

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
)
v.) Criminal No. 98-61-P-C
)
COLEMAN BEELER,)
)
)
)

RECOMMENDED DECISION ON 28 U.S.C. § 2255 MOTION

Coleman Beeler, a federal prisoner serving concurrent sentences totaling 137 months for his conviction following guilty pleas for the malicious destruction of a vehicle by explosive materials in violation of 18 U.S.C. § 844(i) and related offenses, has raised a number of issues in this quest for collateral relief. Before the court are a bevy of motions: a motion to vacate, set aside, or correct his sentence filed pursuant to 28 U.S.C. § 2255 (Docket No. 108); a motion for relief from waiver of a constitutional claim (Docket No. 110); a motion to dismiss the indictment (Docket No. 114); and two motions requesting the scheduling and the holding of an evidentiary hearing on his § 2255 motion and his motion for relief from waiver of his constitutional claim (Docket Nos. 111 & 113). Beeler also filed an amendment to his § 2255 motion and a motion to amend (Docket No. 132), which this court granted on a prior occasion (Docket No. 133). The United States has provided a comprehensive memorandum in opposition to Beeler's motions (Docket No. 130), and a supplemental response (Docket No. 134), in compliance with this court's order to supplement its initial answer to respond to Beeler's amendment (Docket No. 133). The court has given thorough consideration of these submissions, as

well as the arguments in Beeler's reply to the United States' opposition. (Docket No. 131.) For the reasons set forth below, I recommend that his motion be **DENIED** with respect to all of his challenges. One of Beeler's challenges does raise a significant constitutional issue as to the validity of his plea of guilty. As a result, I further recommend that in the event that the Court adopts this recommendation and Beeler files a notice of appeal this court should issue a certificate of appealability pursuant to Federal Rules of Appellate 22(b)(1) and 28 U.S.C. § 2253(c) on the limited issue of whether Beeler is entitled to an evidentiary hearing in light of an intervening Supreme Court precedent that has established that 18 U.S.C. § 844(i) does not reach certain conduct, including possibly the conduct which formed the factual basis of Beeler's guilty plea.

Grounds Raised

Beeler, who was convicted on the basis of an unconditional guilty plea, asserts four grounds for relief in his § 2255 motion. First, the District Court lacked subject matter jurisdiction to indict him because the crime did not have a sufficient connection to interstate commerce. Second, he was denied effective assistance of counsel as promised by the Sixth Amendment in four respects: counsel failed to challenge the court's jurisdiction; counsel failed to raise a concern about Beeler's competency to enter a guilty plea while under the influence of a prescription drug; counsel did not challenge sentencing enhancements; and counsel did not prosecute a direct appeal. Third, the District Court ought not to have accepted his guilty plea because he was on mind-altering prescription medication. And, fourth, there was insufficient evidence to support the enhancement of his sentence under sentencing guideline § 3B1.1(c) or § 2K2.1(b)(5).

In his motion for relief from waiver of his constitutional claim, Beeler asserts that the Supreme Court’s recent decision Jones v. United States, 529 U.S. 848 (2000) dictates the conclusion that the District Court lacked subject-matter jurisdiction over his case.¹ Further, in his amendment to his § 2255 motion, Beeler proffers an additional challenge to his enhancement under sentencing guideline § 2k2.1(b). He asserts that it was improper to use this enhancement in view of a recent “Application Note” for the guideline.²

Discussion

1. Beeler’s Challenges to the Interstate Commerce Connection

Federal charges were brought against Beeler for a car bombing on a theory that the car he bombed was used in interstate commerce and/or in an activity affecting interstate commerce. Count One of the superseding indictment against Beeler and his co-defendant Brian Feyler charged:

On or about July 26, 1997, in the District of Maine, defendants ...maliciously damaged and destroyed by means of explosive materials a vehicle, namely, a 1995 black Infinite G20... used in interstate commerce and in any activity affecting interstate commerce, and did aid and abet the same conduct; [a]ll in violation of Title 18, United States Code, Sections 844(i) and 2.

(Superseding Indictment at 1.) Count Two charged conspiracy in violation of 18 U.S.C.

§ 371:³

¹ In his motion to dismiss the indictment Beeler asserts that the indictment against him must be dismissed because the federal courts did not have jurisdiction over the alleged crime due to a want of sufficient connection between Beeler’s criminal conduct and interstate commerce. He argues that, as a consequence, his rights were violated under a variety of constitutional provisions. The substantive merit of this argument is treated below in the context of the § 2255 motion.

² With respect to this enhancement Beeler’s § 2255 motion also raises Apprendi v. New Jersey, 530 U.S. 466 (2000). I address the applicability of Apprendi below.

³ Section 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or

From in or about July 1997 to on or about July 26, 1997, in the District of Maine, defendants ... knowingly and willfully conspired and agreed with each other and with other persons both known and unknown, to maliciously damage a vehicle by means of an explosive in violation of Title 18, United States Code, Section 844(i).

(Id. at 2.) This count also alleged overt acts undertaken in furtherance of the conspiracy that, beyond listing the make and VIN number for the car, do not attempt to tie the crime to interstate commerce. Count Three of the indictment alleged a violation of 26 U.S.C.

§§ 5841, 5861(d), and 5871, as well as 18 U.S.C. § 2. It reads:

On or about July 26, 1997, in the District of Maine, the defendants ... did knowingly possess a firearm (a destructive device), namely, a pipe bomb, not registered to them in the National Firearms Registration and Transfer Record, and did aid and abet the same conduct.

(Id. at 3.)

Counts One and Two rise or fall on whether Beeler's conduct comes within the embrace of 18 U.S.C. § 844(i). The relevant portion of that statutory section reads:

Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both... .

18 U.S.C. § 844(i).⁴

more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 371.

⁴ Counts One and Three also reference 18 U.S.C. § 2. It provides:

- (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
- (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2.

A. Relevant Recent Case Law

i. Ramification of Jones v. United States

As noted by Beeler in his motion for relief from waiver of a constitutional claim, the United States Supreme Court has recently interpreted the interstate commerce element of 18 U.S.C. § 844(i) in Jones v. United States, 529 U.S. 848 (2000).⁵ Responding to the court's concern that Jones might impact the resolution of Beeler's § 2255 motion, the United States argues that the connection to interstate commerce under § 844(i) does not present subject-matter jurisdiction concerns. Rather, it argues, the connection to interstate commerce is an element of the crime; the adequacy of the interstate commerce connection is a sufficiency of the evidence concern. Since Beeler did not pursue a direct appeal of his unconditional guilty plea, he cannot raise it in a collateral challenge, because a plea of guilty waives non-jurisdictional defects. (The converse of this proposition is that if the challenge is one to subject-matter jurisdiction, Beeler can raise the challenge in this collateral review, even though he failed to pursue the argument in a direct appeal.)

I agree with the United States' subject-matter jurisdiction analysis. However, Jones does not fall from the radar screen as a result. Jones does generate the concern that this jurisdictional element of the § 844(i) counts was not met in Beeler's case. The key to determining the tenability of Beeler's challenge on this score is to read Jones in the

⁵ In his motion to dismiss the indictment filed the same day as the motion for relief from waiver, Beeler argues that his offense was not an offense against the United States. Included in this argument is the statement that "each and every count" of the indictment "fails to state a claim and facts sufficient to constitute an offense against the ... United States because 18 U.S.C. 844(i) and 2, 18 U.S.C. 371, 26 U.S.C. 5841, 5861(d), and 5871 ...[are] clearly [] statutory provision[] that [C]ongress inten[d]ed to affect property 'used in' commerce, and private property within the jurisdiction of 'these several union states' is not a federal offense." (Mot. Dismiss Indictment at 1-2.)

In Beeler's memorandum in support of his § 2255 motion he argues for nine pages that the court lacked subject-matter jurisdiction because of insufficient connections between his crime and interstate commerce. (Mot. § 2255 at 1-9.)

context of the procedural posture of this case, Beeler having tendered an unconditional guilty plea and not having pursued a direct appeal.

In Jones the Supreme Court considered the question, phrased narrowly, of “whether arson of an owner-occupied private residence falls within § 844(i)’s compass.” 529 U.S. at 850. It held: “[A]n owner-occupied residence not used for any commercial purpose does not qualify as property ‘used in’ commerce or commerce-affecting activity; arson of such a dwelling, therefore, is not subject to federal prosecution under § 844(i).” Id. at 850-51. It reversed the Seventh Circuit Court of Appeals because it had concluded that § 844(i) exceeded the authority of Congress when it is applied to the arson of a private residence. The Supreme Court concluded that it did not have to determine the constitutionality of the application because of its conclusion “that § 844(i) does not reach an owner-occupied residence that is not used for any commercial purpose.” Id. at 852. See also id. at 857 (reciting the “guiding principal” that when a statute is susceptible to two constructions, the court should adopt the construction that avoids the constitutional question rather than the one that raises serious constitutional concerns). The Court viewed arson of the private residence as falling within the “genre” of law enforcement cases that Congress left to the States. Id. at 859.⁶

The Jones Court expressly stated that the “proper inquiry” when applying § 844(i) is whether the function of the building affects interstate commerce, id. at 854-55 (quoting United States v. Ryan, 9 F.3d 660, 675 (8th Cir. 1993), Arnold, J., concurring in part and

⁶ Citing concerns at the forefront of its recent commerce-clause decision, United States v. Lopez, 514 U.S. 549 (1995), the Jones Court noted that it was particularly appropriate to avoid the constitutional question in reading § 844(i) because to read § 844(i) as comprehending the arson of a private home would make conduct that is traditionally a local concern into conduct subject to federal enforcement. Id. at 858. It described arson as “a paradigmatic common-law state crime.” Id.

dissenting in part),⁷ and that § 844(i) only applies to “property currently used in commerce or in an activity affecting commerce,” id. at 859 (emphasis added). It concluded that the fact that the property served as collateral for a mortgage held by an out-of-state lender, was insured by an out-of-state insurer, and received natural gas from out-of-state sources did not mean that the building was “used” in an activity affecting commerce. Id. at 855, 857. “[M]erely a passive, passing, or past connections to commerce” is not, in the Court’s view, sufficient to create the kind of “active employment” in interstate commerce needed to bring the crime within the compass of § 844(i). Id. at 855.

At least one Circuit Court of Appeals has applied Jones in the context of a § 2255 motion. See United States v. Ryan, 227 F.3d 1058 (8th Cir. 2000). A district court in the Tenth Circuit has followed suit. United States v. Tush, 2001 WL 309416 (D. Kan. 2001).

ii. Impact of Jones on Existing First Circuit Precedent

The First Circuit’s pre-Jones view of § 844(i)’s “used in interstate commerce or an activity affecting commerce” phrase included an understanding that a building being supplied with natural gas that traveled in an interstate pipeline and that housed food supplies that had traveled in interstate commerce were operative factors in the interstate commerce analysis. United States v. DiSanto, 86 F.3d 1238, 1247 (1st Cir. 1996). Jones explicitly rejected these sorts of passive connections. 529 U.S. at 857. On the other hand Jones dealt with purely residential property with no commercial ties whatsoever. The Supreme Court expressed no view on the “de minimis” standard for effects on interstate

⁷ See United States v. Ryan, 227 F.3d 1058 (8th Cir. 2000) (addressing a § 2255 motion by same party whose § 844(i) conviction was affirmed on direct appeal by the majority in 9 F.3d 660 and en banc, 41 F.3d 361, concluding that in light of Jones the § 844(i) defendant’s/ § 2255 movant’s § 844(i) conviction should be reversed).

commerce as it relates to commercial endeavors. See United States v. Grassie, 237 F.3d 1199, 1208 (10th Cir. 2001). The DiSanto panel ultimately concluded that all that was required to meet the § 844(i) interstate commerce element for DiSanto's pre-Lopez conviction was that the property had a “de minimis connection to interstate commerce.” 86 F.3d at 1247. The Court concluded that the petitioner could not utilize the Lopez requirement of a “substantial effect” on interstate commerce in his sufficiency of the evidence challenge to the interstate commerce element because the Lopez argument was not raised below. Id.⁸ When dealing with a commercial endeavor such as a restaurant or

⁸ The First Circuit has yet to address the implication Jones bears for its de minimis standard. In DiSanto the court addressed a challenge to the interstate commerce component of § 844(i) that bridged the pre and post Lopez era, the trial having been completed prior to the issuance of Lopez and the direct appeal coming to a head after Lopez. Because of this sequence of events, DiSanto raised the fresh-off-the-press Lopez for the first time in his appeal.

The First Circuit hedged. First is stated that DiSanto's Lopez claim was reviewed for plain error because he had failed to raise it as a sufficiency of the evidence challenge in front of the district court (and it mattered not that Lopez was yet to surface at the time of trial). DiSanto, 86 F.3d at 1247. See also id. at 1244 n.4. Applying the de minimis standard as articulated in United States v. Medeiros, 897 F.2d 13 (1st Cir. 1990), the DiSanto panel concluded that the Medeiros standard was more than met. DiSanto, 86 F.3d at 1247. It stated that it did not need to address whether the Medeiros standard was “invalidated” by Lopez. Id. at 1247 n.8. However, it suggested that while Lopez did not address sufficiency of the evidence concerns for federal criminal statutes it still might control the jurisdictional element. Id.

The Court did not leave it at that. It continued, “We only add this: Even assuming Lopez requires more than de minimis showing, we nonetheless find that the jury was presented with sufficient evidence to support its finding that the [building] was a building either ‘used in’ or ‘used in an activity affecting’ interstate commerce.” Id. at 1248. It reasoned that the Supreme Court’s prior precedent Russell v. United States, 471 U.S. 858 (1985) withstood Lopez, and left intact its holding that Congress had the authority to regulate arson of business property and that rental property is “‘unquestionably’ an ‘activity’ that affects interstate property within the meaning of 18 U.S.C. § 844(i).” Id. (quoting Russell, 471 U.S. at 862). Reading Russell in light of Lopez the Court reaffirmed its Medeiros holding “that rental property is per se sufficiently connected to interstate commerce to confer federal jurisdiction over Section 844(i) and to satisfy the jurisdictional element.” Id.

However the Court did not leave it at that. It stated: “Even assuming that Lopez undermines Russell and Medeiros’ holding regarding rental property, we would nonetheless affirm the jury’s finding. Because uncontested evidence was presented below that the building was used as a commercial establishment which received food supplies and natural gas for its operation that traveled in interstate commerce, the [building] falls within 18 U.S.C. § 844(i)’s ‘real or personal property used in interstate ... commerce.’ Because the [building] was property used in interstate commerce, we need not address whether its activities ‘substantially affect[ed]’ interstate commerce.” Id. (citation omitted).

Jones certainly casts shadows upon this alternative ground for affirming DiSanto's § 844(i) conviction, in that the reception of food supplies and natural gas by a noncommercial (non-rental) building certainly does not meet the United States’ burden. Whether the First Circuit will continue to use terms such as de minimis and per se in post-Jones § 844(i) contests is an open question.

even, perhaps, a home cleaning business, the de minimis standard might yet be sufficient in this Circuit.

iii. Implication of Bousley v. United States

In light of Beeler's assertion that his conduct did not fall within the § 844(i) parameters, this court also must address Beeler's claim with the Supreme Court's Bousley v. United States, 523 U.S. 614 (1998) in view. The § 2255 movant in Bousley had pled guilty to an 18 U.S.C. § 924(c)(1) offense of 'using' a firearm during or in relation to a drug trafficking crime. Though Bousley appealed his sentence, he did not challenge the validity of his guilty plea. Subsequently, he filed a motion for habeas corpus relief⁹ challenging the connection between the firearm and his drug-trafficking. He alleged that his plea was not intelligent and knowing and that the District Court misinformed him of the nature of the charged crime. Id. at 616. The District Court summarily dismissed this motion, acting on the magistrate judge's recommendation. Bousley appealed this dismissal and while this appeal was pending the Supreme Court issued a decision that interpreted 18 U.S.C. § 924(c)(1), holding that a defendant is not subject to § 924(c)(1) prosecution for only having a firearm in the proximity of drugs or drug proceeds or for placing the firearm in a position to embolden or to provide a sense of security. See Bailey v. United States, 516 U.S. 137, 149-50 (1995); see also Bousley, 523 U.S. at 617 (describing its holding in Bailey). The Bousley Court granted cert to "resolve a split among the Circuits over the permissibility of post-Bailey collateral attacks on § 924(c)(1) convictions obtained pursuant to guilty pleas." 523 U.S. at 618.

⁹ Bousley's motion was filed pursuant to 18 U.S.C. § 2241 but the magistrate judge recommended treating it as a § 2255 motion. Id. at 617.

The Bousley Court reasoned that if the criminal defendant, his counsel, and the court did not “correctly under[stand] the essential elements of the crime with which [the defendant] was charged,” the plea would be “constitutionally invalid.” Id. at 618-19. This is because a constitutionally valid plea must be voluntary and intelligent. Id. at 618. Quoting Smith v. O’Grady, 312 U.S. 329, 334 (1941), the Bousley Court stated:

We have long held that a plea does not qualify as intelligent unless a criminal defendant first receives real notice of the true nature of the charge against him, the first and most universally recognized requirements of due process.

523 U.S. at 618 (quotation marks omitted).

Rejecting an argument that Bailey announced a procedural rule not available retroactively to the habeas petitioner, the Court concluded that its interpretation of 18 U.S.C. § 924(c)(1) applied retroactively to habeas cases. It stated, “it would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on our decision in Bailey in support of his claim that his guilty plea was constitutionally invalid.” Id. at 621. In a passage that resonates when analyzing whether Jones can be utilized in a collateral review, the Court reasoned:

[D]ecisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct “beyond the power of the criminal law-making authority to proscribe,” necessarily carry a significant risk that a defendant stands convicted of “an act that the law does not make criminal.”

Id. at 620 (citations omitted).

Of vital importance to this dispute, the Bousley Court then addressed the “significant procedural hurdles” hindering a habeas petitioner collaterally attacking a guilty plea even when the Court’s interpretation of a statute applies retroactively. Id. at 621. It observed that Bousley had procedurally defaulted his claim because a direct

appeal challenging the voluntariness and intelligence of a guilty plea is a prerequisite to lodging such a challenge in a collateral proceeding. Id. (describing habeas as “an extraordinary remedy”). The Court then identified the only avenues left to such procedurally defaulted habeas petitioners: “Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either ‘cause’ and actual ‘prejudice,’ or that he is ‘actually innocent.’” Id. at 622 (citations omitted).

The Court concluded that the petitioner could not demonstrate “cause” on the basis of either of two proffered cause-related excuses. It rejected the argument that Bousley had cause for not raising the challenge on direct appeal because the legal basis for a challenge to the “use” element of 18 U.S.C. § 924(c)(1) was not “reasonably available” to his attorney. Id. at 622. Likewise, the Court dismissed the theory that cause inhered because it would have been futile to make the challenge to the use element because the law in the presiding court ran counter to the pronouncements of Bailey. Id. at 623. See also Brache v. United States, 165 F.3d 99, 102-03 (1st Cir. 1999) (questioning but following Bousley’s conclusion that cause could not be established when circuit precedent was so clearly opposed to the later-announced Supreme Court interpretation of the statute).¹⁰

¹⁰ In analyzing whether a habeas petition was a “second or successive” § 2255 motion the First Circuit has described the Bousley “cause” requirement as “stringent.” Sustache-Rivera v. United States, 221 F.3d 8, 14 n.9 (1st Cir. 2000). It questioned whether a § 2255 movant really had an opportunity or incentive to raise a claim -- that under clear circuit precedent at the time of his conviction or appeal would be futile -- based on a legal theory that the Supreme Court concludes is the proper interpretation of the statute after-the-fact. Id. at 14 & n.9. See also United States v. Smith, 250 F.3d 1073 (7th Cir. 2001) (Wood, J, joined by Rovner, J. and Williams, J., in an opinion dissenting from the denial of rehearing en banc, arguing vis -à-vis a procedurally defaulted Apprendi, 530 U.S. 466 challenge that Bousley need not be read to bar habeas petitioners from establishing “cause” based on legal unavailability and futility).

However, in a passage of some moment to Beeler,¹¹ the Court then addressed its second identified avenue for relief from the procedural default: actual innocence. It stated that the petitioner’s claims could be reviewed in a habeas proceeding if he could “establish that the constitutional error in his plea colloquy ‘has probably resulted in the conviction of one who is actually innocent.’” *Id.* at 623 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). A procedurally-defaulted petitioner can establish actual innocence by demonstrating that, “in light of all the evidence” “it is more likely than not that no reasonable juror would have convicted him.” *Id.* (quoting *Schulp v. Delo*, 513 U.S. 298, 327-28 (1995), internal quotations omitted). The Court reversed and remanded for an evidentiary hearing. It instructed that if Bousley was to be permitted to proceed with his habeas review on the merits, he must make a showing of actual innocence, that is, “that he did not ‘use’ a firearm as that term is defined in *Bailey*.” *Id.* at 623-24.¹² The First Circuit has recognized the “actual innocence” avenue for relief from procedurally defaulted claims, though not in the context of challenges to § 844(i)’s interstate commerce element. *See Santora v. United States*, 187 F.3d 14, 17 (1st Cir.

¹¹ This passage was also the target of a pointed dissent by Justice Scalia. *Bousely*, 523 U.S. at 629 – 36 (Thomas, J. joining).

¹² The majority clarified that to be successful Bousley would need to prove “factual innocence” of the charged offense, not just “legal insufficiency.” *Id.* at 623. Accordingly, at the evidentiary hearing the United States was not limited to the evidence presented at the plea colloquy to prove “use” within the meaning of *Bailey*, but could “present any admissible evidence of the petitioner’s guilt.” *Id.* at 624. If the prosecution had dropped more serious charges in the plea negotiations, the petitioner would also need to demonstrate innocence of those charges. *Id.* It does not appear that Beeler would encounter this counterburden as his plea comprehended three of five counts and the United States proceeded to trial on the remaining two counts, without success.

A part-concurrence/ part-dissent by Justice Stevens objected to putting the burden of the evidentiary hearing on the petitioner. He argued that a constitutionally invalid plea ought to be collaterally attackable whether or not it was first challenged on direct appeal. *Id.* at 625 – 29 (arguing that the majority had no authority to support its blanket assertion that right to collateral review of the voluntariness or intelligence of a plea is dependent on lodging this challenge via a direct appeal). Stevens contended that the record before the Court demonstrated that the § 924(c)(1) charge was constitutionally invalid and that the plea should have been “treated it as a nullity,” the conviction should have been voided, and the petitioner/defendant should have been allowed to re-plead. *Id.* at 629.

1999) (per curiam) (18 U.S.C. § 924(c)'s use and carriage of a firearm element and 18 U.S.C. § 2 aiding and abetting the firearm offense, guilty plea); Simpson v. Martesanz, 175 F.3d 200, 209-10 (1st Cir. 1999) (challenge to jury instructions on burden of proof in state murder trial); Brache, 165 F.3d at 102-03 (1st Cir. 1999) (§ 924(c)'s use and carriage of firearm element, jury trial).

There is an inescapable symmetry between the construction of 18 U.S.C. § 844(i) in Jones and the construction of 18 U.S.C. § 942(c)(1) in Bailey. As the United States argues in its supplemental answer, the connection of the damaged or destroyed property to interstate commerce in § 844(i) is an element of the crime (rather than a prerequisite to the court's exercise of subject-matter jurisdiction). Likewise, the "use" of the firearm is an element that must be proven to sustain a conviction under § 924(c)(1). To convict Beeler at a jury trial the United States would need to prove this element beyond a reasonable doubt. This accords with the First Circuit's view of § 844(i)'s interstate commerce connection as "a jurisdictional predicate of the substantive offense," a "jurisdictional element," that "like other elements of the offense," is an element that "must be proved to the jury beyond a reasonable doubt." DiSanto, 86 F.3d at 1246.

Just as Bailey altered the understanding of what was necessary to establish that a defendant 'used' a firearm in a violent or drug trafficking crime, Jones has altered the understanding of what the United States must establish to prove that the damaged or destroyed property was "used in interstate or foreign commerce or in an activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i). See Jones, 529 U.S. at 855-56 (quoting Bailey discussion on the meaning of 'use' in 18 U.S.C. § 924(c)(1) as support for its interpretation of 'use' in § 844(i)). Rather than passing, passive, or past contacts,

the property must be currently used in commerce or in an activity affecting commerce. If the property is not so used in interstate commerce then the defendant is not subject to § 844(i) prosecution or, if prosecuted, the defendant may very well be factually innocent of a § 844(i) offense. And, as the Bousley Court observed, when the Court, the prosecution, and the defendant misunderstand an element of the charged offense when participating in the plea colloquy, the defendant does not get ““real notice of the true nature of the charge against him”” and his plea is not intelligent. 523 at 618-19.¹³

Though Beeler has not used the magic words of “actual innocence” in challenging the interstate commerce element of his § 844(i) convictions he certainly asserts in his various motions that his were not federal crimes. As a pro se movant, his argument that the United States cannot prove facts that would sustain the interstate commerce element of his convictions is sufficient. See United States v. Garth, 188 F.3d 99, 107-10 (3d Cir. 1999) (careful discussion of an initially pro se § 2255 challenge to a § 924(c) conviction whose pleadings lacked the phrase “actual innocence” but contained the substance of an “actual innocence” argument).¹⁴

B. The United States’ Interstate Commerce Showing

An examination of the transcript of the Rule 11 colloquy reveals that the Court, the prosecution, and Beeler’s attorney clearly (and understandably in light of DiSanto and

¹³ The Eight Circuit did not address the Bailey/ Bousley line of cases when it concluded that an unconditional guilty plea to a § 844(i) count “waived the right to appeal the district court’s finding that the interstate commerce element was satisfied” even though Jones means that that conclusion rested on a faulty premise. United States v. Beck, 250 F.3d 1163, 1166-67 (8th Cir. 2001). It concluded that the defendant did not meet the “plain error” standard applicable on a direct appeal. Id. It also remarked that the defendant’s argument that his waiver [read plea] was not knowing and intelligent was “unconvincing” because the Supreme Court had granted cert in Jones two months prior to Beck’s plea. Id. at 1167.

¹⁴ As noted above, the Bousley court suggested if the petitioner could leap this evidentiary hurdle, then he was entitled to a habeas review of whether his plea was knowing and intelligent, and, thus, constitutionally valid. The evidentiary hearing on “actual innocence” is a “gateway” that Beeler must pass through in order to have his claim considered on the merits. Herrera v. Collins, 506 U.S. 390, 404 (1993).

the force of multi-circuit precedent) were proceeding upon the assumption that the interstate commerce element of Counts One and Two required showing only a minimal relation of the bomb-damaged car to interstate commerce.¹⁵ The Court asked Beeler whether he understood that Count One charged him “with having committed the offense of malicious destruction of a vehicle by means of explosive materials and aiding and abetting therein.” (R. 11 Trans. at 10.) With respect to Count Two, the Court queried if Beeler understood that he was “charged with having committed the offense of conspiracy to maliciously destroy a vehicle by means of explosive materials.” (Id.) Beeler answered an unequivocal “yes” to each of these queries. (Id.) At this juncture no mention was made that the prosecution would have to prove that the vehicle was used in interstate commerce or an activity affecting interstate commerce.

The court referenced the prosecution’s version and made sure that Beeler and his attorney had reviewed the document. (Id. at 13.) This document has one paragraph that addresses the property:

The car did not belong to Deirdre Nickerson, but was owned by Infinite Financial Services of Torrence, California. It was leased to a woman named Dorothy Nickerson, who used it for her cleaning business. Dorothy Nickerson had no connection to [the co-defendants]. She was listed in the telephone book as “D. Nickerson” with an address at Indian Ridge Road in Yarmouth.

(Prosecution Version at 3-4.) During the colloquy, defense counsel represented to the court that he and Beeler had reviewed this document and that Beeler understood that it “sets forth the Government’s representation as to what it would prove at trial to be the facts of this case.” (R. 11. Trans. at 14.) Beeler directly represented to the Court that he understood everything in the document and that he comprehended his attorney’s

¹⁵ The minimal attention given to the nexus with interstate commerce stands out all the more because the meticulous care the Court took in conducting the colloquy.

explanation of its contents. (Id. at 15.) While Beeler registered his disagreement with certain representations in the prosecution’s version (id. at 16-18), the only disagreement that related to the car was that Beeler contended that he did not believe that the car belonged to Deirdre Nickerson (id. at 18). The prosecutor indicated to the court that not one of Beeler’s points of contention would affect the ability of the government to prove the three charged offenses beyond a reasonable doubt. (Id.)¹⁶

When asked by the Court whether he believed that the United States could prove its case beyond a reasonable doubt, Beeler’s attorney responded:

The answer is yes, your Honor. What I would just say is that I think the government would prove a specific agreement between Mr. Beeler and Mr. Feyler to maliciously damage a car by the use of an explosive device and overt acts in furtherance of that specific agreement. We may disagree on the timing of that agreement. We may disagree on the exact details of that agreement but on the legal elements of conspiracy I think we do not.

(Id. at 19-20.) Beeler’s attorney assured the Court that the government could produce the evidence that it indicated it would in the prosecution version and that the evidence would be sufficient for a properly instructed jury to find Beeler guilty beyond a reasonable doubt of each offense. (Id. at 20.) The Court then found that there was “a factual basis for the plea of guilty” as to all three counts. (Id.)¹⁷ There was no plea agreement. (Id. at 21.) There was no further reference to the interstate commerce nexus.

¹⁶ The Court expressed its concern that Beeler’s dispute as to his beliefs concerning who owned the car he was bombing might go to an element of the Count Two conspiracy charge. However, the prosecutor alleviated this concern by pointing out that Count Two charged a conspiracy to maliciously damage a vehicle but did not identify the owner. (Id. at 18-19.)

¹⁷ Referring back to the indictment does not add much to Beeler’s knowledge about the nature of the interstate commerce element. It reads that Beeler was involved in the bombing of “a 1995 black Infinite G20... used in interstate commerce and in any activity affecting interstate commerce, and did aid and abet the same conduct; [a]ll in violation of Title 18, United States Code, [s]ections 844(i) and 2.”

C. Was Beeler's Guilty Plea Knowing and Intelligent With Respect to the Interstate Commerce Element of 18 U.S.C. § 844(i)?

On its face, the destruction of a vehicle seems different in kind than the destruction of a private residence for purpose of analyzing its relation to interstate commerce. A car is capable of easily traveling between states (and in state on interstate highways) whereas the private residential home such as the one in Jones does not (as a rule). However, the fact that the § 844(i) property is a vehicle rather than real property does not mean “per se” that there is a connection to interstate commerce and, therefore, does not alleviate the need to analyze the interstate commerce nexus. Though the bulk of § 844(i) cases that have percolated to the appeal and/or collateral review stage seem to involve real property, there are some that involve vehicles.

For example, applying Jones the Tenth Circuit examined the connection of a truck damaged by arson to interstate commerce in Grassie, 237 F.3d 1199. The court concluded that the fact that the truck was used a few times a year for several uninterrupted years to transport pecans to a broker was sufficient to support the § 844(i) jury verdict. 237 F.3d at 1211-12. It remarked that the truck's use approached a level of connection to interstate commerce “so remote as to be something less than de minimis,” but observed that the pecan sales were sales in interstate commerce and the truck was engaged in this commercial enterprise in a “settled, regular annual pattern of engagement.” Id. at 1212.

More troublesome for the United States, in a pre-Jones case the Third Circuit reversed a § 844(i) and 18 U.S.C. § 2 conviction concluding that there was insufficient evidence to support the District Court's finding that the vehicle damaged by a pipe-bomb was used in an activity affecting interstate commerce. United States v. McGuire, 178

F.3d 203 (3d Cir. 1999). The damaged car was one of several vehicles used to transport items for a locally operated catering business co-owned by the car's owner. Id. at 205. Being "particularly deferential" in its sufficiency of the evidence review, id. at 206 n.2, the court nonetheless concluded that the evidence proffered to the District Court judge (who was skeptical that there was a sufficient nexus) at most established a de minimis connection to interstate commerce which was not enough after the Supreme Court's Lopez. Id. at 206-12. Looking at the nature of the car's use in the catering business and the extent to which the catering business affected commerce, id. at 206-07, the Third Circuit concluded that the periodic use of a personal car in the catering business and the presence in the car of a bottle of Florida orange juice in the trunk intended for a catering event could not be the basis for sustaining a § 844(i) conviction "without obliterating the intrastate/interstate distinction that was reinforced under Lopez." Id. at 211. The Court concluded that the government must prove more than the "dubious" and "so very nebulous" nexus to interstate commerce that a bottle of orange juice used in a business that was "concededly local in character" has. Id. at 212.¹⁸

The United States in this case seemed to be relying on these kinds of nebulous associations to meet the interstate commerce element of its § 844(i) charge against Beeler. It appears that the fact that the car's lease involved an out-of-state firm,¹⁹ and that the car's owner used the car to commute to and from her cleaning work sufficed, in the Government's and Court's view, to show the connection. The Jones court did

¹⁸ The Court observed: "We do not believe that the Supreme Court required Congress to include a jurisdictional element under Lopez only to have courts interpret the resulting statutes in such a way as to remove it." Id.

¹⁹ Though addressing a stationary house, the Jones Court did conclude that the fact that the home served as collateral for a mortgage held by an out-of-state lender, was insured by an out-of-state insurer, and received natural gas from out-of-state sources did not mean that the building was "used" in an activity affecting commerce. Jones, 529 U.S. at 855-56.

suggest that the use of property in a trade or business might be an indicator that supported the interstate commerce element of § 844(i). See Jones, 529 U.S. at 856. However, if a car is only used to commute to cleaning jobs at in-state private residences, an enterprise that one must concede is more local in nature than a catering business, this may well be the kind of insubstantial, passing, or passive contact to interstate commerce that would be insufficient to bring Beeler’s conduct within the “compass” of § 844(i).

In Jones the Supreme Court did not specifically address the factual sufficiency of evidence relating to those activities that substantially affect interstate commerce in a commercial context. It is worth noting that the language in DiSanto regarding the significance of passive interstate contacts such as the natural gas pipeline and the receipt of food supplies that had previously traveled in interstate commerce is one of three alternative grounds for affirmance. The second ground for affirming the verdict was “that rental property is per se sufficiently connected to interstate commerce to confer federal jurisdiction under Section 844(i) and to satisfy the jurisdictional element.”

DiSanto, 86 F.3d at 1248. Relying upon its own Medeiros, 897 F.2d 13, and the Supreme Court’s Russell, 471 U.S. 858, the First Circuit merely reaffirmed that rental property fits the description of property that is ‘used’ in an ‘activity’ that affects commerce.²⁰

The million-dollar question is whether a procedurally defaulted defendant such as Beeler should be entitled to an evidentiary hearing pursuant to the Bousley rule in the context of a § 844(i) conviction. The closest case on point is the Eighth Circuit’s ruling in United States v. Beck, 250 F.3d 1163 (8th Cir. 2001) that refused to consider on direct

²⁰ Some may argue that a leased motor vehicle meets this criterion. It does seem odd to me that an out-of-state financing company holding a secured interest in this vehicle would not provide a sufficient nexus, but that rental property could provide the nexus. Yet this anomalous result is reached when Jones and Russell are applied to the facts of this case. See footnote 8.

appeal defendant's claim that his plea was not knowing and intelligent because he had admitted the elements of the statute as set forth in pre-Jones cases rather than the elements as the Supreme Court subsequently defined them. If Beeler is entitled to the benefit of the Bousley "actual innocence" relief in the form of an evidentiary hearing on the question of the sufficiency of the United States' evidence on the jurisdictional element of the crime, no case directly on point has granted such relief.²¹ The determination of whether or not Beeler is entitled to the evidentiary hearing that under Bousley is the necessary predicate to any habeas relief, may also depend on the court's view of the symmetry between "actual innocence" of the "use" in 18 U.S.C. § 924 and "actual innocence" of the "use" in 18 U.S.C. § 844(i).

The bottom line is that it is not clear to this court at this time that Beeler's claim is really one of "actual innocence" in the Bousley sense. For that reason I do not believe that he is entitled to, or would benefit from, an evidentiary hearing to establish his "actual innocence." I do think that the call is close enough and the legal question important enough that Beeler is entitled to a certificate of appealability.

2. *Effectiveness of Counsel*

Beeler mounts four attacks on the performance of his counsel. Though these are claims of a constitutional stature that need not be preserved by a direct appeal, all are without merit under the Supreme Court's Strickland v. Washington, 466 U.S. 668 (1984). See also Knight v. United States, 37 F.3d 769, 774-75 (1st Cir. 1994) (applying Strickland to ineffective assistance of counsel claim in context of a guilty plea). To successfully press an ineffective assistance of counsel claim under Strickland Beeler must demonstrate

²¹ Certainly on the current state of the record it does not appear that the Government's evidence is sufficient to carry the day after Jones. However, at an evidentiary hearing the Government might be able to adduce additional evidence that would meet the standard of "actual use" in interstate commerce.

that his attorney's representation was "deficient": "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. He must also show that the deficiency prejudiced him: "that counsel's errors were so serious as to deprive [Beeler] of a fair [proceeding]." Id.

First, Beeler asserts that it was ineffective for his counsel not to challenge the connection between his crime and interstate commerce, either at the plea colloquy or via a motion to dismiss the indictment. The above Jones discussion demonstrates that this challenge may not only have been theoretically defensible but 'supremely' prescient. Wild geese do come home to roost occasionally, but the Sixth Amendment does not demand that defense counsel chase all visible wild geese in the hopes that one will be of the homing variety. Indeed, if Beeler's attorneys had challenged the interstate commerce connection at the pre-Jones indictment or plea colloquy, they most likely would have been answered with a swift rebuff. As already noted, the clear law in the First Circuit prior to Jones was that only de minimis connections to interstate commerce were needed to establish the § 844(i) federal jurisdictional element. See DiSanto, 86 F.3d 1238. Thus, it was not deficient for Beeler's attorney not to challenge the interstate commerce element of § 844(i).

With respect to Beeler's grievance with his attorney for failing to raise a concern about Beeler's competency to enter a guilty plea when Beeler was under the influence of a prescription drug the transcript of the Rule 11 colloquy counters this gripe. (R. 11 Tr. at 4.) Upon the Court's inquiry Beeler indicated he was taking a prescription drug called Zanex to treat anxiety. (Id.) Beeler represented that it did not affect his thought process or his ability to understand people. (Id.) Nothing said by Beeler in the remainder of the

hearing suggests that he was other than competent. Indeed, Beeler nowhere alleges any facts that would support a determination that his attorneys should have been aware that he was not competent. Therefore, the fact that Beeler's attorney did not mount a challenge to Beeler's competency is far from deficient within the meaning of Strickland. Indeed, to have done so would have been misleading to the Court, have failed, and/or been detrimental to Beeler's best interests, as the United States suggests in its response.

Beeler's assault on his attorney's failure to challenge unspecified sentencing enhancements must fail for the reason offered by the United States: he simply does not specify which enhancements he thinks his attorney should have but did not challenge. Though an unchallenged enhancement can be the basis for a cognizable ineffective assistance claim, Beeler has provided no "specific" let alone "detailed supporting facts." United States v. Butt, 731 F.2d 75, 77 (1st Cir. 1984). On his form-petition Beeler merely proposes that his Sixth Amendment right to effective assistance of counsel was violated by his attorney's failure to chall[e]nge the sentencing enhancements." In his supporting memorandum he mentions a general desire to challenge "several issues regarding his sentencing" in an appeal that was discouraged by his counsel (§ 2255 Mem. at 11) but offers no specifics or supporting facts. Thus, Beeler is entitled to no further consideration of this challenge, nor could the court undertake such an inquiry based on such a generalized aspersion.

Finally Beeler alleges that he requested that his attorney file a notice of appeal and his attorney told him that there were no meritorious grounds for an appeal. While such a claim could be of great moment if counsel was directly instructed to file the notice and

failed to do so, see Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000), failure to file a notice of appeal is not per se deficient. Id. at 484-87.

On the record before me that has been expanded to address this challenge I concluded that Beeler's challenge on this score is without merit. As a result of leg work by the Court and the parties early on in this proceeding the Court has before it correspondence between Beeler and his attorneys regarding the right to and grounds for appeal, as well as a stipulation by Beeler that he received this correspondence and had certain discussions with one of his attorneys on the issue of the appeal (Docket No. 127). See Butts, 731 F.2d at 77. Beeler stipulates that he received two letters from his attorneys in response to Beeler's "concerns for direct appeal": one dated January 4, 2000, and one dated May 1, 2000. (Id.) Beeler recalls that his attorneys advised him that there were no facts available to the attorneys that could form the basis of a successful appeal. Beeler states that based on this correspondence and the post-sentencing conversation he understood that an appeal was not warranted. (Id.) The January 4, 2000, letter to Beeler from his attorneys recounts the fact of a post-sentencing discussion about whether or not to appeal; states that "[a]fter reviewing all possible grounds for appeal, you understand that any appeal is unlikely to be successful and have made your decision based on that reasoning"; and clearly advises Beeler that the time for taking an appeal of the sentence is limited. (Docket No. 130, GX 1.) In a letter dated March 13, 2000, Beeler writes to one of his attorneys:

I know with your intell[i]gence you can come up with a way to get me less time by appealing this and that. I know we ran out of time in the appeal process but I think we can go another ang[le] if need be. I can say that the medication I was on I[m]pared my judgment in real[ity] it did[.] I didn't think 11.5 years was anything[,] then they took me off my meds in [O]tisville and I had a [rough] time and I realized that this isn't no light sentence. I want to cover everything and then I can say, ["I give[,]"] but not until. There [are] a lot of jail house lawyers in here and I take what they say with a grain of salt, cause I know your more intelligent then them and all

they know how to do is file 2255 on the[ir] lawyers and say th[y're] incompet[ent] but I don't think that so I can[t] say that about you regardless of anything. Just do what you can for me....

(Id., GX 4.)²² The May 1, 2000, letter from Beeler's attorney to Beeler that Beeler concedes he received, responds to Beeler's suggestion that there may be other avenues to achieve a lesser sentence. It further supports the conclusion that the decision not to appeal was based on reasoned advice of counsel.

Analyzed under Roe, it is clear that Beeler's attorneys made an avid effort to consult with Beeler on the grounds for and timing of his appeal. As the discussion above and below shows, Beeler's suggested challenge had no buoyancy (at the time). Not taking the appeal, thus, cannot be seen as "deficient" under Strickland.

3. Competency

In addition to the challenge to the effectiveness of his attorney on this score, Beeler asserts that the District Court should not have accepted his guilty plea because he was not competent to so plead due to the prescription medication he was taking. Federal Rule of Criminal Procedure 11(d) and the due process requirements of the Constitution dictate that a plea be "voluntary." United States v. Savinon-Acosta, 232 F.3d 265, 268 (1st Cir. 2000). Commonsense and case law teach that medication can influence a defendant's mental state in a manner that impairs the ability to enter a plea that is voluntary. Id. In line with the subsequent recommendation in Savinon-Acosta, the District Court identified the drug that Beeler was taking, how recently Beeler had taken it, and what its purpose and effects were. Id. at 268-69. Beeler assured the Court that his mind was clear, see id.

²² While Beeler does not recognize this letter in his stipulation, it is part of the disclosure made by Beeler's attorney in response to an order by this Court ordering turnover. (Docket No. 123.) Clearly it is in Beeler's handwriting and was received by his attorney.

at 269, and nothing in the colloquy served to undermine those assurances, see id. See also Cody v. United States, 249 F.3d 47, 52-53 (1st Cir. 2001).

4. Sentencing Enhancements

Beeler's § 2255 attack on his sentencing enhancement and his assertion in his motion to amend that recent Sentencing Guideline Application Notes dictate that certain enhancements were improperly applied to him also fail. His claims of error by the District Court in applying the sentencing guidelines are the kind of non-constitutional claims that could have been raised, but which Beeler did not raise, on direct appeal. See Knight, 37 F.3d at 772-73. Beeler cannot now raise these claims in a collateral attack absent a showing that there was a "fundamental defect" resulting in a miscarriage of justice in the sentencing or that the "rudimentary demands of fair procedure" were not met due to an omission. Id. at 772. Beeler has proffered no facts or argument that come near lifting his case over this high hurdle.

To the extent that Beeler raises an Apprendi v. New Jersey, 530 U.S. 466 (2000) claim, one judge in the District of Maine has interpreted First Circuit law to foreclose an Apprendi challenge in a collateral attack. See Bowen v. United States, 2001 WL 263306, at *1 & n.2 (D. Me. 2001) (citing Sustache-Rivera v. United States, 221 F.3d 8, 15 (1st Cir. 2000)). Though this determination seems far from clear-cut to this court, see generally Teague v. Lane, 489 U.S. 288 (1989), see, e.g., Vazquez v. United States, ___ F. Supp.2d ___, 2001 WL 649012, at *1 (D.P.R. 2001) (collecting cases, noting that the question is still open but that the majority of courts have concluded that Apprendi does not apply retroactively to first habeas petitions); Doward v. United States, 142 F.Supp.2d 169, 169 (D.N.H. 2001) (assuming without deciding that Apprendi can be applied in a

first § 2255 motion); United States v. Tosh, 141 F.Supp.2d 738, 743-746 (W.D. Ky. 2001) (“[A]s applied to criminal defendants in general, Apprendi’s rule may fall within Teague’s second exception.”), in the absence of controlling authority to the contrary, the court will not recommend so extending Apprendi at this juncture in this case.

With respect to Beeler’s challenge to his sentencing enhancement premised on the amendment to the Application Note, it fails for the reason offered in the United States’ supplemental response. At sentencing the Court concluded that, “pursuant to U.S.S.G. § 2K2.1(b)(3), the offense level is increased by two (2) levels, to Level “22,” because the Court *FINDS* that the offense conduct involved a destructive device.” United States v. Beeler, 1999 WL 1995201, * 1 (D. Me. 1999) (observing that there were no objections to this finding and conclusion). Rounding its contents off, the Application Note, Guideline Amendment 599, directs the court not to apply the § 2K2.1(b)(5) enhancement if the explosive or weapon was “possessed, brandished, used, or discharged in the course of the underlying offense” if the firearm or explosive related conduct is the conduct that forms the basis for the underlying offense conviction. As the United States points out, this guideline amendment is on the list of retroactively applicable amendments. However, as the United States also explains, this guideline amendment does not apply to the statutory provisions under which Beeler was convicted, but rather to 18 U.S.C. §844(h), § 924(c) and § 929(a).

Conclusion

I recommend that the Court **DENY** Beeler’s § 2255 motion, his two motions requesting an evidentiary hearing, and his motion to dismiss the indictment. With respect to Beeler’s motion for relief from waiver of his constitutional claim this is not an

independently cognizable claim and should be **DISMISSED AS MOOT**. I further recommend that court issue a certificate of appealability with regard to Beeler's challenge to his 18 U.S.C. § 844(i) conviction in the event Beeler pursues an appeal.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated July 20, 2001

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)

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aka [term 12/27/99]

JOEY BEELER 784-3576

defendant [COR LD NTC ret]

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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 RESULTS - Malicious destruction of a vehicle by means of explosive materials.

Imprisonment: 137 months on Count 1s; 60 months on Count 2s, and 120 months on Count 3s (the upper limit of the 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 RESULTS - Malicious destruction of a vehicle by means of explosive materials.

Imprisonment: 137 months on Count 1s; 60 months on Count 2s, and 120 months on Count 3s (the upper limit of the 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 (2s)

26:5841.F REGISTRATION OF FIREARMS - Possession of an unregistered firearm (destructive device) Imprisonment: 137 months on Count 1s; 60 months on Count 2s, and 120 months on Count 3s (the upper limit of the 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

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]

BRYANT FEYLER (2) NEAL K. STILLMAN

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