

No. 21-__

IN THE
SUPREME COURT OF THE UNITED STATES

RAFI WALI MCCALL,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO
FILE A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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PARTIES TO THE PROCEEDINGS

A jury acquitted applicant Rafi Wali McCall of criminal charges of one count of possession with intent to distribute cocaine in *United States v. Rafi Wali McCall*, Criminal No. 7:20-CR-223, in the Western District of Texas, Midland Division. After receiving the jury's verdict, the district judge who presided over the trial set a hearing the next day to revoke Mr. McCall's supervised release in a separate case—*United States v. Rafi Wali McCall*, Criminal No. 7:07-CR-00096, in the Western District of Texas, Midland-Odessa Division—based on the same drug crime of which a jury had just acquitted Mr. McCall. The revocation case, in which the district court imposed 57 additional months of imprisonment on Mr. McCall in connection with a 2007 sentence for a drug conviction, is the matter before this Court.

Mr. McCall was the defendant in the district court and the appellant in the Fifth Circuit. The United States was the plaintiff in the district court and the appellee in the Fifth Circuit.

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To the Honorable Samuel Alito, Associate Justice of the United States
Supreme Court and Circuit Justice for the Fifth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.3 of the Rules of
this Court, applicant Rafi Wali McCall respectfully requests a 60-day extension of
time, to and including March 20, 2022, within which to file a petition for a writ of
certiorari to review the judgment of the United States Court of Appeals for the Fifth
Circuit in this case.

The court of appeals entered its judgment on October 21, 2021 (opinion
attached as Exhibit A). The time for filing a petition for a writ of certiorari, if not
extended, will expire on January 19, 2022. This application is being filed more than

ten days before that date. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

1. This case presents an important question regarding the constitutionality of using an alleged crime of which a criminal defendant has been acquitted by a jury as a ground to revoke that defendant's supervised release in connection with his sentence in a different case. The district court below imposed 57 additional months of imprisonment after revoking Mr. McCall's supervised release, citing the crime of which a jury had just acquitted Mr. McCall as the basis for the additional punishment. Such use of acquitted conduct to impose additional prison time violates core protections afforded by the Constitution and this Court's precedent. *See, e.g.*, U.S. CONST. art. III, § 2; *id.* amends. V, VI; *United States v. Haymond*, 139 S. Ct. 2369 (2019) (plurality); *United States v. Booker*, 543 U.S. 220 (2005); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

2. Mr. McCall began serving a term of supervised release in February 2019, after his 2007 sentence for distributing crack cocaine was reduced under the First Step Act. The district judge who revoked Mr. McCall's supervised release in connection with that 2007 sentence was the same judge who presided over the 2021 trial in which a jury acquitted Mr. McCall of one count of possession with intent to distribute a quantity of cocaine, a federal crime under 21 U.S.C. § 841. After receiving the verdict and entering a judgment of acquittal, that judge scheduled a hearing the next day to consider revocation of Mr. McCall's supervised release in connection with a sentence for a prior drug-related conviction.

3. The probation officer who had initiated the revocation proceeding relied specifically on the federal drug charge of which Mr. McCall had just been acquitted at the revocation hearing. *See* 18 U.S.C. § 3583(d), (e)(3) (requiring as a condition of supervised release “that the defendant not commit another Federal, State, or local crime during the term of supervision” and prohibiting more than five years imprisonment for a violation that is a Class A felony and more than 3 years for a violation of a Class B felony). His worksheet, which was filed the day the jury acquitted Mr. McCall of the new drug crime, identified the most serious revocation ground as a Grade B violation of the term of supervised release requiring that Mr. McCall “[s]hall not commit another federal, state, or local crime.” ROA.1004. For that violation, the probation officer calculated additional prison time within the range of 18-24 months. *Id.*

4. At the revocation hearing, the government argued that the federal drug crime of which the jury had just acquitted Mr. McCall constitutes a Class A, not Class B, felony. ROA.991. The district court shifted the violation class accordingly, ROA.991, indicating that this change raised Mr. McCall’s punishment range from 18-24 months to 46-57 months of additional prison time. ROA.992.

5. At the hearing, Mr. McCall’s trial counsel argued that, “[w]hile 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.” ROA.993. But the district judge, who had presided over the trial that resulted in Mr. McCall’s

acquittal, pushed aside the jury's determination. "[F]rom the 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 found otherwise." ROA.996-97. The court imposed 57 months of additional imprisonment. ROA.997.

6. The Fifth Circuit affirmed. Ex. A. It rejected Mr. McCall's arguments that it was plain error under the Constitution for the district judge to impose that additional punishment based on a finding that Mr. McCall committed a federal crime of which he was just acquitted by a jury of his peers. That error was particularly plain given that the district court's finding was not based on any evidentiary offerings by the government at the revocation hearing, but on the court's reassessment of the evidence presented to the jury that acquitted Mr. McCall. *See* ROA.996-97.

7. "[J]uries in our constitutional order exercise supervisory authority over the judicial function by limiting a judge's power to punish. A judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct." *Haymond*, 139 S. Ct. at 2376 (plurality). By revoking Mr. McCall's supervised release based on a judicial finding that he committed a federal crime that the government prosecuted and that resulted in an acquittal by jury, the district court disregarded the supervisory authority over the judicial function reflected in the jury's verdict: a limitation on the court's power to use the crime of which Mr. McCall was acquitted to impose additional punishment.

8. At the time of the Founding, an acquittal by a jury was understood to reflect not only a factual determination about the evidence presented by the prosecution but also a moral judgment that the defendant should not be punished. *See generally* THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800 267-317 (1985) (discussing Founding Era English law authorities on juries). Punishing Mr. McCall under a new label like revocation of supervised release does not erase “the demands of the Fifth and Sixth Amendments,” and “[c]alling part of a criminal prosecution a ‘sentence modification’ imposed at a ‘postjudgment sentence-administration proceeding’ can fare no better.” *See Haymond*, 139 S. Ct. at 2379.

9. The 60-day extension is necessary because the University of Texas School of Law Supreme Court Clinic has now joined Mr. McCall’s Fifth Circuit counsel, Mark G. Parenti, who was appointed under the Criminal Justice Act, in representing Mr. McCall before this Court. The Clinic did not represent Mr. McCall below, and co-counsel request this additional time to work together in reviewing the record, analyzing relevant authorities, and ensuring submission of a thorough petition that fully engages the historical roots and this Court’s precedent on the critical constitutional rights that are at stake.

For the foregoing reasons, applicant requests that the time within which he may file a petition for a writ of certiorari in this matter be extended for 60 days, to and including March 20, 2022.

Respectfully submitted,

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December 22, 2021

EXHIBIT A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

October 21, 2021

Lyle W. Cayce
Clerk

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

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 counts of distributing crack cocaine. *See* 18 U.S.C. § 3583(e). In his letter brief, McCall challenges on Sixth Amendment grounds the district

* 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.

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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.