policy from an out-of-state insurer; and 3) the homeowner "used" the residence to receive natural gas from sources outside the state. Id. at 855-857. The Court held that the phrase "used" in the statute meant "active employment for commercial purposes, and not merely a passive, passing or past

accident, as well as to do some family errands. (Trial Tr. 6-6:58-68).

6. Defense Case Regarding Interstate Commerce Elements

Trenkler's counsel introduced no evidence rebutting the government's proof regarding the interstate commerce elements of 844(d) and 844(i). He also made no reference whatsoever to the interstate commerce elements of Counts Two and Three, nor did he challenge the evidence establishing these elements, at any point in his closing argument. (Trial Transcript 17:57-88).

Based on the evidence at trial, the jury found Trenkler guilty of all three counts.

POINT TWO

JONES CLEARLY DID NOT INVALIDATE TRENKLER'S 844(d) CONVICTION

Trenkler contends that Jones "established new law that necessarily heightens the requirements of interstate commerce under 844(d), as well as 844(i). Brief at 34. This argument, attempting to extend Jones, which dealt with 844(i), to entirely different statutes, such as 844(d), has been soundly rejected by numerous Courts, including the Third Circuit, and is fatally flawed.

In United States v. Jones, 529 U.S. 848 (2000), the defendant tossed a Molotov cocktail into a home owned and occupied by his cousin as a dwelling place. No one was injured but the ensuing blaze severely damaged the house. Jones was charged with arson, in violation of 844(i); using a destructive device during and in relation to a crime of violence in violation of 18, U.S.C. § 924(c); and making an illegal destructive device in violation of 26 U.S.C. § 5861(f). He was convicted of all three counts and sentenced to 35 years' imprisonment and five years' supervised release. On appeal, Jones argued that 844(i), when applied to arson of a private residence, exceeded the authority vested in Congress under the Commerce Clause of the Constitution, Art. I, § 8, cl.3. Because Courts of Appeals had divided both on the question of whether 844(i) applies to buildings not used for commercial purposes and on the constitutionality of such an

the habeas petition must be dismissed for lack of jurisdiction. Application of Galante, 437 F.2d 1164, 1165 (3rd Cir. 1971). See also Strollo v. Alldrege, 463 F.2d 1194, 1195 (3rd Cir. 1972) ("as to issues cognizable by the sentencing court under §2255, a motion under that section supersedes habeas corpus and provides the exclusive remedy.").

The only exception, i.e., when a federal prisoner nevertheless can seek habeas relief under §2241, is when §2255 proves "inadequate or ineffective" to test the legality of detention. 28 U.S.C. §2255; Davis, 417 U.S. at 343; Dorsainvil, 119 F.3d at 251; Vial, 115 F.3d at 1194. As discussed below, this exception rarely exists.

One of the principles vindicated by these limitations "is a 'presumption deeply rooted in our jurisprudence: the 'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights.'" Daniels, 532 U.S. at 381 (emphasis added) (quoting Parke v. Raley, 506 U.S. 20, 29 (1992)). See also United States v. Miller, 197 F.3d 644, 651 (3rd Cir. 1999) (AEDPA was intended to codify the judicial doctrine of abuse of writ and to create a modified res judicata rule to prevent petitioners from relitigating habeas claims absent exceptional circumstances).

The failure to satisfy the stringent gatekeeping requirements on §2255 motions imposed by AEDPA does not constitute one of the exceptions where a §2255 motion is "inadequate or ineffective" so as to permit a defendant to challenge his/her federal conviction via a §2241 habeas petition.

In Dorsainvil, this Court addressed the "inadequate and ineffective" exception of §2255, known as the "safety-valve" clause or "savings" clause of §2255, and held that it **must** be construed **strictly**. 119 F.3d at 251 (emphasis added) (collecting cases). The Court made it clear that §2255 would not be found to "be 'inadequate or ineffective' so as to enable a second petitioner to invoke §2241 merely because that petitioner is unable to meet the stringent gatekeeping requirements of the amended §2255. Such a holding would effectively eviscerate Congress's intent in amending §2255." Id. at 251. See also United States v. Baptiste, 223 F.3d 188, 189-90 (3rd Cir. 2000) (petitioner cannot evade AEDPA's requirements regarding second or successive §2255 petitions by filing a writ of coram nobis).

Thus, the availability of §2241 to challenge a federal conviction is extremely limited and "is now reserved for rare cases." Dorsainvil, 119 F.3d at 250. As recognized in Dorsainvil, a prisoner can pursue habeas relief under the savings clause of §2255 typically only where a subsequent statutory interpretation

reveals that the prisoner's **conduct is not criminal** so as to avoid a complete miscarriage of justice. The safety-valve clause of §2255 otherwise does not apply. Id. See also Kinder v. Purdy, 222 F.3d 209, 213-14 (5th Cir. 2000); Brown v. Mendez, 167 F.Supp.2d 723, 726-27 (M.D. Pa. 2001).

Here, because Trenkler is not actually innocent of either the 844(d) or 844(i) charges, as discussed in more detail below, his 2241 Petition is jurisdictionally defective and should be dismissed. He has also failed to demonstrate cause and prejudice for his failure to raise these issues previously. See, e.g., Moscato v. Federal Bureau of Prisons, 98 F.3d 757 (3rd Cir. 1996) (inmate's challenge to disciplinary hearing procedurally defaulted, thereby barring consideration of merits of 2241 claim absent showing of cause and prejudice). Where the Jones case was argued on March 21, 2000, prior to the Massachusetts District Court's denial of Trenkler's 2255 petition on April 18, 2000, Trenkler was sufficiently on notice of the potential Commerce Clause challenges to his conviction such that he could have amended his pending 2255 petition to raise these issues. His failure to do so should bar him from taking advantage of the savings clause of 2255.

POINT ONE

**TRENKLER'S PETITION SHOULD BE DISMISSED
AS HE CANNOT CHALLENGE HIS CRIMINAL CONVICTION
AND SENTENCE VIA A §2241 HABEAS PETITION.**

To seek federal post-conviction relief from a judgment of conviction, persons convicted in federal court are **required** to bring their collateral attacks challenging the validity of their conviction and sentence by filing a motion to vacate sentence pursuant to 28 U.S.C. §2255, **not** under 28 U.S.C. §2241. In re Dorsainvil, 119 F.3d 245, 249 (3rd Cir. 1997); In re Vial, 115 F.3d 1192, 1194 (4th Cir. 1997); Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996). Section 2255 motions, thus, are the **exclusive** means by which a federal prisoner can challenge a conviction or sentence that allegedly is in violation of the Constitution or federal laws or that is otherwise subject to collateral attack. Davis v. United States, 417 U.S. 333, 343 (1974); United States ex rel. Leguillou v. Davis, 212 F.2d 681, 683 (3rd Cir. 1954). See also Coady v. Vaughn, 251 F.3d 480, 484 (3rd Cir. 2001) (a state petitioner must file his challenge to his conviction under 28 U.S.C. §2254, rather than §2241, because "the more specific statute takes precedence over the more general one," particularly when utilizing the more general statute "'would undermine limitations created by a more specific provision'"). Accordingly, if a prisoner attempts to challenge his federal conviction or sentence under 28 U.S.C. §2241,

application, the Supreme Court granted certiorari. The Court framed the question presented as follows:

Whether in light of United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L.E.2d 626 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, [citation omitted], 18 U.S.C. § 844(i) applies to arson of a private residence; and if so, whether its application to the private residence in the present case is constitutional.

Id. at 852.

The Court held: "[s]atisfied that § 844(i) does not reach an owner-occupied residence that is not used for any commercial purpose, we reverse the Court of Appeals judgment." 529 U.S. at 851-852.

The Court first reviewed the legislative history of 844(i) and then noted that it had previously construed § 844(i) in Russell v. United States, 471 U.S. 858, 105 S.Ct. 2455, 85 L.Ed.2d 829 (1985) and "there held that § 844(i) applies to a building 'used as rental property.'" and that the property "was being used in an activity affecting commerce within the meaning of § 844(i)." Id. at 853.

The Court then stated:

We now confront a question that was not before the Court in Russell: Does § 844(i) cover property occupied and used by its owner not for any commercial venture, but as a private residence. Is such a dwelling place, in the words of § 844(i), "used in . . . any activity affecting commerce."

Id. at 854.

work he had performed out of his home was on the car of a Lewis Rotman, who lived in a nearby town. Shay, Sr. had possession of Rotman's car for approximately two weeks, and he completed the work and returned the car to Rotman on Friday, October 25, 1991, just three days before the bombing. During the period between approximately October 12 and October 25, Shay, Sr. had loaned his customer his 1986 Buick as a replacement car while he repaired Rotman's car. Mr. Rotman had a business in Randolph, Massachusetts and Shay, Sr. drove the repaired car out to that business and swapped it for his 1986 Buick. (Trial Tr. 6:55-58). He also stored tools for his business in his garage. (Trial Tr. 6:72-73). When shown a picture depicting a piece of wood found in his driveway, he stated that it was a remnant from wood used to repair yet another car. (Trial Tr. 6:131-133).

On the following Monday, October 28, 1991, the day of the bombing, Shay, Sr. was scheduled to do autobody repair work for a Ruth Leary, who owned a 1990 Mazda, which needed repair work to the hood area, the roof panel and the trunk area. She did not need a loan of the 1986 Buick because she was going to Texas on business for the week and would not need a car. The previous day, Sunday, October 27, he had used the 1986 Buick to drive to Malden or Medford to look at someone's car and give advice about some work that needed to be done on an automobile that had been in an

connection." Id. at 855. Significantly, for purposes of distinguishing Jones from this case, the Court noted that the government did not allege that the residence "served as a home office or the locus of any commercial undertaking. The home's only 'active employment,' so far as the record reveals, was for the everyday living of Jones' cousin and his family. " Id. at 856.

The Court stated that were it to interpret 844(i) to reach arsons of all private homes, the phrase "used in any commerce-affecting activity" would "have no office." Id. at 857.

The Court also noted that its decision was in harmony with the guiding principle that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (citations omitted)Id. at 857.

The Court then referred to its holding in United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed. 2d 626 (1995), where the Court invalidated the Gun-Free School Zones Act, former 18 U.S.C. § 922(q) (1988 ed., Supp. V), which made it a federal crime to possess a firearm within 1,000 feet of a school. In Lopez, the Court held that the Act exceeded Congress' power to regulate commerce where the area was one of traditional state concern and where the legislation aimed at an activity in which "neither the

the bomb, as an Austin Powder Rock Star electronic detonator. Finally, he testified that Austin Powder never had any manufacturing facilities in Massachusetts. (Trial Tr. 4:4-11).

b. Evidence Supporting Violation of 844(i) - Shay, Sr.'s Car

The government called Thomas Shay, Sr., the father of Trenkler's co-defendant Thomas Shay, Jr., and the owner of the car under which the bomb was attached. He testified, inter alia, that he had been an autobody repair worker for twenty years, that he owned his own autobody repair business at various locations over the years, and had ceased full-time employment in October 1989 as a result of a disability. He further testified that after October 1989, he performed part-time autobody work at one point using a garage in South Boston, which his brother was renting, including in October 1991, and that he also did autobody repair work in his driveway, "such as straightening and refinishing, replacing." (Trial Tr. 6:45-47).

Shay, Sr. also testified that when he stopped working at his own garage in 1989, he sent out a card to a preferred list of "maybe over a hundred" customers to alert them to how they could reach him if they desired to have services performed on their vehicles. A copy of that postcard was introduced into evidence. At three locations on the card was Shay, Sr.'s home telephone number at 39 Eastbourne Street, Roslindale. (Trial Tr. at 6:47-50).

Second, contrary to Trenkler's claim, Jones did not hold, or even remotely suggest, that where the property is actively employed for a commercial purpose, the employment must be more than de minimi. Nor, as discussed below, does Lopez support such a claim. Moreover, as also discussed in more detail below, Shay Sr's use of the car in an activity affecting interstate commerce was more than de minimis.

Third, and most important for purposes of the immediate discussion, Jones did not address 844(d) whatsoever, nor can Jones be read to call into question the constitutionality of 844(d) or to graft onto it, as Trenkler's argues, a requirement that the government need prove more than the shipment of an explosive device in interstate commerce to satisfy the interstate commerce requirement of 844(d).

In support of this claim, Trenkler argues that the "broader holding of Jones is that de minimis links to interstate commerce are no longer sufficient to establish federal jurisdiction over traditionally local concerns, and that it is "appropriate to avoid the constitutional question[s]" raised by Lopez by construing statutes which raise such Commerce Clause issues narrowly to avoid encroachment on the authority of the states." Trenkler Brief at 36. Trenkler also opines that "a reading of 844(d) which permits conviction upon nothing more than proof that the explosives had

with Shay Jr. 11/10:98. He also mentioned Shay Jr.'s lack of technical ability. Id. Lindholm also testified that, during their conversation, Trenkler made the following admissions: "well, even if I did build a bomb, I did not place it on the car;" "so, I built the bomb. I built the bomb. I don't deserve to die or spend the rest of my life in prison for building this device." According to Lindholm, Trenkler also stated that the two bomb squad officers were foolish and negligent for not wearing body armor at the time that they were examining this device; that it served them right for what happened to them; and that it was not his fault. 11/10:96-97.⁶

5. Evidence Supporting Interstate Commerce Elements

a. Evidence Supporting Violation of 844(d) - Detonator Cap

The government called Stephen Adams, who testified that he was employed by Austin Powder company since 1986, that he was the New England regional sales manager, and worked out of its Kingston, New Hampshire office since January 1992. Mr. Adams further testified that Austin Powder had been in existence since 1833, that its corporate headquarters was in Cleveland, Ohio, that it was one

⁶ Trenkler called witnesses to establish that he was a hard-working and highly skilled electrical engineer whose business was doing reasonably well in the fall of 1991 (see, for example, testimony on 11/12) and to establish that he was working at another location away from the Christian Science Church on October 18, 1991, the day that the toggle switch was purchased at Radio Shack by Shay Jr. 11/12:76-89; 11/12:167-171).

Act exceeds the authority of Congress '[t]o regulate Commerce . . . among the several states. . . .' U.S.Const., Art. I, § 8, cl.3." 514 U.S. at 551.

In reaching this holding, the Court noted that in Maryland v. Wirtz, 392 U.S. 183, 197, 88 S.Ct. 2017, 20 L.Ed2d 1020 (1968), it had stated that:[t]he Court has said only that where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence."

The Court then stated:

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. . . . First, Congress may regulate the use of the channels of interstate commerce. See e.g., Darby, 312 U.S., at 114, 61 S.Ct., at 457; Heart of Atlanta Hotel, supra, at 256, 85 S.Ct., at 357 ("[T]he authority of Congress to keep channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." (quoting Caminetti v. United States, 242 U.S. 470, 491, 37 S.Ct. 192, 197, 61 L.Ed. 442 (1917))). Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, even though the threat may come only from intrastate activities. (citations omitted). Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, Jones & Laughlin Steel, 301 U.S., at 37, 57 S.Ct., at 624, i.e., those activities that substantially affect interstate commerce, Wirtz, supra, at 196, n. 27, 88 S.Ct. at 20244, n. 27.

Id. at 558-559. The Court then noted that "within this final category, admittedly, our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate in

He mentioned that he had given Shay Jr. rides on occasion, including to Shay Jr.'s father's house, and that he was aware that Shay Jr. hated his father. Id. Trenkler also acknowledged having visited the Radio Shack store near the Christian Science Church. Id. During one discussion, Trenkler said to an ATF agent, with an "arrogant" demeanor, "if we did it, then (sic) only we know about it ... how will you ever find out and (sic) if neither one of us talked (sic)?" 11/8:73.

There were several factual and circumstantial similarities between the 1986 and 1991 bombings. As with the 1991 incident, the 1986 incident was the product of a conspiracy wherein Trenkler agreed to assist a friend, Donna Shea, in an effort to take revenge against others. 11/8:137; 145-146. In 1986, Trenkler used a young male friend, Todd Leach, to acquire electrical components for him. 11/8:144-145; 11/9:27-28, just as the government suggested had occurred with Shay Jr. in 1991. There was also testimony that Trenkler tested the 1986 device before using it, utilizing two plastic boxes and a test lamp. 11/9:33-34.⁴

Once all the forensic and factual evidence from the 1986 and 1991 incidents was admitted, the government called ATF Explosives

⁴ This fact was important since there was evidence, in the form of the Radio Shack receipt, Ex. 33, that Shay Jr. purchased two small plastic project boxes and a test lamp along with the toggle switch in October 1991.

of goods in interstate commerce, except that it made clear, contrary to Trenkler's central claim in his brief, that its holding had no bearing on Congress' right to enact such statutes.

Thus, neither Jones nor Lopez support Trenkler's claim that the government was required to demonstrate more than the fact that the explosive device was shipped in interstate commerce to satisfy the interstate commerce element of 844(d).

Indeed, the Third Circuit, in United States v. Singletary, 268 F.3d 196 (3rd Cir. 2001), has conclusively rejected precisely the same argument advanced by Trenkler in a post-Jones case involving an analogous statute, 18, U.S.C. Section 922(g)(1), the felon-in-possession statute, which makes it unlawful for felons, "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

In Singletary, the defendant, relying upon Jones and United States v. Morrison, 529 U.S. 598, 120 S.Ct.1740, 146 L.Ed.2d 658 (2000), argued that the statute was "unconstitutional because the conduct it proscribes - the intrastate possession of a firearm - does not have a substantial effect upon interstate commerce, and thus does not constitute a valid exercise of Congress' authority under the Commerce Clause." 268 F.3d at 197. In Singletary, the

constructing on September 1, 1986. 11/10:72. The device was placed under a truck belonging to the Capeway Fish Market causing it to sustain minor damage to its undercarriage. 11/10:74. Trenkler confessed to building the explosive device, and further admitted that he had constructed the device for a friend as a favor. 11/8:118-120.

When first questioned about his relationship with Shay Jr., Trenkler falsely claimed that he had known Shay Jr. for only six months, that he had only been with him on two occasions and that Shay Jr. had never been to his apartment. 11/5:144; 11/8:50. The evidence established that Shay Jr. and Trenkler were acquaintances dating back at least two years; that they were both homosexual; that Shay Jr. had in fact visited Trenkler's apartment; and that they had been in contact with one another on multiple occasions in the days and weeks prior to the bombing on October 28, 1991. 11/4:152-157; 11/5:31-37; 11/5-93. Shay Jr.'s address book had an entry which read "Al Trenkler, BPR #553-0778." Ex. 32. Trenkler's roommate, John Cates, confirmed that the number 553-0778 was the pager number used by Trenkler in the fall of 1991. 11/4:105. Mr. Cates also testified that Shay Jr. was paging Trenkler and leaving voice mail messages in September and October 1991, right up until the few days prior to the explosion in Roslindale. Id.

constitute a valid exercise of Congress' authority under the Commerce Clause; and 2) the statute was unconstitutional because there was no evidence that his possession of the gun substantially affected interstate commerce, or indeed, that it had any effect whatsoever on commerce, interstate or intrastate. Singletary, 268 F.3d at 200.

The Court engaged in a thorough review of the analyses and holdings of Jones and Morrison, as well as its own post-Lopez decision, United States v. Gateward, 84 F.3d 670, 671 (3rd Cir. 1996), where it held that it did "not understand Lopez to undercut the Bass/Scarborough proposition that the jurisdictional element "in or affecting commerce" keeps the felon firearm law well within the constitutional fringes of the Commerce Clause." The Court then made the following ruling, which applies with equal force to Trenkler's 844(d) claim:

Missing from Singletary's analysis, however, is the recognition that, while Lopez and Morrison were questions concerning the power of Congress to regulate activities substantially affecting interstate commerce, § 922(g)(1) regulates the possession of goods moved in interstate commerce. The jurisdictional element in § 922(g)(1) distinguishes it from the statutes considered in Lopez and Morrison. Section 922(g)(1), by its very terms, only regulates those weapons affecting interstate commerce by being the subject of interstate trade. It addresses items sent in interstate commerce and the channels of commerce themselves, delineating that the latter be kept clear of firearms. Thus, an analysis of the kind utilized in Lopez or Morrison is neither appropriate nor needed.

Shay Jr. also gave an interview to a local television station (WLVI-TV) on October 17, 1992. 11/10:126, Ex. 37. Shay Jr. made the following incriminating statements on the portion of the videotape that was played at trial:

I, Tommy Shay, am guilty of something in that case [the Roslindale bombing], but do not know what...

...The Radio Shack clerk on Mass Ave. recognized me. I don't know really why he recognized me.

[I bought] a toggle switch, AA battery holder, wires, you know, electrical supplies I didn't buy no explosives.

There's only two things that I purchased that were inside that explosive device that killed Officer Hurley the toggle switch and the AA battery holder.

My guiltiness is knowing who did it or thinking about who did it after the bomb and then fleeing, not to tell anybody. That's my guiltiness.

The foregoing evidence established that Shay Jr. was a participant in a conspiracy to kill his father, and that he aided and abetted the unlawful plan by purchasing certain essential device components. The evidence also established that Shay Jr. had no electronics background, and that he was not capable of designing or constructing a sophisticated remote control explosive device. 11/1:131; 11/5:73.

The ATF chemists identified the specific toggle switch used in the bomb as Model Number 275-602, a toggle switch which was custom manufactured for Radio Shack. 10/28:47-48. During the

the distinction between activities engaged in interstate commerce and purely intrastate activities having a substantial effect on interstate commerce. (citation omitted) The Court stated that the 'affecting commerce' test was developed in our jurisprudence to define the extent of Congress' power over purely intra state commercial activities that nonetheless have substantial interstate effects.'"

In addition, Trenkler's contention that 'the evidence at trial with respect to the transport or receipt of the explosives in interstate commerce was extremely weak," (Trenkler Brief at 18) is baseless. As discussed above, Stephen Adams of Austin Powder testified that his company had been in existence since 1833, with corporate headquarters in Cleveland, Ohio, that it was one of the larger manufacturing outfits in the business, that it manufactured commercial explosives and detonators, that its customers were primarily drilling and blasting contractors, sewer contractors and rock quarries, that it had storage facilities and offices in Vermont, Maine, New Hampshire and Massachusetts, and that it was licensed and inspected on a periodic basis by the Bureau of Alcohol, Tobacco and Firearms. (Trial Tr. 4:2-4).

He further testified that Austin Powder's detonators caps had been manufactured in Austria, were shipped to MacArthur, Ohio, and from MacArthur, Ohio were distributed to Austin's

a toggle switch and other necessary electrical components, contained within a well-crafted rectangular wooden box. 10/28:40-53; 10/29:82-130.

2. Evidence of Shay Jr.'s Involvement. The evidence established that Shay Jr. had both a personal and a financial motive to seek his father's death. Shay Jr. was the victim of years of neglect and abandonment by both of his natural parents, Shay Sr. and Nancy Shay, and was estranged from his father at the time of the bombing. 11/1:121; 11/3:67; 11/1:114-116.

One month before the bombing, Shay Jr. learned that his father could receive up to approximately \$300,000 or \$400,000 if a pending personal injury lawsuit was successful 11/3:136; that the lawsuit would survive even if his father were to die, and that any recovery would go to Shay Sr.'s estate to be divided equally among his four children, including Shay Jr. 11/3:135-136. In the weeks prior to the bombing, Shay Jr. told a friend that he was very angry with his father, and felt abandoned by him, 11/3:135-136, that his father was terminally ill and was going to die soon, and that he expected to inherit a large amount of money when his father died. 11/5:38-39.

On October 31, Shay Jr. was arrested on an outstanding warrant for an unrelated charge. 11/3:72-73. The next day, during conversation with a fellow detainee, Paul Evans, Shay Jr. asked

Clearly, there was overwhelming, uncontroverted evidence at trial to satisfy the government's burden of proof that the explosives were shipped in interstate commerce. Moreover, while not required by Jones and its progeny, there was also overwhelming evidence that the company that shipped the explosive device was engaged in interstate and foreign commerce and that its activities substantially affected interstate and foreign commerce.

Thus, even if, as Trenkler wrongly claims, the government were required to establish not just that the explosives were shipped in interstate commerce but also an affect upon interstate or foreign commerce, the government satisfied that burden whether it was required either to establish a de minimis or substantial affect on interstate commerce.

Accordingly, that portion of Trenkler's Petition seeking to vacate his 844(d) conviction should be dismissed for lack of jurisdiction as he is not "actually innocent" of that offense. Furthermore, given that Trenkler will continue to serve a life sentence as a result of his conviction under Count Two, even if his conviction on Count Three is vacated, the portion of the

Trenkler did not commit the crimes for which he has been convicted; and 3) that an additional witness concerning the veracity of the testimony of David Lindholm had come forward and offered to testify as to Lindholm. The District Court denied Trenkler's Motion in its entirety on December 28, 2000. On April 6, 2001, the First Circuit dismissed Trenkler's appeal from the district court's denial of his motion for a new trial as untimely. Trenkler's Petition for Writ of Certiorari in the Supreme Court was denied on October 9, 2001. United States v. Trenkler, 112 S.Ct. 345 (2001).

At no time either prior to trial, during trial or in any of his numerous post-trial motions and appeals did Trenkler raise any objection to the constitutionality, or sufficiency of the evidence, supporting the interstate commerce element of the 844(i) or 844(d) convictions.

STATEMENT OF FACTS

A. The Trial

1. The Discovery of the Suspicious Device. On October 28, 1991, two members of the Boston Police Department ("BPD") Bomb Squad, Francis Foley and Jeremiah Hurley, were called to the scene of a suspicious object that was found lying in a driveway at 39 Eastbourne Street in Roslindale, Massachusetts. 10/26:42-43;

car to drive to another person's house to give advice about his car the day before the bombing, and he picked up another customer's car to perform repair work on the day of the bombing. Trenkler offered no evidence at trial to contradict this evidence and did not even attempt to contest the government's evidence regarding the interstate commerce element of the offense in his closing argument. Clearly, the car was actively used in an activity affecting interstate commerce and, thus, the government's evidence more than met the requirements of Jones.

Trenkler argues that numerous cases since Jones have held that de minimis uses of property in interstate commerce are insufficient to satisfy the statute. (Trenkler Brief at 23). However, these cases are clearly distinguishable in that they involved property that had no "active employment" in commercial activity whatsoever, unlike the car in this case. See, United States v. Odom, 252 F.3d 1289, 1296-97 (11th Cir.2001) (arson of church not actively engaged in any business); United States v. Rea, 223 F.3d 741, 743-744 (8th Cir. 2000) (remanded to determine whether church annex was "in active employment for commercial purposes, and not merely a passive, passing or past connection to commerce;" no requirement use be more than de minimi); United States v. Johnson, 246 F.3d 749, 750 (5th Cir. 2001) (arson of church not actively employed for commercial purposes); United

possibly falsely implicating himself in crimes that he did not commit, was new evidence allegedly not available to him at the time of the trial. As a second ground for a new trial, Trenkler contended that the government had failed to disclose the existence of an alleged agreement for leniency in exchange for testimony between the United States and a government witness, David Lindholm.

On February 4, 1997, the district court denied Trenkler's Motion for a New Trial in its entirety without a hearing. The court rejected Trenkler's claim that the Phillips testimony constituted new evidence. The court also rejected Trenkler's contention that Lindholm's post-trial sentence reduction suggested the existence of an undisclosed "deal" with the government at the time of Lindholm's testimony.

On November 19, 1996, Trenkler filed a Motion for Judicial Inquiry into Possible Juror Misconduct and for a New Trial, based upon an allegation that one of the alternate jurors may have been present at a home where drugs were sold in Trenkler's presence twelve years prior to his trial. On May 22, 1997, the district court denied Trenkler's motion in its entirety.

Trenkler appealed the denial of both motions. On January 6, 1998, the First Circuit issued its decision affirming the district court's denial of both of Trenkler's motions for a new trial.

commerce" rather than "substantially affected commerce," the Court stated: "Even in the post-Lopez environment, the Supreme Court did not interpolate 'substantial' into § 844(i)'s language." Id. at 257.

Similarly, vehicles used in interstate commerce are also covered by 844(i), regardless of whether the use is de minimis. See, e.g., United States v. Geiger, 263 F.3d 1034, 1036-1037 (9th Cir. 2001) (truck leased by national company); United States v. Beeler, 2001 WL 832357, 3-4, 6 (D. Me) (rental car used to commute to home cleaning business covered by 844(i); significantly, the District Court noted that "Jones dealt with purely residential property with no commercial ties whatsoever. The Supreme Court expressed no view on the 'de minimis' standard for effects on interstate commerce as it relates to commercial endeavors."); United States v. Cristobal, 293 F.3d 134, 146 (4th Cir. 2002) (pick-up trucks owned by two businesses with primarily but not exclusively intrastate business activity, road paving and iron railing assembly and sales, but which purchased parts from throughout the United States).

Trenkler quite rightly does not place much reliance upon the Third Circuit's holding in United States v. McGuire, 178 F.3d 203 (3rd Cir. 1999), involving the arson of a car which was used in a local catering business and which had a bottle of juice

commerce with knowledge and intent that the explosive materials would be used to kill, injure and intimidate Thomas L. Shay (Shay Jr.'s father, hereinafter "Shay Sr.") and cause damage and destruction to his real and personal property, including a 1986 Buick, in violation of 18 U.S.C. §§ 844(d) and 2 (Count Two); and with knowingly attempting to maliciously damage and destroy, by means of fire and explosive, a 1986 Buick owned by Shay Sr. and used in interstate commerce and in activities affecting interstate commerce, in violation of 18 U.S.C. §§ 844(i) and 2 (Count Three). The case was severed by the district court prior to trial on Trenkler's motion.¹

Trenkler's trial began on October 25, 1993 (the Honorable Rya W. Nobel, presiding). After a 17-day trial, the jury convicted Trenkler on all counts. On March 8, 1994, the district court sentenced Trenkler to life imprisonment on Counts Two and Three, and 60 months' imprisonment on Count One, to be served concurrently.

¹ The jury convicted Shay Jr. of Counts One and Three. He was sentenced to 188 months' imprisonment on Count One and 60 months' imprisonment on Count Three, to be served concurrently. He appealed his conviction and sentence. United States v. Shay, 57 F.3d 126 (1st Cir. 1995). The First Circuit overturned Shay's conviction. In October 1998, Shay pled guilty to Counts One and Three, pursuant to a plea agreement with the government and was sentenced to twelve years' imprisonment.

several trips were required to deliver the entire yield to the broker; the pecans yielded anywhere from \$775 up to \$2,000 annually after expenses. Id. at 1205. The Court upheld a challenge to the jury instruction, which required only a de minimis effect, and to the sufficiency of the evidence. It noted that Jones did not require more than a de minimis showing where the property was actively involved in commercial activity and declined to change the law in its circuit on this issue. The Court explained:

The Court expressed no view on the "de minimis" standard for effects on interstate commerce. Its focus was on active use versus passive or passing relationship to commerce. The Court required only "active employment" which affects commerce, not a particular quantum of effect.

Indeed, the Court relied upon its prior decision in Russell v. United States, 471 U.S. 858, 105 S.Ct. 2455, 85 L.Ed.2d 829 (1985), where once the use of a building for rental purposes was established, the effect on commerce was simply presumed because of the nature of the activity. In other words, it was not necessary to show dollar amounts, dollar tracing, individual conduct or any other nexus between the two rental units in question and interstate commerce. Clearly, the dollar amount or activity involved in Russell was trivial as a proportion of commerce in rental properties, or all commerce, nationally; but that was not significant because of the nature of the activity in the aggregate.

a. 18 U.S.C. § 844(i)

As to § 844(i), rather than contradicting our controlling precedent, the Court in Jones confirmed it, citing with approval our opinion in United States v. Monholland, 607 F.2d 1311 (10th Cir.1979). See Jones, 120 S.Ct. at 1911. In Monholland we focused on the "use" language of § 844(i) and

instrumentalities of interstate commerce, and have held that Jones does not apply to such statutes, of which 844(d) is one. Given that Trenkler's conviction under 844(d) is unaffected by Jones, his Petition with respect to this conviction is both substantively meritless and jurisdictionally defective. Moreover, given that he is serving a life sentence with respect to that sentence, his claim that Jones invalidates his conviction under 844(i) is moot and need not be addressed by this Court, as Trenkler will still be subject to a life imprisonment sentence even if the 844(i) conviction were overturned.

Second, Trenkler's claim that Jones invalidates his conviction under 844(i) is also baseless. Jones merely held that 844(i) "covers only property currently used in commerce or in an activity affecting commerce." 529 U.S. at 859. There was absolutely no evidence that the private home at issue in Jones was used in any trade or business. In contrast, in this case, as even Trenkler concedes, there was undisputed evidence that the car in question was used in connection with the owner's part-time auto body repair business. Contrary to Trenkler's contention in this petition, the Court in Jones did not hold, or even remotely suggest, that 844(i) does not cover arson of property actually used in commerce or in an activity affecting commerce, nor did the Court explicitly state or even suggest that such use must be more than de minimis. Thus,

CONCLUSION

For the foregoing reasons, the government respectfully requests that Trenkler's 2241 petition be denied in its entirety.

Respectfully submitted,

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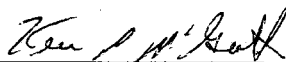
CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the persons listed below a copy of the foregoing document by depositing in the United States mail a copy of same in an envelope bearing sufficient postage for delivery:

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This 13th day of January 2003.



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18 U.S.C. § 844(d) ("844(d)") and one count of conspiracy to violate 844(d) and 844(i), in violation of Title 18 U.S.C. § 371 ("371"), arising from an explosion of a car bomb that Trenkler built and that killed one Boston Police Officer and seriously maimed another Boston Police Officer. Trenkler was sentenced to concurrent sentences of life imprisonment on his conviction under 844(i) and 844(d) and to a concurrent sixty month sentence on his conviction of the conspiracy count. He is currently serving his sentence in the United States Prison in Allenwood, Pennsylvania.

Trenkler contends that he is in custody unlawfully based upon the Supreme Court's decision in United States v. Jones, 529 U.S. 848 (2000), which held that Congress did not intend 844(i) to apply to arsons of private residences which are not actively involved in commercial activity. Trenkler argues that, as a result of Jones, the conduct for which he was convicted under 844(i), 844(d) and 371, is no longer criminal and that, pursuant to the savings clause of Title 28, U.S.C. § 2255 and §2241, he is entitled to issuance of a writ of habeas corpus in this District.

As discussed in more detail below, the government respectfully submits that Trenkler's Petition should be dismissed in its entirety. First, Jones dealt with the Court's statutory interpretation of Congress' intent with respect to 844(i), which provides, in relevant part, that: "[w]hoever maliciously damages or