

NO. 03-1775

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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ALFRED W. TRENKLER,  
Petitioner/Appellant

v.

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

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

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REPLY BRIEF OF  
PETITIONER/APPELLANT ALFRED W. TRENKLER

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## INTRODUCTION

In his brief-in-chief, petitioner Alfred Trenkler [“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”]. Nothing in the government’s memorandum diminishes the validity of Trenkler’s position. In its attempt to stave off the legal force of Trenkler’s claims for relief, the government makes three erroneous arguments. First, the government wrongly asserts 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 government falsely claims 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 government erroneously argues that §2241 is not available as a procedural rubric 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 rubric.

**I. THE GOVERNMENT’S ARGUMENT THAT *JONES* DID NOT INVALIDATE TRENKLER’S SECTION 844(i) CONVICTION IS WITHOUT MERIT.**

In his brief-in-chief, 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). (*Pet. Br.* 18-32) In response, the government argues that where a vehicle is used for any commercial purpose, that use is sufficient to meet the interstate commerce test “regardless of whether the use is *de minimis*.” (*Gov. Br.* pp. 42). The government 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 (11<sup>th</sup> 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 854-55. In other words, notwithstanding the government’s contentions 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.

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 (3<sup>rd</sup> Cir. 1999), the government made a nearly identical argument to that made 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.<sup>1</sup>

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

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<sup>1</sup> While it is true, as the government notes (*Gov. Br.* 42), 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 (3<sup>rd</sup> 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.

explosion. The evidence established that the one customer he serviced shortly before the explosion lived in a nearby town. A “past” connection to interstate commerce is not sufficient under *Jones*. See *United States v. Ryan*, 227 F.3d 1058, 1063-1064 (8<sup>th</sup> 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 desperate 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 to conduct this work.

In *United States v. Jimenez*, 256 F.3d 330, 339 (5<sup>th</sup> 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 (11<sup>th</sup> 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 leave 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 to live on in 1991. *Tr.* 7/14 (*App. II*, 120).<sup>2</sup>

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. In *McGuire*, 178 F.3d at 208, 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

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<sup>2</sup> The government complains that petitioner’s pointing out Shay Sr.’s disability status is somehow “improper.” (*Gov. Br.* 39) There is nothing “improper” about highlighting the testimony regarding Shay Sr.’s disability status and receipt of Social Security benefits, introduced at trial by both the government and the defense, *Tr.* 6/44-45, 7/14 (*App. II*, 5-6, 120), which is exceedingly relevant to the question presented here.

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. 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.<sup>3</sup> 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 to portray Shay Sr.’s use of the car as “significant, integral, on-going use” for commercial purposes (*Gov. Br.* 44), 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,

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<sup>3</sup> The trial evidence established that 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).

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 constituted use in interstate commerce.<sup>4</sup> In-state purchase of materials which have traveled from out-of-state constitute a passive use which has been routinely held insufficient, as in *Odom*, 252 F.3d at 1296-97; *United States v. Rea*, 223 F.3d 741, 743 (8<sup>th</sup> Cir. 2000); *United States v. Johnson*, 246 F.3d 749, 750 (5<sup>th</sup> Cir. 2001); and *United States v. Laton*, 180 F.Supp. 948 (W.D. Tenn. 2002).<sup>5</sup>

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<sup>4</sup> The case of *United States v. Grassie*, 237 F.3d 1199, 1208 (10<sup>th</sup> Cir. 2001) cited by the government (*Gov. Br.* 45-46) is readily distinguishable. In that case, where the government established a settled, regular annual pattern of the use of a specific truck to seasonally transport a pecan crop for direct sale in interstate commerce to an out-of-state buyer, the Tenth Circuit held that the evidence of interstate commercial use of the truck was sufficient. *Id.* at 1212. In contrast, here as in *McGuire*, there was no evidence that the car was ever used for anything more than in-state transportation in connection with part-time, local self-employment.

<sup>5</sup> The government's attempt to distinguish these cases on the ground that they involve "non-commercial entities, such as fire stations or churches" utterly begs the question. The category of property is not determinative; what matters is the analysis of whether the property is "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 854-55. 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 (4<sup>th</sup> Cir. 2001) (church used as daycare center). Likewise, a property generally thought of as commercial, including a small business, may not meet the standard sufficiently to be deemed used in interstate commerce. *See, e.g., Ryan*, 227 F.3d at 1061 (inactive  
(continued...))

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 (9<sup>th</sup> Cir. 2001), or *United States v. Beeler*, 2001 WL 832357, \*6 (D.Me.). Contrary to the government's claim (*Gov. Br.* 40), Trenkler did not contest in his brief-in-chief that there was evidence that the Buick was used as a loaner vehicle. However, 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 prove 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 (6<sup>th</sup> Cir. 2003) (to constitute participation in rental market for purposes of the *Jones* test, house must be "actually rented. . . through an arm's length transaction;" it was not enough to establish merely that someone other than the homeowner lived in it).

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<sup>5</sup>(...continued)  
fitness center); *cf. 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, only secondarily in connection with his sporadic and intermittent part-time, local work, and was never formally "rented" to anyone. Accordingly, it does not constitute a vehicle actively used in interstate commerce under *Jones*.<sup>6</sup> Trenkler has demonstrated a non-frivolous claim that, following *Jones*, the evidence at trial was insufficient to prove that he violated §844(i) or conspired to commit such a violation under 18 U.S.C. §371. Accordingly, he is entitled to have his claim reviewed on its substantive merits, and the dismissal of his petition by the district court on jurisdictional grounds was improper.

## **II. THE GOVERNMENT'S ARGUMENT THAT *JONES* DID NOT INVALIDATE TRENKLER'S SECTION 844(d) CONVICTION IS WITHOUT MERIT.**

The government fares no better with its defense of Trenkler's § 844(d) conviction. In his brief-in-chief, Trenkler conducted a detailed and extensive

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<sup>6</sup> The government gripes that Trenkler did not contest the interstate commerce element of the offense at trial. (*Gov. Br.* 39). However, there was no legal basis to contest the interstate commerce element at the time of trial because the standard for demonstrating interstate commerce at that time under First Circuit law (where Trenkler was convicted) was the *de minimis* standard. *See United States v. Medeiros*, 897 F.2d 13, 15 (1<sup>st</sup> Cir. 1990) ("To establish jurisdiction under § 844(i), the government need only show a *de minimis* connection to interstate commerce."); *United States v. DiSanto*, 86 F.3d 1238, 1248 (1<sup>st</sup> Cir. 1996) (same). That standard has changed post-*Jones*, now requiring "active employment" in more than a "merely passive, passing, or past" manner. 529 U.S. at 854-55.

analysis demonstrating why any analogy to the federal felon-in-possession of firearms statute, 18 U.S.C. § 922(g), utterly fails to control the interpretation of 18 U.S.C. §844(d). (*Pet. Br.*, pp. 38-41) Apparently unable to respond to Trenkler’s argument, the government simply cites to *United States v. Singletary*, 268 F.3d 196 (3<sup>rd</sup> Cir. 2001), and *Scarborough v. United States*, 431 U.S. 563 (1977), both of which upheld the federal felon-in-possession of firearms statute, and erroneously asserts that §844(d) is “precisely such a statute.” (*Gov. Br.* 54). The government’s attempt to avoid the critical distinction in statutory language between § 844(d) (“in interstate commerce”) and § 922(g) (“in or affecting interstate commerce”) utterly fails.

The plain language of the statutes illustrates that they are not the same. 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). In contrast, 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 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). Similarly, § 922(g)’s predecessor statute, 18 U.S.C. § 1202(a), made it unlawful for a felon to “receive, transport or possess *in or affecting commerce*, any firearm or ammunition.” (emphasis supplied).



The government's myopic insistence that the interstate commerce elements of §§ 844(d) and 922(g) are the same evinces a lack of understanding, both of Trenkler's argument and of interstate Commerce Clause jurisprudence generally. 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 *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 government misconstrues Trenkler's argument at every turn. Trenkler has not, as the government claims (*Gov. Br.* 51-52), argued that § 844(d) is unconstitutional, as the defendant in *Singletary* argued with respect to § 922(g). Nor has Trenkler argued, as the government claims (*Gov. Br.* 52-53), that § 844(d) is defective because the activity it proscribes insufficiently "affects" interstate commerce, as the defendant argued in *Singletary* with respect to § 922(g). Rather,

Trenkler argues that § 844(d), pursuant to the broader holding of *Jones*, must be read narrowly as a matter of statutory construction to avoid constitutional problems. Trenkler argues that the “affecting commerce” language is not present in § 844(d), which relates instead to receipt or transportation of explosives “in commerce.” Therefore, the government must prove **more** than merely “affecting commerce” (either substantially or minimally) and must instead prove that the defendant was in some way directly involved in the receipt or transport in interstate commerce of the explosives. *See United States v. Robertson*, 514 U.S. 669, 671 (1995) (*per curiam*) (A party is “in commerce” when it is “directly engaged in the production, distribution, or acquisition of goods and services in interstate commerce”).

The government’s claim (*Gov. Br.* 54) that this Court in *Singletary* “has rejected the argument advanced by Trenkler” is without merit. The government’s *Scarborough/Singletary* analogy actually supports Trenkler’s claim. As Trenkler discussed at length in his brief-in-chief (*Pet. Br.* 39), in *Scarborough*, 431 U.S. at 568, the Supreme Court held, purely as a matter of statutory construction based on the “affecting commerce” language, that in order to convict a defendant for being a felon in possession of a firearm, the government only had to prove that “the firearm

possessed by the convicted felon traveled at some time in interstate commerce.”<sup>7</sup> Following *Scarborough*’s analysis, in *Singletary*, the Third Circuit held that proof of past transport of a weapon across state lines was sufficient to support a felon-in-possession conviction, again based on the “affecting interstate commerce” language. *Singletary*, 268 F.3d at 205. The Third Circuit cited the continuing vitality of the *Scarborough* analysis and stated that § 922(g) “regulates those weapons *affecting interstate commerce* by being the subject of interstate trade.” (emphasis added). The Court in *Singletary* 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,” and specifically does not mention “affecting” commerce as a basis for jurisdiction.

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<sup>7</sup> In *Scarborough*, 431 U.S. at 571-574, the Supreme Court explained the significance of the “affecting commerce” language on its holding: “As we have previously observed, Congress is aware of the ‘distinction between legislation limited to activities ‘in commerce’ and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce.’ . . . [B]y prohibiting both possessions in commerce and those affecting commerce, Congress must have meant more than to outlaw simply those possessions that occur in commerce or in interstate facilities. . . . We see no indication that Congress intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce.” *Id.* (internal citations omitted).

Thus, contrary to the government's garbled misunderstanding of Trenkler's argument (*Gov. Br.* 53, 57-58), Trenkler does not argue that the government was required to prove that the explosives "affected" interstate commerce. Trenkler has **never** argued, as the government continues to insist (*Gov. Br.* 55), that the government must prove more than a *de minimis* **effect** on 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.

Section 844(d), which requires that Trenkler must have "transported or received" the explosives "in interstate or foreign commerce" cannot be satisfied by mere proof that the movement of explosives at some time in the past "affected" interstate commerce. The phrase "in 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. Maintenance Industries*, 422 U.S. 271, 276-280 (1975). As stated earlier, a party is "in commerce" when it is "directly engaged in the production, distribution, or acquisition of goods and services in interstate commerce." *Robertson*, 514 U.S. at 671. Under this more narrow and restrictive definition, the mere purchase from a local supplier of goods

which at one time traveled in interstate commerce does not constitute engaging “in commerce.” See *American Bldg. Maintenance Industries*, 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 purchases all items from local suppliers). Accordingly, the evidence at trial was insufficient to establish that Trenkler transported or received explosives “in commerce.”

The government complains that Trenkler has not cited a case applying *Jones* to § 844(d) (*Gov. Br.* 24). However, it matters not that no court to date has yet addressed the specific question of whether the broader principles of *Jones* apply to the interpretation of § 844(d). The question is now before this Court, which is empowered to address it as a matter of first impression. The broader holding of *Jones* is that it is “appropriate to avoid the constitutional question[s]” 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. 529 U.S. at 858-859. Accordingly, 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. Evidence directly linking the

defendant to the movement of the explosives “in commerce” is required.

In this case, there was nothing more than evidence that the explosives had, at some time in the past, been shipped in interstate commerce, and an utter dearth of evidence that Trenkler played any role in that interstate shipment. Under the evidence as presented by the government, “the flow of commerce [may well have] ceased,” *American Bldg. Maintenance Industries*, 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, Trenkler has presented a non-frivolous claim of actual innocence on the ground that the evidence was insufficient to prove he violated § 844(d) or conspired to commit such a violation under 18 U.S.C. § 371. 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 GOVERNMENT GROSSLY MISAPPREHENDS THE AVAILABILITY OF 28 U.S.C. § 2241 FOR LITIGATING THE SUBSTANTIVE MERITS OF TRENKLER’S CLAIMS.**

The government argues on procedural grounds that “because Trenkler is not actually innocent of either the 844(d) or 844(i) charges, he did not come within *Dorsainvil*’s limited exception for extraordinary cases, and his 2241 petition was jurisdictionally defective and correctly dismissed by the district court.” (*Gov. Br.* 31). This is nothing more than the government’s position on the merits masquerading as

a jurisdictional defense. After all, if Trenkler is right that his alleged conduct did not violate the federal criminal statutes at issue, properly construed in light of *Jones*, then he is “actually innocent” of those charges. *See Ryan*, 227 F.3d at 1062 (“[W]e conclude that there is insufficient evidence to satisfy the interstate commerce requirement of section 844(i), an essential element of this statute. Thus because Ryan stands convicted for conduct not prohibited by section 844(i), we must reverse the judgment.”); *United States v. Prevatte*, 300 F.3d 792, 802 (7<sup>th</sup> 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). The government’s exhortations that this Court should seek to avoid “administrative problems” in litigating a § 2241 habeas petition in the district of confinement due to purported difficulties in obtaining relevant records (*Gov. Br.* 32-33) fall flat in light of this Court’s recognition 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 (3<sup>rd</sup> Cir. 1997).<sup>8</sup>

Of course, the Court does not first decide the merits of a claim in order to

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<sup>8</sup> Moreover, it should be noted that Respondent’s counsel on the brief and in the proceedings below is an Assistant United States Attorney for the District of Massachusetts and can readily obtain and provide any necessary records.

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 in *Bailey v. United States*, 516 U.S. 137 (1995), 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 has jurisdiction to hear the substantive merits of his claims. Accordingly, Trenkler’s claims cannot 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.<sup>9</sup>

## 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

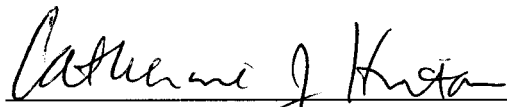
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<sup>9</sup> The government observes that because Trenkler is serving concurrent life sentences, “[e]ven if he were to succeed with an argument on one count, it would not affect his prison sentence.” (*Gov. Br.* 58 n. 15). It should be noted that Trenkler is entitled to substantive review of both of his claims. Trenkler is not subject here to the so-called “concurrent sentence doctrine,” which allows a reviewing court discretion to avoid resolution of legal claims respecting concurrently sentenced counts, because that doctrine may not be invoked where the sentences are not truly concurrent. *United States v. McKie*, 112 F.3d 626, 628 n.4 (3<sup>rd</sup> Cir. 1997). In *Ray v. United States*, 481 U.S. 736, 737 (1987) (*per curiam*), the Supreme Court held that the concurrent sentence doctrine did not apply where the District Court imposed a \$50 assessment on each count of conviction, for a total of \$150. “Since petitioner’s liability to pay this total depends on the validity of each of his three convictions, the sentences are not concurrent.” *Id.* See also *United States v. Barel*, 939 F.2d 26, 35 (3<sup>rd</sup> Cir. 1991) (same). In this case, as in *Barel* and *Ray*, Trenkler was assessed a \$50 assessment on each of three counts of conviction for a total of \$150. See *Judgment* (appended as Exhibit A to *Petitioner’s Reply Memorandum*, Document #17, in the district court below). Thus, Trenkler’s sentences are not fully concurrent, and the concurrent sentence doctrine does not apply.

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.

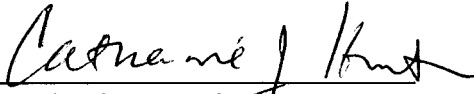
For the foregoing reasons, and for the reasons set forth in his Brief-in-chief, this Court should reverse the judgment of the district court dismissing Trenkler's Petition for Writ of Habeas Corpus for lack of jurisdiction and remand to the district court for an adjudication of the merits of petitioner's claim for relief.

Respectfully submitted  
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By his counsel,

  
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## CERTIFICATE OF COMPLIANCE

1. This reply brief complies with the requirements of 3<sup>rd</sup> 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 reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5001 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the word count feature of WordPerfect 9.0.
  
3. This reply brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect 9.0 in 14-Point Font in Times New Roman.

  
Catherine J. Hinton

NO. 03-1775

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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ALFRED W. TRENKLER,  
Petitioner/Appellant

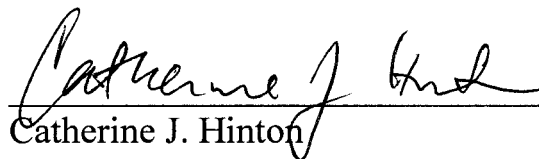
v.

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

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**CERTIFICATE OF SERVICE**

I hereby certify that I served the *Reply Brief of Petitioner/Appellant Alfred W. Trenkler* by mailing two copies thereof, U.S. mail, postage prepaid, to: Kevin McGrath, Assistant U.S. Attorney, District of Massachusetts, United States Courthouse, Suite 9200, 1 Courthouse Way, Boston, MA 02110 on June 18, 2003.



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