No. 00-3400

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-3400

UNITED STATES OF AMERICA,

Appellee

v.

JAMES COLVIN,

Defendant-Appellant

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

RESPONSE OF THE UNITED STATES TO APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

RALPH F. BOYD, JR.
Assistant Attorney General

JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys
Department of Justice
P.O. Box 66078
Washington, DC 20035-6078
(202) 305-7999

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STATEMENT OF FACTS

James G. Colvin first joined the American Knights of the Ku Klux Klan during the summer of 1996 (Tr. 356).[1] Upon joining the Klan, Colvin became acquainted with Travis Funke (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

[1] References to "Tr. __" are to pages in the consecutively paginated three-volume trial transcript; references to "A. __" are to pages in the Appendix filed with the Appellant's opening brief; references to "Pet. __" are to pages in Colvin's Petition for Rehearing; references to "App. Br. __" are to pages in the Appellant's opening brief; and references to "Rep. Br. __" are to pages in the Appellant's Reply Brief.

and another Klan member burned a cross outside the home of a black family and threw a rock through their window along with a threatening note[2] (Tr. 46-48, 158-163). Funke later told Colvin what he had done, and he and Colvin then decided to burn another cross (Tr. 49). Funke and Colvin were instructed by the Imperial Wizard of the Indiana Klan, Jeff Berry (Tr. 44, 49), 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 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). 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). While Mathis and Funke set up and ignited the cross in the Ortizes' front yard, Colvin sat in his truck, holding an SKS assault rifle (Tr. 56, 61-62, 111-113, 135). 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). After throwing a rock through the window of the Ortizes' home, the three men drove away (Tr. 63, 115).

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[2] 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).

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 and abandoned their furniture in order to move to a different residence (Tr. 218-219, 239-240).

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). On December 14, 1999, James G. Colvin was indicted for (1) conspiracy to violate rights, in violation of 18 U.S.C. 241, (2) intimidation or interference with housing rights using fire on the basis of race, in violation of 42 U.S.C. 3631, (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). After a three-day jury trial, Colvin was convicted on all four counts on May 10, 2000 (A. 22).

SUMMARY OF ARGUMENT

On appeal, Colvin challenged, *inter alia*, his conviction under Section 844(h), claiming that applying that provision to his convictions under Section 3631 and under Section 241 violated the Double Jeopardy Clause of the Constitution. The majority panel opinion correctly held that Congress intended that violations of Section 844(h) be punished cumulatively with violations of crimes such as Colvin's felony violation of Section 3631. The panel also held that the Section 3631 felony conviction was sufficient to sustain Colvin's 844(h) conviction, thereby obviating the need to address the interplay between Section 844(h) and Section 241. Because the panel opinion was correct in every respect, and because it does not conflict with the law of any other Circuit, Colvin's petition for rehearing and suggestion for rehearing en banc should be denied.

At trial, the district court instructed the jury that it could convict Colvin of violating Section 844(h) if it found that he had used fire to commit either the Section 3631 violation or the Section 241 violation. Because Colvin failed to object to these instructions, this Court may only consider the objections he now makes under the plain error standard of review. In order to show plain error, Colvin must demonstrate that any error in instructing the jury caused him prejudice in the sense that it changed the outcome of the proceedings. It is impossible for Colvin to meet this burden in this case because, in order to convict Colvin of the Section 3631 violation, the jury *must* have found beyond a reasonable doubt that the government had proved every element of a violation of Section 844(h). Where there is no doubt that the jury's verdict would have been the same absent the putative error, there is no prejudice, and therefore no plain error.

In addition, the panel was correct in finding that Congress clearly intended that the penalties of Section 844(h) be applied cumulatively to felony cross-burnings under Section 3631 even though Section 3631 contains its own enhancement for the use of fire. Because fire is an inherently dangerous device when used in conjunction with flammable liquids, as it was here, and because fire was used in this case in a dangerous manner, there is no question that Colvin's acts constituted the use of a "deadly or dangerous weapon or device," as contemplated in the statute.

ARGUMENT

I. The Panel Was Correct In Concluding That It Need Not Address The Question Whether Section 241 Can Serve As A Predicate Felony To A Violation Of Section 844(h)(1)

On appeal, Colvin argued that his conviction under 18 U.S.C. 844(h), use of fire in commission of a felony, was unconstitutional because neither of the substantive convictions – under 18 U.S.C. 241 for conspiracy to violate rights, or under 42 U.S.C. 3631 for intimidation or interference with housing rights on the basis of race – could serve as the necessary predicate felony for an 844(h) conviction without running afoul of the Double Jeopardy Clause. A majority of the panel concluded that, because Congress intended that violations of Section 3631 be punished cumulatively with violations of Section 844(h), Colvin's conviction under Section 844(h) should stand. The panel expressly declined to reach the question whether Section 241 could serve as a predicate felony for a violation of Section 844(h), opting instead to "rest [its] decision on the use of substantive cross-burning, 42 U.S.C. § 3631, as the predicate felony." *United States* v. *Colvin*, 276 F.3d 945, 950 (7th Cir. 2002). Colvin now urges this Court to reconsider its decision, arguing that, because it is not possible to know which predicate offense

the jury relied on in convicting Colvin of violating Section 844(h), this Court must either find that Section 241 is a valid predicate offense or reverse Colvin's conviction. Colvin's argument is fundamentally flawed, however, because he ignores the fact that the Court's consideration of his objections is limited to plain error review.

It is undisputed that Colvin failed to object in the district court to the jury instruction that he now finds objectionable. Before delivering his instructions to the jury, the district court judge presented the prosecution and the defense with his proposed instructions, including an instruction on the 844(h) charge that stated:

> I instruct you that the crimes charged in Count I, conspiracy against rights, and Count II, interference with rights, are both felonies prosecutable in a court of the United States. If you find the defendant guilty of either Count I or Count II, you shall then consider his guilt or innocence as to Count III.

(A. 18). After objecting to certain charges concerning Colvin's co-conspirators, Colvin's lawyer stated, "We have no objection with any of the other instructions, Your Honor" (Tr. 373). Federal Rule of Criminal Procedure 30 states that: "No party may assign as error any portion of the [jury] charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection." This Court has held that "[t]he rationale underlying the requirement of a distinct statement of objection is, of course, to draw the attention of the trial court to the alleged error at a time when the court is able to rectify the error." *United States* v. *Marquardt*, 786 F.2d 771, 782 (7th Cir. 1986). Because Colvin did not object to the judge's jury instruction regarding the Section 844(h) charge, this Court may only reverse Colvin's conviction if it finds plain error.

Fed. R. Crim. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

The Supreme Court has held that, in order to prevail under the plain error standard, a defendant must demonstrate that: 1) there was an error, 2) the error was plain, 3) the error affected substantial rights, and 4) the error seriously affected "the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 731 (1993)(internal quotation marks omitted); accord, *United States* v. *Gibson*, 170 F.3d 673 (7th Cir. 1999). Assuming *arguendo* that it was error to instruct the jury that it could base the Section 844(h) conviction on the Section 241 conviction – a point the United States does not concede – and that the error was plain, Colvin simply cannot prevail under the plain error standard because he has failed to demonstrate that the error affected his substantial rights.

Colvin's (Pet. 5-6) reliance on *United States* v. *Briscoe*, 65 F.3d 576, 584 n.9 (7th Cir. 1995), and *Griffin* v. *United States*, 502 U.S. 46 (1991), is a red herring. Because neither of those cases dealt with a challenge to jury instructions under the plain error standard, the standard for reversal discussed in those cases does not control the instant case. Thus, contrary to Colvin's assertion (Pet. 5) that controlling precedent indicates that his conviction "must be reversed" if the district court issued erroneous jury instructions about the elements of the Section 844(h) offense, reversal is warranted only if Colvin can satisfy the rigorous plain error standard of review. See *United States* v. *Perez*, 43 F.3d 1131, 1139 (7th Cir. 1994) ("This circuit has held that failure to instruct clearly on the elements of the offense is not always plain error.").

This Court has held that "plain error affects 'substantial rights' if the error was prejudicial, meaning that the error 'must have affected the outcome of the district court

proceedings.'" *Gibson*, 170 F.3d at 678 (quoting *Olano*, 507 U.S. at 734). Moreover, "[t]he defendant, not the government, bears the burden of persuasion with respect to prejudice." *Ibid.* There is no question that Colvin has failed to meet this burden. Colvin argued in his briefs before the panel (App. Br. 6-8; Rep. Br. 11-13) that his conviction should be reversed because the jury *might have* based its 844(h) conviction *only* on the Section 241 violation, which he claims is an impermissible predicate felony. But Colvin is simply incorrect.[3] The record in this case leaves absolutely no doubt that Colvin's jury found that he used fire in the commission of his felony violation of Section 3631.

In its instructions to the jury on the Section 3631 count, the district court issued the following charge:

> In order to establish the offense described by Section 3631, the government must prove these elements beyond a reasonable doubt:
> First: The defendant used force or threat of force.
> Second: The defendant injured, intimidated or interfered with, or attempted to injure, intimidate or interfere with the victims' right to rent and occupy their home, and to associate in their home with persons of another race or national origin.
> Third: The defendant acted as he did on account of the race or national origin of one or all of the victims and because one or all of the victims were occupying or renting their home or associating in their home with persons of another race.
> Fourth: *The defendant's conduct involved the use or attempted use of fire.*
> Fifth: The defendant acted willfully.

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[3] Even if Colvin were correct that the jury might have based its Section 844(h) conviction on the Section 241 violation alone, such an assertion might not be enough to satisfy the plain error standard given the Supreme Court's admonition that, "[w]here the effect of an alleged error is so uncertain, a defendant cannot meet his burden of showing that the error actually affected his substantial rights." *Jones* v. *United States*, 527 U.S. 373, 394-395 (1999).

(A. 13 (emphasis added)). Because the jury returned a verdict of guilty on this Section 3631 felony charge, there is no question that the jury thereby found that the government had proved beyond a reasonable doubt everything it needed to prove to establish a violation of Section 844(h) as well – namely, (1) that Colvin committed a felony, (2) that he did so using fire, and (3) that he acted willfully. Thus, even if Colvin is correct that the district court erred in instructing the jury that the violation of Section 241 could serve as a predicate felony to the violation of Section 844(h), there is no question that the error was not prejudicial to Colvin, and therefore does not rise to the level of plain error.

This Court has found that erroneous jury instructions rise to the level of plain error only where it is possible that a jury convicted a defendant without finding that a necessary element of an offense was proved beyond a reasonable doubt. In *United States* v. *Jones*, 21 F.3d 165 (7th Cir. 1994), for example, this Court reversed the defendant's conviction only after finding that an "erroneous jury instruction clearly affected the outcome of [one of the] charge[s] because the government had presented no evidence at trial to establish [an] element of the offense," thereby leaving open a "clear possibility" that the defendant could not be found guilty on that charge. *Id.* at 173. Conversely, where it is clear that, notwithstanding an erroneous jury instruction, the jury would have found beyond a reasonable doubt that all of the elements of an offense were satisfied, this Court has found no prejudice, and therefore no plain error. See *United States* v. *Taylor*, 226 F.3d 593, 601 (7th Cir. 2000). It is beyond peradventure that any jury instruction error in the instant case did not rise to the level of plain error; not only *would* the jury have found beyond a reasonable doubt that the government proved every element of the Section 844(h) offense, the

jury *did* find that every 844(h) element had been satisfied when it convicted Colvin of a felony violation of Section 3631.

II. The Panel Was Correct In Ruling That Congress Intended That Punishments Under Section 844(h)(1) Be Cumulative To Other Punishments, Including Those Under Section 3631

1. The majority of the panel correctly held that the plain language of Section 844(h)(1) indicates that Congress intended that its punishments be applied cumulatively with those of "fire-related felonies." *Colvin*, 276 F.3d at 948-950. 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). Because fire, especially when used in conjunction with gasoline, is inherently a dangerous device, and, more particularly, because Colvin and his co-conspirators used fire as a dangerous device in this case, the majority was correct in concluding that Congress plainly intended Section 844(h)(1) to apply to felony cross burnings under Section 3631.

Colvin insists (Pet. 9) 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 for 18 U.S.C. § 844(h)(1) to be used to doubly-enhance a defendant's punishment for predicate felonies in which fire has been used, but not used as a 'deadly or dangerous weapon or device.'" This argument ignores the fact that fire is itself a deadly and dangerous weapon and device. As the panel opinion recognizes, "[t]he dangerousness of fire when used to commit a felony is evidenced in part by the fact that the use of uncontained gasoline, the accelerant used by many arsonists (and probably here by Colvin, Funke, and Mathis), is subject to federal regulation to

reduce the hazard to persons and property arising from its misuse." *Colvin*, 276 F.3d at 949.[4] Indeed, the legislative history of the 1982 amendment to Section 844(h) 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, 97th Cong., 2d Sess. 2 (1982). As the House Report of the legislation pointed out, 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" within the meaning of 18 U.S.C. 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). Colvin himself admits (Pet. 14) that the use of an explosive under Section 844(i) is "clearly within the ambit of § 844(h)'s provision for double-enhancement of crimes committed by 'deadly or dangerous weapon or device.'"

Moreover, there is no need to reach the question whether the phrase "deadly or dangerous weapon or device" encompasses all uses of fire because, as the panel opinion recognizes, Colvin and his co-conspirators used fire to commit the Section 3631 felony violation in a way that was in fact dangerous. The panel opinion correctly notes that:

> [C]ross burnings, in particular, are dangerous. Indeed, it is their violent character that so effectively communicates their underlying racist ideology. Cross-burnings also have the serious potential to cause significant property damage, even when not so intended.

Colvin, 276 F.3d at 949. Because, by using fire and gasoline to burn a cross with the intent of communicating a threatening message to the Ortizes and Mr. Rivera, Colvin used a dangerous

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[4] The record reflects that, 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).

device to commit the felony of intimidation or interference with housing rights on the basis of race, he is subject to cumulative punishments under Section 844(h)(1) and Section 3631.

Nor is the panel's decision in conflict with that of any other Circuit. 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." See also *Ibid.* ("It is irrational to view § 844(h)(1) as first explicitly linking fire and explosives for additional punishment when used in committing any felony then, *sub silentio*, delinking fire from that pairing for purposes of the cumulative punishment clause which refers expansively to deadly or dangerous weapons or devices."). 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 *Blacharski* v. *United States*, 215 F.3d 792, 794 (7th Cir. 2000), cert. denied, 531 U.S. 903 (2000); *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.").

2. Furthermore, it is unnecessary, and indeed inappropriate, to engage in an analysis under *Blockburger* v. *United States*, 284 U.S. 299 (1932), 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"); *Missouri* v. *Hunter*, 459 U.S. 359, 368-369 (1983). As the panel opinion found, however, the application of Section 844(h) along with Section 3631 would satisfy the *Blockburger* test because each statute clearly contains at least one element that the other does not. *Colvin*, 276 F.3d at 950. 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).[5] The structure

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[5] Colvin suggested to the panel 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 *United States* v. *Chaney*, 559 F.2d 1094 (7th Cir. 1977). But this analogy is not sound. 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

and plain language of Section 844(h) leave little doubt that, as the panel found, Congress intended the provision to codify an independent crime, subjecting a defendant to *additional* punishment for using fire to commit a felony.

> 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).

CONCLUSION

Because the panel opinion in this case was correctly decided in all respects and does not conflict with the holding of any other Circuit, Colvin's petition for rehearing and suggestion for rehearing en banc should be denied.

Respectfully submitted,

RALPH F. BOYD, JR.
Assistant Attorney General

____
JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys
U.S. Department of Justice
Civil Rights Division, Appellate Section
950 Pennsylvania Ave. NW, PHB 5020
Washington, DC 20530
(202) 305-7999

CERTIFICATE OF SERVICE

I certify that the foregoing Brief for the United States as Appellee was sent by Federal Express to the following counsel of record on this 20th day of February, 2002:

Laruen Robel, Esq.
Seth Lahn, Esq.
Attorneys at Law
Indiana University School of Law
211 S. Indiana Avenue
Bloomington, IN 47405

____

SARAH E. HARRINGTON
Attorney
U.S. Department of Justice
Civil Rights Division, Appellate Section
950 Pennsylvania Ave. NW, PHB 5020
Washington, DC 20530
(202) 305-7999