No. 03-1547

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JAY SCOTT BALLINGER,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA,

Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
Honorable Sarah Evans Barker

BRIEF FOR THE UNITED STATES AS APPELLEE

R. ALEXANDER ACOSTA
Assistant Attorney General

JESSICA DUNSAY SILVER
LINDA F. THOME
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - PHB 5014
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
(202) 514-4706

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FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

The appellant's jurisdictional statement is complete and correct.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether appellant waived or procedurally defaulted the issues raised by his petition under 28 U.S.C. 2255.

2. Whether, in light of *Jones* v. *United States*, 529 U.S. 848 (2000), counsel rendered ineffective assistance.

3. Whether, in light of *Jones* v. *United States*, 529 U.S. 848 (2000), the conviction violated appellant's due process rights.

STATEMENT OF THE CASE

This is an appeal from the dismissal of a petition under 28 U.S.C. 2255 in which petitioner-appellant Jay Scott Ballinger sought to vacate his unconditional plea of guilty. (R. 1, No. IP01-C-1750.)[1]

1. Ballinger originally was charged in 12 federal judicial districts in connection with the arson of 31 churches in Indiana, Tennessee, California, Kentucky, Missouri, South Carolina, Ohio, Alabama, and Georgia, committed between January, 1994, and February, 1999. In the Southern District of Indiana, where the largest number of offenses occurred, Ballinger was charged with one count of conspiracy under 18 U.S.C. 371, two counts of arson under 18 U.S.C.

[1] "R. __" refers to documents in the Record, by number, as shown on the district court docket sheet, and by district court docket number. "Br. __" refers to pages in the petitioner-appellant's brief in this Court. "App. __" refers to pages in the Short Appendix filed by the appellant.

844(i),[2] five counts of church arson under 18 U.S.C. 247(a)(1)[3], and five counts of use of fire to commit a federal felony under 18 U.S.C. 844(h).[4] (No. IP99-CR-0048-01.)

The charges in the other districts were as follows (R. 9, No. IP00-CR-0069-01):

---

[2] Section 844(i) provides a criminal penalty for "[w]hoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building * * * used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce[.]"

[3] Section 247(a) provides a criminal penalty for "[w]hoever, in any of the circumstances referred to in subsection (b) of this section --

> (1) intentionally defaces, damages, or destroys any religious real property, because of the religious character of that property, or attempts to do so[.]

Section 247(b) provides: "The circumstances referred to in subsection (a) are that the offense is in or affects interstate or foreign commerce."

[4] Section 844(h) provides, in pertinent part, that whoever "(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States * * * shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 20 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used[.]"

ORIGINAL DISTRICT	DOCKET NUMBER (S.D. Indiana)	CHARGES
E.D. Tennessee	IP00-CR-0024-01	1 count Section 247(a)(1)
C.D. California	IP00-CR-0025-01	1 count Section 844(i)
W.D. Kentucky	IP00-CR-0030-01	4 counts Section 247(a)(1)
E.D. Missouri	IP00-CR-0032-01	1 count Section 247(a)(1)
D. South Carolina	IP00-CR-0039-01	1 count Section 247(a)(1)
N.D. Indiana	IP00-CR-0045-01	2 counts Section 247(a)(1); 1 count Section 844(i)
W.D. Ohio	IP00-CR-0050-01	1 count Section 247(a)(1); 1 count Section 844(i)
N.D. Alabama	IP00-CR-0060-01	1 count Section 247(a)(1)
N.D. Ohio	IP00-CR-0065-01	1 count Section 247(a)(1)
N.D. Georgia		5 counts Section 247(a)(1); 5 counts Section 844(h)

In Georgia, one of the Section 247 counts carried a possible death penalty. See *United States* v. *Ballinger*, Nos. 99-CR-26, 99-CR-32 (N.D. Ga.).

2. Ballinger was represented in the Southern District of Indiana by Steven J. Riggs. Based upon incriminating statements made by the defendant and other evidence, Riggs concluded that there was "virtually no factual defense to any of the charges from any district." (R. 1, No. IP01-C-1750, Riggs Affidavit ¶ 4.) For that reason, he worked to negotiate a plea agreement disposing of all the charges. (*Ibid.*; see also R. 3, No. IP01-C-1750, ¶ ¶ 4, 5.) According to Riggs and

Ballinger, Riggs did not discuss with Ballinger the possibility of challenging the constitutionality of the statutes under which he was charged or challenging the adequacy of the factual basis for the interstate commerce elements. (R. 1, No. IP01-C-1750, Riggs Affidavit ¶ 4; R. 3, No. IP01-C-1750, ¶¶ 5, 8.)

In connection with the negotiation of the plea agreement, all but the Georgia charges were transferred to the Southern District of Indiana, pursuant to Rule 20, Fed. R. Crim. P., which permits the transfer of charges from one judicial district to another, with the consent of the United States, when a defendant wishes to plead guilty. Fed. R. Crim. P. 20(1).

On July 7, 2000, the parties submitted a plea agreement to the district court for the Southern District of Indiana, resolving all the pending charges in all of the districts except those in Georgia. (R. 4, No. IP00-CR-0069-01.) Ballinger agreed to plead guilty unconditionally to 29 counts, including one count of conspiracy to commit arson and church arson in violation of 18 U.S.C. 371, two counts of use of fire in the commission of a felony in violation of 18 U.S.C. 844(h), six counts of arson in violation of 18 U.S.C. 844(i), and 20 counts of church arson, in violation of 18 U.S.C. 247(a)(1) and (b). (R. 4, No. IP00-CR-0069-01 at 2-5.)

In the plea agreement, the United States agreed to dismiss the indictment in No. IP99-CR-0048-01, and proceed under an information in No. IP00-CR-0069-

01, which included two, rather than five, counts under 18 U.S.C. 844(h). (R. 4, No. IP00-CR-0069-01 at 2, 8.) This concession by the United States significantly reduced Ballinger's sentence, by eliminating three mandatory, consecutive, 20 year sentences. See n.4, *supra* (Section 844(h) provides for a mandatory, consecutive sentence of ten years for a first offense and 20 years for subsequent offenses).

The plea agreement recited the elements of each of the offenses to which Ballinger was pleading guilty, including the requirement, for Section 247(a)(1), that the offense "was in or affected interstate commerce," and, for Section 844(i), that the building "was used in interstate commerce or in an activity affecting interstate commerce." (R. 4, No. IP00-CR-0069-01 at 5-6). The parties agreed to recommend jointly that Ballinger be sentenced to 42 years, 7 months, consisting of 151 months as a guideline sentence for all counts except counts 7 and 12 (the Section 844(h) counts), and consecutive sentences of 120 months and 240 months respectively for those two counts. (*Id.* at 8-9.)

The plea agreement stated that, if Ballinger was sentenced to not more than 42 years, 7 months, he "expressly waives his right to appeal the conviction and sentence imposed on any ground" and "expressly agrees not to contest his sentence or the manner in which it was determined in any collateral attack,

including but not limited to, an action brought under Title 28, United States Code, Section 2255." (R. 4, No. IP00-CR-0069-01 at 10-11.) Ballinger and his attorney, Steven J. Riggs, both signed the agreement. (*Id.* at 14.)

The district court held a Rule 11 hearing on July 11, 2000. (R. 17, No. IP00-CR-0069-01.) Steven Riggs and Paul Kish (Ballinger's Georgia counsel, and his attorney in this appeal) both appeared for the defendant. (*Id.* at 1.) In response to questions from the court, Ballinger confirmed that he agreed to transfer of the charges from the other districts to the Southern District of Indiana (*id.* at 6-7); that he had read the Summary of Charges and Penalties, which set out the charges and maximum penalties (*id.* at 8-10); and that he understood and waived his right to have a grand jury consider the evidence against him in some of the districts (*id.* at 10-13). Ballinger told the court that he had reviewed the plea agreement before he signed it, had reviewed it carefully with Mr. Riggs, and had decided voluntarily to enter into the plea agreement. (*Id.* at 14.) He confirmed that he understood that he was waiving his right to appeal and his right to file a collateral attack on the sentence or the conviction. (*Id.* at 18-19.) He said that he had made these decisions voluntarily and on his own, with the advice of Mr. Riggs, and that he was satisfied with Mr. Riggs's representation. (*Id.* at 19-20.) Ballinger confirmed that he understood that he was giving up his right to a trial by

jury, where the government would be required to prove the charges beyond a reasonable doubt, where he would have the opportunity to present evidence in his defense, where he would be presumed innocent until proven guilty, and where he would have the right to appeal if convicted. (*Id.* at 20-26, 28-31.) He confirmed that he had read the stipulated factual basis submitted to the court, and that the facts presented in it were true. (*Id.* at 27-28.) He stated that his plea to all of the charges specified in the plea agreement was guilty. (*Id.* at 36-37.)

The court found that the factual basis "suffice[d] as a factual basis for the acceptance of pleas in each of the cause numbers referenced as a part of the caption at the top of the stipulated factual basis document." (R. 17, No. IP00-CR-0069-01 at 28.) The court found that the defendant was "fully competent and capable of entering informed pleas; that he [was] aware of the nature of the charges and the consequences of the pleas; and that his pleas of guilty [were] knowing and voluntary pleas, supported by an independent basis in fact, containing each of the essential elements of each of the counts of each of the offenses with which he [had] been charged." (*Id.* at 38.) The court accepted the plea and adjudged Ballinger guilty (*ibid.*), but explained that no decision would be made on whether to accept the plea agreement until the time of sentencing (*id.* at 18).

3. The district court held a sentencing hearing on November 14, 2000. Again both Mr. Riggs and Mr. Kish appeared on behalf of the defendant. (R. 16, No. IP00-CR-0069-01 at 1.) Mr. Riggs stated that both he and Mr. Kish had spoken to Ballinger "at length" concerning the plea agreement, and that "[b]ased upon those communications, and with some understanding of Mr. Ballinger's view, Mr. Ballinger agreed to the plea agreement." (*Id.* at 21-22.) Riggs explained that Mr. Kish was present at the hearing because of the pendency of the case against Ballinger in Georgia "that has potentially even more far reaching consequences to him" than the case at hand. (*Id.* at 22.)

In response to the court's questions, Ballinger confirmed his agreement to the sentencing provisions set forth in the plea agreement. (R. 16, No. IP00-CR-0069-01 at 8-9.) In accord with the plea agreement, and based upon the presentence report prepared by the probation office, the court found that the guideline range for the conspiracy, church arson, and arson counts was 108 to 135 months, and that a one-level upward departure was appropriate, resulting in a sentence on these counts of 151 months, followed by the mandatory consecutive sentences of 120 months and 240 months on the Section 844(h) counts. (*Id.* at 39-40, 44.) The court complimented counsel for both sides "for a first rate lawyerly

effort" in resolving the charges from multiple jurisdictions in one plea agreement. (*Id.* at 37).

4. Ballinger did not appeal his conviction or sentence. On November 20, 2001, he filed a petition under 28 U.S.C. 2255 seeking to vacate and set aside his sentence and conviction in the cases docketed in the Southern District of Indiana. (R. 1, No. IP01-C-1750.) In the petition, he contended that his attorney, Steven Riggs, had rendered ineffective assistance because he had not challenged the constitutionality of the Church Arson Prevention Act, 18 U.S.C. 247, or questioned whether there were sufficient facts to support the interstate commerce elements of the Section 247 and Section 844(i) counts. (R. 2, No. IP01-C-1750 at 3).

Ballinger supported his petition with an affidavit in which he stated that Mr. Riggs had never discussed with him any possible challenges to the charges against him in the Southern District of Indiana or any of the other districts. (R. 3, No. IP01-C-1750 ¶ 5.) Based upon Mr. Riggs's advice, according to Ballinger, he "decided to try and get the best possible sentence on all the cases by transferring them to Indiana and entering a plea of guilty." (*Id.* at ¶ 5). He claimed that he learned in December 2000 from his attorney in Georgia that there was a potential challenge to the statutes he was charged with violating, based upon judicial

decisions that had been issued before he had entered into the plea agreement in Indiana. (*Id*. at ¶ 8). If Mr. Riggs had discussed this issue with him, he stated, "I would have given serious consideration to challenging the Indiana cases, and all of the charges from the other districts as well." (*Id.* at ¶ 8.)

Ballinger also supported his petition with an affidavit from Steven Riggs regarding his representation. (R. 1, No. IP01-C-1750, Riggs Affidavit.) Mr. Riggs stated that, because of "numerous incriminating statements" and other evidence, he had concluded that "there was virtually no factual defense to any of the charges [pending against Ballinger] in any district." (*Id.* at ¶ 4.) Thus, his "main focus was on whether agents acted properly in questioning Mr. Ballinger." (*Id.* at ¶ 4.) He stated that did not "discuss with Mr. Ballinger the possibility of directly attacking the statutes he was charged under" or "whether there was sufficient evidence of an impact on interstate commerce to even prove the federal charges that the government was using in the various districts." (*Id.* at ¶ 4.) Instead, he had worked on obtaining a global plea agreement. (*Id.* at ¶ 4.)

The United States opposed the petition. (R. 8, No. IP01-C-1750.) The United States argued that, with the possible exception of his claim of ineffective assistance of counsel, Ballinger had waived or procedurally defaulted his claims by pleading guilty and waiving his right to appeal and to file a collateral attack.

(*Id.* at 7-8, 12-14.) As to his claim of ineffective assistance of counsel, the United States argued that Ballinger had failed to establish either that his counsel's performance was objectively unreasonable or that he was prejudiced by any errors of counsel. (*Id.* at 9-10.) As to prejudice, the United States argued that Ballinger's allegation that he would have given "serious consideration" to going to trial rather than pleading guilty was insufficient to establish that, but for his counsel's errors, he would not have pled guilty. (*Id.* at 9-10 & n.8.) Nor was counsel's performance inadequate. On the one hand, no court had held either Section 844(i) or Section 247 to be unconstitutional. On the other, the plea agreement negotiated by Ballinger's attorney had provided him with substantial benefits, including a certain disposition, avoidance of ten trials in ten different jurisdictions, and a lighter sentence. (*Id.* at 10-11.) Thus, the United States argued, there were good strategic reasons for recommending the plea and foregoing what would have been a fruitless challenge to the constitutionality of the charges. (*Id.* at 10.) And the mere fact that his counsel had not negotiated a conditional plea did not render his assistance ineffective. (*Id.* at 10.) The United States further argued that there was no merit to Ballinger's constitutional challenges to the statutes, either on their face or as applied to his conduct. (*Id.* at 14-22.)

The district court dismissed the petition. (App. 14.) The court held that Ballinger's failure to file a direct appeal constituted a procedural default. (App. 15.) An issue not raised on appeal, the court held, may not be challenged on collateral review absent a showing of good cause for the failure to raise it, and actual prejudice resulting from the failure; and Ballinger had shown neither cause nor prejudice. (App. 15.) Citing *Jones* v. *United States*, 167 F.3d 1142 (7th Cir. 1999), the district court concluded that an agreement not to file a collateral attack was enforceable as a general rule, and could be challenged "'only with respect to those discrete claims which relate directly to the negotiation of the waiver.'" (App. 15.) The court found that the claims asserted in Ballinger's petition did "not relate to the presence, validity, or effect of his waiver." (App. 16.) In addition, the court found that there was a sufficient factual basis for the plea, and that by pleading guilty, Ballinger had admitted every element of the offenses charged. (App. 16.) Nor did the court find any merit to his contention that his attorney had "rendered either deficient performance in this case or committed errors which caused prejudice to Ballinger. (App. 16, citing *Strickland* v. *Washington*, 466 U.S. 668, 694-697 (1984).) The court also denied Ballinger's request for an evidentiary hearing because it found the record was sufficient to permit a full and fair resolution of his claims. (App. 16.)

Ballinger submitted a notice of appeal and request for certificate of appealability, dated August 12, 2002, but these documents were not docketed by the district court until February 4, 2003. (R. 12, 13, 14, No. IP01-C-1750.) The district court found that the notice of appeal was timely, but denied the request for a certificate of appealability, ruling: "For the reasons stated in connection with the denial of Mr. Ballinger's motion for relief pursuant to 28 U.S.C. § 2255, the court finds no basis on which to conclude that he will be able to make 'a substantial showing of the denial of a constitutional right.'" (R. 17, No. IP01-C-1750 at 3.)

On July 11, 2003, this Court granted Ballinger's request for a certificate of appealability on the following issues: "whether, in light of *Jones* v. *United States*, 529 U.S. 848 (2000), counsel rendered ineffective assistance or the conviction violated Mr. B[a]llinger's due process rights." Counsel were also directed "to brief the questions of whether Mr. B[a]llinger waived these issues in his plea agreement and whether he procedurally defaulted these issues by failing to litigate a direct appeal."

5. Meanwhile, in the Northern District of Georgia, Ballinger filed a motion to dismiss the indictments pending in that district on December 13, 2000, approximately one month after his sentencing in the Southern District of Indiana. *United States* v. *Ballinger*, Nos. 99-CR-26-ALL, 01-CR-32-ALL (N.D. Ga.). The

district court denied the motion, and Ballinger subsequently pled guilty to 4 counts of violating Section 247(a)(1), but conditioned his plea upon a judicial determination of the constitutionality of Section 247, both on its face and as applied to his conduct. See *United States* v. *Ballinger*, 312 F.3d 1264, 1265-1266 (11th Cir 2002), petition for rehearing pending, Nos. 01-14872, 01-15080.

Ballinger appealed his Georgia conviction, and a divided panel of the Eleventh Circuit reversed. The panel unanimously upheld the constitutionality of the statute. 312 F.3d at 1268, 1276. But the majority concluded, as a matter of statutory construction, that the statute did not apply to Ballinger's conduct, and reversed his conviction. *Id.* at 1268-1276.

STATEMENT OF FACTS

The facts are set out in the Stipulated Factual Basis submitted to the court with the plea agreement (App. 1-13):

Jay Scott Ballinger "terms himself a missionary of Lucifer." (App. 1.) "Beginning in approximately the 1980's and continuing through his adult life, [he] travelled extensively throughout the United States, while maintaining his permanent residence in Indiana." (App. 1.) "Beginning in January 1994 and continuing until early 1999, Ballinger and [his girlfriend Angela] Wood set numerous church fires throughout the United States." (App. 2.) During their

travels, Ballinger and Wood lived in hotels "on a short term basis" and "did not usually stay in one place for more than a few weeks at a time." (App. 2.) They remained in a few places "for a few months at a time, including around the Indianapolis, Indiana, area, in Memphis, Tennessee, and in Myrtle Beach, South Carolina." (App. 1.) Wood supported the pair by working, on a short term basis, as a dancer "at numerous nightclubs throughout the United States." (App. 2.)

Ballinger stipulated that he set at least twenty-six fires at churches in eight different states, usually with Wood's assistance. (App. 2.) They set most of the fires late at night at isolated churches in rural areas. (App. 3.) They set the fires because of the religious character of the buildings, and never set fire to any other structures but churches. (App. 3.) In some instances they were assisted by a friend of Ballinger's, Donald Puckett. (App. 3, see App. 1.) Ballinger and Wood travelled "throughout the United States to set the fires, travelling on interstate and national highways, and purchasing gasoline and other goods as they travelled from state to state." (App. 13.)

The churches Ballinger burned engaged in a variety of economic activities and had various types of interstate connections. Most purchased goods and services from out of state or were insured by an out-of-state insurer. (App. 3-12.) And most belonged to interstate organizations and sent or received funds across

state lines from or through those organizations. (App. 3-12.) The arsons to which Ballinger pled guilty in this case caused over $3.5 million in damage. (R. 16, No. IP00-CR-0069-01 at 12, 33-34.)[5]

SUMMARY OF ARGUMENT

Ballinger has waived or procedurally defaulted all claims except his claim of ineffective assistance of counsel. A guilty plea constitutes not only an admission of all the facts alleged in the indictment or set forth in the stipulated factual basis, it is also an admission of guilt on all elements of the crime. A voluntary, knowing, and intelligent plea of guilt by an accused who is advised by competent counsel may not be collaterally attacked. Even a claim that a plea was not knowing, voluntary, or intelligent may be procedurally defaulted if it is not raised on direct appeal. In this case, Ballinger waived any challenge to the adequacy of the factual basis for the offenses when he pled guilty. He procedurally defaulted the right to collaterally attack his conviction on that ground when he failed to take a direct appeal. Only his claim of ineffective assistance of counsel is not subject to waiver or procedural default.

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[5] This figure includes losses from the fires at only 21 of the 26 churches burned. (R. 16, No. IP00-CR-0069-01 at 33.)

Ballinger was not denied effective assistance of counsel. First, his counsel's performance was objectively reasonable. The plea agreement that he negotiated provided Ballinger with substantial benefits: a certain disposition of the charges against him and a substantially lower sentence than he would have received had he been convicted after trial. Moreover, counsel's failure to challenge the sufficiency of the interstate commerce evidence was objectively reasonable. A challenge to the basis for the interstate commerce element of the Section 247 charges was without merit, since Ballinger's travel in interstate commerce to commit church arson satisfied the requirement that the "offense is in or affects interstate or foreign commerce." 18 U.S.C. 247(b). Even assuming a challenge to the Section 844(i) counts would have been successful, elimination of those counts would not have reduced Ballinger's sentence. Second, for substantially the same reasons, Ballinger has not alleged sufficient facts to establish that he was prejudiced by his counsel's failure to raise the interstate commerce issues.

Ballinger's conviction did not violate his due process rights. Even if this claim has not been waived or procedurally defaulted, there is no merit to Ballinger's contention that his guilty plea is invalid because it was not knowing and intelligent or because he was actually innocent of the offenses to which he pled guilty. His contention that his plea was not knowing and intelligent should

be rejected for the same reasons as his claim that he was denied effective assistance of counsel. His claim of actual innocence should also be rejected. The evidence that he traveled in interstate commerce to commit church arson is sufficient to sustain his conviction on the Section 247 counts. This Court need not decide whether the Section 844(i) counts would have been sustained. In considering a claim of actual innocence, the court must take into account more serious charges that the government has foregone during plea negotiations. *Bousley* v. *United States*, 523 U.S. 614, 623 (1998). Because the government dismissed more serious charges in this case – three counts of 18 U.S.C. 844(h)(1) violations, carrying a sentence of 60 years – and because there was sufficient evidence to sustain those charges, Ballinger cannot establish actual innocence.

ARGUMENT

I

PETITIONER HAS WAIVED OR PROCEDURALLY DEFAULTED ALL CLAIMS EXCEPT INEFFECTIVE ASSISTANCE OF COUNSEL

The district court ruled that Ballinger had waived and procedurally defaulted the claims in his Section 2255 petition (App. 14-16). This ruling is "reviewed for clear error in factual matters and de novo as to issues of law." *Galbraith* v. *United States*, 313 F.3d 1001, 1006 (7th Cir. 2002).

As a general matter, a guilty plea "constitutes a waiver of non-jurisdictional defects occurring prior to the plea." *United States* v. *Adams*, 125 F.3d 586, 588 (7th Cir. 1997), quoting *United States* v. *Robinson*, 20 F.3d 270, 273 (7th Cir. 1994). By pleading guilty, a defendant admits all the facts alleged in the indictment, *United States* v. *Walton*, 36 F.3d 32, 34 (7th Cir. 1994), and "'all the elements of a formal criminal charge.'" *United States* v. *Martin*, 147 F.3d 529, 533 (7th Cir. 1998), quoting *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). "By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *United States* v. *Broce*, 488 U.S. 563, 570 (1989). "It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *Bousley* v. *United States*, 523 U.S. 614, 621 (1998), quoting *Mabry* v. *Johnson*, 467 U.S. 504, 508 (1984). Thus, in a collateral attack on a guilty plea "the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary." *Broce*, 488 U.S. at 569. Moreover, even a claim that a plea was involuntary or

unintelligent is procedurally defaulted if it is not raised on direct appeal, unless the petitioner can show cause and actual prejudice. *Bousley*, 523 U.S. at 621-622.[6]

Claims of ineffective assistance of counsel, however, may be preserved where other claims have been waived or defaulted. A claim of ineffective assistance may be raised in a collateral attack even if not raised in a direct appeal. *Massaro* v. *United States*, 123 S. Ct. 1690 (2003). Ballinger, therefore, has neither waived nor procedurally defaulted his claim of ineffective assistance of counsel.

Ballinger has waived and procedurally defaulted all other claims, including his contention that his conviction should be reversed because the stipulated facts are not sufficient to establish the interstate commerce elements of the crimes to which he pled guilty. (Br. 17-18, 27, 31.) By pleading guilty unconditionally, he admitted not only the facts set forth in the stipulated factual basis, but also all the

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[6] An express waiver in the plea agreement of the right to appeal or to file a collateral attack is "valid and must be enforced" if it is knowing and voluntary. *United States* v. *Sines*, 303 F.3d 793, 798 (7th Cir. 2002). Only a claim that "relates directly to the negotiation of the waiver" is not extinguished. *Ibid.* Such waivers are enforced, however, "only to the extent of the agreement." *Ibid.* Thus, where a defendant waives only his right to bring a collateral attack to contest his sentence, he does not thereby waive his right to challenge his conviction in a collateral attack. *Bridgeman* v. *United States*, 229 F.3d 589, 591-592 (7th Cir. 2000). We therefore do not rely upon the express waiver in the plea agreement as a bar to a collateral attack on Ballinger's conviction. See R. 4, No. IP00-CR-0069-01 at 10-11.

elements of the offenses charged, and thereby waived any contention that he was not guilty. By failing to take a direct appeal, he procedurally defaulted any claim (other than ineffective assistance of counsel) that his plea was not voluntary and intelligent. *Bousely*, 523 U.S. at 621; *Massaro*, 123 S. Ct. at 1693-1696.

A petitioner may overcome a procedural default by showing cause for his default and proving that he was prejudiced by it. See *Bousley*, 523 U.S. at 622. But Ballinger cannot establish either in this case. As in *Bousley*, the legal basis for his claim was available to his counsel before his plea. *Id*. at 622-623. His real argument is that his counsel's failure to mount such a challenge constituted ineffective assistance. As we establish below (Part II, *infra*), there is no merit to that claim. Nor, as demonstrated below (Part II.B. *infra*), can he show prejudice.

Petitioner relies upon *Bousley* for his contention that, notwithstanding his guilty plea, he should be permitted to claim actual innocence by challenging the adequacy of the factual basis for the interstate commerce elements, on the basis of the Supreme Court's decisions in *Jones* v. *United States*, 529 U.S. 848 (2000), and *United States* v. *Morrison*, 529 U.S. 598 (2000). (Br. 28-31). But an examination of the circumstances in *Bousley* and in this case reveals that that reliance is misplaced. The petitioner in *Bousley* pled guilty to "using" a firearm "during and in relation to a drug trafficking crime," in violation of 18 U.S.C. 924(c)(1). His

plea had been entered five years *before* the Supreme Court's decision in *Bailey* v. *United States*, 516 U.S. 137, 144 (1995), which interpreted the term "use" to require the Government to prove "active employment of the firearm." Bousley contended, in a petition under Section 2255, that his plea had not been knowing and voluntary because he had been misinformed as to the true nature of the crime to which he had admitted guilt. *Bousley*, 523 U.S. at 616. The Supreme Court held that he had procedurally defaulted this claim by failing to raise it on direct appeal, *id*. at 618-623, but nonetheless remanded for a determination whether, using the correct legal standard, and "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Id.* at 623, internal quotations and citations omitted.

The ruling in *Bousley* was anticipated by this Court in *Lee* v. *United States*, 113 F.3d 73 (7th Cir. 1997), and *Stanback* v. *United States*, 113 F.3d 651, 654-656 (7th Cir. 1997). In both *Lee* and *Stanback*, this Court permitted petitioners to challenge the adequacy of the factual bases for their guilty pleas to determine whether there was sufficient evidence to establish the "use" prong of Section 924(c). In both cases, the guilty pleas had been entered *before* the decision in *Bailey*.

In this case, in contrast, Ballinger pled guilty *after* the decisions in *Jones* and *Morrison*. As this Court explained in *Martin*, that distinction is a significant one. 147 F.3d at 533. In *United States* v. *Martin*, 147 F.3d 529, the defendant challenged his plea of guilty to a violation of Section 844(i) on the ground that, under the decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), the evidence was insufficient to establish the interstate commerce element required by the statute. This Court held that Martin had "admitted every element of the offense by pleading guilty" and had waived any right to argue on appeal that the element had not been satisfied. 147 F.3d at 533. *Martin* specifically distinguished *Stanback* on the ground that that decision involved a challenge to a plea entered before the Supreme Court's decision in *Bailey*. Because *Lopez* had already been decided and thus "the law was established" when Martin pled guilty, this Court held, "[i]t should have been apparent that the stipulated facts were intended to establish the commerce element of § 844(i)." *Ibid.* Martin had therefore waived his right to challenge the sufficiency of those facts on appeal. *Ibid.*

The plea agreement in this case recited each element of the statutes involved, including the interstate commerce elements of both Section 247 and Section 844(i). (R. 4, No. IP00-CR-0069-01 at 5-6.) The stipulated factual basis included facts establishing that Ballinger traveled across state lines to commit the

offenses to which he was pleading guilty and that the churches he burned engaged in economic activities affecting interstate commerce. At the very least, these facts "are colorably probative and they may not be challenged on appeal." *Martin*, 147 F.3d at 533. Thus, unless this Court concludes that Ballinger was deprived of effective assistance of counsel, he is bound by his plea of guilty and has waived any further inquiry into the adequacy of the stipulated facts.

II

BALLINGER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

This Court applies *de novo* review to a district court's ruling on effective assistance of counsel. *Coleman* v. *United States*, 318 F.3d 754, 757 (7th Cir. 2003), cert. denied, 124 S. Ct. 333 (2003). "This analysis takes place in the context of the presumption that an attorney's conduct is reasonably proficient." *Galbraith* v. *United States*, 313 F.3d 1001, 1008 (7th Cir. 2002), citing *United States* v. *Godwin*, 202 F.3d 969, 973 (7th Cir. 2000), cert. denied, 529 U.S. 1138 (2000); see also *Coleman*, 318 F.3d at 758 ("Our scrutiny of counsel's performance is highly deferential").

To establish that he was denied effective assistance of counsel in connection with his guilty plea, Ballinger must show (1) that the advice he received from his attorney was not "'within the range of competence demanded of attorneys in

criminal cases'" *Hill* v. *Lockhart*, 474 U.S. 52, 56 (1985), quoting *McMann* v. *Richardson,* 397 U.S. 759, 771 (1970); and (2) that he was prejudiced by his attorney's performance, *i.e.*, "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. Ballinger has established neither of these factors in this case.

A. Riggs's Performance Was Objectively Reasonable

A defendant seeking to establish that his counsel's performance was objectively unreasonable must identify "specific acts or omissions of his counsel which he alleges constitute ineffective assistance." *Menzer* v. *United States*, 200 F.3d 1000, 1003 (7th Cir. 2000). The court "then determine[s] whether, under all the circumstances of th[e] case, these alleged acts or omissions were made outside the wide range of professionally competent assistance." *Ibid.*

In his petition, Ballinger contended that Riggs was ineffective because he failed to challenge the facial constitutionality of the Church Arson Prevention Act, 18 U.S.C. 247(a)(1) and (b), or to contest the sufficiency of the evidence to establish the interstate commerce elements of either Section 247 or of 18 U.S.C. 844(i). (R. 1, No. IP01-C-1750 at 5; R. 2, No. IP01-C-1750 at 3-25.) On appeal, he contends only that Mr. Riggs should have recognized that the alleged

insufficiency of the interstate commerce evidence constituted a valid factual defense to the charges. (Br. 23-27.) In light of all the circumstances of this case, however, Mr. Rigg's performance was within "the wide range of professionally competent assistance." *Menzer*, 200 F.3d at 1003. The plea agreement provided substantial benefits to Mr. Ballinger, providing him with a certain disposition and a significantly shorter sentence than he would have received had he been convicted after trial. Moreover, a challenge to the adequacy of the factual basis for the interstate commerce elements was unlikely to have provided Ballinger with a better outcome.[7]

1. The Plea Agreement Provided Substantial Benefits To Ballinger

Before he pled guilty, Ballinger was facing charges and separate trials in 11 different federal jurisdictions. By consolidating the charges from ten of the districts (all but the Northern District of Georgia) in one jurisdiction, and pleading guilty, Ballinger obtained not only a certain disposition of the charges, but also a *substantially* lower sentence.

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[7] Although Ballinger does not raise this question on appeal, there can be little doubt that Section 247(a)(1) and (b) is constitutional. See *United States* v. *Ballinger*, 312 F.3d 1264, 1268 (11th Cir. 2002), petition for rehearing pending, Nos. 01-14872, 01-15080; *id.* at 1276, Hall, J., concurring.

With the sentence imposed under the plea agreement, it is possible for Ballinger to complete his sentence during his lifetime. (R. 16, No. IP00-CR-0069-01 at 20.) Proceeding to trial, in contrast, could have resulted in a sentence much longer than his natural lifetime. First, before the plea agreement, he was charged with five counts of violating Section 844(h), which would have produced a mandatory consecutive sentence of 90 years. Under the plea agreement, Ballinger pled guilty to only two counts of Section 844(h), thus limiting the mandatory consecutive portion of his sentence to 30 years. Second, Ballinger received a three level reduction in the base offense level for the remaining counts for acceptance of responsibility and because he had timely notified authorities of his intention to plead guilty. (R. 4, No. IP00-CR-0069-01 at 12.)

Third, because sentence was imposed in one proceeding, Ballinger benefitted from the rules for calculation of sentences for multiple counts in Part D of Chapter 3 of the Sentencing Guidelines. U.S.S.G. Ch. 3 Pt. D. Under the plea agreement, the sentence for the conspiracy count and all 26 of the Section 247 and Section 844(i) counts in all of the ten districts was 151 months. In contrast, conviction on just one count of Section 247 in one of the jurisdictions in which he was charged would have resulted in a sentencing range of at least 87 to 108

months.[8] Obviously, additional convictions in other districts would quickly have resulted in combined sentences much greater than 151 months.

By negotiating this plea, Ballinger's counsel obtained a substantial benefit for him. That benefit is a significant factor in evaluating counsel's performance. See *Williams* v. *United States*, 343 F.3d 927, 928-929 (8th Cir. 2003) (advice to maintain guilty plea reasonable because it reduced defendant's sentencing range to 140 to 175 months from 210 to 262 months); cf., *Tezak* v. *United States*, 256 F.3d 702, 712 (7th Cir. 2001) (rejecting ineffective assistance of counsel claim where plea agreement reduced sentence by 15 years).

2. Failure to Challenge The Sufficiency Of The Interstate Commerce Evidence Was Not Objectively Unreasonable

Ballinger contends that, under *Jones* v. *United States*, 529 U.S. 848 (2000), *Morrison* v. *United States*, 529 U.S. 598 (2000), and a series of decisions from other circuits in cases involving the burning of churches, the evidence in this case would have been found insufficient to satisfy the interstate commerce elements of both Section 247 and Section 844(i). (Br. 14-21, 27, 28-31) Thus, he argues, his

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[8] The base offense level for church arson is 24. See U.S.S.G. § 2K1.4. With a three level adjustment for intentional selection of the victim because of religion, the adjusted offense level would be 27. With a criminal history category of III (see Presentence Investigative Report ¶ 170) the sentencing range would be 87 to 108 months.

counsel failed to provide effective assistance because he did not challenge the sufficiency of this evidence. As explained below, however, the evidence in the stipulated factual basis was sufficient to support Ballinger's conviction on the Section 247 counts. In turn, those counts would have served as predicates for the conspiracy and Section 844(h) counts. And, as we have demonstrated, conviction on those counts, even without conviction on the Section 844(i) counts, would have resulted in a longer sentence than he obtained through his plea bargain. Thus, a challenge to the evidence, while jeopardizing the benefits he gained by pleading guilty, would have resulted in no better outcome.

a. The Section 247 Counts

Twenty of the 26 arson charges to which Ballinger pled guilty were under Section 247(a)(1). (See R. 9, No. IP00-CR-0069-01). The stipulated factual basis established that Ballinger traveled in interstate commerce to commit these offenses, and was therefore sufficient to establish the interstate commerce element in Section 247(b). The Section 247 violations formed the predicate for the conspiracy and Section 844(h) counts. His counsel's failure to challenge these counts, therefore, was not an omission that rendered his representation objectively unreasonable.

Congress may use its Commerce Power to regulate "three broad categories of activity:" (1) "'the use of the channels of interstate commerce;'" (2) "'the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;'" and (3) "'those activities that substantially affect interstate commerce.'" *Morrison*, 529 U.S. at 608-609, quoting *United States* v. *Lopez*, 514 U.S. 549, 558-59 (1995). The decisions in both *Jones* and *Morrison* concern only the third *Lopez* category: activities that substantially affect interstate commerce. *Morrison*, 529 U.S. at 609; *Jones*, 529 U.S. at 854, 857-858. The interstate commerce element of Section 247, however, requires proof that "the offense is in or affects interstate commerce." 18 U.S.C. 247(b). Thus, the element is established if the government proves either that the offense was *in* interstate commerce, or that it affected interstate commerce. The decisions in *Morrison* and *Jones* would be relevant to the second method of establishing this element (*i.e.*, by proving an effect on interstate commerce). But they have little relevance to determining the adequacy of the facts to establish that the offenses in this case were "in commerce," a requirement that implicates the first two *Lopez* categories. Cf. *United States* v. *Schaffner*, 258 F.3d 675, (7th Cir. 2001) (finding prohibition of interstate transportation of child pornography, 18

U.S.C. 2251(a), valid legislation under the first two *Lopez* categories), cert. denied, 534 U.S. 1148 (2002).

It is well-established that the movement of people across state lines is a form of interstate commerce. *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 573 (1997). Congress has the authority to keep the channels of interstate commerce free from "immoral and injurious uses." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256 (1964), quoting *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917). And Congress may regulate the movement of people and things in interstate commerce. *Lopez*, 514 U.S. at 558. Thus, Congress may criminalize travel across state lines to commit a criminal act, even if the criminal conduct is purely local and even if it is noncommercial. *Caminetti* v. *United States*, 242 U.S. 470 (1917); *Hoke* v. *United States*, 227 U.S. 308 (1913); cf. *Morrison*, 529 U.S. at 613-614 n.5 (observing that the courts of appeals uniformly had sustained the validity of 18 U.S.C. 2261(a)(1), which provides criminal penalties for any person who travels across state lines with the intent to commit domestic violence).

The plain language of Section 247(b) includes offenses where the defendant travels across state lines to commit the offense of church arson. The interstate commerce provision in Section 247(b) is nearly identical to that of 18 U.S.C.

922(g)(1), which makes it unlawful for a felon to "possess in or affecting commerce, any firearm[.]" The Supreme Court has held that proof that the firearm has moved in interstate commerce is sufficient to satisfy this interstate commerce element, even where the felon's possession of the firearm is purely intrastate. *Scarborough* v. *United States*, 431 U.S. 563, 571-572 (1977); see also *United States* v. *Bass*, 404 U.S. 336, 350-351 (1971). Since the Supreme Court's decisions in *Lopez*, *Morrison*, and *Jones*, this Circuit consistently has reaffirmed this standard for Section 922(g)(1). See, *e.g.*, *United States* v. *Lemons*, 302 F.3d 769, 772-773 (7th Cir.) (collecting cases), cert. denied, 537 U.S. 1049 (2002). Just as the phrase "possess in or affecting interstate commerce" in Section 922(g)(1) includes possession of a firearm after it has moved in interstate commerce, the term "offense is in or affects interstate commerce" in Section 247(b) includes the commission of the offense after moving in interstate commerce, *i.e.*, after crossing state lines.

Moreover, by using the term "in or affecting interstate commerce" in Section 247(b), Congress signaled its intent to apply its full powers under the Commerce Clause. See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 115 (2001) ("the phrase 'affecting commerce' indicates Congress' intent to regulate to the outer limits of its authority under the Commerce Clause"); *Allied-Bruce*

Terminix Cos. v. *Dobson*, 513 U.S. 265, 273 (1995). As set forth above, there is no dispute that this authority includes the power to regulate interstate travel.

If there is any doubt about the meaning of Section 247(b), its applicability to cases where the defendant crosses state lines to commit church arson is supported by the history of the statute. As originally enacted, Section 247 applied only when "in committing the offense, the defendant travels in interstate or foreign commerce, or uses a facility or instrumentality of interstate or foreign commerce in interstate or foreign commerce." 18 U.S.C. § 247(b) (1995). In 1996, in the wake of what was perceived as a national epidemic of attacks on churches, Congress unanimously enacted the Church Arson Prevention Act. Congress made statutory findings in the 1996 Act that incidents of damage and destruction of religious property "pose a serious national problem," that "[c]hanges in Federal law are necessary to deal properly with this problem," and that "the problem is sufficiently serious, widespread, and interstate in scope to warrant Federal intervention to assist State and local jurisdictions." Pub. L. No. 104-155, § 2, 110 Stat. 1392. Thus, the purpose of the 1996 amendments was to broaden the applicability of the law. The House Report on the 1996 Act explained that the language of the old version of the statute was "virtually impossible to satisfy, thereby making the section relatively useless." H.R. Rep. No. 621, 104th Cong., 2d Sess. 2 (1996)

(House Report). According to the Report, the 1996 Act "cures this problem by replacing current language with the interstate commerce requirement that the 'offense is in or affects interstate or foreign commerce.'" *Ibid.* As the Section-By-Section Analysis in the Report stated:

> Under this new formulation of the interstate commerce requirement, the Committee intends that *where in committing, planning, or preparing to commit the offense*, *the defendant either travels in interstate or foreign commerce*, or uses the mail or any facility or instrumentality of interstate or foreign commerce, the statute will be satisfied.

Id. at 7 (emphasis added). The Report explained that this revision of the interstate commerce element of Section 247 "*expand[ed]* the reach of section 247 to specifically include all church arsons motivated by religious, ethnic, or racial considerations." *Id.* at 8 (emphasis added).

In light of Congress's intent to broaden the reach of the statute, the most plausible construction of the interstate commerce element as a whole is that Congress intended the term "in interstate commerce" as a shorthand for the previous version of the interstate commerce element in the statute, and that it added the term "affects interstate commerce" to broaden the statute's reach to other circumstances.

A divided panel of the Eleventh Circuit nonetheless rejected this reading of Section 247(b) in *United States* v. *Ballinger*, 312 F.3d 1264, 1273-1274 (11th Cir. 2002), petition for rehearing pending, Nos. 01-14872, 01-15080. The panel majority did not question Congress's authority to prohibit interstate travel to commit an offense. 312 F.3d at 1269. And it acknowledged the House Report's statement expressing Congress's intent that Section 247(a) should apply where the defendant has traveled across state lines in the commission of church arson. *Id.* at 1273-74. Yet, the majority concluded that the statute does not apply to travel across state lines because it does not expressly prohibit "travel, or the use of any of the channels of interstate commerce, to commit a church arson." *Id.* at 1273 & n.8 (identifying several federal criminal statutes that expressly prohibit interstate travel in the commission of an offense). Further, according to the majority, the offense prohibited by the statute is arson, and arson, an intrastate activity, cannot occur "in commerce." *Id.* at 1269. But the majority's reasoning proves too much, since it would mean that Congress prohibited an impossibility, and would read the "in commerce" language out of the statute. This reasoning is also inconsistent with the undisputed construction of similar language in the felon-in-possession statute, 18 U.S.C. 922(g)(1), which applies when the firearm has moved in

interstate commerce, even where the felon's possession of the firearm is purely intrastate. See *Scarborough*, *supra*; *Lemon*, *supra*.

The stipulated factual basis in this case establishes that Ballinger traveled in interstate commerce to commit church arson. He stipulated that he "travelled extensively throughout the United States, while maintaining his permanent residence in Indiana" and that, "[i]n his extensive travels, [he] studied and practiced his religious beliefs as a Luciferian." (App. 1.) He and Angela Wood traveled around the United States, living "primarily in hotels on a short term basis" (App. 2). Although they stayed in a few places "for a few months at a time," "they usually did not stay in one place for more than a few weeks at a time." (App. 2.) Wood worked as a dancer "on a short term basis" to support them. (App. 2.) During these travels, they set church fires "throughout the United States." (App. 2.) As the detailed listing of their church burnings illustrates, in many instances, they set fires in different states over a short time period, or while in transit from one state to another. (App. 3-12.)

Because any challenge to the factual basis for the interstate commerce element of the Section 247 counts would have failed, counsel did not render ineffective assistance by failing to mount such a challenge.

b. The Section 844(i) Counts

Ballinger also contends that the evidence in the stipulated factual basis was not sufficient to establish that the churches that were the subjects of the six Section 844(i) counts were "used in interstate or foreign commerce or in any activity affecting interstate commerce," as required by that statute. We recognize that the courts of appeals have differed on the appropriate test to apply to church arsons prosecuted under Section 844(i). Compare, *e.g.*, *United States* v. *Grassie,* 237 F.3d 1199, 1205-1208 (10th Cir.) (holding that interstate commerce element of Section 844(i) may be satisfied by showing of "any effect at all on interstate commerce" where defendant stipulated that churches were "engaging in activities affecting interstate commerce"), cert. denied, 533 U.S. 960 (2001); with *United States* v. *Odom*, 252 F.3d 1289,1295-1297 (11th Cir. 2001) (requiring a showing that a church engaged in activities with a *substantial* effect on interstate commerce), cert. denied, 535 U.S. 1058 (2002); *United States* v. *Johnson*, 194 F.3d 657, 663-666 (5th Cir. 1999), vacated and remanded, 530 U.S. 1201 (2000), reinstated, 246 F.3d 749, 752 & n.5 (5th Cir. 2001) (same). But this Court does not need to resolve this question. The evidence was sufficient to sustain the Section 247 counts. And those counts alone could serve as the predicates for the conspiracy and Section 844(h) counts. Because Ballinger's sentence would have

been longer, even without the Section 844(i) counts, had he gone to trial instead of pleading guilty, (see Part II.A.1, *supra*), his counsel's failure to challenge these six counts was not objectively unreasonable.

B. Ballinger's Allegations Do Not Establish That He Was Prejudiced By His Counsel's Representation

The prejudice inquiry "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985). The petitioner must establish that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Ibid.* This "inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial." *Ibid.* For example, "where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Ibid.* A claim of prejudice must be supported by objective evidence; self-serving statements by the defendant that he would not have pled guilty had counsel performed differently are not sufficient. See *Toro* v. *Fairman*,

940 F.2d 1065, 1068 (7th Cir. 1991), cert. denied, 505 U.S. 1223 (1992); *Berkey* v. *United States*, 318 F.3d 768, 772-773 (7th Cir. 2003).

As explained above (pp. 26-39, *supra*), an objective examination leads to the conclusions that Ballinger obtained significant benefits by pleading guilty, and that a challenge to the interstate commerce evidence in this case would not have succeeded. Thus, it is unlikely that discussion of the issues presented in such a challenge would have affected either counsel's advice to Ballinger or Ballinger's decision whether to plead guilty or go to trial. Indeed, Mr. Riggs does not say in his affidavit that his advice would have been different had he considered the interstate commerce question. Nor does Ballinger allege that he would have made a different decision if Mr. Riggs had discussed the issue with him, or that there is a "reasonable probability he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. He alleges only that he "would have given serious consideration to challenging the Indiana cases, and all of the charges from the other districts as well." (R. 3, No. IP01-C-1750 ¶ 8.) See *Toro*, 940 F.2d at 1068 (statement that petitioner "would have to be insane not to have accepted the plea agreement for the minimum sentence" insufficient to establish reasonable probability that, but for counsel's advice, he would have accepted plea agreement).

Significantly, Ballinger did not submit any evidence as to the advice he was given by Mr. Kish concerning either the plea agreement or a possible interstate commerce challenge. Mr. Kish represented Ballinger in Georgia, and he was present at both the plea and sentencing hearings in the Southern District of Indiana. Mr. Riggs told the district court at the sentencing hearing that both he and Mr. Kish had spoken to Ballinger "at length" concerning the plea agreement, and "[b]ased upon those communications, and with some understanding of Mr. Ballinger's view, Mr. Ballinger agreed to the plea agreement." (R. 16, No. IP00-CR-0069-01 at 21-22.) Nothing in this record contradicts that statement.

Because a challenge to the sufficiency of the interstate commerce evidence would not have achieved a better outcome for Ballinger, and because his allegations, even if true, do not establish that he would have rejected the plea agreement in this case and gone to trial, he has failed to demonstrate that he was prejudiced by his counsel's representation.

III

BALLINGER'S CONVICTION DID NOT VIOLATE HIS DUE PROCESS RIGHTS

Ballinger contends on appeal that his due process rights were violated because his plea was not "knowing and intelligent" and because he was actually

innocent of the charges to which he pled guilty. (Br. 28-31.) As explained above (Part I, *supra*), Ballinger has waived and procedurally defaulted these claims. Even if these claims are not barred, however, they are without merit. This issue presents a question of law subject to *de novo* review. *Galbraith* v. *United States*, 313 F.3d 1001, 1006 (7th Cir. 2002).

"A plea is knowing and intelligent when the defendant is competent, aware of the charges and advised by competent counsel." *Galbraith* 313 F.3d at 1006. Ballinger's claim that his plea was not "knowing and intelligent" is, in essence, a claim that he was denied effective assistance of counsel. For the reasons set forth in Part II, that claim should be rejected.

Ballinger's claim that he is actually innocent of the arson charges should also be rejected. As the Supreme Court explained in *Bousley* v. *United States*, "'actual innocence' means factual innocence, not mere legal insufficiency." 523 U.S. 614, 623 (1998). And, "where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." *Id.* at 624.

As explained above (pp. 30-37, *supra*), the evidence that Ballinger traveled in interstate commerce to commit church arson was sufficient to establish the interstate commerce element of Section 247. Thus, his claim that he was actually

innocent of the 20 Section 247 charges to which he pled guilty is baseless. Moreover, the United States dismissed three more serious charges under Section 844(h) as a part of the plea bargain in this case. These dismissed charges alone would have resulted in an additional, mandatory, consecutive sentence of 60 years. The Section 247 counts are felonies, and thus form the predicate for the Section 844(h) counts, as well as the conspiracy count. Thus, even if the factual basis for the six Section 844(i) charges were insufficient, Ballinger cannot make a showing of actual innocence.

CONCLUSION

Appellant's conviction should be affirmed.

Respectfully submitted,

R. ALEXANDER ACOSTA
Assistant Attorney General

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JESSICA DUNSAY SILVER
LINDA F. THOME
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - PHB 5014
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
(202) 514-4706

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LINDA F. THOME
Attorney
Department of Justice
Civil Rights Division
Appellate Section - PHB 5014
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
(202) 514-4706

Dated: January 23, 2004

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing brief for the United States as appellee, and a disc with an electronic copy of the brief were served on counsel listed below, by first class mail, this 23d day of January, 2004.

Paul S. Kish
Federal Defender Program, Inc.
Suite 200, 100 Peachtree Street
Atlanta, Georgia 30303

____

LINDA F. THOME
Attorney
Department of Justice
Civil Rights Division
Appellate Section - PHB 5014
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
(202) 514-4706