No. ______________

IN THE

Supreme Court of the United States

JARON MCCREE,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

APPENDIX

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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED
December 1, 2025

Lyle W. Cayce
Clerk

No. 23-30218

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JARON MCCREE,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:22-CR-88-1

Before JONES and GRAVES, *Circuit Judges*, and RODRIGUEZ, *District Judge.*[†]

FERNANDO RODRIGUEZ, JR., *District Judge*:

Jaron McCree pled guilty to knowingly possessing a firearm after being convicted of a felony offense, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The district court sentenced him to 70 months incarceration followed by three years of supervised release.

[†] United States District Judge for the Southern District of Texas, sitting by designation.

On appeal, McCree advances facial and as applied constitutional challenges to his conviction under § 922(g)(1). And he argues that the district court erred by applying a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B), based on a finding that McCree possessed the firearm in connection with another felony offense.

This court concludes that the governing law precludes McCree's constitutional challenges, and that the district court did not commit clear error by applying the enhancement under § 2K2.1(b)(6)(B).

I.

In February 2022, detectives set out to arrest McCree based on an outstanding warrant. They observed McCree near a corner store, and when a detective began to approach him, McCree noticed the officer and fled, discarding a firearm into a bush as he ran. The officers apprehended McCree and then recovered the discarded firearm, a 9mm Glock model 17. In addition, when the officers conducted a search of McCree incident to the arrest, they found five rocks of crack cocaine and $94 on his person.

At the time of his arrest, McCree knew that he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year. His criminal history included five felony convictions under Louisiana law: attempted possession of a firearm by a convicted felon (LA-R.S. 14:(27)95.1); aggravated flight from an officer (LA-R.S. 14:108.1); possession of heroin (LA-R.S. 40:966(C)); possession of a firearm by a convicted felon (LA-R.S. 14:95.1); and aggravated battery (LA-R.S. 14:34).

McCree pled guilty to knowingly possessing a firearm after being convicted of a felony offense, in violation of §§ 922(g)(1) and 924(a)(2).

The Presentence Investigation Report applied a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B), based on McCree possessing

the firearm while in possession of crack cocaine. McCree objected to the enhancement on the grounds that no evidence supported its application.

After McCree filed his objection, the Probation Office submitted an Addendum contending that McCree possessed the crack cocaine with the intent to distribute it, and simultaneously possessed the firearm to protect the narcotics and the proceeds from their sale. The Addendum noted that at the time of the incident, McCree had not possessed a crack pack, heating element, pipe-pushing tool, or any other items typically associated with the mere personal use of drugs.

At the sentencing hearing, the district court heard argument on the objection, posing various questions regarding relevant facts and caselaw, in particular the case of *United States v. Jeffries*, 587 F.3d 690, 695 (5th Cir. 2009). The district court then overruled McCree's objection, making express findings and explaining the basis of those findings:

> In my opinion, the *Jeffries* case from the Fifth Circuit is the most important case to me in terms of the guidance that a sentencing judge has to consider in determining whether or not a guideline enhancement is correct or not. And, again, these guidelines are discretionary. I'm not bound to pronounce a guideline sentence.
>
> But *Jeffries* involved a single rock of crack cocaine and a gun in the same vehicle that the crack cocaine was in. This case involves five rocks of crack cocaine, a gun that was in the direct possession of Mr. McCree while he was trying to flee from police officers who he saw and he was running away from to avoid arrest for a serious offense.
>
> This wasn't a mere accident that the gun and the drugs were together on his direct person. It wasn't an accident that he fled the scene, attempted to discard the loaded firearm that was in his possession with the five rocks of crack cocaine.

> From my reading of the Fifth Circuit cases, as well as the *Jeffries* case, and even the one that's cited today by counsel, this wasn't a mere accident, it wasn't coincidental, it was all done to facilitate that gun possession, it was all done to facilitate the possession of those five rocks of crack cocaine, an activity that the guideline enhancement has made applicable.

The district court adopted the PSR, which calculated a Total Offense Level of 21 and a Criminal History Category of V, resulting in a guideline range of 70 to 87 months. The court sentenced McCree to 70 months with three years of supervised release.

Absent the challenged enhancement, McCree would have a Total Offense Level of 17, with a resulting guideline range of 46 to 57 months.

McCree timely appealed. In his opening Appellant's brief, McCree challenged the district court's application of the sentencing enhancement and, for the first time, argued that § 922(g)(1) facially violates the Second Amendment. Before the government filed its responsive brief, this court granted McCree's unopposed request to stay proceedings pending the court's decision in *United States v. Collette*, No. 22-51062, 2024 WL 4457462 (5th Cir. Oct. 10, 2024).

This court then decided *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024), which rejected facial and as-applied challenges to § 922(g)(1) under the Second Amendment. McCree requested and this court granted him leave to file a Supplemental Brief in light of *Diaz*. In his Supplemental Brief, in addition to re-urging his facial challenge to § 922(g)(1) and his challenge to the sentencing enhancement, McCree also asserted an as-applied challenge to § 922(g)(1) under the Second Amendment.

II.

This court has foreclosed facial challenges to § 922(g)(1) as unconstitutional under the Second Amendment. *See Diaz*, 116 F.4th at 471–72.

As to McCree's as-applied challenge, the Government raises the threshold questions of whether McCree waived the issue by pleading guilty, and furthermore forfeited the matter by failing to include it within his opening appellant's brief. The court rejects both contentions.

This court has discretion to consider arguments otherwise forfeited when intervening decisions have "provided an important clarification in the law" and a refusal to consider a new claim "would result in perpetuating incorrect law." *United States v. Zuniga*, 860 F.3d 276 (5th Cir. 2017). We granted leave to McCree to file a Supplemental Brief in light of *Rahimi* and *Diaz*, the latter of which included an as-applied challenge under § 922(g). Between McCree's opening Appellant's Brief and the Supplemental Brief, this court also decided *United States v. Connelly*, 117 F.4th 269 (5th Cir. 2024), which affirmed the dismissal of an indicted count under § 922(g)(3) based on an as-applied challenge under the Second Amendment. These decisions clarified the law regarding as-applied challenges to § 922(g). And as reasonable minds may disagree regarding McCree's challenge, we deem consideration of the issue appropriate. Still, we review for plain error. *See United States v. Jones*, 88 F.4th 571, 572 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 1081 (2024). And under that standard, in the context of as-applied challenges, the absence of binding authority typically defeats the defendant's argument. *Id.* at 573–74.

At the time of his arrest, McCree had state felony convictions under Louisiana law for attempted possession of a firearm by a convicted felon,

aggravated flight from an officer, possession of heroin, possession of a firearm by a convicted felon, and aggravated battery. McCree does not identify any binding authority establishing that these convictions could not form the basis for a conviction under § 922(g)(1). As a result, he has not overcome the stringent standard under plain error review. *See United States v. Cisneros*, 130 F.4th 472, 477 (5th Cir. 2025).

Moreover, this court recently affirmed a conviction under § 922(g)(1) as to a defendant whose predicate offenses included aggravated battery causing bodily injury under Florida law. *See United States v. Schnur*, 132 F.4th 863, 867–70 (5th Cir. 2025). The court applied the two-step framework that the Supreme Court has established for analyzing whether a particular firearm regulation is consistent with the Second Amendment. *Id.* at 867 (citing *New York Rifle and Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022)). "First, the Second Amendment's plain text must cover the defendant's conduct, in which case the Constitution presumptively protects that conduct." *Id.* (citing *Bruen*, 597 U.S. at 24). "Second, if the defendant's actions are covered, '[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.'" *Id.* (quoting *Bruen*, 597 U.S. at 24).

In *Schnur*, this court focused on the defendant's conviction for aggravated battery under Florida law. After conducting a review of the Nation's historical tradition of firearm regulation, the court concluded that "our caselaw suggests that there are historical analogues demonstrating our Nation's longstanding tradition of disarming persons with a violent criminal history." *Id.* at 869. The court further explained that "Schnur's felony conviction for a 'crime of violence' indicates that he poses a threat to public safety and the orderly functioning of society. The regulation of such person's ability to possess a firearm 'is consistent with this Nation's historical

tradition of firearm regulation' and punishment of people who have been convicted of violent offenses." *Id.* at 870 (internal citations omitted).

Applying the same analysis as in *Schnur*, McCree's conviction for aggravated battery under Louisiana law also serves as a constitutionally-adequate predicate for the § 922(g)(1) conviction. The crime qualifies as a "crime of violence," which includes "an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon." LA. REV. STAT. §§ 14:2(B). As in *Schnur*, McCree's conviction for aggravated battery "indicates that he poses a threat to public safety and the orderly functioning of society." *Schnur*, 132 F.4th at 870. "The regulation of such person's ability to possess a firearm is consistent with this Nation's historical tradition of firearm regulation and punishment of people who have been convicted of violent offenses." *Id.* (internal quotation marks omitted).[1]

[1] The dissent argues that *Schnur* does not control because we do not know whether McCree, when committing aggravated battery, injured any person or merely threatened to do so. But neither *Schnur* nor any other authority dictates that a predicate offense must have involved actual injury to permit the deprivation of Second Amendment rights. As this court explained in *Schnur*, the Supreme Court has confirmed "that § 922(g)(8) 'fits comfortably' within this nation's tradition of 'preventing individuals who *threaten* physical harm to others from misusing firearms.'" *Schnur*, 132 F.4th at 868 (quoting *United States v. Rahimi*, 602 U.S. 680, 690 (2024)) (emphasis added); *see also Rahimi*, 602 U.S. at 693 ("From the earliest days of the common law, firearm regulations have included provisions barring people from misusing weapons to harm *or menace* others.") (emphasis added); *Schnur*, 132 F.4th 869 ("An offense qualifies as a violent felony under [18 U.S.C. § 924(e)(2)(B)(i)] if it 'has as an element the use, attempted use, or *threatened use* of physical force against the person of another.'") (quoting *Borden v. United States*, 593 U.S. 420, 424 (2021)) (emphasis added).

For these reasons, McCree's as-applied challenge also fails.

III.

When a defendant appeals the application of a sentencing enhancement, "[t]his court reviews a district court's interpretation or application of the guidelines *de novo* and its factual findings for clear error." *United States v. Eaden*, 914 F.3d 1004, 1007 (5th Cir. 2019). "The district court's determination of the relationship between [a firearm] and another offense is most usually a factual finding[.]" *See id.* "A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole." *Jeffries*, 587 F.3d at 692 (internal citation omitted).

McCree challenges the sentencing enhancement that the district court applied under § 2K2.1(b)(6)(B), which authorizes a four-level increase if the defendant "used or possessed any firearm or ammunition in connection with another felony offense." The enhancement automatically applies "in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia [because] the presence of the firearm has the potential of facilitating" these types of offenses. U.S.S.G. § 2K2.1 cmt. n. 14(B)(ii). Otherwise, the enhancement applies only "if the firearm . . . facilitated, or had the potential of facilitating, another felony offense[.]" U.S.S.G. § 2K2.1 cmt. n. 14(A). As to McCree, the district court found that McCree's possession of a firearm facilitated his possession of crack cocaine.

McCree principally relies on *Jeffries* to argue that "the simultaneous possession of a small quantity of drugs and a gun[,]" by itself, does not amount to facilitation for purposes of the § 2K2.1 enhancement. *Jeffries*, 587 F.3d at 695. As this court has explained, "outside the context of drug trafficking, 'no presumption is made' that a firearm facilitated possession of other contraband just because the two items are in close proximity and both

are illegally possessed." *United States v. Henry*, 119 F.4th 429, 436 (5th Cir. 2024) (quoting *Jeffries*, 587 F.3d at 693).

The United States distinguishes *Jeffries* and *Henry*, arguing that the facts of this case present more than mere proximity of a gun to drugs. The United States argues that McCree's illegitimate possession of a loaded gun with an extended magazine, his flight when law enforcement approached to arrest him, his discarding of the gun as he fled, his simultaneous possession of the gun and the crack cocaine, and his statements at sentencing of how important using crack was to him, all indicate that the gun had at least the potential to embolden McCree's possession of drugs.

We recognize that the record in this case bears resemblance to the records in past decisions in which this court has found the § 2K2.1(b)(6) enhancement inapplicable. *See, e.g.*, *Henry*, 119 F.4th at 429; *Jeffries*, 587 F.3d at 690; *see also United States v. Ratcliff*, No. 24-30192, 2025 WL 618105 (5th Cir. Feb. 26, 2025) (per curiam) (unpublished); *United States v. Garza*, No. 22-20338, 2023 WL 3918993 (5th Cir. June 9, 2023) (per curiam) (unpublished); *United States v. Ledesma*, 750 F. App'x 344 (5th Cir. 2018) (unpublished); *United States v. Pimpton*, 589 F. App'x 692 (5th Cir. 2014) (per curiam) (unpublished).

Still, this court "may affirm on any ground supported by the record [] even if it was not reached by the district court." *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 481 F.3d 309, 311 (5th Cir. 2007). And for purposes of the sentencing enhancement, "another felony offense" need not be indicted conduct. U.S.S.G. § 2K2.1 cmt. n. 14(C), (E). Here, irrespective of whether McCree's possession of a firearm facilitated his possession of the crack

cocaine, the record renders amply plausible that McCree possessed the firearm in connection with his trafficking of drugs.

To engage in the federal offense of drug trafficking, an individual must knowingly possess a controlled substance with the intent to distribute it. *See United States v. Williamson*, 533 F.3d 269, 277 (5th Cir. 2008). The intent element may be proven by "mere possession of a quantity of drugs inconsistent with personal use." *Id.* (internal quotation marks and footnote omitted). McCree possessed a firearm with an extended magazine while also possessing five rocks of crack cocaine, a quantity of drugs that the district court highlighted, and that is greater than the personal-use amount at issue in *Jeffries*. McCree stood on a street corner with no paraphernalia associated with the personal use of crack cocaine, such as a crack pack, heating element, or pipe-pushing tool. And when he observed an officer approaching him, he immediately fled. Based on this record, the district court could have plausibly found that McCree intended to sell the crack cocaine, a finding that would have automatically triggered the application of § 2K2.1(b)(6).[2] *See* U.S.S.G. § 2K2.1 cmt. n. 14(B)(ii). And given that the record supports such a finding, remand is not required to permit the district court to make it. *Cf. United States v. Orozco*, 786 F. App'x 17, 19 (5th Cir. 2019) (per curiam) (unpublished).

IV.

As a result, we AFFIRM McCree's conviction and sentence.

[2] The dissent details the evidence supporting a contrary conclusion. The ultimate question, however, is not whether this court would reach the same decision as the district court, but whether the record contains evidence rendering plausible the application of the sentencing enhancement. It does, warranting affirmance.

James E. Graves, Jr., *Circuit Judge*, dissenting in part.

I agree with the majority that the issue of whether 18 U.S.C. § 922(g)(1) is facially unconstitutional under the Second Amendment is foreclosed by *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024). However, I disagree with the majority's conclusion that Jaron McCree's as-applied challenge is foreclosed. I also disagree with the majority's affirmance of the sentencing enhancement under U.S.S.G. § 2K2.1(b)(6)(B). Thus, I respectfully dissent in part.

Law enforcement officials (LEO) in New Orleans obtained a warrant to arrest Jaron McCree for aggravated assault in 2022 based on an incident that allegedly happened on "an unknown date." An unnamed woman reported that a blue SUV drove past her house a couple of times. Then later while driving on I-10 with her sister, the woman said the same SUV was behind her. The woman pulled into the other lane so the SUV could pass, and she took a picture of the tag. The woman claimed that, as the driver passed, he pointed a "black semi-automatic firearm" out the driver's side window. The PSR says that "LEO were able to identify the vehicle and locate the registered owner." But the PSR does not divulge the identity of the registered owner. Following an investigation and at some point "thereafter," McCree was driving the vehicle, so a warrant was obtained for his arrest.[1] On February 15, 2022, McCree was seen standing near a corner store on St. Louis Street.[2] LEO chased him on foot and observed him discard a "Glock model 17, 9 mm" handgun into the bushes. After he was arrested, LEO found five rocks of crack in his pants pocket.

[1] There is no indication in the record that the unknown woman identified McCree as the driver of the blue SUV.

[2] The store was approximately four blocks from McCree's residence.

McCree's predicate felony was a juvenile adjudication from May 14, 2014, for aggravated battery in violation of LA-R.S. 14:34.[3] The PSR does not include the juvenile adjudication in its list of crimes when it sets out that, "[p]rior to possessing the firearm, the defendant knew [sic] had previously been convicted of a crime punishable by imprisonment for a term exceeding one year." The Factual Basis also does not include the juvenile adjudication. But the PSR does include the juvenile adjudication in McCree's criminal history, allocating 3 points under U.S.S.G. § 4A1.1(a). The PSR also states that "[t]he circumstances of this case were unavailable."

In other words, McCree's original felony was a juvenile offense for aggravated battery for which we do not know the circumstances. As set out by the majority, McCree's very next conviction was possession of a firearm by a convicted felon, then another for attempted possession of a firearm by a convicted felon, and now another for possession of a firearm by a convicted felon stemming from an alleged incident with an unknown person on an unknown date and a blue SUV owned by someone else that he was driving at some point thereafter.[4] His other offenses have been running from the police and possessing drugs.

In the case before this court, McCree pleaded guilty to knowingly possessing a firearm after being convicted of a felony offense, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The PSR applied a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B), based on McCree possessing a firearm while in possession of crack. McCree objected to the enhancement.

[3] The "date of referral" for the offense was listed as "06/07/11" with a notation "(Age 16)."

[4] McCree was on foot the day of his arrest, and there was no mention of the blue SUV.

The district court overruled his objection, adopted the PSR, and sentenced him to 70 months with three years of supervised release. McCree appealed.

I. As-applied challenge to § 922(g)(1)

McCree asserts that § 922(g)(1) is unconstitutional as applied to him. The majority concludes that McCree's challenge fails due to his aggravated battery conviction under *United States v. Schnur*, 132 F.4th 863, 867-70 (5th Cir. 2025). I disagree that *Schnur* forecloses McCree's as-applied challenge because McCree was not convicted of "aggravated battery causing great bodily injury," and we do not know any of the facts pertaining to his conviction. In *Schnur*, this court said:

> Among Schnur's predicate felonies is his prior Florida conviction for aggravated battery causing great bodily injury. Schnur was charged with this offense after he brutally attacked the victim, kicking and punching the man while he was on the ground before stealing the man's cell phone and leaving the scene. Witnesses observed Schnur holding a taser in his hand at the time of the attack. Officers were dispatched to a local hospital emergency department where they observed that the victim's eyes were swollen shut, his eyes, nose, and mouth were bloodied, and he sustained a deep laceration above his right eye that required stitches. Schnur was eventually detained and charged with aggravated battery, in addition to possession of a weapon (taser) by a convicted felon, burglary of a dwelling structure or conveyance while armed, and petit theft. He later pled guilty to, and was sentenced for, aggravated battery with great bodily harm and a lesser included offense of improper exhibition of a firearm as part of a plea agreement. The burglary charge and petit theft charges were nolle prossed.

132 F.4th at 867-68. This court then relied on caselaw to determine that the regulation of Schnur's ability to possess a gun was consistent with historical firearm regulation of people with a violent criminal history. *Id.* at 869-70.

We know none of the circumstances of McCree's juvenile adjudication for aggravated battery, and there is no requirement of injury under La. Rev. Stat. § 14.34. Thus, there is no basis for concluding that there was great bodily injury as discussed by this court in *Schnur*. The majority cites only the Louisiana statutory definition for a "crime of violence." La. Rev. Stat. § 14:2(B). However, that definition includes even a threat and does not require any bodily injury.[5] The majority cites no authority for the proposition that we determine whether "there are historical analogues demonstrating our Nation's longstanding tradition of disarming persons with a violent criminal history" by simply looking to each state's definition for a

[5] Notwithstanding the fact that *Schnur* does not foreclose McCree's as-applied challenge, as discussed herein, I briefly touch on the majority's additional argument that a "threat" would be sufficient. The majority emphasizes the word "threaten" in a quote from *Schnur*. *See Schnur*, 132 F.4th at 868. However, the use of "threaten" in that sentence pertains to some future credible threat "from misusing a firearm," not to whether the prior offense involved only a threat. *Id.* at 868; *see also United States v. Rahimi*, 602 U.S. 680, 690 (2024). In *Rahimi*, the Supreme Court said:

> When a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may—consistent with the Second Amendment—be banned from possessing firearms while the order is in effect. Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms.

Id.

The same holds true for the majority's additional quotes from *Schnur* with emphasis on "menace" or "threatened." *See id.* at 689-90. We have no evidence that McCree ever used a firearm to "menace" or "threaten" anyone. We also have no "restraining order" or anything else containing a finding to indicate that McCree "poses a credible threat to the physical safety" of anyone from "misusing a firearm." Moreover, this court has no basis for making such a finding.

crime of violence. *Schnur*, 132 F.4th at 869. That is also not what this court did in *Schnur*, as stated previously.[6]

The majority concedes there is no evidence here comparable to *Schnur* but concludes that "neither *Schnur* nor any other authority dictates that a predicate offense must have involved actual injury to permit the deprivation of Second Amendment rights." But *this* predicate offense does. As quoted above, the predicate felony in *Schnur* was a "Florida conviction for aggravated battery causing great bodily injury," as the majority concedes. *Id.* at 867. That is how we know that McCree's predicate offense must also have caused "great bodily injury" for *Schnur* to establish that § 922(g)(1) is constitutional as applied to McCree. In Louisiana, the equivalent statute is "second degree battery," which applies "when the offender intentionally inflicts serious bodily injury." La. Rev. Stat. § 14:34.1. McCree was not convicted of "second degree battery." We have no evidence that McCree committed "aggravated battery causing great bodily injury." Further, nothing in the PSR, the factual basis or the majority opinion establishes that McCree "poses a threat to public safety and the orderly functioning of society." *Schnur*, 132 F.4th at 870. There is no evidence that McCree was convicted of a "dangerous and violent crime" or that he has a "violent criminal history." While that evidence existed in *Schnur*, it does not exist here. For these reasons, McCree's conviction does not serve "as a constitutionally-adequate predicate for the § 922(g)(1) conviction" despite

[6] I acknowledge that the *Schnur* court noted Florida's definition for "crime of violence" and cited *Borden v. United States*, 593 U.S. 420, 424 (2021), upon which the majority now relies. *Schnur*, 132 F.4th at 869, n.3. But *Borden* involved a sentencing enhancement under the Armed Career Criminal Act and preceded both *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), and *Rahimi*. Nothing in *Borden* supports the proposition that this court should merely look to the definition of a "crime of violence" for purposes of a sentencing enhancement and forego any other analysis, much less that required by *Bruen* and its progeny.

the majority's claim to the contrary, and McCree's as-applied challenge is clearly not foreclosed by *Schnur*.[7]

II. Sentencing enhancement

McCree asserts that the district court clearly erred in applying the sentencing enhancement under U.S.S.G. § 2K2.1(b)(6)(B) for possessing a firearm "in connection with" another felony offense. The majority concludes that the district court did not err. I disagree.

This court previously decided the similar case of *United States v. Jeffries*, 587 F.3d 690 (5th Cir. 2009). In *Jeffries*, this court vacated the sentence, concluding that the district court erred in applying the § 2K21.1(b)(6) enhancement where a firearm and one rock of crack were found in Vincent Jeffries' car.

As explained in *Jeffries* and stated by the majority, the Application Notes of the Sentencing Guidelines provide that the enhancement automatically applies "in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia." 587 F.3d at 692 (quoting § 2K2.1 cmt. n. 14(B)(ii)). For all other felony offenses, including drug possession, the enhancement only applies "if the firearm facilitated, or had the potential of facilitating" the offense. *Id.* at 693 (quoting § 2K2.1 cmt. n. 14(A)) (internal marks omitted).

[7] The majority also indicates that any of McCree's other state felony convictions could form the basis for a conviction under §922(g)(1). McCree's juvenile adjudication for aggravated battery had to be the original predicate because his next state conviction was for possession of a firearm by a convicted felon. To the extent that the majority may be suggesting that the juvenile adjudication could not form the basis here, it fails to cite any authority establishing that we are then free to rely on any subsequent convictions obtained as a result of that problematic original predicate.

"[O]utside of the context of drug trafficking, 'no presumption is made' that a firearm facilitated possession of other contraband just because the two items are in close proximity and both are illegally possessed." *United States v. Henry*, 119 F.4th 429, 436 (5th Cir. 2024) (quoting *Jeffries*, 587 F.3d at 693). The district court must "explain how the firearm plausibly facilitated" the possession of crack. *Id.* There must be some evidence that McCree is selling or distributing drugs or that he has some other specific reason for protecting the drugs. *Id.* The evidence of facilitation "must be something more than the simultaneous possession of a small quantity of drugs and a gun." *Jeffries*, 587 F.3d at 695. The court then concluded that:

> The facts here are too sparse to support the conclusion that [the defendant's] possession of a gun "emboldened" him to engage in the crime of cocaine possession, *see, e.g., Jenkins*, 566 F.3d at 164; *Smith*, 535 F.3d at 886, or that it served to "protect" such a small amount of drugs, *see, e.g., Jenkins*, 566 F.3d at 164; *United States v. Angel*, 576 F.3d 318, 322 (6th Cir.2009); *United States v. Gambino-Zavala*, 539 F.3d 1221, 1230 (10th Cir.2008).

587 F.3d at 695.

The district court here found that McCree's possession of a firearm facilitated his possession of crack cocaine. The district court relied on the facts that McCree possessed five rocks of crack and a firearm, and he attempted to flee. But the district court failed to explain how possession of the firearm facilitated the possession of the crack. That the firearm could be used to protect the five rocks of crack is not enough to apply the enhancement. *Henr*y, 119 F.4th at 436. Further, the district court failed to explain how attempting to flee somehow supported a conclusion that McCree was emboldened to possess the small quantity of crack by possessing the firearm. McCree knew that he could not be in possession of a firearm regardless of whether he possessed anything else. That was a reason to flee.

Possessing crack was another reason to flee. But attempting to flee in no way establishes that his possession of the firearm facilitated his possession of five rocks of crack. The record also fails to establish that five rocks of crack is anything other than a small, personal-use quantity.

While the defendant in *Jeffries* did not flee, the defendant in *Henry* fled when an officer approached. *Henry*, 119 F.4th at 431. In that case, which involved the possession of a firearm and a stolen car, the government argued that the defendant used the firearm to protect the valuable stolen car. *Id.* at 436. This court specifically referenced the facts that the defendant "immediately ran, without any attempt to engage with the officer, and dropped the gun" in concluding that the government's theory was not plausible because there was "a lack of evidence to suggest a relationship between the gun and the stolen car aside from proximity. *Id.* 119 F.4th at 436, n.5. The same holds true for McCree.

Further, McCree consistently maintained that he possessed a firearm for his safety because he has "experienced significant gun trauma." He also said he was "fearful for my life" living in New Orleans. "I wasn't using it to harm anyone. I didn't have it to harm anyone, Your Honor. I was just protecting myself."

Also, as in *Jeffries*, McCree's PSR lacked a "critical step—namely, any nexus between the firearm possession and the drug possession." *Id.*, 587 F.3d at 694 & n.9. "[T]he nexus cannot simply be presumed." *Id.*

The PSR simply said: "The defendant possessed a firearm while in possession of cocaine. Therefore, pursuant to USSG 2K2.1(b)(6)(B), since the defendant possessed a firearm in connection with another felony offense, increase by four levels." This is essentially the same as the PSR in *Jeffries* that the court concluded was insufficient. 587 F.3d at 694 & n.9.

Following McCree's objection, the addendum included the following:

> LEO believed, based on the defendant's possession of five crack cocaine pieces relatively equal in size without a crack pack, heating element, pipe-pushing tool, or any other items typically associated with the personal use of crack cocaine, that the defendant possessed the crack cocaine with the intent to distribute and that the firearm was to protect the narcotics and narcotic proceeds.

The LEO's mere belief that the gun was connected fails to establish a nexus, particularly when McCree possessed only a small, personal-use amount of crack in a single baggie not packaged for distribution and a small amount of cash, there is no evidence he ever used a firearm to protect or attempt to protect possession of anything, and he provided legitimate non-nefarious reasons for possessing a firearm. Such a belief without plausible evidence is nothing more than a presumption, and "the nexus cannot simply be presumed." *Jeffries*, 587 F.3d at 694.

Because the record here does not support a plausible finding that McCree's possession of a firearm facilitated or had the potential to facilitate his possession of a small quantity of crack cocaine, I conclude that the district court clearly erred in applying the enhancement. *Id.* at 695.

The majority concedes as much, acknowledging "that the record in this case bears resemblance to the records in previous cases where this court has found the § 2K2.1 enhancement inapplicable." (Citing *Henry*, 119 F.4th 429; *Jeffries*, 587 F.3d 690; *United States v. Ratcliff*, No. 24-30192, 2025 WL 618105 (5th Cir. Feb. 26, 2025) (per curiam) (unpublished); *United States v. Garza*, No. 22-20338, 2023 WL 3918993 (5th Cir. June 9, 2023) (per curiam) (unpublished); *United States v. Ledesma*, 750 F. App'x 344 (5th Cir. 2018) (unpublished); *United States v. Pimpton*, 589 F. App'x 692 (5th Cir. 2014) (per curiam) (unpublished)).

The majority then disregards those cases, saying that "irrespective of whether McCree's possession of a firearm facilitated his possession of crack cocaine, the record renders amply plausible that McCree possessed the firearm in connection with his trafficking of drugs."[8] I disagree. In doing so, the majority makes the unsupported determination that McCree possessed a firearm "while also possessing five rocks of crack cocaine, a quantity of drugs that the district court highlighted, and that is greater than the personal-use amount at issue in *Jeffries.*" The mere fact that *Jeffries* involved one rock of crack cocaine in no way establishes that five rocks is greater than a personal-use amount, and the majority cites no authority for such a proposition. Also, the district court simply referenced the quantity in an attempt to distinguish this case from the one rock in *Jeffries* and to find that McCree possessed the gun "to facilitate the *possession* of those five rocks of crack cocaine." (Emphasis added). The district court did not find that McCree was intending to distribute.

The Factual Basis here merely stated: "According to the police report, a search incident to arrest led to the recovery of 5 crack rocks on McCree's person." There is no mention of any drug trafficking, any intent to distribute, or any suggestion that the quantity was more than a personal-use amount. Further, there is no evidence in the record to establish that McCree was distributing drugs or that the quantity he possessed was more than a personal-use amount. But there is significant evidence to contradict such a conclusion.

[8] The majority also cites U.S.S.G. § 2K2.1 cmt. n. 14(C), (E) for the proposition that "'another felony offense' need not be indicted conduct." However, nothing in the definition of "another felony offense" allows the majority to ignore precedent or the complete lack of evidence to reach unsupported conclusions.

At sentencing, the district court asked the government: "Is there any reliance from the government that the police officer suspected drug activity by Mr. McCree? Is there anything in the record to show why they had that suspicion?" The government explicitly responded: "There wasn't anything in the record." The government then explained that it was taking that position because McCree did not simultaneously possess paraphernalia, he had $94 in cash, he attempted to flee, "[a]nd, frankly, five crack rocks is more than a *single use* of that substance." (Emphasis added). Importantly, "more than a single use" does not mean more than a personal use; it simply means more than typically would have been smoked at once. The government also acknowledged at sentencing that the five crack rocks were contained in one baggie, as opposed to individual baggies for distribution.

Both the PSR and McCree's testimony at sentencing indicate that he was using crack on a regular basis, and occasionally other drugs, to deal with emotional trauma after his pregnant girlfriend was killed, his brother died, his close friend was killed, and his father died from cancer over just a few years. I disagree with the majority's characterization that McCree offered "statements at sentencing of how important using crack was to him." McCree explained why he started using it but said nothing about how important using it was to him. To the contrary, before McCree's statements, his counsel had already argued that "he has never received drug treatment as part of his sentence. We are specifically requesting that the court adopt probation's recommendation that he do some form of drug treatment." The district court indeed accepted that recommendation. Additionally, McCree explained that he did not use a pipe to consume crack. He testified that "I was not using a pipe. I was crunching it, smashing it, putting it in cigarettes or I would put it in my marijuana." The government offered nothing to dispute that method of consumption, which was acknowledged by a government witness in another case discussed below.

The government also did not offer any evidence at sentencing regarding the size, weight or value of the rocks, how much an addict typically consumes in a given time-period, or anything else to establish that this was somehow more than a personal-use amount. Despite the lack of any such evidence, the majority now concludes that five rocks of crack of unknown size and weight are more than a personal-use amount. Such a determination is unsupported by any legal authority.

The majority cites *United States v. Williamson*, 533 F.3d 269, 277 (5th Cir. 2008), for the proposition that intent to distribute can be proven by "mere possession of a quantity of drugs inconsistent with personal use." But, again, it cites nothing to establish that five rocks of crack are inconsistent with a personal-use amount.

This court has repeatedly set out that a quantity consistent with personal use does not support an inference of distribution, even if the quantity may be indicative of distribution. *See United States v. Hunt*, 129 F.3d 739, 742-44 (5th Cir. 1997). In *Hunt*, this court concluded that 7.998 grams of crack cocaine, a gun, the lack of paraphernalia, and other evidence was insufficient to infer intent to distribute. The 7.998 grams of crack cocaine consisted of one large rock and several smaller rocks. *Id.* at 741. In that case, Hunt also testified that she did not use crack cocaine. *Id*. A detective testified that the cocaine was worth about $200 and was a distributable amount. *Id*. "Furthermore, he stated that each of the smaller rocks would be 'a lot of crack for a crack head' and that the rocks are available in sizes smaller than that size." *Id*. Authorities did not find any "crack pipes" or "smoking devices" with the crack. *Id*. The court recounted that the detective also said the following:

> [I]n his opinion, the tobacco and cigar wrappings they found were evidence of "blunts" being sold out of Hunt's house. He explained that blunts are made by taking the tobacco out of

> cigars and replacing it with marijuana and that "primos" are made by adding crack cocaine to the marijuana. He stated that in the area of town where Hunt's house was located, marijuana and crack are usually sold hand in hand, "like a little drug store." On recross, however, he stated that "primos" are one way that cocaine users smoke cocaine.

Id.

The court further said:

> Although the government introduced testimony that this amount is a distributable amount and that the individual rocks may be larger than those that Detective Rodriguez believes are usually smoked or that Cho, the forensic analyst, usually tests, the testimony also indicated, as in *Skipper*, that this amount was also consistent with personal use. In particular, Detective Rodriguez testified that a crack cocaine user may smoke, in one day alone, close to $500 worth, an amount that exceeds even the highest value he assigned to the cocaine found in Hunt's house.

Id. (citing *United States v. Skipper*, 74 F.3d 608, 611 (5th Cir. 1996)).

Regarding the gun, the court referenced situations where a loaded gun was found in a drawer with a large quantity of cocaine and/or where a defendant saw authorities watching him feeding bales of marijuana on a conveyor belt to a boat and ran for his loaded weapons, and said: "Unconnected with any such circumstances, however, the gun is no more probative of distribution of drugs than of other, non-nefarious purposes for which one may keep a gun." *Id.* at 744. This court then determined that the larger quantity of crack cocaine, along with a razor blade, evidence of blunts, the gun, the government's testimony, and Hunt's own testimony that she did not use crack was insufficient to establish intent to distribute.

Similar to *Hunt*, the authorities did not find paraphernalia here. There was also a gun with no evidence of any connection to the drugs. Unlike Hunt's testimony, McCree admitted to using crack on a regular basis, and in a manner consistent with the detective's testimony in *Hunt*, as quoted above, which negates reliance on paraphernalia. Again, we do not have any evidence of the weight or size of the rocks here. But the addendum to McCree's PSR characterizes them as "five individual pieces of crack rocks" and "five crack cocaine pieces relatively equal in size." Five relatively equal sized pieces of crack rock would appear to be less than one large rock and several smaller rocks that are still larger than typical rocks.

In *Skipper*, this court concluded that 2.89 grams of crack cocaine "is not clearly inconsistent with personal use" and "is insufficient to prove intent." 74 F.3d at 611. The Supreme Court has also held that 14.68 grams of cocaine is a personal-use amount. *See Turner v. United States*, 396 U.S. 398, 423-24 (1970). In *United States v. Dotsey*, No. 95-50050, 1995 WL 534956, at *1 (5th Cir. Aug. 1, 1995) (unpublished), this court affirmed a sentence involving the sale of rocks of crack weighing .10, .20, and .35 grams, for an average of .16 grams per rock, to an undercover agent. As an example, even if McCree's five rocks were equivalent to the largest size of .35 grams in *Dotsey*, which is not likely, the total weight would only be 1.75 grams—well under a personal-use amount. Additionally, that total would not necessarily be entirely cocaine, as additional ingredients are added to make crack.

Although it is not controlling, it also is worth mentioning that there is a more recent state court appellate decision from Louisiana which found that five rocks of crack cocaine (weighing a total of .77 grams) is consistent with personal use. *See State v. James*, 2016-522 (La. App. 3 Cir. 4/15/17); 216 So.3d 117, 121-24. This weight averages .15 grams per rock, which is just below the average weight in *Dotsey*. Additionally, district courts in Louisiana have relied on five factors set out by the Louisiana Supreme Court in

determining whether circumstantial evidence is sufficient to prove the intent to distribute. *See Stewart v. Cain*, No. CIV A 00-1651, 2000 WL 1511686, at *11 (E.D. La. Oct. 10, 2000) (quoting *State v. Hearold*, 603 So.2d 731 (La. 1992)). Those factors are:

> (1) whether the defendant ever distributed or attempted to distribute the drug; (2) whether the drug was in a form usually associated with possession for distribution to others; (3) whether the amount of drug created an inference of an intent to distribute; (4) whether expert or other testimony established that the amount of drug found in the defendant's possession is inconsistent with personal use only; and (5) whether there was any paraphernalia, such as baggies or scales, evidencing an intent to distribute.

Hearold, 603 So.2d at 735. None of those factors are present here.

Because the record here does not support a plausible finding that McCree's possession of a firearm facilitated or had the potential to facilitate his possession of a small quantity of crack cocaine and there is no basis for the majority's conclusion that McCree possessed more than a personal-use amount of crack cocaine or was involved in drug trafficking, I conclude that the district court erred in applying the enhancement.[9]

For the reasons stated herein, I respectfully dissent in part.

[9] The majority references the dissent and states: "The ultimate question, however, is not whether this court would reach the same decision as the district court, but whether the record contains evidence rendering plausible the application of the sentencing enhancement. It does, warranting affirmance." Nowhere do I say or suggest that the standard is whether this court would reach the same decision as the district court. Instead, I consistently apply the correct standard as set out in *Jeffries* and *Henry*, both of which the majority ignores—particularly the analysis on what is and is not plausible—before engaging in erroneous fact-finding unsupported by the record or relevant authority.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 30, 2025
Lyle W. Cayce
Clerk

No. 23-30218

United States of America,

Plaintiff—Appellee,

versus

Jaron McCree,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:22-CR-88-1

ON PETITION FOR REHEARING EN BANC

Before Jones, Graves, *Circuit Judges*, and Rodriguez, *District Judge*.[†]

Per Curiam:

Treating the petition for rehearing en banc as a petition for panel rehearing (5th Cir. R.40 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R.

[†] United States District Judge for the Southern District of Texas, sitting by designation.

App. P.40 and 5th Cir. R.40), the petition for rehearing en banc is DENIED.

1 **THE COURT:** Counsel, I notice that there was an
2 objection from the report and you've also submitted a
3 memorandum that outlines that objection with citations and case
4 authority for your objections. It's also summarized in the
5 presentence report at page 19 at Record Document 42.
6 Other than that objection to the four-level
7 increase for possession of a firearm in connection with another
8 felony offense, are there any other objections that your client
9 has to the report?
10 **MS. MIRON:** That's the only one, Your Honor.
11 **THE COURT:** Do you agree with that, Mr. McCree?
12 **THE DEFENDANT:** Yes, Your Honor.
13 **THE COURT:** And, government, I see you have no
14 objections to the report, although you did submit a response to
15 the defense's request for a variance or a sustaining of their
16 objection.
17 **MR. TRUMMEL:** That's correct, Your Honor, no
18 objections.
19 **THE COURT:** Mr. McCree, did you go over with your
20 lawyer the reasons why she believes that you should be given
21 some adjustment to your guideline calculations?
22 **THE DEFENDANT:** Yes, Your Honor.
23 **THE COURT:** I'm going to ask your lawyer some
24 questions about that, as well as the government's lawyer, and
25 then at the end, I'll ask you some questions if you want to

1 have any response to the questions I ask your lawyer or the
2 government's lawyer.
3 First, let's go to defense counsel. You've
4 obviously read the government's response to your motion?
5 **MS. MIRON:** Yes.
6 **THE COURT:** All right. The main case that you cite,
7 which they address and try to distinguish, is the *Jeffries*
8 case, I believe. Do you want to respond to the government's
9 thoughts on that point? Why it's distinguishable?
10 **MS. MIRON:** Yes, Your Honor. I think the government
11 relies more heavily on *Jenkins*, which is a Fourth Circuit case.
12 *Jeffries* cites *Jenkins* in a favorable way.
13 **THE COURT:** That it rarely is -- your objection's
14 rarely sustained?
15 **MS. MIRON:** I wouldn't characteristic it that way. I
16 do think the guidelines make a distinction between possessing a
17 firearm in connection with a drug trafficking offense where
18 that guideline enhancement is presumed to apply versus
19 possession of a firearm in connection with possession of some
20 type of narcotic.
21 **THE COURT:** Let's take *Jeffries*. That's Fifth
22 Circuit. All right.
23 **MS. MIRON:** I'm sorry, *Jeffries*?
24 **THE COURT:** *Jeffries* is Fifth Circuit.
25 **MS. MIRON:** Right. Well --

1 **THE COURT:** *Jeffries*, the Court rejected the
2 increase --
3 **MS. MIRON:** Correct.
4 **THE COURT:** -- saying that one crack -- one piece of
5 cocaine -- crack cocaine and a weapon that was found in the
6 same vehicle that the defendant was in with the drugs would not
7 lead to the application of the four-level increase; correct?
8 **MS. MIRON:** Yes, and I'd also like --
9 **THE COURT:** Is that distinguishable from here?
10 **MS. MIRON:** No, Your Honor. In that case, there was
11 a firearm and there were narcotics. There was no evidence of
12 drug trafficking. Here there is also no evidence of drug
13 trafficking, and I think the government concedes such by
14 arguing that the enhancement should be sustained for mere
15 possession of cocaine.
16 I'd also like to add to the record, having the
17 benefit of the Government's response, *United States versus*
18 *Ledesma*, 750 Fed Appx. 344, 2018, I understand the Court didn't
19 have the opportunity to review this case ahead of time, but it
20 is a Fifth Circuit case that distinguishes *Jenkins*. And it
21 says in *Jenkins* the firearm in that case went to a scene where
22 a shooting had occurred where a firearm had been fired.
23 And in *Ledesma*, those facts were not present.
24 Instead the firearm was taken alongside drugs in a public place
25 and that was insufficient to sustain the enhancement. Again,

1 the Fifth Circuit remanded directing the District Court to not
2 apply the enhancement and to resentence the defendant.
3 **THE COURT:** Were the drugs and the gun connected
4 directly in those two cases to the defendant's person?
5 **MS. MIRON:** Yes, they were both on his person. Just
6 as they are here. But there was no other connection --
7 **THE COURT:** The gun in both cases was either on his
8 person or seen at some point on his person?
9 **MS. MIRON:** Correct.
10 **THE COURT:** Were the drugs found on his person or
11 indirectly in the same vicinity?
12 **MS. MIRON:** In *Ledesma*?
13 **THE COURT:** Either one.
14 **MS. MIRON:** In both *Ledesma* and my client's case, the
15 drugs and firearm were at some point located on the person.
16 **THE COURT:** What do you mean "at some point"?
17 **MS. MIRON:** Well, in Mr. McCree's case, he discarded
18 the firearm, so when it was recovered, it was no longer located
19 on him. You know, we concede that he possessed it. That's why
20 he pled guilty. But to the extent that the government is
21 arguing that *Jeffries* is limited in some way to possession of a
22 gun and drugs in a vehicle, that distinction makes no
23 difference.
24 There is a more recent Fifth Circuit case,
25 *Ledesma*, which reversed when there was no additional facts that

1 the Court could rely on to establish that the gun was in
2 connection with possession of the firearm.
3 **THE COURT:** In either of those cases, did the
4 defendant in either of those cases that you just cited involve
5 a defendant who fled the police?
6 **MS. MIRON:** No, I don't believe *Ledesma* involved that
7 scenario.
8 **THE COURT:** In either of those cases, did the
9 arresting police officers suspect a drug trafficking offense?
10 **MS. MIRON:** Yes, in *Ledesma*, law enforcement
11 testified that he believed *Ledesma* possessed the gun for the
12 purpose of protecting his drugs. So, yes in this case, the two
13 share that aspect in common. Of course, we dispute that.
14 Mr. McCree is addicted to crack cocaine and was using that.
15 The Probation Office in rejecting our objection
16 noted that no crack pipe was found in his pocket. Mr. McCree
17 does not use a crack pipe when he consumes crack cocaine. He
18 smokes it alongside marijuana, but that doesn't transform it
19 into a drug trafficking offense.
20 So he can explain, unfortunately, that he is
21 addicted to crack cocaine, that's why he possessed the gun --
22 excuse me, the drugs, but that the gun was not emboldening him
23 in any way in possessing the drugs.
24 In the sense that the Fifth Circuit says if the
25 two possessions are accidental or coincidental, the enhancement

1 should not apply. We're not alleging they were accidental. It
2 would be difficult for me to imagine a scenario where
3 possession is accidental. But we are saying that they are
4 coincidental.
5 They were not intended to facilitate one
6 another. In fact, he didn't discard the drugs at the same time
7 that he discarded the gun. But it was coincidental. One was
8 for his use and the other is because he's experienced
9 significant gun trauma in his life and he had the firearm for
10 his safety. So for those reasons, Your Honor, we continue to
11 object to that four-level enhancement.
12 In the alternative, should the Court overrule
13 that objection, we do ask for a downward variance to 46 to
14 57 months for a few different reasons, but I can stop here or
15 continue on.
16 **THE COURT:** As you suspect, and as I'm somewhat
17 predicting, the government's going to also point out to me your
18 client's prior conviction history of similar offenses. How
19 would you respond to that contemplated argument?
20 **MS. MIRON:** That does speak to the 3553(a) factors,
21 which, of course, the Court has significant discretion here.
22 No matter the guidelines range, the Court is --
23 **THE COURT:** And I'm not raising this to address the
24 enhancement issue, but the alternative argument which you would
25 make about variance.

1 **MS. MIRON:** Yes, Your Honor. My argument to that is
2 that he certainly does have some convictions. He does fall
3 into category V, but that is because -- he would otherwise fall
4 into category IV but for this two-point assessment for being on
5 supervision. And I would note that the Sentencing Commission
6 today is voting on whether or not to eliminate that two-point
7 enhancement for essentially being on supervision.
8 The reason that they have proposed amendments
9 eliminating that two-point enhancement is because there is now
10 determined to be no empirical basis that that two-point
11 enhancement has a predictive value in any way. So certainly he
12 has these convictions and he would otherwise have nine points
13 and fall in category IV and face a 57 to 71-month range but for
14 this two-point enhancement.
15 His prior sentences, he has not served near --
16 because of the way that the state system works, he has not
17 served 46 to 57 months before. So he has been sentenced to a
18 term of seven years, but he did not serve much of that. So
19 today's sentence, even if the Court were to give us our
20 request, which is 46 to 57 months, it would represent a
21 significant increase in the punishment that he has faced in his
22 life.
23 Mr. McCree -- on the other side of the scale are
24 the significant personal trauma that he's experienced. He will
25 tell the Court about it, but he's lost his girlfriend. His

1 girlfriend, who was pregnant at the time, was killed. He lost
2 his father and he lost a brother all in a short span of time.
3 And those tragedies compounded such that he did spiral into a
4 drug -- a substance abuse problem and was not thinking like the
5 man he can be when he is sober and clear minded.
6 So for those reasons, I'd ask the Court to
7 impose a sentence within the lower guidelines, recognizing the
8 difficult situation that he was in at the time of the offense.
9 **THE COURT:** All right. Thank you. Let's go to the
10 government.
11 Before you respond to some of the statements by
12 counsel, on page 2 of the government's response to the
13 objection and the request for downward variance, you mention in
14 the first full paragraph that the government agrees with the
15 sentencing guideline calculation set forth in the PSR, and you
16 go on to state that the defendant does not dispute the
17 calculation.
18 No doubt that Probation made the calculation,
19 but isn't that a misstatement there?
20 **MR. TRUMMEL:** It is, Your Honor. I apologize.
21 **THE COURT:** Okay. The other thing was you heard me
22 talk to counsel about the *Jeffries* case. She's pointed out
23 another matter, and, of course, she was responding to your
24 statements about the possible application of that Fourth
25 Circuit case in *Blount* as well as in *Jenkins*. You distinguish

1 *Jeffries*, which is for our purposes here binding authority on
2 this Court, a Fifth Circuit case, although we've got to
3 consider the facts on each to determine whether or not it's
4 distinguishable.
5 Do you believe *Jeffries* is distinguishable, and
6 I'm quoting now on page 3 of your memo that in *Jeffries* there
7 was no finding of facilitation or emboldening, that the only
8 facts in the record were simultaneous possession of a single
9 rock of crack cocaine and a gun found in the same vehicle,
10 which led to the Court's determination that that was
11 insufficient for the application of the enhancement?
12 You go on to say that this case is different
13 where the conduct shows Mr. McCree's conduct was not a mere
14 accident, but the gun and the drugs were together on his
15 person. You state that he fled the scene, fled from arrest by
16 the police officers, attempted to discard the loaded firearm,
17 and was also in possession of more than a single rock of crack
18 cocaine. I believe there was, what, five rocks here?
19 **MR. TRUMMEL:** Yes, sir, five or six.
20 **MS. MIRON:** We believe there were five rocks, Your
21 Honor.
22 **THE COURT:** In regards to the application of the
23 enhancement, isn't the underlying basis for enhancement the
24 belief that the possession of the gun was to facilitate
25 possession of the drugs?

1 **MR. TRUMMEL:** Yes, sir.
2 **THE COURT:** And that it can't be a mere accident or a
3 mere coincidence?
4 **MR. TRUMMEL:** Yes, sir.
5 **THE COURT:** The reference to -- and each case is
6 factually -- I realize has to stand on its own set of facts.
7 Is there any reliance from the government that the police
8 officer suspected drug activity by Mr. McCree? Is there
9 anything in the record to show why they had that suspicion?
10 **MR. TRUMMEL:** There wasn't anything in the record.
11 That was what law enforcement stated in the police report. A
12 lot of that, I believe, Your Honor, has to do with the fact
13 there was no paraphernalia found upon him. There was cash
14 found upon him. And, frankly, five crack rocks is more than a
15 single use of that substance, Your Honor. Additionally, he did
16 also flee from police with a firearm --
17 **THE COURT:** Were the pieces of crack cocaine in one,
18 say, little baggy, or was it separate baggies, or what?
19 **MR. TRUMMEL:** I believe it was in one baggy, Your
20 Honor.
21 **THE COURT:** And the amount of money was, what,
22 90-some dollars?
23 **MR. TRUMMEL:** $94.
24 **THE COURT:** And you would agree that Mr. McCree
25 accepted responsibility for the acts that we've been discussing

1 here; right?
2 **MR. TRUMMEL:** I do, Your Honor.
3 **THE COURT:** Is there anything else that you want to
4 point out to me concerning the defense argument, factually or
5 legally?
6 **MR. TRUMMEL:** In terms of the enhancement, Your
7 Honor, or in terms of the variance?
8 **THE COURT:** Both.
9 **MR. TRUMMEL:** In terms of the enhancement, Your
10 Honor, I think it is important to understand that this is
11 actual possession in both cases. In *Jenkins*, it was actual
12 possession; in *Jeffries*, it wasn't. We're talking constructive
13 possession inside a vehicle.
14 And *Jeffries* is clear, Your Honor, and I'm
15 quoting, that such a potential will usually be found when
16 talking about a firearm and talking about narcotics, the
17 potential that they are facilitating one another because
18 firearms are used to protect drugs. And this firearm,
19 particularly, Your Honor, had an extended clip on it. And he
20 chose to go to the streets of New Orleans with both of those on
21 him. It wasn't in a vehicle that he ended up later in. It
22 wasn't in a house he ended up later in. He made that choice to
23 put both those things on him.
24 **THE COURT:** He was at some corner of a supermarket or
25 something like that when the police saw him?

1 **MR. TRUMMEL:** Yes, sir. Yes, sir. Near the
2 Iberville housing development and outside standing. Right?
3 And --
4 **THE COURT:** Where exactly in relationship to where
5 his residence was?
6 **MR. TRUMMEL:** I do not know where his residence is,
7 Your Honor.
8 **THE COURT:** Counsel.
9 **MS. MIRON:** It's about four blocks away, Your Honor.
10 **MR. TRUMMEL:** Yes, sir. And when he talks about
11 *Jenkins* and the fact that firearms are there to protect, I
12 think it's important that he was out there and that he also did
13 flee. And the firearm was not just a firearm, it was an
14 extended clip.
15 When we go to the 3553(a) factors, Your Honor, I
16 understand that the two-point enhancement may not be predictive
17 of future criminal conduct, but it is illustrative of both his
18 character as well as the need for deterrence. This would be
19 the third time he's been arrested either possessing or
20 attempting to possess a firearm. In all his convictions, his
21 parole has been revoked.
22 **THE COURT:** Well, not just arrested but convicted as
23 well?
24 **MR. TRUMMEL:** Yes, sir. And according to the PSR, on
25 all of his convictions, his parole has been revoked, which

1 means, as defense counsel states, he didn't spend much time in
2 jail, but upon being out of jail, he was unsatisfactory.
3 The fact we're needing to have a sentence that
4 reflects deterrence, clearly this gentleman, it's not the first
5 time he's fled from police, not the first time he's possessed
6 guns and drugs together.
7 And, finally, the nature and circumstances of
8 the offense, Your Honor, I don't think it should be lost on
9 this Court that the reason the police were out there to arrest
10 him was because a magistrate had found probable cause that he
11 had brandished a firearm against an unarmed female.
12 And I understand Ms. Miron states he possesses
13 these firearms because of gun violence, his history, or needs
14 to protect himself, but he's clearly possessing firearms to
15 brandish them on people as well. And I think that is important
16 that is why the police were even sent to this area.
17 So when I'm looking at the nature and
18 circumstance of the offense, the fact that he has done this
19 before and has not been deterred, the fact it was an extended
20 clip magazine, and the fact he attempted to discard the
21 evidence, just lucky the police were fast enough to catch him,
22 I think counts against -- when considering the 3553(a) factors
23 would suggest a guideline sentence is appropriate.
24 **THE COURT:** Rebuttal.
25 **MS. MIRON:** Your Honor, I would object to the

1 reliance on things that are outside the record. He was never
2 charged with such an offense that Mr. Trummel is -- excuse
3 me -- regardless that offense that Mr. Trummel is citing was
4 not established in Criminal District Court and it should not be
5 relied on here for any reason.
6 In terms of the fact that he had been revoked,
7 he has never received drug treatment as part of his sentence.
8 We are specifically requesting that the Court adopt Probation's
9 recommendation that he do some form of drug treatment. I do
10 think that would assist in his compliance.
11 It's not just me who's saying that the two-level
12 enhancement for status offenses for being on supervision is
13 unnecessary, it's the Sentencing Commission, which has proposed
14 amendments to that, and, hopefully, will vote on those today.
15 Unfortunately, it's too early for Mr. McCree to benefit from
16 it, but I would ask the Court to consider that when determining
17 what an appropriate sentence is in his case.
18 I know Mr. McCree has some things to add, but
19 those are my rebuttal arguments to Mr. Trummel's.
20 **THE COURT:** Mr. McCree.
21 **THE DEFENDANT:** How are you doing, Your Honor? For
22 the record, my name is Jaron McCree. Your Honor, I've been
23 incarcerated for 14 and a half months. I have taken that time
24 to rehabilitate myself. What I mean by "rehabilitate myself,"
25 like elevate my mind, read, and telling myself not to make bad

1 decisions, and learn from my mistakes. I take full
2 responsibility for my actions.
3 I'm from New Orleans, Louisiana. Growing up in
4 New Orleans is hard. I have a single mother. She had one job.
5 She had two kids, me and my brother, Joe McCree, who has
6 recently passed away. She struggled to provide to keep a roof
7 over our head, clothes on our back, and meals in our mouth.
8 Growing up, I knew that I had mental problems.
9 Mental health. I struggled with depression and bipolar. As
10 time got older -- as time went by, I tried to get help. I told
11 my mother about it. I tried to get help for my mental health
12 and what I was going through. She told me it was going to get
13 better. She was working so hard, so she never got a chance to
14 bring me to get help or seek help.
15 I recently lost my kid's mother and my kids to
16 street violence, gunned down in the streets. Ten months after
17 that, I lost my brother. Four months after that, I lost my
18 father. That's what led me to doing drugs. It started off
19 small, but this was the only thing that could ease my pain.
20 I was not on the streets selling drugs. I was
21 not on the streets taking anyone's things. I was not on the
22 street robbing anyone. I was not on the street robbing little
23 kids at bus stops. I wasn't doing none that. I was going
24 through something mentally and that was the only thing that
25 could ease my pain was drugs, crack cocaine.

1 I was not using a pipe. I was crunching it,
2 smashing it, putting it in cigarettes or I would put it in my
3 marijuana. That was the only thing that could ease my pain,
4 Your Honor, from going through what I was going through from
5 losing my only sibling, my firstborn. That was the only thing
6 that could ease my pain.
7 Seeing my mother going through what she was
8 going through, it hurt me. I didn't have nobody. This is the
9 only family I got right here. I have a small family.
10 **THE COURT:** Your lawyer pointed out some things about
11 you and your background, and she also attached a letter from, I
12 believe, your fiancée, Ms. Smith, and a letter from your
13 mother, Ms. Stephanie McCree.
14 She talked about -- your mother talked about
15 your early diagnosis when you were ten years old for attention
16 deficit. You were put on medication, but you didn't like
17 taking it. Did you ever start taking it again?
18 **THE DEFENDANT:** Sometimes.
19 **THE COURT:** And there's also a reference that -- in
20 your fiancée's letter that you went on pills and crack to help
21 cope with stress and depression over the losses you've had in
22 your family and I imagine your own health issues that you
23 described that's in the report.
24 What type of pills?
25 **THE DEFENDANT:** Percocet.

1 THE COURT: Percocet?
2 THE DEFENDANT: Yes, sir.
3 THE COURT: Between Percocet and crack, what was the
4 one you used most often?
5 THE DEFENDANT: Both. I used to be sneaking doing
6 crack cocaine, hiding it from my family. I didn't want them to
7 see me like that.
8 THE COURT: Why were you on that corner when the
9 police tried to arrest you?
10 THE DEFENDANT: I was actually going to borrow money.
11 I didn't have no money. I was going to borrow money from a
12 friend of mine that owned the store.
13 THE COURT: How do you normally support yourself?
14 THE DEFENDANT: Sir?
15 THE COURT: How do you support yourself? It says
16 here that in your girlfriend's letter that --
17 THE DEFENDANT: Sometimes I borrow money. You know,
18 I wash cars. And I used to pay him back. I used to ask my
19 girlfriend for money sometimes. She wouldn't know what I was
20 asking her for it for. But I used to borrow money, and used to
21 pay it back, and I used to also pay her back.
22 THE COURT: It says that she was working multiple
23 jobs, but that since your arrest, she's only been able to, I
24 think, work one job to help with her youngest son who's had
25 some difficulties in school, not wanting to go to school, et

1 cetera. Where else -- where does she work?
2 **THE DEFENDANT:** Auto Zone.
3 **THE COURT:** And what are the other jobs she had
4 before Auto Zone?
5 **THE DEFENDANT:** She had a fast food job and she
6 worked in a local mall.
7 **THE COURT:** She mentioned too that -- in her letter
8 that she's been stressed and that she's been to the emergency
9 room many times and she had to go by herself since she had no
10 one else to help her. Do you know why she went to the
11 emergency room?
12 **THE DEFENDANT:** Stressing me being incarcerated,
13 stressing.
14 **THE COURT:** So a mental issue?
15 **THE DEFENDANT:** Yes, sir. Family health problems,
16 family problems. She's out there by herself. She's got three
17 kids. The youngest son, he sometimes tends to act up in
18 school. I was a big influence for him. He used to look up to
19 me. I used to help him out really well, and she'd be looking
20 forward to that. Now he's getting older, he's maturing and
21 sometimes he tends to get beside himself.
22 **THE COURT:** Why were you carrying a gun?
23 **THE DEFENDANT:** New Orleans, sir. New Orleans. I
24 was fearful for my life. You watch the news every day, Your
25 Honor. You see what's going on. I was scared for my life.

1 **THE COURT:** I don't carry a gun, and I go through all
2 parts of the city.
3 **THE DEFENDANT:** I wasn't using it to harm anyone. I
4 didn't have it to harm anyone, Your Honor. I was just
5 protecting myself. I'm just being honest.
6 **THE COURT:** Your fiancée also says that you want to
7 own your own business. What type of business?
8 **THE DEFENDANT:** A shoe company. I love fashion.
9 **THE COURT:** I know making a move from one residence
10 or even city to another is difficult, particularly if you're
11 strapped for the resources to make that kind of a move. Have
12 you all talked about possibly making a move out of this city if
13 you think that the city is part of your problem?
14 **THE DEFENDANT:** Yes. Your Honor, I'm going to tell
15 you the God's honest truth, two weeks before I was coming to
16 jail -- well, I come to jail the day before I was being
17 released on parole, a day before I was going to visit Texas.
18 We was going to look at an apartment in Texas. I was just
19 going to relocate to Texas to get from New Orleans, and I come
20 to jail a week before I was going to look at some apartments to
21 move.
22 **THE COURT:** Do you have relatives there?
23 **THE DEFENDANT:** No, I was going to start a new life.
24 For the better.
25 **THE COURT:** Does he have anyone that he wants to

1 speak on his behalf before sentencing?
2 **THE DEFENDANT:** My mom. This is the only family I
3 have, Your Honor. I have my grandmother. She's 72 years old.
4 And I have my mom. Her nerves are so bad now.
5 **THE COURT:** I mean, I read their letters and if they
6 want to say something, I'll give them that opportunity if they
7 want to.
8 **THE DEFENDANT:** My grandmother.
9 **THE COURT:** All right. That's fine.
10 **MS. McCREE:** My name is Betty McCree.
11 **THE COURT:** Wait. Hold on. Come to the podium
12 first.
13 **MS. McCREE:** Oh, it's the first time I've ever been
14 in a place like this.
15 **THE COURT:** I need to hear what you're saying.
16 **MS. McCREE:** Can you hear me?
17 **THE COURT:** I can hear you.
18 **MS. McCREE:** My name is Betty McCree. I'm his
19 grandmother.
20 **THE COURT:** How are doing, Ms. McCree?
21 **MS. McCREE:** I've never been in a place like this,
22 and I was raised right across the bridge.
23 **THE COURT:** How far are you from where your grandson
24 lives?
25 **MS. McCREE:** I live now -- I had moved my mother out

1 of the Calliope project, so I'm Uptown and he's downtown, you
2 know. And he can't stand my steps. I have a lot of steps
3 where I live at. And he goes, "Grandma, why did you do this?"
4 **THE COURT:** So Mr. McCree's mother, is that your
5 daughter?
6 **MS. McCREE:** Yeah.
7 **THE COURT:** And it was either in the mom's letter or
8 the fiancée -- do you know his fiancée, Ms. Smith?
9 **MS. McCREE:** Yeah. She's here.
10 **THE COURT:** In one of their letters, they mentioned
11 how they thought part of his problem was who he associated
12 with. Can you tell me about that?
13 **MS. McCREE:** Kids he done came up with. You know,
14 it's hard. I'm constantly telling him to try to stay prayed up
15 instead and be a leader and not a follower. You know, I'm
16 constantly preaching that. Because I've never been in trouble
17 one day of my life. His mother, his uncles, none of them. You
18 know, so he's going to be all right, you know.
19 And I call the place where he's at now college.
20 I said, uh-uh, because you got a master degree now, so, you
21 know, you got to do right, you know, and believe, and it's
22 going to work. Trouble is easy to get in and hell to get out
23 of.
24 **THE COURT:** What should I do with your grandson?
25 **MS. McCREE:** Let my baby come home. Let him come

1 home and we going to handle that with this man they call Jesus.
2 And he loves church. Oh, yes, let my baby come home. Because
3 this is not the place -- unless you're going to put him in
4 school or something, you know, learn, you know, some kind of
5 discipline place -- not discipline. You know, to be sitting in
6 one spot. I don't even know how they sit in here. You know,
7 because like I said, I've ever been locked up.
8 **THE COURT:** The problems that he had before --
9 **MS. McCREE:** He's going to do right this time.
10 **THE COURT:** The problems that he had before in the
11 prior cases where he was convicted a couple of times, there
12 were problems with probation a couple of times. What would be
13 different now?
14 **MS. McCREE:** What would be different is that I would
15 probably pay more attention. At that time, I was working, but
16 I'm not working anymore. I used to work right down the street
17 at Charity, but I'm no longer working, and I'll spend more
18 time. You know, sometimes they need time, somebody to talk to
19 them, somebody to just inspire them to do the right thing. And
20 you never get too old to learn something. Every day I'm
21 learning something.
22 And I live Uptown half a block off Magazine and
23 Camp. You know, I'm up in that area there, not too far from
24 St. Charles. I've been there 29 years.
25 But other than that, I'm just trying to stay

1 prayed up. That's all I know, stay prayed up. Every day is
2 hard. And it's getting harder, and it ain't the world, it's
3 the people that's in it. So I can instill a lot of things in
4 him, he's just got to listen. Please give my baby another
5 chance.
6 **THE COURT:** All right. Thank you, ma'am.
7 **MS. McCREE:** Thank you.
8 **THE COURT:** Either counsel want to respond to
9 anything so far? I'm about to shut it down.
10 **MS. MIRON:** No, Your Honor.
11 **MR. TRUMMEL:** No, Your Honor.
12 **THE COURT:** Mr. McCree, do you want to say something
13 else? Mr. McCree? Counsel, I have their letters.
14 **MS. MIRON:** Yes, I know. Thank you, Your Honor.
15 **THE DEFENDANT:** Your Honor, I just want to ask you
16 that you take --
17 **THE COURT:** Did your grandmother say the right thing?
18 **THE DEFENDANT:** Yes, Your Honor.
19 **THE COURT:** You heard what she said?
20 **THE DEFENDANT:** Yes, Your Honor. I'd just ask that
21 you take this into consideration. You see what I have been
22 through in my life. I'm not a bad person, Your Honor. And I'm
23 just trying to do better as the days go by, and I ask that you
24 take into consideration and have mercy on me and show me
25 leniency.

1 Thank you, Your Honor.
2 **THE COURT:** In addition to the need to further your
3 education, vocational skills to improve your lifestyle, it's
4 apparent from what I see here that you've got to take the
5 medications that's prescribed for you.
6 **THE DEFENDANT:** Yes, Your Honor.
7 **THE COURT:** You also need to get drug treatment
8 programs because, apparently, you haven't had that or didn't
9 benefit from it. You're not going to get that, in my opinion,
10 if you don't realize that if you don't get any of that that you
11 need, vocational training, medical help, you're going to be
12 back before another judge or me --
13 **THE DEFENDANT:** Yes, sir.
14 **THE COURT:** -- in the future.
15 I don't know you other than what I see in the
16 paperwork. There's what your lawyer said, the government's
17 lawyer said, what your family has said. You know, I always say
18 that the law sometimes has some serious issues on how they, you
19 know, fashion remedies for misconduct. And we see, as you told
20 us what you saw, the violence out there and how people resolve
21 their disputes. They don't fight anymore; they resort to
22 shooting each other. Kids your age. I see too much of that.
23 There's a mother who lost her 34-year-old son in
24 front of her, saw her son get shot to death. I can't imagine
25 how that was.

1 **THE DEFENDANT:** I'm all she has, Your Honor.
2 **THE COURT:** I'm sorry?
3 **THE DEFENDANT:** I'm all she has. I'm all my mother
4 has left, Your Honor. I'm all she has left, Your Honor. She
5 doesn't have nothing else.
6 **THE COURT:** Ma'am, you're going to have to leave the
7 courtroom. Sorry.
8 **MS. MIRON:** Your Honor, she's upset because she lost
9 her son as well.
10 **THE COURT:** No, I understand. I mean, they've had a
11 lot of tragedy in their life, the whole family.
12 Hopefully, this sentence will instill hope, but
13 at the same time, I realize that to have hope, you have to want
14 to not just acknowledge your misbehavior, but also to
15 acknowledge what you need to do to correct that and get a
16 lifestyle that wouldn't have you in front of somebody like me
17 again.
18 **THE DEFENDANT:** Yes, sir.
19 **THE COURT:** In my opinion, the *Jeffries* case from the
20 Fifth Circuit is the most important case to me in terms of the
21 guidance that a sentencing judge has to consider in determining
22 whether or not a guideline enhancement is correct or not. And,
23 again, these guidelines are discretionary. I'm not bound to
24 pronounce a guideline sentence.
25 But *Jeffries* involved a single rock of crack

1 cocaine and a gun in the same vehicle that the crack cocaine
2 was in. This case involves five rocks of crack cocaine, a gun
3 that was in the direct possession of Mr. McCree while he was
4 trying to flee from police officers who he saw and he was
5 running away from to avoid arrest for a serious offense.
6 This wasn't a mere accident that the gun and the
7 drugs were together on his direct person. It wasn't an
8 accident that he fled the scene, attempted to discard the
9 loaded firearm that was in his possession with the five rocks
10 of crack cocaine.
11 From my reading of the Fifth Circuit cases, as
12 well as the *Jeffries* case, and even the one that's cited today
13 by counsel, this wasn't a mere accident, it wasn't
14 coincidental, it was all done to facilitate -- that gun
15 possession, it was all done to facilitate the possession of
16 those five rocks of crack cocaine, an activity that the
17 guideline enhancement has made applicable.
18 For those reasons, the defense objection to the
19 enhancement under the guideline calculations here as
20 recommended by Probation, the objection is overruled.
21 Regarding the request -- the alternative request
22 for a variance based upon Mr. McCree's personal history, his
23 characteristics, the nature and circumstances of the offense,
24 including his acceptance of responsibility of committing the
25 offense, as well as to reflect the seriousness of that offense,