No. 98-50396

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA

v.

ROBERT EARL JOHNSON

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument would be helpful to the Court in this appeal.

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STATEMENT OF JURISDICTION

This is an appeal from a judgment of conviction entered by the United States District Court for the Western District of Texas. The United States charged the defendant with violating a federal criminal statute, 18 U.S.C. 844(i) (R. Vol. 1 at 1).[1/] The defendant pled guilty and was sentenced by the district court, which entered judgment on April 16, 1998 (R. Vol. 2 at 292-297). He filed a timely notice of appeal on April 24, 1998 (R. Vol. 2 at 299). The district court had subject matter jurisdiction under 18 U.S.C. 3231. This court has appellate jurisdiction under 28 U.S.C. 1291.

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[1] Citations to "R. Vol. __ at __" refer to documents in the Record on appeal, by volume and page number. Citations to "Tr. __" refer to pages in the Transcript of the Rearraignment Proceedings at which defendant pled guilty, November 21, 1997. Citations to "Def. Br. __" refer to pages in the defendant's brief in this Court.

STATEMENT OF THE ISSUE

Whether the church building that defendant destroyed by fire was a building used in interstate commerce or in any activity affecting interstate commerce.

STATEMENT OF THE CASE

A. Statement Of Facts [2/]

Early on the morning of December 7, 1996, the Hopewell United Methodist Church and its contents, in Centerville, Texas, were completely destroyed by an arson fire (R. Vol. 2 at 288; Tr. 7-8). Fire investigators' examination of the scene revealed that an explosion had occurred, that a propane valve inside the Church was opened, and that propane was escaping from another propane line inside the Church where a valve or fitting had been removed (R. Vol. 2 at 288; Tr. 8). Defendant Robert Earl Johnson, who lived next door to the Church, later confessed that he had burglarized the Church on at least four occasions and had stolen two propane heaters on December 5 and December 6, 1996 (R. Vol. 2 at 288-289; Tr. 8). Johnson also admitted to investigators that he had set the fire at the Church in an effort to cover up the burglaries (R. Vol. 2 at 289; Tr. 8).

Hopewell United Methodist Church is a member of the Texas Annual Conference of the United Methodist Church (R. Vol. 2 at

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[2] Because defendant pled guilty, there was no trial. This statement of facts is based upon the Factual Basis submitted by the United States at the rearraignment hearing (Tr. 7-9; R. Vol. 2 at 288-289), as well as the exhibits submitted by the United States in Opposition to Defendant's Motion to Dismiss the Indictment (R. Vol. 1 at 92-105).

289; see also R. Vol. 1 at 92; Tr. 8). All Churches within the Conference are required to submit approximately 16 percent of their annual collections to the Conference (R. Vol. 2 at 289; see R. Vol. 1 at 93; Tr. 9). The Conference forwards the majority of those funds to the United Methodist Church's General Counsel on Finance and Administration (GCFA) in Evanston, Illinois (R. Vol. 2 at 289; see R. Vol. 1 at 92-93; Tr. 9). The GCFA uses the funds it receives to support a number of its national and international functions, including support for Church ministries in the United States and throughout the world, the Church's seminaries, and 13 predominantly African-American colleges across the United States, as well as for administrative expenses including salaries, pensions, and benefits (R. Vol. 2 at 289; see R. Vol. 1 at 93-97; Tr. 9). Hopewell United Methodist Church paid its full apportionment to the Annual Conference from 1993 through 1996, in the amounts of $918 in 1993, $883 in 1994, $685 in 1995, and $611 in 1996 (R. Vol. 1 at 94-97).

Title to property owned by individual Churches within the denomination is held in trust for the United Methodist Church (R. Vol. 1 at 98). In addition, the United Methodist Church has obtained federal tax exempt status from the Internal Revenue Service on behalf of all local Churches and Annual Conferences (R. Vol. 1 at 99, 101-103).

The Hopewell United Methodist Church building and its contents were insured by the Church Mutual Insurance Company, located in Merrill, Wisconsin, which paid a claim of over $89,000

as a result of the fire (R. Vol. 2 at 289; see also R. Vol. 1 at 104-105; Tr. 9).

B. Proceedings Below

Defendant Robert Earl Johnson was indicted by a federal grand jury on June 10, 1997, for violating 18 U.S.C. 844(i) (R. Vol. 1 at 1). The indictment charged that, on or about December 7, 1996, defendant "maliciously damaged and destroyed, and attempted to damage and destroy, by means of fire" the Hopewell United Methodist Church in Centerville, Texas (R. Vol. 1 at 1). The indictment further charged that the Church was a building "used in interstate commerce and in an activity affecting interstate commerce" (R. Vol. 1 at 1).

The defendant moved to dismiss the indictment, contending that the burning of the Hopewell United Methodist Church was not an act that affected interstate commerce and that, as applied to him, 18 U.S.C. 844(i) was beyond Congress' powers under the Commerce Clause (R. Vol. 1 at 72, 74-79).

The district court denied the motion to dismiss, ruling that the Church building was real property used in or affecting interstate commerce (R. Vol. 2 at 284-287). The court based this finding on the Church's annual contribution of funds to the GFCA, the GFCA's disbursement of those funds to various national and international activities, and the payment of the insurance claim to the Church by an out-of-state insurance company (R. Vol. 1 at 285-286). "Taken individually or in the aggregate, these facts

establish the necessary interstate commerce element" (R. Vol. 1 at 286).

On November 21, 1997, the defendant pled guilty to violating 18 U.S.C. 844(i) (R. Vol. 2 at 292, 303; Tr. 6-7, 16-17). There was no plea agreement (Tr. 6). At the rearraignment proceeding, the attorney for the United States recited the factual basis for the charge (Tr. 7-9; see also R. Vol. 2 at 288-289), and the defendant stated that he had no disagreement with that recitation of facts (Tr. 9). After questioning the defendant (see Tr. 2-7, 9, 13-19), the court accepted the defendant's plea (Tr. 19). The court found that the plea was freely and voluntarily made, that the defendant understood the charge and its penalties, that he understood his constitutional and statutory rights and wished to waive them, and that there was a factual basis for the plea (Tr. 19).

The record does not support the defendant's claim (Def. Br. 2) that he reserved his right to appeal. The document he cites to support that contention is the judgment, which merely states that he pled guilty (see R. Vol. 2 at 292). Indeed, in a subsequent order, the district court stated that the defendant's "plea was not a conditional plea" (R. Vol. 2 at 303).

On April 16, 1998, the district court entered judgment, sentencing the defendant to 115 months imprisonment (R. Vol. 2 at 292-293).

SUMMARY OF ARGUMENT

Although he pled guilty, the defendant appeals the district court's finding that there was a factual basis for his guilty plea. That finding must be upheld, and the defendant's conviction affirmed, if the facts set forth in the Record constitute a crime under 18 U.S.C. 844(i).

Defendant's conviction should be affirmed. Section 844(i) prohibits arson of buildings used in interstate commerce or used in an activity affecting interstate commerce. In enacting this statute, Congress intended to exercise the full extent of its power under the Commerce Clause. To establish the interstate element of a Section 844(i) violation, the government must show only a slight effect on commerce, as long as the defendant's conduct is of a general type which, viewed in the aggregate, substantially affects interstate commerce.

The Hopewell United Methodist Church building was used in an activity affecting interstate commerce. The Hopewell Church was part of a greater whole, contributing funds for the interstate activities of the United Methodist Church throughout the United States and abroad. Viewed in the aggregate, similar arsons would have a substantial effect on interstate commerce.

ARGUMENT

DEFENDANT'S CONVICTION SHOULD BE AFFIRMED

A. Standard Of Review

The defendant in this case was indicted and pled guilty to violating 18 U.S.C. 844(i), which provides a criminal penalty for

anyone who "maliciously damages or destroys * * * by means of fire or an explosive, any building * * * used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. 844(i). There is no question that the defendant set fire to, and thereby destroyed the Hopewell United Methodist Church building. He has admitted as much (Tr. 7-9; see Def. Br. 2, 8, 11), and his guilty plea "removes the issue of factual guilt from the case." Menna v. New York, 423 U.S. 61, 62 n.2 (1975). He nonetheless seeks to challenge his conviction on appeal on the ground that the interstate commerce element of the statute was not satisfied.

By pleading guilty unconditionally, a defendant ordinarily waives his right to appeal all non-jurisdictional defects below. United States v. Andrade, 83 F.3d 729, 731 (5th Cir. 1996); United States v. Bell, 966 F.2d 914 (5th Cir. 1992).[3/] The jurisdictional exception is not applicable here. Although sometimes referred to as "jurisdictional," the interstate commerce element in Section 844(i) is a substantive element of the crime. It "is not 'jurisdictional' in the sense that a failure of proof would divest the federal courts of adjudicatory power over the case." United States v. Robinson, 119 F.3d 1205,

[3] There can be no question that defendant's plea was unconditional. See Fed. R. Crim. P. 11(a)(2) (requiring that a conditional plea be in writing and that it be approved by the court and by the government). The requirement that a conditional plea be in writing may be waived where the Record reveals that "the defendant has expressed an intention to preserve a particular pretrial issue for appeal and that neither the government nor the district court opposed such a plea." Bell, 966 F.2d at 916. There is no such indication in the Record here.

1212 n.4 (5th Cir. 1997) (describing interstate commerce element of Hobbs Act, 18 U.S.C. 1951(a)), cert. denied, 118 S. Ct. 1104 (1998); see United States v. Baucum, 80 F.3d 539 (D.C. Cir. 1996) (holding that facial constitutional challenge to criminal statute is not jurisdictional); United States v. Dupaquier, 74 F.3d 615, 619 (5th Cir. 1996) (applying plain error review to Commerce Clause challenge where defendant did not raise it below).

Under some circumstances, however, a defendant may appeal the district court's acceptance of his guilty plea. Before entering judgment on a plea of guilty, a district court is required to "mak[e] such inquiry as shall satisfy it that there is a factual basis for the plea." Fed. R. Crim. P. 11(f). This Court has held that, notwithstanding a guilty plea, a defendant may challenge a district court's finding of a factual basis for the plea on appeal, on the ground that the facts set forth in the record do not constitute a crime. United States v. Dayton, 604 F.2d 931, 936-938 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904, (1980); United States v. Montoya-Camacho, 644 F.2d 480 (5th Cir. 1981); Andrade, 83 F.3d at 731-732. "This factual basis must appear in the record * * * and must be sufficiently specific to allow the court to determine that the defendant's conduct was within the ambit of that defined as criminal." United States v. Oberski, 734 F.2d 1030, 1031 (5th Cir. 1984). Appellate review of the district court's finding of a factual basis for the plea is under the clearly erroneous standard. Ibid.; cf. United States v. Knowles, 29 F.3d 947, 950-952 (5th

Cir. 1994) (plain error review of Commerce Clause challenge after guilty plea). If the factual basis is found to be insufficient, the proper course is to vacate the guilty plea and remand for further proceedings. Andrade, 83 F.3d at 730-732.

While the defendant here has not explicitly challenged the district court's finding of a factual basis for his guilty plea, the essence of his argument on appeal is that the underlying facts asserted by the United States (which he does not dispute) are insufficient to establish the interstate commerce element of a violation of Section 844(i) (see, e.g., Def. Br. 8-9). Thus, his appeal can be maintained only if it is construed as a challenge to the district court's finding of a factual basis for the interstate commerce element of the crime to which he pled guilty.

As we explain below, the district court did not clearly err in finding a factual basis for the defendant's plea to a violation of Section 844(i).

B. The Hopewell United Methodist Church Was A Building Used In Interstate Commerce And In An Activity Affecting Interstate Commerce.

The defendant erroneously contends that Section 844(i) is unconstitutional as applied to the conduct with which he was charged in this case because the arson of a church is not within Congress' powers under the Commerce Clause.[4/]

[4] Although defendant appears in one part of his brief to contend (Def. Br. 3) that the statute itself is unconstitutional, it is clear elsewhere (e.g., Def. Br. at 4), that he is making only an as-applied challenge. In any event, as this Court

(continued...)

Section 844(i) protects property that is "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. 844(i). When it enacted this statute, Congress intended "to exercise its full power under the Commerce Clause." Russell v. United States, 471 U.S. 858, 859 (1985). "Congress at least intended to protect all business property, as well as some additional property that might not fit that description, but perhaps not every private home." Id. at 860; see id. at 860-862 & nn. 5-9. The proposed legislation was amended to remove the requirement that the property be used "for business purposes" in response to inquiries as to whether the original version of the bill would cover bombings of police stations and churches. Id. at 860-861 & n. 7.

1. The Supreme Court has "identified three broad categories of activity that Congress may regulate under its commerce power." United States v. Lopez, 514 U.S. 549, 558 (1995); id. at 558-589 (citations omitted):

> First, Congress may regulate the use of the channels of interstate commerce. * * * Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. * * * Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.

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[4](...continued)
already has held, Section 844(i) is protected from facial challenge by the statutory requirement that a nexus to interstate commerce be proven on a case-by-case basis. United States v. Corona, 108 F.3d 565, 570 (5th Cir. 1997).

Lopez concerned the constitutional validity of 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. The Court analyzed the statute solely under the third category of Congressional authority -- to regulate activities having a substantial relation to interstate commerce. 514 U.S. at 559. The Court noted that Section 922(q) "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." Id. at 561. Thus, it could not be upheld as a regulation of activity that "arise[s] out of or [is] connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." Id. at 561. And, unlike Section 844(i), Section 922(q) had no "jurisdictional element" limiting its application to those transactions whose relation to interstate commerce could be identified on a case-by-case basis. See 514 U.S. at 561-562, 567.

The United States suggested that the possession of a firearm in a school zone could substantially affect commerce by resulting in violent crime, thereby imposing costs on the economy at large through the mechanism of insurance, and reducing the willingness of individuals to travel to areas perceived to be unsafe. In addition, the United States argued, the presence of guns near schools threatens students' learning environment, thereby resulting in a less productive workforce and an adverse effect on the national economy. Id. at 563-564. The Court rejected these

"costs of crime" and "national productivity" rationales (id. at 564), finding that, if accepted, they would justify federal intervention into a myriad of activities generally entrusted to the States, including family law and the day-to-day operations of local schools. Id. at 564-566. The interstate effects of such a noncommercial activity as the possession of a firearm, the Court concluded, were simply too inferential to justify federal action: "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." Id. at 567. The Court concluded 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." Id. at 567.

At the same time, the Court made it clear that legislation enacted pursuant to Congress' Commerce Clause power may extend to areas traditionally reserved to the States where it is designed to regulate commercial activities with a substantial effect on interstate commerce (514 U.S. at 565-566):

> We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.

In addition, Lopez "expressly reaffirmed" the principle that Congress may regulate intrastate noncommercial activity "'if it

exerts a substantial economic effect on interstate commerce.'" United States v. Bird, 124 F.3d 667, 676 (5th Cir. 1997) (quoting Lopez, 514 U.S. at 556, internal citation and quotation marks omitted), cert. denied, 118 S. Ct. 1189 (1998).

Lopez also left intact the "bedrock principle of modern Commerce Clause jurisprudence that Congress may regulate a category of activity whose many instances, taken together, substantially affect interstate commerce." United States v. Robinson, 119 F.3d at 1214 (citing Katzenbach v. McClung, 379 U.S. 294, 300-301 (1964)); see Lopez, 514 U.S. at 558 (quoting Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968)) ("'where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence'"). Thus, in "prosecutions based on local activities that affect interstate commerce, the government need not prove that the effect of an individual defendant's conduct was substantial. It suffices to show a slight effect in each case, provided that the defendant's conduct is of a general type which, viewed in the aggregate, affects interstate commerce." Robinson, 119 F.3d at 1208;[5/] Bird, 124 F.3d at 676 (Lopez "reiterated that intrastate, noncommercial activities can, in certain circumstances,

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[5] See also Robinson, 119 F.3d at 1212 ("even if Lopez imposes a new requirement of substantiality, that requirement applies to the class of cases prosecuted in the aggregate; in any particular case, proof of a slight effect on interstate commerce suffices"); id. at 1214 ("courts must look to the cumulative effect of all similar instances of the regulated activity, carried on in different places by different persons").

substantially affect interstate commerce when considered in the aggregate"); see also United States v. Corona, 108 F.3d 565, 570 (5th Cir. 1997) (declining to "challeng[e] the general thrust of the aggregation principle" in Section 844(i) case).[6/]

Robinson concerned application of the interstate commerce element of the Hobbs Act, 18 U.S.C. 1951 et seq., but the same principle applies to Section 844(i). As in Section 844(i), the definition of commerce in the Hobbs Act "is co-extensive with constitutional limits." Robinson, 119 F.3d at 1212. Moreover, whether applied to robberies or to arsons, requirement of a substantial effect on interstate commerce in each case would simply be impractical. "The third branch of the commerce power would be negligible if its exercise were limited to particular incidents, each of which individually has a substantial effect

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[6] Other Circuits agree that Lopez did not overrule the aggregation principle. See United States v. Bolton, 68 F.3d 396, 398 (10th Cir. 1995) (Hobbs Act); United States v. Hicks, 106 F.3d 187, 189 (7th Cir.) (Section 844(i)), cert. denied, 117 S. Ct. 2425 (1997); United States v. Franklyn, 157 F.3d 90 (2d Cir.) (18 U.S.C. 922(o)), petition for cert. filed, (Oct. 16, 1998) (No. 98-6500); United States v. Harrington, 108 F.3d 1460, (D.C. Cir. 1997) (Hobbs Act); United States v. McMasters, 90 F.3d 1394, 1399 (8th Cir. 1996) (Section 844(i)), cert. denied, 117 S. Ct. 718 (1997). Two appellate decisions state that, at least under some circumstances, a substantial effect on commerce must be shown in each Section 844(i) case. United States v. Pappadopoulos, 64 F.3d 522, 527 (9th Cir. 1995); United States v. Denalli, 73 F.3d 328, 330 (11th Cir. 1996). But, as discussed infra, p. 19, both cases involved the arson of a private home, with scant connection to interstate commerce. And both have been limited by subsequent decisions in the same circuits. See United States v. Gomez, 87 F.3d 1093, 1095 (9th Cir. 1996) (reiterating aggregation principle in Section 844(i) case involving rental property); United States v. Dascenzo, 152 F.3d 1300, 1301-1304 (11th Cir. 1998) (questioning Denalli, and applying aggregation principle to arson of rental property in Section 844(i) case).

upon the nation's commerce." Id. at 1214; see United States v. Harrington, 108 F.3d 1460, 1465 (D.C. Cir. 1997) (noting that Lopez had "suggested that a jurisdictional element could justify the application of the commerce power to a single firearm possession, despite the inevitable insubstantiality of such a one-time, small-scale event from the perspective of interstate commerce").

2. Unlike the Gun-Free School Zones Act, Section 844(i) includes an express requirement that the charged conduct have a relation to interstate commerce. Section 844(i) protects only properties that are used in interstate commerce or that are used in an activity having an effect on interstate commerce. See 18 U.S.C. 844(i); cf. Lopez, 514 U.S. at 561 (Section 922(q) "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms"). In the wake of Lopez, courts have upheld convictions under Section 844(i) as long as the subject property was used in an activity such that the aggregate effects of similar arsons could affect interstate commerce.[7/]

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[7] See United States v. Corona, 108 F.3d 565, 568-571 (5th Cir. 1997) (upholding conviction for arson of warehouse used by taxi owners and drivers, but questioning application of statute to arson of house that was neither rented nor on the rental market); compare United States v. Nguyen, 117 F.3d 796 (5th Cir.) (upholding conviction for arson of apartment building and van used for building maintenance), cert. denied, 118 S. Ct. 455 (1997); United States v. Hicks, 106 F.3d 187, 188-191 (7th Cir.) (upholding conviction for arson of building containing restaurant and unoccupied apartment), cert. denied, 117 S. Ct. 2425 (1997); United States v. McMasters, 90 F.3d 1394, 1398 (8th Cir. 1996) (upholding conviction for arson of single rental unit), cert.

(continued...)

Defendant's arson of the Hopewell United Methodist Church was a crime under Section 844(i) because the Church building was used in an activity affecting interstate commerce. The Hopewell Church is a part of a greater whole that operates nationally and internationally. Through the Texas Annual Conference, money collected by the Hopewell Church flows to the General Counsel on Finance and Administration (GCFA) of the United Methodist Church in Evanston, Illinois. These funds in turn are spent in a variety of interstate and foreign operations, including assistance to educational institutions and payment of such administrative expenses as salaries, insurance, and pensions, as well as for the national Church's publishing activities. Title to the Hopewell Church building is held in trust for the United Methodist Church, and the GCFA performs administrative services such as obtaining blanket tax exempt status for the Hopewell Church and other local Churches. Finally, the Hopewell Church building was insured by an out-of-state insurance company, which paid a claim of over $89,000 as a result of defendant's arson. The Hopewell Church was thus engaged in economic activity,

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[7](...continued)
denied, 117 S. Ct. 718 (1997); United States v. Gomez, 87 F.3d 1093, 1094-1096 (9th Cir. 1996) (upholding conviction for arson of six-unit apartment building); United States v. Dascenzo, 152 F.3d 1300 (11th Cir. 1998) (upholding conviction for use of explosive device causing damage to single rental unit); to United States v. Denalli, 73 F.3d 328 (11th Cir. 1996) (reversing conviction for arson of private home); United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995) (reversing conviction for arson of private home); United States v. Gaydos, 108 F.3d 505 (3d Cir. 1997) (reversing conviction for arson of house permanently removed from rental market).

collecting and transmitting funds to the United Methodist Church's national office for a variety of national and international activities. Arsons of similar properties, when aggregated, would have a substantial effect on commerce.

To be sure, the United Methodist Church is not a for-profit business. But Congress' power under the Commerce Clause is not limited to for-profit business activities. As this Court held in sustaining Congress' authority to enact the Child Support Recovery Act, 18 U.S.C. 228, "the construction of the term 'commerce' is a practical one and embraces economic activity beyond that which is traditionally considered commerce." United States v. Bailey, 115 F.3d 1222, 1228 n.7 (5th Cir. 1997), cert. denied, 118 S. Ct. 866 (1998); see United States v. Sherlin, 67 F.3d 1208, 1212-1214 (6th Cir. 1995) (upholding conviction for arson of college dormitory on finding that college was engaged in business of providing educational services), cert. denied, 516 U.S. 1082 (1996).

The effect on interstate commerce in a Section 844(i) case such as this one is fundamentally different than that asserted in Lopez. As stated by the Court, a finding that the conduct prohibited by the Gun-Free School Zone Act had an effect on interstate commerce would have required "pil[ing] inference upon inference." Lopez, 514 U.S. at 567. Here, in contrast, no such "elongated and speculative chain of causation" is necessary. United States v. Hicks, 106 F.3d 187, 189 (7th Cir.), cert. denied, 117 S. Ct. 2425 (1997). "[T]he activity regulated by the

arson statute is the burning of property used in or affecting commerce, and it doesn't take any fancy intellectual footwork to conclude that the aggregate effect of such arsons on commerce is substantial." Ibid. Hicks, which involved a Section 844(i) prosecution for the arson of a restaurant, cited the elimination of out-of-state deliveries of food and natural gas that might have occurred if the defendants had been successful in destroying the building, as well as the costs that were imposed on out-of-state insurance companies as a result of damage caused by the fire. "This was what one fire in one town could have done; multiply the effects by all fires of incendiary origin and you will get an idea of the aggregate effects of arson on commerce." Ibid.[8/]

Defendant's contention (Def. Br. 9-10) that the government's theory in this case would permit a conviction for the arson of his counsel's car is wrong. The circumstances described in his hypothetical do not indicate that the car itself was used in an activity affecting commerce, merely that its owner engaged in some commercial transactions. Compare United States v. Nguyen,

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[8] United States v. Voss, 787 F.2d 393 (8th Cir.), cert. denied, 479 U.S. 888 (1986), is not to the contrary. In that case, the defendant's Section 844(i) conviction was reversed because the jury had been instructed that it could find him guilty based solely on the fact that the owners of the subject building had purchased insurance from an out-of-state insurer, without any evidence that the building itself was insured or otherwise related to interstate commerce. See Hicks, 106 F.3d at 190-191 (distinguishing Voss); see also United States v. Grossman, 608 F.2d 534, 537 (4th Cir. 1979) (finding interstate nexus where backhoe that was subject of arson was, inter alia, insured by out-of-state insurance company).

117 F.3d 796, 798 (5th Cir.) (upholding Section 844(i) conviction for arson of van used in rental operation), cert. denied, 118 S. Ct. 455 (1997); to United States v. Collins, 40 F.3d 95, 99-100 (5th Cir. 1994) (reversing Hobbs Act conviction for theft of car from individual), cert. denied, 514 U.S. 1121 (1995).

Defendant's reliance (Def. Br. 6-7) on United States v. Denalli, 73 F.3d 328 (11th Cir. 1996), and United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995), is similarly misplaced. Both decisions involved Section 844(i) prosecutions for arsons of private homes. In Denalli, the only connection to interstate commerce was the presence of a personal computer sometimes used by the owner to work at home. See 73 F.3d at 330-331. In Pappadopoulos, it was the home's connection to an interstate natural gas line. See 64 F.3d at 528.

The Hopewell United Methodist Church, in contrast, was not a private home or private automobile. It was, as discussed above, a building used by a local organization tied financially and otherwise to a nationwide organization of Churches. The funds that were collected by the Church flowed, through the national organization, to a variety of activities affecting commerce. The Hopewell United Methodist Church was therefore a building used in an activity affecting commerce, and the application of Section 844(i) to defendant's arson of the Church was constitutional.

CONCLUSION

Defendant's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing brief for the United States as appellee were sent by first class mail, this 30th day of November, 1998, to:

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