In The

United States Court of Appeals

For the Fourth Circuit

RECORD NO. 03-4589

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ROBERT NELSON MAY,

Defendant-Appellee.

BRIEF OF APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA
(Hon. Graham C. Mullen presiding)

R. ALEXANDER ACOSTA
Assistant Attorney General
DENNIS J. DIMSEY
ANGELA M. MILLER
Attorneys, U.S. Department of Justice
Civil Rights Division, Appellate Section
950 Pennsylvania Avenue, N.W., PHB-5300
Washington, D.C. 20530
202/514-2195

ROBERT J. CONRAD, JR.
United States Attorney
JENNIFER MARIE HOEFLING
Assistant United States Attorney
Western District of North Carolina
227 West Trade Street, Suite 1700
Charlotte, North Carolina 28202
704/344-6222

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the district court in a criminal case. The District Court's jurisdiction is derived from 18 U.S.C. § 3231. This Court has jurisdiction to hear the appeal of the defendant's sentence pursuant to 18 U.S.C. § 3742(b). The district court issued its judgment on July 2, 2003, J.A. at 9, 119, and the United States timely filed its notice of appeal on July 3, 2003, J.A. at 9, 125.

ISSUES PRESENTED ON APPEAL

1. Whether, in this "cross-burning" case, the district court erred in granting the defendant a downward departure for victim provocation under U.S.S.G. §5K2.10.

2. Whether, in this "cross-burning" case, the district court erred by granting a downward departure for aberrant behavior under U.S.S.G. §5K2.20.

3. Whether the sentencing court clearly erred in finding that the defendant had accepted responsibility for his criminal conduct.

STATEMENT OF THE CASE

Defendant Robert Nelson May and his co-defendant, Charles Danny Carpenter, were charged in a three-count Bill of Indictment in the Western District of North Carolina at Charlotte on September 11, 2000.[1] J.A. at 11-14. Count One charged that May and Carpenter on May 11, 1999, willfully conspired and agreed to injure, oppress, threaten or intimidate Anthony Sanders, an African-American, and Jacquelette Paige Williams, a Caucasian, together an interracial couple living at the same residence, in their constitutional and statutory right to occupy a dwelling without intimidation, injury or interference because of race or association with a person of another race, by burning a cross near their dwelling, in violation of 18 U.S.C. § 241. J.A. at 11-12. In furtherance of the conspiracy, the defendants committed the following overt acts:

> (1) Defendants erected a sign on Carpenter's property, that stood from approximately April 11 through May 12, 1999, and that read, "NO TRESPASSING – ESPECIALLY NIGGERS."
>
> (2) Defendant May, on May 11, 1999, approached Sanders, pointed a handgun at him, and said, "Hey, nigger, I got something for you."

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[1]May was charged on May 11, 1999, with state charges of Ethnic Intimidation, N.C. Gen. Stat. § 14-401.14, and Placing an Exhibit with Intention of Intimidating Another, N.C. Gen. Stat. § 14-12.13. J.A. at 135. Both counts were dismissed on November 17, 2000, in favor of this federal prosecution. J.A. at 135.

(3) Defendants, also on May 11, 1999, erected a cross on Carpenters' property that stood approximately twenty feet from Sanders' and Williams' residence.

(4) Defendants lit the cross on fire and watched it burn, while possessing a handgun and a shotgun or rifle.

J.A. at 12. Count Two charged May and Carpenter with the substantive offense of cross-burning with intent to intimidate, in violation of 42 U.S.C. §§ 3631(b)(1) and 2. J.A. at 12-13. Count Three charged May and Carpenter with the use of fire to commit a civil rights conspiracy as charged in Counts One and Two, in violation of 18 U.S.C. §§ 844(h)(1) and 2. J.A. at 13-14.

Prior to trial, May and Carpenter filed multiple Motions to Continue,[2] all of which were granted by the district court and delayed the trial until January 2002. J.A. at 4-5. On the eve of trial, co-defendant Carpenter pleaded guilty to Counts One and Two and agreed to cooperate against May. J.A. at 6. Thereafter, May pleaded guilty to Counts One and Two on January 18, 2002. J.A. at 6, 17, 47, 55, 56.

May thrice violated his bond conditions by using illicit narcotic drugs. J.A. at 131. He first tested positive for marijuana on January 4, 2001. J.A. at 61, 62,

[2]Motions were filed on December 20, 2000; March 16, 2001; June 26, 2001; and October 2, 2001. J.A. at 4-5.

131. Initially, he adamantly denied having used marijuana, although he later signed a statement admitting use. J.A. at 62. May again tested positive for marijuana on October 4, 2001. J.A. at 61, 62, 131. As with the January 4 incident, he again denied having used marijuana but then later signed a statement admitting use. J.A. at 62. After the second positive drug test, May was placed in an Intensive Out Patient Drug Treatment Program. J.A. at 62.

On February 21, 2002, approximately one month after entering a plea of guilty, May tested positive for cocaine. J.A. at 61, 62, 131. When confronted with the positive test, the defendant "adamantly denied the use of any illicit substances." J.A. at 62. May claimed that he had tested positive for cocaine because "he recently had been with a female who had cocaine on her tongue and that they had been kissing and that she had performed oral sex on him." J.A. at 62.

Due to his use of illegal drugs, the defendant's bond was revoked on May 28, 2002, J.A. at 7, 131, and the defendant then served 73 days in jail in the Inpatient Drug Treatment Program, J.A. at 72. He was released on July 30, 2002. J.A. at 8.

May filed a Motion to Continue Sentencing on February 11, 2003. J.A. at 8, 66. In his Motion, May argued that the then-pending Supreme Court case of

Virginia v. Black, 123 S. Ct. 1536 (2003), could impact his guilty plea. J.A. at 66. The Supreme Court issued its opinion in *Black* on April 7, 2003, holding that a state may ban cross burning with the intent to intimidate without violating the First Amendment. *Black*, 123 S. Ct. at 1549-50.

The district court, the Honorable Graham C. Mullen, Chief United States District Judge presiding, accepted defendant May's guilty plea and the plea agreement on June 17, 2003. J.A. at 72. The court found that the Presentence Report furnished a factual basis for the plea. J.A. at 72. According to the Presentence Report, May had a Criminal History of Category I[3] and an Offense Level of 15, which provided for a guidelines sentencing range of 18 to 24 months. J.A. at 138.

Prior to sentencing, May had submitted a statement to the Probation Officer preparing his Presentence Report. J.A. at 132-33. In his statement, he explained that he accepted responsibility for his conduct. J.A. at 132. May then stated that, after the victim Sanders moved in with Williams, May had heard of thefts and

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[3]May's criminal history includes state non-support and speeding charges. J.A. at 134-35. He also has a prior state arrest (nolle prosequi) for possession of marijuana, and state arrests stemming from the present incident for Ethnic Intimidation and Placing Intimidating Exhibit. J.A. at 135. The latter charges were dismissed in favor of federal prosecution.

attempted thefts in the neighborhood, which he attributed to Sanders. J.A. at 132. May also reported that he had heard that Sanders had fired a gun in the neighborhood and that he knew that Sanders had a "significant criminal record." J.A. at 132. Finally, May explained that, on the day of the cross burning, Carpenter had informed him that he had been threatened by Sanders. J.A. at 132. According to his statement in the Presentence Report, the cross was burned, "at least partially, as a result of Sanders' threat to Carpenter made earlier that day." J.A. at 133. This reason was not provided to the police immediately following the cross burning nor at any time up until he submitted his statement to the Probation Officer.

In the Revised Presentence Report, the Probation Officer recommended that May not be given acceptance of responsibility credit because:

> The defendant has minimized his role in this offense during interview (sic) with this United States Probation Officer and currently denies most of the key facts in the offense conduct. In addition, the defendant has violated the terms of his bond release by testing positive for marijuana and cocaine.

J.A. at 133.

The court rejected the probation office recommendation and granted May a two-level reduction in his offense level for acceptance of responsibility, saying: "He gets two points off for acceptance. He pled guilty. All the elements are there.

Everything is there. He gets the two points off." J.A. at 72. Afterward, May told the court, "I had to sign a statement of three allegations that were lies against me but I'll go with it." J.A. at 80.

The district court also granted defendant May a three-level downward departure under U.S.S.G. §5K2.10 for Victim Conduct and under U.S.S.G. §5K2.20 for Aberrant Behavior. J.A. at 79, 80. To substantiate his motion for the downward departure, defendant May presented Dawn Fullerton, a private investigator. J.A. at 73. She testified that she had interviewed neighbors of Sanders, May, and Carpenter to ascertain Sanders' reputation. J.A. at 73. Significantly, she admitted that everyone in the area was related to defendant May. J.A. at 74 ("The whole mountain is the family."). According to Fullerton, the neighborhood changed after Sanders moved in with Williams. J.A. at 73. For example, Sanders made obscene gestures at some of the neighbors. J.A. at 73. Also, one neighbor reported that he had a piece of property stolen from his garage and that he never had had anything stolen before Sanders moved in. J.A. at 73. The victim never was charged with this theft by the police. Similarly, defendant May's cousin, Jimmy May, told the investigator that he had run Sanders off his

property but nothing had been taken. J.A. at 73. Others apparently reported that Sanders was "a dope pusher." J.A. at 73.

The only police service call regarding Sanders involved an allegation that he had discharged a firearm on April 30, 1999. J.A. at 74, 106. This occurred twelve days before the cross-burning incident. Law enforcement officers never arrested or filed charges against Sanders based on this call, and defendant May was not the complainant. J.A. at 106. No other incidents involved Sanders.

Finally, Fullerton testified that Sanders had a criminal record that included larceny and concealed weapons. J.A. at 73-74 After this comment, the court expressed dismay with the case, saying that it was "appalled" that defendant's case was in federal court when members of this community were alleging that the victim was violating federal law also.

THE COURT:	Are you all going to investigate this guy as a felon in possession? Mr. Sanders?
MR. SMITH:	I think he's already been convicted and served his time. Your Honor.
MR. TIN:	Not over this incident.
THE COURT:	Not over this.
MR. SMITH:	Well, Your Honor, quite frankly –

THE COURT: No. Just answer the question. Are you or aren't you?

MR. SMITH: A lot of this, quite frankly, are [sic] just allegations of what people in the community are saying.

THE COURT: Well, the allegations are that he's been arrested for carrying a concealed weapon and he's a convicted felon, and you all are presenting him in here as some sympathetic victim. And sauce for the goose ought to be sauce for the gander. And if you have evidence that he, too, is a federal felon, why don't you all do something about it?

MR. SMITH: Well, Your Honor, we would contend, and Mr. Tin can object if he wants, but he's not the only victim. The woman he was with is also a victim.

THE COURT: I understand that. I understand that. But it is appalling that we wind up here in federal court with this and the victim is likewise violating federal law. It's just amazing. . . .

J.A. at 74. Finally, Fullerton conceded that no one had any problems with the other victim, Williams. J.A. at 74.

The court granted a downward departure based upon aberrant behavior and victim misconduct. J.A. at 79. In support of the aberrant behavior departure, the court merely said: "The evidence of aberrant behavior I think, however, is clearly met under the language of the guidelines and I'm finding that he has aberrant

behavior." J.A. at 79. No factual findings were made to support the conclusion that May's offense constituted aberrant behavior.

With respect to victim misconduct under U.S.S.G. §5K2.10, the court said:

> THE COURT: And I think most importantly on this in 5K2.10 is victim provocation. I agree with the government that Ms. Williams didn't do anything to provide a provocation but that the persistence of animus from this Sanders guy to the rest of the people in the neighborhood, the total persistence of his hostility to everybody, the motions of the way he's acted, it seems to me are extremely persistent.
>
> He has a terrible record. He does, in fact, present – he's the kind of fellow that if he was here the government would be arguing, and I would be agreeing, needs to be incarcerated to protect the public [weal].
>
> So I think that there is relevant conduct by him that substantially contributed to the danger presented and that there is a victim conduct downward departure available.

J.A. at 79. Based on its finding of victim provocation and aberrant behavior, the court departed downward to an offense level of 10. J.A. at 80. The judge imposed a sentence of one month, with credit for time served; five months of house arrest; and two years of supervised release. J.A. at 80. If the acceptance of responsibility credit and a downward departure had not been given, May's sentencing range would have been set at offense level 15, Criminal History I, or 18-24 months. J.A.

at 138. The court recognized as much, saying the government would probably appeal and that, if the Fourth Circuit disagreed with his decision, he would be required to impose an active sentence. J.A. at 81.

STATEMENT OF THE FACTS

In approximately April 1999, Anthony Sanders, an African American male, and Jacquelette Paige Williams, a Caucasian female, moved in together on Sutton-Carpenter Road in Gastonia, North Carolina. J.A. at 100. That residence had been Williams' home place for more than 30 years. J.A. at 100. Williams knew her neighbor, co-defendant Charles Danny Carpenter, J.A. at 100, and both Williams and Carpenter lived on Sutton-Carpenter Road, J.A. at 106, 131. She also knew the defendant Robert Nelson May, who lived a half mile away on Clyde May Road, named after a member of May's family. J.A. at 100, 130, 136. Both May and Carpenter are Caucasian. J.A. at 102, 130. There is no indication in the record that Williams had ever had problems with either man.

From the start it was not so with Sanders. Soon after Sanders moved in with Williams – next door to Carpenter – racially-motivated acts of intimidation began. First, a sign had been nailed to a tree on Carpenter's property, facing the Williams/Sanders home, that warned "NO TRESPASSING." J.A. at 104, 132.

Once Sanders moved in, May and Carpenter added to the sign in scrawl an addition that said "ESPECIALLY NIGGERS." J.A. at 78, 104, 132. When creating the sign, the defendants had difficultly spelling "especially," so they called May's wife for assistance. J.A. at 78. "This sign was placed so the victims could clearly see it." J.A. at 104.

On May 11, the defendants ratcheted up their race-based acts of intimidation. While Sanders was cleaning his car on his own property, May walked to the property line and pointed a chrome handgun at Sanders and told him "Hey, nigger, I got something for you." J.A. at 12. Sanders responded to this threat by saying that he had something for May. J.A. at 132.

Later that same day, the defendants plotted their next move against Sanders. Carpenter and May constructed a wooden cross fashioned out of old cedar wood that was approximately five or six feet large. J.A. at 99-100. The defendants positioned the cross at the edge of Carpenter's yard, in view of the victims' residence. J.A. at 132. The cross was approximately 20 feet from the victims' home. J.A. at 12. That night, May and Carpenter lit the cross on fire and then sat drinking beers, armed with a handgun and shotgun, and watching the cross burn. J.A. at 12, 102, 132. According to Carpenter, they were waiting by the cross to

provoke Sanders into crossing onto Carpenter's property so they could shoot at him and start an altercation. J.A. at 78. May later told police that they had burned the cross "to let the nigger know he wasn't welcome here." J.A. at 103, 105, 132.

The evening of the cross burning, the victim, Jacquelette Paige Williams, called the police to report gun shots being fired from behind Carpenter's house. J.A. at 102, 106. When the police arrived, they found defendants May and Carpenter watching the burning cross while holding a shotgun and a handgun. J.A. at 12, 102, 132. The police then went to the Williams/Sanders home from which they could see the burning cross. J.A. at 102. The police returned to Carpenter's property to talk to the defendants. J.A. at 103. As stated above, May told the police that they had burned the cross to "let the nigger know he wasn't welcome here." J.A. at 103, 105, 132. According to the police, "Each time the suspects referred to Mr. Anthony Sanders they called him a 'nigger' '(that nigger).'" J.A. at 105.

Two days later, a local newspaper reporter talked with May and Carpenter. J.A. at 99. The defendants asked a black TV reporter to leave the property. J.A. at 99. According to May, they burned the cross because "We wanted to let him know he wasn't wanted in our community." J.A. at 99.

After the cross burning, Sanders and Williams moved out of the neighborhood.

SUMMARY OF THE ARGUMENT

"Nigger" is an epithet used by racist criminal bullies.[4] Whether in the form of a posted sign stating "No Trespassing – Especially Niggers"; or a statement backed by a pointed pistol: "Hey, nigger, I got something for you"; or a cross burning,[5] civilized society cannot countenance such assaults on the dignity of the human person. When throughout our nation's history these tragic acts have occurred, our laws have provided both sanctuary and sanction. Our minds cannot fathom, the notion that on the record in this case racial intimidation of this victim could have been "provoked." It is appalling then that the district court did just that finding "a terrible record" and "persistent animus from this Sanders [the African

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[4] *Cf. Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001) ("Far more than a 'mere offensive utterance,' the word 'nigger' is pure anathema to African-Americans.").

[5] "[T]he burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. . . . [T]he possibility of injury or death is not just hypothetical. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with [his] wishes." *Virginia v. Black*, 123 S. Ct. 1536, 1545 (2003).

American victim] guy to the rest of the people in the neighborhood" justified a three-level downward departure.

The defendant May made his intentions clear: He and (co-conspirator) Carpenter were burning the cross "to let the nigger know he wasn't welcome here." J.A. at 103, 105, 132. Any American, regardless of the color of his skin, is entitled to live where he chooses, free of racially-motivated acts of terror. Those who perpetrate such acts of hatred are sent to jail. Here, the neighborhood has been "cleansed," the victims have moved out, and the court has sent the terrorizer home. The civil rights laws have been stood on their head.

Victim provocation, U.S.S.G. §5K2.10: The district court's departure for alleged victim provocation was not justified by the facts of this case. Under Section 5K2.10 of the Guidelines, the victim's wrongful conduct must have *significantly* contributed to provoking the behavior. May's evidence falls woefully short of establishing significant contribution in that it consists of hearsay testimony from family members; of a prior criminal record; of an unsubstantiated threat against a third party; of a poor reputation in the neighborhood; and of accusations of trespassing, which were never reported to police. The only documented evidence is a call to police that occurred 19 days after the defendants

posted a sign that warned "No Trespassing – Especially Niggers" and did not lead to an arrest.

May cannot reasonably claim that Sanders provoked the cross burning by a verbal confrontation earlier in the day where May instigated the confrontation and was the only one armed. *See United States v. Paster,* 173 F.3d 206, 211 (3d Cir. 1999) (affirming denial of departure where defendant initiated physical confrontation).

In the Fourth Circuit, a district court must find that the victim actually engaged in provocative, wrongful behavior before it may grant a downward departure. *United States v. Morin*, 80 F.3d 124, 128 (4th Cir. 1996). There is no evidence that Sanders instigated any provocative, wrongful behavior toward the defendant May. Nor is there any evidence that the other victim, Paige Williams, a 30-year resident in the neighborhood, engaged in any wrongful conduct toward the defendant.

Aberrant behavior, U.S.S.G. §5K2.20: This is not an *extraordinary* case where the defendant's criminal conduct constituted aberrant behavior. *United States v. Castano-Vasquez*, 266 F.3d 228, 234 (3d Cir. 2001) (Court must find both (1) that the conduct was aberrant and (2) that this is an extraordinary case.).

To be aberrant, the defendant's conduct must be without significant planning, of limited duration, and represent a marked deviation from an otherwise law-abiding life. U.S.S.G. §5K2.20, comment. (n.1).

Defendant May engaged in an extended campaign to force his neighbors to move from their home – he helped post a "No Trespassing–Especially Niggers" sign; he threatened Sanders with a gun, saying "Hey, nigger, I got something for you"; and he burned a cross 20 feet from his co-defendant's neighbors' home. This campaign started in April after Sanders moved in with Williams and continued for almost a month, when the cross was burned. The extended duration of May's actions prevent a finding that his offense was "without significant planning" or "of limited duration." Additionally, May's three bond violations for using marijuana and cocaine show that his offense was not a "marked deviation from an otherwise law-abiding life." *United States v. Jimenez*, 282 F.3d 597, 602 (8th Cir. 2002) (defendant's perjury not marked deviation from otherwise law-abiding life because defendant had previous arrest for providing false information and subsequent arrest for attempted possession of a controlled substance).

May also cannot satisfy the requirement that he presents an "extraordinary" case. His motive for committing his crime – racial animus – and his failure to

mitigate the effects of his crime prevent a finding that May presents an extraordinary case. U.S.S.G. §5K2.10.

Acceptance of responsibility, U.S.S.G. §3E1.1: The district court clearly erred in rejecting the probation office recommendation and granting acceptance of responsibility to May. May continued to engage in criminal activity on three occasions after indictment by using illegal substances (cocaine and marijuana) and denying responsibility each time. He engaged in mendacious statements claiming that cocaine must have gotten in his system via a woman's performance of fellatio while having cocaine on her tongue. Such mendacity continued through the sentencing hearing at which he stated: "I had to sign a statement of three allegations that were lies" but decided to "go with it." J.A. at 80.

The court impermissibly based its ruling solely on the entry of a guilty plea, reasoning: "He pled guilty. All the elements are there. Everything is there. He gets two points off." The Guidelines and Fourth Circuit case law require that a defendant must *clearly* demonstrate acceptance. U.S.S.G. §3E1.1. A defendant who enters a guilty plea is *not* entitled to an adjustment as a matter of right. U.S.S.G. §3E1.1, comment.(n.3); *United States v. Nale*, 101 F.3d 1000, 1005 (4th Cir. 1996). Because May failed to fully and truthfully admit the conduct

comprising the offense of conviction, *see* U.S.S.G. §3E1.1, comment. (n.3), and continued to engage in criminal conduct even after the Indictment and his plea, *Id.* (n.1), the court erred in finding that he clearly accepted responsibility.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT DEFENDANT MAY DESERVED A DOWNWARD DEPARTURE FOR VICTIM MISCONDUCT.

A. Standard of Review

Departures under the Guidelines now are reviewed de novo. 18 U.S.C. § 3742(e), as amended by § 401(c) of the Protect Act, 108 Pub. L. 21, 117 Stat. 650, ____, April. 30, 2003; *see also United States v. Semsak*, 336 F.3d 1123, 1125 (9th Cir. 2003) (" [T]he PROTECT Act now requires that we review de novo whether the district court's departure was based on proper factors."); *United States v. Flores*, 336 F.3d 760, 763 (8th Cir. 2003); *United States v. Camejo*, 333 F.3d 669, 675 (6th Cir. 2003); *United States v. Jones*, 332 F.3d 1294, 1299-1300 (10th Cir. 2003).

B. Analysis

1. This cross burning was not provoked.

One can hardly fathom a situation in which a cross burning could be provoked. A cross burning is "a tool of intimidation and a threat of impending violence." *Virginia v. Black*, 123 S. Ct. 1536, 1545 (2003). It is directed at others because of the characteristics they possess, such as their race, or their beliefs, such as their religion.

In holding that a cross burning with the intent to intimidate is proscribable under the First Amendment, the Supreme Court in *Black* recognized that the burning cross is inextricably intertwined with the Ku Klux Klan, which espouses White Supremists ideology, believes it is to be used when the law won't help, and advocates violence – such as bombings, beatings, shootings, stabbings, and mutilations – to convey its message of intimidation. *Id.* at 1545-46. Its violence long has been directed at African-Americans. *Id.* at 1544-46 (citing examples of violence and cross burnings directed at African-Americans). Significantly,

> when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim

> to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan. . . . [I]ndividuals without Klan affiliation who wish to threaten or menace another person sometimes use cross burning because of this association between a burning cross and violence.

Id. at 1546.

Justice Thomas clarified that the burning cross "is unlike any symbol in our society." *Virginia v. Black*, No. 01-1107, 2002 WL 3183589, *23 (Dec. 11, 2002) (oral argument). It is not a religious symbol but rather a symbol of "almost 100 years of lynching and activity in the South by the Knights of Camellia and – and the Ku Klux Klan and this was a reign of terror and the cross was a symbol of that reign of terror." *Id.* at *22-*23. The burning cross represents even more than a threat as "it was intended to cause fear . . . and to terrorize a population." *Id.* at *24. Because the burning cross is used to intimidate and threaten someone because of his race, it is difficult to conceive how it ever could be provoked.

May's cross burning stemmed only from racial animus. His actions catalogue a racist's determination to intimidate his African-American neighbor into moving from the neighborhood. He first helped post the "NO TRESPASSING–ESPECIALLY NIGGERS" sign on his co-defendant's property. J.A. at 12, 132. Then, he threatened the victim, saying "Hey, nigger, I got something for you" while pointing a handgun at him. J.A. at 12, 132. Next, he

burned a cross, the "tool of intimidation" and the "threat of impending violence." *Black*, 123 S. Ct. at 1545. Finally, he justified the cross burning by explaining that it was to "let the nigger know he wasn't welcome here." J.A. at 132, 99.

The above actions, especially the escalating nature of them, demonstrate both May's racial animus and his motive for burning the cross – to scare Sanders into moving from the neighborhood. The Assistant United States Attorney assigned to this case argued as much at sentencing, recounting the separate acts May committed and saying that the cross burning "is yet another step. This is not just an isolated incident." J.A. at 78. Nothing Sanders did provoked May into burning the cross; rather, it was burned because Sanders is an African-American and May hates him because of it. Because Sanders did not provoke the cross burning, the district court erred in granting the downward departure.

2. The district court's departure was not justified by the facts of this case.

The facts of this case clearly demonstrate that no actions by Sanders or Williams provoked defendant May into burning the cross to intimidate them. According to May, he burned the cross because "The man [Sanders] shoots guns, gets the police called on him. Steals things. Has a long felony record. . . . Everybody said everything was fine until he moved in . . . ." J.A. at 76-77. May's

motive stems from his racist bias, and the above reasons are his attempt to divert attention from that.

According to Section 5K2.10 of the Sentencing Guidelines, "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense." U.S.S.G. §5K2.10. To depart, therefore, the sentencing court first must determine that the victim committed wrongful conduct and then must find that such conduct contributed significantly to provoking the defendant's offense behavior. *United States v. LeRose*, 219 F.3d 335, 340 (4th Cir. 2000); *accord United States v. Paster*, 173 F.3d 206, 211 (3d Cir. 1999).[6] To

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[6]Once the sentencing court finds that the victim's misconduct significantly provoked the defendant's offense, the Guidelines supply factors for determining "the extent of a sentence reduction." U.S.S.G. §5K2.10; *United States v. Harris*, 293 F.3d 863, 873 (5th Cir.) (listed factors for determining *extent* of departure rather than *whether* to depart), *cert. denied*, 537 U.S. 950 (2002); *United States v. Tsosie*, 14 F.3d 1438, 1442 (10th Cir. 1994) (factors could be considered in reducing sentence once found wrongful victim conduct significantly provoked offense behavior); *United States v. Yellow Earrings*, 891 F.2d 650, 654 (8th Cir. 1989) (same). The factors for the district court to consider in determining the extent of a departure include:

> (a) the size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant;
>
> (b) the persistence of the victim's conduct and any efforts by the defendant

(continued...)

make this determination, the court should consider "'all of the circumstances' of the encounter in question." *United States v. Mussayek*, 338 F.3d 245, 254 (3d Cir. 2003).

The plain language in the Guidelines "contemplates that the victim must actually have done something wrong." *United States v. Morin*, 80 F.3d 124, 128 (4th Cir. 1996); *LeRose*, 219 F.3d at 340 (victim's "lack of action" means there was no victim misconduct). Indeed, the victim's conduct must be quite "egregious" to justify a departure. *United States v. Dailey*, 24 F.3d 1323, 1328 (11th Cir. 1994). For example, in *Koon v. United States*, 518 U.S. 81 (1996), the court departed downward for the officers accused of beating Rodney King because of King's misconduct, that is: his driving while intoxicated, fleeing from the

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[6](...continued)

to prevent confrontation;

(c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;

(d) the danger actually presented to the defendant by the victim; and

(e) any other relevant conduct by the victim that substantially contributed to the danger presented.

U.S.S.G. §5K2.10. As the departure was not warranted here, these factors do not need to be examined.

police, refusing to obey the officers' commands, and attempting to escape from police custody. *Id.* at 102, 104; *see also United States v. Yellow Earrings*, 891 F.2d 650, 652-53 (8th Cir. 1989) (victim pushed, verbally abused, and publicly humiliated defendant because the defendant refused to have sex with the victim).

Conversely, courts have refused to find wrongful conduct when the victim has committed adultery, *see Paster*, 173 F.3d at 212, or has breached dating etiquette, *see United States v. Desormeaux*, 952 F.2d 182, 186 (8th Cir. 1991) (riding around with defendant's boyfriend was "probably a breach of dating etiquette" but not wrongful). Significantly, courts refuse to depart based on a victim's bad reputation. *See United States v. Bigelow*, 914 F.2d 966, 975 (7th Cir. 1990) (victim was "at worst an unpleasant and untrustworthy person"; departure not warranted); *United States v. Hatney*, 80 F.3d 458, 461 (11th Cir. 1996) (victims' "corresponding seaminess" did not justify departure).

The district court found that "the persistence of animus" and "hostility" from Sanders to the community, "the way he's acted," and his "terrible record" were factors that "substantially contributed to the danger presented" in the community and justified a downward departure. J.A. at 79. The district court erred in concluding that this constituted wrongful conduct.

No actions by Sanders qualify as "wrongful conduct." Several of May's complaints against Sanders do not even amount to "conduct" or actions taken by Sanders but rather consist of speculation about Sanders' actions or testimony about Sanders' reputation. "Perceived" misconduct cannot support a departure under Section 5K2.10. *Morin*, 80 F.3d at 127-28. Defendant May speculated that thefts and attempted thefts in the neighborhood were committed by Sanders. J.A. at 132. His witness at sentencing – a private investigator employed after the fact to ask May's relatives their opinion on a victim who the defendant had persecuted – attempted to substantiate this speculation: One neighbor assumed a stolen item was taken by Sanders because he never had had anything stolen before Sanders moved in and another relative said only that he had run Sanders off his property once. J.A. at 73. Self-serving and biased speculation against Sanders by May and his long-time friends and neighbors does not qualify as wrongful conduct.[7] May admittedly is prejudiced against Sanders because of his race, and it is not surprising that he would attribute any happenings in the neighborhood to Sanders

[7]The private investigator also testified that Sanders had made obscene gestures at some of the neighbors. J.A. at 73 Although this might be considered rude behavior, it is not wrongful.

solely because he is an African-American. However, May never reported that Sanders had stolen or attempted to steal any property from him.

May also justified his cross burning because he claimed that Sanders had a "significant criminal record." J.A. at 132. The investigator May presented at sentencing checked his record after May's crime; any evidence she provided does not demonstrate what May knew when he burned the cross. J.A. at 74. May never explained what he knew about Sanders' criminal record or why that would justify burning a cross to intimidate Sanders. Indeed, May himself has a criminal record, J.A. at 134-35, and committed criminal activity while on pre-trial release in the instant case. Finally, May presented no evidence that Sanders committed any crimes while he was living with Williams or that Sanders had committed any crimes in the recent past.

The investigator also testified that Sanders was a dope pusher. J.A. at 73. May's concern about Sanders' involvement with drugs is insincere given that he has been caught using marijuana and cocaine himself.[8] Also, May again fails to

[8]In addition to May's three positive drug tests that violated his bond, J.A. at 131, May also has a 1989 arrest for possession of cannabis and drug paraphernalia, J.A. at 135.

provide any evidence of this assertion, and it at most constitutes evidence about Sanders' reputation, which is not "conduct" by Sanders.

May also reported that he had heard that Sanders had fired a gun in the neighborhood on April 30, 1999. J.A. at 74, 106. The police report was made by co-defendant Carpenter, but when the police arrived, Sanders was not home. Without any evidence to substantiate Carpenter's allegation, the police never arrested or filed charges against Sanders. No evidence supports Carpenter's conclusion that Sanders was the one who fired the gun. An unsubstantiated allegation that Sanders fired shots does not show wrongful conduct on his part. Ironically, the police were called to Carpenter's house on the night of the cross burning with the same report – the defendants were shooting off guns. This time, however, the police found the defendants at the scene and in possession of the firearms.

Finally, May explained that the cross was burned, "at least partially, as a result of Sanders' threat to Carpenter made earlier that day." J.A. at 133. May never provided this explanation before he submitted his statement to the Probation Office. He instead repeatedly claimed that he burned the cross to "let the nigger

know he wasn't welcome here." J.A. at 99, 103, 105, 132. May's explanation is disingenuous.

Even when taking all of May's excuses for burning the cross together, *see United States v. Harris*, 293 F.3d 863, 874 (5th Cir.), *cert. denied*, 537 U.S. 950 (2002), he has not shown that Sanders committed wrongful conduct. Most of Sanders' "conduct" was not conduct at all but was merely speculation about Sanders' actions or his reputation. "Perceived" misconduct is insufficient to depart. *Morin*, 80 F.3d at 127-28. The only potential "conduct" were uncorroborated allegations that Sanders had fired a gun behind his house and that he had threatened May's co-defendant. May presented no concrete evidence of either of these allegations. Additionally, he *never* stated that Sanders had directed *any* of his actions toward him. And finally, any excuses that May presented are suspect given how long it took for him to relate them and his loudly proclaimed hatred of Sanders because he is an African-American.

May also cannot show that anything Sanders did "contributed significantly to provoking" the cross burning. U.S.S.G. §5K2.10. That the defendant would not have committed his offense but for the victim's conduct is insufficient; the victim's conduct must have *provoked* the defendant's offense. *United States v.*

Mussayek, 338 F.3d 245, 255 (3d Cir. 2003). "Provocation" necessarily involves deliberate conduct that stirs a defendant to action; that goads the defendant. *United States v. LeRose*, 219 F.3d 335, 340 (4th Cir. 2000). It involves a distinct element of incitement or arousal of rage, resentment or fury. *Black's Law Dictionary* 1225 (1991); *Mussayek*, 338 F.3d at 255.[9] Sanders' actions lack the immediacy or "the highly charged context of tension, emotional build-up, or arousal, that typically exemplifies the provocative situation." *Mussayek*, 338 F.3d at 255. The only tension or emotional build-up stemmed from May's hatred of African-Americans, not from Sanders' conduct.

The conduct that May alleges that Sanders committed cannot provoke the racially-motivated acts that May committed. No connection exists between a racially-motivated cross burning with intent to intimidate and speculation that Sanders committed thefts or Sanders' supposed reputation as a drug dealer or a

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[9]Violent conduct by the defendant usually is required to justify a departure. *LeRose*, 219 F.3d at 340 ("The factors enumerated in §5K2.10 are tailored to crimes involving violence . . . ."); U.S.S.G. §5K2.10 ("[T]his provision usually would not be relevant in the context of non-violent offenses."). *Accord Paster*, 173 F.3d at 211 ("Generally only violent conduct, albeit wrongful, justifies a downward departure."). Because the crime here did not involve the type of victim-initiated, physical confrontation that is generally present in cases where a departure under U.S.S.G. § 5K2.10 has been granted, see ibid, the district court erred in granting May a downward departure under this provision.

convict. A relationship must exist between the type of offense behavior and the type of victim misconduct. *Mussayek*, 338 F.3d at 255; *Harris*, 293 F.3d at 872-73. No relationship exists between Sanders' conduct and May's cross burning; the relationship is between May's racist views and May's cross burning.

Even the two overt acts that May claims Sanders committed could not provoke the cross burning. First, the claim that Sanders fired a gun. Without any evidence that May saw Sanders fire the gun, that Sanders threatened someone or aimed the gun at someone while firing it, or that Sanders damaged May's property, this allegation is superfluous. Even if May could (or the police had) proven that it was indeed Sanders who had fired a gun, this alone does not show why May should be upset by it. Indeed, his own actions of firing shots while burning a cross after issuing an armed threat to Sanders are the provocative ones.

Similarly, May now claims that Sanders threatened his co-defendant and that this threat was part of the reason that they burned the cross. Besides the obvious point that if Carpenter was threatened, he or May should have called the police, May's own actions negate any provocation by Sanders. First, May initiated the confrontation by threatening Sanders and then by burning the cross. *See United States v. Paster,* 173 F.3d 206 (3d Cir. 1999) (affirming denial of departure

where defendant initiated physical confrontation). Second, even if Sanders had threatened Carpenter, May escalated the confrontation beyond mere words by issuing the armed threat and then later burning a cross. *See Blankenship v. United States*, 159 F.3d 336, 339 (8th Cir. 1998) (defendant's escalation of yelling match by producing loaded weapon prevented court from finding that defendant deserved downward departure). Again, no relationship exists between Sanders' alleged conduct and May's racist reaction. *Mussayek*, 338 F.3d at 255; *Harris*, 293 F.3d at 872-73. Finally, in determining whether a departure is justified, this Circuit concentrates on the proportionality of the defendant's offense to the victim's misconduct. *Morin*, 80 F.3d at 128. This cross burning is not "proportionate" to *any* alleged conduct by this victim.

Moreover, when the defendant is not in personal danger or alternatives to his offensive behavior exist, this Court looks less favorably on a departure. *Id.*; *accord Blankenship*, 159 F.3d at 339 (reasonable alternative available). The defendant's response in *Morin* parallels May's response here and demonstrates why his actions were not proportionate. 80 F.3d at 125-26. In *Morin*, the defendant fell in love with the victim's wife and believed that the victim abused his wife. In response, the defendant attempted to hire someone to kill the victim.

In concluding that the defendant did not deserve the departure, the Court pointed out that the defendant was in no personal danger from the victim, that the defendant did not attempt to prevent a confrontation with the victim, and that the defendant did not attempt to insulate the wife from the perceived danger, such as by contacting local law enforcement officials. *Id.* at 128. Similarly, here, May presented no evidence that he was subject to personal danger from Sanders; May did not attempt to prevent a confrontation with Sanders, indeed, he initiated both his threat and the cross burning; and May did not attempt to insulate Carpenter from any perceived dangers by contacting the police after Carpenter told him that he had been threatened by Sanders. May should not have received the downward departure.

Because Sanders did not provoke this cross burning, the district court erred in granting the downward departure here. The facts of this case clearly demonstrate that defendant May did not deserve the downward departure because no conduct of the victim was wrongful and such conduct did not contribute significantly to provoking May's offense. Instead, May's racist views provoked the cross burning.

II. THE DISTRICT COURT ERRED IN GRANTING DEFENDANT MAY A DOWNWARD DEPARTURE FOR ABERRANT BEHAVIOR.

A. Standard of Review

The standard of review for departures from the Guidelines is de novo. 18 U.S.C. § 3742(e), as amended by § 401(c) of the Protect Act, 108 Pub. L. 21, 117 Stat. 650, ____, April. 30, 2003; *United States v. Semsak*, 336 F.3d 1123, 1125 (9th Cir. 2003) (" [T]he PROTECT Act now requires that we review de novo whether the district court's departure was based on proper factors.").

B. Analysis

The sentencing court may depart below the Guidelines range "in an extraordinary case if the defendant's criminal conduct constituted aberrant behavior."[10] U.S.S.G. §5K2.20.[11] The court must find both (1) that the conduct

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[10]However, the court may not depart below the guideline range on this basis if (1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood); or (5) the defendant has a prior federal, or state, felony conviction, regardless of whether the conviction is countable under Chapter Four.

U.S.S.G. §5K2.20. The fact that May pleaded guilty to an indictment which charged, among other things, that he pointed a handgun at Sanders on the morning of the cross burning, and that he was in possession of a firearm when police

(continued...)

was aberrant and (2) that this is an extraordinary case. *United States v. Castano-Vasquez*, 266 F.3d 228, 234 (3d Cir. 2001).

Aberrant behavior means "a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life." U.S.S.G. §5K2.20, comment. (n.1).

Defendant argued at sentencing that his offense conduct was without significant planning, that it had a limited duration because it occurred only in one evening, and that it was "a marked deviation from an otherwise law-abiding life." J.A. at 76. He did not argue that he presented an extraordinary case. In granting

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[10](...continued)
arrived at the scene of the cross burning, provides further evidence that the district court erred in granting a downward departure on this basis.

[11]The Sentencing Commission enacted Section 5K2.20 in response to a circuit conflict on the appropriate standard for granting a departure based on aberrant behavior. U.S.S.G., App. C, amend. 603. The Commission decided "not [to] adopt in toto" either the majority (including the Fourth Circuit) view, requiring a single spontaneous and thoughtless act, or the minority view, endorsing a totality of the circumstances approach. *Id.* Instead, the Commission first emphasized that the departure was available only in an "extraordinary" case and then explained that the amendment was designed to have more flexibility than the majority view but to be less vague and overly broad than the minority view. *Id.* Finally, the Commission predicted that "this compromise amendment will not broadly expand departures for aberrant behavior." *Id.*

the departure, the court merely said: "The evidence of aberrant behavior I think, however, is clearly met under the language of the guidelines and I'm finding that he has aberrant behavior." J.A. at 79.

When a court sentences a defendant outside the applicable guidelines range, it is required to state in open court the reasons for its imposition of a particular sentence. 18 U.S.C. § 3553(c)(2). No factual findings were made to support the conclusion that May's offense constituted aberrant behavior, which is error.[12] *United States v. Guerrero*, 333 F.3d 1078, 1082 (9th Cir. 2003); *United States v. Bayles*, 310 F.3d 1302, 1314 (10th Cir. 2002) (reversing district court's finding of aberrant behavior because court made "no specific factual findings on the relevant factors necessary to establish aberrant behavior").

Under the first part of the analysis, May's conduct did not constitute aberrant behavior. May's campaign to intimidate his neighbors so that Sanders would move out did not initiate with the cross burning; rather, the cross burning was the culmination of May's efforts. This demonstrates that May's offense involved significant planning and was not of limited duration. First, soon after

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[12] The district court also failed to state in its written order of judgment the specific reasons for departing from the guidelines as required by 18 U.S.C. § 3553(c)(2).

Sanders moved in with Williams, May and Carpenter added a homemade sign to a "No Trespassing" sign already posted on Carpenter's property. J.A. at 132. This homemade sign added "ESPECIALLY NIGGERS" to the no trespassing warning. J.A. at 132, 104. According to Carpenter's statement to the FBI, neither he nor May could spell "especially" and they needed to call May's wife for the correct spelling, demonstrating May's involvement in the posting of the derogatory sign. J.A. at 78.

Next, May threatened Sanders on the morning of the cross burning. J.A. at 132. Carrying a handgun, May walked up to Sanders, threatening, "Hey, nigger, I got something for you." J.A. at 12, 132. Pointing the handgun at Sanders while issuing the threat that he "had something for him" shows that May was attempting to intimidate his neighbor. J.A. at 132. This threat, issued the same day as the cross burning, and without provocation from Sanders, emphasizes the message that the defendants wanted to convey through the cross burning: leave our neighborhood or you will be hurt. Indeed, May's comments in the hours and days following the cross burning reinforce his message of intimidation. He justified his actions to the police by saying that they had burned the cross to "let the nigger know he wasn't welcome here." J.A. at 103, 105, 132. Then, two days later, he

informed a local newspaper that they burned the cross because "We wanted to let him know he wasn't wanted in our community." J.A. at 99.

May's campaign of intimidation, which began with the "No Trespassing" sign, continued with May's armed threat to Sanders, and culminated with the cross burning, cannot be considered to be without significant planning or of limited duration. Each step of the campaign was intended to heighten the fear felt by Sanders. Using derogatory words on a posted sign for all the neighbors to see was intended to show Sanders that he was not wanted in the neighborhood. Then, threatening him while armed showed Sanders that May had the tools to seriously hurt Sanders. Finally, using a burning cross – which "serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm," *Virginia v. Black*, 123 S. Ct. 1536, 1546 (2003) – was designed to inspire fear in Sanders because of the association the burning cross has with immediate violence against the target. May's actions, when taken together, can only be considered a concerted effort by himself and Carpenter to threaten and intimidate Sanders because of his race.

Even if looking at only the cross burning incident, it did not involve insignificant planning or last for a limited time. May arrived at Carpenter's house

in the morning because Carpenter claimed that Sanders had threatened him, although Carpenter never reported the incident to the police. They started drinking beers and, at some point, determined that they wanted to build a large cross, plant it facing Sanders' and Williams' home, and then light it on fire. To build the cross required planning by May and Carpenter: to design the cross, to acquire the necessary tools to construct it, and then to physically build it. The defendants further calculated, erroneously, that if they erected the cross on the edge of Carpenter's property, albeit immediately adjoining Sanders' and Williams' property, they could not be arrested for using a burning cross to intimidate their neighbors. J.A. at 132. Also, the defendants timed the lighting of the cross to have the most impact: at dusk when the nighttime sky would illuminate the burning cross best. Finally, the defendants sat in lounge chairs by the burning cross with firearms in their laps, hoping to provoke a reaction from Sanders. J.A. at 78. These actions show that May put significant planning into his cross burning and that it was not of a limited duration.

Finally, May argued that his cross burning represented a marked deviation from an otherwise law-abiding life. However, while on bond in the instant case, May tested positive for illegal drug use three times: twice for marijuana and once

for cocaine. J.A. at 61-62, 131. In each instance, although he had a duty to speak truthfully to his probation officer, he denied illegal drug use. Subsequent unlawful acts weigh against a finding that May was leading a law-abiding life. *See United States v. Jimenez*, 282 F.3d 597, 602 (8th Cir. 2002) (defendant's perjury not marked deviation from otherwise law-abiding life because defendant had previous arrest for providing false information and subsequent arrest for attempted possession of a controlled substance); *United States v. Harrell*, 207 F. Supp.2d 158, 167 (S.D.N.Y. 2002) (investigation and arrest of defendant might uncover other wrongful conduct that would negate finding of aberrant behavior). Altogether, May's conduct does not constitute aberrant behavior.

May's case also cannot be considered "extraordinary," a required finding under the Guidelines. U.S.S.G. App. C, amend. 603 ("As a threshold matter, this amendment provides that the departure is available only in an extraordinary case."); *United States v. Gonzalez*, 281 F.3d 38, 47-48 (2d Cir. 2002) (ordering district court on remand to determine whether it was an "extraordinary case" warranting departure for aberrant behavior); *Castano-Vasquez*, 266 F.3d at 234 ("[A] sentencing court is obligated to make two separate determinations: (1)

whether the defendant's case is extraordinary, and (2) whether his or her criminal conduct constituted aberrant behavior.").

"Extraordinary" means "out of the ordinary," " remarkable," "uncommon," "rare." *Black's Law Dictionary* 587 (1991). In determining whether the case is extraordinary, "the court may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense." U.S.S.G. §5K2.20, comment. (n.2).

May's case is not extraordinary. The sentencing court held that May's alleged post-traumatic stress disorder was not causally connected to the cross burning. J.A. at 79. Any other "mental or emotional condition" was induced by May through his use of alcohol. J.A. at 99 ("'We just got drunk last night and were having a little too much fun.' May said" to the local newspaper.). Also, although a former co-worker testified that he never noticed any racial animus emanating from May, even though they worked in a predominantly African-American office, J.A. at 75, this does not indicate what type of employment record May held. In addition, May did not present any evidence of prior good works.

None of the above factors weigh in favor of a finding that May is an extraordinary case.

The final two factors negate any possible finding that this case is extraordinary. First, May's motivation for committing the offense was to intimidate Sanders and Williams, because Sanders was African-American, to the point that he would move out of the neighborhood. Intimidation based on racial animus in no way suggests that May presents a "remarkable" or "uncommon" case. Finally, May made no efforts to mitigate the effects of the offense. Instead, May provoked his neighbors by first posting a derogatory sign and then by personally threatening Sanders. May also made no attempts to mitigate his crime after it was completed but rather acerbated it by first telling the police that they burned the cross to "let the nigger know he wasn't welcome here," J.A. at 132, and then by informing the newspaper that they burned the cross because "We wanted to let [Sanders] know he wasn't wanted in our community," J.A. at 99. The record is void of *any* attempt by May to mitigate the effects of his crime.

May's conduct did not constitute "aberrant behavior." Additionally, he cannot meet the threshold requirement that his is an extraordinary case. For these reasons, the district court erred when granting May a downward departure for aberrant behavior.

III. THE DISTRICT COURT CLEARLY ERRED IN FINDING THAT DEFENDANT MAY ACCEPTED RESPONSIBILITY FOR HIS ACTIONS.

A. Standard of Review

This Court reviews a district court's determination on whether to reduce a defendant's sentence for acceptance of responsibility for clear error. *United States v. Ruhe*, 191 F.3d 376, 388 (4th Cir. 1999).

B. Analysis

Under Section 3E1.1 of the Sentencing Guidelines, a defendant may receive a two-level reduction in his offense level if he *clearly* demonstrates acceptance of responsibility for his criminal conduct. May needed to prove by a preponderance of the evidence that he was entitled to the reduction. *United States v. Harris*, 882 F.2d 902, 907 (4th Cir. 1989).

In overruling the Probation Office and granting defendant May the reduction, the district court stated only that "He gets two points off for acceptance. He pled guilty. All the elements are there. Everything is there. He gets the two points off." J.A. at 72. His guilty plea did not automatically entitle him to the reduction. *United States v. Nale*, 101 F.3d 1000, 1005 (4th Cir. 1996); *see also* U.S.S.G. §3E1.1, comment. (n.3) ("A defendant who enters a guilty plea is not

entitled to an adjustment for acceptance of responsibility as a matter of right."). That is, a court "is not obligated to grant an unrepentant criminal a two-step reduction in return for grudgingly cooperating with authorities or merely going through the motions of contrition." *Harris*, 882 F.2d at 905-06. The judge erroneously concluded that, because May had pled guilty, he deserved the reduction for acceptance of responsibility.

Additionally, to receive the reduction, May must have accepted responsibility for all of his criminal conduct; partial acceptance is insufficient. *United States v. Underwood*, 970 F.2d 1336, 1338-39 (4th Cir. 1992); *United States v. Gordon*, 895 F.2d 932, 936 (4th Cir. 1990) (defendant "must first accept responsibility for *all* of his criminal conduct," not merely that comprising the count or counts to which he pled guilty). This Court has upheld district court denials of the acceptance of responsibility reduction when the defendants pled guilty but denied elements of their crimes or minimized their involvement in the criminal activity. *See United States v. Pauley*, 289 F.3d 254, 261 (4th Cir.), *modified*, 304 F.3d 335 (4th Cir. 2002) (no adjustment for defendant who pleaded guilty but sought to characterize his involvement as significantly less than facts revealed and denied his culpability for other relevant offense conduct), *cert.*

denied, 123 S. Ct. 1007 (2003); *Nale*, 101 F.3d at 1005 (no adjustment for defendant who pleaded guilty but downplayed his motive and minimized his criminal activity); *Gordon*, 895 F.2d at 937 (no adjustment for defendant who offered no evidence he accepted responsibility other than "his counsel's assertion that he was sincere in accepting his guilt" for one count for which he was found guilty).

When considering whether to award a reduction for acceptance of responsibility, a court may consider whether a defendant has truthfully admitted the conduct comprising the offense of conviction, *see* U.S.S.G. §3E1.1, comment. (n.3), and voluntarily terminated or withdrawn from criminal conduct, *see* U.S.S.G. §3E1.1, comment. (n.1).[13]

In this case, May's statements after entering his guilty plea firmly establish that this decrease is not warranted. The Probation Officer found that he substantially denied his role in the instant offenses and, in the Revised Presentence Report, did not recommend that the court give him an acceptance of responsibility reduction. J.A. at 133. More important, during the sentencing hearing itself, the

[13]A court also may consider the timeliness of a defendant's acceptance of responsibility. U.S.S.G. §3E1.1, comment. (n.1). May was arrested on September 15, 2000, but he did not plead guilty until January 14, 2002, just 8 days before trial. J.A. at 6.

defendant told the court that he signed a statement of "three allegations that were lies." J.A. at 80. Such statements do not support a finding that May "truthfully admitted the conduct comprising the offense of conviction." U.S.S.G. §3E1.1, comment. (n.1). Because May did not completely and voluntarily accept responsibility for his criminal conduct, the court should not have given him a two-level reduction.

May also did not "voluntarily terminate[] . . . criminal conduct." U.S.S.G. §3E1.1, comment. (n.1). He was arrested for violating the conditions of his bond by testing positive for illegal drugs on three separate occasions over a one-year period. When faced with evidence of his positive marijuana drug tests, May adamantly denied using any illegal drugs. Only later did he provide the Probation Office with admissions of his drug use. May also denied using illegal drugs after he tested positive for cocaine. In a phantasmagoric attempt to explain his positive drug test, he crafted a story involving an illicit sexual encounter with a woman who had cocaine on her tongue. This explanation was rejected by the Probation Office and serves as an additional basis to support the Probation Officer's position that he did not accept responsibility for his crimes.

May's participation in a court-ordered drug treatment program as grounds for the adjustment is counter to the spirit of Section 3E1.1, which permits adjustments based on voluntary post-offense behavior indicative of a defendant's clear acceptance of responsibility. *See* U.S.S.G. §3E1.1, comment. (n.1(g)). Moreover, May already had been given "a chance" to give up his criminal ways when – after his second positive drug test for marijuana – he was ordered into the Intensive Out Patient Drug Treatment Program. J.A. at 62.

This Court previously has held that, even if a defendant pleads guilty, admits all relevant criminal conduct, cooperates with the Probation Office, and voluntarily participates in rehabilitative measures, the defendant is not entitled to an adjustment for accepting responsibility if he engages in illegal conduct while on bond awaiting sentencing. *United States v. Kidd*, 12 F.3d 30, 34 (4th Cir. 1993) (upholding district court's refusal to grant adjustment based on acceptance of responsibility where defendant, who pled guilty, admitted relevant conduct, cooperated with Probation Office, and voluntarily participated in drug rehab, nonetheless tested positive for illegal drug use three times while on bond). If an offense level adjustment was not appropriate in *Kidd*, it is even less appropriate here, where May, despite pleading guilty, denied elements of his offense conduct,

was uncooperative with his Probation Officer, tested positive for illegal drugs on three occasions, and then lied to the Probation Office about his drug use.

Although a sentencing judge's determination of whether a defendant has accepted responsibility is generally entitled to "great deference" on review, U.S.S.G. §3E1.1, comment. (n.5), the facts of this case do not support a finding that May clearly accepted responsibility for any of his criminal conduct. The district court thus clearly erred in granting May a two-level reduction to his base offense level under Section 3E1.1.

CONCLUSION

For the foregoing reasons, the United States respectfully requests the Court to grant the United States' request for relief.

Respectfully submitted, this the 4th day of September, 2003.

R. ALEXANDER ACOSTA
Assistant Attorney General

ROBERT J. CONRAD, JR.
United States Attorney

DENNIS J. DIMSEY
ANGELA M. MILLER
Attorneys
Civil Rights Division
U.S. Department of Justice

JENNIFER MARIE HOEFLING
Assistant United States Attorney
Western District of North Carolina

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 34(a) of the Federal Rules of Appellate Procedure, the United States respectfully requests oral argument because it would aid in the disposition of this case and because of the importance of the issues presented herein.

R. ALEXANDER ACOSTA
Assistant Attorney General

ROBERT J. CONRAD, JR.
United States Attorney

DENNIS J. DIMSEY
ANGELA M. MILLER
Attorneys
Civil Rights Division
U.S. Department of Justice

JENNIFER MARIE HOEFLING
Assistant United States Attorney
Western District of North Carolina

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-4589: United States v. Robert Nelson May

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Dated: September 4, 2003

_____
Attorney for the Appellant

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I hereby certify that on this 4th day of September, 2003, the foregoing brief of the United States was duly served upon the defendant by mailing two copies to counsel for appellee at the following address:

Noell P. Tin
212 South Tryon Street
Suite 1270
Charlotte, North Carolina 28281

_____
ROBERT J. CONRAD, JR.
UNITED STATES ATTORNEY

_____
JENNIFER MARIE HOEFLING
ASSISTANT UNITED STATES ATTORNEY

U.S. Department of Justice
United States Attorney
Western District of North Carolina

Suite 1700, Carillon Building
227 West Trade Street
Charlotte, North Carolina 28202
Telephone: (704) 344-6222
Facsimile: (704) 344-6629

September 4, 2003

Ms. Patricia S. Connor, Clerk
United States Court of Appeals Fourth Circuit
1100 East Main Street, Fifth Floor
Richmond, VA 23219

Re: *USA v. Robert Nelson May*
Docket No.: 03-4589

Dear Ms. Connor:

Enclosed herewith for filing in the above case are eight copies of the brief of the Appellant, six copies of the Joint Appendix–Volume I, and four copies of the sealed Joint Appendix–Volume II (in a separate envelope marked SEALED) . By copy of this letter, Appellant's counsel is being served with two copies of the Brief and one copy of the Joint Appendix and sealed Joint Appendix at the below address.

Sincerely,

ROBERT J. CONRAD, JR.
UNITED STATES ATTORNEY

JENNIFER MARIE HOEFLING
ASSISTANT UNITED STATES ATTORNEY

Enclosure
cc: Noell P. Tin
212 South Tryon Street
Suite 1270
Charlotte, North Carolina 28281