

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION**

THE UNITED STATES OF AMERICA

v.

WILMER OFILIO CASTRO

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Criminal No. AW-00-0323

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DEFENDANT’S SENTENCING MEMORANDUM

Defendant herein, Wilmer Ofilio Castro, through his attorneys, James Wyda, Federal Public Defender for the District of Maryland, and Michael T. CitaraManis, Assistant Federal Public Defender, hereby submits for this Court’s consideration the following Memorandum in aid of sentencing. This Memorandum explains why this Court should depart below the applicable Sentencing Guideline range on the ground that Mr. Castro’s offense amounted to “aberrant behavior.”

I. INTRODUCTION.

A. History of Case.

Wilmer Ofilio Castro was originally charged in a single-count indictment with attempted arson of a building owned by the United States, in violation of 18 U.S.C. §844(f). The building in question was “Building 522,” an abandoned residence located at the Agricultural Research Center (“ARC”) in Beltsville, Maryland. See **Exhibit A**, overhead view of area with Building 522 indicated.¹

¹ Ironically, this building is due to be demolished.

On October 24, 2000, Mr. Castro pleaded guilty to a one-count information charging him with the same offense but under a different statute, 18 U.S.C. §81, which applies to arson offenses within the special maritime and territorial jurisdiction of the United States.

B. Facts of Offense.

The prosecution of Mr. Castro was brought after he and his sister were found on the property of the ARC by NASA security officers at about midnight on June 17, 2000. At that time, Mr. Castro and his sister were detained and questioned and a search of Mr. Castro's car was conducted. In the trunk of the car was found a partially filled gas can. Found in the passenger compartment of the car was a package of match boxes and a pair of rubber gloves.

During questioning of Mr. Castro and his sister at the scene by ARC and NASA security officers, statements were made by Mr. Castro and his sister which led officers to further investigate the scene. A trail of gasoline was detected up the walkway to the building toward the front porch. In addition, the cap to the gasoline can was found on the front porch; and near a puddle of gasoline at the end of the walkway near where Mr. Castro's car was parked was found the spout to the gasoline can. See **Exhibit B**, two photographs taken at scene, showing Building 522, the walkway, and Mr. Castro's car (in forefront).

United States Park Police officers also responded to the scene and took over the investigation. They formally arrested Mr. Castro and his sister. While in custody, Mr. Castro admitted to trying to burn the abandoned residence.

C. Issue Presented.

The sole issue in dispute in this case which this Court must resolve is whether Mr. Castro's offense amounted to "aberrant behavior," and therefore, whether this Court should depart below the Sentencing Guideline range.²

II. WHAT IS "ABERRANT BEHAVIOR"?

ab-er-rant /a-`ber-ent/adj [L *aberrant-*, *aberrans*, prp. of *aberarre* to go astray, fr. *ab-* + *errare* to wander, err] **1:** straying from the right or normal way **2:** deviating from the usual: ATYPICAL (Webster's Dictionary)

A departure is permitted for "single acts of aberrant behavior," which "suggests `a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning because an act which occurs suddenly and is not the result of a continued reflective process is one for which the defendant may be arguably less accountable.'" *United States v. Glick*, 946 F.3d 335 , 338 (4th Cir. 1991), quoting from *United States v. Carey*, 895 F.2d 318, 325 (7th Cir. 1990).

"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.
(§5K2.20 Aberrant Behavior (Policy Statement), Application Note 1, Federal Sentencing Guidelines Manual [amended November 1, 2000].)

Before discussing the facts of this case in more detail, an understanding of what constitutes "aberrant behavior" is first necessary. Underlying the three definitions noted above is the

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The presentence report prepared by the United States Probation Office reflects a sentencing guideline range of 24-30 months. This is consistent with the stipulations in the plea agreement in this case. Pursuant to the plea agreement, the defense is limited to asking for a downward departure of two (2) levels for aberrant behavior.

element of “deviation.” However, in the context of whether a departure is warranted, this does not mean deviation from the conduct of the typical person or offender. It means deviation from the defendant’s own normal law-abiding conduct.

At the time of Mr. Castro’s offense, the applicable definition of “aberrant behavior” was that adopted by the Fourth Circuit Court of Appeals in *Glick*, noted above. Authority to depart, at that time, was derived from language in the Federal Sentencing Guideline Manual, at Ch. 1, Pt. A, 4(d), p.s. (departure permitted for “single acts of aberrant behavior”). Since then, the Sentencing Commission has adopted a specific policy statement set out now at U.S.S.G. §5K2.20.

This policy statement both broadens and restricts situations where a departure for aberrant behavior will apply. It is broader than the definition in *Glick* since it is not limited to cases where there is “spontaneous and seemingly thoughtless act.” However, it is more restrictive than the definition in *Glick* since a departure for aberrant behavior under §5K2.20 is not approved in particular categories of cases.³

Under either *Glick* or new §5K2.20, however, the defense submits that Mr. Castro’s offense conduct constitutes “aberrant behavior,” and thus warrants the downward departure. Application of either standard to the facts of this case are discussed below. Before doing so, it is important to stress two principles:

1. **First, once “aberrant behavior” is shown, no other showing that the case is “extraordinary” or “outside the heartland” is necessary.** This is because the Sentencing Commission, as reflected in Ch. 1, Pt. A, 4(d) and newly created §5K2.20, has already

³ Undersigned defense counsel submits that Mr. Castro does not fall within any of these excluded categories, as set out in §5K2.20.

determined that offenses constituting “aberrant behavior” are “extraordinary” or “outside the heartland.”

As outlined by the U.S. Supreme Court in *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035 (1996), if a factor is an “encouraged factor” (pursuant to the guidelines, policy statements or commentary), a departure is authorized so long as the applicable guideline does not already take the factor into account. *Koon*, 518 U.S. at 95-96, 116 S.Ct. at 2045. *Also see United States v. Hairston*, 96 F.3d 102, 105-06 (4th Cir. 1996); *United States v. Rybicki*, 96 F.3d 754, 757-58 (4th Cir. 1996). A determination of whether a factor takes a case “outside the heartland” or is present to an “exceptional” degree is called for only when the factor is unmentioned in the guidelines or where it is discouraged or encouraged but already taken into account by the applicable guideline. *Koon*, 518 U.S. at 96, 116 S.Ct. at 2045.

Here, by virtue of Ch. 1, Pt. A, 4(d) and newly created §5K2.20, “aberrant behavior” is an “encouraged” factor justifying departures. Further, the arson guideline does not already take “aberrant behavior” into account. Therefore, if “aberrant behavior” is shown, a downward departure is warranted.

2. **In determining if Mr. Castro’s offense constituted “aberrant behavior,” the Court is to apply a “preponderance of the evidence” standard.** This standard has been universally accepted in determining the existence of factors under the Sentencing Guidelines. *See United States v. Urrejo-Linares*, 879 F.2d 1234, 1238 (4th Cir. 1989). In applying this standard, the Court should ask as to each factual element, “Is it more likely true than not true?”

A. Pursuant to *Glick*, Mr. Castro's Offense was "Spontaneous and Seemingly Thoughtless."

Mr. Castro's crime clearly was a "single act" of aberrant behavior. The defense submits it also was "spontaneous and seemingly thoughtless." *Glick*, 946 F.2d at 338.

In particular, there was no planning and little thought put into the crime. Mr. Castro's decision to commit the crime was made on the spur of the moment after he and his sister left his job site where he worked as a janitor late at night. Further, the building that was picked was not previously known to him. The only real thought put into picking Building 522 was that it appeared abandoned and out of the way.

Also, materials used in the crime were already in Mr. Castro's possession when the decision was made to commit the crime. The gasoline can was already in the car and the rubber gloves were something Mr. Castro typically had in the car since he used them in connection with his job.

Mr. Castro's crime was also very limited in duration since it consisted of a single act occurring over a matter of minutes.

Finally, Mr. Castro's crime was "seemingly thoughtless," even to Mr. Castro, who has difficulty explaining why it occurred.

The facts of this case stand in stark contrast to the facts in *Glick*, where the defendant was convicted of interstate transportation of stolen property. Over a ten week period, Glick sent five letters containing confidential information to Arbitron's principal competitor, A.C. Nielson Company ("Nielson"). He also offered to become a consultant and devised a code to communicate with Nielson through a trade publication.

In reversing the district court's downward departure for aberrant behavior, the Fourth Circuit found that Glick's conduct could not constitute a single act of aberrant behavior because of "the extensive planning, number of actions involved, and length of time over which Glick planned and perpetrated his offense, . . ." *Id.*

Here, there was no planning, only one act, and a very brief period of time over which Mr. Castro's offense occurred. Therefore, under *Glick*, a downward departure for aberrant behavior is warranted.

B. Under New U.S.S.G. 5K2.20, Mr. Castro's Offense Constituted Aberrant Behavior.

As state above, §5K2.20 defines aberrant behavior as "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."

As shown above, Mr. Castro's crime was a single act, occurrence or transaction. It also was of limited duration. Tthe only other remaining element under §5K2.20, is whether the offense was a "marked deviation" from Mr. Castro's otherwise law-abiding life.

Since this is the essence of the defense claim, this is discussed separately below. Included is discussion of several factors which the Sentencing Commission, in Application Note 2 to §5K2.20, has indicated a court may consider in determining whether to depart on the basis of aberrant behavior. These factors are:

. . . the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense.

III. WHY MR. CASTRO'S OFFENSE CONSTITUTES ABERRANT BEHAVIOR.

“My image of Wilmer Castro is one of a good citizen, a good son, a good friend, and a good human being. He has always then and now been a law abiding person. To me, Wilmer is incapable to comitt a crime like arson . . . This case Wilmer has is nothing like his behavior or his doing.” *Excerpt from letter of family friend, Francisca Amorete.*

“Mr. Wilmer Castro is one of my caring nephews. I’ve seen him grow up . . . always abiding to all rules.” *Excerpt from letter of Luisa Marin.*

“Wilmer is a good citizen, polite, and respectful. He is also quiet and hard working. I believe that Wilmer is incapable of doing such an offense.” *Excerpt from letter of neighbor, Miriam Wilson.*

As the excerpts from the aforementioned letters of support reflect, Mr. Castro’s offense behavior in this case is unquestionably a deviation, and significant deviation at that, from his normal behavior.

Indeed, this case represents the first time Mr. Castro has been charged with a crime. His only past transgressions of the law concern a few traffic tickets. Indeed, what happened on June 17, 2000, represents the first time Mr. Castro has engaged in any sort of arson or attempt to set fire to a structure.

For these reasons alone, Mr. Castro’s offense represents a “marked deviation” from his otherwise law-abiding behavior. An examination of the specific factors identified by the Sentencing Commission in its Commentary to §5K2.20, as set out below, further supports this conclusion.

A. Mental and Emotional Conditions/Motivation for Committing Offense.

Consideration of Mr. Castro's "mental and emotional conditions" and "motivation for committing offense" are pretty much intertwined. It is important to note, however, in connection with the "motivation," that Mr. Castro's crime was not motivated by any dispute with someone at the ARC or financial gain. As to why it happened, the best explanation is that Mr. Castro was "acting out," perhaps trying to get attention, amidst a sometimes chaotic life and feelings of frustration, betrayal, and loneliness.

The factual circumstances giving rise to this premise need not be set out in detail here. One, this would only amount to public humiliation for Mr. Castro, which would only add to his pain. Two, these circumstances are adequately set out in the presentence report ("PSR") prepared by the U.S. Probation Office ("Probation"), a report of psychological tests prepared by a psychologist retained by the defense, and other submissions from defense counsel. The PSR, which is confidential, will be supplied this Court by Probation. The psychological report and other submissions by defense counsel, including letters of support, will be separately provided this Court under seal.

B. Employment Record.

Although employment record may be more relevant to a crime where financial gain is involved, it is worth it to mention that Mr. Castro has worked or attempted to find work for much of his short adult life. He worked with his father doing janitorial work when he was in high school. (This in fact caused him to miss school, which may have affected his grades and prevented him from graduating on time with his senior high school class.) Since then, as reflected in the PSR, he has worked a variety of unskilled jobs, doing what he can to make money to help

support his family, which has always been beset by financial difficulties. Currently, Mr. Castro is unemployed, having been laid off from his most recent job.

During those periods when he has not worked, he has looked after his younger brother and sister.

C. Record of good works.

Because of Mr. Castro's youth and much of his time being taken up going to school, working and helping take care of his younger brother and sister, there has not been much opportunity to perform charitable works. However, the defense submits that school, work and helping with younger siblings themselves should be construed "good works" for purposes of §5K2.20. In addition, Mr. Castro has been involved for quite a few years with his church and its youth group.

D. Efforts to mitigate the effects of the offense.

There was a distinct effort on Mr. Castro's part to mitigate the possible effects of his offense. In particular, as noted above, the building chosen was abandoned and in a remote area. This ensured that no other building or person could be harmed. In addition, Mr. Castro attempted offense occurred late at night, also minimizing the possibility of anyone else being nearby.

Finally, although perhaps not intentional, the attempt in this case was pretty amateurish and if committed by someone intent upon causing a great deal of damage, more gasoline or more volatile substances could have been used.

IV. CONCLUSION.

For the foregoing reasons and those argued at sentencing herein, undersigned defense counsel submits that the requested downward departure of two (2) levels for “aberrant behavior” is warranted and that this Court should downward depart as requested.

Respectfully submitted,
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CERTIFICATE OF SERVICE

_____ I HEREBY CERTIFY that on this 21st day of December 2000, a copy of the foregoing Defendant's Sentencing Memorandum was delivered to Odessa P. Jackson, Assistant United States Attorney, 6500 Cherrywood Lane, Room 400, Greenbelt, Maryland 20770; and Turner Mebane, United States Probation Officer, 6500 Cherrywood Lane, Room 100, Greenbelt, Maryland 20770.

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