



the ambit of § 844(i) because the owner-occupied residence was not used in commerce or in an activity affecting interstate commerce. *Id.* *Jones* was on a direct appeal of the sentence after a jury trial and the Court remanded, ordering that the defendant's conviction must be vacated. *Id.* The Court did not directly address the dispute in terms of jurisdiction.

The progress of *United States v. Rea*, a case relied upon by the United States in its initial answer, raises concern with respect to the jurisdictional implications of *Jones*. *Rea* entered a conditional guilty plea on a § 844(i) charge for arson of a church, reserving the right to appeal the District Court's denial of his motion to dismiss the indictment for want of subject-matter jurisdiction.<sup>2</sup> In its first treatment of the subject -matter jurisdiction question, the Court of Appeals for the Eighth Circuit rejected *Rea*'s challenge. First it concluded, "section 844(i)'s 'interstate commerce' requirement, while jurisdictional in nature, is merely an element of the offense, not a prerequisite to subject- matter jurisdiction." *United States v. Rea*, 169 F.3d 1111, 1113 (8<sup>th</sup> Cir. 1999) (citing *United States v. Ryan*, 41 F.3d 361, 363 (8<sup>th</sup> Cir.1994)). Then, addressing the challenge as a sufficiency of the evidence concern, it determined, pursuant to its prior precedent, that a *de minimis* connection to interstate commerce sufficed. *Id.*<sup>3</sup> Acting on the defendant's petition for a writ of certiorari, the United States Supreme Court remanded the case to the Eighth Circuit for consideration in light of *Jones*. *Rea v. United States*, 120 S. Ct. 2193 (2000)(mem).<sup>4</sup> On remand the Eighth Circuit concluded that there was insufficient fact-finding by the District Court – that was ruling on the defendant's motion to dismiss the indictment for want of subject-matter jurisdiction or, in the alternative a motion for entry of judgment of acquittal -- for it to determine whether the connections to interstate commerce met the requirements mandated by *Jones*. *United States v. Rea*, 223 F.3d 741, 744 (8<sup>th</sup> Cir. 2000).

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<sup>2</sup> *Rea* had moved, in the alternative, for a judgment of acquittal.

<sup>3</sup> *Jones* calls into question the United States's future reliance on the First Circuit's *de minimis* standard applied in *United States v. Disanto*, 86 F.3d 1238 (1<sup>st</sup> Cir. 1996).

<sup>4</sup> Though this treatment does not clarify the Supreme Court's position as to the jurisdictional nuisances of § 844(i), it does make clear that the *Jones* standard applies to cases that preceded its pronouncement. *See also United States v. Ryan*, 227 F.3d 1058, 1062-63 (8<sup>th</sup> Cir. 2000)(concluding that *Jones* applies retroactively).

Though neither *Rea* nor *Jones* mirrors the procedural posture of the case before me, they raise significant questions about the issue of subject-matter jurisdiction. This is a potential infirmity with which I cannot easily dispense even in the context of a collateral review of a conviction and sentence that was never directly appealed. Far reaching are the implications of whether or not the sufficiency of the interstate commerce connections is determinative of subject-matter jurisdiction or is merely an element of the offense. *See DiSanto*, 86 F.3d at 1246 (citing *United States v. Ryan*, 41 F.3d 361, 363-63 (8<sup>th</sup> Cir. 1994) and treating the interstate commerce connection as an element of the offense). *See also Jones*, 529 U.S. at \_\_\_. 120 S.Ct. at 1909-10 (posing the question as whether § 844(i) “applies to the arson of a private residence,” answering that it “*does not reach* an owner occupied residence that is not used for any commercial purpose”) (emphasis added); *Ryan*, 227 F.3d at 1063 (treating a post-*Jones* collateral challenge to the § 844(i) interstate commerce connection as a sufficiency of the evidence inquiry, which was a ground raised on direct appeal, and overturning *United States v. Ryan*, 41 F.3d 361 after identifying insufficient evidence under *Jones* that the fitness center was used in an activity affecting commerce). The scope of my review turns, in large measure, upon whether or not this *Jones*-based attack is cognizable as a challenge to the court’s subject-matter jurisdiction or as a test of the sufficiency of the evidence. Therefore, I offer the United States the opportunity to address the issues raised by *Jones* and its progeny, especially the appropriate scope of my review in this collateral attack.

I also **GRANT** Beeler’s motion to amend and **ORDER** the United States to **ANSWER** Beeler’s assertion regarding the impropriety of the U.S.S.G. § 2K2.1(b)(3) enhancement in light of the cited and attached “Application Note” to the Sentencing

Guidelines.” Though the motion came in after the United States’s answer was filed, under the Federal Rules of Civil Procedure leave to amend after a responsive pleading has been filed must be "freely given when justice so requires." Fed. R. Civ. P. 15(a). Congress has expressly provided that this standard, operative in civil actions, applies to amendments to or supplementation of habeas applications. *See* 28 U.S.C. § 2242; *see also James v. Giles*, 221 F.3d 1074,1077-78 (9<sup>th</sup> Cir. 2000) (observing that Federal Rule of Civil Procedure 15(a) applies to habeas corpus actions just as it does to "garden variety" civil actions); *Scott v. Clark*, 761 F.2d 1524, 1527 (11<sup>th</sup> Cir. 1985)(*pro se* § 2255 petitioner's efforts to amend should have been permitted by the district court under Rule 15(a), even though the petitioner had not sought leave to amend). Further, in light of the need of the United States to respond to the concerns raised by *Jones* and *Rea*, allowing the amendment and seeking a response from the United States will not result in an additional delay, while assuring that this disposition of Beeler’s first habeas petition is comprehensive and well considered.

The United States must file its amended answer by March 23, 2001.

**SO ORDERED.**

Dated February 21, 2001

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Margaret J. Kravchuk  
U.S. Magistrate Judge

U.S. District Court  
District of Maine (Portland)  
CRIMINAL DOCKET FOR CASE #: 98-CR-61-ALL

USA v. BEELER Filed: 12/16/98

Other Dkt # 2:98-m -00028

Pending Counts: NONE

Terminated Counts: NONE

Complaints: NONE

Case Assigned to: JUDGE GENE CARTER

COLEMAN BEELER (1) JULIAN L. SWEET

aka [term 12/27/99]

JOEY BEELER 784-3576

defendant [COR LD NTC ret]

[term 12/27/99] STEVEN D. SILIN

[term 12/27/99]

JODI L. NOFSINGER, ESQ.

[term 12/27/99]

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COLEMAN BEELER

[COR LD NTC] [PRO SE]

Reg. No. 03768-036

Federal Correctional

Institution Ray Brook

P.O. Box 9001  
Ray Brook, NY 12977

Pending Counts: Disposition

18:844I.F PENALTIES - IF DEATH Imprisonment: 137 months on  
RESULTS - Malicious Count 1s; 60 months on Count  
destruction of a vehicle by 2s, and 120 months on Count 3s  
means of explosive materials (the upper limit of the  
(1s) Guideline Range being displaced by the upper limit of 10 years), to be  
served concurrently with each other; Supervised Release: 3 years on each of counts 1s, 2s and  
3s, to be served concurrently; Special Assessment: \$300; Restitution: \$10,065.45

(1s)

18:844I.F PENALTIES - IF DEATH Imprisonment: 137 months on  
RESULTS - Conspiracy to Count 1s; 60 months on Count  
maliciously destroy a vehicle 2s, and 120 months on Count 3s  
by means of explosive (the upper limit of the  
materials Guideline Range being displaced  
(2s) by the upper limit of 10 years), to be served concurrently with each other;  
Supervised Release: 3 years on each of counts 1s, 2s and 3s, to be served concurrently;  
Special Assessment: \$300; Restitution: \$10,065.45

(2s)

26:5841.F REGISTRATION OF Imprisonment: 137 months on  
FIREARMS - Possession of an Count 1s; 60 months on Count  
unregistered firearm 2s, and 120 months on Count 3s  
(destructive device) (the upper limit of the  
(3s) Guideline Range being displaced by the upper limit of 10 years), to be  
served concurrently with each other; Supervised Release: 3 years on each of counts 1s, 2s and  
3s, to be served concurrently; Special Assessment: \$300; Restitution: \$10,065.45

(3s)

Offense Level (opening): 4

Terminated Counts: Disposition

18:844I.F PENALTIES - IF DEATH  
RESULTS Malicious  
destruction of a vehicle by means of explosive materials  
(1)

18:371.F CONSPIRACY TO DEFRAUD

THE UNITED STATES Conspiracy to maliciously destroy a vehicle by means of explosive  
materials(2)

26:5841.F REGISTRATION OF  
FIREARMS Possession of an  
unregistered firearm  
(destructive device) and  
aiding and abetting (also  
26:5861(d), 5871 and 2)  
(3)

18:844H.F EXPLOSIVES USED IN  
COMMISSION OF FELONY Use of  
explosive materials to collect  
extensions of credit by  
extortionate means  
(4)

18:844H.F EXPLOSIVES USED IN  
COMMISSION OF FELONY - Use of  
explosive materials to collect  
extensions of credit by  
extortionate means  
(4s)

18:894.F COLLECTION OF CREDIT  
BY EXTORTION  
(5)

18:894.F COLLECTION OF CREDIT  
BY EXTORTION  
(5s)

Offense Level (disposition): 4

Complaints	Disposition
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malicious destruction of a 1995 Infiniti G20 automobile by means of explosive materials and aiding and abetting, 18:844(i), 2 [ 2:98-m -28 ]	
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Case Assigned to: JUDGE GENE CARTER

BRYANT FEYLER (2)                      NEAL K. STILLMAN  
aka    [term 02/09/99]  
BRIAN FEYLER                                773-8169  
defendant                                    [COR LD NTC cja]  
[term 12/27/99]                              97A EXCHANGE STREET  
    PORTLAND, ME 04101  
    207-773-8169  
    BRUCE M. MERRILL, ESQ.  
    [term 12/27/99]  
    225 COMMERCIAL STREET  
    SUITE 401  
    PORTLAND, ME 04101  
    775-3333

Pending Counts:                              Disposition

18:844I.F PENALTIES - IF DEATH    Imprisonment: 63 months on  
RESULTS - Malicious                      Count 1, 60 months on Count 2  
destruction of a vehicle by              and 63 months on Count 3, all  
means of explosive materials          such terms to run  
(1)    concurrently with each other;  
Supervised Release: 3 years  
on each of counts 1, 2, and 3,  
all such terms to run  
concurrently with each other;  
Special Assessment: \$300;  
Restitution: \$10,065.45  
(1)

18:844I.F PENALTIES - IF DEATH    Imprisonment: 63 months on  
RESULTS - Conspiracy to                Count 1, 60 months on Count 2  
maliciously destroy a vehicle          and 63 months on Count 3, all  
by means of explosive                    such terms to run  
materials                                      concurrently with each other;  
(2)    Supervised Release: 3 years  
on each of counts 1, 2, and 3,  
all such terms to run  
concurrently with each other;

Special Assessment: \$300;

Restitution: \$10,065.45

(2)

26:5841.F REGISTRATION OF FIREARMS - Possession of an unregistered firearm (destructive device) Imprisonment: 63 months on Count 1, 60 months on Count 2 and 63 months on Count 3, all such terms to run

(3) concurrently with each other;

Supervised Release: 3 years on each of counts 1, 2, and 3, all such terms to run

concurrently with each other;

Special Assessment: \$300;

Restitution: \$10,065.45

(3)

Offense Level (opening): 4

Terminated Counts: Disposition

18:844H.F EXPLOSIVES USED IN COMMISSION OF FELONY - Use of explosive materials to collect (4)

extensions of credit by extortionate means

(4)

18:894.F COLLECTION OF CREDIT BY EXTORTION - Use of extortionate means to collect (5)

an extension of credit

(5)

18:922N.F TRANSPORT FIREARMS INTERSTATE BY FELON - Being a person under indictment for a (6)

felony in receipt of a firearm

(6)

Offense Level (disposition): 4

Complaints Disposition

malicious destruction of a  
1995 Infiniti G20 automobile  
by means of explosive  
materials and aiding and  
abetting, 18:844(i), 2  
[ 2:98-m -28 ]

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