

No. 03-30438

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAVID ANTHONY FUSELIER,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS APPELLEE

R. ALEXANDER ACOSTA  
Assistant Attorney General

JESSICA DUNSAY SILVER  
KAREN L. STEVENS  
Attorneys  
Department of Justice  
Civil Rights Division  
Appellate Section - PHB 5504  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530  
(202) 353-8621

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## **STATEMENT REGARDING ORAL ARGUMENT**

While the United States believes the issue raised by appellant can be resolved on the briefs, we do not object to appellant's request for oral argument.

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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 had jurisdiction under 18 U.S.C. 3231. Defendant filed a timely notice of appeal on April 14, 2003. This Court has jurisdiction under 28 U.S.C. 1291. Defendant is in federal custody serving a sentence of 13 years and one month.

**STATEMENT OF THE ISSUE**

Whether the district court committed clear error in finding that Fuselier qualified for a four-level enhancement as a leader or organizer of a criminal activity under Section 3B1.1 of the Sentencing Guidelines.

## **STATEMENT OF THE CASE<sup>1</sup>**

On November 13, 2002, appellant David Anthony Fuselier and four co-defendants were indicted on three counts arising from a cross-burning at a home rented by three black men in Longville, Louisiana: conspiracy against civil rights in violation of 18 U.S.C. 241; intimidation to interfere with housing rights in violation of 42 U.S.C. 3631 and 18 U.S.C. 2; and using fire or explosives to commit a felony offense in violation of 18 U.S.C. 844(h)(1) and 18 U.S.C. 2. R.1 at 1-5.

The defendants all pleaded guilty. Fuselier, the last to enter a plea, pleaded guilty to all three counts on February 25, 2003. On April 10, the district court sentenced him to 37 months for Counts one and two and a mandatory ten years for Count three, to be served consecutively. R.1 at 142-143.

## **STATEMENT OF THE FACTS**

In September 2002, David Anthony Fuselier resided in Iowa, Louisiana and served as a “Great Titan” of the American Invisible Empire (“Invisible Empire”), a faction of the Klu Klux Klan. R. 1 at 110; R. 3 at 34. The Invisible Empire is dedicated to the basic principles of the original Ku Klux Klan, and has continued to use the Klan’s governing law, official titles, symbols, and other insignia. PSR ¶ 11. The purposes of the Invisible Empire include “to shield forever White homes

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<sup>1</sup> Citations to the Record on Appeal are denoted “R.” Citations to the Presentence Investigation Report are denoted “PSR.” Citations to Fuselier’s Brief as Appellant are denoted “Br.”

and \* \* \* to restore and preserve [the] right to SEGREGATE.” PSR ¶ 11. As Great Titan, Fuselier was responsible for the conduct of the local Klan chapters, known as “Klaverns,” in his district. PSR ¶ 12. He recruited new members, or “Knights,” and trained each Klavern’s “Exalted Cyclops,” the title of the Klavern leader. PSR ¶¶ 12, 13; R. 3 at 36; R. 5 at 15-16.

Fuselier first joined the Invisible Empire in 2000 as a member of Klavern 1500, located in Longville. PSR ¶¶ 9, 13. Before his elevation to Great Titan in February 2001, he served as Klavern 1500’s Exalted Cyclops. PSR ¶ 13. Longville is approximately 37 miles from Fuselier’s residence in Iowa.

On September 1, 2002, Fuselier and five other members of Klavern 1500 burned a cross in the yard of a house in Longville that had recently been rented by three black men. With Fuselier were Robert Dartez, who had recently left his position as “Exalted Cyclops” of Invisible Empire Unit 1500; his wife, Holly Rochelle Dartez, the Kligrapp or Klavern secretary; Christopher Hammer, a Knighthawk or security guard; and Knights Berry Harris and Sammy Trahan. R. 1 at 110-111; R. 5 at 8.

Earlier in the day, the six had gathered at the Dartez home in Longville to decide what to do about the new arrivals. The men renting the house had moved to Longville from Natchez, Mississippi after getting work nearby. PSR ¶ 8. None of them knew the three men personally, but they knew that they were black. Br. at 3.

After some discussion, the group decided to scare the men out of town by

burning a cross in their yard. That evening, using tools and materials taken from the Dartez home, they built a five-foot cross. PSR ¶ 8. They wrapped it in cloth, soaked it in gasoline, and loaded it into Harris's car. With Fuselier in the passenger seat and Robert Dartez, Trahan, and Harris in the back, Holly Dartez drove to the house. Once there, Harris and Trahan took the cross out of the trunk, drove it into the ground, and set it on fire. R. 1 at 110-111.

All three of the home's residents were there when the cross was lit. While two of the men had planned to make Longville their permanent home, all three victims moved away within three months. PSR ¶¶ 16-17, 19, 21.

In his Presentence Report, the probation office assessed Fuselier's base offense level at 17. This included a four level enhancement for acting as "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a) (2002); PSR ¶¶ 29, 35. Fuselier objected to the enhancement. R. 1 at 121. The district court overruled his objection and adopted the findings of the Presentence Report. R. 5 at 17.

### **SUMMARY OF THE ARGUMENT**

The district court correctly found that Fuselier was a leader of this cross-burning subject to a four-level enhancement under Section 3B1.1 of the Sentencing Guidelines. His protestations do not come close to establishing clear error. As a "Great Titan" of the Invisible Empire, Fuselier was the highest ranking Klan member in the group, and he was present during the planning and execution

of this attack. His co-defendants stated that he directed them in building and transporting the cross, and in their get-away. Finally, because the Sentencing Guidelines expressly state that there can be more than one leader or organizer of a criminal enterprise, even Fuselier's contention that Robert Dartez qualified as an organizer of the attack is insufficient to establish clear error.

### **STANDARD OF REVIEW**

The district court's factual findings under the sentencing guidelines are reviewed for clear error. *United States v. Cabrera*, 288 F.3d 163, 168 (5th Cir. 2002).

### **ARGUMENT**

Section 3B1.1 of the Sentencing Guidelines directs the sentencing court to increase a defendant's base offense level by four levels "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a) (2002). In making this determination, a court should consider

the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

U.S.S.G. § 3B1.1 cmt. n.4.

"The district court may find that a defendant exercised a leader/organizer role by inference from the available facts." *United States v. Cabrera*, 288 F.3d

163, 174 (5th Cir. 2002) (citing *United States v. Ayala*, 47 F.3d 688, 690 (5th Cir. 1995)). Its findings are not clearly erroneous if they are plausible in light of the record as a whole. *United States v. Lage*, 183 F.3d 374, 383 (5th Cir. 1999), cert. denied, 528 U.S. 1163 (2000). The district court's findings here are amply supported by the record. Both Fuselier's status as a regional leader of the Invisible Empire and his actions the night of the cross-burning support the finding that he was a leader of this attack.

Fuselier held a position of leadership in a hierarchical organization. PSR ¶¶ 12, 13. As Great Titan, he was the highest ranking Invisible Empire official in the group, all of whom belonged to Klavern 1500. R. 3 at 36-37; R. 5 at 15. "The Great Titan is the leader of a district and is responsible for the conduct of the Klaverns in his district." PSR ¶ 12. Fuselier also had previously served as Klavern 1500's Exalted Cyclops. It was reasonable for the district court to conclude that Fuselier's rank and authority as Great Titan carried over to this cross-burning, a hate crime synonymous with the Invisible Empire.

In addition, the other defendants stated that Fuselier decided who did what that night. It was Fuselier who told Holly Dartz to drive the car to the house and selected Samuel Trahan and Berry Harris to place the cross in the yard and set it on fire. PSR ¶ 10. Hammer told investigating agents that when he arrived at the Dartz home, Fuselier instructed him to build a cross. Trahan stated that Fuselier directed the group to the Longville residence. Holly Dartz said that Fuselier told

her where to park the car, and told her to drive back to the Dartez residence after the cross was lit. He also told her to stay within the speed limit, and instructed the group not to look at the cross as they drove away so they would not seem suspicious. PSR Addendum at 1-2.

“Presentence reports generally bear indicia of reliability sufficient to permit reliance thereon at sentencing \* \* \*.” *United States v. Gracia*, 983 F.2d 625, 629 (5th Cir. 1993). A district court may adopt the facts set forth in a Presentence Investigation Report “without further inquiry if those facts have an adequate evidentiary basis with sufficient indicia of reliability and the defendant does not present rebuttal evidence or otherwise demonstrate that the information in the PSR is unreliable.” *Cabrera*, 288 F.3d at 173-174. The facts related to the enhancement in Fuselier’s Presentence Investigation Report were based on interviews with his co-defendants and bore sufficient indicia of reliability. Moreover, Fuselier did not rebut any of those statements. R.1 at 121. He merely asserted that his co-defendants’ statements were unreliable because they were self-serving. But the district court did not agree and this Court gives “due regard to the opportunity of the district court to judge the credibility of the witnesses” when evaluating factual findings for clear error, reversing only if, “based ‘on the entire evidence’” it is “left with the definite and firm conviction that a mistake has been committed.” *Cabrera*, 288 F.3d at 168 (quoting *United States v. Cooper*, 274 F.3d 230, 238 (5th Cir. 2001)).

Fuselier's assertions are particularly unpersuasive. As a high official of the Invisible Empire who participated in the cross-burning, his claim that he was not a leader of the criminal enterprise is not credible. This was not an organization of equals, but one that has an established hierarchy of authority and Fuselier held the highest rank of anyone in the group. The district court's finding that he was a leader of the criminal enterprise was clearly supported by the evidence.

Fuselier tries to cast Robert Dartez as the leader and organizer of the attack. He contends that Dartez, fearing his daughter might eventually have to go to school with black children, brought the group together at his home. Br. at 9; R. 3 at 16. He also notes that Dartez was the only defendant to carry a weapon. But "[t]here can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy." U.S.S.G. § 3B1.1 cmt. n.4; *Cabrera*, 238 F.3d at 175, n.13 (more than one participant in a criminal activity may qualify as a leader or organizer under § 3B1.1). Accordingly, even if Robert Dartez also qualified as an organizer of this attack, that would not demonstrate clear error in light of the ample evidence that Fuselier served as a leader himself.

**CONCLUSION**

This Court should affirm the judgment of the district court.

Respectfully submitted,

R. Alexander Acosta  
Assistant Attorney General

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JESSICA DUNSAY SILVER  
KAREN L. STEVENS  
Attorneys  
Department of Justice  
Civil Rights Division  
Appellate Section – PHB 5504  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530  
(202) 353-8621

## CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2004, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE and a diskette containing the brief were served by Federal Express, next business day delivery, on the following counsel of record:

Christopher A. Aberle, Esq.  
23146 Nelita Road  
Mandeville, LA 70471

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KAREN L. STEVENS  
Attorney

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Fifth Circuit Rule 32.3, I certify that the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE contains 1,900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief was prepared using WordPerfect 9.0 in proportionally spaced Times New Roman typeface in 14-point font.

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KAREN L. STEVENS  
Attorney

Date: January 20, 2004