No. _____

In the
Supreme Court of the United States

DIAMANTE ALFRED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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DIAMANTE ALFRED

QUESTIONS PRESENTED

1. Does a district court fail to appropriately individualize a supervision-violation sentence where the sentence imposed is based on a "promise" made by the judge, long before the supervision violation took place?

2. Must a court sua sponte recuse itself from issuing a sentence where it had predetermined the sentence long before the supervision violation on which the sentence is based took place?

PARTIES TO THE PROCEEDINGS

The parties are petitioner, Diamante Alfred, and respondent, United States of America. All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Diamante Alfred, respectfully prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals, entered in the instant proceeding on March 6, 2020, Ninth Circuit Court of Appeal № 19-10244.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit issued an unpublished Memorandum decision in this matter. App. 3a. See United States v. Alfred, 796 Fed.Appx. 626 (9th Cir. 2019)(unpublished). The district court order from which Mr. Alfred appealed is also unpublished. App. 1a. See United States v. Alfred, U.S. District Court, Eastern District of California № 1:12-cr-00160-LJO-SKO.

STATEMENT OF JURISDICTION

The date on which the Ninth Circuit Court of Appeals filed its Memorandum in the instant matter was March 6, 2020. 3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

A. Mr. Alfred's Personal History

In 1992, Mr. Alfred was born in Fresno, California. PSRs 15. His father left the family when Mr. Alfred was three years old, and his mother was unable to take care of him due to her problem with alcohol. PSRs 5.

Mr. Alfred was raised primarily by his grandparents who were "all about hard work and God." PSRs 25. Thus, Mr. Alfred became involved in the church, playing drums for a church youth group.
PSRs 25. At the age of 16, he went to live with his aunt. PSRs 25.

While in high school, Mr. Alfred met Jenae Lewis. She became his high school sweetheart and the two continued their relationship which produced a son in 2013. PSRs 25.

Mr. Alfred worked a variety of jobs. These jobs included work at Starbucks, Direct TV, and AT&T. PSRs 25.

Mr. Alfred had a history of drug use. In this regard, he reportedly used alcohol and smoked marijuana. PSRs 25.

B. The Facts Giving Rise to Mr. Alfred's Conviction

From late 2011 to April 2012, fifteen year old H.H. advertised her availability for commercial sex acts on a website, listing Mr. Alfred's phone number. H.H. indicated that she gave a portion of her earnings to Mr. Alfred. ER 167. In 2012, Mr. Alfred was approximately 20 years old. PSRs 15.

In May 2012, the United States Attorney for the Eastern District of California filed an indictment against Mr. Alfred alleging, inter alia, that he sex trafficked H.H. by force, fraud and coercion under 18 U.S.C. 1591(a). ER 171. On November 12, 2013 and pursuant to a plea agreement arising from the indictment, the district court convicted Mr. Alfred of one count under 18 U.S.C. 1591(a). ER 23, 161-162, 171-172; PSRs 17.

The Office of Probation recommended a 120-month term of imprisonment and 60 months of supervised release. PSRs 33. The government recommended 84 months of imprisonment. ER 133. Mr. Alfred asked for a prison term of 46 months. ER 134-135, 145.

Support letters for Mr. Alfred included a letter from his mother

explaining that Mr. Alfred ". . .has always been a very kind hearted young man. I took him to church when he was very young. He enjoys singing, football, and track, but most of all the drums. A God given gift." ER 158.

The district court sentenced Mr. Alfred to 60 months of imprisonment. ER 117, 124-125. In so doing, the district court ruled:

> All right. The Court grants the government's motion under 5K1.1. I note the government's motion is for 84 months. But looking at the record and looking at the age, he -- you, Mr. Alfred, are very, very young. That doesn't mean that you're going to skip by this. You're not going to skip by this. This is a serious crime. But I think that it's a little bit more than you need.
>
> And if I'm wrong, you'll be back. And if you're back, I'll be here. And if I'm here and you're back, you're going to be very sorry. Because I'll realize that the semi break I'm going to give you today was a mistake. And I'll correct it next time. Do you understand what I'm saying to you?

ER 141-142.

The court sentenced Mr. Alfred to 60 months of supervised release. ER 118, 124-125, 142. His standard conditions of supervision required the following:

- The defendant shall not commit another federal, state, or local crime;
- the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
- the defendant shall refrain from excessive use of alcohol; and,
- the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.

ER 118, 125, 132.

Mr. Alfred's special conditions of supervision required, inter alia, the following: " As directed by the probation officer, the defendant shall participate in a program of testing (i.e. breath, urine, sweat patch, etc.)

to determine if he has reverted to the use of drugs or alcohol."
ER 119, 126.

C. The First Petition to Revoke Supervision

The Bureau of Prisons released Mr. Alfred from incarceration on or before November 11, 2016, and he began his term of supervised release on that date. ER 109. While on supervised release, Mr. Alfred lived with his grandmother and worked at Cargil Meat Solutions. ER 76, 94.

On February 13, 2017, the Office of Probation filed a Petition for Warrant or Summons for Offender under Supervision, listing two charges. ER 109.The first charge alleged that Mr. Alfred had committed a new crime, i.e., an incident of domestic violence, in January 2017, while intoxicated, and made verbal threats to dissuade the alleged victim from reporting the incident. . . ." ER 109. The second charge alleged that Mr. Alfred answered his probation officer untruthfully when he denied, *inter alia*, leaving his a group therapy session early. ER 110-111. The district court issued the

requested arrest warrant and detained Mr. Alfred. ER 88-89.

On February 28, 2017, the Office of Probation filed a superceding petition which included three additional charges. ER 79-81. The third charge alleged that in February 2017, Mr. Alfred drove without a license. ER 80. Charge 4 alleged that on December 24, 2016, Mr. Alfred was driving under the influence of alcohol and without a license. ER 80. Charge 5 alleged that Mr. Alfred had failed to notify his probation officer of his December 24, 2016 encounter with law enforcement. ER 80.

In response to the filing of the superceding petition, Mr. Alfred admitted charges 4 and 5, with the understanding that charges 1 through 3 would be dismissed. ER 79-2, 79-3.

The revocation guideline range was 24 to 30 months of incarceration. ER 115. Probation, the government, and Mr. Alfred each requested a 24-month prison term. ER 63, 66-67, 75.

Mr. Alfred's sentencing hearing took place on April 3, 2017. At that hearing, the district court gave Mr. Alfred the following choice:

> Depending on how sure he is about being remorseful and sure he is about being able to comply, we are going to find out right now, because I'm going to do one of two things. Either I'm going to follow the recommendation of 24 months, plus 36 months of supervised release to follow, but if I do that, I'm also going to make the promise to him: One more violation, he gets statutory maximum of five years. That's the way it's going to be.
>
> Or I will give him 30 months, plus the 24 months of supervised release, with an indication that it's going to get worse if he violates any terms or conditions, but I'm not going to be promising him the five-year statutory maximum.
>
> But you know, Mr. Litman, if I make this promise, I have this transcript, and I will make good on my promise, whether he does on his or not.
>
> * * *
>
> I'm giving him the choice. He either thinks he can do it or he doesn't. But it is a whale of a condition if he decides that he is going to slip.

ER 68-70.

The following exchange then occurred:

> THE COURT: You better be sure, because if you violate and there is a finding of a violation or

> admission, you are going to prison for five years. It is that simple. It is that direct. Do you understand what I have said?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You are sure that's what you want me to do?
>
> THE DEFENDANT: Yes, sir.

ER 68-70.

The court then committed Mr. Alfred to a 24-month term of imprisonment followed by 36 months of supervised release. ER 54-56, 72. The first three charges of the superceding petition were then dismissed. ER 54, 73.

D. The Second Petition to Revoke Supervised Release

1. The facts giving rise to the second petition

On January 20, 2019, Mr. Alfred was arrested for disorderly conduct/public intoxication. In this regard, Mr. Alfred was allegedly observed sitting in a car that did not belong to him. Police were called and

found Mr. Alfred asleep and under the influence of alcohol. ER 44, 52.

On February 19, 2019, Mr. Alfred was allegedly involved in a hit and run accident while he was under the influence of alcohol. ER 44. He was also driving without a valid license. ER 44. When police attempted to arrest Mr. Alfred, he assertedly fled, but was ultimately apprehended. ER 44, 51.

When asked to explain his behavior, Mr. Alfred stated that he had an alcohol problem, that he had "demons in his life" and that he was trying to work through "depression and frustration" but that the only way he knew how to cope with his stressors was by using alcohol which "numbs me to the point of not thinking about how bad my life is . . . . I hate my life. " ER 52.

On February 21, 2019, Mr. Alfred requested that he be admitted to the Fresno Mission's Academy which provided 12 months of inpatient alcohol treatment followed by 6 months of aftercare. ER 52-53. To accommodate that request, Mr. Alfred's probation officer filed a petition to modify the conditions of his supervision, which the district court granted on February

22, 2019. ER 51.

Mr. Alfred entered drug treatment on March 22, 2019. ER 45. He self-discharged from his residential drug treatment program without authorization on April 12, 2019. ER 44. Mr. Alfred explained, *inter alia*, that his life was being threatened by others at the facility. ER 8; PSRs 4.

2. The second petition to revoke supervised release and the plea

On April 18, 2019, the Office of Probation filed a Petition for Warrant or Summons for Offender under Supervision. ER 35, 41-42. The petition listed six charges, five of which were based on the incidents of January 20 and February 19, 2019 and one of which was based on Mr. Alfred's self-discharge from his drug treatment. ER 43. The district court granted the request for the issuance of a warrant and detained Mr. Alfred. ER 29, 32-33, 46.

At the June 10, 2019 hearing, Mr. Alfred entered admissions to charges 3 and 5, agreeing to waive his right to appeal. ER 18, 23. The

government agreed to dismiss charges 1, 2, 4 and 6, reserving the right to comment on those charges at the time of sentencing. ER 18-19. The district court accepted Mr. Alfred's admission. ER 23.

Charge 3 alleged the unauthorized/excessive use of alcohol stating,

> On or about January 20, 2019, and February 19, 2019, the defendant consumed alcohol; a violation of special condition number 6, to wit: 'The defendant shall abstain from the use of alcoholic beverages and shall not frequent those places where alcohol is the chief item of sale.'"

ER 43.

Charge 5 alleged a failure to reside and participate in an inpatient correctional treatment program, stating:

> On April 12, 2019, the defendant self-discharged from the Rescue Mission's Academy Residential Program without prior approval of the probation officer or program director/counselor; a violation of the modified special condition, to wit: "The defendant shall reside and participate in a n inpatient correctional treatment program, to wit: Fresno Rescue Mission's Academy Residential Program, to obtain assistance for drug and/or alcohol abuse, for a period of 12 months, and up to 10 additional days for substance abuse detoxification

> services if deemed necessary. In addition, the defendant shall complete the 6-month aftercare phase of said program and shall not self-discharge from said program without the prior approval of the probation officer, or the program director/counselor."

ER 44.

3. The office of probation and the parties' memoranda

In its dispositional memorandum, Probation acknowledged that Mr. Alfred was charged with a grade "C" violation as defined by USSG §7B 1. l(a)(3), and thus the district court could revoke his supervised release under USSG §7B l.3(a)(2). PSRs 5. Because Mr. Alfred qualified for a criminal history category of I at the original sentencing, the recommended custody term for Mr. Alfred's release violation was 3-9 months under U.S.S.G §7Bl.4(a). PSRs 5.

Pursuant to U.S.S.G. §7Bl.3(c)(2), Mr. Alfred's minimum term of custody could be satisfied by a custody term of as little as one day followed by supervised release with a special condition of at least 4 months of community confinement or home detention for the balance of the minimum

term. PSRs 5. Probation, however, recommended that the district court commit Mr. Alfred to the custody of the Bureau of Prisons for 3 months. PSRs 6-7. In so recommending, probation stated:

> . . . Alfred struggles with alcohol abuse and seems to lack the will power needed to overcome the temptations. . . . It has been agreed by all parties that the low end, to wit: 3 months, along with an intensive outpatient program (IOP), is appropriate and necessary to address the issues. In addition, Alfred will be subjected to electronic monitoring that includes home detention and the use of Soberlink (BI Sobrietor) to monitor his whereabouts, restrict his activities, and monitor his alcohol use."

ER 6.

In response, to Probation's memorandum, Mr. Alfred filed a memorandum requesting that the court impose a sentence of 3 months incarceration, to be followed by a term of supervised release for 33 months, with special conditions including 180 days of home detention and participation in an alcohol abuse program. ER 15-16. In so requesting, Mr. Alfred stated:

> . . . the common denominator in the current supervised release violation and his 2017 supervised release violation is Mr. Alfred's struggle with alcohol. The USPO further notes that Mr. Alfred requested help and was afforded the opportunity, but he lasted less than two months in residential treatment. Mr. Alfred has advised counsel that he needs and desires mental health treatment to bolster his alcohol abuse treatment, and the USPO has recommended out-patient mental health treatment as a special condition of supervision as well.

ER 16.

4. The sentencing hearing

Mr. Alfred's sentencing hearing took place on July 11, 2019. ER 1. The district court revoked Mr. Alfred's supervision under Charges 3 and 5 and sentenced him to 5 years of incarceration. ER 1-2, 12-13. The district court dismissed Charges 1, 2, 4 and 6. ER 1.

In sentencing Mr. Alfred, the district court relied on the statements that it made at the April 3, 2017 sentencing hearing, wherein the district court promised to give Mr. Alfred a 5-year-term of imprisonment if he violated supervised release a second time. ER 4-6. In so relying, the district

court expressed great displeasure with the fact that " . . . nobody apparently read or bothered to remember . . .the transcript of April 3 of 2017, including Probation." ER 4. The district court told the attending probation officer, who was not the officer who wrote the dispositional memorandum:

> Please convey something that's rare from this bench to Probation. I'm disappointed in this recommendation. He obviously did not bother to read the transcript. And it is his duty and obligation to do that, and I would like you, without growling at you, I would like you to pass that on.

ER 5.

The district court expressed the belief that Mr. Alfred was a danger to the community in that his drinking jeopardized the safety of the community. ER 9-11. The district court further stated that Mr. Alfred had 14 days to appeal the judgment. ER 12-13.

On July 15, 2019, the district court filed Mr. Alfred's notice of appeal challenging the July 11, 2019 judgment. ER 1.

REASONS FOR GRANTING THE WRIT

I. THE DECISION IN THIS MATTER IS CONTRARY TO DUE PROCESS, RELEVANT STATUTE, AND IT IS IN CONFLICT WITH THE DECISIONS OF SISTER CIRCUITS BECAUSE IT ALLOWS THE IMPOSITION OF A SENTENCE THAT IS NOT INDIVIDUALIZED.

At Mr. Alfred's sentencing hearing, Probation and the government recommended a 3-month sentence. PSRs 5. In response, the district court expressed its anger at the recommendations because the parties had failed to read the transcript of Mr. Alfred's sentencing hearing from an earlier revocation of supervised release. At that earlier sentencing hearing, the district court "promised" Mr. Alfred that if, following his release from incarceration, he violated his supervised release a second time, it would impose the maximum custodial sentence of 5 years. ER 68-70. True to its word, the district court ignored the recommendations of a 3-month custodial sentence and imposed the 5-year custodial sentence that it had promised

long before Mr. Alfred had committed the violations on which the sentence was based. ER 4-5, 12.

The predetermined sentence that the Ninth Circuit affirmed in this matter runs afoul of due process, relevant statute, and the decisions of sister circuits because it is in conflict with the concept of individualized sentencing which is firmly entrenched in our present jurisprudence. *Pepper v. United States*, 562 U.S. 476, 492 (2011); *Williams v. New York*, 337 U.S. 241, 247(1949).

A predetermined sentence, such as the one affirmed by the Ninth Circuit, in effect, imposes a categorical bar on the consideration of the most recent information about the defendant/supervisee. It even prevents the sentencing court from considering the facts on which the supervision violations are based. Thus, predetermined sentences are in direct conflict with 18 U.S.C. § 3661. forbidding limitation of a sentencing court's receipt of relevant information. See also, *Pepper*, 562 U.S. 491; *Wasman v. United States*, 468 U.S. 559, 563 (1984); U.S.S.G § 1B1.4.

Predetermined sentences also may contravened 18 USC § 3553(a)(2)

because events occurring after a decision to impose a predetermined sentence is made may critically inform a sentencing judge's overarching duty under § 3553(a) to "impose a sentence sufficient, but not greater than necessary," to comply with the sentencing purposes set forth in § 3553(a)(2). See *Pepper*, 562 U.S. at 491.

In addition to being in conflict with due process principles and relevant statute, the holding in the instant matter is in conflict with the decisions of sister circuits. In *United States v. Tatum*, 760 F.3d 696, 697 (7th Cir. 2014), the Seventh Circuit explained:

> The number and gravity of any violations that are committed would be germane to any rational judgment [regarding]. . . what punishment to impose for the violations. Any significant changes in the defendant's situation, such as mental deterioration, would have to be considered as well. We don't think a judge can be permitted to disable himself from considering such factors by committing himself in advance to a specified sanction for any violation . . . , committed at any time, under any circumstances. That's too much like sentence first, trial afterwards.

Tatum, 760 F.3d at 697.

The Ninth Circuit's holding in this matter is clearly in conflict with the Seventh Circuit's decision in *Tatum*. It is similarly in direct conflict with the Eighth Circuit's holding in *United States v. Keatings*, 787 F.3d 1197, 1204 (8th Cir. 2015), which noted "'We don't think a judge can be permitted to disable himself from considering such factors by committing himself in advance to a specified sanction for any violation of probation, committed at any time, under any circumstances. That's too much like sentence first, trial afterwards.'" *Id.*)

In Mr. Alfred's case, the district court explained at the very start of the sentencing hearing now on appeal that it was making good on the promise it made to him in 2017, long before Mr. Alfred committed the supervised release violations for which he was sentenced in the instant matter. ER 4-5, 68-70. Despite the predetermined nature of the sentence imposed, the Ninth Circuit affirmed it. The conflicts that the Ninth Circuit's decision has created warrant the grant of the instant petition for a writ of certiorari.

II. THE DECISION IN THIS MATTER IS CONTRARY TO DUE PROCESS AND RELEVANT STATUTE BECAUSE IT ALLOWS A PARTIAL JUDGE TO IMPOSE SENTENCE.

When the district court in the matter predetermined Mr. Alfred's sentence in 2017, it immediately rendered itself partial in meting out a future sentence to Mr. Alfred. This partiality required the district court to recuse itself from imposing sentence on Mr. Alfred in this matter. Despite this requirement, the Ninth Circuit affirmed the district court's failure to *sua sponte* recuse itself, and in so failing, the Ninth Circuit created another set of conflicts with due process principles and statute.

The Fifth Amendment[1] recognizes that the right to "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133,136 (1955). The district court's 2017 promise of a predetermined and maximum sentence coupled with its decision to carry out that promised

[1] The amendment states that, "No person shall be deprived of life, liberty, or property, without due process of law. . . ."United States Const. amend. V

sentence in 2019 demonstrated that the district court was not impartial at the time it imposed sentence and was thus in violation of Mr. Alfred's Fifth Amendment to a fair proceeding. The Ninth Circuit's affirmance of the district court's predetermined sentence is thus in conflict with provisions of the Fifth Amendment.

Under 28 U.S.C. § 455, a district court judge has a *sua sponte* duty to recuse himself in any proceeding in which his impartiality might reasonably be questioned. See *United States v. Holland,* 519 F.3d 909, 913 (9th Cir. 2008); *Matter of Yagman*, 796 F.2d 1165, 1181 (9th Cir. 1986), opinion amended on denial of reh'g sub nom. *In re Yagman*, 803 F.2d 1085 (9th Cir. 1986). See also *Weingart v. Allen & O'Hara, Inc.*, 654 F.2d 1096, 1106-1107 (5th Cir. 1981) and *In re Mason*, 916 F.2d 384, 385 (7th Cir. 1990).

Once the district court determined in 2017 that it would reflexively impose the maximum sentence in the event of a future release violation, the judge created a *sua sponte* duty to recuse himself because he immediately lost all impartiality. Despite this loss of impartiality, the Ninth Circuit

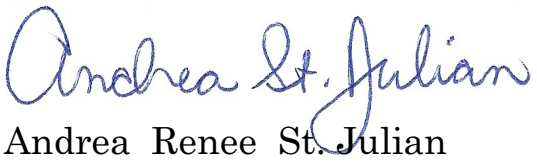
affirmed the district court's sentencing order. This affirmance created a conflict between the decision in the matter and the relevant statute. This conflict obliges the grant of the instant petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: June 3, 2020

Respectfully submitted,



Andrea Renee St. Julian
Counsel of Record for Petitioner,
DIAMANTE ALFRED

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
Eastern District of California

UNITED STATES OF AMERICA

v.

DIAMANTE ALFRED
AKA: Alfred, and Diamante Deshon

JUDGMENT IN A CRIMINAL CASE
(For **Revocation** of Probation or Supervised Release)

Criminal Number: **1:12CR00160-001**

Defendant's Attorney: John Garland, Appointed

THE DEFENDANT:

[✓] admitted guilt to violation of charges 3 and 5 as alleged in the violation petition filed on 4/18/2019 .

[ ] was found in violation of condition(s) of supervision as to charge(s) ___ after denial of guilt, as alleged in the violation petition filed on ___.

The defendant is adjudicated guilty of these violations:

Violation Number	Nature of Violation	Date Violation Ended
Charge 3	UNAUTHORIZED/EXCESSIVE USE OF ALCOHOL	January 20, 2019 and February 19, 2019
Charge 5	FAILURE TO RESIDE AND PARTICIPATE IN AN INPATIENT CORRECTIONAL TREATMENT PROGRAM	April 12, 2019

The court: [✓] revokes: [ ] modifies: [ ] continues under same conditions of supervision heretofore ordered on 4/3/2017 .

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

[✓] Charges 1, 2, 4 and 6 are dismissed. [X] APPEAL RIGHTS GIVEN.

Any previously imposed criminal monetary penalties that remain unpaid shall remain in effect.

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

7/8/2019
Date of Imposition of Sentence

/s/ Lawrence J. O'Neill
Signature of Judicial Officer

Lawrence J. O'Neill, United States District Judge
Name & Title of Judicial Officer

7/11/2019
Date

DEFENDANT: **DIAMANTE ALFRED**
CASE NUMBER: **1:12CR00160-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 60 Months.

[✓] No TSR: Defendant shall cooperate in the collection of DNA.

[ ] 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 ___ 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 ___ on ___.
- [ ] as notified by the United States Marshal.
- [ ] as notified by the Probation or Pretrial Services Officer.

If no such institution has been designated, to the United States Marshal for this district.

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

APPENDIX B

NOT FOR PUBLICATION

FILED

MAR 6 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DIAMANTE ALFRED, AKA Alfred, AKA Diamante Deshon, Defendant-Appellant.	No. 19-10244 D.C. No. 1:12-cr-00160-LJO-SKO-1 MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Submitted March 3, 2020**

Before: MURGUIA, CHRISTEN, and BADE, Circuit Judges.

Diamante Alfred appeals from the district court's judgment and challenges the 60-month sentence imposed upon his second revocation of supervised release. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Accordingly, Alfred's request for oral argument is denied.

Alfred contends that the district court improperly based the sentence on an earlier promise to impose the statutory maximum term if Alfred violated supervised release, rather than an individualized sentencing determination. He also contends that the district court's purported predetermination of his sentence required the court's recusal under 28 U.S.C. § 455 and the Due Process Clause. We review for plain error, *see United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010), and conclude that there is none. Though the district court referred during the revocation hearing to its earlier promise that a violation of supervised release would result in imposition of the statutory maximum term, the district court considered the 18 U.S.C. § 3583(e) factors and properly based the sentence on the need to protect the public, Alfred's multiple breaches of the court's trust, and a determination that Alfred was not amenable to supervision. *See United States v. Simtob*, 485 F.3d 1058, 1062 (9th Cir. 2007). Further, contrary to Alfred's contention, the district court's explanation of its decision to impose the statutory maximum sentence was adequate. *See United States v. Carty*, 520 F.3d 984, 992-93 (9th Cir. 2008) (en banc). This record does not support Alfred's argument that the court's decision to impose the 60-month sentence was based on improper bias, and the district judge did not plainly err by failing to recuse himself. *See United States v. Rangel*, 697 F.3d 795, 804 (9th Cir. 2012).

Alfred next contends that the sentence is substantively unreasonable. The

district court did not abuse its discretion. *See Gall v. United States*, 552 U.S. 38, 51 (2007). The above-Guidelines sentence is substantively reasonable in light of the § 3583(e) sentencing factors and totality of the circumstances, including Alfred's poor performance on supervision and the nature of his violations. *See Gall*, 552 U.S. at 51.

AFFIRMED.