

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	Civil Action No. 06-12072-RWZ
)	
Plaintiff,)	
)	
v.)	
)	
ALFRED TRENKLER,)	
)	
Defendant.)	
)	
)	

PETITIONER’S SUPPLEMENTAL REPLY TO GOVERNMENT’S MOTION FOR RECONSIDERATION OF ORDER GRANTING WRIT OF *CORAM NOBIS*

Petitioner Alfred Trenkler submits this supplemental reply, primarily to address the Government’s erroneous contention that the Court’s sentencing error does not justify grant of the writ of *coram nobis* because the current version of section 844 (as amended in 1994) supposedly would not offend the *ex post facto* clauses of the Constitution if applied retroactively to Mr. Trenkler. Mr. Trenkler also briefly responds below to the Government’s indefensible rationale for its continuing bad faith in the conduct of this action.

A. Under Binding Supreme Court Precedent, Retroactive Application of the Current Version of Section 844 to Mr. Trenkler Upon Re-Sentencing Would Be Prohibited Under the *Ex Post Facto* Clause

According to the Government, this Court’s error of sentencing Mr. Trenkler to life in prison without a jury recommendation, in contravention of the express terms of the version of section 844 in effect at the time of sentencing, is (1) “harmless,” and (2) does not expose Mr. Trenkler to ongoing collateral consequences, because, according to it, the Court can simply apply the new version of the statute now in effect and impose a life sentence again without offending the *ex post facto* clauses of the Constitution.

The Government is wrong. It is beyond intelligent or good faith dispute that applying the amended version of section 844 retroactively to Mr. Trenkler would offend the *ex post facto* clause. The Government's contrary position depends entirely on case law that, to the extent it ever had any validity,¹ has since been overturned by subsequent Supreme Court precedent. In particular, the Government relies on two cases, *Joyner* and *Grimes*, both of which held that the reason retroactive application of amended section 844 to a defendant who committed his crime under the original statute would not offend the *ex post facto* clause was because it supposedly did not fit into one of the three *ex post facto* categories enumerated by the Supreme Court in *Collins v. Youngblood*. In *Joyner*, the Second Circuit held

Collins v. Youngblood, 497 U.S. 37, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990), leads us to conclude [that the *ex post facto* clause is not offended]. In that case . . . [t]he Court defined an *ex post facto* law as one that (1) 'punishes as a crime an act previously committed, which was innocent when done,' (2) 'makes more burdensome the punishment for a crime, after its commission,' or (3) 'deprives one charged with a crime of any defense available according to law at the time when the act was committed.' *Collins*, 497 U.S. at 42-43 (internal quotations and citations omitted) . . . [A] change in law that reduces or eliminates the jury's role in determining the crime or punishment of a defendant does not violate the Ex Post Facto Clause because it does not change the substantive definition

¹ As Mr. Trenkler pointed out in his earlier response, the controlling Second Circuit law on this issue is *Tocco*, which held, directly opposite to *Joyner*, that "the Ex Post Facto Clause precludes application of the 1994 amendment [to a defendant who] committed [an 844 violation] in 1992." *United States v. Tocco*, 135 F.3d 116, 132 (2d Cir. 1998). *Tocco* controls both because it is the earlier panel decision, and because, as discussed in the text above, it is correct under controlling Supreme Court law. *See, e.g., BankBoston, N.A. v. Sokolowski*, 205 F.3d 532, 535 (2d Cir. 2000). As also discussed above, the Supreme Court has overruled the basis for *Joyner's* analysis and decision on this issue. We also note that, even if *Joyner* or *Grimes* were still controlling in the Second and Eleventh Circuits, which they are not given intervening Supreme Court law, they do not control in this Circuit. On that note, we find it not only ironic, but another indication of the Government's utter bad faith in the conduct of this case, that it argues that these very cases are wrong and not controlling with respect to whether an error occurred in this case, but right and controlling with respect to the Ex Post Facto issue. *See, e.g., Joyner*, 201 F.3d at 80 (2d Cir. 2000) (Holding that only a jury could impose a life sentence prior to 1994); *Grimes*, 142 F.3d at 1352 (same) (*See* Government's Opposition and Motion for Reconsideration, March 7, 2007, at 30 ("We think these cases are wrong" on the issue of whether only the jury could impose a life sentence); Government's Opposition to Motion to Strike, March 27, 2007, at 4 (arguing that is free to disregard cases holding that only a jury could impose a life sentence under the pre-1994 version of section 844, because they are not "controlling circuit (i.e. First Circuit) precedent.")).

of the crime, increase the punishment, or eliminate any defense with respect to the offense

United States v. Joyner, 201 F.3d 61, 80 (2d Cir. 2000). Similarly, in *Grimes*, the Eleventh Circuit interpreted *Collins v. Youngblood* to mean that there existed only the three above enumerated categories of *ex post facto* laws, and held that the change in section 844 must be merely “procedural,” because it did not fall into any of the three categories. *United States v. Grimes*, 142 F.3d 1342, 1350 (11th Cir. 1998) (quoting *Collins*, 497 U.S. at 42.); *id.* at 1352 (citing *Collins*, 497 U.S. at 45.); *id.* at 1353.

In mid-2000, after both *Grimes* and *Joyner* were decided, the Supreme Court held that it was wrong to interpret the *ex post facto* clause as only extending to the three categories of laws enumerated in *Collins*. Rather, the Court reaffirmed that a fourth category of *ex post facto* laws exist, those that retroactively “reduce[e] the quantum of evidence” or “lower[] the burden of proof” required for a conviction or an enhanced sentence. *Carmell v. Tex.*, 529 U.S. 513, 532 (2000) (emphasis added.) It rejected any approach to *ex post facto* analysis that tried to distinguish between “procedural” and “substantive” changes in the law. *Id.* at 539. It further rejected the reading of *Collins* on which *Joyner* and *Grimes* had based their decisions, namely that new laws failing to meet the three *Collins* categories were merely procedural and not *ex post facto*. *Id.* Rather, properly interpreted, *Collins* actually “eliminated a doctrinal hitch that had developed in our cases, which purported to define the scope of the [*Ex Post Facto*] Clause along an axis distinguishing between laws involving ‘substantial protections’ and those that are merely ‘procedural.’” *Id.* Instead, under a proper reading of *Collins* and a correct interpretation of the *ex post facto* clause, retroactive application of any law (procedural, substantive or otherwise) that falls into any of the four categories is repugnant to the clause and unconstitutional: “[T]he prohibition which may not be evaded is the one defined by the [four] Calder categories.” *Id.*

Lest there be any doubt about the erroneousess of *Joyner* and *Grime*-type analyses, the Supreme Court in *Carmell* further held

[The Government] argue[s] that we have already effectively cast out the fourth category in *Collins v. Youngblood*, 497 U.S. 37, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990). *Collins* held no such thing *Collins* held that it was a mistake to stray beyond Calder’s four categories, not that the fourth category was itself mistaken.

Id. at 537-39 (emphasis added.) In fact, so comprehensive was the Supreme Court’s rejection of the *Joyner* and *Grime* approach to *ex post facto* principles, that even the dissent agreed that the fourth category prohibits retroactive application of any law that lowers the Government’s burden of proof, not only on a substantive element of a crime, but on a sentencing enhancement factor. The dissent agreed that where an original “statute require[ed] the prosecution to prove a particular sentencing enhancement factor . . . beyond a reasonable doubt [a] new statute providing that the factor could be established by a mere preponderance of the evidence might rank as ex post facto if applied to offenses committed before its enactment.” *Id.* at 572 (emphasis added.)

Under the correct and controlling *Carmell* test—which neither *Grimes* nor *Joyner* applied or considered—the new version of section 844 would undoubtedly violate the *ex post facto* clause under the fourth category of prohibited laws if it were applied retroactively to Mr. Trenkler, at least insofar as the Government contends that under the new statute, the Court would have the power to impose a life sentence by finding sentence-enhancing facts (which the jury did not find) by a preponderance of the evidence. Specifically, under the pre-1994 version of section 844, a jury was required to find two additional facts beyond those required to convict before it could even consider imposing a life sentence: (1) that death resulted; and (2) that the death was a “direct or proximate cause” of the prohibited conduct. *See* 18 U.S.C. 844(d) and (i) (pre-1994 version) (“if death results to any person . . . as a direct or proximate result of conduct prohibited

by this subsection” the offender “shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.”) Under the plain language of the statute, the jury would have had to have found those facts beyond a reasonable doubt, given that only the jury had discretion to impose a life sentence.^{2, 3}

Thus, to the extent that the Government claims that under the new statute, the Court may now find these additional facts by a mere preponderance of the evidence, and without a jury, retroactive application to Mr. Trenkler would undeniably be unconstitutional under *Carmell’s* fourth *ex post facto* category. This is so because it would retroactively “reduce[e] the quantum

² In addition to the express language of the statute at the time, the Sixth Amendment inherently required these additional facts to be found by the jury beyond a reasonable doubt, as the Supreme Court made absolutely clear in *United States v. Jones*. See *Jones v. United States*, 526 U.S. 227, 233, 252 (1999) (Statutory provisions that “not only provide for steeply higher penalties, but condition them on further facts (injury, death),” as the provisions of section 844 do, “must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.”); see also *id.* at 252-53 (Stevens, J., and Scalia, J., concurring) (“It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”); accord *Cunningham v. California*, 127 S. Ct. 856, 864 (2007) (“This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.”) (emphases added).

³ While Mr. Trenkler will reserve most of this discussion for his sentencing memorandum, it is indisputable that the jury did not find a death or proximate cause beyond a reasonable doubt. The jury was not even asked to do so. To the contrary, it was expressly told not to consider factors that might affect the punishment. (See, e.g., Trial Tr. Day 17 at p. 113-114) (“In reaching your verdict, do not consider what the punishment might be Your only job is to determine whether the government has proven him guilty or not.”). Furthermore, the jury was repeatedly instructed that these were not among the elements required to find guilt of the charged offenses. (See, e.g., *id.* at 118-19, 122) (instructing the jury on the three elements required to convict under sections 844(d) and (i), of which neither an actual death or proximate cause for a death are one). While, the Government has argued that Mr. Trenkler should have requested that the jury find these additional facts, the Government could not have it more backwards. It was unquestionably the Government’s burden to ensure that the jury was asked to find these additional facts if it wanted to seek a life sentence. To suggest that Mr. Trenkler had the burden of seeking an enhanced penalty for himself is beyond ludicrous. In fact, the Supreme Court has repeatedly stricken down as unconstitutional any attempt by the Government to shift the burden on any element or sentencing enhancement to a criminal defendant. See, e.g., *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970). The Government took a sentence of life imprisonment off the table when it failed to request a charge instructing the jury that it had to find these additional elements (death and proximate cause) beyond a reasonable doubt in order to secure an enhanced sentence of life.

of evidence” and “lower[] the burden of proof” required to enhance Mr. Trenkler’s sentence. *Carmell v. Tex.*, 529 U.S. at 532; *see id.* 572 (Where an original “statute require[ed] the prosecution to prove a particular sentencing enhancement factor . . . beyond a reasonable doubt . . . [a] new statute providing that the factor could be established by a mere preponderance of the evidence might rank as *ex post facto* if applied to offenses committed before its enactment.”)⁴

Even if the Government were to concede that the new section 844 continues to require a jury finding of death and proximate cause beyond a reasonable doubt before the Court can impose a life sentence (thus proving that Mr. Trenkler suffered fundamental error when the Court took that factual finding away from the jury, in addition to usurping the jury’s discretion to then decide the sentence), the new section 844 would still be *ex post facto* if applied retroactively. This is so because the 1994 amendments expressly increased the maximum punishments for violations of the section. It is beyond dispute that the Constitution prohibits retroactive application of any “law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” *Carmell v. Tex.*, 529 U.S. at 522. The 1994 amendments to subsection (i), under which Mr. Trenkler was convicted, did just that. These amendments doubled the maximum punishments from 10 to 20 years where there is

⁴ In fact, the Government’s interpretation is wrong. Under the new statute, the Court still may not impose a life sentence without a jury finding of the additional sentence-enhancing facts beyond a reasonable doubt. Therefore, even if the new law were to apply on re-sentencing, which it does not, Mr. Trenkler could not be re-sentenced to life. Thus, application of the new law would not render the error that occurred fifteen years ago “harmless,” or reverse the collateral consequences that Mr. Trenkler continues to suffer because of it. To be clear, Mr. Trenkler is not arguing, and has never argued, that the *Jones* error (i.e. judicial fact finding) is the basis for the writ of *coram nobis*. Rather, as we made clear in our petition, the error was the Court’s inadvertent but complete usurpation of the jury’s authority to decide whether to impose a life sentence, in contravention of the express language of the statute (as opposed to a violation of the inherent constitutional requirements under *Jones*). While a *Jones* error is a serious and intolerable impingement on a defendant’s constitutional rights, the fundamental error that occurred here was the Court’s exercise of discretion that it did not have according to the express terms of the statute. *See, e.g., United States v. Prevatte*, 16 F.3d 767, 783 (7th Cir. 1994) (Under the old section 844, “[t]he judge may not usurp the function of the jury as defined by Congress [I]t was plain error to impose a life sentence without a jury direction.”) The *Jones* error merely compounds that fundamental error.

no finding that death resulted as a proximate cause of the prohibited acts, or that personal injury resulted, and from 20 to 40 years where there is only a finding that personal injury resulted. *See* 18 U.S.C. 844(d) (Amendments of Sept. 13, 1994). This doubling of the maximum punishments authorized by the statute irrefutably renders the new law unconstitutionally *ex post facto* if applied retroactively.⁵ Thus, for this additional reason, the Court cannot apply the new version of section 844 to Mr. Trenkler upon re-sentencing. Nor could any court have applied the new version had the sentencing error been discovered earlier.

B. The Government’s Rationale For Its Continuing Assertion That No Error Occurred When The Court Imposed a Life Sentence Without a Jury Recommendation is Unsupportable and a Further Sign of its Bad Faith

In its March 27 Opposition to Mr. Trenkler’s Motion to Strike, the Government continues to argue that no error occurred at all when the Court sentenced Mr. Trenkler to two life terms, because, according to it, the legislative history of pre-1994 section 844 can be (mis)read to suggest that a court actually did have authority to impose a life sentence without a jury recommendation. The Government continues to maintain that, in supposed good faith, “it believes [this] to be the correct interpretation of the law,” despite its admission that every single circuit court in the country to address the issue—the Second, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits among them—have held precisely the opposite. (Government’s March 27 Oppo. at 4.) The Government has even conceded that its “statutory construction argument” was rejected by the Seventh Circuit in *United States v. Martin*, but nevertheless attempts to justify a good faith belief in its “correctness” by arguing that the *Martin* court did “not consider the legislative argument made here.” (Government’s March 7 Motion for Reconsideration, at 33.)

⁵ The defendants did not raise this argument in *Joyner* or *Grimes*, and it is clear from those cases that the respective courts did not consider it. Had those courts considered the argument, they almost certainly would have found an *ex post facto* violation, as the new section 844 falls squarely into the second category enumerated by these courts and the Supreme Court.

What the Government fails to say in its brief is that the law prohibits any “legislative argument” in cases such as this one, where the language of the statute itself is plain. “The task of resolving the dispute over the meaning of [a statute] begins . . . with the language of the statute itself [I]t is also where the inquiry should end . . . where, as here, the statute’s language is plain.” *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (emphasis added). In such cases, “the sole function of the courts is to enforce [the statute] according to its terms.” *Id.* (emphasis added). Given this binding Supreme Court law, in addition to the at least six circuits that have rejected the Government’s argument, the Government cannot in good faith continue to argue that the pre-1994 statute permitted the Court to sentence Mr. Trenkler to life. Accordingly, Mr. Trenkler hereby renews his respectful request that the Court strike the Government’s Motion for Reconsideration, and particularly its argument that no error occurred.⁶

Dated: March 30, 2007.

Respectfully submitted,

/s/ Joan M. Griffin

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⁶ We also note that the Government’s tone reeks of bad faith. The Government repeatedly refers to Mr. Trenkler’s reading of the statute as “implausible” and “def[y]ing commonsense,” despite the fact that it has been confirmed as correct by six courts of appeal, and despite this Court’s holding that “there is no question that this court did not have authority to sentence Trenkler to life.” (*See* Government’s March 7 Motion for Reconsideration at 2, 33; Order of February 20, 2007 at 7) (emphases added). The Government cannot in good faith call Mr. Trenkler’s reading, confirmed by every court in the United States that has considered it, “implausible” when its own reading has been rejected by every one of those courts. This is neither an issue of semantics nor a superficial complaint. The Government has made clear that it will say anything to avoid admitting that it made an obvious mistake, without any regard for its duties to protect the Constitution and the rights afforded to criminal defendants.

