No. 18-40707

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARQ VINCENT PEREZ,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

ERIC S. DREIBAND
Assistant Attorney General

ALEXANDER V. MAUGERI
Deputy Assistant Attorney General

TOVAH R. CALDERON
ELIZABETH P. HECKER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-5550

STATEMENT REGARDING ORAL ARGUMENT

Although the United States believes that this appeal can be resolved on the briefs, the United States will appear for oral argument if the Court deems argument would be helpful.

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RULE:

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STATEMENT OF JURISDICTION

This appeal is from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant Marq Vincent Perez on January 15, 2019. ROA.505-510.[1] Perez filed a timely notice of appeal on July 23, 2018. ROA.429. This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

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[1] "ROA. ___" refers to page numbers of the Record on Appeal. "Br. ___" refers to page numbers in Perez's opening brief.

STATEMENT OF THE ISSUES

1. Whether the district court correctly permitted Perez to be tried and convicted under both 18 U.S.C. 247 and 18 U.S.C. 844(h), where Congress plainly intended to punish the destruction of a mosque through the use of fire under both statutes.

2. Whether the district court correctly sentenced Perez cumulatively under 18 U.S.C. 247 and 18 U.S.C. 844(h) where Congress plainly intended to punish the destruction of a mosque through the use of fire under both statutes.

3. Whether the district court correctly found that federal arson was the underlying offense for Perez's violation of 18 U.S.C. 247, and therefore properly applied Sentencing Guidelines § 2K1.4 to determine Perez's base offense level.

4. Whether the district court correctly applied both Sentencing Guidelines § 2K1.1 and the ten-year mandatory consecutive sentence under Section 844(h) to determine Perez's sentence.

STATEMENT OF THE CASE

1. Procedural History

a. On June 22, 2017, a federal grand jury in the Southern District of Texas returned a three-count superseding indictment charging Perez with (1) through the use of fire, intentionally defacing, damaging, and destroying religious real property because of the religious character of the property, in violation of 18 U.S.C. 247(a)(1); (2) knowingly using a fire and explosive to commit a felony, in

violation of 18 U.S.C. 844(h); and (3) knowingly possessing an unregistered destructive device, in violation of 26 U.S.C. 5841, 5845, 5861(d), and 5871. ROA.106-107. Counts 1 and 2 arose out of Perez's burning of the Victoria Islamic Center, a mosque in Victoria, Texas. Count 3 arose out of Perez's unrelated attempt to destroy a vehicle using explosive devices. ROA.3074-3075.[2]

b. A jury convicted Perez on all three counts. On January 9, 2019, the district court sentenced Perez to 294 months' imprisonment, three years' supervised release, and a $300 special assessment. ROA.506-509. The court also ordered Perez to pay the Victoria Islamic Center $373,370.00 in restitution. ROA.509.

Perez filed a timely notice of appeal. ROA.429.

2. Factual Background: Perez's Destruction Of The Victoria Islamic Center

Perez was a member of the "Three Percenters," a quasi-militia group that purports to defend constitutional rights. ROA.1471. He communicated with other members of this organization primarily through various Facebook groups. ROA.1470. In December 2016, Perez wrote to other Three Percenters that members of the group should form "rogue units" to carry out specific missions. ROA.1466, 1476-1479, 2814. He wrote that such missions would include

[2] Perez has not raised any issues with respect to Count 3 and, other than its application to the calculation of Perez's sentence, it is irrelevant to this appeal.

"[b]reaking the law and operating outside of it." ROA.1478-1479, 2815. In response to an article about Texas banning Sharia law, Perez posted on his Facebook page, "Step 1: Stop their law - complete. Step 2: Push them out before the[y] begin war. In Progress…" ROA.2820. Perez also posted messages on his Facebook page threatening to "burn every mother FUCKER WITH A RAGGEDLY [sic] TOWEL ON THEIR HEAD." ROA. 2824-2825.

On January 19, 2017, Perez wrote in a Facebook message to other Three Percenters that a "Local Response Squad" that he had "trained" was "ready," and that "[p]atrols [we]re set around local mosques and centers." ROA.1490, 2826. The next day, Perez exchanged Facebook messages with an acquaintance and described his plan to do "recon" to find out if weapons were being stockpiled at the Victoria Islamic Center. ROA.1539, 2828-2831.

Perez also told K.R., a juvenile acquaintance, that he believed members of the Islamic Center were stockpiling weapons and intended to attack Victoria. ROA.2055. Shortly after midnight on January 22, 2017, Perez and K.R. walked to the Islamic Center. ROA.2064-2067. Perez removed a piece of the mosque's electrical meter, attempting to cut power to the building. ROA.2069. Perez then broke down the back door to the mosque, and he and K.R. entered the building. ROA.2070-2071. When they failed to find weapons, they took a laptop computer,

several cellular phones, a tablet, watches, and some cash. ROA.2071-2075. They later sold several of the cell phones. ROA.2076.

On January 28, 2017, at approximately 2 a.m., Perez and K.R. broke into the mosque again. ROA.2115-2118, 3077. After again failing to find weapons, Perez stole another laptop computer. ROA.2119-2123. He also destroyed a tablet that was displaying pictures of the mosque. ROA.2120. He then went to the women's prayer room, took out a barbeque lighter that he had brought with him, and used the lighter to set fire to papers and books on a bookshelf, including copies of the Quran. ROA.1820-1823, 2122. The fire engulfed the mosque, and despite the efforts of firefighters, the mosque was completely destroyed. ROA.1410, 3077. Perez told K.R. that he had set the fire to "send them a message." ROA.2122. After Perez and K.R. left the mosque, Perez took photographs of the burning mosque on his cell phone. ROA.2272. K.R. testified that Perez was "excited" about the extent of the fire. ROA.2125.

After he burned down the mosque, Perez continued to post anti-Muslim sentiments on Facebook, including referring to Muslims as "goat-fuckers." ROA. 1484-1489, 1492-1495. Two of Perez's colleagues testified that Perez often used racial slurs to refer to Muslims. ROA.1569, 1578, 1685.

3. Sentencing Proceedings

a. In applying the Sentencing Guidelines to individuals convicted of violating 18 U.S.C. 247, courts determine the base offense level by cross-referencing the offense guideline applicable to the underlying offense. Sentencing Guidelines § 2H1.1. The presentence report (PSR) found that the underlying offense for Count 1 was federal arson and thus applied Sentencing Guidelines § 2K1.4. ROA.3082. Under that guideline, the PSR applied a base offense level of 24 because the offense involved the destruction of a place of public use.[3] ROA.3082. After adding four enhancements totaling nine levels, the PSR calculated Perez's total base offense level for Count 1 to be 33.[4] ROA.3082-3083. The PSR then calculated Perez's base offense level for Count 3, possession of an unregistered destructive device, to be 28. ROA.3083-3084. Applying the grouping rules, the PSR calculated the combined adjusted offense level for Counts

[3] See 18 U.S.C. 2332f(e)(6) (defining "place of public use" to include religious buildings that are open to the public).

[4] The PSR applied a three-level enhancement under Sentencing Guidelines § 3A1.1(a), because Perez selected the property based on anti-Muslim animus. ROA.3082. The PSR applied two additional enhancements, totaling four levels, based on Perez's role as a leader in the crime, and because he used a person under the age of 18, K.R., to assist in committing the crime. See Sentencing Guidelines §§ 3B1.1(c), 3B1.4. ROA.3082-3083. Finally, the PSR applied a two-level enhancement under Sentencing Guidelines § 3C1.1 for obstruction of justice. ROA.3083. Perez has not challenged these enhancements on appeal.

1 and 3 to be 34. ROA.3084-3085. This corresponded with a guidelines sentence of between 151 and 188 months for Counts 1 and 3. ROA.3089. The PSR also stated that Count 2, use of fire to commit a felony, "has a sentence of 10 years that must run consecutively to Count One." ROA.3089.

b. In his objections to the PSR, Perez challenged, among other things, the PSR's application of Sentencing Guidelines § 2K1.4 on the ground that the guideline, which is entitled "Arson; Property Damage by Use of Explosives," does not apply to arson committed without the use of explosives. ROA.3041. The probation officer responded in an addendum to the PSR that Perez had "grossly misunderstood the application of the * * * guideline." ROA.3096. The probation officer explained that Sentencing Guidelines § 2K1.4 "covers a multitude of federal violations" relating to property damage involving arson or explosives, and that Perez's "count of conviction * * * involve[d] the use of fire." ROA.3096.

With respect to Count 2, Perez objected to the PSR on the ground that punishing him under both 18 U.S.C. 247 and 18 U.S.C. 844(h) would violate the Double Jeopardy Clause, because both counts were premised on the same underlying event—Perez's act of setting fire to the mosque. ROA.3045-3049. The probation officer responded that Section 844(h) adds a mandatory ten-year consecutive sentence to all federal felonies committed using fire or explosives,

"including any felony which[,]" like Section 247, "provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." ROA.3099.

c. The district court overruled Perez's objections to the PSR for the reasons stated by the probation officer in the PSR addendum. ROA.23, 2692. The court found that the PSR correctly calculated the guidelines range for Counts 1 and 3 to be 151 to 188 months. ROA.2693-2695. The court sentenced Perez to 174 months on these counts. The district court then added the mandatory ten-year sentence for Count 2, for a total sentence of 294 months. ROA.2721. The court also sentenced Perez to three years' supervised release and imposed a $300 special assessment. ROA.2721.

d. Perez moved for a new trial on 11 different grounds, none of which are at issue in this appeal. ROA.461-463. The district court denied the motion for a new trial. ROA.495-496.

e. Perez filed a timely notice of appeal. ROA.429.

SUMMARY OF THE ARGUMENT

This Court should affirm Perez's convictions and sentence. His double jeopardy challenge fails because Congress intended to punish the destruction of a mosque through the use of fire under both of the statutes charged in Counts 1 and 2 of the indictment. Perez's related sentencing challenges fail for similar reasons.

1. The district court correctly permitted Perez to be tried and convicted under 18 U.S.C. 247 and 18 U.S.C. 844(h) for destroying a mosque through the use of fire because Congress plainly intended to punish such conduct under both statutes. Section 844(h) provides for a mandatory ten-year sentence where a defendant uses fire to commit "any" federal felony and states that the additional sentence cannot "run concurrently with any other term of imprisonment including that imposed for the [underlying] felony." The statute also states that it applies even where the underlying felony "provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." 18 U.S.C. 844(h). The Supreme Court has construed identical language in another statute, 18 U.S.C. 924(c), and has concluded that it applies even to predicate felonies that already contain similar sentencing enhancements. See *United States* v. *Gonzales*, 520 U.S. 1 (1997). Consistent with *Gonzales*, the only courts to have considered the issue presented here have held that Congress plainly intended that Section 844(h) apply to *all* federal predicate felonies involving the use of fire, including those which, like 18 U.S.C. 247, already provide enhancements for the use of fire. See *United States* v. *Grassie*, 237 F.3d 1199, 1202 (10th Cir.), cert. denied, 533 U.S. 960 (2001); *United States* v. *Colvin*, 353 F.3d 569 (7th Cir. 2003), cert. denied, 543 U.S. 925 (2004).

Even if the Court were to find that congressional intent was unclear, Perez's convictions for Section 247 and Section 844(h) do not violate the Double Jeopardy Clause, because under the test set forth by the Supreme Court in *Blockburger* v. *United States*, 284 U.S. 299 (1932), each statute contains an element that the other does not. Namely, Section 247 requires that the violation be directed at a religious property, while Section 844(h) does not. Section 844(h) on the other hand, requires the use of fire or explosives to commit a federal felony, while Section 247(d)(3) may be violated if the defendant uses a dangerous weapon other than fire or explosives, or if the violation results in bodily injury to a person without the use of fire or explosives.

The primary case Perez relies on in support of his double jeopardy argument, *United States* v. *Corona*, 108 F.3d 565 (5th Cir. 1997), is inapposite because its reasoning applies only to situations where the defendant also has been convicted of arson under 18 U.S.C. 844(i), and the government is not required to prove any additional fact to obtain the use-of-fire enhancement under Section 844(h).

Even if the district court erred by permitting Perez to be tried and convicted under 18 U.S.C. 247 and 18 U.S.C. 844(h) based on the same underlying conduct, the error was not plain. Neither this Court nor the Supreme Court has addressed whether trying and convicting a defendant under both Section 247 and Section 844(h) for the same conduct violates double jeopardy, and the only circuit court of

appeals to have done so, *United States* v. *Grassie* from the Tenth Circuit, held that it does not.

2. The district court did not err in sentencing Perez cumulatively under 18 U.S.C. 247 and 18 U.S.C. 844(h) based on the same conduct because, as set forth above, Congress plainly intended for Section 844(h) to apply even to predicate felonies that already provide their own enhancements for the use of fire. And even if congressional intent were unclear, Perez's sentence does not violate double jeopardy under *Blockburger* because Sections 247 and 844(h) each contain an element that the other does not.

3. The district court did not err, plainly or otherwise, in finding that federal arson was the underlying offense for Perez's violation of 18 U.S.C. 247 and applying Sentencing Guidelines § 2K1.4 to determine Perez's base offense level. Both the jury and the district court found that Perez intentionally set fire to the mosque because of the building's religious character. This conduct met the definition of federal arson because it established that Perez "maliciously damage[d] or destroy[ed]" the mosque "by means of fire." 18 U.S.C. 844(i).

4. The district court did not err, plainly or otherwise, in applying both Sentencing Guidelines § 2K1.1 and the ten-year mandatory consecutive sentence under Section 844(h) to determine Perez's sentence. Double-counting is impermissible only when the Sentencing Guidelines expressly prohibit it. Perez

does not identify any such express prohibition in Sentencing Guidelines § 2K1.4, and none exists. Thus, even assuming the application of the guideline together with Section 844(h) constituted double-counting, such double-counting was not impermissible under the Sentencing Guidelines, and there was no error.

ARGUMENT

I

THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR BY ALLOWING PEREZ TO BE TRIED AND CONVICTED UNDER BOTH 18 U.S.C. 247 AND 18 U.S.C. 844(h) FOR DESTROYING THE MOSQUE THROUGH THE USE OF FIRE

A. Standard Of Review

Perez did not challenge the indictment on double jeopardy grounds below. Review is thus for plain error.[5] *United States* v. *Vasquez*, 899 F.3d 363, 372 (5th Cir. 2018), cert. denied, 139 S. Ct. 1543 (2019). To satisfy that standard, Perez must establish "(1) there was error, (2) the error was plain or clear, and (3) the error affects [his] substantial rights." *United States* v. *Cisneros-Gutierrez*, 517 F.3d 751, 760 (5th Cir. 2008). An error is not plain unless it was "clear under current law at the time of trial." *United States* v. *Garcia-Rodriguez*, 415 F.3d 452,

[5] It is unclear from Perez's brief what relief he seeks in his double jeopardy challenge to the indictment. In his objections to the PSR, he suggested that Count 2 should be dismissed. ROA.3048. This Court has held that "[w]hen the jury is allowed to return convictions on multiplicitous counts, the remedy is to remand for resentencing, with the government dismissing the count(s) that created the multiplicity." *United States* v. *Buchanan*, 485 F.3d 274, 278 (5th Cir. 2007) (internal quotation marks and citation omitted).

455 (5th Cir.), cert. denied, 546 U.S. 1010 (2005) (citation omitted). Even where a defendant establishes these requirements, the Court "will not exercise [its] discretion to grant relief unless the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Cisneros-Gutierrez*, 517 F.3d at 760 (internal quotation marks and citation omitted).

B. The Indictment Did Not Violate The Double Jeopardy Clause By Charging Perez Under Both Section 247(a)(1) And Section 844(h)

Perez argues (Br. 14-17) that the indictment was defective because Counts 1 and 2 were multiplicitous in violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution. Count 1 charged Perez with violating 18 U.S.C. 247(a)(1), which provides that whoever "intentionally defaces, damages, or destroys any religious real property, because of the religious character of that property * * * shall be punished as provided in subsection (d)." Section 247(d)(3), in turn, provides that "if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire," the punishment shall be up to 20 years' imprisonment. Count 2 charged Perez with violating Section 844(h), which provides that whoever "uses fire or an explosive to commit any felony * * * 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." 18 U.S.C. 844(h)(1). Section 844(h) also provides that "the term of

imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried." *Ibid.* Perez is incorrect that charging him under both statutes violates double jeopardy because, as explained below, Congress plainly intended Section 844(h) to provide an enhanced punishment for felonies involving the use of fire, even where the predicate felony itself contains its own use-of-fire enhancement. Further, even if congressional intent were unclear, the indictment does not violate double jeopardy under the test set forth in *Blockburger* v. *United States*, 284 U.S. 299 (1932), because Section 247 and Section 844(h) each contain an element that the other does not.

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. "The Double Jeopardy Clause's multiplicity doctrine 'prohibits the [g]overnment from charging a single offense in several counts and is intended to prevent multiple punishments for the same act.'" *United States* v. *Barton*, 879 F.3d 595, 599 (5th Cir.), cert. denied, 139 S. Ct. 167 (2018) (citation omitted). Thus, the question of whether an indictment is multiplicitous depends on whether it impermissibly imposes multiple punishments for the same conduct in violation of the Double Jeopardy Clause. *United States* v. *Brechtel*, 997 F.2d 1108, 1112 (5th Cir.), cert. denied, 510 U.S. 1013 (1993).

The Supreme Court has held that "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983); see also *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981) ("[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed."); *Brechtel*, 997 F.2d at 1112 ("Legislative intent typically is dispositive of the multiplicity inquiry.").

Thus, as Perez acknowledges (Br. 15), the first step in deciding whether a conviction or punishment violates double jeopardy is to determine whether "Congress expressed a clear intent to permit punishment cumulatively" for both offenses. *United States* v. *Severns*, 559 F.3d 274, 282 (5th Cir. 2009). If Congress clearly intended cumulative punishments under different statutory provisions, the Double Jeopardy Clause does not prohibit application of both provisions. *Id.* at 283.

Only if congressional intent is unclear does the Court turn to the test set forth in *Blockburger* v. *United States*, 284 U.S. 299 (1932). *Blockburger* held that the same act or transaction can constitute a violation of more than one statute if each offense "requires proof of an additional fact which the other does not." *Id.* at

304. The charges in this case easily satisfy both the congressional-intent inquiry and the *Blockburger* test.

1. Congress Intended Section 844(h) To Apply To Felonies That Already Provide Enhancements For The Use Of Fire

Perez's Double Jeopardy claim is unfounded because Congress clearly intended to punish the use of fire to damage or destroy religious property motivated by the religious character of that property under both statutes. To determine congressional intent, the Court need look no further than the plain language of Section 844(h). The statute provides for a mandatory ten-year sentence in cases where the defendant uses fire to commit "any" federal felony and states that the additional sentence cannot "run concurrently with any other term of imprisonment including that imposed for the [underlying] felony." 18 U.S.C. 844(h). The statute also states that the enhancement applies even when the underlying felony "provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." 18 U.S.C. 844(h). Section 247, which serves as the predicate felony in the instant indictment, is precisely such a statute. Section 247 prohibits the racially or religiously motivated desecration of a house of worship, and provides for an enhanced sentence if the desecration involves "the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire." 18 U.S.C. 247(d)(3).

Perez ignores the statute's plain text and argues that "Congress's intent should * * * be considered unclear when [Section] 844(h)(1), which is a punishment enhancement, is charged along with a predicate offense that includes its own 'use of fire' punishment enhancement." Br. 16. Perez fails to cite a single case that supports this statement, and courts consistently have held otherwise.

Indeed, in *United States* v. *Gonzales*, 520 U.S. 1 (1997), the Supreme Court considered identical text in another statute and declined to find it ambiguous. The question in that case was whether 18 U.S.C. 924(c), which provides an enhanced sentence for use of a firearm during the commission of a crime of violence or drug trafficking crime, must run consecutively with a state-imposed sentence. The *Gonzales* Court discussed an earlier decision, *Busic* v. *United States*, 446 U.S. 398, 404 (1980), where the Court held that the application of a previous version of Section 924(c) to a predicate felony statute that already contained its own firearm enhancement provision violated double jeopardy. *Gonzales*, 20 U.S. at 10. The *Busic* Court had reasoned that the statute was ambiguous as to whether Congress intended it to apply where the underlying statute already contained an enhancement for the use of a weapon, and that in light of this ambiguity, the rule of lenity required holding that defendants could not be punished under both Section 924(c) and the other statute. See *Busic*, 446 U.S. at 405.

The *Gonzales* Court observed that after *Busic* was decided, Congress amended Section 924(c) to state that the statute applies "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.'" *Gonzales*, 520 U.S. at 10 (quoting 18 U.S.C. 924(c)(1)(A)). The Supreme Court explained that through this amendment, "Congress made clear its desire to run [Section] 924(c) enhancements consecutively to all other prison terms, regardless of whether they were imposed under firearms enhancement statutes similar to [Section] 924(c)." *Ibid.*; see also *United States* v. *Holloway*, 905 F.2d 893, 895 (5th Cir. 1990) (holding that "the Double Jeopardy Clause does not prohibit convictions and sentences under both [Sections] 924(c)" and 18 U.S.C. 2113(d), which provides an enhanced sentence for use of a dangerous weapon during a bank robbery).

This analysis controls here. The relevant language in Section 924(c) is identical to the language in Section 844(h)—both state that the enhancement applies to predicate felonies including those that already "provide[] for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." 18 U.S.C. 844(h); 18 U.S.C. 924(c)(1)(A). Congress added this language to Section 844(h) in 1988, a mere four years after it amended Section 924(c) with the same language. Both statutes also provide that the term of imprisonment imposed under the enhancement may not run concurrently with any other term of

imprisonment. See 18 U.S.C. 844(h); 18 U.S.C. 924(c)(1)(D)(ii). Through this language, "Congress made clear its desire to run" Section 844(h) sentences consecutively to other felony statutes, even those like Section 247 that already contain enhancements for the use of fire. *Gonzales*, 520 U.S. at 10.

To the government's knowledge, the only circuit court to have considered the issue presented here—whether a defendant may be convicted of and punished for violating both Section 247 and Section 844(h) based on the same conduct—rejected the double jeopardy argument that Perez advances. In *United States* v. *Grassie*, 237 F.3d 1199, 1202 (10th Cir.), cert. denied, 533 U.S. 960 (2001), the defendant vandalized several Mormon churches in New Mexico. During one such incident, he poured gasoline through a window of a church and ignited it, resulting in the complete destruction of the church. *Id.* at 1203. The defendant was charged with a violation of 18 U.S.C 247 for the church arson, and use of fire during the commission of a federal felony in violation of 18 U.S.C. 844(h), with the Section 247 charge as the predicate felony. *Id.* at 1205.

Like Perez, the defendant in *Grassie* argued that his conviction and sentence for both Sections 247 and 844(h) violated the Double Jeopardy Clause. 237 F.3d at 1212. He acknowledged that Section 844(h) authorizes cumulative convictions and punishments where the underlying felony already "provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device."

Id. at 1214 (quoting 18 U.S.C. 844(h)(1)). But he argued that the phrase "deadly or dangerous weapon or device" in 18 U.S.C. 844(h)(1) included only explosives and did not include fire. *Ibid.* The court rejected this argument, holding 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." *Id.* at 1215. Thus, the court held that Congress plainly intended that Section 844(h) apply cumulatively to offenses that already provide for enhancements for the use of fire such as Section 247. *Id.* at 1215-1216.

The Seventh Circuit reached a similar conclusion when it considered application of the Section 844(h) enhancement to a different civil rights predicate offense. In *United States* v. *Colvin*, 353 F.3d 569, 570-571 (7th Cir. 2003), cert. denied, 543 U.S. 925 (2004), the defendant burned a cross in front of the home of a man of Puerto Rican descent. He was convicted of intimidation and interference with federal housing rights in violation of 42 U.S.C. 3631, which is a felony if it involves the use of fire, and of use of fire in connection with a federal felony in violation of Section 844(h)(1). *Ibid.* He challenged his conviction on double jeopardy grounds, arguing that 42 U.S.C. 3631 could not be the predicate felony for the application of Section 844(h) because Section 3631 already carries an enhanced punishment for using fire. *Id.* at 571. The court rejected this argument,

holding that "the language added * * * to [Section] 844(h)(1), like the 1984 amendment to [Section] 924(c) considered in *Gonzales*, eliminates any doubt about whether Congress intended to impose cumulative punishment when applied to statutes containing an enhanced punishment for the use of fire." *Id.* at 573.

As in *Grassie*, the defendant in *Colvin* argued that because Section 844(h)(1), which states that the statute applies to any felony, "including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device," does not specifically mention felonies with fire enhancements, then Section 844(h) does not apply to such felonies. *Colvin*, 353 F.3d at 573-574 (citation omitted). And as in *Grassie*, the court rejected this argument, recognizing that "[a]s a matter of statutory construction, * * * 'including' usually signals illustration, not exhaustion." *Id.* at 574. "Furthermore," the court continued, "we think fire, under the most straightforward reading of the statute, is encompassed within the phrase 'deadly or dangerous weapon or device.'" *Ibid.* The court explained:

> [W]e see no adequate reason to conclude that Congress intended that fire be treated differently for purposes of [Section] 844(h)(1) than explosives or other dangerous weapons. * * * [Section] 844(h)(1) was designed to discourage offenders from choosing particularly dangerous means of accomplishing their objectives, and *Congress has made clear that those who do are subject to punishment under [Section] 844(h)(1) in addition to any enhanced punishment imposed for the underlying felony.*

Id. at 575 (emphasis added). As in *Grassie* and *Colvin*, the district court in this case did not err in allowing Perez to be convicted under both Sections 247 and 844(h) for burning down the Victoria Islamic Center, because Congress intended Section 844(h) to apply to *all* federal predicate felonies involving the use of fire, including those that already include use-of-fire enhancements.

2. Perez's Convictions Under Section 247 And 844(h) Satisfy The Blockburger *Test Because Each Charge Contains An Element That The Other Does Not*

Having claimed that congressional intent is unclear, Perez argues (Br. 16-17) that the Court should apply a *Blockburger* analysis. He argues that his convictions under Section 247 and Section 844(h) fail the *Blockburger* test because Section 247 does not contain any element that Section 844(h) does not. Thus, he claims, his convictions under these two statutes violate double jeopardy.

This is incorrect. As discussed above, *Blockburger* does not apply in this context because the text of Section 844(h) unambiguously makes clear that Congress intended the statute to apply to predicate felonies involving the use of fire, including those felonies that already provide their own enhancements for the use of fire. "The *Blockburger* test is a 'rule of statutory construction,' and because it serves as a means of discerning congressional purpose the rule should not be controlling where * * * there is a clear indication of contrary legislative intent." *Albernaz*, 450 U.S. at 340. Thus, "[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." *Hunter*, 459 U.S. at 368-369.

But even if *Blockburger* were to apply, it does not help Perez. He argues that his convictions violate *Blockburger* because Section 247 does not contain any element that Section 844(h) does not. Br. 16. In other words, Perez suggests that because Section 844(h)(1) applies when fire is used to commit "any felony," it incorporates all the elements of that underlying felony. But this circuit has rejected that interpretation of statutory sentencing enhancements like Section 844(h). For example, in *United States* v. *Martinez*, 28 F.3d 444, 446 (5th Cir.), cert. denied, 513 U.S. 910 (1994), this Court held that a defendant's convictions for obstruction of commerce by robbery under 18 U.S.C. 1951 and carrying a firearm during a crime of violence under Section 924(c) did not violate double jeopardy, because "[t]he obstruction of commerce by robbery statute [Section 1951] requires proof of threats or force [but] does not require evidence that the defendant possessed a weapon," whereas Section 924(c) "requires evidence that the defendant used or carried a weapon, but does not require proof that the weapon was used to threaten or force." See also *United States* v. *Miles*, 122 F.3d 235, 240 (5th Cir. 1997), cert. denied, 532 U.S. 1011 (1998) (same). These cases make clear that statutory

enhancements like Section 924(c) and Section 844(h) do not incorporate each element of their predicate offenses.

The challenged charges in this case easily satisfy the *Blockburger* test, as each charge contains an element the other does not. Section 844(h) requires that the defendant committed an underlying felony, and that he used fire or explosives to do so. A violation of Section 247(d)(3), however, does not require the use of fire or explosives; rather, it can be satisfied without the use of fire or explosives, for example if the defendant uses a dangerous weapon other than fire or explosives or if the violation causes bodily injury to a person. Further, Section 247 requires that the crime be directed at religious property, an element not found in Section 844(h). As such, even if the *Blockburger* test applies here, it is easily satisfied, and there is no double jeopardy violation.

3. Perez's Reliance On Corona *Is Misplaced*

As set forth above, Perez's convictions do not violate the *Blockburger* test, because Sections 247 and 844(h) both contain an element that the other does not. *United States* v. *Corona*, 108 F.3d 565 (5th Cir. 1997), does not indicate otherwise. In *Corona*, the defendants were charged with arson of buildings used in or affecting interstate commerce in violation of 18 U.S.C. 844(i), conspiracy to commit arson in violation of 18 U.S.C. 371, and use of fire during commission of a felony in violation of Section 844(h). *Corona*, 108 F.3d at 568. The government

charged the conspiracy count as the predicate felony for the Section 844(h) count. *Ibid.* Further, the government identified setting the fire as the "overt act" in furtherance of the arson conspiracy. *Id.* at 573.

The Court in *Corona* assumed that the Double Jeopardy Clause would prevent a defendant from being convicted of both arson under Section 844(i) and use of fire to commit a felony under Section 844(h), because there was "no indication from Congress that every arson should be subject to the * * * enhancement set out in [Section] 844(h)(1)," and because "[n]either crime involves an element that the other does not." 108 F.3d at 572 (citing *United States* v. *Chaney*, 559 F.2d 1094, 1095-1096 (7th Cir. 1977)). The Court held that "[o]nce the jury has found the defendants guilty of arson and conspiracy to commit arson [with setting the fire as the overt act], it has found them guilty of using fire as part of that conspiracy." *Id.* at 573. Because "nothing more need be proved in order to find a violation of [Section] 844(h)(1)," the Court held that the convictions violated *Blockburger*. *Ibid.*

Since *Corona* was decided, this Court has considered additional double jeopardy challenges under Section 844(h). These decisions make clear that double jeopardy prohibits a conviction or sentence under Section 844(h) *only* where the defendant is also convicted of federal arson under Section 844(i), because every violation of federal arson would also violate Section 844(h). But where the

defendant is convicted of both arson and a non-arson count, the non-arson count may serve as a predicate offense to a Section 844(h) use-of-fire enhancement without violating the Double Jeopardy Clause. The only requirement is that once all the elements of the arson count and non-arson count are proven, the government must still have to prove that fire was used to commit the non-arson predicate felony to satisfy Section 844(h). See, *e.g.*, *Severns*, 559 F.3d at 286 (Double Jeopardy Clause's multiplicity doctrine did not prohibit the defendant from being convicted of arson, mail fraud, and use of fire to commit mail fraud under Section 844(h)); *United States* v. *Smith*, 354 F.3d 390, 399 (5th Cir. 2003), cert. denied, 541 U.S. 953 (2004) (same).

As in *Severns* and *Smith*, not every Section 247 violation—or even every felony Section 247 violation—would also violate Section 844(h). Section 247(d)(3) applies where "bodily injury * * * results from the acts committed in violation of this section *or* if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire." 18 U.S.C. 247(d)(3) (emphasis added). A defendant therefore could vandalize a church using a sledgehammer, and in doing so injure a parishioner, without the use of fire or explosives, and thereby violate Section 247(d)(3) without implicating Section 844(h). Because not every violation of Section 247 would also violate Section 844(h), it is distinguishable from arson, making *Corona* inapposite to this case. See *United*

States v. *Patel*, 370 F.3d 108, 117 (1st Cir. 2004) (distinguishing *Corona* on this basis because "[t]he purpose of [Section 844(h)] is to enhance penalties for crimes that *do not require* but may involve the use of fire.") (emphasis added).

C. Even If The Indictment Were Defective On Double Jeopardy Grounds, Plain Error Is Not Satisfied Because Any Such Defect Is Not Clear Under Settled Law

As set forth above, Perez was properly charged, convicted, and punished under both Section 247 and Section 844(h), because Congress intended Section 844(h) to enhance the punishment for federal felonies involving the use of fire, including felonies that already include enhancements for the use of fire. *Grassie*, 237 F.3d at 1215-1216; *Colvin*, 353 F.3d at 574. And even if congressional intent were unclear, the charges in this case easily satisfy the *Blockburger* test. But even if this Court finds otherwise, it should uphold Perez's convictions because the error was not plain.

Whether applying Section 247 and Section 844(h) to the same conduct violates double jeopardy was not clear at the time of trial under the settled law of this circuit. See *United States* v. *Bishop*, 603 F.3d 279, 281 (5th Cir.), cert. denied, 562 U.S. 914 (2010) (refusing to find plain error where there were "no published decisions in this Circuit that address[ed]" the issue); *United States* v. *Jackson*, 549 F.3d 963, 978 (5th Cir. 2008), cert. denied, 558 U.S. 828 (2009) (where an issue is one "of first impression [in the Circuit] and the law was not obvious at the time of

trial, any error was not plain."). Neither the Supreme Court nor this Court has addressed whether the Double Jeopardy Clause precludes convicting a defendant under both Section 247 and 844(h) for the same conduct, and the only circuit court of appeals that has done so has held that it does not. See *Grassie*, 237 F.3d at 1215-1216. Thus, the district court did not commit plain error in allowing Perez to be tried and convicted of both Section 247 and Section 844(h) for the same conduct.

II

THE DISTRICT COURT DID NOT ERR IN PUNISHING PEREZ UNDER BOTH SECTION 247 AND SECTION 844(h)

A. Standard Of Review

Perez objected to the PSR on the ground that punishing him for violating both 18 U.S.C. 247 and 18 U.S.C. 844(h) based on the same conduct violated the Double Jeopardy Clause. ROA.3045-3049. Review is thus de novo. *United States* v. *Severns*, 559 F.3d 274, 282 (5th Cir. 2009).

B. Perez's Sentence Does Not Violate Double Jeopardy Because Congress Intended Section 844(h) To Enhance Punishments Under Section 247

The government incorporates by reference Section I.B., *supra*. For the reasons set forth in that section, the district court did not err in punishing Perez under both 18 U.S.C. 247(d)(3) and 18 U.S.C. 844(h), because Congress intended Section 844(h) to apply to enhance the punishment for federal felonies committed using fire or explosives, including felonies that already include enhancements for

the use of fire. *United States* v. *Grassie*, 237 F.3d 1199, 1215-1216 (10th Cir.), cert. denied, 533 U.S. 960 (2001); *United States* v. *Colvin*, 353 F.3d 569, 574 (7th Cir. 2003), cert. denied, 543 U.S. 925 (2004). In addition, even if congressional intent were unclear, the charges in this case easily satisfy the *Blockburger* test because Section 247 and Section 844(h) each contain an element that the other does not.

III

THE DISTRICT COURT DID NOT PLAINLY ERR IN APPLYING THE § 2K1.4 ARSON GUIDELINE

A. Standard Of Review

In his objections to the PSR, Perez challenged the application of Sentencing Guidelines § 2K1.4, the arson guideline, on the ground that the guideline did not apply to arson committed without the use of explosives. ROA.3041. He did not object on the ground that he now raises—that "the crime of arson is not 'established' by [his] conviction under [Section] 247." Br. 19. Review is thus for plain error. See *United States* v. *Medina-Anicacio*, 325 F.3d 638, 643 (5th Cir. 2003), cert. denied, 542 U.S. 911 (2004) ("When a defendant objects to his

sentence on grounds different from those raised on appeal, we review the new arguments raised on appeal for plain error only.").[6]

B. The PSR Correctly Found That Arson Was The Underlying Offense

Contrary to Perez's argument (Br. 18-21), the PSR correctly found that arson was the underlying offense for Count 1. Thus, the district court did not err, let alone plainly err, in applying Sentencing Guidelines § 2K1.4 to determine Perez's sentence.

Sentencing Guidelines § 2H1.1 applies to convictions under Section 247. Comment 1 to Sentencing Guidelines § 2H1.1 states that where "conduct set forth in the count of conviction * * * constitute[s] more than one underlying offense," a court should follow the procedure set forth in Application Note 4 of Sentencing Guidelines § 1B1.2, which deals with conspiracy to commit multiple offenses, to determine the appropriate base offense level.

Perez argues that this procedure applies here because, in convicting Perez of violating Section 247(a)(1), the jury may have found that Perez merely vandalized the mosque by breaking the back doors, damaging the electrical panel, and defacing a tablet showing images of the mosque, but did not set fire to the mosque.

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[6] If the Court finds that Perez's objection was sufficient to preserve this issue for appeal, then review of the district court's factual findings is for clear error and its application of the Sentencing Guidelines, including application of the cross-reference, is de novo. See *United States* v. *Hicks*, 389 F.3d 514, 529 (5th Cir. 2004).

Br. 22. Alternatively, he suggests that the jury might have found that Perez started the fire "reckless[ly] or accidental[ly]" and that "the unplanned and unintentional starting of a fire * * * could meet the 'involved' the use of fire element of [Section] 247(d)(3) without constituting malicious destruction by means of fire" required for application of the arson guideline. Br. 22. Thus, he argues, the elements of federal arson are not established, and the district court erred by applying the arson guideline. Br. 22. Perez is incorrect.

Perez's conduct, as found by the jury and the district court, establishes all of the elements of federal arson because, by setting fire to the mosque, Perez "maliciously damage[d] or destroy[ed]" the mosque "by means of fire." 18 U.S.C. 844(i). The Sentencing Guidelines provide that the "offense conduct" used to determine the underlying offense is the "conduct charged in the count of the indictment or information of which the defendant was convicted." Sentencing Guidelines § 1B1.2. Here, the indictment charged that Perez, "through the use of a dangerous weapon, explosive, and fire, intentionally defaced, damaged, and destroyed religious real property." ROA.106. It also alleged that Perez "knowingly used a fire and explosive to commit a violation of [Section] 247(a)(1)." ROA.106-107. Further, the jury instructions required that to convict Perez of violating Section 247, the jury must find that he "*intentionally* defaced, damaged or destroyed religious real property" *and* "[t]hat the offense included the

use, attempted use, or threatened use of a dangerous weapon, explosive, or fire." ROA.408 (emphasis added). It is thus clear that the government charged, and the jury found, that Perez intentionally set fire to the mosque.

In addition, the district court at sentencing found that Perez intentionally set the mosque on fire.[7] The PSR stated that Perez "used [a] lighter to set the mosque on fire by lighting papers and books, including Qurans, on fire." ROA.3077. The district court adopted this finding when it overruled Perez's objections to the PSR. ROA.3094, 2692. See Fed. R. Crim. P. 32(i)(3)(B); see also *United States* v. *Hodges*, 110 F.3d 250, 251 n.3 (5th Cir. 1997) ("The PSR generally bears sufficient indicia of reliability to be considered as evidence by the district court in resolving disputed facts relative to sentencing.").

There is no doubt that Perez's act of intentionally setting fire to the mosque, as found by both the jury and the district court, met the definition of federal arson as set forth in 18 U.S.C. 844(i). The district court was thus correct in adopting the PSR's application of arson as the underlying offense for the Section 247 conviction.[8]

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[7] Application Note 4 to Sentencing Guidelines § 1B1.2 provides that a court should apply the guideline for a particular underlying offense "if the court, were it sitting as a trier of fact, would convict the defendant of" committing that offense.

[8] Perez's analogy (Br. 20) to *United States* v. *Lucas*, 157 F.3d 998 (5th Cir. 1998), is inapposite. In that case, the defendant was charged with and pleaded

(continued…)

IV

THE DISTRICT COURT'S APPLICATION OF THE § 2K1.4 ARSON GUIDELINE AND THE SECTION 844(h)(1) TEN-YEAR MANDATORY CONSECUTIVE SENTENCE DID NOT PLAINLY CONSTITUTE IMPERMISSIBLE DOUBLE-COUNTING

A. Standard Of Review

In his objections to the PSR, Perez challenged the application of Sentencing Guidelines § 2K1.4, the arson guideline, on the ground that the guideline did not apply to arson committed without the use of explosives. ROA.3041. He did not object on the ground that he now raises—that the Sentencing Guidelines "prohibit double-counting § 844(i) via the § 2K1.4 arson guideline." Br. 24. Review is thus for plain error. *United States* v. *Medina-Anicacio*, 325 F.3d 638, 643 (5th Cir. 2003), cert. denied, 542 U.S. 911 (2004).

(…continued)
guilty to misdemeanor sexual assault but, during his plea colloquy, admitted to facts constituting felony sexual assault. *Id.* at 999-1000. He also stipulated that the felony sexual abuse guideline should apply. *Ibid.* The district court applied the guideline applicable to consensual criminal sexual abuse of a ward, a lesser offense. *Ibid.* On appeal, this Court analyzed the defendant's plea colloquy and, applying Sentencing Guidelines § 1B1.2(a), held that the felony rape guideline should apply. *Id.* at 1001-1003. The lack of a plea colloquy or stipulation here is irrelevant because, unlike in *Lucas*, a jury convicted Perez of the conduct alleged in Count 1 of the indictment—namely, intentionally setting fire to the mosque—and the district court also found that he set fire to the mosque. See ROA.106-107, 408. Thus, Perez's act of intentionally setting fire to the mosque is the offense conduct, and Sentencing Guidelines § 2K1.4 is the appropriate guideline.

B. The District Court Properly Applied The Arson Guideline And The Section 844(h) Enhancement

Contrary to Perez's argument (Br. 24), the district court's application of the arson guideline, Sentencing Guidelines § 2K1.4, together with the mandatory ten-year consecutive sentence for use of fire under Section 844(h) did not constitute impermissible double-counting. Perez is correct that convicting a defendant under Section 844(h) with Section 844(i) as the predicate offense would violate the Double Jeopardy Clause. See *United States* v. *Corona*, 108 F.3d 565, 572 (5th Cir. 1997). But that does not mean that applying the arson *guideline* for a *different* offense—here, Section 247—where the defendant has also been convicted under Section 844(h) constitutes impermissible double-counting.

"Double counting occurs when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines." *United States* v. *Myers*, 598 F.3d 474, 476 (8th Cir. 2010) (citation omitted). This Court "has recognized that the guidelines do not contain a general prohibition against double-counting." *United States* v. *Calbat*, 266 F.3d 358, 364 (5th Cir. 2001). "Rather, double-counting is prohibited only if it is specifically forbidden by the particular guideline at issue," and "[t]he prohibition must be in express language." *Ibid.* Perez does not identify any such express prohibition in Sentencing Guidelines § 2K1.4, because none exists. There was thus no error in applying both

Section 844(h) and the arson guideline. See *Calbat*, 266 F.3d at 364 (even assuming application of enhancement constituted double-counting, there was no error because the enhancement did not expressly prohibit it).

C. Even If The District Court Erred In Applying The Arson Guideline And The Section 844(h) Enhancement, The Error Was Not Plain

Even if the district court's application of Sentencing Guidelines § 2K1.4 together with Section 844(h) constituted error, such error was not plain. Perez cites no case from this circuit or any other court that has held that cross-referencing Sentencing Guidelines § 2K1.4 to determine a base offense level for an offense that is predicate to a Section 844(h) enhancement constitutes impermissible double-counting. The government is also unaware of any such case. Accordingly, any error was not clear under settled law and therefore does not satisfy plain error review. See *Bishop*, 603 F.3d at 281; *Jackson*, 549 F.3d at 978.

CONCLUSION

For the foregoing reasons, this Court should affirm Perez's convictions and sentence.

Respectfully submitted,

ERIC S. DREIBAND
Assistant Attorney General

ALEXANDER V. MAUGERI
Deputy Assistant Attorney General

s/ Elizabeth P. Hecker
TOVAH R. CALDERON
ELIZABETH P. HECKER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-5550

CERTIFICATE OF SERVICE

I certify that on June 16, 2020, I electronically filed the foregoing BRIEF FOR UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Elizabeth P. Hecker
ELIZABETH P. HECKER
Attorney

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS APPELLEE does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Office Word 2019 and contains 8101 words of proportionally spaced text. The typeface is 14-point Times New Roman font.

s/ Elizabeth P. Hecker
ELIZABETH P. HECKER
Attorney

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