No. 00-4458

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

JEFFREY ROWE,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

BRIEF FOR THE UNITED STATES AS APPELLEE

BILL LANN LEE
Assistant Attorney General

JESSICA DUNSAY SILVER
KEVIN RUSSELL
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 305-4584

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ISSUES PRESENTED

1. Whether Defendant should be relieved of his stipulation that the vehicles burned in this case were used in interstate commerce or an activity affecting interstate commerce within the meaning of 18 U.S.C. 844(i).

2. Whether an automobile used to travel in interstate commerce and to a place of employment is used in interstate commerce or an activity affecting interstate commerce within the meaning of 18 U.S.C. 844(i).

3. Whether there was sufficient evidence to sustain Defendant's convictions.

STATUTORY PROVISION

Title 18 U.S.C 844(i) provides:

> Whoever 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 imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

STATEMENT OF THE CASE

Defendant was indicted in the Eastern District of Virginia on four counts arising from the fire-bombing of two automobiles. The first count of the indictment (J.A. 9) alleged that Defendant violated the intimidation provisions of

the Fair Housing Act, 42 U.S.C. 3631(a), by forcibly interfering with the fair housing rights of the owners of the automobiles on the basis of race. The second and third counts (J.A. 10-11) alleged violations of the federal arson statute, 18 U.S.C. 844(i), for the burning of the two vehicles. The fourth count (J.A. 12) charged a violation of 18 U.S.C. 844(h)(1), which punishes the use of fire to commit a felony.

Before trial, the United States and Defendant entered into various stipulations, including one (J.A. 31) in which Defendant stipulated that the two burned vehicles "were used in interstate commerce and in an activity affecting interstate commerce within the meaning of those terms in Title 18, United States Code, Section 844(i)." On March 14, 2000, Defendant was tried by a jury (J.A. 5). On the following day, the jury acquitted Defendant on Counts 1 and 4, but convicted him on Counts 2 and 3 (J.A. 368). Defendant was sentenced (J.A. 369-371) to a term of 60 months on each count, to run concurrently, followed by three years of supervised release. He was also ordered to pay restitution of $5,287.20 and a special assessment of $100 for each count (J.A. 372-373). Defendant filed a timely notice of appeal (J.A. 375) on June 14, 2000.

STATEMENT OF THE FACTS

Considered in the light most favorable to the Government, the evidence at trial showed the following:

In the early hours of October 31, 1998, Defendant lit two Molotov cocktails and threw them onto two cars owned by Shirley and Alfonzo Webb. Ms. Webb's car was totally destroyed in the ensuing fire. Mr. Webb's car was damaged, but not destroyed because the bottle thrown at it did not break and the fire extinguished itself. Prior to this attack, Ms. Webb regularly drove one or the other of the cars to work in Maryland from her home in Virginia (J.A. 273).

The night before the fires, Defendant had been visiting one of the Webb's neighbors, Brian Ross. Defendant frequently visited Ross and often would park illegally in front of the Webbs' and other neighbors' houses (J.A. 60-61, 112-114, 140-141, 205-206). On several occasions, this resulted in his car being towed, which infuriated Defendant. In the end, Defendant came to believe that Mr. Webb was to blame for these incidents (J.A. 64-65, 141, 206). He vowed to "[g]et even with that nigger" (J.A. 206). Defendant suggested to Ross and others that they should slash the tires on Mr. Webb's car or otherwise vandalize it (J.A. 65). And, on August 3, 1998, Defendant did in fact slash the tires on both of the Webbs' cars

(J.A. 207-208, 270). On September 27, 1998, Defendant went a step further, filling an empty beer can with lighter fluid, inserting a wick, and throwing the makeshift Molotov cocktail between the Webbs' cars (J.A. 207-210, 271-272). The burning can was discovered by a passing motorist, who called the fire department (J.A. 247), but in the end, the device extinguished itself without damaging either vehicle.

On the night of October 30, 1998, Defendant and others gathered at Ross's house. Defendant again spoke of seeking revenge against the Webbs for the prior towing incidents (J.A. 70, 210). Ross eventually went to bed and the others guests left, with the exception of Defendant and Charles Jewell (J.A. 118). Jewell testified that Defendant stayed up all night (J.A. 119) and that Jewell heard Defendant making noise in the kitchen and going in and out the front door several times during the night (J.A. 119-120).

At approximately 5:30 a.m., a passerby noticed that Ms. Webb's car was on fire and called the fire department (J.A. 48-50). After the fire was extinguished, the remains of a Molotov cocktail made from a Coors Lite beer bottle and paper towels, along with a second intact cocktail were discovered at the scene (J.A. 167-169, 276-277). The Fire Marshal determined that these incendiary devices were the cause of the fire (J.A. 187).

During the fire investigation, the Fire Marshal went to Ross's house. Defendant was not there (J.A. 123, 155, 213) and did not return until the next afternoon (J.A. 124, 155-156, 215). However, a search of the Ross residence revealed several empty Coors Lite beer bottles as well as Budweiser beer bottles with the same manufacturing date as bottles found at the scene of the fire (J.A. 172). The search also revealed a roll of paper towels of the same design as the paper towels used to make the Molotov cocktails that burned the Webbs' cars (J.A. 172-174, 200-201). Other Coors Lite and matching Budweiser beer bottles were found in a dumpster near the residence (J.A. 166, 170). A bottle of Varsol, a flammable petroleum product consistent with the accelerant found in the Molotov cocktails, was also found near the dumpster (J.A. 171, 198-202).

The following day, Defendant admitted to Ross that he had burned the vehicles (J.A. 215). Later, Defendant asked Ross not to say anything to incriminate Defendant (J.A. 218)

SUMMARY OF THE ARGUMENT

Defendant's primary contention is that a personal vehicle used to travel in interstate commerce to and from a place of employment is not a "vehicle * * * 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). He contends that the Supreme Court's recent decision in *Jones* v. *United States*, 120 S. Ct. 1904 (2000), limits Section 844(i) to the arson of vehicles used for a business purpose.

As an initial matter, Defendant's pre-trial stipulation that the Webbs' vehicles were covered by Section 844(i) ordinarily would preclude him from contesting the sufficiency of the evidence for this element on appeal. The interstate commerce element, while often called "jurisdictional," does not go the court's subject matter jurisdiction and, therefore, is subject to stipulation and waiver. Nonetheless, the Supreme Court's decision in *Jones*, handed down after trial in this case, could provide a basis for relieving Defendant of his waiver, if the decision made clear that Defendant's actions did not amount to a violation of federal law. In this case, however, the intervening decision does not lead to that result. Even after *Jones*, Defendant's actions clearly violated Section 844(i).

Jones does not limit Section 844(i) to arson of property used for a business purpose. Instead of drawing a distinction between property used for business and non-business purposes (a distinction Congress explicitly rejected in enacting Section 844(i)), *Jones* distinguishes between property that falls within Congress's Commerce Clause powers by virtue of its function or use, and property subject to

Commerce Clause regulation based on a "passive, passing, or past connection to commerce." 120 S. Ct. at 1910. So long as a vehicle is "affecting interstate commerce" because of the way it is used – rather than because it has previously passed through commerce or is subject to out-of-state insurance, etc. – it is protected by Section 844(i) even if it is not used for a business purpose.

A car driven on interstate roads to get its owner to work is used in a way that affects interstate commerce. The phrase "affecting interstate commerce" has long been understood to include any activity that falls within Congress's Commerce Clause power. And it has long been established that this power includes the authority to regulate instrumentalities of interstate commerce, such as a vehicle being used to transport people or goods in interstate travel through the channels of interstate commerce. For this reason, vehicles actively used for interstate transportation are used in an "activity affecting interstate commerce" within the meaning of Section 844(i).

Even if the role of the Webbs' vehicles as instrumentalities was insufficient, their use to transport Ms. Webb to her job had a clear and direct effect on interstate commerce by facilitating her participation in interstate commerce through her employment.

Finally, there was ample evidence to support the jury's conclusion that Defendant firebombed the Webbs' vehicles in violation of Section 844(i).

ARGUMENT

I. DEFENDANT IS BOUND BY HIS STIPULATION AS TO THE INTERSTATE ELEMENT OF HIS SECTION 844(i) CONVICTION AND HAS WAIVED ANY RIGHT TO CONTEST THE SUFFICIENCY OF THE EVIDENCE ON THAT GROUND

Defendant argues (App. Br. 9-20) that the United States failed to provide sufficient evidence to satisfy the interstate commerce element of a Section 844(i) offense. Pointing to the Supreme Court's decision in *Jones* v. *United States*, 120 S. Ct. 1904 (2000), he argues that a vehicle driven in interstate travel to a place of employment is not "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce" within the meaning of the statute.

However, before trial, Defendant stipulated (J.A. 31) that the cars in questions "were used in interstate commerce and in an activity affecting interstate commerce within the meaning of those terms in Title 18, United States Code, Section 844(i)." In ordinary circumstances, by entering a stipulation with respect to an element of the offense, Defendant would waive any right to object to the sufficiency of the evidence regarding this element. *United States* v. *Muse*, 83 F.3d 672, 678-679 (4th Cir.), cert. denied, 519 U.S. 904 (1996). See also *United States*

v. *Harrison*, 204 F.3d 236, 240 (D.C. Cir.), cert. denied, 121 S. Ct. 262 (2000); *United States* v. *Meade*, 175 F.3d 215, 223 (1st Cir. 1999); *United States* v. *Hardin*, 139 F.3d 813, 815-816 (11th Cir.), cert. denied, 525 U.S. 898 (1998); *United States* v. *Melina*, 101 F.3d 567, 572 (8th Cir. 1996); *United States* v. *Clark*, 993 F.2d 402, 406 (4th Cir. 1993); *United States* v. *Reedy*, 990 F.2d 167, 169 (4th Cir.), cert. denied, 510 U.S. 875 (1993).

Defendant asserts (App. Br. 20), however, that he cannot waive the right to challenge the evidence of an interstate commerce connection because this element of the offense affects the subject matter jurisdiction of the court. He is wrong as a matter of law:

> [T]he nexus with interstate commerce, which courts frequently call the "jurisdictional element," is simply one of the essential elements of § 844(i). Although courts frequently call it the "jurisdictional element" of the statute, it is "jurisdictional" only in the shorthand sense that without that nexus, there can be no federal crime * * *. It is not jurisdictional in the sense that it affects the court's subject matter jurisdiction, i.e., a court's constitutional or statutory power to adjudicate a case, here authorized by 18 U.S.C. § 3231.

United States v. *Martin*, 147 F.3d 529, 531-532 (7th Cir. 1998). Thus, numerous courts have held that Section 844(i) is subject to waiver. See *United States* v. *Johnson*, 194 F.3d 657, 659 (5th Cir. 1999), vacated on other grounds, 120 S. Ct. 2193 (2000); *United States* v. *Viscome*, 144 F.3d 1365, 1370 (11th Cir.), cert.

denied, 525 U.S. 941 (1998); *United States* v. *Ryan*, 41 F.3d 361, 363-364 (8th Cir. 1994), cert. denied, 514 U.S. 1082 (1995).

Although Defendant puts forward no other basis for ignoring the conclusive effect of his stipulation, it is established that a stipulation "should not be rigidly adhered to when it becomes apparent that it may inflict a manifest injustice." *Marshall* v. *Emersons, Ltd.*, 593 F.2d 565, 568 (4th Cir. 1979) (quoting *Maryland Cas. Co.* v. *Rickenbacker*, 146 F.2d 751, 753 (4th Cir. 1944)). See also *T I Fed. Credit Union* v. *DelBonis*, 72 F.3d 921, 928 (1st Cir. 1995); *United States* v. *Reedy*, 990 F.2d at 169; *United States* v. *Harding*, 491 F.2d 697, 698-699 (10th Cir. 1974); 73 Am. Jur. 2d *Stipulations* § 13 (1974). In appropriate circumstances, an intervening change in the law may create a situation in which holding a party to a stipulation would be manifestly unjust. See *Harding*, 491 F.2d at 698-699; *Marshall*, 593 F.2d at 568; *T I Fed. Credit Union*, 72 F.3d at 928. In particular, "upon an appeal from a criminal charge, an appellant may be relieved of a stipulation, when it would be manifestly unjust to uphold a conviction where, because of an intervening change in the law, there is insufficient evidence to establish the commission of a crime." *United States* v. *Cutler*, 676 F.2d 1245, 1248 (9th Cir. 1982). Cf. *United States* v. *Mitchell*, 104 F.3d 649, 652-653 (4th Cir.

1997) (acceptance of a guilty plea may be reversed based on intervening change in the law).

Thus, in this case, if a change in the law made clear that the factual basis for Defendant's stipulation was inadequate, it might be appropriate to release him from the stipulation and remand the case for appropriate proceedings in which the United States could prove the nexus under the new legal standard. See, *e.g.*, *Cutler*, 676 F.2d at 1248, 1250; *Harding*, 491 F.2d at 699.[1] However, as discussed below, the asserted change in the law in this case does *not* render the factual basis for Defendant's stipulation insufficient. For that reason, Defendant's stipulation should be enforced and his objection to the sufficiency of the evidence to establish an interstate commerce connection under Section 844(i) should be deemed waived.

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[1] Because a stipulation relieves the government of any obligation to provide additional proof of the stipulated facts, it would be clearly inappropriate to simply reverse the conviction and deprive the government of an opportunity to prove its case. See, *e.g.*, *United States* v. *Muse*, 83 F.3d at 679. However, in this particular case, during the original trial the United States presented all the evidence of an interstate commerce connection that is available. If this Court concludes that those facts are insufficient, a remand for further fact finding would serve no purpose.

II. A PERSONAL VEHICLE USED FOR INTERSTATE TRAVEL TO A PLACE OF EMPLOYMENT IS USED IN INTERSTATE COMMERCE AND AN ACTIVITY AFFECTING INTERSTATE COMMERCE WITHIN THE MEANING OF SECTION 844(i)

At trial the United States proved, and Defendant does not dispute (App. Br. 18), that the burned vehicles were driven by Ms. Webb to travel on interstate roadways across state lines to get to work (see J.A. 273). These facts are sufficient to establish the interstate commerce connection required by Section 844(i).

A. Under *Jones* A Vehicle Must Be Actively Employed In An Activity Affecting Commerce

Section 844(i) requires proof that Defendant damaged or destroyed a vehicle "used in interstate or foreign commerce or in an activity affecting interstate or foreign commerce." Prior to the Supreme Court's decision in *Jones* v. *United States*, 120 S. Ct. 1904 (2000), this Court and others understood this language to reach all property within Congress's Commerce Clause power. See *United States* v. *Ramey*, 24 F.3d 602, 606-607 (4th Cir. 1994). However, *Jones* held that by limiting Section 844(i) to the arson of property "used" in commerce or a commerce-affecting activity, Congress intended to reach only a subset of activities within the broad range of its authority.

Importantly, however, *Jones* did not hold that Section 844(i) drew a line between the destruction of property used for a business purpose and property used for non-business purposes. In fact, the Court in *Jones* specifically noted that Congress rejected a proposal that the statute apply only to "property used for business purposes." *Jones*, 120 S. Ct. at 1909 n.5 (citing *Russell* v. *United States*, 471 U.S. 858, 860 & n.5 (1985)) . That qualification was removed in order to broaden the scope of the provision to include property, such as churches and police stations, that affect commerce but are not used for a business purpose. See *Jones*, 120 S. Ct. at 1909 n.5; *Russell*, 471 U.S. at 860-862. To restrict Section 844(i) to the destruction of property used for a business purpose would effectively reinstate a limitation Congress intentionally removed from the earlier versions of the bill.

Reading the statute to reach only property used for a business purposes would also effectively limit the statute to property "used in interstate commerce" and would render superfluous the additional phrase "used in * * * any activity affecting interstate commerce." That is, "in commerce" are "words of art" used to denote "the generation of goods and services for interstate markets and their transport and distribution to the consumer." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273 (1995) (quoting *Gulf Oil Corp.* v. *Copp Paving Co.*,

419 U.S. 186, 195 (1974)). Property used "in commerce" under this definition is the equivalent to property used for a business purpose.[2] As the Court in *Jones* observed, "[j]udges should hesitate . . . to treat statutory terms in any setting as surplusage, and resistance should be heightened when the words describe an element of a criminal offense." 120 S. Ct. at 1911 (internal punctuation and citation omitted).

Thus, "categorically labeling a * * * vehicle as non-commercial does not preclude it from being used in an activity that affects interstate commerce." *Belflower* v. *United States*, 129 F.3d 1459, 1461-1462 (11th Cir. 1997), cert. denied, 525 U.S. 921 (1998). Instead, the Court in *Jones* properly focused on the qualifying language ("used in") and drew a distinction between a connection with commerce through "active employment" and "a passive, passing, or past connection to commerce." 120 S. Ct. at 1906. Pursuant to this distinction, the property must be brought within Congress's Commerce Clause power by virtue of

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[2] Cf. 18 U.S.C. 33 (prohibiting destruction of certain vehicles "used * * * in interstate or foreign commerce"); 18 U.S.C. 31(a)(6) (defining a covered motor vehicle as limited to those "used for commercial purposes"); 18 U.S.C. 31(a)(10) (defining "used for commercial purposes" to mean "carriage of persons or property for any fare, fee, rate, charge or other consideration, or directly or indirectly in connection with any business, or other undertaking intended for profit.").

its present use and function, rather than based on other factors that would otherwise qualify the property for regulation. *Ibid.*

As a result, the Court explained that the statute did not reach "a building whose damage or destruction might affect interstate commerce," because that effect on commerce is not a result of the property's use or function. *Id*. at 1909-1910 (citations omitted). And the Court held that an interstate gas connection, mortgage, or insurance policy is not enough because these connections with interstate commerce are not a result of the building's being "used" in an "activity," but rather are the result of factors independent of the building's active use. *Id*. at 1910 ("It surely is not the common perception that a private, owner-occupied residence is 'used' in the 'activity' of receiving natural gas, a mortgage, or an insurance policy."). For the same reason, it is not enough to show that the property, or its components, previously traveled through interstate commerce. *Id*. at 1911. Those connections are not a result of the present use or function of the building.

In the end, the Court concluded, Section 844(i) "does not reach an owner-occupied residence that is not used for any commercial purpose," 120 S. Ct. at 1909, because a personal dwelling does not affect interstate commerce by virtue of

any of its active uses. See *id*. at 1910. But this does not mean that no property can ever affect commerce through its active use unless it is used for a business purpose. The Court specifically noted that Congress intended a broader scope in contexts other than personal homes, including non-commercial buildings such as schools, police stations and churches. *Id*. at 1909 n.5. The Court simply concluded that in the situation directly before the Court, involving a private residence, a business use was the only use conceivable that could affect interstate commerce through the building's active employment.

B. A Vehicle Actively Employed To Travel In Interstate Commerce Is Used In An Activity Affecting Interstate Commerce Even If It Is Not Used For A Business Purpose

The question for this case, then, is whether the Webbs' cars were actively employed in an activity that "affect[s] interstate commerce," even though they were not used for a business purpose. See *Jones*, 120 S. Ct. at 1910 ("The proper inquiry * * * is into the function of the [property] itself, and then a determination of whether that function *affects interstate commerce*.") (quotation marks and citation omitted) (emphasis added). They were.

Defendant is correct (App. Br. 17) that *Jones*' active use requirement prevents the United States from proving a violation of Section 844(i) simply by

showing that the vehicles previously had been transported in interstate commerce or were composed of parts that were once in the flow of interstate commerce. Nor can the interstate commerce element be proven by demonstrating that the cars were powered by gasoline that has traveled interstate, were purchased with an interstate loan, or were covered by out-of-state insurance.

Nonetheless, even though they were not used for a business purpose,[3] the vehicles in this case were used in an activity "affecting interstate commerce" within the meaning of the statute because they were actively employed as instrumentalities of commerce, traveling through the channels of interstate commerce in order to permit Ms. Webb to participate in the commercial activity of working at a Maryland firm.

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[3] There can be little doubt that *had* the Webbs used their cars as part of a business, that use would affect commerce within the meaning of the statute. See, *e.g.*, *United States* v. *Shively*, 927 F.2d 804, 808-809 (5th Cir.) (company car), cert. denied, 501 U.S. 1209 (1991); *United States* v. *Metzger*, 778 F.2d 1195, 1207-1208 (6th Cir. 1985) (car used in family business), cert. denied, 477 U.S. 906 (1986); *United States* v. *Michaels*, 726 F.2d 1307, 1310 (8th Cir.) (car used for union business), cert. denied, 469 U.S. 820 (1984).

1. Property Used As An Instrumentality Affects Interstate Commerce

In *Jones* the Court recognized, as it had in *Russell*, that the phrase "in interstate * * * commerce or in any activity affecting interstate * * * commerce" encompasses Congress's "full authority under the Commerce Clause." *Jones*, 120 S. Ct. at 1909; *Russell*, 471 U.S. at 859. The Supreme Court has

> identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the *channels of interstate commerce*. Second, Congress is empowered to regulate and *protect the instrumentalities of interstate commerce*, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate * * * those activities that substantially affect interstate commerce.

United States v. *Lopez*, 514 U.S. 549, 558-559 (1995) (emphasis added).

Congress's power to regulate "the use of the channels of interstate commerce" includes the power to regulate conduct affecting the use of interstate roads and highways or inhibiting interstate travel. See, *e.g.*, *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 255-256 (1964) ; *Hoke* v. *United States*, 227 U.S. 308, 320 (1913) ("Commerce among the states, we have said, consists of intercourse and traffic between their citizens."). Moreover, Congress's authority to "protect the instrumentalities of interstate commerce," includes the power to

protect vehicles, such as automobiles. See, *e.g.*, *United States* v. *Cobb*, 144 F.3d 319, 322 (4th Cir. 1998) (Congress may criminalize carjacking to protect instrumentality of commerce); *United States* v. *Bishop*, 66 F.3d 569, 588-590 (3d Cir.) (same), cert. denied, 516 U.S. 1032 (1995).

Thus, a car used to travel interstate in the channels of interstate commerce falls within Congress's Commerce Clause authority and therefore "affects commerce" within the traditional understanding of that term. That a vehicle is an instrumentality of commerce is a sufficient connection with interstate commerce to permit regulation under the Commerce Clause, even if the vehicle affects commerce in no other way. See *Cobb*, 144 F.3d at 322 n.2. That is, Congress may legislate with respect to activities affecting the channels and instrumentalities of interstate commerce regardless of whether the affected channels and instrumentalities are "commercial in character." *Heart of Atlanta Hotel*, 379 U.S. at 256. See also *Cobb*, 144 F.3d at 322 & n.2 (because statute fell within Congress's power to regulate instrumentalities "we need not decide whether the statute can be sustained as a regulation of an activity that substantially affects interstate commerce"). Thus, for example, this Court has held that pursuant to its authority over instrumentalities, Congress may prohibit the carjacking of privately

owned vehicles serving no commercial function. *Cobb*, 144 F.3d at 322. See also *Bishop*, 66 F.3d at 588-590.

And so long as a vehicle qualifies as an instrumentality of commerce by virtue of its function and active use (rather than some other aspect of the car, such as its past passage through interstate commerce), it is subject to the protection of Section 844(i).[4] That is, nothing in *Jones* indicates that the Court believed that Congress intended to categorically exclude property subject to Commerce Clause regulation as an instrumentality or channel of commerce. The only limitation in Section 844(i) is the requirement that the property fall under Congress's Commerce Clause power by virtue of its function rather than because of a "passive, passing, or past connection to commerce." 120 S. Ct. at 1910.

2. A Vehicle Used To Travel To A Place Of Employment Affects Interstate Commerce

Even if use of a vehicle as an instrumentality of interstate commerce were insufficient under Section 844(i), use of the vehicle to access employment is an "activity affecting interstate commerce" within the meaning of the statute. It is

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[4] The cases cited by Defendant (App. Br. 18-19) do not consider whether the vehicles in those cases affected commerce by virtue of their function as instrumentalities of interstate commerce. See *United States* v. *Monholland*, 607 F.2d 1311, 1316 (10th Cir. 1979); *United States* v. *Montgomery*, 815 F. Supp. 7 (D.D.C. 1993). See also *United States* v. *McGuire*, 178 F.3d 203 (3d Cir. 1999).

well-established that regulation of employment and the protection of interstate labor markets falls squarely within the commerce power. See, *e.g.*, *United States* v. *Darby*, 312 U.S. 100 (1941). Getting to work is an "activity affecting" this aspect of commerce. It is true that the Tenth Circuit rejected a similar argument in *United States* v. *Monholland*, 607 F.2d 1311, 1316 (10th Cir. 1979), concluding that "movement to and from work is an activity which ordinarily has an existence independent from the work." However, all the statute requires is that the activity of driving to work "affects interstate commerce." Driving a vehicle *to* work affects commercial activities just as surely as driving a vehicle *at* work. That is, destroying a vehicle used to get to work interferes with the employee's participation in commercial activities just as surely as the destruction of a vehicle the employee would use upon arriving at work.

C. A Narrower Interpretation Of Section 844(i) Is Not Required To Avoid Constitutional Questions

Defendant argues (App. Br. 17) that Section 844(i) must be limited to only those vehicles used for business purposes because otherwise "every vehicle in the country could fall within the coverage of the arson provision[]" and "Congress did

not intend that the provisions of § 844(i) apply to all the vehicles in the country."[5] He also asserts (App. Br. 16-17) that a narrower construction is required to avoid "grave and doubtful constitutional questions" raised by a reading of the statute that would intrude on state and local authority over the acts "traditionally considered to be local criminal conduct." None of these generalized concerns warrants reading into the statute a limitation that is not there and was never intended.

While prohibiting the burning of every building in the country might raise questions under *Lopez*, see *Jones*, 120 S. Ct. at 1911-1912, there should be no similar concerns about Congress's power to protect vehicles as instrumentalities of commerce. See *Cobb*, 144 F.3d at 322. Although arson may be "traditionally local criminal conduct," the regulation of vehicles capable of interstate travel is just as traditionally a subject of federal regulation. See *ibid*. (citing cases). See also *United States* v. *Morrison*, 120 S. Ct. 1740, 1754 (2000) ("The regulation and punishment of intrastate violence *that is not directed at the instrumentalities,*

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[5] In fact, the United States does not argue that Section 844(i) covers every vehicle in the country. The prosecution must still show that the vehicle qualifies as an instrumentality of interstate commerce or travel by virtue of its use. This would, for example, exclude vehicles incapable of, or never used for, such travel. A tractor driven solely on the grounds of a family home or a broken vehicle sitting on blocks behind the owner's house would not qualify as being actively employed as instrumentalities of interstate commerce.

channels, or goods involved in interstate commerce has always been the province of the States.") (emphasis added). In fact, Defendant himself concedes (App. Br. 17) that "Congress could have enacted § 844(i) to subject all the vehicles in the United States to its provisions."

In the end, the fact that most automobiles may qualify under Section 844(i) simply illustrates the nature of automobiles in our modern society, not a flaw in the United State's interpretation or a defect in Congress's constitutional authority. See *Cobb*, 144 F.3d at 322 ("Cars * * * are both inherently mobile and indispensible to the interstate movement of persons and goods."). This Court has already held that Congress intended, and had the power, to criminalize carjacking even though the statute clearly applies, as a practical matter, to almost every car in the country. *Ibid*. This Court did not attempt to construe the carjacking provision narrowly to avoid that prospect. *Ibid*. Similarly, the fact that almost every handgun is subject to certain federal regulation by virtue of their travels through interstate commerce does not mean that Congress intended to regulate a smaller subset of such handguns. See *Scarborough* v. *United States*, 431 U.S. 563 (1977); *United States* v. *Wells*, 98 F.3d 808, 811 (4th Cir. 1996).

III. THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION

There was sufficient evidence to sustain the jury's verdict. This Court has explained that:

> When reviewing a sufficiency-of-the-evidence claim, we will sustain the jury's verdict if there is substantial evidence, taking the view most favorable to the Government, to support it. Substantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.

United States v. *Jackson*, 124 F.3d 607, 610 (4th Cir. 1997) (citations and internal punctuation omitted), cert. denied, 522 U.S. 1066 (1998). "We must consider circumstantial as well as direct evidence, and allow the government the benefit of all reasonable inferences from the facts proven to those sought to be established." *United States* v. *Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982). Under these strict standards, "an appellate court's reversal of a conviction on grounds of insufficient evidence should be confined to cases where the prosecution's failure is clear." *United States* v. *Jones*, 735 F.2d 785, 791 (4th Cir.) (quotation marks and citation omitted), cert. denied, 469 U.S. 918 (1984).

Defendant's sufficiency-of-the-evidence argument amounts to nothing more than asserting a lack of direct evidence that he was the perpetrator (App. Br. 21) and pointing out the conflict between his own self-serving testimony and all the

other evidence (App. Br. 21-22). Neither argument is sufficient. The United States did provide direct evidence of Defendant's guilt in the form of Ross's testimony that Defendant confessed to him (J.A. 215). The United States also provided ample circumstantial evidence to corroborate that confession. "[C]ircumstantial evidence is treated no differently than direct evidence, and may be sufficient to support a guilty verdict even though it does not exclude every reasonable hypothesis consistent with innocence." *United States* v. *Jackson*, 863 F.2d 1168, 1173 (4th Cir. 1989). As set forth at pp. 4-6, *supra*, the evidence of Defendant's guilt was substantial and more than sufficient to sustain the jury's verdict.

That Defendant denied his guilt is neither surprising nor a reason to set aside the jury's verdict. This Court has observed that "in reviewing the sufficiency of the evidence, we are not entitled to weigh the evidence or to assess the credibility of witnesses, 'but must assume that the jury resolved all contradictions ... in favor of the Government.'" *United States* v. *Romer*, 148 F.3d 359, 364 (4th Cir. 1998) (citation omitted), cert. denied, 525 U.S. 1141 (1999). In this case the jury clearly did not believe Defendant's protestations of innocence or alternative version of the events. That determination was both reasonable and not subject to second-guessing on appeal. See *United States* v. *Lowe*, 65 F.3d 1137, 1142 (4th Cir. 1995)

("Credibility determinations are within the sole province of the jury and are not susceptible to judicial review."), cert. denied, 519 U.S. 807 (1996).

CONCLUSION

For the reasons stated above, Defendant's conviction and sentence should be affirmed.

Respectfully submitted,

BILL LANN LEE
Assistant Attorney General

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JESSICA DUNSAY SILVER
KEVIN K. RUSSELL
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 305-0025

CERTIFICATE OF COMPLIANCE

Kevin K. Russell, a member of the bar of this Court, certifies that the foregoing brief complies with the type-volume limitations of Fed. R. App. P. (a)(7)(A), as it is fewer than 30 pages in length.

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KEVIN RUSSELL
Attorney

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief for the United States as Appellee were sent by first class mail this 6th day of December, 2000, to the following counsel of record:

Alan Hideto Yamamoto
108 North Alfred Street
Alexandria, VA 22314

G. David Hackney
Office of the U. S. Attorney
2100 Jamieson Avenue
Alexandria, VA 22314-5194

_____
KEVIN RUSSELL
Attorney