No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2019

ANDREW ORECKINTO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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October 16, 2019

QUESTIONS PRESENTED

I. Whether the Second Circuit erred in adopting a reading of 18 U.S.C. § 659 unsupported by any relevant canon of statutory construction or relevant precedent?

II. Whether the Second Circuit's reading of the statute will drastically expand the reach of the statute beyond the intent of the drafters and beyond the understanding of the other circuits.

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Andrew Oreckinto ("Oreckinto") respectfully petitions this Court for a writ of certiorari to review the July 18, 2019 order of the United States Court of Appeals for the Second Circuit denying a petition for rehearing or rehearing *en banc* pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure.

INTRODUCTION

The Second Circuit summarily affirmed the conviction of petitioner by defining "shipment" to refer to goods owned by a distributor in Wethersfield, Connecticut. Those goods had been shipped from out of state to the distributor, and some would, in turn, be shipped to customers out of the state, but at the time of their theft, they were in neither physical movement, nor had they been selected or prepared for onward movement (including via necessary in-house processing). To define those goods as being part of a "shipment" at the moment they were stolen is to make the word mean something very different from the shared understanding of the word in previous cases, and in a manner inconsistent with the statutory language.

OPINIONS AND ORDERS BELOW

The Order of the United States Court of Appeals for the Second Circuit denying the petition for rehearing *en banc* is not reported, but appears at Appendix A to this petition. The Opinion of the United States Court of Appeals for the Second Circuit affirming the District Court's judgment is reported at 774 Fed.Appx. 698 and appears at Appendix B to this petition. The Ruling and Order of the United States District Court for the District of Connecticut denying Mr. Oreckinto's motions for acquittal or for new trial is unreported, but is available at 2017 WL 1371255, and appears at Appendix C to this petition.

JURISDICTION

With the United States Court of Appeals for the Second Circuit having affirmed the ruling of the District Court by a judgment dated May 29, 2019, and having thereafter denied a petition for panel rehearing or rehearing *en banc* on July 18, 2019, this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(b), and the District Court had jurisdiction pursuant to 18 U.S.C. § 3231 and 28 U.S.C. § 2255(a).

STATUTORY PROVISIONS INVOLVED

Title 18 of the United States Criminal Code makes it a crime to steal any "goods or chattels moving as or which are part of or which constitute an interstate or foreign shipment of freight, express, or other property…" Violation is punishable by up to ten years in prison.

STATEMENT OF THE CASE

This petition arises from the trial of Andrew Oreckinto on a charge of stealing a truckload of cigarettes from a distributor in Wethersfield, Connecticut, in violation of 18 U.S.C. § 659. Mr. Oreckinto was convicted by a jury after a five-day trial. He moved for dismissal of the indictment before trial, again after the close of the government's evidence, and after the verdict, all three times asserting the same fundamental problem with the prosecution. The fundamental problem was that the cigarettes were delivered to the distributor, paid for, entered into the distributor's inventory, although not yet designated for sale or delivery to any particular customer, nor prepared for shipment via the placement of state-appropriate tax stamps on the cartons, and was thus, not part of any interstate shipment at the time of the theft. The District Court denied all three motions. In its final decision, the district court held that "the interstate shipment requirement of § 659 may be

satisfied on the basis of evidence concerning the routine and normal practices of a business to ship all or a significant portion of its inventory to out-of-state locations."

The denial was appealed to the Second Circuit, which declined to address the validity of the District Court's ruling.[2] Instead, it held that "a reasonable jury could have found that – bills of lading notwithstanding – the interstate shipment of cigarettes had not yet terminated upon its arrival at the NBCC warehouse." It noted that "As our sister circuits have explained, a middleman buyer's intent to reship goods can render those goods an 'interstate shipment' while in the middleman's possession and until they reach their final destination."

Mr. Oreckinto filed a motion for rehearing or rehearing en banc, which was denied on July 22, 2019.

The statute under which Mr. Oreckinto was convicted, 18 U.S.C. § 659, explicitly covers only goods and chattels that are part of, or which constitute, interstate shipments. The text of 18 U.S.C. § 659 says that

> To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. For purposes of this section, goods and chattel shall be construed to be moving as an interstate or foreign shipment at all points between the point of origin and the final destination (as evidenced by the waybill or other shipping document of the shipment), regardless of any temporary stop while awaiting transshipment or otherwise.

[2] The appeal also contained an issue related to the government's summary and closing statement, but that issue is not being contested by Mr. Oreckinto in this petition.

The question that drives this case is whether the 8,000 cartons of cigarettes stolen on May 2011, from a cigarette distributor in Wethersfield, Connecticut, were part of an interstate shipment at the time of the theft. Because the cigarettes in question had ended their previous journeys from tobacco firms to the distributor, which was the destination on their shipping documents, and had not yet undergone any steps that would mark the beginning of new onward journeys to the distributor's customers, they were not part of interstate shipments, and thus, cannot serve as the basis for conviction under § 659.

On the night of Saturday, March 19, 2011, an intruder broke in and stole a large quantity of cigarettes from NBCC. None of the stolen cigarettes had been identified for reshipment to a particular customer, and thus, none had state-specific tax stamps applied. Investigators built a case against Mr. Oreckinto for the NBCC burglary, and eventually arrested him. On February 1, 2016, a grand jury returned an indictment charging Mr. Oreckinto with one count of Theft from an Interstate Shipment, in violation of 18 U.S.C. § 659. On September 12, 2016, Oreckinto filed a motion to dismiss the indictment, arguing that the cigarettes in question were not, at the time of the theft, part of an interstate shipment, because none had been set aside or designated for shipment outside of Connecticut. The motion was denied. The case proceeded to trial in February 2017, and Mr. Oreckinto was convicted. The following is the District Court's summary of the evidence in its order denying Mr. Oreckinto's motion for acquittal at Appendix C. None of these facts are in dispute.

> The relevant undisputed facts are as follows: defendant was charged with theft of more than 8,000 cartons of cigarettes from the New Britain Candy Company (NBCC) warehouse in Wethersfield, Connecticut. As the evidence showed at trial, NBCC was at the time of the theft a business that ordered, warehoused, and then shipped goods, particularly cigarettes, to various Food Bag convenience stores throughout Connecticut and in Massachusetts, New York, and New Jersey. NBCC ordered cigarettes from out-of-state cigarette manufacturers that it used to fulfill future orders to Food Bag convenience

stores; it projected how many cigarettes to order and stock ahead of time based on historical fulfillment figures from each Food Bag store.

When the cigarettes arrived in cases at the NBCC warehouse, they were paid for, became the property of NBCC, and were posted to inventory. NBCC would then cut the cases of cigarettes in half, and store the half-cases in a shelving area by cigarette brand. The cigarettes stayed in that shelving area until a specific order came in from a Food Bag store, after which an NBCC "picker" would select the requested cigarettes from the various shelves to begin fulfillment of the order.

Before cigarettes could be sold, each pack was legally required to receive a tax stamp from the state in which the cigarettes would be sold. Those tax stamps were purchased ahead of time by NBCC based on historical fulfillment figures from Food Bag stores in each state, and the stamps were stored in a safe in the warehouse. After NBCC received an order from a Food Bag store and the picker selected the requested cigarettes, the appropriate tax stamps would be applied to the cigarettes based on the store to which the cigarettes were destined. After the stamp was applied, the cigarettes were sent down a conveyer belt to a loading dock, where they were placed on an NBCC truck for shipment.

The vast majority of cigarettes supplied by NBCC were sent to Food Bag stores within Connecticut, representing approximately 88% of all NBCC cigarette sales. And because sales to Connecticut represented such a high percentage of overall sales, NBCC ran trucks to Connecticut Food Bag stores every day of the week. The remaining 12% of cigarette sales were made to out-of-state Food Bag stores by the following truck schedule: to Massachusetts on Mondays and Wednesdays (approximately 4% of sales), and to New York on Thursdays and Fridays (approximately 6% of sales), with New Jersey (approximately 1% of sales) at the tail end of one of the New York runs. At trial, the Government presented evidence from Ted Hasty, the head of loss prevention for the parent company of both NBCC and Food Bag, who testified that NBCC's entire cigarette inventory turned over approximately every week and a half, or at least that was NBCC's goal for an inventory turnaround rate. *See* Doc. #86 at 7.

The theft of NBCC occurred during the weekend of March 18, 2011, after the business had closed and would not reopen until Monday. By that Friday evening, the trucks for Monday's delivery—to Connecticut and Massachusetts Food Bag stores—had been packed with stamped cigarettes, and they were parked in the loading dock area ready to leave on Monday morning. None of the loaded trucks were stolen or disturbed during the theft; instead, the thief took approximately 8,012 cartons of shelved, unstamped cigarettes. This theft constituted approximately 72% of NBCC's cigarette inventory at the time and was valued at approximately $329,000.

> The Government introduced a chart produced by Hasty that showed a breakdown of cigarette sales by state for the 23 weeks leading up to the theft. *See* Govt. Exh. 500K. Hasty calculated that, of the $329,000 worth of cigarettes stolen, approximately $40,000 worth of stolen cigarettes would have been sent to out-of-state Food Bag stores in that coming week. *See id.* at 7–8. The Government also introduced invoices for cigarettes shipped to out-of-state Food Bag stores in the week following the theft, which far exceeded $1,000 in sales.

Appendix C, pp. 1-3.

After the verdict was returned, Mr. Oreckinto filed a Rule 29 motion for acquittal and/or new trial. On April 14, 2017, the District Court denied the Rule 29 motion. Appendix C. It held that

> The interstate shipment requirement may be satisfied by evidence of a business's general practices to ship a certain portion of its goods to out-of-state locations. Even in the absence of interstate waybills and in the absence of evidence that the stolen goods had already been physically set aside or otherwise specifically designated for interstate shipment, the interstate shipment requirement of § 659 may be satisfied on the basis of evidence concerning the routine and normal practices of a business to ship all or a significant portion of its inventory to out-of-state locations.

Id. at *6.

On May 15, 2017, the Court sentenced Mr. Oreckinto to 48 months of incarceration, concurrent with his extant state sentence, three years of supervised release, and $550,422.58 in restitution to NBCC. ECF No. 104. A timely notice of appeal was filed on May 16, 2017. Mr. Oreckinto is currently at Hazleton FCI, with an estimated release date of March 4, 2021.

The Second Circuit, after briefing and oral arguments, took the unusual step of deciding the case on grounds not used by the District Court. Instead, it held, in a summary order, that

> Undertaking this practical determination here in light of Section 659's text and purpose – and drawing all reasonable inferences in the government's favor – we conclude that there was sufficient evidence for a jury to find that Defendant stole the cigarettes while they were temporarily stored at the NBCC warehouse, and that the stolen cigarettes remained on an interstate

> journey from the North Carolina and Virginia cigarette manufacturers to the individual Food Bag stores located in Connecticut, New York, Massachusetts, and New Jersey. The evidence presented at trial, and outlined above, amply supports this finding. In arguing otherwise, Defendant relies upon the clause in Section 659 that provides that "the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made." 18 U.S.C. § 659. However, while the shipping documents at issue here could certainly have been used as prima facie evidence that the NBCC warehouse was the cigarette shipment's final destination, such prima facie evidence can still be contradicted. … Here, the government contradicted the prima facie evidence by presenting evidence of NBCC's role as a temporary storage point between the manufacturers and the individual Food Bag convenience stores. In sum, a reasonable jury could have found that – bills of lading notwithstanding – the interstate shipment of cigarettes had not yet terminated upon its arrival at the NBCC warehouse.

United States v. Oreckinto, 774 F. App'x 698, 700–01 (2d Cir. 2019).[3]

REASONS FOR GRANTING THIS PETITION

I. THE COURT SHOULD GRANT THE PETITION AND REVERSE THE COURT OF APPEALS BECAUSE THE PANEL'S DECISION IS IRRECONCILABLE WITH EXISTING PRECEDENT AND BASIC TENETS OF STATUTORY CONSTRUCTION.

The Second Circuit's opinion, with its emphasis on the "final destination" of objects that have completed one of a series of discrete journeys, is inconsistent with every relevant canon of statutory construction. It ignores the rule against surplusage, the rule of lenity, the rule against the conjuring of constructive offenses, and the rule that the legislature is assumed to know how to write the statutes it wants. It ignores well-established controlling precedent. Worse, it would allow convictions based on an uncertain future event – the probability that a particular item might be shipped to a new destination in another state.

[3] A petition for rehearing and rehearing en banc was timely filed and denied on July 18, 2019. *See* Appendix A.

The Second Circuit's decision would essentially render Section 659 largely a collection of surplusage. As such, it is contrary to the rule against surplusage—that "'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L.Ed.2d 339 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L.Ed.2d 251 (2001)). The lengthy text of Section 659 would, under the Circuit's interpretation, be largely redundant. The entirety of the definition of "shipment" could be boiled down to "any goods or chattels that have left their place of origin and not yet been received at the location where they are to be sold in the retail market."

Congress knows how to draft broad provisions when it aims to do so and, is otherwise, intentional in its language. *Ziglar v. Abbasi*, ––– U.S. ––––, 137 S. Ct. 1843, 1856, 198 L.Ed.2d 290 (2017) ("It is logical ... to assume that Congress will be explicit if it intends to create a private cause of action."). "This Court cannot conclude-as the Government urges-that Congress 'assuredly intended' section 664 to cover not only the embezzlement of funds, but also their retention over time, especially when it is patent that Congress knows how to write a statute-section 641-that does criminalize the retention of funds." *United States v. Rivlin*, No. 07 CR. 524 (SHS), 2007 WL 4276712, at *4 (S.D.N.Y. Dec. 5, 2007).

Congress clearly knows how to write broad jurisdictional statements, as it did in the Hobbs Act. "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion;" "(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place

outside such State; and all other commerce over which the United States has jurisdiction." 18 U.S.C.A. § 1951. "The language of the Hobbs Act is unmistakably broad. It reaches any obstruction, delay, or other effect on commerce, even if small, and the Act's definition of commerce encompasses 'all ... commerce over which the United States has jurisdiction.'" *Taylor v. United States*, 136 S. Ct. 2074, 2079, 195 L. Ed. 2d 456 (2016). If Congress had wanted Section 659 to have a similar reach, it knew how to do it, but it did not.

The interpretation violates other canons of statutory construction. "The traditional canon of construction, *noscitur a sociis*, dictates that words grouped in a list should be given related meaning." *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36, 110 S. Ct. 929, 108 L.Ed.2d 23 (1990) (internal quotation marks omitted). The list of locations which can be stolen from in Section 659, includes "pipeline system, railroad car, wagon, motortruck, trailer, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air cargo container, air terminal, airport, aircraft terminal or air navigation facility, or from any intermodal container, trailer, container freight station, warehouse, or freight consolidation facility." 18 U.S.C. § 659.

Each of those locations is a specific type of transportation facility. The term "warehouse" must be read as consistent with the "related meaning" of the rest of the list – a place whose purpose is the storage of freight while it is in transit. The facility in question here, New Britain Candy Company, is a business that stores its own goods, but also processes goods via sorting and applying tax stamps. It is not primarily a storage facility, but a business that buys and sells items, including cigarettes. It is no more a warehouse of cigarettes than Hershey is a warehouse for cocoa beans. Witnesses at the trial explained that NBCC made an effort to keep inventory low by anticipating customer orders. NBCC is no more a "warehouse" as defined in 659 than the word "platform" in

that list means "A surface or area on which something may stand, esp. a raised level surface" (www.oed.com) or "a usually raised horizontal flat surface." (www.m-w.com) Such a reading would be nonsense.

Finally, the Second Circuit ignored the Rule of Lenity. Regarding matters of statutory construction, "A criminal statute is to be construed strictly, not loosely. Such are the teachings of our cases from *United States v. Wiltberger*, 5 Wheat. 76, 5 L.Ed. 37, down to this day." *United States v. Boston & M. R. R.*, 380 U.S. 157, 160, 85 S. Ct. 868, 870, 13 L. Ed. 2d 728 (1965). "[T]his is a criminal statute and must be strictly construed. This means that no offense may be created except by the words of Congress used in their usual and ordinary sense. There are no constructive offenses." *United States v. Resnick*, 299 U.S. 207, 210, 57 S. Ct. 126, 127, 81 L.Ed. 127 (1936). "Especially in the interpretation of a criminal statute subject to the rule of lenity … we cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant." *Burrage v. United States*, 134 S. Ct. 881, 891, 187 L. Ed. 2d 715 (2014). "In determining the scope of a statute, we look first to its language … giving the 'words used' their 'ordinary meaning,'" *Moskal v. United States*, 498 U.S. 103, 108, 111 S. Ct. 461, 465, 112 L. Ed. 2d 449 (1990) (internal citations omitted).

These interpretive rules aside, the Second Circuit also ignored the one precedent that is most apposite, one that clearly requires a decision in favor of Mr. Oreckinto: *United States v. Astolas*, 487 F.2d 275 (2d Cir. 1973).

The facts in *Astolas* are directly applicable to this case, and are dispositive in favor of Mr. Oreckinto. *Astolas* concerned goods taken from Middle Atlantic Warehouse Distributors, a New York company that bought auto parts from manufacturers, then resold them to customers primarily in the Northeast states. *Id.* at 277. Two truckloads of parts ordered by customers in other states

had been loaded at the warehouse, bills of lading prepared, and the trailers sealed. The trailers were stolen from a parking lot across the street from the warehouse the night before they were to be driven away. *Id.* A third trailer had just arrived from a parts manufacturer, been driven to the loading dock, and left there overnight without being opened. *Id.* at 277-78. It was also stolen the same night. *Id.*

The Second Circuit found that the contents of all three trailers were part of interstate shipments:

> With respect to trailers 7105 and 7106 the supplies were packaged and segregated and addressed to Middle Atlantic customers. These supplies were loaded into the trailers. Bills of lading showing out-of-state routings were completed. The trailers were sealed. Unless the statute is to be read as requiring more than proof that the goods constituted an interstate shipment this was enough.
>
> With respect to trailer 7107, the goods were still sealed in the body of the trailer. They were segregated from all other Middle Atlantic property. They had been neither examined nor accepted. A finding that the goods still constituted an interstate shipment was proper.

Id. at 282.

In other words, the outgoing trailers had begun their outgoing journey, and the incoming shipment had not yet ended its inbound journey. By implication, the material in the warehouse, which had been "examined" and "accepted" into inventory from previous shipments, but not yet "packaged and separated" for a new journey, was therefore not a part of any shipment. That is exactly the reverse of the facts here. The incoming shipments from cigarette manufacturers had been examined, accepted, paid for, and placed in inventory, but had not been packaged, segregated, addressed, had bills of lading prepared, nor been moved to the loading dock, much less loaded onto a truck that was subsequently sealed. The logic of *Astolas* requires that the cigarettes in this case were not part of a shipment at the time of the theft. To take any other view of *Astolas* is to

read the entire opinion as dicta. Significantly, the Second Circuit did not quote *Astolas* on this issue or address its reasoning. Moreover, it did not address the (non-exclusive) list of factors in Astolas for determining whether something is part of a shipment:

> [T]he determination that a shipment is interstate is essentially a practical one based on common sense and administered on an ad hoc basis. It depends on such indicia of interstate commerce as [1] the relationship of consignee, consignor, and carrier, if they are separate entities, [2] the physical location of the shipment when stolen, [3] whether the goods have been delivered to a carrier at the time of theft … and [4] the certainty with which interstate shipment is contemplated…

United States v. Astolas, 487 F.2d 275, 279–80 (2d Cir. 1973). Note, that of those four factors, only one, number 4, the certainty with which interstate shipment is contemplated, is applicable here. The other three are aligned against the view that the cigarettes were in a shipment at the time of their theft. The Second Circuit could not have had a more clear precedent to follow than *Astolas*. Instead, it ignored it.

II. THE COURT SHOULD GRANT THE PETITION AND REVERSE THE COURT OF APPEALS BECAUSE THE IMPACT OF THE DECISION WILL BE TO REDFINE THE OFFENSE IN QUESTION IN A MANNER INCOMPATIBLE WITH THE EXISTING STANDARD IN OTHER CIRCUITS.

The decision of the Second Circuit to read the word "shipment" as a metaphorical description of the flow of goods in interstate commerce, one which covers any number of intermediate stops, changes of ownership, or processing, makes what was a narrow and technical statute designed to cover certain modalities of commerce into a broad, federal anti-theft act, one covering any goods or chattels that are not sitting in the shelves of a retail merchant.[4]

[4] Or even after they arrived at a retail store. Some merchants, like booksellers, return unsold merchandise. Stores selling sporting wear every year have to return all of the shirts and caps imprinted with the logo of whichever team lost the World Series or Super Bowl. The Second Circuit's assumption that all goods follow a singular, unidirectional path from manufacture to use is not well founded.

In reaching this unprecedented view of § 659, the Court of Appeals has placed itself at odds with sound and appropriate legal precedent, not just within the circuit, but between this Circuit and others. The appellate courts have had a uniform view of the application of § 659 to factories, distributors, and other middlemen in the chain of commerce. In case after case, they have treated materials that are within the walls of a corporate entity awaiting resale or being made into new products as not in "shipment" unless and until they are designated for or prepared for onward delivery to new customers. The position of the panel here is antithetical to that understanding and would create a circuit split on this issue.

The common view of the other circuits is consistent with existing Second Circuit precedent in *Astolas*. That standard is a flexible and realistic one, and has been cited by numerous other circuits who used variations on it. In *United States v. Yoppolo*, 435 F.2d 625, 626 (6th Cir. 1970), a shipment of alcohol was on its way to the Ohio Liquor Control Board. The liquor was stolen before the Board received it, and the court held that if it had arrived and been taken control of by the Board, it would no longer have been a shipment. "The ultimate consignee, namely the Department of Liquor Control, never received the shipment. It was stolen in transit." But, the Liquor Control Board was not intending to consume the alcohol itself. As part of a state-controlled distribution scheme, the goods would have been sent on to a retail distributor, just as NBCC did not intend to smoke the cigarettes in question, they were going to distribute them to retailers.

Similarly, in *United States v. Murray*, 946 F.2d 154 (1991) (per curiam), a computer company operated a warehouse in Massachusetts. A customer out of state ordered some parts, and they were set aside, labelled for shipment, and ready to go when they were stolen by an impostor claiming to be from the trucking company. "Computervision had done everything necessary for the goods to begin their interstate travel. Computervision had prepared a bill of lading, segregated

the goods from the other inventory, and placed them on the loading dock. Computervision then delivered the goods for the commencement of interstate transportation to a person Computervision believed was the carrier. These facts are sufficient to show that the goods were an interstate shipment under 18 U.S.C. § 659." *Id.* at 156. Under the Second Circuit's view, the reasoning in Computervision is also all surplusage, as the parts never would have come to rest in the Computervision warehouse. *See also, United States v. Parent*, 484 F.2d 726, 731 (7th Cir. 1973) (a set of mini-bikes which had been placed in a trailer by the manufacturer for shipment to another state had commenced its interstate journey, although the trailer was stolen before the shipper signed for it); *United States v. Gollin*, 176 F.2d 889, 893 (3d Cir. 1949) (beer brewed at a New Jersey plant that routinely shipped product to New York became a shipment when "[i]ts segregation as such a shipment by Ballantine had been completed [and] It had been sealed within the trailer and a bill of lading had been made out." Under the Second Circuit's holding, all beer made at the Ballantine plant, or each mini-bike, would constitute an interstate shipment because they were manufactured from ingredients or materials that had themselves travelled interstate.

Just as *Astolas* articulated a multi-factor test for shipment status, the First Circuit created their own, highly similar, list in *United States v. Bizanowicz*, 745 F.2d 120 (1st Cir. 1984). The test in *Bizanowicz* encompassed four factors: 1) the physical location of the goods when stolen; 2) whether the goods had been delivered to a carrier at the time of the theft; 3) whether the owner of the goods had taken any steps to carry out an interstate shipment; and 4) whether any shipping documents indicated that the goods would be transported interstate. *Id.* at 122. None of them militate in favor of these cigarettes being part of an interstate shipment. To ignore that list of factors is to set the circuits at odds by implying that non-exclusive list is no longer applicable in the Second Circuit.

The panel's decision here implicitly rejects *Astolas*' reasoning, and with it, the reasoning of the other circuits. The only reference to *Astolas* in the order is a quote about how the statute "is not to be hampered by technical legal conceptions" and an emphasis on the practical nature of the shipment analysis. The actual factors in that analysis, and the logic of *Astolas'* reasoning with regard to the trucks and cargo in question, is completely ignored. In doing so, it risks creating a significant circuit split on this issue.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari be granted, the order of the court of appeals vacated, and the case remanded to the district court for further proceedings.

Respectfully Submitted,

THE PETITIONER,
Andrew Oreckinto

FEDERAL DEFENDER OFFICE

Date: October 16, 2019

/s/Tracy Hayes

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