

Petition Appendix

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

No. 18-10604

United States Court of Appeals
Fifth Circuit

FILED

August 9, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DOMINIC LINDSEY,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CR-512-1

Before HIGGINBOTHAM, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Dominic Lindsey pled guilty to being a felon in possession of a firearm and possessing with intent to distribute a controlled substance. He appeals the district court's decision to run his 78-month, within-guidelines sentence consecutively to anticipated sentences on numerous pending state charges.

Lindsey's unpreserved arguments challenging the consecutiveness of his sentence under U.S.S.G. § 5G1.3 raise fact questions pertaining to whether the conduct underlying his three previous arrests was sufficiently connected or

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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related to the underlying offense so as to qualify it as relevant conduct under U.S.S.G. § 1B1.3. “Questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error.” *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991).

Lindsey argues that other precedents undermine the *Lopez* holding regarding the impossibility of plain error as to fact questions. *See United States v. Olano*, 507 U.S. 725, 732-34 (1993); *United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc). Those decisions addressed only legal error and do not effectively overrule *Lopez*.

A significant indication of the acceptance of this standard is that, according to the Government’s brief in this appeal, this Circuit has applied *Lopez* over 100 times to resolve factual disputes. Without repeating the research, we have no reason to doubt the approximation. Further, our court has done more than just ritualistically repeat the standard. On occasion, panel members have engaged with its reasonableness. At some length, one judge explained why “plain error review should not be applied to . . . [a] purely factual determination,” while another judge in the same case took the opposite position. *See United States v. Claiborne*, 676 F.3d 434, 438-40 (5th Cir. 2012) (Jones, C.J., concurring); *id.* at 440-44 (Prado, J., concurring). Of fundamental importance, a panel has no authority to overturn this court’s precedent. *See United States v. Walker*, 302 F.3d 322, 324-25 (5th Cir. 2002).

Finally, this case is a poor vehicle for suggesting our well-settled rule creates unfairness. Which if any among Lindsey’s prior offenses were relevant conduct could easily have been addressed by the district court if an objection had been made. At most, what is missing from the record is an explanation. An objection should have been employed to prompt one.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA

v.

DOMINIC LINDSEY
Defendant.

§ **JUDGMENT IN A CRIMINAL CASE**
§
§
§ Case Number: **3:17-CR-00512-M(1)**
§ USM Number: **56408-177**
§ **Leandro Delgado**
§ Defendant's Attorney

THE DEFENDANT:

<input type="checkbox"/>	pleaded guilty to count(s)	
<input checked="" type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	Counts 1 and 2 of the Indictment, filed on October 11, 2017
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

<u>Title & Section / Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 USC §§ 922(g)(1) and 924(a)(2) Felon in Possession of a Firearm	07/18/2017	1
21 USC § 841(a)(1) and (b)(1)(D) Possession with Intent to Distribute a Controlled Substance	07/18/2017	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on count(s)
 Count(s) is are dismissed on the motion of the United States

It is ordered that the defendant must 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 must notify the court and United States attorney of material changes in economic circumstances.

May 11, 2018

Date of Imposition of Judgment

Signature of Judge

BARBARA M. G. LYNN
CHIEF UNITED STATES DISTRICT JUDGE

Name and Title of Judge

May 14, 2018

Date

DEFENDANT: DOMINIC LINDSEY
CASE NUMBER: 3:17-CR-00512-M(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Seventy-Eight (78) months. This term consists of 78 months on count 1 and 60 months on count 2 with said terms for run concurrently for a Total Aggregate term of 78 months.

This sentence shall run concurrently with any sentences imposed in the defendant's pending charges for Unlawful Possession of a Firearm by Felon, Case Nos. F-1756574, Possession of Marijuana Less Than or Equal to 5 Pounds but Greater Than 4 Ounces, Case No. F-1756573, pending in the Criminal District Court of Dallas County 6, and Possession of a Controlled Substance PG 3 Less Than 28 Grams, Case No. MA1758375, pending in Dallas County Criminal Court 6, as these cases are related to the instant offense.

The sentence shall run consecutive to any sentences imposed in the defendant's pending charges for Possession of Marijuana Less Than 2 Ounces, Case No. MB1734211; Possession of a Controlled Substance PG 3 Less Than 28 Grams, Case No. MA1741093; Driving While Intoxicated 1st.15, Case No. MA1742154; and Violation of Protective Order, Case No. MA1642233, pending in Dallas County Criminal Court 6; as well as the defendant's pending charges for Evading Arrest/Detention With Previous Conviction, Case No. F-1756309; Assault Bodily Injury Family Violence Enhanced, Case No. F-1641203; Possession of a Marijuana Greater Than 4 Ounces but Less Than or Equal to 5 Pounds, Case No. F-1740655, pending in the Criminal District Court of Dallas County 6, in Dallas, Texas, and the defendant's pending charge for Aggravated Kidnapping, Case No. F-1475660, in the 283rd Judicial District Court in Dallas, Texas; and the defendant's pending charge for Unlawful Possession of a Firearm by Felon, Case No. 17916362, pending in the 362nd Judicial District Court of Denton County, and the defendant's pending charge for Possession of Marijuana Less Than or Equal to 4 Ounces but Greater Than 2 Ounces, Case No. CR2017-00008-D, pending in Denton County Criminal Court 4 in Denton, Texas, as these charges are unrelated to the instant offense.

The court makes the following recommendations to the Bureau of Prisons:

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

The defendant shall surrender to the United States Marshal for this district:

at a.m. p.m. on

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

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 UNITED STATES MARSHAL

DEFENDANT: DOMINIC LINDSEY
CASE NUMBER: 3:17-CR-00512-M(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **Three (3) years on each of counts 1 and 2 to run concurrently with one another.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

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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 of 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; and
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.

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SPECIAL CONDITIONS OF SUPERVISION

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. If the defendant is receiving treatment, the defendant may not use alcohol and/or all other intoxicants at any time. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$10 per month.

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$200.00	\$.00	\$.00

- The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- Restitution amount ordered pursuant to plea agreement \$
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution
 - the interest requirement for the fine restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payments of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal 20 (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of \$200.00 for Counts 1 and 2, which shall be paid immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:
The defendant shall forfeit the following property to the government: one Glock, Model 26, 9x 19-millimeter pistol, bearing Serial No. VWN903, and all ammunition recovered.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10604

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

DOMINIC LINDSEY,

Defendant - Appellant

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

ON PETITION FOR REHEARING EN BANC

(Opinion 8/9/19, 5 Cir., _____, _____ F.3d _____)

Before HIGGINBOTHAM, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:

- (✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.
- () Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court

having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

A handwritten signature in cursive script, appearing to read "Leslie H. Southard", written over a horizontal line.

UNITED STATES CIRCUIT JUDGE