No. 00-3400

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

_____

UNITED STATES OF AMERICA,

Appellee

v.

JAMES G. COLVIN,

Defendant-Appellant

_____

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

_____

BRIEF FOR THE UNITED STATES AS APPELLEE

_____

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JURISDICTIONAL STATEMENT

The United States concurs in the Appellant's jurisdictional statement.

STATEMENT OF THE ISSUES

1. Whether Congress intended that penalties under 18 U.S.C. 844(h), using fire in the commission of a felony, be applied cumulatively to penalties under the predicate felony, even where the predicate felony itself involves the use of fire.

2. Whether conspiring to violate a person's rights by burning a cross may be used as a predicate felony to 18 U.S.C. 844(h), using fire in the commission of a felony.

3. Whether it was error not to require the jury to determine the type of firearm the defendant used or carried in the commission of a felony under 18 U.S.C. 924(c).

STATEMENT OF THE CASE

On December 14, 1999, James G. Colvin was indicted for (1) intimidation and interference with the exercise of housing rights on the basis of race, in violation of 42 U.S.C. 3631; (2) conspiracy to threaten or intimidate persons in the free exercise or enjoyment of housing rights, in violation of 18 U.S.C. 241; (3) use of fire in the commission of a felony, in violation of 18 U.S.C. 844(h); and (4) use or carrying of a firearm in the commission of a felony, in violation of 18 U.S.C. 924(c) (A.1-A.6).[1]

After a three-day jury trial, Colvin was convicted on all four counts on May 10, 2000 (A.22). The trial judge entered judgment against Colvin on September 8, 2000, sentencing him to a total of 22 years of imprisonment, followed by 3 years of supervised release, and ordered him to pay a special assessment of $400 (A.37-A.43). Colvin filed a timely notice of appeal on the same day.

STATEMENT OF FACTS

James Colvin first joined the American Knights of the Ku Klux Klan during the summer of 1996[2] (Tr. 356). At that time, Colvin was appointed to the position of "Knight Hawk" for the Kokomo, Indiana, chapter of the Klan (Tr. 37, 357), in which capacity he was responsible both

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[1] References to "A.__" are to pages of the short appendix attached to Appellant's opening brief; references to "Tr. __" are to pages in the consecutively paginated three-volume trial transcript; references to "Br. __" are to pages of the Appellant's opening brief; references to "Sent. Tr. __" are to pages in the one-volume transcript of the sentencing hearing.

[2] "Because this is an appeal from a conviction, [this Court] must construe the facts in the light most favorable to the Government." *United States* v. *Jaderany*, 221 F.3d 989, 991 (7th Cir. 2000), cert. denied, 121 S. Ct. 1095 (2001). The facts are presented in this brief in the light most favorable to the Government.

for security at Klan-sponsored events (Tr. 36, 155), and for ensuring that Klan members adhered to the rules of the organization (Tr. 276). Colvin joined the Klan in part because of his views "that races should remain pure" (Tr. 361). A fellow-Klansman testified at Colvin's trial that Colvin "didn't like" minorities and "thought that people who dated blacks were nigger lovers" (Tr. 39). He further testified that Klan members, including Colvin, believed that black people living in the United States should be sent "back to Africa," and that Mexican and Puerto Rican people should be "sen[t] back" as well (Tr. 39-41).

Upon joining the Klan, Colvin became acquainted with Travis Funke, who was an Assistant Knight Hawke in the Kokomo Klan (Tr. 36). During the summer of 1996, the two men spent time together discussing such topics as their hatred of black and Hispanic people and their desire to have the Klan "take over" Kokomo (Tr. 41). They also discussed plans for burning crosses in order both to scare minority citizens and to compel them to move out of Kokomo (Tr. 42). On September 30, 1996, Funke and another Klan member burned a cross outside the home of a black family and threw a rock though their window along with a threatening note[3] (Tr. 46-48, 158-163). Funke later told Colvin what he and done, and he and Colvin then decided to burn another cross (Tr. 49). Funke and Colvin traveled to Auburn, Indiana, to secure permission for the cross burning from the Imperial Wizard of the Indiana Klan, Jeff Berry (Tr. 44, 49). Berry gave them permission, but instructed them to "make" Lee Mathis, who was not a Klan member (Tr. 38), participate in the incident because the Klan was concerned that Mathis would report to

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[3] The note read: "White power. Hello, nigger. You have just been paid a little visit by the Ku Klux Klan. You have 30 days to get the fuck out or next time it won't be a cross burning. Watch out, nigger. The Klan is getting bigger" (Tr. 48).

the police what he knew about the earlier cross burning (Tr. 50, 52, 106).

Colvin decided that they should burn the cross in front of the home of Luis Ortiz, a man of Puerto Rican descent (Tr. 210), and his fiancée Erika Ortiz, who was originally from Mexico (Tr. 231; 50, 106). Colvin had met Luis Ortiz earlier that year at the home of their mutual friend Christine Cloe (Tr. 213). At one point, Colvin informed Ortiz that he was interested in Cloe romantically (Tr. 215). On the night of October 6, 1996, Funke, Mathis, and Colvin went to Colvin's house where they built a cross, wrapped the cross in old sheets, and soaked the sheets in gas and oil (Tr. 51-53, 107). Waiting until it was late at night, the three men transported the cross to the Ortizes' home in Colvin's truck (Tr. 53, 57, 108-109). After driving by the residence a couple of times, the men parked in a back alley and transported the cross to the front yard (Tr. 61). While Mathis and Funke set up and ignited the cross, Colvin sat in his truck (Tr. 61-62, 111-112). Before Funke and Mathis set up the cross, Colvin gave Funke a handgun from his truck (Tr. 56, 62, 84, 116-117). Funke told Colvin that he would "shoot somebody if they came out" while he was setting up the burning cross (Tr. 62, 121). While he waited for Funke and Mathis, Colvin held an SKS assault rifle, which he had also retrieved from his truck (Tr. 56, 113, 135). After throwing a rock through the window of the Ortizes' home, the three men drove away (Tr. 63, 115).

Luis and Erika Ortiz were inside the residence, along with Oscar Reviera, who shared the residence with them (Tr. 211, 216). The Ortizes were awakened late at night by the breaking of their bedroom window (Tr. 216, 236). They looked toward the front of the house and saw that it was brightly lit (Tr. 216). Fearing that the house was on fire, the Ortizes jumped out of bed and ran to the front of the house where Luis Ortiz saw a "huge cross burning" in the yard (Tr. 216-

217). The police and the fire department arrived on the scene where they extinguished the fire and took statements from the victims (Tr. 217-218, 238). After the cross burning, the Ortizes and Reviera were afraid to stay in their home and eventually broke their lease in order to move to a different residence (Tr. 218-219, 239). In doing so, the Ortizes were forced to abandon their furniture (Tr. 219, 240).

Funke later stole the two guns used on the night of October 6 from Colvin's truck, and Colvin reported the theft to the police (Tr. 64, 140-141). By the time the police responded to the report, Colvin had already recovered the guns (Tr. 140-141). The police took the guns into evidence, logging in an SKS rifle and a 9 millimeter Bryco handgun (Tr. 141, 144, 149). The guns were later returned to Colvin (Tr. 142).

Both Funke and Mathis entered into plea agreements with the government and testified against Colvin at trial. Funke received a sentence of 46 months of imprisonment (Tr. 65). Mathis received a sentence of 30 months of imprisonment (Tr. 138).

SUMMARY OF ARGUMENT

Congress has broad authority to set penalties for behavior it determines to be criminal. In fact, its authority is so broad as to allow Congress to subject defendants to cumulative punishments for one crime, so long as it clearly expresses its intention to do so. Where such clear intent is evident in the plain language of a statute, courts need look no further before rejecting a Double Jeopardy challenge. As this Court has found, in the case of 18 U.S.C. 844(h), using fire in the commission of a felony, the plain language of the statute evinces Congress's clear intent that penalties for violations of Section 844(h) be cumulative to all penalties for all underlying felonies. Because that intent is clear, it was not error to convict Colvin of violating

both Section 844(h) and 42 U.S.C. 3631, intimidation or interference with housing rights, for burning a cross in the yard of the Ortizes' home. Likewise, it was not error to convict Colvin of violating both Section 844(h) and 18 U.S.C. 241, conspiracy to violate rights, for burning a cross in the yard of the Ortizes' home.

Even if this Court chooses to look beyond the plain language of Section 844(h) by engaging in a *Blockburger* analysis, it will find that application of Section 844(h) along with Sections 3631 and 241 satisfy that test. Neither Section 3631 nor Section 241 require use of fire in order to find a felony violation. In addition, both Sections 3631 and 241 require proof of elements that Section 844(h) does not. That is all that is needed to satisfy the *Blockburger* test. Moreover, it was appropriate to apply Section 844(h) to the predicate felony of conspiracy under Section 241 because Colvin was responsible for all of the foreseeable actions taken by his co-conspirators in furtherance of the conspiracy, and the use of fire was certainly a foreseeable action in furtherance of a conspiracy to burn a cross for the purpose of racially-motivated intimidation.

Finally, the jury was not required to determine what type of gun Colvin used or carried when it found him guilty of violating 18 U.S.C. 924(c) by using or carrying a firearm in the commission of a felony. This Court has found that the type of firearm used in a violation of Section 924(c) is a sentencing factor, not an element of the crime itself, and therefore need not be submitted to the jury, but may be determined by the sentencing judge.

ARGUMENT

I. PUNISHING COLVIN UNDER SECTION 3631, SECTION 241, AND SECTION 844(H) DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE

A. *Congress Intended That Punishments Under Section 844(h)(1) Be Cumulative To Other Punishments, Including Those Under Section 3631*

1. Colvin contends (Br. 9-18) that his conviction under both 42 U.S.C. 3631 for intimidation or interference with housing rights on the basis of race, and 18 U.S.C. 844(h)(1) for using fire in the commission of a felony, violates his right under the Fifth Amendment not to be "twice put in jeopardy." U.S. Const. Amend. 5. Colvin reasons that a violation of Section 3631 may not serve as the predicate felony offense under Section 844(h) because the 3631 violation was a felony only by virtue of the fact that Colvin used fire in its commission. Thus, he reasons, to further punish him for use of fire in commission of a felony is to subject him to multiple punishments for the same crime, which is prohibited by the Double Jeopardy Clause. See *Missouri* v. *Hunter*, 459 U.S. 359, 365-366 (1983). However, Colvin does not contest the fact that "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Hunter*, 459 U.S. at 366. Therefore, if Congress intended that violations of Section 844(h) and of Section 3631 be punished cumulatively, then this Court may not find a violation of the Double Jeopardy Clause.

Colvin suggests that the question whether Section 3631 and Section 844(h) impermissibly impose cumulative punishments for one crime should be analyzed according to the test articulated by the Supreme Court in *Blockburger* v. *United States*, 284 U.S. 299 (1932). Under that formulation, two statutes may be imposed cumulatively only if "[e]ach of the offenses created requires proof of a different element." *Id.* at 304. Colvin's suggestion is inappropriate in

this case, however, because the statutory language of Section 844(h) makes perfectly clear Congress's intent to impose cumulative punishments when a person uses fire in the commission of a felony. As the Supreme Court has held, "[w]here, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the * * * jury may impose cumulative punishment under such statutes in a single trial." *Hunter*, 459 U.S. at 368-369. This Court has specifically noted that the "*Blockburger* test is used to discern legislative intent not to override it." *Blacharski* v. *United States*, 215 F.3d 792, 794 (7th Cir.), cert. denied, 121 S. Ct. 242 (2000).

The statutory language of 844(h) is unambiguous in expressing Congress's intent that sentences imposed under it be cumulative. The statute states:

> Whoever * * * uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, * * * including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years. * * * [N]or shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried.

18 U.S.C. 844(h). This Court had occasion to consider whether a defendant could be convicted under Section 844(h), where the predicate felonies were destroying a vehicle by means of an explosive, 18 U.S.C. 844(i), and unlawfully making a destructive device, 18 U.S.C. 5841, in *Blacharski* v. *United States*. In that case, this Court agreed with the Eighth Circuit's holding in *United States* v. *Shriver*, 838 F.2d 980, 982 (8th Cir. 1988), that "the legislative history [of Section 844(h)] clearly establishes Congress' intent that the crimes of using fire to commit a

felony and the felony itself may be punished cumulatively." *Blacharski*, 215 F.3d at 794. This Court then examined the legislative history of the 1982 amendment to Section 844(h) and concluded that "Section 844(h) was intended to be used in addition to the predicate offense not instead of it." *Id.* at 794. Because the holding of *Blacharski* controls this case as well, Colvin's argument is unavailing.[4]

Colvin relies heavily on this Court's holding in *United States* v. *Chaney*, 559 F.2d 1094 (7th Cir. 1977), to support his argument. Such reliance is misplaced, however, because *Chaney* dealt with an earlier version of Section 844(h), in which the statutory language did not clearly evince Congress's intent that the statute's penalties be cumulative. Congress amended Section 844(h) in 1982[5] in order to make clear "that whoever uses a fire, as well as an explosive to commit any felony which may be prosecuted in a court of the United States commits an

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[4] The fact that the underlying felony in this case is based on Section 3631 while the underlying felonies in *Blacharski* were based on Section 844(i) and 26 U.S.C. 5841 is irrelevant. Both of those underlying felonies require use of fire or an explosive device.

[5] In addition to raising the mandatory minimum sentences, the 1982 legislation amended Section 844(h) by, *inter alia*, adding the following italicized language:

> (h) Whoever –
>
> (1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States,
>
> *including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device* shall*, in addition to the punishment provided for such felony,* be sentenced to imprisonment for 10 years. * * * Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, *nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried.*

additional offense and shall be subject to a sentence *in addition* to the sentence for the predicate offense." H.R. Rep. No. 678, 97th Cong., 2d Sess. 3 (1982) (emphasis added). This amendment to the language of Section 844(h), and the concomitant alteration in the clear intent of the statute, makes the holding of *Chaney* inapposite to this case. Rather, this Court is bound to follow the lead of the much more recent decision in *Blacharski* in holding that the plain language of Section 844(h) clearly expresses Congress's intent that the penalties in Section 844(h) be cumulative.

Colvin tries to argue that the plain language of the statutes indicate that Congress did not intend for their punishments to be cumulative. Although it is true that Section 3631 contains its own enhancement provision, which is triggered when, *inter alia*, a defendant uses fire, Section 844(h) expressly states that it applies even when the underlying felony is "a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." 18 U.S.C. 844(h). Colvin insists (Br. 16) that the fact that the statute uses the phrase "deadly or dangerous weapon or device" instead of using the word "fire" is evidence that Congress "did not intend to impose double enhancements where the underlying statute already contained an added penalty for use of fire, as opposed to weapons and explosive devices." This argument utterly ignores the fact that fire is itself a deadly and dangerous weapon and device. The legislative history of the 1982 amendment indicates that Congress specifically intended to reach the use of fires such as the one at issue in the instant case, which were begun using "gasoline or other flammable liquids." H.R. Rep. No. 678, *supra*, at 2. Indeed, as Congress pointed out in that legislative history, this Court has long held that starting a fire by igniting an item that has been soaked in a flammable liquid constitutes use of an "explosive" or "incendiary device" within the meaning of Section 844(i). *United States* v. *Agrillo-Ladlad*, 675 F.2d 905,

910-911 (7th Cir.) (cited in H.R. Rep. No. 678, *supra*, at 2), cert. denied, 459 U.S. 829 (1982).

Exactly the same argument that Colvin makes was rejected by the Tenth Circuit in *United States* v. *Grassie*, 237 F.3d 1199, 1215 (10th Cir. 2001), which held that, "under any ordinary construction of the English language 'fire,' when used to commit a felony, is surely encompassed within the adjectives 'deadly or dangerous' in describing weapons." Although this Court did not explicitly tackle this question of interpreting the phrase "deadly or dangerous weapon or device" in holding that Congress intended that the penalties in Section 844(h) be applied cumulatively in *Blacharski*, it implicitly answered the question when it found that both the language and the legislative history of the statute "clearly establish[] Congress' intent that the crimes of using fire to commit a felony and the felony itself may be punished cumulatively." 215 F.3d at 794. The Fourth Circuit reached a similar conclusion in *United States* v. *Ramey*, 24 F.3d 602, 610 (4th Cir. 1994), cert. denied, 514 U.S. 1103 (1995), stating that the language in Section 844(h) mandating that its penalties be served consecutive to any other penalties "cannot be tortured into an *exclusion* of sentences for underlying fire-related felonies" (emphasis in original). The Eleventh and Eighth Circuits have joined this Court in holding that the plain language of Section 844(h) indicates that Congress intended that its penalties be cumulative. See *United States* v. *Stewart*, 65 F.3d 918, 928 (11th Cir. 1995) ("In [Section 844(h)(1)] itself, Congress unambiguously authorized cumulative punishment."), cert. denied, 516 U.S. 1134 (1996); *United States* v. *Shriver*, 838 F.2d 980, 982 (8th Cir. 1988) ("Congress intended that the crimes of using fire to commit a felony and the felony itself may be punished cumulatively.").[6]

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[6] The Third Circuit held that a similar subsection of Section 844 – Section 844(h)(2) – "clearly authorize[d]" cumulative sentences to be applied, even before it was amended in 1984.

Indeed, several courts, including this one, have reached the same conclusion about 18 U.S.C. 924(c), which employs wording very similar to that of Section 844(h). The current version of Section 924(c) provides that any person who uses or carries a firearm "in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device)" shall be sentenced to a term of years determined by the type of firearm used, "in addition to the punishment provided for such crime of violence or drug trafficking crime." 18 U.S.C. 924(c). The language of the statute was amended in 1984 to clarify that the statute's "sentencing enhancement would apply regardless of whether the underlying felony statute 'provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device'" after the Supreme Court had construed an earlier version of the statute not to apply in such cases. *United States* v. *Gonzales*, 520 U.S. 1, 10 (1997) (see *Busic* v. *United States*, 446 U.S. 398 (1980), for limiting construction of earlier version of statute). As the Supreme Court held, by amending the statute, "Congress made clear its desire to run § 924(c) enhancements consecutively to all other prison terms, regardless of whether they were imposed under firearms enhancement statutes similar to § 924(c)." *Gonzales*, 520 U.S. at 10. This Court has similarly held that the plain language of Section 924(c) evinces Congress's intent that its penalties should be applied cumulatively with the penalties imposed for the underlying felonies. See, *e.g.*, *United States* v. *Handford*, 39 F.3d 731, 733-734 (7th Cir. 1994); *United States* v. *Garrett*, 903 F.2d 1105, 1114 (7th Cir.) ("Congress expressly authorised

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United States v. *Rosenberg*, 806 F.2d 1169, 1177 (3d Cir. 1986), cert. denied, 481 U.S. 1070 (1987).

cumulative punishments."), cert. denied, 498 U.S. 905 (1990); *United States* v. *Harris*, 832 F.2d 88, 90 (7th Cir. 1987); accord *United States* v. *Singleton*, 16 F.3d 1419, 1425-1426 (5th Cir. 1994). Because the language of Section 924(c) is so similar to that in Section 844(h), this Court should continue to construe it to expressly authorize cumulative punishments.

2. Although it is unnecessary, and indeed inappropriate, to engage in a *Blockburger* analysis where the statutory language so clearly indicates Congress's intent to authorize cumulative punishments, see *Garrett* v. *United States*, 471 U.S. 773, 779 (1985) (holding that "the *Blockburger* presumption must of course yield to a plainly expressed contrary view on the part of Congress"); *Hunter*, 459 U.S. at 368-369, the application of Section 844(h) along with Section 3631 would satisfy the *Blockburger* test as well because each statute clearly contains at least one element that the other does not. In order to prove a violation of Section 844(h), a prosecutor need only prove two elements: that the defendant committed an underlying felony, and that he used fire to do so. A violation of 3631, however, does not require that a defendant use fire. Section 3631 does require that the defendant (1) use force or threat of force, (2) in order to intimidate or interfere with a person's housing rights (3) because of that person's race, none of which must be proved to find a violation of Section 844(h).

Colvin suggests that application of Section 844(h) to a felony violation of Section 3631 is analogous to application of that Section to a violation of 844(i), arson of a building used in interstate commerce, which he argues violates Double Jeopardy under this Court's holding in *Chaney*. Even if *Chaney* had not been superceded by both a congressional amendment to Section 844(h) and an intervening decision by this Court, see *Blacharski*, the analogy would fail. Because the use of fire is a necessary and indisputable element of each and every violation of

Section 844(i), and every violation of Section 844(i) is a felony, Section 844(h) would apply in every case in which Section 844(i) applies and the two statutes would fail the *Blockburger* test. In contrast, not every violation of Section 3631, or even every felony violation of Section 3631, involves the use of fire. A felony violation of Section 3631 could arise from the use of a dangerous weapon or explosive that was not fire, or from a case in which fire was not used but death or bodily injury resulted, or from a case in which fire was not used but kidnapping or aggravated sexual assault was involved. In all of those cases, a defendant would commit a felony violation of Section 3631 without implicating Section 844(h). As the Fifth Circuit has noted:

> The *Blockburger* inquiry focuses on the statutory elements of the offenses, not on their application to the facts of the specific case before the court. Thus, the question is not whether *this* violation of [the underlying felony] also constituted a violation of § 924(c), but whether *all* violations of the former constitute violations of the latter.

United States v. *Singleton*, 16 F.3d 1419, 1422 (5th Cir. 1994) (emphasis in original) (footnotes omitted). The structure and plain language of Section 844(h) leaves little doubt that Congress intended the provision to codify an independent crime, subjecting a defendant to *additional* punishment for using fire to commit a felony.

B. *Section 241 May Be Used As A Predicate Felony For The Application Of Section 844(h)*

Colvin appears to advance two rationales in support of his contention that a violation of 18 U.S.C. 241 cannot serve as a predicate felony for the application of Section 844(h). First, he argues that, if fire is considered an element of the conspiracy because it was an "overt act" in

furtherance of the conspiracy,[7] the conspiracy charge cannot serve as the predicate felony for the Section 844(h) charge without running afoul of the Double Jeopardy Clause. Second, he argues that, if fire is not considered an "overt act" in furtherance of the conspiracy, then fire was not used at all in the commission of the Section 241 violation.

With respect to his first argument, Colvin employs essentially the same analysis he used to argue that Section 3631 may not serve as a predicate felony to a Section 844(h) charge. For the same reasons articulated in Section I.A of this brief, Colvin's argument must fail. Congress clearly intended that the penalties in Section 844(h) be cumulative to the penalties of the predicate felony, even where an element of that felony involves the use of fire. *Blacharski* v. *United States*, 215 F.3d 792, 794 (7th Cir.), cert. denied, 121 S. Ct. 242 (2000). Because the statutory language unambiguously expresses Congress's intent, this Court should not look beyond that language for further indications of congressional intent. *Missouri* v. *Hunter*, 459 U.S. 359, 368-369 (1983). If it does, however, it will find that the legislative history of the 1982 amendment to Section 844(h) also clearly indicates that "whoever uses a fire, as well as an explosive to commit any felony which may be prosecuted in a court of the United States commits an *additional* offense and shall be subject to a sentence *in addition* to the sentence for the predicate offense." H.R. Rep. No. 678, 97th Cong., 2d Sess. 3 (1982) (emphasis added). Moreover, if this Court resorts to the *Blockburger* test, it will find that combining charges under Section 241 and Section 844(h) does not violate the Double Jeopardy Clause. Just as Section

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[7] The Indictment charged that Colvin "and his co-conspirators poured a flammable liquid on the cross and ignited it in the front yard" of the Ortizes home as one of the overt acts in furtherance of the conspiracy under Section 241 (A.3).

3631 does not require that a defendant used fire in order to commit a felony violation of the statute, neither does Section 241 require any involvement of fire. The fact that fire was involved in this particular case is irrelevant to the *Blockburger* analysis. See *United States* v. *Singleton*, 16 F.3d 1419, 1422 (5th Cir. 1994). Moreover, a violation of Section 241 requires proof of an agreement, which Section 844(h) does not. Colvin's reliance on the Fifth Circuit's holding in *United States* v. *Corona*, 108 F.3d 565 (5th Cir. 1997), is unavailing because the holding of that case is in direct conflict with the holding of this Court in *Blacharski*.

With respect to his second argument, Colvin is also misguided. Even if fire is not considered an overt act[8] in furtherance of the conspiracy under Section 241, this Court should still find that Colvin used fire in the commission of the conspiracy, thereby violating Section 844(h). It is well settled that a defendant who has been convicted of participating in a conspiracy "is responsible for the acts of his co-conspirators if those acts: *1) were reasonably foreseeable to the defendant; and 2) were in furtherance of the conspiracy.*" *Gray-Bey* v. *United States*, 156 F.3d 733, 740 (7th Cir. 1998) (emphasis in original) (citing *Pinkerton* v. *United States*, 328 U.S. 640, 646 (1946)), cert. denied, 525 U.S. 1092 (1999).[9] In the instant case, Colvin was convicted

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[8] This Court has held that:

> A conspiracy requires the government to prove (1) the existence of an agreement to commit an unlawful act; (2) that defendants knowingly and intentionally became members of the conspiracy; and (3) the commission of an overt act that was committed in furtherance of the conspiracy.

United States v. *Gee*, 226 F.3d 885, 893 (7th Cir. 2000).

[9] The district court judge in the instant case delivered a "*Pinkerton* instruction" to the jury, which read (A.9):

of conspiring to deprive the Ortizes of their housing rights by burning a cross in their yard. Although Colvin may not have lit the cross himself, his co-conspirators did light it, thereby using fire in furtherance of the conspiracy in an utterly foreseeable manner. That is all that is required to find that Colvin used fire in commission of the conspiracy in this case; likewise, that is all that is required to find that the violation of Section 241 may serve as a predicate felony to a violation of Section 844(h). Again, an analogy to Section 924(c), with its similar structure and language, is instructive. This Court has repeatedly held that "[u]nder the *Pinkerton* doctrine a defendant may be found guilty of violating § 924(c) if a co-conspirator used or carried a firearm during and in relation to the conspiracy." *United States* v. *Chairez*, 33 F.3d 823, 826 (7th Cir. 1994); accord *United States* v. *Thomas*, 86 F.3d 647, 651 n.6 (7th Cir.), cert. denied, 519 U.S. 967 (1996); *United States* v. *Monroe*, 73 F.3d 129, 132 (7th Cir. 1995). Because the same rule should be applied with respect to Section 844(h), Colvin's conviction for using fire in the commission of the conspiracy to violate rights must stand.[10]

> A conspirator is responsible for offenses committed by his fellow conspirators if he was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of and as a natural consequence of the conspiracy.

[10] Even if this Court finds that only one of the predicate felonies in this case was properly used as the underlying felony in the Section 844(h) violation, Colvin's conviction and sentence must stand. In the instant case, both the Section 241 and the Section 3631 convictions were based upon the planning and execution of the burning of a cross in the yard of the Ortizes' home. Because both violations were felonies in which fire was used, either one could have served as the predicate felony for the Section 844(h) violation, and either one was sufficient on its own to support the Section 844(h) conviction.

II. COLVIN'S CONVICTION AND SENTENCE FOR USING AN ASSAULT RIFLE IN THE COMMISSION OF A FELONY WERE NOT PLAIN ERROR

In addition to being convicted under Sections 3631, 241, and 844(h), Colvin was also convicted of violating Section 924(c) by using or carrying a firearm in the commission of a felony. Because the sentencing judge determined that Colvin was using or carrying a "semiautomatic assault weapon," he sentenced Colvin to the statutory mandatory minimum consecutive sentence of ten years. 18 U.S.C. 924(c)(1)(B)(i). Colvin argues (Br. 22-25) that the district court judge committed plain error by failing to instruct the jury that, in determining whether Colvin had violated Section 924(c) by using or carrying a firearm in the commission of a felony, they also had the responsibility to "determine that the firearm was, in fact, an assault rifle." This exact argument was squarely rejected by this Court in an opinion handed down the very day Colvin filed his opening brief in this appeal. *United States* v. *Sandoval*, No. 99-4223, 2001 WL 166837, at *2 (7th Cir. Feb. 20, 2001).

Colvin relies on the Supreme Court's holding in *Castillo* v. *United States*, 120 S. Ct. 2090 (2000), to support his argument. In considering an earlier version of Section 924(c)(1), the *Castillo* Court determined that the type of firearm used by a violator of the statute was an element of the offense committed, rather than a mere sentencing factor. *Id.* at 2092-2093. As such, the type of firearm used was determined to be a question for the jury, not the sentencing judge. *Id.* at 2092. Colvin's reliance on *Castillo* is misplaced. The *Castillo* Court considered Section 924(c) as it was written in 1993. *Id.* at 2091. As recognized in *Castillo* and by this Court in *Sandoval*, however, Congress amended Section 924(c) in 1998 by altering the structure of the subsections. *Id.* at 2093; accord *Sandoval*, 2001 WL 166837, at *2. It was this amended

version of Section 924(c) that was applied in Colvin's case. And it was this amended version of Section 924(c) that was considered in *Sandoval*.

Indeed, the *Sandoval* panel considered the exact subsection at issue in the instant case, Section 924(c)(1)(B)(i), and the same type of firearm, a "semiautomatic assault weapon." 2001 WL 166837, at *1-*2. The *Sandoval* panel carefully considered the holding in *Castillo* and then carefully explained why the 1998 amendment to the statute altered the nature of the weapons-related sentence enhancements. That panel explained:

> Now, the first clause of § 924(c)(1), standing alone, defines the offense of using or carrying a firearm during a crime of violence, while subsections (A) and (B) single out subsets of those persons (those who carry or use firearms during crimes of violence or drug trafficking) for more severe punishment. In addition, the subsections under (A) and (B) are separated from the offense clause of the statute by the word "shall" – a clear indication that what follows are sentencing provisions.

Id. at *2. The panel agreed with the reasoning of the Eighth and Eleventh Circuits in holding that "the classification of the weapon used in a § 924(c) prosecution is a sentencing factor." *Ibid.*; accord *United States* v. *Pounds*, 230 F.3d 1317, 1319 (11th Cir. 2000) ("Accordingly, we hold that § 924(c)(1)(A) defines a single criminal offense for using or carrying a firearm during a crime of violence, while subsection (iii) describes the sentencing implications if a firearm is discharged during the commission of the crime."); *United States* v. *Carlson*, 217 F.3d 986, 987 (8th Cir. 2000) (finding that "both § 924(c)(1)(A)'s plain language and structure show Congress intended brandishing to be a sentencing factor and not an element of the § 924(c)(1)(A) offense"), cert. denied, 121 S. Ct. 822 (2001). Under the binding holding of *Sandoval*, the district court did not commit any error, let alone harmless error. Because this Court is bound by the holding in *Sandoval*, Colvin's argument that the type of firearm used or carried by Colvin

was necessarily a question for the jury must fail.

Colvin also seems to argue (Br. 24-25) that there was insufficient evidence for the jury to conclude that Colvin "used" a firearm when he participated in the burning of a cross in the yard of the Ortizes' home. In order to find a violation of Section 924(c), however, the jury needed to find either that Colvin used a firearm in the commission of a felony, or that Colvin carried a firearm in the commission of a felony. 18 U.S.C. 924(c). The Supreme Court has clearly held that the word "carry," as used in Section 924(c)(1) encompasses both carrying a weapon on a person's body and carrying a gun in a vehicle. *Muscarello v. United States*, 524 U.S. 125, 139 (1998). There was clearly sufficient evidence presented at trial for the jury to find that Colvin carried a firearm within the meaning of Section 924(c) (Tr. 56, 112-113, 135-136).

Colvin also seems to suggest (Br. 24-25) that there was insufficient evidence to find that he used a semiautomatic assault weapon as opposed to a handgun. Again, there was clearly sufficient evidence presented at trial for the jury to find that Colvin used or carried an SKS assault rifle during the cross burning at the Ortizes' home (Tr. 56, 113, 135, 141, 144, 149). Moreover, contrary to Colvin's suggestion (Br. 22), the sentencing court did find that Colvin used a semi-automatic assault weapon, as defined by the statute, after the prosecution presented the weapon and the defense stipulated to the fact that it fell within the statutory definition of semiautomatic assault weapon (Sent. Tr. 2-4). This is sufficient to support Colvin's ten year sentence under Section 924(c).

CONCLUSION

For the above reasons, James Colvin's convictions and sentence for violating 42 U.S.C. 3631, 18 U.S.C. 241, 18 U.S.C. 844(h), and 18 U.S.C. 924(c) should be affirmed by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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