

No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

DUSTIN LARMON McDONALD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

INDEX TO APPENDICES

Appendix A Judgment and Opinion of Fifth Circuit

Appendix B Order of the Fifth Circuit, Denying Petition for Rehearing

Appendix C Judgment and Sentence of the United States District Court for the
Northern District of Texas

Appendix D Order of the district court revoking supervised release

APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-11463
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

July 18, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DUSTIN LARMON MCDONALD,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:13-CR-94-1

Before JOLLY, COSTA, and HO, Circuit Judges.

PER CURIAM:*

Dustin Larmon McDonald challenges the 18-month prison sentence imposed upon revocation of his supervised release. For the first time on appeal, he argues that the district court procedurally erred by failing to provide an adequate explanation for its sentencing decision. In particular, he asserts as follows: the district court failed to address his arguments in mitigation; its perfunctory statement regarding deterrence and protection of the public did

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

not illuminate its reasons for imposing a sentence above the recommended range; the court did not explain how these factors related to his case; the error was plain; it affected his substantial rights; and this court should exercise its discretion to correct the error.

Because McDonald did not preserve his claim of procedural error for appeal by first raising it in the district court, plain error review applies. *See United States v. Warren*, 720 F.3d 321, 326 (5th Cir. 2013). Although McDonald argues that an objection was unnecessary to preserve his claim, he correctly concedes that this argument is foreclosed under circuit precedent, and he raises it solely to preserve it for further review. *See id.* at 326-27; *United States v. Whitelaw*, 580 F.3d 256, 261-62 (5th Cir. 2009).

McDonald has not shown clear or obvious error. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). Before pronouncing its sentencing decision, the district court heard defense counsel's arguments in mitigation, particularly facts concerning McDonald's educational and employment accomplishments after his release from prison and his struggles with addiction. Additionally, the district court, the same court that presided over McDonald's original sentencing, addressed the need for the sentence to provide adequate deterrence and protect the public, thereby explicitly identifying those 18 U.S.C. § 3553(a)(2) factors that the court deemed relevant to its sentencing determination. Although the court's explanation was brief, we are satisfied that the stated reasons show, in the context of McDonald's case, that the court considered the arguments presented and had a reasoned basis for imposing an above-range sentence. *See Whitelaw*, 580 F.3d at 261.

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11463

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

DUSTIN LARMON MCDONALD,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

Before JOLLY, COSTA, and HO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

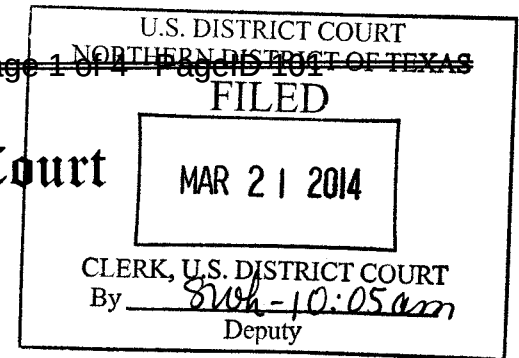


UNITED STATES CIRCUIT JUDGE

APPENDIX C

United States District Court**Northern District of Texas**

Lubbock Division



UNITED STATES OF AMERICA

v.

Case Number 5:13-CR-094-01-C

USM No. 46951-177

DUSTIN LARMON McDONALD

Defendant.

JUDGMENT IN A CRIMINAL CASE**(For Offenses Committed On or After November 1, 1987)**

The defendant, DUSTIN LARMON McDONALD, was represented by Sherylynn A. Kime-Goodwin.

The defendant pleaded guilty to count 1 of the indictment filed on 09/11/2013. Accordingly, the court has adjudicated that the defendant is guilty of the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date of Offense</u>	<u>Count Number</u>
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	Convicted Felon in Possession of a Firearm	February 2013	1

As pronounced on 03/21/2014, the defendant is sentenced as provided in pages 1 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$100.00, for count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 21st day of March, 2014.

DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

Defendant: DUSTIN LARMON McDONALD
Case Number: 5:13-CR-094-01-C

Judgment--Page 2 of 4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 27 months with this term of imprisonment to be served consecutive to any sentence imposed in Case No. 2011-431,868, 364th District Court, Lubbock County, Texas.

The defendant is remanded to the custody of the United States Marshal.

The Court recommends that the defendant be placed at FCI Bastrop, Texas.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report to the Probation Officer in a manner and frequency directed by the Court or Probation Officer.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

- ☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.
- ☒ The defendant shall not possess a firearm, destructive device or any other dangerous weapon.
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.
- ☐ the defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: DUSTIN LARMON McDONALD

Judgment--Page 4 of 4

Case Number: 5:13-CR-094-01-C

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1. The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$20.00 per month.
2. The defendant shall abstain from the use of alcohol and all other intoxicants during the term of supervision.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA)	
)	
v.)	NO. 5:13-CR-094-01-C
)	ECF
DUSTIN LARMON MCDONALD)	

ORDER

Came on for hearing the Motion to Revoke Supervised Release in the above-styled and -numbered cause. Both parties appeared and announced ready.

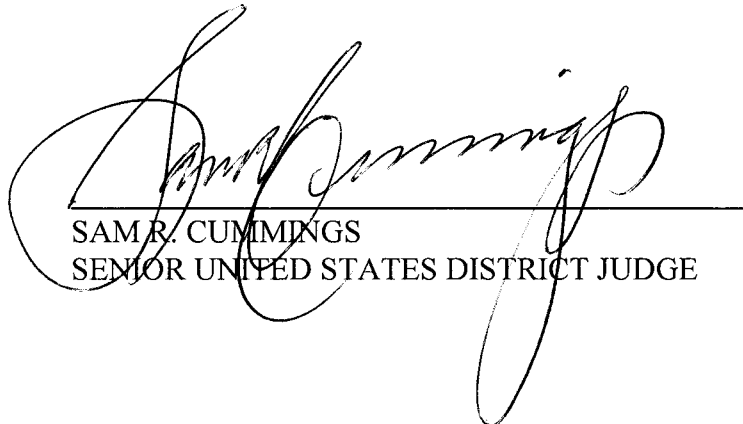
The Motion to Revoke Supervised Release was read in open court. The Defendant admitted as true the allegations contained in said motion.

The Court is of the opinion that the motion should be **GRANTED**.

The Defendant is sentenced to the custody of the United States Bureau of Prisons for a term of eighteen (18) months, with no additional term of supervised release imposed. The Court recommends that Defendant be incarcerated at FCI Big Spring, Texas. The Defendant is remanded to the custody of the United States Marshal.

SO ORDERED.

Dated November 1, 2018.



SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE