ORAL ARGUMENT IS REQUESTED

No. 99-2281

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

WALTER GENE GRASSIE,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
C. LEROY HANSEN, UNITED STATES DISTRICT JUDGE

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF RELATED CASES

THERE ARE NO PRIOR OR RELATED APPEALS TO THIS CASE.

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment in a criminal prosecution under three federal statutes. The district court had jurisdiction under 18 U.S.C. 3231. Defendant was convicted of violating 18 U.S.C. 247(a)(1), 18 U.S.C. 844(h)(1), and 18 U.S.C. 844(i).

The district court entered judgment on August 30, 1999. Defendant filed a timely notice of appeal on September 9, 1999. This court has appellate jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether defendant's consecutive sentences under separate and distinct criminal statutes, for conduct arising out of a single act of arson, violated the Double Jeopardy Clause of the United States Constitution.

2. Whether the interstate commerce element of 18 U.S.C. 844(i) was satisfied in connection with defendant's conviction for the arson of the Church of Jesus Christ of Latter Day Saints (LDS) in Roswell, New Mexico.

3. Whether the interstate commerce element of 18 U.S.C. 247(a)(1) was satisfied in connection with

defendant's conviction for the arson and vandalism of four LDS churches.

4. Whether the interstate commerce element of 18 U.S.C. 844(i) was satisfied in connection with defendant's conviction for the arson of a vehicle used in an activity affecting interstate commerce.

STATEMENT OF THE CASE

This case involves an escalating campaign of property damage and violence directed at four Mormon churches in southern New Mexico and at the Jensen family of Dexter, New Mexico. The campaign culminated on June 28, 1998, when the Mormon church in Roswell, New Mexico, a $2.5 million structure, was completely consumed by a gasoline accelerated fire.

On October 22, 1998, a 10-count superseding indictment was returned against defendant Walter Gene Grassie (Grassie) (Doc. 42).[1/] Counts 1 through 3

[1/] Citations to "Doc. __" refer to documents in the

(continued...)

concerned the destruction by fire of the Church of Jesus Christ of Latter Day Saints (LDS) church located in Roswell, New Mexico. Count 1 charged Grassie with a felony violation of 18 U.S.C. 247(a)(1), religiously motivated church arson. Count 2 charged the destruction by fire of a structure used in an activity affecting interstate commerce, in violation of 18 U.S.C. 844(i). Count 3 charged the use of fire in the commission of the felony church arson, in violation of 18 U.S.C. 844(h)(1). The indictment also charged six misdemeanor violations of 18 U.S.C. 247(a)(1) in connection with vandalism of the Roswell church and three other LDS churches in Alamogordo, Alto, and Artesia, New Mexico (Counts 4-9); and one count

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[1/](...continued)
Record, by district court docket number. Citations to "Tr. __ at __" refer to the trial transcript by volume and page number. Citations to "Br. __" refer to pages in defendant's opening brief in this appeal. Citations to "Supp. Br. __" refer to pages in defendant's supplemental opening brief.

alleging arson of a truck used in an activity affecting interstate commerce, in violation of 18 U.S.C. 844(i) (Count 10) (Doc. 42).

Defendant moved to dismiss Count 3 on the basis of the Double Jeopardy Clause of the Fifth Amendment (Doc. 62). On March 5, 1999, the district court denied the motion to dismiss in a memorandum opinion and order (Doc. 71).

On March 23, 1999, following a two-week jury trial, defendant was convicted on all ten counts of the indictment (Doc. 78). On July 20, 1999, Grassie was sentenced to a total of 15 years imprisonment (Doc. 86). The district court imposed a guideline sentence of 57 months on Count 1; a sentence of five years on Count 2, a sentence of 10 years on Count 3; guideline sentences of one year on Counts 4-9, and a sentence of five years on Count 10. Pursuant to 18 U.S.C. 844(h), the district court ordered the sentence

on Count 3 to run consecutively to the other sentences, and ordered all the other sentences to run concurrently. The judgment was entered on August 30, 1999 (Doc. 86), and Grassie filed a timely notice of appeal on September 9, 1999 (Doc. 88).

STATEMENT OF THE FACTS

Defendant's series of attacks on Mormon churches in southern New Mexico began on May 2, 1998, when paint was thrown on the front exterior wall of the Roswell Church of Jesus Christ of Latter Day Saints (LDS) church building (Tr. II at 239-243). The violence ended on June 28, 1998, when the same church was completely destroyed by an arson fire (Tr. VI at 1227-1235; VII at 1236-1271). Within those two months, the same Roswell LDS church suffered two more incidents of vandalism, and the LDS churches in Alto, Artesia, Alamogordo, and Las Cruces, New Mexico were each vandalized once (Tr. III at 590-593, 604-613,

637-653; VI at 1189-1190). During the same period, the Jensen family of Dexter, New Mexico, fell prey to a pattern of increasingly serious acts of violence directed against them and their property. The Jensens' van was doused with paint and then destroyed by shotgun blasts, the windows to their house were broken, their telephone wires were cut, and, finally, their garage and their son's truck were destroyed by gasoline-accelerated fires (Tr. I at 50-54; II at 276-278; V at 925-937, 996-997).

This appeal concerns defendant's indictment and conviction for the vandalism and/or arson of four of the five churches, and for the arson of the truck. Evidence at trial established that Grassie committed each of these offenses, and he does not challenge his convictions on the ground of insufficient evidence, except as to the interstate commerce elements of the Section 844(i) and the Section 247 counts. For that

reason, we only summarize in the text the voluminous evidence regarding each incident of arson or vandalism. Evidence demonstrating that Grassie was responsible for each of the incidents is summarized in the footnotes.

1. Defendant Grassie, a 50-year-old former minister, part-time farmer, and semi-professional yodeler, lived in Roswell, New Mexico (Tr. I at 143-144; VIII at 1564-1564). Beginning in 1980, Grassie engaged in an eight-year extra-marital affair with Sharlene Jensen, his singing partner in a semi-professional yodeling group (Tr. I at 143-145).

In January 1998, Sharlene Jensen ended the affair and communicated her decision to Grassie by leaving a note in his mailbox that she did not want to see him again (Tr. I at 147-48). In addition, Mrs. Jensen's husband, Buddy Jensen, called Grassie and ordered him to stay away from his wife and his house (Tr. I at 16-

17). Grassie did not take the news well. In February 1998, he delivered a package to Mr. Jensen and Keith Heine, the LDS Bishop for southern New Mexico, which contained a letter with explicit references to his sexual relationship with Sharlene Jensen (Tr. I at 34-36; II at 425-430). Grassie's letter stated that Sharlene's decision to reunite with her husband was because "she wants to be a Mormon and a mother, not because she wants to be your wife" (Tr. I at 34). Grassie wrote on the envelope that copies had been made to the "Bishop, stake president, stake patriarch, temple department and Sunday friends" (Tr. I at 36). In mid-February 1998, Grassie confronted Heine, who is a Roswell stock broker as well as the stake president supervising the LDS congregations in Clovis, Portales, Lovington, Hobbs, Carlsbad, Artesia, and Roswell (Tr. II at 425-428). After walking into Heine's office, Grassie requested that Sharlene Jensen "be ex-

communicated from her church" (Tr. II at 428-429). Heine thought Grassie unstable and quickly ended the meeting (ibid.).

In May, 1998, Grassie began his campaign of vandalism and arson directed at LDS churches. On May 2, 1998, the custodian for the Roswell LDS church discovered that red/maroon paint had been thrown on the front of the church (Tr. II at 239-43).[2/]

On May 19, 1998, Buddy Jensen woke up at home and discovered that Sharlene's minivan, which had been parked in the driveway, had been doused with a silver or aluminum colored paint (Tr. I at 50-51). After reporting the damage to the Dexter Police Department,

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[2/] A sales receipt from a Wal-Mart in Roswell showed that on May 2, 1998, at 9:35 p.m., Grassie purchased a quart of magenta paint (Tr. II at 291-292). Forensic analysis by an ATF chemist established that the type of paint purchased by Grassie at Wal-Mart was "the same type" and was of "the same chemical type of paint with the same chemical properties, same elemental composition" as the paint that had been thrown on the church on May 2, 1998 (Tr. III at 493-495).

Buddy Jensen took his wife's van to a body shop in Roswell to have the damage repaired (Tr. I at 52). On May 23, 1998, shortly before 10:00 p.m., the Jensen van, alone out of 15 to 20 vehicles in the body shop that night, was totally destroyed after receiving at least 13 shotgun blasts (Tr. I at 53-54; II at 276-278).[3/]

On Friday, May 22, 1998, the Roswell LDS church was again vandalized by having black/brown colored paint thrown across the same front portion of the church that had been vandalized on May 2 (Tr. II at 243- 244, 267-270).[4/]

[3/] During the execution of a state search warrant of Grassie's house on May 27, 1998, investigators found a 12 gauge shotgun and shotgun shells which were consistent with the shells fired at the van (Tr. IV at 705-710; VIII at 1681-1687).

[4/] Between 4:30 p.m. and 5:00 p.m. on Friday, May 22, 1998, Debra West, a member of the Roswell LDS church, saw Grassie's red Ford Ranger truck parked in front of the church and heard the sole male occupant of the truck yodeling, not singing, with a "beautiful voice"

(continued...)

On Memorial Day, Monday, May 25, 1998, at approximately 4:15 p.m., a member of the Alamogordo LDS Church, John C. Seawell, noticed that brown paint had been splattered on the church sign and on three of the four outside walls of that church (Tr. III at 590-593). When he entered the church, Seawell noticed that paint had been thrown onto the podium as well as inside the grand piano, and that a window had been broken (Tr. III at 593-597).[5/]

[4/](...continued)
(Tr. V at 876-880). Ms. West then saw the yodeler, a person she described as a white middle-aged male, get out of his truck, walk to the church, and stare at the building in the exact spot where the red/magenta paint had been thrown on May 2 (Tr. V at 883-886).

[5/] Grassie spent Memorial Day weekend in Silver City, New Mexico, departing Roswell on Friday, May 22 and returning to Roswell on Monday, May 25 (Tr. III at 570-575). On Monday, May 25, he stopped at his aunt's house in Alamogordo (Tr. IV at 684-685). His aunt noticed that Grassie had a drop of white paint in his hair and on his arm (Tr. IV at 686-687). When she asked Grassie about the paint, Grassie told her that he had been at a Walmart and that "someone had been shaking paint in the paint department and the lid came

(continued...)

On Tuesday morning, May 26, 1998, the branch president of the LDS church in Alto, New Mexico, Joe Magill, received a call that his church had been vandalized (Tr. II at 604-605). Upon arriving at the church, Magill noticed that 20 exterior windows of the church had been broken and that the musical instruments within the church had been destroyed (Tr. III at 607-613).[6/]

[5/](...continued)
off and splashed him" (Tr. IV at 687). Although Grassie was not charged with the offense in this indictment, the Las Cruces LDS church was vandalized with white paint during the Memorial Day weekend of 1998 (Tr. VI at 1189-1190).

[6/] Three witnesses, Arlene and Paul Jones and their grandson, Justin, testified that, on the afternoon of May 25, 1998, they noticed a red pickup truck with a white stripe parked on the side of the Alto church (Tr. V at 803-806, 819-822). All three identified the truck as Grassie's (Tr. V at 805-806, 826-827, 849-852). Arlene Jones noticed the male driver carry a package to an arroyo (Tr. V at 807-810). Paul and Justin searched the arroyo and found a cardboard box which contained paper towels soiled with reddish brown paint and a latex glove (Tr. V at 831-832, 853-854). Grassie used his credit card to purchase gas at 6:36

(continued...)

On Wednesday, May 27, 1998, Jean Franks, a member of the Roswell LDS Church, arrived at the church at 8:00 in the morning (Tr. III at 637-639). Upon entering the church, she immediately noticed extensive vandalism to the interior of the church (Tr. III at 639-640). Vandalism resulted in extensive water damage from a baptismal faucet that had been broken, broken doors and windows, and "ax damage to the floors, pews and to all of the pianos and organs" (Tr. II at 433; III at 644-653). The damage was estimated to be over $100,000.[7/]

[6/](...continued)
p.m. on May 25, 1998, approximately four miles south of the Alto LDS Church (Tr. V at 862-864).

[7/] Deborah West, the same congregation member who saw Grassie's truck at the Roswell LDS Church on May 22, 1998, also saw Grassie's truck on Tuesday, May 26, at approximately 4:30 p.m. in the church parking lot (Tr. V at 888-889). Because Ms. West's curiosity was piqued, she pulled into the parking lot and parked behind the truck. (Tr. V at 890-892). Although Ms. West did not make an in-court identification, she was able to ascertain that the individual in the red truck

(continued...)

During the early morning hours of June 12, 1998, an unattached garage on Buddy and Sharlene Jensen's property in Dexter, New Mexico was destroyed by fire (Tr. V at 925-927). Investigation revealed that the

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[7/](...continued)
was a white male wearing blue jeans and a dark western shirt (Tr. V at 893-894). According to Ms. West, the male appeared to be the same size as the white male she had seen on Friday night May 22, 1998, driving the same red truck in the Roswell LDS parking lot (Tr. V at 894-895).

On May 29, 1998, a state search warrant was executed at Grassie's residence. The items seized included four books critical of the Mormon religion and twelve gauge shotgun shells (Tr. IV at 707-711). Silver paint drops were found on the driver's side bed of the truck, the wheel well, and underneath the door handle on the driver's side (Tr. IV at 711-712). In the course of the several hour interview, Grassie stated that his return route from Silver City to Roswell after his Memorial Day performance took him through Reserve, Magdalena, Socorro, and Carrizozo before reaching Roswell. Grassie specifically denied having been in Alamogordo or Ruidoso (Tr. IV at 728-730). Detective Moore also noticed that Grassie was wearing brand new boots. When questioned about the boots, Grassie stated that he had thrown the old ones away (Tr. IV at 733-734).

fire had been accelerated by gasoline and thus was an act of arson (Tr. V at 935-937).[8/]

On June 17, 1998, Norman Jensen, Buddy and Sharlene Jensen's son, who lived in Las Cruces, New Mexico, awoke at approximately midnight and discovered that his 1984 Ford Bronco was on fire (Tr. V at 996-997). Norman extinguished the fire with water from a garden hose (Tr. V at 997). Investigation by the Las Cruces South Valley Fire Department revealed that the fire damage to the Bronco was caused by a gasoline-accelerated fire that was not accidental in nature (Tr. VI at 1033-1035).[9/]

[8/] Marcia Torres, one of the Jensen's neighbors, also knew Grassie as a member of the Dexter community and had seen him perform as a yodeler (Tr. V at 948-950). During the afternoon of June 11, 1998, Ms. Torres saw Grassie drive his red truck around the Jensen house two times, park in front of her house, get out of the truck, walk across the street, and cut the telephone wire which provided service to the Jensen residence (Tr. V at 950-954).

[9/] In the early morning hours after the arson of

(continued...)

On June 28, 1998, the Roswell LDS Church, a $2.5 million structure, was completely consumed by fire (Tr. II at 433-434). Fire fighters worked approximately six hours attempting to extinguish the blaze (ibid.). During the extensive search of the ruins and debris, investigators found an iron bar and gasoline residue within the interior of the destroyed church. The ATF fire investigator concluded that the fire was intentionally set by the use of an accelerant

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[9/](...continued)
Norman Jensen's Bronco, Grassie was stopped by U.S. Border Patrol agents on U.S. Highway 70 at the Border Patrol checkpoint in Orogrande, the only direct path between Roswell and Las Cruces (Tr. VI at 1089-1091, 1114). Agents noticed a shotgun in the cab of Grassie's truck as well as a pistol that was secreted in a shirt behind the passenger seat area of the cab (Tr. VI at 1097, 1099). During a further search of Grassie's truck, agents located a pair of binoculars on the seat (Tr. VI at 1100-1101). The border patrol agent who conducted the search also noticed "a strong odor of gasoline" emanating from a blue plastic container which was in the bed of the truck (Tr. VI at 1100-1101). Grassie was in Roswell on June 17, 1998, at 7:39 p.m., and he purchased gas at a store there and paid with a personal check (Tr. VI at 1166).

after the arsonist had climbed to the roof of the church, broken the window with the iron bar, and then poured gasoline through the window (Tr. VII at 1269-1271).[10/]

The prosecution established (see nn. 2-10, supra), that Grassie was responsible for each of these

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[10/] Grassie was seen pumping gas into containers in the back of his truck on June 26 (Tr. VI at 1213-1214). He was also seen by two local Roswell youths who were leaving a dance at the American Legion hall in Roswell at 1:00 a.m. on June 28, 1998 (Tr. VIII at 1588-1593, 1615-1620). At about 2:00 a.m. that morning, Grassie's next door neighbor saw him sitting in his truck outside his residence(Tr. VIII at 1569). At approximately 4:20 a.m. the Chavez County Sheriff's Department arrived at Grassie's residence and asked to speak with him (Tr. VII at 1313-1314). Grassie consented to a search of his house (Tr. VII at 1315-1320). Among the items seized were a black funnel that was found in the bed of Grassie's truck, a box of latex gloves, and a pistol that had been secreted underneath the seat of the pickup (Tr. VII at 1321). In addition, three five gallon plastic containers which smelled like gasoline were found in Grassie's garage (Tr. VII at 1327-1328). In the course of the interview, Grassie denied having set the fire at the Roswell LDS Church and claimed that he was in bed by "1:00 or 1:30" (Tr. VII at 1330-1333).

incidents, and the jury convicted him on all counts charged in the indictment.

SUMMARY OF ARGUMENT

Defendant's conviction and sentencing under both 18 U.S.C. 247(a)(1) and 18 U.S.C. 844(i), for the arson of the Roswell LDS church does not violate the Double Jeopardy Clause of the Fifth Amendment. Congress clearly intended to punish church arson motivated by the religious character of the property under both statutes. Application of both statutes to defendant's conduct also satisfies the test set out in Blockburger v. United States, 284 U.S. 299, 304 (1932), because each offense charged "requires proof of an additional fact which the other does not."

Defendant's conviction under 18 U.S.C. 844(i) for arson of the Roswell church should be affirmed. Defendant stipulated that the church was engaged in activities affecting interstate commerce, and that

stipulation established the interstate commerce element of Section 844(i). The Supreme Court's intervening decision in Jones v. United States, 120 S. Ct. 1904 (2000), provides no basis for relieving the defendant of the stipulation. Jones did not change the law in this Circuit; to the contrary, it confirmed this Court's construction of the interstate commerce element of Section 844(i).

Defendant's contention that churches are necessarily excluded from protection under Section 844(i) is inconsistent with the plain language of the statute, its legislative history, and the decision in Jones. The statute applies to "any building" used in an activity affecting interstate commerce. The legislative history of Section 844(i) indicates that Congress intended to cover houses of worship. And the decision in Jones makes it clear that courts should apply a functional analysis in determining whether a

building is used in such an activity. Because churches engage in commercial activities, they fall within the protections of the statute.

There is no basis for defendant's contention that the jury was improperly instructed on the interstate commerce element of Section 844(i). The jury was correctly instructed that, to convict, it was required to find that the church was used in an activity affecting interstate commerce, and that if it found that "that there would be any effect at all on interstate commerce, then that is enough to satisfy this element." Nothing in Jones supports defendant's contention that the jury was required to find a substantial effect on interstate commerce. In any event, even if the instruction were erroneous, any error was harmless because defendant stipulated that the church was engaged in activities affecting interstate commerce.

Nor was the application of Section 844(i) to defendant's arson of the Roswell LDS church unconstitutional. The Supreme Court's decisions in Jones and in Russell v. United States, 471 U.S. 858 (1985), and this Court's decision in United States v. Bolton, 68 F.3d 396 (10th Cir. 1995), cert. denied, 516 U.S. 1137 (1996), confirm that Section 844(i) may be constitutionally applied to buildings actively used in a commercial activity.

For the same reasons, defendant's convictions under Section 247(a)(1) for the arson and vandalism of the churches should be affirmed. Defendant's stipulation that the churches engaged in activities affecting interstate commerce satisfies the interstate commerce element of Section 247. Defendant's contention that the stipulation is inadequate because it did not establish that his crimes caused an actual effect on interstate commerce is inconsistent with

this Court's settled interpretation of the similarly-worded interstate commerce element of the Hobbs Act, 18 U.S.C. 1951(a), which was undisturbed by the decision in Jones.

Defendant's Section 844(i) conviction for the arson of Norman Jensen's truck should be affirmed. Jensen actively used the truck for commercial purposes, employing it to perform tasks in exchange for rent and utilities on a farm that engaged in interstate commerce.

ARGUMENT

I

DEFENDANT'S CONVICTION AND SENTENCING UNDER BOTH 18 U.S.C. 247(a)(1) AND 18 U.S.C. 844(i) DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE

Defendant argues (Br. 6-30) that his convictions under both Count 1 (a felony violation of 18 U.S.C. 247, damage to religious property) and Count 3 (18 U.S.C. 844(h), use of fire in the commission of a

felony) exposed him to double jeopardy in violation of the Fifth Amendment to the Constitution. This Court's review of this question is de novo. United States v. Pearson, 203 F.3d 1243, 1267 (10th Cir. 2000), cert. denied, 120 S. Ct. 2734 (2000). Defendant's Double Jeopardy claim is unfounded because Congress clearly intended to punish church arson motivated by the religious character of the property under both statutes.

Defendant acknowledges that the first step in a punishment double jeopardy analysis is to determine whether the legislature intended that each violation be a separate offense. United States v. Lanzi, 933 F.2d 824, 825 (10th Cir. 1991) (citing Garrett v. United States, 471 U.S. 773, 778 (1985)). If Congress clearly intended cumulative punishments under different statutory provisions, multiple punishment does not violate the Double Jeopardy Clause. Ibid.

(citing Missouri v. Hunter, 459 U.S. 359, 368-369 (1983)). If the legislative intent is unclear, the Court must turn to the test set out in Blockburger v. United States, 284 U.S. 299 (1932). Blockburger held that the same act or transaction can constitute a violation of more than one statute if each offense "requires proof of an additional fact which the other does not." 284 U.S. at 304. The charges in this case easily satisfy both the congressional-intent inquiry and the Blockburger test.

1. To determine Congressional intent, this Court need look no further than the plain language of Section 844(h). The statute, which provides for a mandatory ten year sentence in cases in which fire is used to commit a federal felony, specifically applies when the defendant has committed an underlying felony, even when the underlying felony "provides for an enhanced punishment if committed by the use of a

deadly or dangerous weapon or device." 18 U.S.C. 844(h). Section 247, which serves as the predicate felony in the instant indictment, is precisely such a statute. Section 247 prohibits the racially or religiously motivated desecration of a church, and provides for an enhanced sentence if the desecration involves "the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire." 18 U.S.C. 247(d)(3).

This Court used a similar analysis to determine that a defendant could be convicted under both an armed robbery statute, 18 U.S.C. 2113(a) & (d), and a statute providing for a mandatory minimum sentence for the use of a firearm, 18 U.S.C. 924(c)(1), even though the underlying robbery statute already contained an enhancement for the use of a weapon. Lanzi, 933 F.2d at 825-826. This Court took the analysis one step further in United States v. Overstreet, 40 F.3d 1090,

1094 (10th Cir. 1994), cert. denied, 514 U.S. 1113 (1995), upholding dual convictions under the federal carjacking statute and Section 924(c), even though the carjacking statute, at the time, only applied when the defendant committed the act "while possessing a firearm." Even though Section 924(c) would apply to every violation of the carjacking statute, the Tenth Circuit determined that the clear Congressional intent to apply the mandatory sentencing provision of Section 924(c) in all cases involving the use of a firearm to commit a felony obviated the need to apply the Blockburger test, which the indictment would have failed.

Defendant contends, however, (Br. 11-13) that this analysis is inapplicable to Section 844(h) because it expressly refers only to "a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device[.]" 18 U.S.C.

844(h). Because this term does not include the word "fire," he argues, it was not intended to include felonies for which an enhanced punishment has already been imposed because of the use of fire, such as Section 247(d)(3). There is no merit to this contention because the use of fire is capable of causing injury and death, and thus is inherently dangerous and, sometimes, deadly. Congress recognized this in other subsections of the same statute. Sections 844(f) and (i), for example, provide for enhanced penalties where arson causes personal injury or death. 18 U.S.C. 844(f)(2), (3); id. at 844(i); see also id. at 844(e) (offense to threaten injury or death by means of fire).

Defendant also contends (Br. 12-13) that the absence of the word "fire" from the final clause of Section 844(h) belies Congressional intent to impose cumulative punishment for offenses already providing

for enhanced punishment for the use of fire. This clause provides that a term of imprisonment imposed under Section 844(h) may not be suspended or run concurrently with any other term of imprisonment "including that imposed for the felony in which the explosive was used or carried." 18 U.S.C. 844(h). Defendant, however, does not cite a single case holding that this provision is limited to felonies committed with explosives. Moreover, the legislative history of Section 844(h) makes it clear that Congress intended the term "explosive" to include arson fires. The term "fire" was added to Section 844(h) (as well as to subsections (e), (f), and (i) of the statute) in the Anti-Arson Act of 1982. The House Report on the bill states that the legislation was intended to "clarify" the statute's applicability to offenses involving fire as well as explosives. H.R. Rep. No. 678, 97th Cong., 2d Sess., 1 (1982). According to the

Report, several courts of appeals (including the Tenth Circuit) had held the use of "gasoline mixed with air" to ignite a fire to constitute the use of an explosive for purposes of Section 844(i). Id. at 2 & n.5, (citing United States v. Poulos, 667 F.2d 939 (10th Cir. 1982) (additional citations omitted)). Because other courts had rejected that theory, and to obviate the need for technically difficult, time-consuming investigations needed to establish that a fire was caused by an explosive, Congress amended the statute to clarify its applicability to fire. Id. at 2-3.

Thus, even without the addition of the term "fire," Section 844(h) would apply to defendant's use of gasoline to burn the Roswell LDS church. As this Court wrote in Poulos, "[a]ny person would conclude that the pouring of gasoline around a room with the intention of igniting it or the fumes with an incendiary device was prohibited by sections 844(i)

and (j). It is common knowledge that gasoline is highly combustible and capable of exploding." 667 F.2d at 941.

2. Although the unambiguous Congressional intent as expressed in the plain language of the statute obviates the need for further inquiry, the challenged charges in this case also easily satisfy the Blockburger test, as each charge clearly contains an element the other does not. Section 844(h) has but two elements: that the defendant committed an underlying felony, and that he used fire to do so. A violation of the church desecration statute, on the other hand, does not require the use of fire. Section 247 does require that the crime be directed at religious property, an element not found in Section 844's arson provisions.

Contrary to defendant's suggestion (Br. 13-14), the application of Section 844(h) to a felony

violation of Section 247 is not analogous to an indictment charging a violation of Section 844(h) with a predicate violation of Section 844(i) (arson of a building used in interstate commerce). Because the use of fire is an undisputable element of Section 844(i), and Section 844(i) is a felony, Section 844(h) would apply in each and every case in which Section 844(i) applied, and the two charges thus would fail the Blockburger test. In contrast, it cannot be argued that every Section 247 violation -- or even every felony Section 247 violation -- would also violate Section 844(h). For example, a defendant could vandalize a church using a firearm, or could do it in such a way as to cause bodily injury without the use of fire or explosives, and thereby commit a felony Section 247 violation without implicating Section 844(h).

Notwithstanding defendant's effort to characterize Section 844(h) as a mere "sentencing enhancement," the structure and plain language of the statute leave little doubt that Congress intended the provision to codify an independent crime, subjecting a defendant to additional punishment for using fire to commit a felony. Defendant erroneously argues that it is precisely his use of fire to commit a Section 247 violation that insulates him from the use-of-fire charge under Section 844(h). His argument appears to be that, in this particular case, the use of fire is what made the Section 247 violation a felony, and that without the use of fire there would be no felony to underlie the Section 844(h) charge. Using the defendant's logic, an indictment charging both armed robbery and a Section 924(c) violation for the use of a firearm in the commission of a felony would be multiplicitous in any case in which the only weapon

the defendant used was a firearm. In that case, there would be no underlying felony if not for the defendant's possession of the gun. This Court has explicitly rejected this contention in Lanzi, 933 F.2d at 825-26.

Thus, because Congress clearly intended Section 844(h) to stand as an independent criminal offense applying additional punishment for a felony involving the use of fire, and because Section 247 and Section 844(h) each require an element of proof not necessary to the other, the indictment charging both violations does not expose the defendant to Double Jeopardy.[11/]

[11/] Notably, the legislative history for the 1996 amendment to Section 247 also indicates that Congress intended the church desecration statute to complement, rather than displace, Section 844. Although the legislative history does not specifically address the applicability of Section 844(h) to a church arson, its discussion of Section 844(i) can arguably be applied to other applicable provisions in Section 844 as well: "The Committee does not intend [for the amended Section 247] to alter or in any way limit the applicability of section 844(i) of Title 18 to the

(continued...)

II

DEFENDANT'S SECTION 844(i) CONVICTION FOR THE ARSON OF THE ROSWELL CHURCH (COUNT 2) SHOULD BE AFFIRMED

Defendant was convicted on Count 2 of violating 18 U.S.C. 844(i) for the arson of the Roswell LDS church. He now challenges that conviction on the ground that the building's connection to interstate commerce was factually insufficient to satisfy the interstate commerce element of the statute, particularly in light of the Supreme Court's intervening decision in Jones v. United States, 120 S. Ct. 1904 (2000). Defendant, however, stipulated at trial that "at all times relevant to the indictment the Mormon churches in Roswell, Alamogordo, Alto, and Artesia were engaging in activities affecting interstate commerce" (Tr. III at 466). In light of that stipulation, his conviction should be affirmed.

[11/](...continued)
same conduct." H.R. Rep. No. 621, 104th Cong., 2d Sess., 8 (1996).

This Court's review of these questions is de novo. United States v. Bolton, 68 F.3d 396, 398 (10th Cir. 1995) (statutory interpretation and constitutionality of application of statute to defendant's conduct), cert. denied, 516 U.S. 1137 (1996); United States v. Nguyen, 155 F.3d 1219, 1227 (10th Cir. 1998) (jury instructions), cert. denied, 525 U.S. 1167 (1999).

A. This Circuit's Interpretation Of The Interstate Commerce Element Of Section 844(i) Was Fully Consistent With The Decision In Jones

Jones interpreted the interstate commerce element of 18 U.S.C. 844(i), which makes it a federal offense to "damage[] or destroy[], or attempt[] 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[.]" In Jones, the Court reversed a conviction under Section 844(i) for the arson of an owner-occupied

private home, holding that the home was not a building used in an activity affecting interstate commerce. The Court rejected the United States' argument that the requisite connection to interstate commerce was established because the house was used as collateral for a mortgage from an out-of-state lender, insured by an out-of-state insurance company, and connected to an interstate natural gas line. 120 S. Ct. at 1910-1911. The requirement that the building be "'used' in an activity affecting commerce," the Court held, "is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." Id. at 1910. In the absence of evidence that the house "served as a home office or the locus of any commercial undertaking," its only "'active employment,'" the Court stated, "was for the everyday living of Jones's cousin and his family." Ibid. The decision in Jones did not disturb the

Court's holding, in Russell v. United States, 471 U.S. 858 (1985), that Section 844(i) was validly applied to prosecute the attempted arson of a two-unit apartment building. See 120 S. Ct. at 1909.

This Court's pre-Jones decisions construing the interstate commerce element of Section 844(i) were fully consistent with the Jones decision. Even before the Supreme Court's decision in United States v. Lopez, 514 U.S. 549 (1995),[12/] this Court refused to apply Section 844(i) to the arson of property absent a showing that the property was used in some kind of commercial activity. United States v. Monholland, 607 F.2d 1311 (10th Cir. 1979), for example, reversed a

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[12/] Lopez held that Congress lacked the authority, under the Commerce Clause, to enact the Gun Free School Zones Act of 1990, 18 U.S.C. 922(q), which made it a federal criminal offense to possess a firearm in a school zone, concluding that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." 514 U.S. at 567.

conviction for conspiracy to violate Section 844(i) in a plot to blow up a truck owned by a state court judge. The government contended that the truck was used in an activity affecting interstate commerce because the judge used it to travel to and from courthouses where, in the course of his duties, he sometimes adjudicated cases that affected interstate commerce. See id. at 1314-1316. This Court rejected that expansive view of the interstate commerce element of the statute. While acknowledging that only a de minimus connection to interstate commerce was required for a Section 844(i) conviction, it noted that prior decisions had involved property used for some kind of business or commercial purpose. Id. at 1315-1316. The judge's truck, in contrast, "was not even used on official business. * * * If a connection is to be established between the vehicle and the work, it must be shown that there exists a nexus between the two

activities. Here activities are independent." Id. at 1316.[13/]

Following Lopez, this Court continued to apply the same principles in reviewing convictions under both Section 844(i) and the Hobbs Act, 18 U.S.C. 1951, which includes a similar interstate commerce element.[14/]

In United States v. Little, 132 F.3d 43 (Table), 1997 WL 767765 (10th Cir. Dec. 11, 1997),[15/] this Court

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[13/] As the Court noted in Monholland, 607 F.2d at 1315, United States v. Schwanke, 598 F.2d 575 (10th Cir. 1979), involved the explosion of a building housing a cafe that purchased goods in interstate commerce. See also United States v. Yost, 24 F.3d 99, 104 (10th Cir. 1994) (affirming Section 844(i) conviction for arson of automobile body shop which dealt in automobile parts that moved in interstate commerce).

[14/] The Hobbs Act makes it a federal offense to "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do[.]" 18 U.S.C. 1951(a).

[15/] We cite this unreported decision here because it has "persuasive value with respect to a material issue that has not been addressed in a published opinion; and will "assist the court in its disposition." See

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affirmed a Section 844(i) conviction for the bombing of a college dormitory. Little concluded that the dormitory was used in an activity affecting interstate commerce because students, 10% of whom came from out of state, paid rent to live there. In United States v. Swapp, 198 F.3d 260 (Table), 1999 WL 989336 (10th Cir. Oct. 29, 1999),[16] this Court rejected the defendants' contention that Lopez required the reversal of their Section 844(i) convictions for the arson of an LDS church building. In reaching that conclusion, Swapp relied upon evidence that the church burned in that case collected more than $1 million annually, that those funds were reported to and monitored by an out-of-state data center, and electronically transferred to the LDS Church in Salt

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[15] (...continued)
Local Rule 36.3. A copy of the decision in Little is attached to this brief.

[16] See n.17, supra. A copy of the decision in Swapp is attached to defendant's opening brief.

Lake City for investment and expenditures throughout the country. Id. at *3.

United States v. Bolton, supra, reaffirmed prior holdings in this Circuit that the interstate commerce element in the Hobbs Act could be established upon a showing of only a de minimis effect on commerce. "Because the Hobbs Act regulates activities that in aggregate have a substantial effect on interstate commerce, 'the de minimis character of individual instances arising under that statute is of no consequence.'" Id. at 399 (quoting Lopez, 115 S.Ct. at 1629). Significantly, the robberies prosecuted under the Hobbs Act in Bolton all involved commercial entities: restaurants that purchased goods in interstate commerce and a scrap metal dealer that bought and sold metal across state lines. See 68 F.3d at 397-400.[17/] Subsequent Hobbs Act decisions in this

[17/] The defendant in Bolton also robbed an individual

(continued...)

Circuit have uniformly involved similar entities engaged in commercial transactions.[18/]

B. Defendant's Stipulation Satisfies The Interstate Commerce Element Of Section 844(i)

In this case, the defendant stipulated that the Roswell church (and each of the other churches he vandalized) engaged in activities affecting interstate commerce. That stipulation established the interstate commerce element of the Section 844(i) charge. For that reason, the United States submitted no evidence

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[17/](...continued)
of his credit cards. But that offense was not prosecuted under the Hobbs Act. See 68 F.3d at 397-398.

[18/] See United States v. Bruce, 78 F.3d 1506 (10th Cir. 1996) (threats of violence sent to Pizza Hut world headquarters), cert. denied, 519 U.S. 854 (1996); United States v. Wiseman, 172 F.3d 1196 (10th Cir. 1999) (robberies of grocery stores), cert. denied, 120 S. Ct. 211 (1999); United States v. Nguyen, 155 F.3d 1219 (10th Cir. 1998) (robbery of restaurant), cert. denied 525 U.S. 1167 (1999); United States v. Romero, 122 F.3d 1334 (10th Cir. 1997) (robbery of restaurant), cert. denied, 523 U.S. 1025 (1998).

on how the church buildings were used. Defendant's efforts to escape the consequences of his stipulation on appeal should be rejected.

A stipulation in a criminal case "is in effect a limited plea of guilty." United States v. Harding, 491 F.2d 697, 698 (10th Cir. 1974). A defendant who stipulates to the facts that establish an element of a crime "waives his right to a jury trial on that element." United States v. Mason, 85 F.3d 471, 472 (10th Cir. 1996); see United States v. Wittgenstein, 163 F.3d 1164, 1169 (10th Cir. 1998). This Court has made it clear that "[s]tipulations as to facts freely and voluntarily entered into during trial are the equivalent of proof and on appeal neither party will be heard to suggest that the facts were other than as stipulated." Harding, 491 F.2d at 698 n.1 (quoting United States v. Campbell, 453 F.2d 447, 451 (10th Cir. 1972) (internal citations omitted)).

To be sure, "[r]elief can be granted from a stipulation in order to prevent manifest injustice." Harding, 491 F.2d at 698. But defendant is wrong in contending (Supp. Br. 10 n.1) that he is entitled to relief from the stipulation in this case because the decision in Jones significantly changed the law. As explained above, the law in this Circuit prior to Jones regarding the proof necessary to establish the interstate commerce element of Section 844(i) was fully consistent with the Court's decision in Jones. Defendant's citation (Supp. Br. 6) of decisions from other circuits with a more expansive view of the interstate commerce element in Section 844(i) cannot change the fact that the law in this Circuit has not been materially changed by the decision in Jones. There is therefore no basis for relieving him of his stipulation.

Indeed, it would be patently unfair and prejudicial to the United States to allow the defendant to avoid the effect of his stipulation. The prosecution relied upon the stipulation to establish the interstate commerce element of the crime. But for the stipulation, the government would have introduced abundant evidence of the commercial activities of each of the churches involved in this case. See Vallejos v. C.E. Glass, 583 F.2d 507, 511-512 (10th Cir. 1979) (refusing to vacate stipulation where other party "had submitted the case in reliance on the stipulation without producing witnesses to make the type of proof later demanded").[19/]

[19/] In any event, even if there were a basis for relieving defendant of his stipulation, the remedy would not be reversal of his conviction, but rather remand to the district court to take evidence on the actual use of the church building to determine whether it was "active[ly] employ[ed] for commercial purposes." Jones, 120 S. Ct. at 1910. That was the action taken by this Court in Harding. See 491 F.2d at 699; see also United States v. Harding, 507 F.2d

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Finally, there is no merit to defendant's contention (Supp. Br. 10) that the stipulation failed to establish the interstate commerce element of Section 844(i) because it stated that "the Mormon church[] in Roswell" was engaged in activities affecting interstate commerce, and did not state specifically that the church building was used in such activities. The term "church" can mean both the congregation and the building in which it meets. See Random House Dictionary of the English Language 371 (2d ed. 1987). In either case, the church building is the place in which the congregation conducts its activities. Thus, where the church engages in activities affecting interstate commerce, the building

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[19/](...continued)
294, (10th Cir. 1974) (on remand to assess validity of stipulation, defendant not entitled to jury trial to determine whether materials met changed obscenity standard), cert. denied, 420 U.S. 997 (1975).

is, by definition, used in an activity affecting interstate commerce.

C. Churches Are Included Within The Protections Of Section 844(i)

Defendant also argues (Supp. Br. 8-9) that a church building "is not 'actively employed for commercial purposes,'" and therefore can never be protected by Section 844(i). This argument should be rejected. Indeed, most churches do engage in activities affecting interstate commerce and therefore fall within the statute's coverage.

The premise of this argument is defendant's erroneous contention (Supp. Br. 9) that the statement in Jones that a building must be used for "commercial purposes" really means that the building must be used "for business purposes." The text of the statute, the decisions in Jones and Russell, and the legislative history of the statute directly contradict this assertion. As the Supreme Court recognized, the

original version of the bill that was enacted as Section 844(i) was amended to delete an explicit requirement that the property be used "for business purposes * * * [a]fter some House members indicated that they thought the provision should apply to the bombings of schools, police stations, and places of worship[.]" 120 S. Ct. at 1909 n.5 (citing Russell v. United States, 471 U.S. 858, 860-861 & n.5 (1985) (emphasis added)).[20/]

[20/] As initially introduced in the House of Representatives, H.R. 16699, one of the two bills from which Section 844(i) emerged, applied to the destruction by explosives of property "used for business purposes by a person engaged in commerce or in any activity affecting commerce." Explosives Control: Hearings on H.R. 17154, H.R. 16699, H.R. 18573 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 31 (1970). During hearings on the bill, Representative Rodino asked a Department of Justice representative whether the language of H.R. 16699, quoted above, would cover the bombings of police stations, churches, synagogues, or religious edifices. The Department of Justice official stated that he did not think it would. Id. at 56. It was suggested later in the hearings that leaving out the words "for

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Defendant nonetheless makes the bald assertion (Supp. Br. 9) that "a church building is not 'actively employed for commercial purposes'" and that, therefore, the arson of a church cannot be prosecuted under Section 844(i). Nothing in either the terms of the statute or the decision in Jones, however, authorizes such a per se exclusion of churches from the statute's protection, particularly in light of the Court's citation of Congressional intent to include places of worship within its protections. As the Court recognized, Section 844(i) "excludes no particular type of building." 120 S. Ct. at 1910. The Court therefore adopted a "'use'-centered reading" of the statute. Id. at 1911. "The proper inquiry," the Court held, "'is into the function of the building

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[20/](...continued)
business purposes" would broaden the legislation to cover "a private dwelling or a church or other property not used for business." Id. at 300. The phrase "for business purposes" was not included in the bill reported by the House Judiciary Committee.

itself, and then a determination of whether that function affects interstate commerce.'" Id. at 1910 (quoting United States v. Ryan, 9 F.3d 660, 675 (8th Cir. 1993) (Arnold, C.J., concurring in part and dissenting in part) (footnote omitted)).

Contrary to defendant's suggestion (Supp. Br. 9), Jones did not impose a requirement that the nature of the building's use be limited to its primary function. Rather, Jones requires an examination of the ways in which a building is actually used in identifying its function. Indeed, the Court acknowledged that a building may have more than one use, noting twice that the private home at issue in Jones was used only as a residence and not also as a home office or in some other commercial enterprise. See id. at 1909, 1910.[21/]

[21/] See also United States v. Denalli, 73 F.3d 328, 330-331 (11th Cir. 1996) (reversing Section 844(i) conviction for arson of private home, and noting that homeowner made only very limited use of his home office in the course of his employment); and United

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Thus, while it may be true that most church buildings are used primarily as places of worship, that does not mean that churches are not also actively used for commercial purposes, and therefore within the protections of Section 844(i). Most, if not all churches provide services not only to their own members but also to the public at-large, including travelers from other states who may find themselves in the community and want to worship or take part in a religious activity while there. See Katzenbach v. McClung, 379 U.S. 294, 300 (1964). An individual traveling from out of state might choose a church to attend based upon its affiliation with a particular national church organization. In this sense, churches are similar to other non-residential properties, such

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[21/](...continued)
States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995) (reversing Section 844(i) conviction for arson of private home where only connection to interstate commerce was its receipt of natural gas from out of state).

as museums, that are supported by a combination of membership fees and contributions and provide services both to contributing members and to transient non-members. To provide services, these enterprises purchase materials from out-of-state suppliers. Those materials are not purchased for personal consumption as are similar materials purchased by owners of residential property. Rather, the materials purchased by churches are necessary for the provision of religious education and worship services available to members of the public who choose to visit and avail themselves of the services provided.

Congress recognized that churches engage in activities that are commercial in nature when it enacted the Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392 (1996). The legislative history of that statute indicates that churches often provide social services, such as day

care and aid to the homeless. See, e.g., 142 Cong. Rec. S7909 (daily ed. July 16, 1996) (Sen. Faircloth); 142 Cong. Rec. S6522 (daily ed. June 19, 1996) (Sen. Kennedy). Churches collect and contribute funds for charitable, educational, and religious activities in other states; they purchase goods and services in interstate commerce; and they provide salaries and benefits to their employees, sometimes advertising and recruiting for positions nationwide. See Church Burnings: Hearings on The Federal Response to Recent Incidents of Church Burnings in Predominantly Black Churches Across the South Before the Senate Comm. on the Judiciary, 104th Cong., 2d Sess. 37 (1996) (appendix to the prepared statement of James E. Johnson and Deval L. Patrick).

This Court has recognized that churches -- specifically an LDS church like the church destroyed by the defendant here -- engage in activities

affecting interstate commerce. In Swapp, supra, this Court rejected a contention that the interstate commerce nexus was insufficient to support defendants' Section 844(i) conviction, based upon evidence of funds in excess of $1 million annually collected by the local church and transmitted to the LDS church headquarters for use throughout the nation.[22/]

[22/] Following its decision in Jones, the Supreme Court granted petitions for certiorari, vacated the decisions below, and remanded two cases involving church arsons. United States v. Rea, 169 F.3d 1111 (8th Cir. 1999), cert. granted, 120 S. Ct. 2193 (2000); and United States v. Johnson, 194 F.3d 657 (5th Cir. 1999), cert. granted, 120 S. Ct. 2193 (2000). The Eighth Circuit has issued its decision on remand. United States v. Rea, No. 98-2546, 2000 WL 1141030 (8th Cir. Aug. 11, 2000) (copy attached). In its initial decision, the Eighth Circuit had rejected the defendant's contention that his guilty plea to conspiracy to commit arson in violation of Section 844(i) should be vacated for lack of sufficient nexus to interstate commerce. The court concluded that the church's use of materials purchased in interstate commerce and use of natural gas from an out-of-state source satisfied the interstate commerce element. On remand, the Eighth Circuit reversed the conviction and remanded to the district court to determine "whether the Church annex was used in commerce or in an

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The fact that churches are not for-profit businesses does not foreclose coverage under Section 844(i), because Congress's power under the Commerce Clause is not limited to protection of for-profit business activities. Thus, in Little, supra, this Court affirmed a Section 844(i) conviction for the bombing of a college dormitory. See also United States v. Sherlin, 67 F.3d 1208, 1212-1214 (6th Cir. 1995), cert. denied, 516 U.S. 1082 (1996); cf. Associated Press v. NLRB, 301 U.S. 103, 125-129 (1937) (not-for-profit association of newspapers engaged in interstate commerce).

[22/](...continued)
activity affecting commerce under § 844(i)." Id. at *2.

D. The Jury Was Correctly Instructed Regarding The Interstate Commerce Element Of Section 844(i)

Nor is there any basis for defendant's contention (Supp. Br. 10-11) that his conviction should be reversed and he should be retried because the jury instructions on the interstate commerce element of Section 844(i) were incorrect in light of Jones.

First, because the defendant stipulated that the church was engaged in activities affecting interstate commerce, any error in the instructions would be harmless. "[T]he jury need not resolve the existence of an element when the parties have stipulated to the facts which establish that element." Mason, 85 F.3d at 472; Wittgenstein, 163 F.3d at 1169 (even if an instruction is erroneous, any error is harmless when the defendant has admitted or stipulated to the element at issue).

In any event, there was no error in the instructions in this case. With respect to the interstate commerce element of Section 844(i), the jury was instructed that it had to find (Tr. 1901):

> That the building, vehicle, or other real or personal property was used in an activity affecting interstate or foreign commerce. The government is not required to prove that the defendant knew that his conduct would interfere with or affect interstate commerce. It is not necessary for the government to show that the defendant actually intended or anticipated an effect on interstate commerce by his actions or that commerce was actually affected. All that is necessary is that the natural and probable consequences of the acts the defendant took would be to affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element.

Defendant objected to this instruction, contending that the jury should have been told that it was necessary for it to find a substantial effect on interstate commerce (Tr. IX at 1808-1809). Nothing in Jones, however, justifies such a conclusion. The

ruling in Jones, which held that a building that engages in no commercial activity is not protected by Section 844(i), reflected a qualitative, not a quantitative limitation on the interstate commerce element. The Court said nothing about the quantum of effect on interstate commerce proven by the government in that case. Rather, it limited the reach of the statute in a qualitative way, interpreting it to cover only buildings actively used in some commercial activity. Jones did not disturb this Court's rule, which was reexamined and reaffirmed after Lopez, that where a statute "regulates activities that in aggregate have a substantial effect on interstate commerce, 'the de minimis character of individual instances arising under that statute is of no consequence.'" Bolton, 68 F.3d at 399 (quoting Lopez, 514 U.S. at 558).

E. Application Of Section 844(i) To The Arson Of The Roswell LDS Church Was Constitutional

Finally, the application of Section 844(i) to the arson of the Roswell LDS church was constitutional. This Court's review of the constitutionality of statutes is de novo. Bolton, 68 F.3d at 398.

Defendant contends that the statute was unconstitutionally applied "because arson is a 'paradigmatic common-law state crime'" (Supp. Br. 14 (citing Jones, 120 S. Ct. at 1912)), and "because, on the facts of this case, 'neither the actors nor their conduct has a commercial character,'" (ibid. (citing Lopez, 514 U.S. at 580 (Kennedy, concurring))).

The fact that arson is traditionally a local concern does not foreclose federal involvement. As the Supreme Court recognized in Russell and Jones, Congress has the power to make arson a federal

criminal offense as long as the requisite connection to interstate commerce is established.

While the holdings in Jones and Russell both were matters of statutory construction, both have constitutional significance. In both, the Court recognized that, in enacting Section 844(i), Congress intended to exercise its full commerce power, qualified only by the requirement that the property be "used" in an activity affecting commerce. Russell, 471 U.S. at 859 (footnote omitted); Jones, 120 S. Ct. at 1909-1910. Moreover, in Jones, the Court adopted its interpretation of the statute, in part, to avoid doubtful constitutional questions. See id. at 1911. Thus, if the interstate commerce connection is adequate to satisfy the statute, as construed in Jones, it is within Congress's commerce power.

Both Russell and Jones implicitly recognized that Congress has the authority, not only to regulate, but

to protect activities that have a substantial effect on interstate commerce, at least where those activities have a commercial component. See Jones, 120 S. Ct. at 1912; cf. NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 36-37 (1937) ("The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection or advancement' * * * to adopt measures 'to promote its growth and insure its safety' * * * 'to foster, protect, control, and restrain. * * * That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.'") (citations omitted); Bolton, 68 F.3d at 399 (upholding Hobbs Act against a constitutional challenge).

Nothing in Lopez calls into question the validity of that principle as applied to this case. As this Court recognized in Bolton, 68 F.3d at 399, Lopez did

not question Congress's authority to enact a criminal statute, with an express jurisdictional element, that regulates activities that, in the aggregate, substantially affect interstate commerce. Unlike the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q)(1)(A), involved in Lopez, Section 844(i) is limited to arsons of buildings that are used in interstate commerce or in any activity affecting interstate commerce. The churches at issue here, and churches generally, are encompassed within that definition.

Moreover, the Court in Lopez noted that it was necessary to "pile inference upon inference" to establish the requisite connection between interstate commerce and the possession of a gun in a school zone. 514 U.S. at 567. No such inferences are necessary here. Defendant's conduct, of course, had a quite direct affect on the church building -- it totally

destroyed it. Where the statute applies only to arsons of buildings used in interstate commerce or activities affecting interstate commerce, and where the defendant stipulated that the church engaged in such activities, the requisite effect on interstate commerce has been established.

Nor does the decision in United States v. Morrison, 120 S. Ct. 1740 (2000), affect the viability of the application of Section 844(i) to defendant's conduct. In Morrison, the Court held that Congress lacked the authority under the Commerce Clause to provide a federal civil remedy for victims of gender-motivated violence in the Violence Against Women Act of 1994 (VAWA), 42 U.S.C. 13981. The Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." 120 S. Ct. at 1754; see also id. at 1751

("thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature"). The violence criminalized by the VAWA was an attack against a person, not a commercial institution. The Court determined that the connection between such attacks and interstate commerce was too attenuated and would make federal crimes out of virtually all violent crime and many other areas of traditional state regulation. Morrison, 120 S. Ct. at 1752-1753. As Jones implicitly recognized, no such concerns arise from the application of Section 844(i) to the arson of a building that is actively used in a commercial activity, since the effect on interstate commerce is quite direct.

Defendant's conviction on Count 2 should therefore be affirmed.

III

DEFENDANT'S SECTION 247(a)(1) CONVICTIONS (COUNTS 1 AND 4-9) SHOULD BE AFFIRMED

Defendant makes substantially the same objections to his convictions for violating 18 U.S.C. 247(a)(1) (see Supp. Br. 11-14).[23/] This Court's review of these questions is de novo. Bolton, 68 F.3d at 398 (statutory interpretation and constitutionality of application of statute to defendant's conduct); Nguyen, 155 F.3d at 1227 (jury instructions).

For the same reasons set out in Part II above, these objections should be rejected. The only variation in his arguments as to Section 247(a)(1) is his contention (Supp. Br. 12) that the stipulation did not establish the interstate commerce element of that statute because it did not state that his conduct --

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[23/] Because his conviction on Count 3 under 18 U.S.C. 844(h)(1) depends upon his conviction on Count 1, defendant contends that the 844(h)(1) conviction should be reversed or vacated as well (Supp. Br. 13 n.2).

the arson and vandalism of the churches -- had an actual effect on interstate commerce. This contention should be rejected because there is no requirement that an actual effect be proven to establish the interstate commerce element of Section 247.

Section 247(a)(1) prohibits defacing of, damage to, or destruction of religious property because of the religious character of that property, where "the offense is in or affects interstate or foreign commerce." This interstate commerce element is similar to that in the Hobbs Act, which prohibits robbery and certain other conduct that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce[.]" 18 U.S.C. 1951(a). This Court has made it clear that "only a potential effect on commerce is required to satisfy the interstate commerce element" in a Hobbs Act prosecution. United States v. Wiseman, 172 F.3d

1196, 1216 (10th Cir. 1999), cert. denied, 120 S. Ct. 211 (1999) (citing United States v. Nguyen, 155 F.3d at 1228). In Wiseman, this Court held that the evidence was sufficient to establish the interstate commerce element of the Hobbs Act where the jury was presented with evidence that the businesses that had been robbed purchased goods from out of state, and that their assets had been depleted by the robberies. See 172 F.3d at 1214. As Wiseman explained, the jury could have inferred from this evidence "that the stolen money could have been used to purchase goods in commerce." Ibid.

The same level of proof satisfies the interstate commerce element of Section 247. The statutes are similarly worded, and, as it did in enacting the Hobbs Act, Congress intended to exercise the full extent of its Commerce Power when it amended Section 247 in 1996. See Wiseman, 172 F.2d at 1214; H.R. Rep. No.

621, 104th Cong. 2d Sess., 7 (1996). Here, the defendant stipulated that each of the churches he burned or vandalized engaged in activities affecting interstate commerce. The physical damage he caused to those churches -- ranging from the $100,000 in damage caused by his vandalism of the Roswell church and ultimately the destruction of the $2.5 million structure, to the more minor, but still substantial, damage caused to the other churches in the form of broken windows, destruction of musical instruments, and paint-splattered exteriors and interiors -- necessarily depleted the churches' assets and therefore potentially affected their participation in activities affecting interstate commerce. Moreover, at least in the case of the Roswell church, funds to repair the damage came from an LDS church office in Texas, demonstrating the interstate nature of the LDS church (Tr. II at 247). No further proof is required.

Nothing in Jones casts doubt on this conclusion. As discussed above (pp. 58-59, supra), the decision in Jones reflected a qualitative, not a quantitative limitation on the interstate commerce element in Section 844(i). The Court rejected the government's arguments that the requisite commercial nexus had been established, not because the effect on interstate commerce was inadequate, but because the asserted connections -- an out-of-state mortgagee, out-of-state insurer, and receipt of natural gas from out-of-state -- did not indicate that the building itself was used in a commercial activity. Here, the stipulation established that the churches engaged in activities affecting interstate commerce.

Nor was there any error in the jury instructions on the Section 247 counts. The jury was instructed that the government was required to prove that the offense was "in or affected interstate commerce" (Tr.

X at 1899). To establish that element, the jury was told: "All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element" (Tr. X at 1899). That instruction was consistent with this Court's rule that only a potential effect on commerce is required to establish a violation of the similarly-worded Hobbs Act. See Wiseman, 172 F.3d at 1216 ; Nguyen, 155 F.3d at 1228.[24/]

[24/] Wiseman approved a Hobbs Act instruction that informed the jury that it could find the "defendant obstructed, delayed, or affected commerce" if "all or part of the money allegedly stolen from these businesses because of the alleged robbery could have been used to obtain such foods or services from outside the State of New Mexico[.]" 172 F.3d at 1215. Nguyen approved an instruction that the government was required to show that "interstate commerce, or an item moving in interstate commerce, was actually or potentially delayed, obstructed, or affected in any way or degree" and that the defendant's conduct "either caused, or would probably cause, an effect on

(continued...)

Defendant's convictions for violating Section 247(a)(1) should therefore be affirmed.

IV

DEFENDANT'S CONVICTION FOR ARSON OF A TRUCK USED IN AN ACTIVITY AFFECTING INTERSTATE COMMERCE (COUNT 10) SHOULD BE AFFIRMED

Defendant contends (Br. 33-35, Supp. Br. 11) that the evidence was insufficient to support his conviction on Count 10 for the arson of Norman Jensen's Ford Bronco truck. In particular, he argues that the evidence was insufficient to establish the interstate commerce element of 18 U.S.C. 844(i). This Court must reject that contention if it finds that the evidence, direct and circumstantial, viewed in the light most favorable to the government, is sufficient to establish the requisite effect on interstate commerce beyond a reasonable doubt. United States v.

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[24] (...continued)
interstate commerce[.]" 155 F.3d at 1228.

Hooks, 780 F.2d 1526, 1531 (10th Cir.), cert. denied, 475 U.S. 1128 (1986).

Under the standard set out in Jones, the evidence in this case was sufficient to support conviction on Count 10. The evidence established that Norman Jensen actively used his truck for commercial purposes, and that the truck had more than a passive, passing, or past connection to commerce. Jensen lived on a farm owned by Ruth Jones, and performed work on the farm in exchange for free rent and utilities (Tr. V at 995). While he used the truck for personal transportation (e.g., to drive to school), he also used it in the performance of his duties on the farm: hauling limbs, cleaning ditches, transporting Mrs. Jones across state lines from the farm in New Mexico to the airport in El Paso, Texas, and transporting pecans from Mrs. Jones's farm to a neighboring farm owned by David Byrd (Tr. V at 1006). At the Byrd farm, Jones's pecans were

cleaned and prepared for sale to out-of-state buyers (Tr. VI at 1039-1041). In 1998, Byrd sold 45,000 pounds of pecans, including 560 pounds from the Jones farm, to out-of-state buyers (Tr. VI at 1041-1042, 1047). He received $83,336 for the pecans, of which he paid $775 to Mrs. Jones (Tr. VI at 1041, 1050-1062).

These facts establish that Norman Jensen actively used his truck for commercial purposes, and that those activities affected interstate commerce. See Jones, 120 S. Ct. 1904. He used the truck to provide services to Mrs. Jones in exchange for rent and utilities. This in-kind exchange was a commercial transaction just as if Jensen had used the truck to earn money in a business and then used the funds earned to pay his rent or other living expenses. Cf. Russell, supra, (two-unit apartment building was used in an activity affecting interstate commerce).

These commercial uses of the truck distinguish this case from Monholland, 607 F.2d 1311. In that case, the owner of the truck used it only to drive himself to and from work. This Court held that the interstate commerce element of Section 844(i) was not satisfied (607 F.2d at 1315):

> The important problem here is that movement to and from work is an activity which ordinarily has an existence independent from the work. It does not blend into and become a part of the career. If a connection is to be established between the vehicle and the work, it must be shown that there exists a nexus between the two activities. Here the activities are independent.

In this case, in contrast to Monholland, the government established a connection between the vehicle and the work; the truck was an integral part of Norman Jensen's work on Mrs. Jones's pecan farm. The truck was therefore used in an activity affecting interstate commerce and defendant's conviction on Count 10 should be affirmed.

CONCLUSION

Defendant's convictions should be affirmed.

Respectfully submitted,

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ORAL ARGUMENT STATEMENT

This appeal presents important questions concerning the construction of two federal criminal statutes, 18 U.S.C. 247, and 18 U.S.C. 844(i), and their application to church arsons. The United States believes that oral argument would be helpful to the Court in deciding these questions. Defendant-appellant has also requested argument.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), Fed. R. App. P., I certify that the foregoing brief for the United States as appellee contains 12,059 words. I relied on my word processor to obtain the count and it is WordPerfect 7.0.

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CERTIFICATE OF SERVICE

I certify that the foregoing brief for the United States as appellee was sent by overnight delivery to the following counsel of record, this 8th day of September, 2000:

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