No. 98-6241-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ALAN ODOM & BRANDY NICOLE BOONE,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

CORRECTED VERSION OF BRIEF FOR THE UNITED STATES AS APPELLEE

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United States v. Alan Odom & Brandy Nicole Boone, No. 98-6241-BB

CERTIFICATE OF INTERESTED PERSONS AND

CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for appellee, United States of America, in compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, certifies that the following list of persons and parties have an interest in the outcome of this case. These representations are made so that the Judges of this Court may evaluate possible disqualification or recusal pursuant to the local rules of this Court:

David Allred, trial counsel for the United States

Brandy Nicole Boone, defendant

John Wayne Boone, trial counsel for defendant Boone

Gregory Bordenkircher, Assistant United States Attorney

Hon. William E. Cassady, United States Magistrate Judge

John Kenneth Cumbie, defendant

Karla Dobinski, trial counsel for the United States

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United States v. Alan Odom & Brandy Nicole Boone, No. 98-6241-BB

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STATEMENT REGARDING ORAL ARGUMENT

This appeal presents questions of interpretation of the Supreme Court's recent decision in Jones v. United States, 120 S. Ct. 1904 (2000). The United States agrees with appellants that oral argument would be helpful to the Court.

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STATEMENT OF JURISDICTION

Since this is an appeal from a final judgment in a criminal case, the jurisdiction of this Court is based upon 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether, in light of Jones v. United States, 120 S. Ct. 1904 (2000), a church is a "property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce" within the meaning of 18 U.S.C. 844(i); and if so, whether the statute's application to the arson of St. Joe Baptist Church is constitutional.

2. Whether the indictment was unconstitutionally vague as failing to specify a predicate felony with respect to the conspiracy to violate 18 U.S.C. 844(h)(1).

3. Whether Odom's conviction for violation of 18 U.S.C. 844(h)(1) should be reversed as inconsistent with his acquittal on the two counts that were specified in the indictment as the predicate offenses for that violation.

4. Whether the order of restitution imposed on defendant Boone exceeded the loss attributable to the conduct that formed the basis of her conviction.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Below

A federal grand jury sitting in the Southern District of Alabama issued a ten-count indictment charging defendants Brandy Boone, Alan Odom, and Kenneth Cumbie, along with two others,[1/] with violations of 18 U.S.C. 371 (conspiracy to commit an offense against the United States); 18 U.S.C. 247(a)(1) (damage to religious property because of the religious character of that property); 18 U.S.C. 247(c) (damage to religious property because of the race of any individual associated with that property); 18 U.S.C. 844(h)(1) (use of fire or an explosive to commit a felony prosecutable in federal court); 18 U.S.C. 844(i) (damage or destruction "by means of fire or an explosive, [of] any * * * property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce"); and 18 U.S.C. 2 (aiding and abetting an offense against the United

[1/] The other two defendants, Michael Woods and Jeremy Boone, pled guilty prior to trial.

States) (R2-34).[2/] The conspiracy count (Count One) charged the four substantive crimes as objects of the conspiracy (R2-34-1-2). Counts One to Five related to the burning of the St. Joe Baptist Church in Little River, Alabama, on June 30, 1997 (R2-34-1-7).[3/]

Following a jury trial, Odom was convicted of conspiracy to violate 18 U.S.C. 844(i) and 844(h)(1) (Count 1); and, on two separate counts (Counts 4 and 5), of violating and attempting to violate both of those statutes (R2-147-2-3). Brandy Boone and Kenneth Cumbie were convicted only on the conspiracy count (Count 1), and of conspiring to violate only 18 U.S.C. 844(i) and 18 U.S.C. 844(h)(1) (R2-147-3-5). As to the convictions regarding St. Joe Baptist Church, Odom was sentenced to imprisonment for a total term of 180 months -- 41 months on Count 1, 60 months on Count Four to run concurrently with Count One, and 120 months on Count Five to run consecutively to Counts One and Four (R2-170-2).[4/] He was assessed $400 and ordered to make restitution, jointly and severally with codefendants Brandy Boone, Kenneth Cumbie and others, to St. Joe's Baptist Church in the amount of $96,836 (R1-170). Brandy Boone and Kenneth Cumbie were each

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[2/] References to "R_-_-_" are to the volume number, docket entry number and (where applicable) to the page number or page range of the original document in the record.

[3/] Counts Six to Ten involved the arson of a separate church, Tate Chapel A.M.E. (R2-34-7-13). Trial of those counts was severed (R2-103), and Odom's conviction on Count Nine of violating 18 U.S.C. 844(i) is not involved in these appeals.

[4/] His Section 844(i) sentence as to Count Nine, involving the burning of Tate Chapel, runs concurrently with his sentence as to Count Four, involving St. Joe Baptist Church (R2-170-2).

sentenced to 41 months imprisonment and to three years of supervised release (R2-167). They were each assessed $100 and, as noted above, shared joint and several liability with Odom and others for restitution to St. Joe's (R2-167).

All three defendants filed timely notices of appeal (R2-164 (Odom); R2-165 (Boone)). Cumbie, however, filed a motion to dismiss his appeal, which was granted by this Court on July 14, 2000.

B. Statement Of The Facts

On the night of June 30, 1997, the defendants and others were drinking large quantities of beer at a party in the home of Dennis and Daniel Gentry in Little River, Alabama, a small community in northern Baldwin County, a predominantly rural county in southern Alabama (R5-271, 290-294).[5/]

Around 10 or 11 p.m., a number of the partygoers, including the defendants, left the party in three vehicles with the purpose of finding an abandoned car and setting it on fire (R5-271). Defendant Cumbie and two others had burned an abandoned car on the side of the road just four days prior to June 30. Defendant Odom rode in Brandy Boone's car, a blue Toyota, to a nearby gas station, where he filled a small plastic bottle with gasoline drained from the pump hoses (R5-271-272). In the car with Odom were Jessica Perry and Michael Woods, who was driving (R5-272, 436). Cumbie was driving his black Ford Ranger, in which Brandy

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[5/] References to the transcript cite to the volume number in the original docket and the page or page range of the transcript.

Boone and Jeremy Boone were also riding, and Patrick Redditt drove his truck, in which two other individuals who are not charged in the indictment were also riding (R5-436). These two other vehicles met up with Odom's vehicle at the gas station, and the three vehicles went off in search of the abandoned car.

After they were unable to find the abandoned car, the three vehicles pulled up alongside each other at an intersection (R5-273-275). While there, Boone said, "Let's burn the nigger church" (Govt. Exh. 44 (Boone's statement); R4-177; R5-276-277, 337, 345). All three vehicles went down Tommy John Earle Road to St. Joe's Baptist Church (R5-277, 337-338). Michael Woods, a defendant who pled guilty to two counts of the indictment, kicked in the church's back door, poured the gasoline on a couch and used Odom's lighter to light the gasoline (R5-277-278). They got back into their cars, but another individual, Patrick Redditt, made Woods go back and put out the fire (R5-279-281). Although all of the participants drove away, Woods went only about 200 yards and then turned back (R5-282). He and Odom re-entered St. Joe Baptist and set the curtains on fire with Odom's lighter (R5-283). They went back to Gentry's house, but Wood later returned to watch the church burn (R5-283-284).

Reverend Joe L. Dees, Sr., the pastor of St. Joe Baptist Church for the past 10 years and a member for the past 35 years, testified that the church was organized in 1886 (R4-133, 138). The building that was burned was completed in 1960 (R4-133). The church has 21 members, all of whom are residents of Alabama, and

the congregation is predominantly black (R4-137-138). The church holds regular worship services one Sunday a month, Sunday school classes on a weekly basis, and Bible studies and prayer meetings one night each week (R4-138). In addition, regular choir practices and rehearsals and occasional funerals are held at the church (R4-139).

The church had hymnals and Sunday school materials that were purchased from the National Baptist Publishing Board in Nashville, Tennessee (R4-141-142, R6-478-479; Govt. Exh. 52).

The parties stipulated that the propane used to heat St. Joe's Baptist Church was purchased in Stockton, Alabama, but the originating source for the propane gas came from Mississippi; the propane gas used to heat St. Joe's crossed state lines; and the propane gas was used by St. Joe's in the functioning of their religious activities (R6-479).

The church receives periodic financial contributions from individuals in another state (R4-142).

Reverend Dees and each of the church members are members of the First Eastern Shore Missionary Baptist Church Association (R4-142-143, 148; Govt. Exh. 51). St. Joe's pays dues to that Association (see Govt. Exh. 50); Reverend Dees and other members of the congregation attend meetings of the Association (R4-143); and Reverend Dees participates in the election of officers of the Association (R4-144-145, 149). The Association is a member of the Alabama State Convention, which, in turn, is part of the National Baptist Convention, U.S.A. (R4-150). The Association

pays dues that come from the local churches to the state convention (R4-150-151). In turn, the state convention finances the national convention (R4-152).

C. Jury Instructions On Interstate Commerce

The jury was instructed on interstate commerce as follows (R7-787-788):

> The term "in or affects interstate commerce" means the religious real property purchases, sells, or uses goods or services that originated or came from out of state or conducts activities which involve commerce or travel across state lines.
>
> There has been an agreement between the Parties that the gas in the propane tank was purchased outside the State of Alabama * * * and in the State of Mississippi and crossed state lines in interstate commerce and that the hymnals were purchased in Tennessee and crossed state lines to reach St. Joe Baptist Church in Little River, Alabama.
>
> You are instructed that based on this stipulation and the undisputed evidence of the church's affiliation with a national church organization, the Court charges you that this is adequate to allow you to make a finding that the church was engaged in interstate commerce.

After retiring to deliberate, the jury sent out a note asking whether, as to Count One (Section 371 conspiracy), they had to rule or make a decision on each element of each count (R7-829). After consultation with counsel, the judge prepared new jury verdict forms that required the jury to indicate affirmatively, as to each possible object of the conspiracy, whether the defendant was guilty or not guilty.

On November 3, 2000, the jury returned a verdict convicting Odom of conspiracy to violate 18 U.S.C. 844(i) and 844(h)(1); and, in two separate counts, of violating and attempting to

violate both of those statutes. Brandy Boone and Kenneth Cumbie were convicted only on the conspiracy count, and of conspiring to violate only 18 U.S.C. 844(i) and 18 U.S.C. 844(h)(1).

SUMMARY OF THE ARGUMENT

This appeal involves a challenge to the constitutionality of 18 U.S.C. 844(i), as applied to the facts of this case. In addition, both defendants raise a number of arguments concerning the validity of their convictions under 18 U.S.C. 844(h)(1) and under 18 U.S.C. 371 for conspiracy to violate that statute. As set out more fully below, the convictions under both statutes should be affirmed.

In Part I(A), we address the principles demonstrating that this case differs from the conviction under 18 U.S.C. 844(i) for arson of a private residence that was at issue in Jones v. United States, 120 S. Ct. 1904 (2000). We discuss the legislative evidence that Congress intended to protect churches under Section 844(i) and then demonstrate that churches, unlike owner-occupied residences, are engaged in activity that is properly characterized as commercial within the meaning of the statute. Thus, the decision in Jones does not control this case.

In Part I(B), we argue that Section 844(i) is constitutional as applied to the convictions in this case. First, we demonstrate that this Court's holding in United States v. Dascenzo, 152 F.3d 1300 (1998), that only a minimal connection between the property at issue and some aspect of interstate commerce is required to make out that element of the statute,

remains viable after Jones as to property, such as a church, that is engaged in commerce. In addition, we show that the decisions in United States v. Lopez, 514 U.S. 549 (1995), or United States v. Morrison, 120 S. Ct. 1740 (2000), are fully consistent with application of Section 844(i) to the circumstances of this case. Unlike here, neither of those cases involved an attack on an institution involved in commerce.

We then discuss the jury instruction concerning interstate commerce that was given at trial. Although that instruction is incomplete and possibly misleading in light of what the Court has now held in Jones, any error that might exist is harmless. Based upon the general nature of churches in regard to commerce and the specific connections to interstate commerce established in the record, no rational jury could have acquitted the defendants on the basis that the interstate commerce nexus was lacking in this case. United States v. Neder, 197 F.3d 1122 (11th Cir. 1999), cert. denied, 120 S. Ct. 2717 (2000). We argue, however, that if this Court disagrees with our submission and reverses the conviction for error in the jury charge, it should remand for a retrial under an instruction that would be proper under Jones.

In Part II, we address Boone's challenge to her conviction under 18 U.S.C. 844(h)(1). In Part II(A), we argue that the district court properly denied Boone's motion to dismiss the indictment on grounds of vagueness, because the indictment set out a sufficient statement of the facts and circumstances to inform her of the offense charged, and she has demonstrated no

prejudice to her from the alleged vagueness. United States v. Cole, 755 F.2d 748 (11th Cir. 1985); United States v. Chilcote, 724 F.2d 1498 (11th Cir. 1984). In addition, Boone has not demonstrated plain error in the omission from the indictment of specification of the predicate offenses for her conviction, under Count One, for conspiring to use fire to commit a felony prosecutable in federal court, 18 U.S.C. 844(h)(1). United States v. Johnson, 982 F.2d 1192 (8th Cir. 1992); United States v. Zavala, 839 F.2d 523 (9th Cir.), cert. denied, 488 U.S. 831 (1988).

In Part II(B), we argue that any inconsistency between her conviction for conspiracy to violate 18 U.S.C. 844(h)(1) and her acquittal of conspiracy to violate 18 U.S.C. 247 is not grounds for reversal. United States v. Powell, 469 U.S. 57 (1984). The rule that inconsistent verdicts are not grounds for reversal because they are likely to be the product of compromise or lenity by the jury does not permit a case-by-case, speculative assessment of the reasons why a particular jury may have rendered its verdict.

In Part III, we argue that, for the same reasons, Odom's Count Five conviction for use of fire to commit a federal felony, in violation of 18 U.S.C. 844(h)(1), should not be reversed as inconsistent with his acquittal on the two counts specified in Count Five as predicate felonies. That result is not altered because the jury was charged that it had to find Odom guilty of

those predicate felonies in order to convict him under Section 844(h)(1). Powell, 469 U.S. at 68.

In Part IV, we argue that Boone has failed to meet the substantial burden of proving that she withdrew from the conspiracy after the first fire set at St. Joe Baptist Churchh was extinguished and before the second fire was set. United States v. Finestone, 816 F.2d 583 (11th Cir. 1987), cert. denied, 485 U.S. 972 (1988). Thus, the district court's order requiring Boone to pay over $96,000 in restitution, jointly and severally with her co-conspirator defendants, to St. Joe's does not exceed the loss attributable to her conduct and is, therefore, neither error nor plain error. Ceasing her own activity in the conspiracy after the first fire was extinguished is insufficient where she failed to take any affirmative steps to disavow or defeat the object of the conspiracy and either communicated her intention to her co-conspirators or disclosed the illegal scheme to law enforcement officials. United States v. Hogan, 986 F.2d 1364, 1375 (11th Cir. 1993). Her failure to do so is especially significant where it was her idea to "burn the nigger church" as an alternative to the original plan to burn a vehicle.

ARGUMENT

I

ODOM'S AND BOONE'S CONVICTIONS FOR VIOLATING 18 U.S.C. 844(i) SHOULD BE UPHELD

Section 844(i) of Title 18 provides in relevant part:

> [w]hoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building vehicle, or other real or personal

> property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce
> * * *

shall be guilty of a federal crime. Defendant Odom argues (Br. 15-16) that the evidence was insufficient to prove that St. Joe Baptist Church was "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." Defendant Boone argues (Br. 16-27) that 18 U.S.C. 844(i) could not constitutionally be applied to the arson of St. Joe Baptist Church. Those arguments are erroneous.

A. Churches Engage In Activity That Is Properly Characterized As Commerce Within The Meaning Of Section 844(i)

In Russell v. United States, 471 U.S. 858, 859 (1985), the Supreme Court held that the language of 18 U.S.C. 844(i) "expresses an intent by Congress to exercise its full power under the Commerce Clause." After examining the legislative history of Section 844(i), the Court in Russell noted that Congress wanted to cover bombings of places of worship under 18 U.S.C. 844(i). See Belflower v. United States, 129 F.3d 1459, 1462 (11th Cir. 1997).

As initially introduced in the House of Representatives, H.R. 16699, one of the two bills from which Section 844(i) emerged, applied to the destruction by explosives of property "used for business purposes by a person engaged in commerce or in any activity affecting commerce." Explosives Control: Hearings on H.R. 17154, H.R. 16699, H.R. 18573 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st

Cong., 2d Sess. 31 (1970) (1970 Hearings). During hearings on the bill, Representative Rodino asked a Department of Justice representative whether the language of H.R. 16699, quoted above, would cover the bombings of police stations, churches, synagogues, or religious edifices. The Department of Justice official stated that he did not think it would. 1970 Hearings at 56. It was suggested later in the hearings that leaving out the words "for business purposes" would broaden the legislation to cover "a private dwelling or a church or other property not used in business." 1970 Hearings at 300. The phrase "for business purposes" was not included in the bill reported by the House Judiciary Committee. The House Report stated:

> Section 844(i) proscribes the malicious damaging or destroying, by means of an explosive, [of] any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. Attempts would also be covered. Since the term affecting [interstate or foreign] "commerce" represents "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause," NLRB v. Reliance Fuel Corp., 83 S.Ct. 312, 371 U.S. 224, 226, 9 L.Ed.2d 279 (1963), this is a very broad provision covering substantially all business property. While this provision is broad, the committee believes that there is no question that it is a permissible exercise of Congress['s] authority to regulate and to protect interstate and foreign commerce. Numerous other Federal statutes use similar language and have been constitutionally sustained in the courts.

H.R. Rep. No. 1549, 91st Cong., 2d Sess. 69-70 (1970). Representative McCulloch stated that the provisions of Section 844 had been drawn largely from H.R. 16699 but that the House Judiciary Committee had "extended the provision protecting interstate and foreign commerce from the malicious use of

explosives to the full extent of [Congress's] constitutional power." 116 Cong. Rec. 35,198 (1970).

After reviewing this legislative history, the Court in Russell stated that "after considering whether the bill as originally introduced would cover bombings of police stations or churches, the bill was revised to eliminate the words 'for business purposes' from the description of covered property." Russell, 471 U.S. at 860-861 (footnotes omitted). The Court summarized the legislative history as suggesting that "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 862. See United States v. Grimes, 142 F.3d 1342, 1346 (11th Cir. 1998), cert. denied, 525 U.S. 1088 (1999).[6/]

In Jones v. United States, 120 S. Ct. 1904 (2000), the Court was called upon specifically to consider whether the arson of an owner-occupied private residence would violate Section 844(i). The Court in Jones construed the term "used in an activity

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[6/] Congress has subsequently recognized the fact that churches engage in activities that are commercial in nature in connection with the enactment of the Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392 (1996). See, e.g., 142 Cong. Rec. S7909 (daily ed. July 16, 1996) (Sen. Faircloth) (provision of day care and social services); 142 Cong. Rec. S6522 (daily ed. June 19, 1996) (Sen. Kennedy) (aid to the homeless, other social services). See also Church Burnings: Hearings on The Federal Response to Recent Incidents of Church Burnings in Predominantly Black Churches Across the South Before the Senate Comm. on the Judiciary, 104th Cong., 2d Sess. 37 (1996) (appendix to the prepared statement of James E. Johnson and Deval L. Patrick) (describing numerous ways in which the activity of churches affects interstate commerce).

affecting commerce" to mean "active[ly] employ[ed] for commercial purposes, and not merely a passive, passing, or past connection to commerce." Id. at 1910. Evidence had been introduced at trial in Jones proving that the property was used as collateral to secure an out-of-state mortgage; the residence was covered by an out-of-state casualty insurance policy; and the dwelling received natural gas from sources in another state. The Court concluded, however, that in the ordinary meaning of the word "used," a private, owner-occupied residence is not "used" in the "activity" of receiving natural gas, a mortgage or an insurance policy. Ibid. Observing that such connections with interstate commerce are shared by nearly every building in the United States, the Court determined that the statute should not be construed in a way that would so radically alter the federal-state balance in the prosecution of crimes without a very clear indication that Congress had such an intention. Id. at 1912.

Significantly, in Jones, the Court reiterated its recognition in Russell that Congress did intend to cover some property that might not fit within the category of business property, including churches and other places of worship. Jones, 120 S. Ct. at 1909 & n.5.

The Court stated that the "proper inquiry" in determining whether a particular property is used in commerce or in an activity affecting commerce "'is into the function of the building itself, and then a determination of whether that function affects interstate commerce.'" Jones, 120 S. Ct. at

1910 (quoting United States v. Ryan, 9 F.3d 660, 675 (8th Cir. 1993) (Arnold, C. J., concurring in part and dissenting in part)).

Because of the fundamental differences between the function of an owner-occupied residence and a church, the decision in Jones does not control the outcome in this case. In contrast to an owner-occupied home that is used solely for residential purposes, a church engages in activities that properly can be characterized as commerce within the meaning of Section 844(i).

All churches, including St. Joe Baptist Church, provide services not only to their own members but also to the public at-large, including travelers from other states who may find themselves in the community and want to worship or take part in a religious activity while there. See Katzenbach v. McClung, 379 U.S. 294, 300 (1964). The evidence in the record concerning the relationship of St. Joe Baptist Church to the National Baptist Convention, through the regional and state conventions, demonstrates the interstate nature of the services offered by a church. An individual traveling from out of state might choose a church to attend based upon its affiliation with a particular national church organization.

While a church is first and foremost a building that functions as the center of a congregation's religious activities, a church is also similar to other non-residential properties, such as museums, that are supported by a combination of membership fees and contributions and provide services both to

contributing members and to transient non-members. St. Joe's, for example, received periodic contributions from individuals who reside in another state.

In addition, in order to provide services, these enterprises purchase materials, such as the instructional materials and hymnals purchased by St. Joe's, from out-of-state suppliers. Those materials are not purchased for individual consumption as are similar materials purchased by owners of residential property; rather, those materials purchased by churches are necessary for the provision of religious education and worship services available to members of the public who choose to visit and avail themselves of the services provided.

The fact that St. Joe's is not a for-profit business does not foreclose coverage under Section 844(i), because Congress's power under the Commerce Clause is not limited to protection of for-profit business activities. For example, the Sixth Circuit has upheld a conviction under Section 844(i) for arson of a college dormitory on a finding that the college was engaged in the business of providing educational services. United States v. Sherlin, 67 F.3d 1208, 1212-1214 (1995), cert. denied, 516 U.S. 1082 (1996).

B. Section 844(i) Is Constitutional As Applied To The Facts Of This Case

This Court has held that Section 844(i) is facially constitutional. United States v. Grimes, 142 F.3d 1342, 1346 (1998), cert. denied, 525 U.S. 1088 (1999). Boone argues, however (Br. 24-27), that the statute is unconstitutional as

applied to this case, because the United States did not prove the requisite interstate commerce nexus.

1. Because A Church Engages In Commercial Activity In A Way That An Owner-Occupied, Private Residence Does Not, Section 844(i) Requires Only A Minimal Effect On Interstate Commerce

The law in this Circuit is that while "the statute requires that the property involved in the arson have some effect on interstate commerce: no requirement of 'substantial effect' is set out." United States v. Dascenzo, 152 F.3d 1300, 1304 (1998). Anticipating the Supreme Court's holding in Jones, this Court in Dascenzo distinguished between the arson of a private home and the arson of a commercial property. 152 F.3d at 1302-1303. Accordingly, in cases involving arsons of properties used for commercial purposes, the government is required to establish only minimal connection between the property at issue and some aspect of interstate commerce. Id. at 1303. That holding recognizes 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 1205, 1214 (5th Cir. 1997), cert. denied, 522 U.S. 1139 (1998) (citing Katzenbach v. McClung, 379 U.S. 294, 300-301 (1964)).[7/]

[7/] The shortcoming in Jones was not that there was insufficient evidence of interstate commerce, but that there was no evidence of commercial activity. If there is no evidence of commercial activity, the aggregation principle does not add anything to the analysis.

Contrary to Boone's contention (Br. 17-27), nothing in United States v. Lopez, 514 U.S. 549 (1995), or in Jones, calls into question the validity of that principle as applied to this case. As this Court held in Dascenzo, 152 F.3d at 1303 & n.6, "Lopez does not affect the constitutionality of statutes which expressly require an effect on commerce as an element of the crime." Unlike the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q)(1)(A), involved in Lopez, Section 844(i) is limited to arsons of buildings that are used in interstate commerce or in any activity affecting interstate commerce. The church at issue here, and churches generally, are encompassed within that definition. Boone is thus incorrect in asserting (Br. 18) that applying the aggregation principle here "would, in effect, give Congress the Commerce Clause power to regulate all arsons."

Moreover, the Court in Lopez noted that it was necessary to "pile inference upon inference" in order to justify the Gun-Free School Zones Act under the Commerce Clause. 514 U.S. at 567. The Court expressed concern not only about the local and noncommercial character of schools but also about the attenuated connection between the protected buildings (schools) and the prohibited activity (gun possession). 514 U.S. at 564-68. This case is unlike Lopez in both respects. First, unlike a publicly supported school, a church conducts a private economic enterprise that constitutes commerce within the meeting of the statute. And second, burning a church has an immediate and direct impact on

the church, requiring none of the inferences needed to establish the impact on a school of gun possession in the vicinity.

Nor does the decision in United States v. Morrison, 120 S. Ct. 1740 (2000), affect the viability of this Court's holding in Dascenzo. In Morrison, the Court held that Congress lacked the authority under the Commerce Clause to provide a federal civil remedy for victims of gender-motivated violence in the Violence Against Women Act of 1994 (VAWA), 42 U.S.C. 13981. The Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." Id. at 1754; see also id. at 1751 ("thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature"). As the Court implicitly recognized in Jones, Congress has the authority to protect as well as to regulate "property currently used in commerce or in an activity affecting commerce." 120 S. Ct. at 1912; cf. NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 36-37 (1937) ("The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection or advancement' * * * to adopt measures 'to promote its growth and insure its safety' * * * 'to foster, protect, control, and restrain.' * * * That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.'") (citations omitted). The violence criminalized by the VAWA was an attack against a person,

not a commercial institution. The Court determined that the connection between such attacks and interstate commerce was too attenuated and would make federal crimes out of virtually all violent crime and many other areas of traditional state regulation. Morrison, 120 S. Ct. at 1752-1753. No such concerns arise from the application of Section 844(i) to the arson of a building that is actively used in commercial activities, since the effect on interstate commerce is quite direct.

2. The Jury Instruction Did Not Anticipate The Subsequent Decision In Jones, But Any Error Is Harmless

Although defendants do not specifically challenge the jury instructions in their appeals, the jury charge on interstate commerce in this case was arguably misleading, in light of the subsequent decision in Jones. The decision in Jones established that an owner-occupied private residence does not become a property used in commerce or an activity affecting interstate commerce merely by virtue of the fact that it receives natural gas from another state, provides collateral for a mortgage from an out-of-state lender, or is the subject of insurance from an out-of-state insurer. Thus, if the instruction suggested to the jury that the statute covers any building that receives products or conducts activities across state lines, that would be an incorrect statement of the law after Jones.

But unlike the owner-occupied, private residence in Jones, a church engages in activities that properly can be characterized as commercial within the meaning of Section 844(i). A church is

established for the purpose of providing services for its members -- in the form of a place, a leader, and equipment for worship, as well as other social services -- for which the members pay by making contributions. Although those contributions are largely voluntary, members of the church understand that the church cannot provide services without financial support and are, therefore, encouraged to contribute in accordance with their means.

Moreover, a church makes these services available not only to members but also to nonmembers, including travelers from out of state. A church is therefore more akin to the rental property in Russell than the private residence in Jones. In light of that fundamental difference between the activities of a church and the activities of an owner-occupied, private residence, the court's instructions correctly informed the jury that the various interstate transactions of the church were sufficient to support a determination that the commerce of this church had the interstate character required by the statute.

To be sure, the instructions did not spell out the distinction between churches and owner-occupied, private residences, because the trial occurred prior to the decision in Jones. But that omission, if error, was harmless.[8/] This Court has held that an erroneous jury charge entitles a defendant to

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[8/] Error in instructing the jury would be characterized as "trial error" subject to harmless error analysis. See McIntyre v. Williams, No. 99-1089, 2000 WL 873301 (11th Cir. June 30, 2000); United States v. Burgess, 175 F.3d 1261, 1266-1267 (11th Cir. 1999).

reversal of his or her conviction and remand for a new trial on the count in question only when a reasonable likelihood exists that "'the jury applied the instruction in an improper manner.'" United States v. Quinn, 123 F.3d 1415, 1428 (11th Cir. 1997) (quoting United States v. Chirinos, 112 F.3d 1089, 1096 (11th Cir. 1997), cert. denied, 522 U.S. 1052 (1998), and citing other cases).[9/]

In addition to the general principle, discussed at pp. 16-17, supra, that churches engage in activities that are properly characterized as commerce within the meaning of Section 844(i), the interstate commerce nexus was established here by evidence concerning the relationship between St. Joe Baptist Church and the National Baptist Convention, its purchase of materials necessary to provide services to its members from out-of-state, and its receipt of contributions from individuals residing in another state. Based upon that evidence and under instructions required by Jones, no rational jury could have acquitted the defendants on the basis that the government failed to prove that the church was used in interstate commerce or an activity affecting interstate commerce. See United States v. Neder, 197 F.3d 1122, 1129 (11th Cir. 1999), cert. denied, 120 S. Ct. 2717 (2000) (government must show that evidence is so overwhelming

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[9/] This Court employs de novo review when determining whether the district court misstated the law when instructing the jury or misled the jury to the prejudice of the defendant. United States v. Chandler, 996 F.2d 1073, 1085 (11th Cir. 1993), cert. denied, 512 U.S. 1227 (1994).

that no rational jury, properly instructed on element of an offense, could have acquitted).

In the alternative, if this court were to conclude that the jury charge as given was misleading and requires reversal, then the case should be remanded for retrial under a proper instruction addressed to the issue created by Jones -- the distinction between a church and an owner-occupied, private residence for purposes of the interstate commerce element of 18 U.S.C. 844(i). United States v. Mount, 161 F.3d 675, 678 (11th Cir. 1998); Quinn, 123 F.3d at 1428. The only count affected by such a reversal and remand would be Count Four, as Odom's conviction on Count Five was not challenged on this ground, and the convictions of Odom and Boone on Count One were based not only on 18 U.S.C. 844(i), but also 18 U.S.C. 844(h)(1), to which no Commerce Clause challenge has been raised.

II

ANY INCONSISTENCY BETWEEN BOONE'S CONVICTION FOR CONSPIRING TO USE FIRE TO COMMIT A FEDERAL FELONY, IN VIOLATION OF 18 U.S.C. 844(h)(1), AND HER ACQUITTAL ON THE TWO COUNTS OF DAMAGE TO RELIGIOUS PROPERTY UNDER 18 U.S.C. 247, IS NOT GROUNDS FOR REVERSAL

Defendant Boone raises two issues concerning her conviction under Count One of the indictment for conspiring to violate 18 U.S.C. 844(h)(1). First, she contends that the indictment was vague as to the elements of the offense. Second, she argues that the jury's verdict convicting her of that offense was inconsistent with her acquittal of conspiring to damage religious

property, in violation of 18 U.S.C. 247(a)(1) and (c). Neither of those arguments warrants reversal of her conviction.

A. The District Court Properly Found That The Indictment Was Not Vague As To The Elements Of The Offense

An indictment must be sufficiently specific to inform the defendant of the charge against her in order to satisfy the guarantee of the Sixth Amendment. United States v. Ramos, 666 F.2d 469, 474 (11th Cir. 1982). An indictment meets that requirement if it sets forth the essential elements of the crime. United States v. Cole, 755 F.2d 748, 759 (11th Cir. 1985). An "indictment for conspiracy to commit a criminal offense is not required to be as specific as a substantive count." Ibid. (citation omitted). If the indictment sets forth the offense in the language of the statute, "'it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.'" Hamling v. United States, 418 U.S. 87, 117-118 (1974) (quoting United States v. Hess, 124 U.S. 483, 487 (1888)). This Court has held that "practical, rather than technical, considerations govern the validity of an indictment[, and] [m]inor deficiencies that do not prejudice the defendant" are not grounds for reversing a conviction." United States v. Chilcote, 724 F.2d 1498, 1505 (1984).

On defendants' pre-trial motions for dismissal of the indictment, the district court found that the indictment

"sufficiently informs the defendants of the charges they face [and] * * * charges sufficient facts and circumstances to permit the defendants to present a defense in this case" (R2-125-4). The court also considered and rejected the specific contention that the indictment was vague, uncertain, indefinite, and ambiguous, stating that the indictment "alleges facts, dates, places, and violations of specific statutory provisions" (R2-125-1-2). Boone does not allege any prejudice to her from the alleged vagueness of the indictment.

Boone raises for the first time on appeal the argument that the conspiracy count of the indictment (Count One) is vague, because the government failed to specify a predicate felony with regard to the charge of conspiracy willfully to use fire to commit a felony prosecutable in a court of the United States, in violation of 18 U.S.C. 844(h)(1). Accordingly, this Court reviews her claim only for plain error. "For the Court to correct plain error: (1) there must be error; (2) the error must be plain; and (3) the error must affect substantial rights." United States v. Stevenson, 68 F.3d 1292, 1294 (11th Cir. 1995). A plain error is an error that is "obvious" and is "clear under current law." United States v. Humphrey, 164 F.3d 585, 587 (11th Cir. 1999) (quoting United States v. Olano, 507 U.S. 725, 734 (1993)). When an error is not raised in the district court, the decision whether to correct it is within the sound discretion of this Court. Olano, 507 U.S. at 732. This Court should not exercise that discretion unless it "'seriously affect[s] the

fairness, integrity or public reputation of judicial proceedings.'" Ibid. (citations omitted).

There is no requirement that the predicate felonies be specifically listed in the indictment, so long as the defendant has actual notice of the charges. United States v. Johnson, 982 F.2d 1192, 1197 (8th Cir. 1992). In the analogous context of an indictment charging that a defendant engaged in a continuing criminal enterprise in violation of 21 U.S.C. 848, courts have held that the failure to list the predicate felonies is not grounds for reversal of a conviction where the defendant has demonstrated no prejudice resulting from the failure of the indictment to "spell out [the prosecution's] theory in further detail." United States v. Zavala, 839 F.2d 523, 527 (9th Cir.), cert. denied, 488 U.S. 831 (1988).

In United States v. Becton, 751 F.2d 250, 256-257 (8th Cir. 1984), cert. denied, 472 U.S. 1018 (1985), the court of appeals rejected the defendant's claim that the indictment was impermissibly vague where it did not list the specific violations of federal narcotics law constituting the alleged continuing criminal enterprise. The court held that due process may be satisfied so long as the defendant has actual notice of the charges. 751 F.2d at 256. The court noted that other counts of the indictment gave the defendant adequate notice of the underlying felonies and, furthermore, that the defendant failed to "allege that any of the felonious activities proved at trial took him by surprise." Ibid. See also Zavala, 839 F.2d at 527

(no due process problem where defendant vigorously contested the counts that were central to the trial, and his defense was not hindered).

In this case, Count One of the indictment sets forth all of the underlying facts concerning the three felonies which the government charged that the defendants conspired to commit by the use of fire, in violation of 18 U.S.C. 844(h)(1). Those felonies are intentional damage to religious real property in and affecting interstate commerce based on its religious character, 18 U.S.C. 247(a)(1); intentional damage to religious real property because of the race and color of individuals associated with it, 18 U.S.C. 247(c); and malicious damage by fire of a building used in interstate commerce, 18 U.S.C. 844(i). The defendants knew that they were charged with conspiring to set fire to St. Joe Baptist Church on a particular date. In addition, two of the predicate felonies were specified in Count Five, which charged a substantive violation of 18 U.S.C. 844(h)(1), and the third was charged as a separate substantive count, Count Four. Boone does not claim that she was surprised by any of the felonious activity proved at trial, nor that she was unable to mount a defense as to those felonies. Accordingly, her claim that the district court erred in refusing to dismiss the indictment as vague should be rejected.

B. The Inconsistency Of The Jury's Verdict Is Not A Reason For Reversal

Boone also argues that the jury's verdict was inconsistent because she was convicted for conspiring to violate Section

844(h)(1) but was acquitted of conspiring to violate 18 U.S.C. 247(a)(1) and (c), which were specified as the predicate felonies for the Section 844(h)(1) violation elsewhere in the indictment (see Count 5, R2-34-6-7). Boone acknowledges (Br. 31), citing United States v. Funt, 896 F.2d 1288, 1293 (11th Cir. 1990), and United States v. Church, 955 F.2d 688, 695 (11th Cir.), cert. denied, 506 U.S. 881 (1992), that inconsistent verdicts are not grounds for reversal. Relying on this Court's statement in Funt that inconsistent jury verdicts are not "necessarily" cause for reversal, she argues that this case is distinguishable from Funt and Church. She contends that the district court "apparently agreed" that the verdict was inconsistent and that it erroneously attempted to make it consistent by resolving the alleged ambiguity of the indictment against her. [10/] She claims that the district court should have applied the rule of lenity to resolve the ambiguity in her favor instead.[11/] This reasoning is flawed.

[10/] Even if the district court agreed that the verdict was inconsistent (Br. 31), that fact would not add anything to the analysis, since the Supreme Court has refused to reverse convictions based on inconsistencies conceded by the United States. See United States v. Powell, 469 U.S. 57, 61 n.5 (1984).

[11/] Boone's suggestion that the judge should have applied a rule of lenity in interpreting the alleged ambiguity in the indictment about the predicate felonies for the conspiracy to use fire in the commission of a federal felony ignores the fact, acknowledged in Powell, that the inconsistent verdict was likely to have been a product of juror lenity in the first place. Moreover, while the rule of lenity is applicable in construing a criminal statute, see, e.g., Lewis v. United States, 445 U.S. 55, 65 (1980) ("touchstone" of the rule of lenity "is statutory ambiguity"), Boone points to no case requiring a district court to apply a rule of lenity to the interpretation of an indictment.

The rule stated by this Court in Funt and Church was based upon the Supreme Court's decision in United States v. Powell, 469 U.S. 57 (1984). In Powell, the Court examined the continued validity of its holding in Dunn v. United States, 284 U.S. 390 (1932), that a defendant convicted on one count could not attack his conviction as inconsistent with an acquittal on another count, in light of decisions in a number of courts of appeals that had begun to "carve exceptions out of the Dunn rule." Powell, 469 U.S. at 63-64. In reaffirming the rule in Dunn, the Court stated:

> [I]nconsistent verdicts -- even verdicts that acquit on a predicate offense while convicting on a compound offense -- should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense.

Id. at 65. Since the government cannot appeal an acquittal under the Double Jeopardy Clause, "it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course." Ibid. The Court concluded, therefore, that inconsistent verdicts should not be reviewable, and it rejected, "as imprudent and unworkable," a rule that would permit an individualized assessment of the reason for the inconsistency, since it would be based either on "pure speculation" or would require a court to inquire into the jury's deliberations. Id. at 66. Thus, Boone's contention that the circumstances of this case

permit an exception from the general rule is contrary to the law announced in Powell.

Accordingly, Boone's conviction for conspiracy to use fire to commit a federal felony should be affirmed.

III

ANY INCONSISTENCY BETWEEN ODOM'S CONVICTION FOR VIOLATION OF 18 U.S.C. 844(h)(1) AND HIS ACQUITTAL ON THE TWO COUNTS SPECIFIED IN THE INDICTMENT AS PREDICATE OFFENSES FOR THAT VIOLATION IS NOT GROUNDS FOR REVERSAL

Odom argues (Br. 17-21) that his conviction under Count Five of the indictment (R2-34-6-7) for using fire to commit a felony prosecutable in a court of the United States, in violation of 18 U.S.C. 844(h)(1), cannot stand, because it is inconsistent with his acquittal on the two counts of violating 18 U.S.C. 247 that were specified in Count Five as the predicate felonies for the 844(h)(1) violation (see R2-34-7). This is the only challenge he makes to his conviction under Count Five.

The arguments made in Part II, supra, which demonstrate that inconsistency of a verdict is not grounds for overturning a conviction, are fully applicable here and will not be repeated. Moreover, the Supreme Court in United States v. Powell, 469 U.S. 57, 67-68 (1984), rejected creating an exception based upon the precise situation at issue here. The Court noted that the defendant in Dunn v. United States, 284 U.S. 390 (1932), was acquitted both of unlawful possession and unlawful sale of unlawful liquor but was convicted of maintaining a nuisance by keeping unlawful liquor for sale at a specified location. Powell, 469 U.S. at 67-68. The Court noted that Dunn could not

have been convicted on the nuisance count without finding that he possessed or sold liquor. Ibid.

Odom makes the additional argument that reversal is warranted in his situation, because the court instructed the jury that it must acquit on Count Five unless it found the defendant guilty under Counts Two or Three, or both. He acknowledges (Br. 20), however, that the Supreme Court in Powell held that an inconsistent verdict is not grounds for reversal even where the district court instructs the jury that they must find the defendant guilty of a predicate offense in order to convict on a compound offense. The Court in Powell stated that "[a]lthough such an instruction might indicate that the counts are no longer independent, if inconsistent verdicts are nevertheless reached those verdicts are still likely to be the result of mistake, or lenity, and therefore are subject to the Dunn rationale." 469 U.S. at 68.

Accordingly, Odom's conviction for using fire to commit a felony prosecutable in the courts of the United States should be upheld.

IV

THE RESTITUTION ORDER ENTERED AGAINST DEFENDANT BOONE SHOULD BE AFFIRMED, BECAUSE THERE IS NO EVIDENCE THAT SHE WITHDREW FROM THE CONSPIRACY BEFORE THE CHURCH WAS BURNED

Defendant Boone argues (Br. 32-36) that the district court exceeded its authority in finding her liable, jointly and severally with co-conspirators Odom, Cumbie, and Michael Woods, for over $96,000 in restitution to St. Joe Baptist Church,

pursuant to 18 U.S.C. 3663. As Boone admits (Br. 32 n.5), she did not object to the restitution order at sentencing, and, therefore, the legality of this portion of her sentence is reviewable only for plain error.

The basis for this argument is Boone's claim (Br. 32) that the record shows that she withdrew from the conspiracy before defendant Odom and others returned to the church a second time and set the church on fire. Withdrawal is an affirmative defense, which the defendant has the burden of proving, and that burden is substantial. United States v. Finestone, 816 F.2d 583, 589 (11th Cir. 1987), cert. denied, 485 U.S. 972 (1988). It is not sufficient merely for a defendant to cease his activity in a conspiracy. United States v. Young, 39 F.3d 1561, 1571 (11th Cir. 1994); United States v. Hogan, 986 F.2d 1364, 1375 (11th Cir. 1993); United States v. LeQuire, 943 F.2d 1554, 1564 (11th Cir. 1991), cert. denied, 505 U.S. 1223 (1992). The well-established law in this Court requires that in order to withdraw from the conspiracy, and thus to avoid further liability for his or her actions, a defendant "must prove that he undertook affirmative steps, inconsistent with the objects of the conspiracy, to disavow or to defeat the conspiratorial objectives, and either communicated those acts in a manner reasonably calculated to reach his co-conspirators or disclosed the illegal scheme to law enforcement authorities." Hogan, 986 F.2d at 1375. Boone has failed to show that she meets that test.

While it is true that Boone left the vicinity of St. Joe Baptist after Patrick Redditt insisted that Michael Woods put out the first fire that was set and that she may not have anticipated that Odom and others would return to the church and set a second fire, she remains liable for their actions, because she failed to take any affirmative steps to disavow the objective of the conspiracy let alone to communicate such a disavowal in any way to the other participants and co-conspirators. The record does not reveal any such steps, and Boone points to no evidence of any steps, that she took to persuade the others to abandon the plan to burn the church or that she otherwise took actions that might have thwarted the later realization of that plan. See R5-281 (testimony of Michael Woods that no one except Patrick Redditt discouraged him from burning St. Joe Baptist). Boone admits (Br. 35) that she did not communicate the scheme to law enforcement officials, but she submits (Br. 35) that by leaving the church after the first fire was extinguished and not returning, she took "an affirmative step inconsistent with the objects of conspiracy." What she did, however, was nothing more than cease her own participation in the scheme. That is not sufficient to establish withdrawal from the conspiracy. United States v. LeQuire, supra.

The absence of any affirmative steps on her part is particularly significant, because it was Boone who suggested burning the church after the defendants could not find the car they originally set out to burn. Her initial incitement to "burn

the nigger church" remained operative, because she took no steps to countermand that proposal.

Accordingly, the restitution order entered by the district court does not exceed the loss attributable to her conduct and her co-conspirators' conduct.

CONCLUSION

For the foregoing reasons, the convictions on all counts should be affirmed. Alternatively, if the Court determines that the jury charge requires reversal as to charges under 18 U.S.C. 844(i), then Odom's conviction on Count Four, the only count affected by that determination, should be remanded for retrial under an instruction addressed to the issue created by the intervening decision in Jones.[12/]

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[12/] The convictions on Count One can stand, because the jury found not only a conspiracy to violate Section 844(i), but also Section 844(h)(1), to which no Commerce Clause challenge has been raised.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in FRAP 32(a)(7)(B). This brief contains 8950 words.

Marie K. McElderry
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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Corrected Version of the Brief for the United States as Appellee upon the parties to this appeal by mailing two copies to counsel of record, first class, postage prepaid, at the following addresses:

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This 11th day of August, 2000.

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