NO. 03-1775

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ALFRED W. TRENKLER,
Petitioner/Appellant

v.

MICHAEL PUGH, Warden, USP-Allenwood,
Respondent/Appellee

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PETITION FOR PANEL REHEARING AND FOR REHEARING *EN BANC* OF PETITIONER/APPELLANT ALFRED W. TRENKLER

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REQUIRED STATEMENT BY COUNSEL UNDER LAR 35.1

Undersigned counsel express the belief, based on a reasoned and studied professional judgment, that the panel decision conflicts with a decision of the United States Supreme Court, *Jones v. United States*, 529 U.S. 848 (2000), and two decisions of the Third Circuit, *United States v. McGuire*, 178 F.3d 203 (3rd Cir. 1999) and *In re Dorsainvil*, 119 F.3d 245, 250 (3rd Cir. 1997). Consideration by the full Court is therefore necessary to secure and maintain uniformity of decisions in this Court.

INTRODUCTION

Alfred Trenkler ["Trenkler"] was convicted in 1994 in the United States District Court for the District of Massachusetts of attempting to damage or destroy, by means of explosive, an automobile owned by Thomas Shay, Sr. ["Shay, Sr."], which was allegedly used in interstate commerce or in an activity affecting interstate commerce, in violation of 18 U.S.C. § 844(i); receiving explosive materials in interstate commerce in violation of 18 U.S.C. § 844(d); and conspiracy, in violation of 18 U.S.C. § 371. The charges arose from an explosion which occurred on October 28, 1991 at the Roslindale, Massachusetts home of Shay, Sr., which killed one Boston Police bomb squad officer and severely injured another. Trenkler was sentenced to two concurrent life terms of imprisonment for the § 844 convictions and a concurrent sixty month term for the conspiracy conviction.

In the proceedings before the district court and before a

panel of this Court, Trenkler demonstrated that he is entitled to substantive review on the merits under 28 U.S.C. § 2241 because he has presented a meritorious claim that the conduct for which he was convicted no longer falls within the scope of 18 U.S.C. §§ 844(i) and 844(d) in light of *Jones v. United States*, 529 U.S. 848 (2000) ["Jones"]. The panel made three erroneous rulings. First, the panel wrongly held that the *de minimis* trial evidence of Shay Sr.'s occasional use of his personal vehicle in connection with his sporadic, part-time auto body work was sufficient to meet the interstate commerce element of § 844(i). Second, the panel wrongly held that *de minimis* trial evidence that the explosive had crossed state lines by unknown means at some point in the unspecified past was sufficient to meet the interstate commerce element of § 844(d). Third, the panel erroneously held that §2241 is not available as a procedural vehicle for litigating the substantive merits of Trenkler's claims, despite his having jumped through every one of the multiple hoops required for the proper use of that statute.

I. THE PANEL'S DECISION THAT *JONES* DID NOT INVALIDATE TRENKLER'S SECTION 844(i) CONVICTION IS LEGALLY ERRONEOUS.

Trenkler established that under *Jones* and its progeny, the trial evidence respecting Shay, Sr.'s 1986 Buick was insufficient to meet the interstate commerce element of § 844(i). However, the panel held that where a vehicle is ever used for <u>any</u> commercial purpose, that use is sufficient to meet the interstate commerce test, and there is no requirement as to "the degree to which a building's (or vehicle's) function must affect interstate

commerce." (Panel Decision, pp. 6). The panel is wrong.

It is well-established that "[t]he mere engagement in commercial activities may not necessarily provide the requisite nexus between the function of the building [or vehicle] and interstate commerce." *United States v. Odom*, 252 F.3d 1289, 1295 (11th Cir. 2001). Rather, under *Jones*, the test is whether the building or vehicle was **"active[ly] employ[ed] for [interstate] commercial purposes"** and had more than a **"merely ... passive, passing, or past connection to commerce,"** *Jones*, 529 U.S. at 854-855. A determination of whether a connection is "passive, passing, or past" is necessarily an inquiry into the "degree" of effect upon interstate commerce. In other words, notwithstanding the panel's rulings to the contrary, *Jones*, by its plain language, requires more than a *de minimis* connection between the property's use and interstate commerce. That standard was not met in this case.

The panel held that because Shay, Sr., sometimes used the Buick in connection with his part-time auto body repair business, and occasionally drove the Buick to stores to purchase parts, drove it to insurance offices, and loaned it to customers while he repaired their cars, the use of the Buick met the *Jones* standard. (Panel Decision, p. 7) The panel is wrong. Viewing the interstate commerce test of *Jones* functionally, it is clear first that Shay Sr.'s personal vehicle was not used in the course of a commercial enterprise that was interstate in scope. In *United States v. McGuire*, 178 F.3d 203 (3rd Cir. 1999), the government made a nearly

identical argument to the position embraced by the panel's decision here, claiming that a local catering business "by virtue of its existence as a for profit commercial enterprise, supplied by food items purchased at distributors, to include out of state suppliers, is by its nature a commercial enterprise which affects interstate commerce." *Id.* at 207. This Court rejected that argument, concluding that the periodic use of a car in a "family business" that was "concededly local in character" and the presence in the trunk of a bottle of Florida orange juice intended for a catering event was not a sufficient basis for sustaining a § 844(i) conviction. *Id.* at 211-212. In sum, *McGuire* demonstrates that not all businesses are interstate in character.[1]

Here, as in *McGuire*, Shay Sr.'s "business" was decidedly local in character. Shay Sr. testified that typically his customers came from the Boston area and surrounding towns. At most, there was evidence that during the years between 1989 and 1991, Shay Sr. occasionally had customers from out of state; however, there was no evidence that he had any out-of-state customers at or near the time of the explosion. *Tr.* 6/53 (*App. II*, 14). The evidence established that the one customer he serviced shortly before the explosion lived in a nearby town. *Tr.* 6/56 (*App. II*, 17). A "past"

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[1] While it is true that active involvement in the national rental market has been held to constitute an activity affecting interstate commerce *per se* (*see Russell v. United States*, 471 U.S. 858 (1985); *United States v. Williams*, 299 F.3d 250, 255-57 (3rd Cir. 2002)), the same cannot be said of other minimal commercial activities which are unrelated to the rental market, as demonstrated by *McGuire*, 178 F.3d at 211.

connection to interstate commerce is not sufficient under *Jones*. *See United States v. Ryan*, 227 F.3d 1058, 1063-1064 (8th Cir. 2000)(a building which was formerly a fitness center was insufficiently commercial because evidence of past commercial use did not render the property presently commercial).

Second, it cannot reasonably be said that Shay Sr.'s sporadic performance of auto body repair work in his driveway constituted commercial activity "affecting" interstate commerce. In contrast to the government's attempts to portray Shay Sr.'s work as "an ongoing auto body repair business" (*Gov. Br.* 38, 39), Shay Sr. himself described the work as far more sporadic: "[S]ometimes I'll do some auto body work periodically." *Tr.* 6/44 (*App. II*, 5) There was no evidence that at the time of the explosion Shay Sr. had any significant income from his casual, part-time auto body work, had any employees, or was incorporated as a business.

In *United States v. Jimenez*, 256 F.3d 330, 339 (5th Cir. 2001), the court found that a victim's home, which contained a home office that was the primary location for the victim's family-owned construction business with gross receipts averaging nearly $20,000 per month and paying over $8,000 per month in wages, was used in an activity affecting interstate commerce. In so holding, the *Jimenez* court specifically distinguished *United States v. Denalli,* 73 F.3d 328, 321 (11th Cir. 1996), a case involving someone who "occasionally works from home" using a personal computer. 256 F.3d at 339. Here, Shay Sr. "sometimes" and "periodically" worked from

home; he also worked part-time at his brother's Rolling Wrench garage in South Boston. *Tr.* 6/47, 7/26 (*App. II*, 8, 132). The exceedingly marginal nature of Shay Sr.'s auto body work was demonstrated by his permanent disability status and his receipt of Social Security disability payments at the time. Indeed, Shay Sr. specifically agreed at trial that the $600 per month he received in Social Security benefits was the main income he relied upon in 1991. *Tr.* 7/14 (*App. II*, 120).

Third, there was insufficient evidence that the 1986 Buick was "actively used" in connection with any interstate commercial enterprise, even assuming such an enterprise existed. Contrary to the panel's characterization (pp. 7-8), in *McGuire,* 178 F.3d at 208, the presence of the bottle of orange juice was not the only factor this Court considered. Rather, in *McGuire*, this Court concluded that the "periodic" use of one personal car among several in a local catering business together with the presence of a bottle of out-of-state orange juice could not be a sufficient basis for sustaining a § 844(i) conviction, noting: "[W]e consider both the nature and frequency of that use [of the car], **as well as the extent to which the catering activity affected commerce**, in deciding if the evidence supports the exercise of federal jurisdiction." *Id.* at 208 (emphasis added). The Court observed: "[t]his was not a situation where the Toyota was necessary to the catering operation." *Id.* at 211, n. 8. Here, as in *McGuire*, the government's evidence established only the occasional use of one

personal car among several cars that might have been used in a local business.[2] Indeed, the evidence established that Shay, Sr. was able to conduct his affairs without the use of the Buick for several weeks at a time. *Tr.* 6/57 (*App. II*, 18).

In contrast to the government's efforts below to portray Shay Sr.'s use of the car as "significant, integral, on-going use" for commercial purposes, there was no evidence presented in this case that the use of Shay Sr.'s personal vehicle in connection with his part-time auto body work was anything more than casual and intermittent. The trial evidence established that Shay, Sr. used his personal car on a daily basis to run personal errands, drive to social events, pick up take-out food, visit family members in the hospital, and the like. *Tr.* 6/60-63, 67 (*App. II*, 21-24, 28). His use of the car along the way to pick up parts in-state which were made out-of-state or to travel to in-state insurance companies did not transform the car's use to interstate commercial use, any more than the use of the car in *McGuire* to transport out-of-state orange juice for purposes of a catering business constituted use in interstate commerce. In-state purchase of materials which have traveled from out-of-state constitutes a passive use which has routinely been held insufficient, as in *Odom*, 252 F.3d at 1296-97; *United States v. Rea*, 223 F.3d 741, 743 (8th Cir. 2000); *United*

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[2] In addition to the 1986 Buick, Shay Sr. owned a 1983 General Motors van and a 1969 Pontiac GTO, sometimes used a 1989 Lincoln Town Car owned by the woman he lived with, and at some unknown time (at least as of 1992 but perhaps earlier) "had another vehicle." Tr. 6/41, 53, 55-56, 59 (App. 2, 14, 16-17, 20).

States v. Johnson, 246 F.3d 749, 750 (5th Cir. 2001).[3]

Finally, there was no evidence that the vehicle was part of the national rental market for vehicles, as in *United States v. Geiger*, 263 F.3d 1034, 1036-1037 (9th Cir. 2001), or *United States v. Beeler*, 2001 WL 832357, *6 (D.Me.). Shay, Sr.'s occasional use of the car as a "loaner vehicle" while he was fixing customers' cars was clearly an informal and impromptu arrangement that was not the primary use of his personal vehicle. Such an informal swapping arrangement is not sufficient to satisfy the requirements of the interstate commerce element. *See United States v. Carr II*, 202 F. Supp. 2d 467 (E.D.N.C. 2002) (owner-occupied mobile home, serving primarily as a residence and secondarily as a church, with some isolated child care activities taking place therein, does not qualify as a property used in interstate commerce, despite "informal and insubstantial" bill-sharing arrangements); *Martin v. Perez*, 319 F.3d 799, 804 (6th Cir. 2003) (to constitute participation in rental market under *Jones* test, house must be "actually rented. . . through an arm's length transaction;" not merely have someone other than the owner living in it).

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[3] These cases cannot be distinguished on the grounds that they involve churches. A property generally thought of as non-commercial, such as a church, may meet the standard sufficiently to be deemed used in interstate commerce. *See, e.g., United States v. Terry*, 257 F.3d 366 (4th Cir. 2001) (church used as daycare center). Likewise, a property generally thought of as commercial may not meet the standard sufficiently to be deemed used in interstate commerce. *See, e.g., Ryan*, 227 F.3d at 1061 (inactive fitness center); *McGuire*, 178 F.3d at 207 (personal car periodically used in connection with local catering business).

In sum, Shay Sr.'s automobile served primarily as a personal vehicle, was used only secondarily in connection with his sporadic and intermittent part-time, local work, and was never formally "rented" to anyone. Accordingly, it did not constitute a vehicle actively used in interstate commerce under *Jones*. Trenkler has demonstrated a non-frivolous claim that, following *Jones*, the evidence at trial was insufficient to prove that he violated or conspired to violate §844(i). Accordingly, he is entitled substantive review of his claim, and the dismissal of his petition by the district court on jurisdictional grounds was improper.

II. THE PANEL'S DECISION THAT *JONES* DID NOT INVALIDATE TRENKLER'S SECTION 844(d) CONVICTION IS LEGALLY ERRONEOUS.

The panel's decision respecting Trenkler's § 844(d) conviction is also faulty. The panel failed to address Trenkler's argument that the broader principles of *Jones* apply to the interpretation of § 844(d), and rejected Trenkler's claim based upon its restatement of only the narrowest holding of *Jones*, respecting whether a building (or vehicle) was actively "used" in interstate commerce. (Panel Decision, pp. 8-9). However, Jones stands for a broader legal principle, namely that "it is appropriate to avoid the constitutional question" raised by *United States v. Lopez*, 514 U.S. 549 (1995), by construing statutes which raise Commerce Clause issues narrowly to avoid encroaching on the authority of the states by rendering "traditionally local conduct . . . a matter for federal enforcement." *Jones*, 529 U.S. at 858. That broader holding of *Jones* is clearly implicated in this case. This Court should

address the application of that principle to § 844(d), rather than simply ducking the issue entirely.

Section 844(d) punishes whoever "transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive . . ." The phrase "affecting commerce" does not appear within § 844(d). The presence or absence of the term "affecting commerce" has enormous significance in Commerce Clause jurisprudence. The Supreme Court in *Jones* pointed out the "recognized distinction between legislation limited to activities 'in commerce' and legislation invoking Congress' full power over activity substantially 'affecting . . .commerce.'" 529 U.S. at 856. *See, e.g., Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964)("affect[ing] commerce" statutory language shows congressional intent to reach as far as the Commerce Clause permits). Since § 844(d) does not use the phrase "affecting commerce," there was no intent by Congress to exercise its fullest Commerce Clause power with respect to § 844(d). Accordingly, § 844(d)'s elements must be more narrowly defined.

The statutory elements of § 844(d), prohibiting receipt of explosives "in commerce," cannot be satisfied by mere proof of the movement of explosives at some time in the past.[4] The phrase "in

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[4] It should be noted that the government's contention below that this Court in *United States v. Singletary*, 268 F.3d 196 (3rd Cir. 2001) "rejected the argument advanced by Trenkler" is without merit. The *Singletary* analogy actually supports Trenkler's claim. 18 U.S.C. § 922(g) renders it illegal for a felon to "ship or transport in interstate or foreign commerce, or possess *in or* (continued...)

commerce" denotes "only persons or activities within the flow of interstate commerce--the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *United States v. American Bldg. Maint. Indus.*, 422 U.S. 271, 276-280 (1975). A party is "in commerce" when it is "directly engaged in the production, distribution, or acquisition of goods and services in interstate commerce." *United States v Robertson*, 514 U.S. 669, 671 (1995). Under this more restrictive definition, the mere purchase from a local supplier of goods which at one time traveled in

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[4](...continued)
affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." (emphasis supplied). In *Scarborough v. United States*, 431 U.S. 563, 568 (1977), the Supreme Court held, purely as a matter of statutory construction based on the "affecting commerce" language, which signaled an assertion of Congress' full Commerce Clause power, that in order to convict a defendant for being a felon in possession of a firearm under the similar predecessor statute, 18 U.S.C. § 1202(a), the government only had to prove that "the firearm possessed by the convicted felon traveled at some time in interstate commerce." 431 U.S. at 571-574. The Third Circuit in *Singletary* cited the continuing vitality of the *Scarborough* analysis, stating that § 922(g) "regulates those weapons *affecting interstate commerce* by being the subject of interstate trade." (emphasis added), and thus rejected the argument that a firearm which had previously traveled interstate insufficiently "affected commerce." 268 F.3d at 204.

In contrast, in this case, whether or not an explosive "affected" interstate commerce is both insufficient and irrelevant under § 844(d), which instead proscribes the direct transportation or receipt of explosives by the defendant "in ...commerce." Trenkler does not argue that the government was required to prove that the explosives "affected" interstate commerce to prove a violation of § 844(d). Rather, Trenkler argues that there was insufficient evidence that he, Trenkler, had anything directly to do with transporting or receiving the explosives "in commerce," which is an entirely different question.

interstate commerce does not constitute engaging "in commerce." *See American Bldg. Maint. Indus.*, 422 U.S. at 280 (company did not engage "in commerce" based on local purchases of supplies manufactured out-of-state where "the flow of commerce had ceased"); *Robertson*, 514 U.S. at 671 (Alaskan gold mine that directly purchased equipment from out-of-state supplier was engaged "in commerce," contrasted with a company that purchased goods from local suppliers).

In this case, the only pertinent evidence on this essential element was that the explosives had, at some unknown time in the past, been shipped in interstate commerce. There was no evidence that Trenkler had played any role in that interstate shipment. Based upon the evidence as presented at trial, "the flow of commerce [may well have] ceased," *American Bldg. Maint. Indus.*, 422 U.S. at 280, and the explosives may well have been stored in Massachusetts for many years before Trenkler ever allegedly possessed them. Accordingly, the evidence at trial was clearly insufficient to establish that Trenkler transported or received explosives "in commerce."

As set forth above, the broader holding of Jones was that "it is appropriate to avoid the constitutional question" raised by *Lopez* by construing statutes which raise Commerce Clause issues narrowly. *Jones*, 529 U.S. at 858. An interpretation of §844(d) by which mere interstate transportation of an explosive at any time in the past is sufficient would be "constitutionally doubtful" and

must be avoided pursuant to *Jones'* broader holding. Evidence directly linking the defendant to the movement of the explosives "in commerce" is required, but was utterly lacking here. Accordingly, Trenkler has presented a non-frivolous claim of actual innocence on the ground that the evidence was insufficient to prove he violated or conspired to violate § 844(d). Trenkler is entitled to have his § 844(d) claim reviewed on its substantive merits, and the district court's dismissal of the claim was erroneous.

III. THE PANEL'S DECISION MISAPPREHENDS THE AVAILABILITY OF 28 U.S.C. § 2241 FOR LITIGATING THE SUBSTANTIVE MERITS OF TRENKLER'S CLAIMS.

The panel ruled on procedural grounds that "[T]he District Court properly held that there was not an intervening change in substantive law that entitled Trenkler to rely on the savings clause provision of 28 U.S.C. § 2255 to challenge the validity of his conviction pursuant to a petition under 28 U.S.C. § 2241." (Panel Decision, p.9). However, this is nothing more than a position on the merits masquerading as a jurisdictional holding. If there is a possibility that Trenkler's alleged conduct did not violate the federal criminal statutes at issue, properly construed in light of *Jones*, then he is entitled to seek relief under §2241. *See United States v. Prevatte*, 300 F.3d 792, 802 (7th Cir. 2002) (where there is a "possibility that Mr. Prevatte has been convicted of a crime for activity that Congress did not intend to make criminal," possibility for relief existed under §2241). This Court has recognized that where a petitioner stands convicted for conduct

which the substantive federal criminal law does not proscribe, such a result is "a complete miscarriage of justice and present[s] exceptional circumstances that justify collateral relief." *In Re Dorsainvil*, 119 F.3d 245, 250 (3rd Cir. 1997).

Of course, the Court does not first decide the merits of a claim in order to determine whether it has proper jurisdiction over it. Rather the Court has jurisdiction to resolve the substantive claim if the petitioner has sufficiently alleged each of the requirements of the savings clause such that a possibility of relief exists under § 2241. *See Dorsainvil*, 119 F.3d at 252 (where petitioner presented "colorable claim" that the intervening Supreme Court decision had rendered his conduct non-criminal for purposes of 18 U.S.C. § 924(c), he was entitled to substantive review on the merits by the district court under § 2241); *Martin*, 319 F.3d at 806 (where petitioner stated a "not. . . frivolous" claim satisfying the requirements of § 2241 that *Jones* invalidated his §844(i) conviction, he was entitled to a hearing on the merits); *Prevatte*, 300 F.3d at 802 (where petitioner presented "non-frivolous challenge" that due to the intervening Supreme Court decision in *Jones*, he was convicted for conduct that Congress did not intend to make criminal under § 844(i), substantive review on the merits by the district court under § 2241 was appropriate). Here, as in *Dorsainvil, Martin,* and *Prevatte*, Trenkler has properly alleged all of the bases for a claim under § 2241 (*see Pet. Brief-in-chief*, pp. 49-56), and the district court had jurisdiction to hear the

substantive merits of his claims. Accordingly, Trenkler's claims could not properly be dismissed at the outset for lack of jurisdiction. Rather, this case must be remanded to the district court for resolution of the substantive claims on their merits.

CONCLUSION

Trenkler has presented a cognizable and non-frivolous claim that the *Jones* decision significantly heightened the requirements for proving the interstate commerce element, thereby removing his alleged conduct from the ambit of §§ 844(i) and 844(d). Trenkler has sufficiently alleged that, because the evidence at trial was insufficient to support his convictions, he remains imprisoned for alleged "traditionally local criminal conduct" which the substantive federal criminal law does not prohibit. Trenkler's petition under § 2241 provides the appropriate means for his claims to be heard, and there is no procedural or jurisdictional obstacle to the district court's resolution of both of his claims on their merits. Trenkler's petition was erroneously dismissed and must be reinstated for review on the merits.

For the foregoing reasons, the petitioner/appellant's petition for both panel rehearing and rehearing en banc should be granted.

Respectfully submitted
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the requirements of 3rd Circuit L.A.R. 46.1 because both of the attorneys whose names appear on the brief are members of the Bar of this court.

2. This brief complies with the typeface-volume limitations of Fed. R. App. Proc. 32(a)(7)(B). As a Petition for Rehearing, it is subject to a 15 page limitation.

3. This brief has been prepared using 12 point, monospaced typeface, Courier New, WordPerfect 9.0.

4. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 15 pages, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Catherine J. Hinton

CERTIFICATE OF SERVICE

I certify that I have served the foregoing document upon counsel of record by mailing two copies on January 30, 2003 to:

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