

**United States Court of Appeals
for the Fifth Circuit**

No. 21-50201
Summary Calendar

United States of America,

Plaintiff—Appellee,

versus

Rafi Wali McCall,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:07-CR-96-1

(Filed Oct. 21, 2021)

Before JOLLY, WILLETT, and ENGELHARDT, *Circuit
Judges.*

PER CURIAM:*

Rafi Wali McCall appeals his sentence of 57 months in prison imposed upon revocation of his supervised release following his 2007 conviction of two

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

counts of distributing crack cocaine. *See* 18 U.S.C. § 3583(e). In his letter brief, McCall challenges on Sixth Amendment grounds the district court's use of conduct underlying a federal drug charge of which a jury acquitted McCall, to sentence him upon revoking his supervised release. McCall has also filed an unopposed motion for summary disposition asserting that his arguments are foreclosed by this court's prior decisions including *United States v. Partida*, 385 F.3d 546, 565-66 (5th Cir. 2004), and *Garland v. Roy*, 615 F.3d 391, 398 (5th Cir. 2010), which rely on *United States v. Watts*, 519 U.S. 148, 157 (1997). Because none of the cited cases directly address his specific argument, summary disposition is inappropriate. *See United States v. Houston*, 625 F.3d 871, 873 n.2 (5th Cir. 2010).

Nonetheless, further briefing is unnecessary. Because McCall raised his acquitted-conduct challenge for the first time on appeal, we review only for plain error. *See United States v. Toure*, 965 F.3d 393, 399 (5th Cir. 2020). In light of *Watts* and the cases following it, and in the absence of precedent specifically rejecting the application of this line of cases in the context of a supervised release revocation, McCall fails to show that the district court clearly or obviously erred in considering his acquitted conduct in arriving at the revocation sentence. *See Watts*, 519 U.S. at 157; *Toure*, 965 F.3d at 399.

The motion for summary disposition is DENIED. The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

UNITED STATES	§
OF AMERICA	§
<i>Plaintiff</i>	§ Case No.
VS	§ MO-07-CR-00096-DC
(1) RAFI WALI MCCALL	§
<i>Defendant</i>	§

ORDER REVOKING SUPERVISED RELEASE
and RESENTENCING OF DEFENDANT

(Filed Mar. 4, 2021)

On this the February 26, 2021, came on to be heard the Government's Motion for Revocation of Supervised Release granted by virtue of Judgment entered on December 4, 2007, in the above numbered and styled cause.

Defendant appeared in person and was represented by attorney of record, Matthew Kozik. The United States was represented by Assistant United States Attorney, Glenn Harwood.

After reviewing the motion and the records in this case as well as hearing testimony and arguments of counsel, the Court is of the opinion that said Defendant has violated the provisions of his Supervised Release and that the ends of justice and the best interests of the public and of the Defendant will not be subserved by continuing said Defendant on Supervised Release.

Further, the Court is of the opinion that the Motion for Revocation of Supervised Release should be, and it is hereby **GRANTED**.

IT IS THEREFORE ORDERED that the term of Supervised Release of Defendant named above granted by the Judgment entered on December 4, 2007, and it is hereby **REVOKE**D and **SET ASIDE** and the Defendant is resentenced as follows:

The Defendant, RAFI WALI MCCALL, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Fifty-Seven (57) months. No further Supervised Release shall be imposed.

The Clerk will provide the United States Marshal Service with a copy of this Order and a copy of the Judgment entered on December 4, 2007, to serve as the commitment of the Defendant.

SIGNED this 4th day of March, 2021.

/s/ David Counts
David Counts
United States District Judge

18 U.S.C. § 3583. Inclusion of a term of supervised release after imprisonment

(a) IN GENERAL.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) AUTHORIZED TERMS OF SUPERVISED RELEASE.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) FACTORS TO BE CONSIDERED IN INCLUDING A TERM OF SUPERVISED RELEASE.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the

factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

(d) CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful

use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4).¹ The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

¹ See References in Text note below.

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a

condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) MODIFICATION OF CONDITIONS OR REVOCATION.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of postrelease supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal

Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) WRITTEN STATEMENT OF CONDITIONS.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) MANDATORY REVOCATION FOR POSSESSION OF CONTROLLED SUBSTANCE OR FIREARM OR FOR REFUSAL TO COMPLY WITH DRUG TESTING.—If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

- (2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;
- (3) refuses to comply with drug testing imposed as a condition of supervised release; or
- (4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) **SUPERVISED RELEASE FOLLOWING REVOCATION.**—When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) **DELAYED REVOCATION.**—The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of

supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) **SUPERVISED RELEASE TERMS FOR TERRORISM PREDICATES.**—Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

UNITED STATES SENTENCING GUIDELINES (2018)

§7B1.1. Classification of Violations (Policy Statement)

- (a) There are three grades of probation and supervised release violations:
 - (1) GRADE A VIOLATIONS — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;
 - (2) GRADE B VIOLATIONS — conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;
 - (3) GRADE C VIOLATIONS — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision.
- (b) Where there is more than one violation of the conditions of supervision, or the violation includes conduct that constitutes more than one offense, the grade of the violation

is determined by the violation having the most serious grade.

§7B1.3. Revocation of Probation or Supervised Release (Policy Statement)

- (a) (1) Upon a finding of a Grade A or B violation, the court shall revoke probation or supervised release.
- (2) Upon a finding of a Grade C violation, the court may (A) revoke probation or supervised release; or (B) extend the term of probation or supervised release and/or modify the conditions of supervision.
- (b) In the case of a revocation of probation or supervised release, the applicable range of imprisonment is that set forth in §7B1.4 (Term of Imprisonment).
- (c) In the case of a Grade B or C violation—
 - (1) Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is at least one month but not more than six months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e) for any portion of the minimum term; and

- (2) Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is more than six months but not more than ten months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.
- (3) In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended.
- (d) Any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under §7B1.4 (Term of Imprisonment), and any such unserved period of community confinement, home detention, or intermittent confinement may be converted to an equivalent period of imprisonment.

- (e) Where the court revokes probation or supervised release and imposes a term of imprisonment, it shall increase the term of imprisonment determined under subsections (b), (c), and (d) above by the amount of time in official detention that will be credited toward service of the term of imprisonment under 18 U.S.C. § 3585(b), other than time in official detention resulting from the federal probation or supervised release violation warrant or proceeding.
- (f) Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.
- (g) (1) If probation is revoked and a term of imprisonment is imposed, the provisions of §§5D1.1–1.3 shall apply to the imposition of a term of supervised release.
(2) If supervised release is revoked, the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. 18 U.S.C. § 3583(h).

§7B1.4. Term of Imprisonment (Policy Statement)

(a) The range of imprisonment applicable upon revocation is set forth in the following table:

Grade of Violation	Revocation Table (in months of imprisonment)					
	I	II	III	IV	V	VI
Grade C	3-9	4-10	5-11	6-12	7-13	8-14
Grade B	4-10	6-12	8-14	12-18	18-24	21-27
Grade A	(1) Except as provided in subdivision (2) below:					
	12-18	15-21	18-24	24-30	30-37	33-41
	(2) Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony:					
	24-30	27-33	30-37	37-46	46-57	51-63

*The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of supervision.

(b) *Provided*, that—

- (1) Where the statutorily authorized maximum term of imprisonment that is imposed upon revocation is less than the minimum of the applicable range, the statutorily authorized maximum term shall be substituted for the applicable range; and
- (2) Where the minimum term of imprisonment required by statute, if any, is greater than the maximum of the applicable range, the minimum term of imprisonment required by statute shall be substituted for the applicable range.
- (3) In any other case, the sentence upon revocation may be imposed at any point within the applicable range, provided that the sentence—
 - (A) is not greater than the maximum term of imprisonment authorized by statute; and
 - (B) is not less than any minimum term of imprisonment required by statute.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

UNITED STATES)	Case No. 7:07-CR-096
OF AMERICA,)	COA No. 21-50201
Plaintiff,)	Midland, Texas
vs.)	
RAFI WALI McCALL,)	February 26, 2021
Defendant.)	4:07 p.m.

**TRANSCRIPT OF REVOCATION
BEFORE THE HONORABLE DAVID COUNTS
UNITED STATES DISTRICT JUDGE**

APPEARANCES:

FOR THE GOVERNMENT:

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Proceedings reported by machine shorthand reporter.
Transcript produced by computer-aided transcription.

* * *

[8] THE COURT: All right. The Court from all the evidence I have heard in the underlying cause --

Cristina, what was that cause number that we tried this week?

THE CLERK: Hang on. I'll get it.

MR. KOZIK: It's 7:20-CR-223, Your Honor.

[9] THE COURT: 223. Yeah. Okay. That sounds right. So M/O:20-CR-223. The 7 is an M/O designation so either way. It works either way. So M/O:20-CR-223, based on that evidence that I've heard and the proffer I've heard today, the Court finds both allegations to be true in spite of Mr. McCall's pleas of not true.

The most serious violation is a Grade B violation.
Ms. Irving, is that right?

(Sotto voce discussion)

THE COURT: And that's the --

MR. HARWOOD: Your Honor, the government thinks it's an A because of the violation --

THE COURT: Of the federal, state, or local crime?

MR. HARWOOD: -- the federal crime.

THE COURT: Let's look that up real quick. Y'all determine what it is.

(Sotto voce discussion)

MR. HARWOOD: Your Honor, the government's position is that he committed a federal crime. He was found not guilty, but he did -- there is evidence that he committed the federal crime. The crime plus the enhancement carried a penalty of 30 years. That should be a Grade A violation.

THE COURT: Ms. Irving, do you agree with that?

PROBATION OFFICER: Well, I was instructed that it was a B violation, but I will double-check.

[10] THE COURT: I believe it to be a Grade A, but I just want to make sure that the government is in agreement. I'm taking it from Mr. Harwood that it is.

MR. HARWOOD: The premise that probation was working off of was that that allegation wasn't on the table any longer.

THE COURT: Oh, I see.

MR. HARWOOD: The government's position is that that allegation is absolutely on the table.

THE COURT: Right. I agree. Regardless of the --

PROBATION OFFICER: That was the reason for it being reduced due to the -- him being found not guilty.

THE COURT: Found acquitted. Yeah. But, no, I agree with Mr. Harwood. Regardless of what the jury did, even if they had found him guilty or not guilty, it doesn't matter. The Court heard that evidence and obviously believes it could be true.

So I find a Grade A violation then. Now, with a Grade A violation, Criminal History Category V.

PROBATION OFFICER: Your Honor, it changes the guidelines to 46 to 57 months.

THE COURT: 46 to 57 months under the guidelines. And the statutory maximum is 60 months.

Right?

PROBATION OFFICER: Yes, Judge.

THE COURT: That remains at 60 months.

[11] We have life of supervised release available. And, Ms. Irving, let me ask you a question real quick.

(Off-the-record sidebar conference)

THE COURT: All right. With that then, Mr. Kozik and Mr. McCall -- go ahead and stand back up, Mr. McCall.

Mr. Kozik, what would you have the Court consider prior to determining what to do?

MR. KOZIK: While I understand the evidentiary standard differences between the criminal case and a probation revocation case, we would note that the findings of the Court by a jury of his peers is something that the Court should give significant weight. I say that obviously in a respectful manner.

THE COURT: Of course.

MR. KOZIK: And Mr. McCall has been already serving six months of confinement. We would obviously ask if the Court is inclined to revoke, the nominal period of probation. Mr. McCall has -- or nominal period of confinement. Mr. McCall acknowledges his potentially new lease on life in a way, and we do not believe a significant period of confinement is necessary on this matter but obviously defer to the Court on the matter, Your Honor.

THE COURT: Thank you, Mr. Kozik. And I take it in a respectful manner. I honestly do. And I think -- it's [12] incumbent that you state that. I think that's the right thing to argue.

Mr. McCall, what would you like to say, sir?

THE DEFENDANT: I'm kind of choked up a little bit.

THE COURT: Well, take your time.

THE DEFENDANT: I thought I was going home today. I talked to my daughter --

THE COURT: Well, hang on. You knew that you had this.

THE DEFENDANT: I thought -- from my understanding, it was because of this charge here. I got paperwork that I seen that y'all had it and Griffin said -- Judge Donald Griffin [sic] that these wasn't being pursued. It was taken off the page, the indictment, whatever it was. And I didn't -- I thought -- from my understanding, I was going home. I told my little girl I'm coming home today.

THE COURT: Okay. Well, that's not going to happen. So what do you want to tell me?

THE DEFENDANT: Okay.

(Attorney/defendant sotto voce discussion)

THE COURT: Anything you want to say?

MR. KOZIK: Your Honor, I think Mr. McCall is just expressing his desire to get home as soon as possible. And I do believe that the six months in confinement has already allowed him enough time to amend his ways. And nothing further [13] from defense, Your Honor.

THE COURT: Thank you.

Mr. Harwood.

MR. HARWOOD: Your Honor, yesterday's result is, by definition, justice because that's what our system is. But just like yesterday's result is justice, and it's very unsatisfactory to the government, today's result can be justice even though it may not be satisfactory to the defendant because that's what this process is.

The Court saw evidence that somebody who has two prior federal drug convictions and was on supervised release for the most recent drug conviction fled from law enforcement in a dangerous manner, tossed drugs out of the vehicle, and was ultimately found after fleeing the vehicle that he was driving in someone else's backyard with baggies and marijuana and two phones.

And, Your Honor, the defendant -- the Court, rather than the jury, can make the decision that the defendant did commit this violation by a preponderance of the evidence standard, that he did commit a federal criminal, that he did commit a state crime. The guidelines reflect the serious nature of the defendant's criminal history and the serious nature of the offense that the Court can determine that he violated.

And for those reasons, not only are the guidelines [14] appropriate, the Court would be well-founded if the Court went ahead and sentenced the defendant to the additional three months to reflect the full term available to the Court. And, quite frankly, we're going to be appealed anyway. And so the government

thinks that what happened yesterday is fair by definition and what happens today is fair by definition.

THE COURT: Thank you. I did sit and preside over the trial. I heard the evidence. Besides the cocaine that was tossed out the window -- which I believe, which wasn't on the video. You couldn't see it on the video because it's not a 3D dimensional video -- I do believe the credibility of the officer -- of Sergeant Rodgers, that he saw what he saw. Corroborating that is they went back to right where he said he saw it thrown out, and lo and behold, that's where the cocaine was.

There was also cocaine from inside the car that Mr. McCall was driving. There's also cocaine, I believe, found in his cigarette pack in the dollar bill or some currency. I don't remember if it was a dollar bill. I was concentrating on the cocaine.

And so I find by a preponderance of the evidence that the -- from that evidence that I heard, not only preponderance of the evidence, I find beyond a reasonable doubt, me personally, that Mr. McCall committed that offense. That an offense was committed, and that he committed that. The jury [15] found otherwise.

I in no way am ruling today based upon anything the jury determined. Because as I told that jury in private afterwards, juries always do the right thing. No matter what they do, no matter who agrees with them or disagrees with them, they do the right thing. So I believe justice was done in that case as well as it's done in every other case that a jury makes a decision.

I do find the evidence was very strong against Mr. McCall.

Pursuant to the Sentencing Reform Act of 1984, it is ordered that the term of supervised release in this case is revoked.

The Court has reviewed the policy statements contained in Chapter 7 of the guidelines and the sentencing factors set forth in 18 U.S.C., Section 3553(a) in determining the appropriate disposition of this matter in relation to the defendant's violations of his conditions of release.

The defendant is committed to the custody of the United States Bureau of Prisons to serve a term of imprisonment of 57 months.

The Court does find that an upward departure would be justifiable. I will not do that. I'll stay within the guidelines and sentence Mr. McCall for a number of reasons, including all those stated by Mr. Harwood.

Upon release from the -- and I will say, Mr. McCall, [16] had you been sentenced, had you been found guilty on the other case, this likely would have just merely been stacked on top of the sentencing on the other one. There is nothing to stack it on top of or run consecutively to that I'm aware of.

The defendant -- upon release from the United States Bureau of Prisons in this case, however, re-imposition of supervised release is not ordered.

I have no indication from Mr. McCall's past -- I say this respectfully -- that he would comply or even attempt to comply with conditions of supervision that the Court sets, and I have to believe that the very day that Mr. McCall steps out of prison and is released -- of course this case will be behind you, Mr. McCall; but I have no doubt that you'll be committing crimes on that very day. I don't think you'll wait even until the next day.

From what I've heard and what I've seen your collective body of work, that's what I believe will happen. And then we'll see you either back here or some other court will deal with you.

You have the right to appeal this decision, and you have to file Notice of Appeal in writing within 14 days of the entry of the judgment. If you're unable to afford the appellate costs, those services will be provided at no expense to you. And I certainly expect you to appeal this.

* * *
