

11-1369

To Be Argued By:
DOUGLAS P. MORABITO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-1369

UNITED STATES OF AMERICA,
Appellee,

-vs-

HAROLD GEORGE MACDANIEL,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Chatigny, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on April 4, 2011. Appendix (“A”)67-A69. On April 8, 2011, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A70. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

**Statement of Issue
Presented for Review**

Whether the three-year term of supervised release imposed by the district court on MacDaniel following his term of imprisonment was procedurally and substantively unreasonable.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-1369

UNITED STATES OF AMERICA,
Appellee,

-vs-

HAROLD GEORGE MACDANIEL,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant, Harold MacDaniel, pleaded guilty to one count of possession of ammunition by a felon and was sentenced to 57 months' imprisonment followed by three years' supervised release. Having waived his right to appeal the incarceration portion of his sentence, the defendant challenges the district court's imposition of the three-year term of supervised release as procedurally invalid by arguing, for the first time,

that the district court failed to consider statutorily required factors and did not adequately explain its reasons for its sentence. He also challenges the substantive reasonableness of the three-year term of supervised release.

MacDaniel's appeal should be dismissed. The record shows that the district court faithfully discharged its duty to consider the statutory factors for imposing a term of supervised release and more than adequately explained its sentence in light of these factors, the offense conduct, and MacDaniel's personal characteristics. Moreover, this run-of-the-mill, guideline sentence of three years' supervised release will further the district court's purpose of ensuring that, after MacDaniel's incarceration, he receives adequate substance abuse and mental health treatment.

Statement of the Case

On August 18, 2010, a federal grand jury returned an indictment charging MacDaniel with two counts of possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). A5. On December 28, 2010, MacDaniel pleaded guilty to Count One of the Indictment. A3. The plea agreement contained an appeal waiver which applied only to the incarceration term as long as it did not exceed 57 months' imprisonment. A47. On April 4, 2011, the district court sentenced the defendant to 57 months' imprisonment and three years' supervised release.

A60. The defendant filed a timely notice of appeal on April 8, 2011. A70.

**Statement of Facts and Proceedings
Relevant to this Appeal**

A. The offense conduct

On July 1 and 3, 2010, MacDaniel was observed at K-5 Arms Exchange (“K-5”), located at 962 Boston Post Road, Milford, Connecticut, purchasing ammunition and other firearms-related equipment. K-5 is a federally licensed firearms dealer, authorized to sell firearms. Three K-5 store employees spoke to the police and confirmed that, on July 1, 2010, MacDaniel had purchased two five-round boxes of Hornady 12 gauge shotgun ammunition. The employees also gave the police a re-printed sales receipt, which confirmed that MacDaniel had paid cash for the rounds. *See* PSR ¶ 6.

K-5 employees additionally advised that, on July 3, 2010, MacDaniel returned to the store and purchased a shotgun “sidesaddle” ammunition holder, a pistol grip designed for a Remington model 870 shotgun, and a firearm bluing pen. Employees also provided a reprinted sales receipt for these purchases and video surveillance video only from July 3, 2010. *See* PSR ¶ 7.

On August 4, 2010, MacDaniel was arrested at the Shoreline Motel in Milford. At that time, MacDaniel gave agents consent to search his hotel room and his Ford pickup truck. Pursuant to

that search, agents recovered one round of Hornady 12 gauge shotgun ammunition consistent with what MacDaniel purchased at K-5, a small amount of cocaine and a kit which would allow someone to deceive a urinalysis test. *See* PSR ¶ 9.

The seized ammunition was manufactured in Nebraska, and MacDaniel had been previously convicted of several felony offenses. *See* PSR ¶¶ 8, 10.

B. The guilty plea hearing

MacDaniel entered his guilty plea on December 28, 2010. The district court placed MacDaniel under oath and questioned him to determine his competence to enter a guilty plea. A9-A13. The court informed MacDaniel of the rights he was waiving by pleading guilty. A14-A15.

The court then went over the plea agreement in detail, ensuring that MacDaniel understood all of its terms. A16. Under the agreement, MacDaniel agreed to plead guilty to Count One of the Indictment. A17. The court noted that this charge carried a maximum penalty of ten years' imprisonment and three years' supervised release, and MacDaniel confirmed that he understood these maximum penalties. A19-A20. The agreement discussed in detail the Sentencing Guidelines and set forth a guideline stipulation, under which the parties agreed to a total offense level of 17, a Criminal History Category V and a guideline range of 46-57 months of imprison-

ment. A21-A22. The parties further agreed that a sentence of 57 months' imprisonment reflected the factors enumerated in 18 U.S.C. § 3553(a). A22.

At this point, the district court paused to discuss the Sentencing Guidelines with MacDaniel. A23. The court noted that the parties' recommendation was not binding; instead the court would determine the appropriate sentence based on 18 U.S.C. § 3553, which would include a consideration of the guideline range and the statutory factors enumerated in § 3553(a). A25. The court further informed MacDaniel that he would have no right to withdraw his guilty plea should he receive a sentence higher than 57 months. A25. MacDaniel understood and acknowledged these facts. A25.

The court returned to the substance of the agreement and noted that MacDaniel waived his right to appeal or collaterally attack the sentence of imprisonment, provided that it did not exceed 57 months. A26-A27. The waiver did not address any sentence of supervised release. MacDaniel understood and agreed to these terms. A26-A27.

The court then questioned MacDaniel to ensure he was entering the plea agreement voluntarily. A29-A31. The parties signed the agreement, A31-A32, and MacDaniel allocated to the facts alleged in Count One of the Indictment. A35-A36. Finally, the government informed the court of the evidence it would have presented

had the case gone to trial. A36-A37. MacDaniel agreed to the factual basis and entered a plea of guilty to Count One of the Indictment; the court accepted his plea. A38-A41.

C. The sentencing hearing

MacDaniel appeared before the district court for sentencing on April 1, 2011. The court began this proceeding by considering the Pre-sentence Report (“PSR”). A54. The parties agreed with the factual findings contained in the PSR, and, absent objection, the court adopted those factual findings. A54.

As explained below, the PSR contained a host of factors relevant to the sentence imposed by the court, including MacDaniel’s criminal record, his education, his employment history, his extensive use and abuse of controlled substances, and his mental health history. *See* PSR ¶¶ 25-38, 61-80. The PSR also calculated the guideline range. Contrary to the plea agreement, which assumed that MacDaniel would be in a Criminal History Category V, the PSR classified him as a Category IV. A55, PSR ¶ 39. Given MacDaniel’s total offense level of 17, this reduction in his Criminal History Category lowered the guideline range to 37-46 months’ incarceration. A55-A56, PSR ¶ 86.

Despite this change in the guideline range, the parties agreed to abide by the plea agreement, and both sought an incarceration term of

57 months. A56-A57. MacDaniel and his counsel explained that this upward departure from the guideline range would allow him simultaneously to resolve pending, unrelated state charges with a single sentence in federal prison so that he could take advantage of the better employment and educational opportunities available in federal prison. A56-A59. The court noted that it was unusual for a defendant to request an upward departure, but abided by the parties request and agreed to impose a term of 57 months' imprisonment. A59.

In reaching this decision, the court explained that it had to fashion a sentence that was sufficient, but not harsher than necessary to serve the purposes of a criminal sentence. A59. It stated that "under the law that applies here, I am expected to determine the applicable guideline range, and, using that as a starting point, I am expected to consider your offense conduct and the circumstances in which it occurred, your personal history and characteristics as disclosed by the presentence report and the statements of your counsel as well as you own statements in deciding what sentence is sufficient but not too harsh." A60. The court then discussed some of the factors enumerated in § 3553(a) before noting that "[MacDaniel's] interest and the interest of the community" warrant a 57 month sentence. A60. The court further observed that the programs available to MacDaniel in the Bureau of Prisons would "be of assistance to [him] in moving forward" and that "under the law the court is

entitled to, indeed required to, consider a defendant's need for correctional treatment in the most effective manner." A60. The court determined that a 57 month sentence reflected the factors set forth under § 3553(a). A60.

The court then imposed a three-year period of supervised release. A61-A63. In addition to the mandatory and standard conditions of supervised release, the court imposed three special conditions that would "respond to the particular facts of your offense conduct and personal history and characteristics." A61. Specifically, the court ordered, as special conditions of supervised release, that MacDaniel participate in a substance abuse program, receive mental health treatment, and refrain from possessing a firearm, ammunition, or any other dangerous weapon. A61-A62. The court also stated that, in light of MacDaniel's history and background, he could be successful on supervised release if he worked with the Probation Office. A62. The court declined to impose a fine, but required MacDaniel to pay a special assessment of \$100. A63.

Finally, the court reviewed the appeal waiver provision of the plea agreement, which stated that MacDaniel had waived his right to appeal his term of imprisonment provided it did not exceed 57 months. A64. In advising him of his limited appeal rights, the court noted that, because it had imposed a sentence of exactly 57 months, the very sentence requested by MacDaniel, he had waived his right to appeal his sentence. A64. Neither MacDaniel nor his counsel

objected to the sentence imposed by the court at any time during the hearing. Indeed, MacDaniel asked for the very incarceration term that he received and made no request whatsoever with respect to the supervised release term.

Summary of Argument

MacDaniel argues that the district court in this case committed both procedural and substantive error in imposing the three-year term of supervised release.¹ This claim lacks merit. MacDaniel asked the district court to impose the agreed-upon 57 month incarceration term so that he could take advantage of better opportunities offered in federal prison and avoid state prison all together. In making this request, he cut short the typical sentencing procedure and focused the court instead on his reasons for wanting to serve all of his time in federal prison. He never made any specific requests as to supervised release, did not challenge the special conditions imposed, and he never asked for a fuller explanation of the court's supervised release determination. As a result, his claim on appeal must be reviewed for plain error.

¹ MacDaniel has waived his right to appeal the term of imprisonment and does not dispute the enforceability of this waiver. *See* Def.'s Brief at 10. This appeal is thus limited to the length of the term of supervised release following his incarceration.

MacDaniel asserts that the district court failed to consider the statutory factors or state the reasons for its sentence as to the supervised release term. But the court explained those factors in imposing the prison term and again in setting the three special conditions of supervised release. It also adopted all of the factual findings from the PSR. Thus, the court gave an adequate explanation and justification for the three-year term of supervised release, and any procedural error was not plain and did not affect MacDaniel's substantial rights.

MacDaniel's substantive reasonableness claim likewise fails. The facts set forth in the PSR reflect a serious offense, a lengthy criminal history, an extensive substance abuse problem, and significant mental health issues. These facts, which the district court adopted, were more than sufficient to support the district court's conclusion that a guideline sentence of three years' supervised release was appropriate.

Argument

I. The district court did not commit plain error in sentencing MacDaniel to three years of supervised release.

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the “Statement of Facts” above.

B. Governing law and standard of review

1. Reviewing a sentence for reasonableness

Under 18 U.S.C. § 3553(a), in determining an incarceration term, a sentencing court should consider: (1) “the nature and circumstances of the offense and history and characteristics of the defendant”; (2) the need for the sentence to serve various goals of the criminal justice system, including (a) “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” (b) to accomplish specific and general deterrence, (c) to protect the public from the defendant, and (d) “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”; (3) the kinds of sentences available; (4) the sentencing range set forth in the guidelines; (5) policy

statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. *Id.* As to the length and conditions of supervised release, the sentencing court should consider the factors specified in §§ 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7). *See* 18 U.S.C. § 3583(c).

Following *United States v. Booker*, 543 U.S. 220 (2005), appellate courts are to review sentences for reasonableness, which amounts to review for “abuse of discretion.” *Gall v. United States*, 552 U.S. 586, 591 (2007); *United States v. Cavera*, 550 F.3d 180, 187 (2008) (en banc). This reasonableness review consists of two components: procedural and substantive review. *Cavera*, 550 F.3d at 189.

Substantive review is exceedingly deferential. The Second Circuit has stated it will “set aside a district court’s substantive determination only in exceptional cases where the trial court’s decision ‘cannot be located within the range of permissible decisions.’” *Id.* (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)). This review is conducted based on the totality of the circumstances. *Cavera*, 550 F.3d at 190. Reviewing courts must look to the individual factors relied on by the sentencing court to determine whether these factors can “bear the weight assigned to [them].” *Id.* at 191. However, in making this determination, appellate courts must remain appropriately deferential to the institutional com-

petence of trial courts in matters of sentencing. *Id.* Finally, the Second Circuit neither presumes that a sentence within the Guidelines range is reasonable nor that a sentence outside this range is unreasonable, but may take the degree of variance from the Guidelines into account when assessing substantive reasonableness. *Id.* at 190. This system is intended to achieve the Supreme Court’s insistence on “individualized” sentencing, *see Gall*, 552 U.S. at 50; *Cavera*, 550 F.3d at 191, while also ensuring that sentences remain “within the range of permissible decisions,” *Cavera*, 550 F.3d at 191.

This deference is appropriate, however, only when a reviewing court determines that the sentencing court has complied with the procedural requirements of the Sentencing Reform Act. *Cavera*, 550 F.3d at 190. Sentencing courts commit procedural error if they fail to calculate the Guidelines range, erroneously calculate the Guidelines range, treat the Guidelines as mandatory, fail to consider the factors required by statute, rest their sentences on clearly erroneous findings of fact, or fail to adequately explain the sentences imposed. *Cavera*, 550 F.3d at 190. These requirements, however, should not become “formulaic or ritualized burdens.” *Cavera*, 550 F.3d at 193. The Second Circuit thus presumes that a district court has “faithfully discharged [its] duty to consider the statutory factors” in the absence of evidence in the record to the contrary. *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006). Moreover, the level of

explanation required for a sentencing court's conclusion depends on the context. A "brief statement of reasons" is sufficient where the parties have only advanced simple arguments, while a lengthier explanation may be required when the parties' arguments are more complex. *Cavera*, 550 F.3d at 193. Finally, the reasoning requirement is more pronounced the more the sentencing court departs from the Guidelines or imposes unusual requirements. *Id.* This procedural review, however, must maintain the required level of deference to sentencing courts' decisions and is only intended to ensure that "the sentence resulted from the reasoned exercise of discretion." *Id.*

2. Plain error review

A defendant may – by inaction or omission – forfeit a legal claim, for example, by simply failing to lodge an objection at the appropriate time in the district court. Where a defendant has forfeited a legal claim, this Court engages in "plain error" review pursuant to Fed. R. Crim. P. 52(b). Applying this standard, "an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the

fairness, integrity or public reputation of judicial proceedings.” *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009)); see also *Johnson v. United States*, 520 U.S. 461, 467 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *United States v. Deandrade*, 600 F.3d 115, 119 (2d Cir.), *cert. denied*, 130 S. Ct. 2394 (2010).

To “affect substantial rights,” an error must have been prejudicial and affected the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993). This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, “[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” *Id.*

This Court has made clear that “plain error” review “is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings.” *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, “[t]he error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant’s failure to object.” *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (internal quotation marks omitted).

C. Discussion

In this case, the parties agreed to the PSR's factual findings and guideline calculation and asked the district court to abide by a specific agreement they had reached as to the incarceration term. Indeed, the parties asked the court to impose a jail sentence that was above the guideline range. In doing so, the parties made sentencing arguments that focused on the practical reasons for why the court should accept their joint request. For this reason, the sentencing court did not have to resolve any factual disputes and did not engage in a lengthy § 3553(a) analysis.

Against this backdrop, MacDaniel now asserts that the three-year term of supervised release imposed by the district court was both procedurally and substantively unreasonable. *See* Def.'s Brief at 11. This argument lacks merit. The district court did not commit plain error in articulating the basis for its three-year term of supervised release, which reflected both the statutory factors set forth in § 3553(a) and the undisputed facts contained in the PSR. Moreover, the court did not abuse its discretion in determining that the seriousness of the offense, as well as the defendant's lengthy criminal record and history of drug abuse and mental health problems, warranted a supervised release term at the top of the advisory guideline range.

1. The three-year term of supervised release imposed by the district court was procedurally reasonable.

Nothing in the record indicates that the district court failed to consider the statutory factors or committed procedural error in imposing the three-year term of supervised release. To the contrary, when deciding the term of imprisonment, the court explicitly referenced the requirements of § 3553(a). A59-A60. Specifically, the court noted that it had a responsibility to impose a sentence that was “sufficient but not harsher than necessary to the serve the purposes of a criminal sentence.” A59. The court then stated that “under the law that applies here, I am expected to determine the applicable guideline range, and using that as a starting point I am expected to consider your offense conduct and the circumstances in which it occurred, your personal history and characteristics as disclosed by the presentence report and the statements of your counsel as well as you own statements in deciding what sentence is sufficient but not too harsh.” A60. The court then explained, “[V]iewed in the context of your state cases and the agreement you’ve reached there and considering your interest and the interest of the community, I think that a sentence of 57 months is warranted.” A60.

Moreover, in explaining its sentence, the court also considered “the programs available” to MacDaniel through the Bureau of Prisons and noted that it was entitled to take into account

the “defendant’s need for correctional treatment in the most effective manner.” A60. This is a clear reference to 18 U.S.C. § 3553(a)(2)(D) and shows that, as to the supervised release term, the court was cognizant of the defendant’s need for treatment. In fact, in addition to the mandatory and standard conditions of supervised release, the court imposed special conditions that it believed would “respond to the particular facts of your offense conduct and personal history and characteristics.” A61. These conditions required MacDaniel to participate in a substance abuse treatment program, to receive mental health treatment, and to refrain from possessing a firearm, ammunition, or any other dangerous weapon. A61-A62. The court also stated, explicitly, that MacDaniel’s history and background showed that he could be successful on supervised release if he worked with the probation officer. A62.

MacDaniel argues that the district court failed to invoke any § 3553(a) factors when it determined the supervised release term. But the sentencing transcript reveals that the district court did consider the § 3553(a) factors in reaching its decision as to the incarceration term and, therefore, necessarily considered these same factors in reaching its decision as to the supervised release term. Indeed, the district court adopted the factual findings contained in the PSR, which included MacDaniel’s substance abuse and mental health history, and then relied on these facts

in deciding to impose specific special conditions of supervised release.

This Court “presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors.” *Fernandez*, 443 F.3d at 30. “No robotic incantations are required to prove the fact of consideration,’ and we will not assume a failure of consideration simply because a district court fails to enumerate or discuss each [statutory] factor individually.” *United States v. Verkhoglyad*, 516 F.3d 122, 131 (2d Cir. 2008) (quoting *Fernandez*, 443 F.3d at 30). While this presumption most often arises in the context of the statutory factors a district court must consider in imposing a term of imprisonment, it also applies in the context of the statutory factors that a court must consider in setting a term of supervised release. *See United States v. Sero*, 520 F.3d 187, 192 (2d Cir. 2008).

MacDaniel has pointed to nothing in the record that overcomes this presumption that the district court faithfully considered the applicable § 3553(a) factors in imposing the three-year term of supervised release. In fact, the district court’s imposition of special conditions of supervised release serves as additional evidence that it did consider the requisite factors. If a district court chooses to set any special conditions of supervised release, it is required by § 3583(d)(1) to consider the factors enumerated in §§ 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D). In other words,

the factors a court must consider in setting special conditions of supervised release are the same factors as those it must consider in setting the length of supervised release. Here, the court, absent comment or objection, ordered special conditions of supervised release and, in doing so, explained that these conditions would “respond to the particular facts of your offense conduct and personal history and characteristics.” A61.

The requirement that a district court state its reasons for imposing a particular sentence applies to the sentence as a whole, not to every individual component of the sentence. *See Sero*, 520 F.3d at 192 (rejecting defendant’s attack on supervised release term as “seemingly automatic” by presuming, in the absence of contrary evidence, that the sentencing judge faithfully considered the § 3553(a) factors). Because the district court here stated reasons for its sentence both when it imposed the term of imprisonment and when it set the special conditions of supervised release, A59-A61, it adequately articulated its basis for the supervised release term and did not commit procedural error. *See Sero*, 520 F.3d at 192. And by explicitly adopting the factual findings contained in the PSR, which included information about the defendant’s offense conduct, criminal history, educational background, substance abuse, mental health issues and employment history, the district court provided ample justification for both the length of the supervised release term and the specific conditions of supervised release.

Finally, to the extent that the district court did err, this error was not plain, did not affect MacDaniel's substantial rights and did not seriously impact the integrity of the judicial proceedings. As stated above, the district court twice referred to the required statutory factors during the sentencing hearing, both in reference to the incarceration term and in reference to the imposition of special conditions of supervised release. Thus, any error was not "plain." In addition, it is difficult to conceive how MacDaniel's substantial rights could have been impacted or how the integrity of the judicial proceedings could have been undermined given that the underlying purpose of the supervised release term, as represented by the special conditions, was to ensure that MacDaniel receive substance abuse and mental health treatment, and thereby avoid the pattern of recidivism indicated by his criminal record.

2. The three-year term of supervised release imposed by the district court was substantively reasonable.

MacDaniel asserts, without explanation, that the three-year term of supervised release was substantively unreasonable. *See* Def.'s Brief at 11. This contention fails for three reasons.

First, the factual findings contained in the PSR detail a personal history which fully supports the imposition of a supervised release term

at the top of the guideline range. More specifically, the PSR sets forth the offense conduct, including the fact that MacDaniel possessed cocaine and a device designed to deceive a drug testing kit at the time of his arrest, his lengthy criminal record, his ongoing battle with drug addiction, and his serious mental health issues. The court adopted these facts without objection, and they fully support the conclusion that a sentence at the top of the guideline range for supervised release is necessary to promote MacDaniel's rehabilitation and to help him avoid committing future crimes.

Second, MacDaniel requested an upward departure as to the incarceration portion of the sentence to permit him to resolve pending state charges with a single term of federal incarceration, allowing him to take advantage of better educational and employment opportunities. A55-A56. Both MacDaniel and his counsel below, A56-A59, affirmed that this upward departure was appropriate and, more specifically, by implication, that the statutory factors were adequate to support such a departure. If the § 3553(a) factors support an incarceration term above the guideline range, then it is reasonable to conclude that they support a supervised release term within the guideline range.

Third, the district court explicitly noted that "the particular facts of [MacDaniel's] offense conduct and personal history and characteristics" warranted the imposition of special conditions of release. A61. Two of these special condi-

tions require MacDaniel to participate in a program of substance abuse monitoring and to receive a mental health evaluation, counseling, and treatment. A61-A62. MacDaniel has not challenged these conditions and thus implicitly concedes that the facts of his “offense conduct and personal history and characteristics” are sufficient to support them. If these factors justify these special conditions of release, they are also adequate to justify a three-year term of release, a guideline sentence well “within the range of permissible decisions.” *Cavera*, 550 F.3d at 189. Moreover, given that these two special conditions are intended to provide MacDaniel with “needed . . . medical care,” 18 U.S.C. § 3553(a)(2)(D), the length of the supervised release term is integrally related to the conditions and is necessary to effectuate them, *i.e.*, to allow MacDaniel to receive adequate substance abuse and mental health treatment.

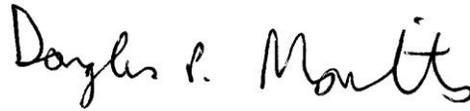
Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: December 8, 2011

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink that reads "Douglas P. Morabito". The signature is written in a cursive style with a large initial 'D' and 'M'.

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