APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 20-2860

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAYONTA MCCLINTON,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:18-cr-00252-TWP-MJD-1 — **Tanya Walton Pratt**, *Chief Judge*.

Argued October 25, 2021 — Decided January 12, 2022

Before EASTERBROOK, ROVNER, and WOOD, *Circuit Judges*.

ROVNER, *Circuit Judge*. In search of pharmaceutical drugs, Dayonta McClinton and five accomplices, Marvin Golden, Malik Perry, Larry Warren, Willonte Yates, and an unnamed getaway driver robbed a CVS pharmacy at around eight o'clock in the evening of October 13, 2015. The robbers pointed guns at customers, grabbed purses and wallets, and demanded their cell phones, which they stomped to prevent calls to police. But all did not go as planned. One customer fled, and although Yates chased after her, she escaped by jumping a fence and running to

a nearby restaurant. Yates returned and told the others to hurry up. He and Warren took money from the cash register, but the drugs proved harder to acquire than they had thought. One of the gang pointed a gun at a pharmacy technician and demanded drugs, but the technician informed him that the majority of the drugs that the crew wanted were kept in a time-delay safe. He did give one of the robbers one bottle of hydrocodone, which the pharmacy kept outside the safe pursuant to store policy for this exact purpose—to mollify robbers who might become agitated when the safe would not open. The policy turned out to be prescient. When the pharmacist entered the passcode and the safe would not open, the robbers became agitated, banging on the counter and knocking over a cabinet. To appease the robbers, the pharmacist additionally offered promethazine syrup and acetaminophen—both with codeine, neither of which were in the safe. Worried about time, the robbers left before the safe opened. Perry had possession of the few drugs that the robbers were able to acquire before leaving the pharmacy.

The team of robbers drove to an alley about ten minutes away to split the proceeds. McClinton and Perry began arguing over the disappointing haul when Perry declared "ain't nobody getting none," and exited the car with all of the drugs. McClinton followed Perry out of the car and shot him four times in the back, killing him. Golden, Warren, and Yates exited the car and ran away. The following day at a dice game, McClinton told another player, that the group had "hit a pharmacy" the night before, and that he shot Perry after they got into a dispute about splitting the proceeds.

After transfer to adult court (McClinton was three months away from his eighteenth birthday at the time of the robbery), a jury found McClinton guilty of robbing the CVS in violation of 18 U.S.C. § 1951(a); and brandishing a

firearm during the CVS robbery in violation of 18 U.S.C. § 924(c)(1)(A)(ii). The jury found him not guilty of the indicted crimes of robbery of Perry, in violation of 18 U.S.C. § 1951(a), and causing death while using a firearm during and in relation to the robbery of Perry, in violation of 18 U.S.C. § 924(j)(1). At sentencing, the district court concluded, using a preponderance of the evidence standard, that McClinton was responsible for Perry's murder. The district court judge therefore enhanced McClinton's offense level from 23 to 43, but also varied downward to account for McClinton's age and the sentences of his co-defendants, ultimately sentencing him to 228 months in prison.

McClinton asks us to consider two questions. First, whether the district court could consider conduct for which McClinton was acquitted for purposes of calculating his sentence. The second is whether McClinton's counsel was ineffective during his juvenile transfer proceeding.

A. The use of acquitted conduct in sentencing

The Supreme Court has held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *United States v. Watts*, 519 U.S. 148, 157 (1997). The holdings in this circuit have followed this precedent, as they must. *See, e.g.*, *United States v. Slone*, 990 F.3d 568, 572 (7th Cir. 2021), *cert. denied*, No. 20-8280, 2021 WL 4508213 (Oct. 4, 2021) (noting that "sentencing courts may consider acquitted conduct provided that its findings are supported by a preponderance of the evidence."). Despite this clear precedent, McClinton's contention is not frivolous. It preserves for Supreme Court review an argument that has garnered increasing support among many circuit court judges and Supreme Court Justices, who in dissenting and concurring

opinions, have questioned the fairness and constitutionality of allowing courts to factor acquitted conduct into sentencing calculations. *See, e.g.*, *Jones v. United States*, 574 U.S. 948, 949–50 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from the denial of cert.) (noting that it violates the Sixth Amendment when the conduct used to increase a defendant's penalty is found by a judge rather than by a jury beyond a reasonable doubt, and highlighting that this is particularly so when the facts leading to a substantively unreasonable sentence are ones for which a jury has acquitted the defendant); *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting) (allowing district judges "to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal."); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of the r'hrg en banc) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."). Many other circuit court judges have supported this position in dissenting and concurring opinions.

But despite the long list of dissents and concurrences on the matter, it is still the law in this circuit—as it must be given the Supreme Court's holding—that a sentencing court may consider conduct underlying the acquitted charge, so long as that conduct has been found by a preponderance of the evidence. *Watts*, 519 U.S. at 157. Until such time as the Supreme Court alters its holding, we must follow its precedent. *Cross v. United States*, 892 F.3d 288, 303 (7th Cir. 2018) ("As a lower court, we are required to follow the Court's precedents until the Court itself tells us otherwise."). McClinton's counsel advocated

thoroughly by preserving this issue for Supreme Court review.

In applying this precedent to the case before us, we may review for clear error only the district court's factual findings that Perry's murder was relevant conduct. *United States v. Vaughn*, 585 F.3d 1024, 1031 (7th Cir. 2009). The United States Sentencing Guidelines define relevant conduct as:

> (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—
>
> (i) within the scope of the jointly undertaken criminal activity,
>
> (ii) in furtherance of that criminal activity, and
>
> (iii) reasonably foreseeable in connection with that criminal activity; that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

U.S.S.G. 1B1.3. The distribution of proceeds of a robbery is undoubtedly an act that occurs in furtherance of that robbery. *See, e.g.*, *United States v. Hargrove*, 508 F.3d 445, 449 (7th Cir. 2007) (conversations about getting a cut of the proceeds indicated that defendant was still part of the conspiracy); *United States v. Gajo*, 290 F.3d 922, 928 (7th Cir. 2002) (explaining that the conspiracy continues as the co-conspirators acquire the proceeds); *United*

States v. Morgan, 748 F.3d 1024, 1036–37 (10th Cir. 2014) ("It is well settled that the distribution of the proceeds of a conspiracy is an act occurring during the pendency of the conspiracy.").

In this case Perry's murder clearly occurred in the course of the planned robbery. Dividing up the proceeds of the robbery was part and parcel of the plan to obtain cash and drugs for the perpetrators. The fact that, in order to avoid detection, the group traveled a safe distance away from the CVS and waited a few minutes to divvy up the drugs and cash, does not sever its connection to the crime. It was Perry's announcement that he intended to keep the stolen drugs for himself that drew McClinton's ire. And it was owing to the prior decision of McClinton, Perry, and others to arm themselves for the robbery that ensured McClinton had a firearm at the ready to settle the dispute by shooting Perry. There is no doubt that under Watts, the murder was relevant conduct that could be used to calculate McClinton's sentence.

B. Ineffective assistance of counsel

McClinton also claims that the lawyer who represented him during the juvenile transfer proceeding was ineffective for failing to appeal the juvenile court order transferring the matter to adult court. In fact, McClinton is so adamant about bringing this claim before the court now that he moved to file his own pro se supplementary brief on the matter, in addition to his lawyer's brief. At oral argument, with some prompting from the panel, McClinton's lawyer withdrew McClinton's ineffective assistance of counsel claim. We take just a moment to explain why this was the most effective advocacy she could provide to her client.

Having this matter aired before a court is clearly important to McClinton. We can assume, therefore, that he wishes to have the claim heard by a court where it has a chance for success. That is not this court, at this time.

The appeal here is a direct appeal from the district court's judgment finding McClinton guilty of robbery and brandishing a firearm in relation to a crime of violence. Our review is limited to the factual record developed in the district court below, which does not include evidence concerning his prior counsel's advice and decision making concerning the transfer order. A defendant does not have the opportunity on appeal to present evidence outside of the record about the ways in which his lawyer below may have been ineffective. Instead, the United States Code creates an opportunity for a secondary or collateral proceeding where the defendant can develop and present to the court all of this evidence, even deposing his own lawyer as a witness. 28 U.S.C. § 2255; *Massaro v. United States*, 538 U.S. 500, 504–09 (2003). For this reason, anyone who raises a claim of ineffective assistance of counsel on direct review, as McClinton initially did, is doomed to fail. *See Delatorre v. United States*, 847 F.3d 837, 844 (7th Cir. 2017).

During oral argument, McClinton's lawyer dutifully reported to this court that, despite her warning to her client, McClinton was adamant about raising the ineffectiveness claim in the direct appeal. But a defendant only gets one chance to raise a claim of ineffective assistance of counsel. And once he raises the claim and loses, he can never raise it again. *United States v. Flores*, 739 F.3d 337, 341 (7th Cir. 2014).

As we have warned defendants and their lawyers time and time again, claims of ineffective assistance of counsel are "'invariably doomed' on direct review because they often require augmentation of the record with extrinsic evidence, which cannot be considered." *Delatorre*, 847 F.3d at 844 (7th Cir. 2017) (citing *United States v. Gilliam*, 255 F.3d 428, 437 (7th Cir. 2001)). We have even noted that this court has never reversed a conviction on direct appeal because of ineffective

assistance of counsel. *United States v. Trevino*, 60 F.3d 333, 339 (7th Cir. 1995). As far as we can tell, that statistic remains true today. *See United States v. Morgan*, 929 F.3d 411, 433 (7th Cir. 2019). We have documented our concerns and warnings repeatedly. *See United States v. Harris*, 394 F.3d 543, 557 (7th Cir. 2005) (compiling cases with warnings against pursuing ineffective assistance claims during direct appeal). *See also Massaro*, 538 U.S. at 506.

At the end of the day, counsel's duty to vigorously defend her client in an effective manner means that she should not make a claim that she knows has zero chance of success, when she knows that reserving such a claim for a collateral proceeding is the only means of preserving whatever chance of success on the merits that the claim might have. Some aspects of the trial and decision-making are completely within the province of the client—"notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). Trial management, tactical and strategic decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence" are all within the lawyer's province. *Id.* (citing *Gonzalez v. United States*, 553 U.S. 242, 248 (2008)). In this case, McClinton's counsel chose the only competent strategy by withdrawing the claim of ineffective assistance, thus preserving the claim for a later proceeding under 28 U.S.C. § 2255. For this reason, McClinton's pro se motion for leave to file a pro se supplemental brief is DENIED as moot. The judgment of the district court is AFFIRMED in all other respects.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
	Case Number:
v.	1:18CR00252-001
	USM Number: 15743-028
DAYONTA MCCLINTON	Jeffrey A. Baldwin
	Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s)_ which was accepted by the court.

☒ was found guilty on count(s) 1 and 2 after a plea of not guilty.

The defendant is adjudicated guilty of these offense(s):

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18§1951(a)	Interference with Commerce by Robbery	10/13/2015	1
18§924(c)(1)(A)(ii)	Brandishing a Firearm During and in Relation to a Crime of Violence	10/13/2015	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 3 and 4.

☐ Count(s) are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material change in the defendant's economic circumstances.

September 22, 2020
Date of Imposition of Sentence:

/s/ Tanya Walton Pratt
Hon. Tanya Walton Pratt, Judge
United States District Court
Southern District of Indiana

Date: 9/23/2020

A CERTIFIED TRUE COPY
Roger A.G. Sharpe, Clerk
U.S. District Court
Southern District of Indiana
By /s/
Deputy Clerk

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **144 months on Count 1 and 84 months on Count 2, to be served consecutively, for a total of 228 months.**

☒ The court makes the following recommendations to the Bureau of Prisons:

Placement at USP Big Sandy. Participation in continuing education and Prison Industries.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years on each of Counts 1 and 2, to be served concurrently.**

MANDATORY CONDITIONS

1. You shall not commit another federal, state, or local crime.
2. You shall not unlawfully possess a controlled substance.
3. You shall refrain from any unlawful use of a controlled substance. You shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. ☒ You shall make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*

5. ☒ You shall cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

6. ☐ You shall comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

7. ☐ You shall participate in an approved program for domestic violence. *(check if applicable)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the conditions listed below.

CONDITIONS OF SUPERVISION

1. You shall report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from the custody of the Bureau of Prisons.
2. You shall report to the probation officer in a manner and frequency directed by the court or probation officer.
3. You shall permit a probation officer to visit you at a reasonable time at home or another place where the officer may legitimately enter by right or consent, and shall permit confiscation of any contraband observed in plain view of the probation officer.
4. You shall not knowingly leave the federal judicial district where you are being supervised without the permission of the supervising court/probation officer.
5. You shall answer truthfully the inquiries by the probation officer, subject to your 5th Amendment privilege.
6. You shall not meet, communicate, or otherwise interact with a person you know to be engaged, or planning to be engaged, in criminal activity.

You shall report any contact with persons you know to be convicted felons to your probation officer within 72 hours of the contact.

7. You shall reside at a location approved by the probation officer and shall notify the probation officer at least 72 hours prior to any planned change in place or circumstances of residence or employment (including, but not limited to, changes in who lives there, job positions, job responsibilities). When prior notification is not possible, you shall notify the probation officer within 72 hours of the change.
8. You shall not own, possess, or have access to a firearm, ammunition, destructive device or dangerous weapon.
9. You shall notify the probation officer within 72 hours of being arrested, charged, or questioned by a law enforcement officer.
10. You shall maintain lawful full time employment, unless excused by the probation officer for schooling, vocational training, or other reasons that prevent lawful employment.
11. You shall make a good faith effort to follow instructions of the probation officer necessary to ensure compliance with the conditions of supervision.
12. You shall not use or possess any controlled substances prohibited by applicable state or federal law, unless authorized to do so by a valid prescription from a licensed medical practitioner. You shall follow the prescription instructions regarding frequency and dosage.
13. You shall submit to substance abuse testing to determine if you have used a prohibited

substance or to determine compliance with substance abuse treatment. Testing may include no more than 8 drug tests per month. You shall not attempt to obstruct or tamper with the testing methods.

14. You shall provide the probation officer access to any requested financial information and shall authorize the release of that information to the U.S. Attorney's Office for use in connection with the collection of any outstanding fines and/or restitution.

15. You shall submit to the search by the probation officer of your person, vehicle, office/business, residence, and property, including any computer systems and hardware or software systems, electronic devices, telephones, and Internet-enabled devices, including the data contained in any such items, whenever the probation officer has a reasonable suspicion that a violation of a condition of supervision or other unlawful conduct may have occurred or be underway involving you and that the area(s) to be searched may contain evidence of such violation or conduct. Other law enforcement may assist as necessary. You shall submit to the seizure of contraband found by the probation officer. You shall warn other occupants these locations may be subject to searches.

I understand that I and/or the probation officer may petition the Court to modify these conditions, and the final decision to modify these terms lies with the Court. If I believe these conditions are being enforced unreasonably, I may petition the Court for relief or clarification; however, I must comply with the directions of my

probation officer unless or until the Court directs otherwise. Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the condition of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

Defendant	Date
U.S. Probation Officer/ Designated Witness	Date

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

TOTALS

Assessment	Restitution	Fine	AVAA* Assessment	JVTA** Assessment
$200.00	$68.00	$1,000.00		

☐ The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

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* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Loss**[***]	**Restitution Ordered**	**Priority or Percentage**
CVS Pharmacy	$68.00	$68.00	1
TOTALS	$68.00	$68.00	

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[***] Findings for the total amount of losses are required under Chapters 109A, 110, 110A. and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☒ the interest requirement is waived for the ☒ fine ☒ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☒ F or ☒ G below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $_____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $_____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ If this case involves other defendants, each may be held jointly and severally liable for

payment of all or part of the restitution ordered herein and the Court may order such payment in the future. The victims' recovery is limited to the amount of loss, and the defendant's liability for restitution ceases if and when the victims receive full restitution.

G ☒ Special instructions regarding the payment of criminal monetary penalties:

Any unpaid restitution balance during the term of supervision shall be paid at a rate of not less than 10% of the defendant's gross monthly income.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee
Larry Warren – 1:17CR00093-001	$68.00	$68.00	CVS Pharmacy
M.G. – 1:17CR00097-001	$68.00	$68.00	CVS Pharmacy

☐ The defendant shall pay the cost of prosecution.
☐ The defendant shall pay the following court cost(s):

_____
☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX C

FILED
AUG 14 2018
U.S. CLERK'S OFFICE
INDIANAPOLIS, INDIANA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
V.	)	CAUSE NO.
DAYONTA MCCLINTON,	)	1:18-cr-0252TWP-MJD
Defendant.	)	

INDICTMENT

COUNT 1

18 U.S.C. § 195l(a)
(Interference with Commerce by Robbery)

At all times material to this Indictment, the CVS Pharmacy located at 6290 North College Avenue, in Indianapolis, Marion County, Indiana, was engaged in the operation of a pharmacy open to the public in interstate commerce and in an industry that affects interstate commerce.

On October 13, 2015, in the Southern District of Indiana, Indianapolis Division, DAYONTA MCCLINTON, the defendant herein, did unlawfully obstruct, delay, and affect, and attempt to obstruct, delay, and affect commerce and the movement of articles and commodities in such commerce by means of robbery, in that the defendant, DAYONTA MCCLINTON, did unlawfully take and obtain money and property from the person of, or in the presence of, an employee of the CVS Pharmacy against his will by means of actual and threatened force, violence, and fear of injury to his person, that is, by brandishing a firearm, and by taking controlled substances from the employees of CVS Pharmacy.

All in violation of Title 18, United States Code, Section 1951(a) and Section 2.

COUNT 2

18 U.S.C. § 924(c)(1)(A)(ii)
(Using a Firearm During and in Relation To a Crime of Violence)

On or about October 13, 2015, in the Southern District of Indiana, Indianapolis Division, DAYONTA MCCLINTON, the defendant herein, did knowingly carry, use, and brandish a firearm during and in relation to a crime of violence, to wit: the robbery of the CVS Pharmacy located at 6290 North College Avenue, in Indianapolis, Marion County, Indiana, charged in Count One of the Indictment.

All in violation of Title 18, United States Code, Section 924(c)(1)(A)(ii) and Section 2.

COUNT 3

18 U.S.C. § 1951(a)
(Interference with Commerce by Robbery)

On or about October 13, 2015, within the Southern District of Indiana, Indianapolis Division, DAYONTA MCCLINTON did unlawfully obstruct, delay, and affect commerce and the movement of articles and commodities in such commerce, by means of robbery, in that DAYONTA MCCLINTON did unlawfully take or obtain personal property, that is, controlled substances that constituted the proceeds of a Hobbs Act Robbery, from an individual, Malik Perry, without his consent, induced by wrongful use of actual and threatened force, violence or fear.

All in violation of Title 18, United States Code, Section 1951(a) and Section 2.

COUNT 4

18 U.S.C. § 924(j)(1)
(Using a Firearm During and in Relation To a Crime of Violence Causing Death)

On or about October 13, 2015 in the Southern District of Indiana, Indianapolis Division, DAYONTA MCCLINTON, the defendant herein, did knowingly carry, use and discharge a firearm during and in relation to a crime of violence to wit: the robbery of Malik Perry in Indianapolis, Marion County, Indiana charged in Count Three of the Indictment. It is further alleged that the discharge of the firearm caused the death of a person and constituted the crime of murder.

All in violation of Title 18, United States Code Section 924(j)(1) and Section 2.

A TRUE BILL:
[REDACTED]
FOREPERSON

JOSH J. MINKLER
United States Attorney

By: _____
Peter A. Blackett
Assistant United States Attorney

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	1:18-cr-00252-TWP-MJD
DAYONTA McCLINTON,	)	
	)	
Defendant.	)	

VERDICT

Count 1: Interference with Commerce by Robbery

With respect to the charge of Interference with Commerce by Robbery, in violation of Title 18, United States Code Section 1951(a), as described in Count 1 of the Indictment, we the jury, unanimously find the Defendant, Dayonta McClinton, as follows *[check one]*:

Guilty ___√___ Not Guilty _____

9/11/19 [Redacted]

DATE FOREPERSON

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	1:18-cr-00252-TWP-MJD
DAYONTA McCLINTON,	)	
	)	
Defendant.	)	

VERDICT

Count 2: Using a Firearm During and in Relation to a Crime of Violence

With respect to the charge of Using a Firearm in Furtherance of a Crime of Violence, in violation of Title 18, United States Code Section 924(c)(1)(A)(ii), as described in Count 2 of the Indictment, we the jury, unanimously find the Defendant, Dayonta McClinton, as follows *[check one]*:

Guilty ___√___ Not Guilty _____

With respect to whether the Defendant, Dayonta McClinton, brandished the firearm charged in Count 2, we, the jury, unanimously find the Defendant, Dayonta McClinton, as follows */check one]*:

Brandished ___√___ Did Not Brandish_____

9/11/19 [Redacted]
DATE FOREPERSON

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	1:18-cr-00252-TWP-MJD
DAYONTA McCLINTON,	)	
	)	
Defendant.	)	

VERDICT

Count 3: Interference with Commerce by Robbery

With respect to the charge of Interference with Commerce by Robbery, in violation of Title 18, United States Code Section 1951(a), as described in Count 3 of the Indictment, we the jury, unanimously find the Defendant, Dayonta McClinton, as follows *[check one]*:

Guilty _____ Not Guilty ___√___

9/11/19 [Redacted]

DATE FOREPERSON

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	1:18-cr-00252-TWP-MJD
DAYONTA McCLINTON,	)	
	)	
Defendant.	)	

VERDICT

Count 4: Using a Firearm During and in Relation to a Crime of Violence Causing Death

With respect to the charge of Using a Firearm During and in Relation to a Crime of Violence Causing Death in violation of Title 18, United States Code Section 924(j)(1), as described in Count 4 of the Indictment, we the jury, unanimously find the Defendant, Dayonta McClinton, as follows *[check one]*:

Guilty _____ Not Guilty ___√___

9/11/19 [Redacted]

DATE FOREPERSON

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	) Cause No.
	) 1:18-cr-0252-TWP-MJD-01
Plaintiff,	) Indianapolis, Indiana
	) **September 22, 2020**
vs.	) 1:59 p.m.
	)
DAYONTA McCLINTON,	)
	)
Defendant.	)

Before the Honorable
TANYA WALTON PRATT

OFFICIAL REPORTER'S TRANSCRIPT OF SENTENCING

For Plaintiff:

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[3] (In open court.)

THE COURT: Good afternoon. We are on the record. This is the United States of America versus Dayonta McClinton, our case number is 1:18-cr-252, and we are here this afternoon for a sentencing hearing.

* * * *

THE COURT: * * * When we were last in court, lawyers, Mr. McClinton was found guilty, following a trial by jury, of Count 1, interference with commerce by robbery; and, Count 2, brandishing a firearm during and in relation to a crime of violence. And it's the Court's understanding that everyone is [4] prepared for sentencing.

* * * *

THE COURT: Has the government had an opportunity to review the Presentence Investigation Report that was prepared by the Probation Office?

MR. BLACKETT: We have, Your Honor.

THE COURT: And does the government have any objections or corrections to that report?

MR. BLACKETT: We have no objections and no [5] corrections, Your Honor.

THE COURT:

Thank you. Mr. Baldwin, have you and your client had an opportunity to review the Presentence Investigation Report?

MR. BALDWIN: Yes, Your Honor.

THE COURT: And, Counsel, you do have objections?

MR. BALDWIN: Yes, Judge.

THE COURT: Okay. That would be to paragraphs 23, 28, 31, and 73. And these are the paragraphs that address the increase of the base offense level to 43 for the death of Malik Perry. So the Court has read the parties' sentencing

memorandums. And I know you didn't prepare the memorandum on behalf of your client, that was his prior counsel, Mr. Baldwin. And the defendant also filed his own sentencing memorandum, which the Court has also reviewed. That's at docket 199. And there's one at 201 that was prepared by, I think, Mr. Moudy. So you may proceed, Mr. Baldwin. Did you want to add anything to the filings?

MR. BALDWIN: Judge, only that we would also object to the factual assertions in paragraphs 17 and 18. That would have to do with the death of Malik Perry, as well.

THE COURT: Okay. Hold on one second. 17. The paragraph that they received the -- that IMPD got the call about --

[6] MR. BALDWIN: That would --

THE COURT: -- multiple gunshots?

MR. BALDWIN: With respect to the conclusions as to Mr. Perry's death.

THE COURT: Okay. Well, all that says is that they got the call and then the person observed the body in the alley.

MR. BALDWIN: Paragraph 18 says that Mr. McClinton shot Mr. Perry.

THE COURT: Okay. You don't object to 17, you object to 18?

MR. BALDWIN: True.

THE COURT: Okay. All right. Well, Government, you do have the burden, so do you want to make an argument or present any evidence?

MR. BLACKETT: Your Honor, the United States sticks by its argument that it made in its sentencing memorandum. We are in agreement with Probation, specifically that we believe that, based on the United

States Sentencing Guidelines 1B1.3(a), that the death of Malik Perry constitutes relevant conduct. It would be the Court -- the Court would be the -- it would decide whether we have established that by a preponderance of the evidence.

Obviously, we presented all that evidence during the trial. We believe that, by a preponderance of the evidence, [7] that that was proven, and that we would ask that the Court find that the death of Malik Perry was relevant conduct in this case and that Mr. McClinton's base offense level be a 43.

THE COURT: Okay.

MR. BLACKETT: And, again, we would stand by the arguments that we made in our sentencing memorandum.

THE COURT: All right. I have a question for you.

MR. BLACKETT: Yes, Your Honor.

THE COURT: Look at Guidelines Section 1B1.3(a), relevant conduct. And that's where it says relevant conduct is defined as, "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant.

"In the case of a jointly undertaken criminal activity," which this was, "by the defendant in concert with others," and, "whether or not charged as a conspiracy, all acts and omissions of others that were within the scope of the jointly undertaken criminal activity." And then my question is, it next states that the Court would have to make a finding -- let me get that paragraph.

Excuse me. Let me find it.

(1)(B)(3). The Court would have to make a finding -- I'm sorry. Let me find it.

Okay. "That the acts and omissions of others are: (i), within the scope of the jointly undertaken criminal [8] activity; (ii), in furtherance of that criminal activity; and, (iii), reasonably foreseeable in connection with that criminal activity; that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."

So under what theory does the government believe the Court can apply the relevant conduct enhancement?

MR. BLACKETT: Your Honor, it is our theory that, obviously, this occurred just minutes after the robbery took place, while they were arguing over the proceeds from the robbery, before they had essentially gotten all the way away, while they're still arguing over the proceeds. It is our -- it is our argument that that is still within the scope of the robbery, that within a few minutes, the individuals, Mr. Perry and Mr. McClinton, are arguing over the proceeds, so therefore, were still within the scope of the robbery.

It's in furtherance of a robbery, it's actually what has been stolen in the robbery, and that when you have guns and you're doing something like a robbery, it is reasonably foreseeable that someone could get hurt. So that is our argument for why we believe that this is relevant conduct. Again, we would ask the Court to find, by a preponderance of the evidence, a base offense level of 43, Your Honor.

THE COURT: Okay.

[9] MR. BLACKETT: Thank you.

THE COURT: All right. Do you have anything else to add, Mr. Baldwin?

MR. BALDWIN: Judge, I do have argument on that point, obviously.

THE COURT: Go ahead.

MR. BALDWIN: Go ahead?

THE COURT: Yes. On whether or not I should apply the enhancement.

MR. BALDWIN: Because you pointed out exactly what I was going to point out, in that Section 1B1.3(a)(1) sets out the general situations which conduct can be considered relevant:

It's either conduct that occurs during commission of the offense. That's not the case here, Judge. They were well away from the CVS robbery, which is Count 1, which is the offense that he was actively convicted of;

Conduct that occurs in preparation of an offense. That's not the case here. This is after the fact;

And conduct that occurs in the course of attempting to avoid detection or responsibility to the offense. And, Judge, that all actually comes from the case of *Jones* that is cited in the government's sentencing memorandum.

THE COURT: Uh-huh.

MR. BALDWIN: In that particular instance, I can [10] distinguish, because in that one Jones was convicted of possession of a firearm, but while he was out with the firearm, he committed a robbery where there was a death, and he was -- they gave him the enhancement there. But he also, in that case, unlike this one where we have a jury verdict acquitting Mr. McClinton, in that case he admitted to having the gun and being present during the robbery. So that was in possession during the occurrence of the robbery.

The other cases, the government has cited to you in an attempt to basically get a second bite at the apple since they were unsuccessful at trial and Mr. McClinton was acquitted, at punishing him for what they believe was his conduct.

The other cases do not support that either. For instance, the *Kroledge* case, where they cited in their brief for relevant conduct, that was -- they were acquitted of arson, but it occurred during the time that they were doing the wire fraud. And in that case, the Court also distinguished the penalties as being if they had been convicted of the arson, it was a minimum of five years, and they actually were only sentenced to 27 or 33 months.

In *Valenti*, I don't understand why that one is even cited. It's a tax evasion case, and that was relevant conduct, was for conduct that occurred outside the statute of limitations, not that he was acquitted of or not charged.

[11] *Edwards* was a drug case where they cited *Whitt v. United States*, where guidelines the judge alone determines which drug was distributed and what quantity. In that case, the appeal was on the basis that there was no specified jury verdict.

Watson, we're getting a little closer. That was the robbery of an armed truck. But, however, in that case, the appeal and the decision was based on whether they could give him a reckless endangerment enhancement versus enhancement for the assault that he was acquitted of. But in that case, the Court said, first of all, the assault charge and the reckless endangerment enhancement were not substantively equivalent. And, in fact, the reckless endangerment enhancement was for a high-speed chase in a vehicle, not for the assault that he was acquitted of. So that one wasn't even a case where the relevant conduct was the acquitted charge.

Garcia Ortiz, there was no acquittal in that one, so we're not talking about something that wasn't proven to the jury or -- by a preponderance of the evidence.

Salyers was a destructive device case. The only appeal in that case was whether an expert who testified that this was a destructive device was qualified to do it, and that was the only enhancement in that one. There was no acquitted conduct or relevant conduct that was outside the scope of the charges. And then the Jones case we already discussed.

[12] So, Judge, we do believe that the enhancement or the relevant conduct findings should not be made in this case. He was acquitted of Counts 3 and 4. They are not in the -- covered by the guidelines of what is relevant conduct in that it's not in preparation of, during the commission of, or in avoiding detection.

Additionally, Judge, for -- to take the government's argument, one, you'd one have to, one, find that it was a murder. And that means you have to rule out manslaughter, which was never presented to the jury. And even by their own evidence, there was an argument going on, if you want to accept that, so that wouldn't make it a murder.

Additionally, Judge, we're going back to where the due process under the Sixth Amendment or the Fifth Amendment requires that a sentence be imposed on that which the defendant has either admitted or been found guilty of. If we accept the government's argument and sentence under relevant conduct for an offense that he was acquitted of, we're going back to the days when the guidelines were

mandatory, and it's the tail wagging the dog instead of the other way around.

In this particular instance, we're talking about a sentence that would triple his sentence for conduct that he was acquitted of. It would also create a disparity in that the co-defendants who were sentenced would also, under the government's theory, would be just as responsible for the [13] relevant conduct if this is during the commission of the robbery that they were convicted of. And the government is asking for a sentence two or three times longer than Mr. Warren's and -- well, Mr. Yates, another -- that would be five times as long.

So, Judge, we believe the Court is correct that the relevant conduct is not established in this case and the Court should not sentence based on that relevant -- what the government has called relevant conduct.

THE COURT: Okay.

MR. BLACKETT: Just very briefly, Your Honor. I would note, Mr. Baldwin was making differences between certain cases. The cases -- a lot of the cases that he just cited were specifically linked for the issue that a court has the opportunity to find something to be relevant conduct even if the charges are dismissed.

So he's comparing like wire fraud cases, but that -- those -- that case law was specifically after the quote that said it may include crimes where charges have been dismissed. That wasn't -- those fights weren't for the purposes of comparing this circumstance to those, other than to say the Court has within its power the ability to find relevant conduct for even charges that have been dismissed or not formerly charged in an indictment.

I will point out, again, where this really boils [14] down to is, it's the government's position that they were still in the course of this robbery, that they were driving away from the robbery, that they were hiding in an alley,

that an argument broke out, and that's when the killing of Malik Perry happened. That's the government's position.

While he's pointing out Mr. Yates, Mr. Yates testified in this case, and as the Court is well aware of, you know, he got consideration for the fact that he cooperated and testified in this case. So it's the government's position that this is relevant conduct. We, again, we would ask the Court to find that it's relevant conduct.

THE COURT: What about his argument about the murder? Because A -- 2A1.1 says the guideline for 43 applies in cases of premeditated killing. "This guideline also applies when death results from the commission of certain felonies. For example, this guideline may be applied as a result of a cross reference, in other words, kidnapping in which death occurs...or in cases in which the offense level of a guideline is calculated using the underlying crime." And then it says, "In other words, murder in aid of racketeering."

So do you think we have -- to get to level 43, that this was an intentional killing?

MR. BLACKETT: Your Honor, I believe so. If the Court remembers, going back to when the pathologist testified, Mr. Perry's -- the gunshot wound was in the back of the head, [15] so that was the -- the entry wound was in the back. He was -- it's clear, from the testimony, he was --

THE COURT: Fleeing --

MR. BLACKETT: -- trying to walk away and he got shot in the back of the head. That's the entry point. So that's why the government believes, again, that it's an intentional murder, and that's why we're making the argument we are, Your Honor.

THE COURT: Okay. All right, anything further, Mr. Baldwin, before I make a ruling?

MR. BALDWIN: No, Your Honor.

THE COURT: Okay. All right, the Court is going to overrule the objection. The goal of including relevant conduct in sentencing is to allow the Court to reflect in its sentence the actual seriousness of an offense instead of strictly limiting it to charges in the indictment. And this language is from *U.S. v. Ritsema*, 31 F.3d 559, 565, Seventh Circuit, 1994.

Thus, the relevant conduct provision directs a court to sentence a defendant for uncharged conduct germane to the offense -- charged offense by authorizing it to consider events before, during, and after the offense conduct. And that language is from the *Jones* case that both parties have referred to, citing to the *Ritsema* case.

[16] Relevant conduct may include crimes where the charges have been dismissed and for crimes for which the defendant has been acquitted. That is from the *Kroledge* case at 201 F.3d 900, 908, Seventh Circuit, 2000.

A co-conspirator who is killed during the offense can be considered a victim for purposes of applying the cross-reference that we're -- that the government is asking the Court to apply. And that is *U.S. v. Garcia Ortiz*, 528 F.3d 74, which is a 2008 case from the First Circuit.

The government has argued that, regardless of who actually killed Malik Perry, his murder constitutes relevant conduct for the robbery of the CVS based on both the timing and the motive.

The evidence at trial is that on October 13th of 2015 at approximately 7:52 p.m., a forced armed takeover/robbery of the CVS Pharmacy at 62nd and College Avenue here in Indianapolis occurred. The video is very dramatic and frightening as five hooded

individuals with firearms pointed -- they rushed into the drugstore.

The robbery was committed by Mr. McClinton, [M.G.], Willonte Yates, Malik Perry, and Larry Warren. Yates testified to the identities of the five robbers, and there's also a video of the robbery. Some of the other robbers have pled guilty and admitted who the participants were.

The victims, the store patrons and the employees, [17] confirmed Yates' testimony, that all five robbers rushed into the store, they were all armed with handguns. The robbers demanded everyone lie on the floor face down. The defendant is identified by Mr. Yates in the video as demanding a customer's cell phone and stomping on it.

Another customer, Ms. Massey, runs out of the CVS during the robbery, and Mr. McClinton and Yates terrified this woman and chased after her, but she was able to jump a fence or go behind a fence and allude the robbers. Yates and McClinton then returned inside the store and continued to aid and assist in the robbery.

The pharmacy employees, those are victims Warney and Wheaton, they testified that at gunpoint they were ordered to enter the combination into the safe where the drugs were kept. The robbers were frustrated because there was a time delay on the safe. Mr. Wheaton handed Mr. Perry a bottle of hydrocodone in an attempt to satisfy the robbers while they waited. Mr. Warren -- Warney also showed the robbers the location of the codeine syrup. Perry and [M.G.] took some items that were not controlled substances. I believe they took an acid reflux medication as well as a bottle of oxybutynin, which is a bladder pill.

As the robbers were still waiting to open the safe, they made the decision that they should leave. All five robbers leave the pharmacy at approximately 7:55 p.m. The [18] evidence is that as the robbers left the store, Malik Perry can be seen in the video as the person carrying the bag of stolen drugs as they run out of the pharmacy. All of the victims testified and described being in fear during the course of this chaotic and traumatizing robbery.

The evidence is that after the robbery, as they were leaving the drugstore, the five robbers went to 41st and Byram to split the drugs, to split up the booty. Because the safe didn't open, they did not get a substantial amount of drugs.

Mr. Yates testified that once they parked, Yayo and Mook, that would be Mr. Perry and Mr. McClinton, were arguing that they didn't get enough, and then Perry states, "Ain't nobody getting none." He exits the car. McClinton follows Perry out of the vehicle and, according to Mr. Yates, McClinton shoots Perry in the head, the back of the head, and then shoots him three to four more times while he's on the ground, which would be an intentional murder. The murder occurs approximately nine minutes after the CVS robbery.

Clevon Williams testified that the next day at a dice game, Mr. McClinton admitted to him that he shot Perry. There's also testimony that McClinton traded the firearm that was used to kill Mr. Perry for a handgun with a camouflage pattern, and Mr. McClinton was found to be in possession of the camouflage pattern handgun during a traffic stop three days after the robbery.

[19] The jury found that the government had proved -- had not proven, beyond a reasonable doubt, that Mr. McClinton used a firearm in the course of robbing Perry of the drugs and that the firearm caused Mr. Perry's

death, so Mr. McClinton was acquitted under Counts 3 and 4. I think it's important that those counts were the robbery of Malik Perry and causing Mr. Perry's death in relation to the robbery of Malik Perry. So I don't think it would be inconsistent. The jury definitely believed that Mr. McClinton participated in the robbery and that he was one of the five robbers in the car.

It could be their belief, and we can't invade the province of the jury, that Mr. Perry -- I'm sorry, that Mr. McClinton did not attempt to rob Mr. Perry, that he just shot him. And that would have been a homicide, which he was not charged with. So I don't think there's any conflict in the jury's verdict.

So the Court is going to find that the government has -- the government, of course, has the burden to establish relevant conduct by a preponderance of the evidence, and the government argues the murder of Malik Perry is relevant conduct to the CVS robbery, regardless of who killed Mr. Perry. The government argues that even if the Court were to find that the government had not met its burden by a preponderance of the evidence, and McClinton actually killed Perry, Perry was still killed during the course of the [20] robbery, which Mr. McClinton participated in.

The government notes that under Title 18 U.S.C., Section 2, whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as the principal. Therefore, Mr. McClinton's relevant conduct as a member of the conspiracy includes the murder of Malik Perry.

The Court does recognize that the jury acquitted Mr. McClinton of the counts related to the death of

Mr. Perry and the robbery of Mr. Perry. Again, in determining relevant conduct, the jury finding was beyond a reasonable doubt, but the government's burden in today's hearing, in a sentencing hearing, is by a preponderance of the evidence, not beyond a reasonable doubt.

The cross-reference at Guidelines Section 2B3.1(c) applies if a victim was killed under circumstances that would constitute murder under Title 18 United States Code, Section 111. The Court does find that the murder of Malik Perry constitutes relevant conduct for the robbery committed by this defendant.

The Guidelines Section 1B1.3(a), as we talked about earlier, relevant conduct is defined as: A, all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and, B, in the case of a jointly undertaken criminal activity, [21] which this was, regardless of whether it was charged as a conspiracy, all acts and omissions of the others that were, one, involved in the scope of the jointly undertaken criminal activity; two, in furtherance of the criminal activity; and, three, reasonably foreseeable in connection with their criminal activity.

The Court finds that those apply, that that occurred during the commission of the offense of conviction, in preparation for the offense, or in the course of attempting to avoid detection and responsibility of the offense. The Court agrees with the government that this relevant conduct occurred in the course of attempting to avoid detection or responsibility for the offense, and that's because of the close proximity following the robbery of the CVS, while they were leaving the CVS, and before the parties went their separate ways. So they were still -- the

conduct was still taking place in -- at the end of the robbery.

So, again, the jury acquitted Mr. McClinton of robbery of Malik Perry and causing Perry's death in relation to the robbery of Malik Perry. The jury did not consider a charge of murder of the homicide of Mr. Perry. So, for those reasons, the Court is going to overrule the objection.

Did you have any other objections or corrections, Mr. Baldwin?

MR. BALDWIN: To the Presentence, no, Your Honor.

[22] THE COURT: Okay. All right, the Court is going to accept the Presentence Investigation Report for the record under seal. In the event of appeal, counsel on appeal will have access to the report, but not the recommend portion, which shall remain confidential.

Pursuant to the guidelines, the base offense level will be level 43, and that's because of the cross-reference at 2B3.1(c). If a victim was killed under circumstances that would constitute murder under 18 U.S.C. Section 111, then Guidelines Section 2A1.1 applies, and that's how we get the base offense level of 43.

There are no specific offense characteristics, and the adjusted offense level is level 43. The total offense level is level 43. There's been no acceptance of responsibility. * * * *

[28] MR. BALDWIN: * * * As the Court noted, Judge, you have -- the guidelines are advisory, so you're right. I mean, I understand the Court's finding of the relevant conduct. However, the Court still has to fashion a sentence that is sufficient, but not greater

than necessary, regardless of what the guidelines suggest.

[29] I think it's -- an interesting note that the Court should note is that Mr. McClinton's conduct that brought him before this Court was when he was 17. As the Court is well aware, there's a whole list of Supreme Court decisions -- with *Roper*, *Graham*, all of them -- that acknowledge the difference between an adult and a juvenile in their decision-making, in their maturity, and their culpability for their actions.

We believe that there is hope for Mr. McClinton, that he does not need to simply be locked away and stashed for years upon years upon years. His letter, I think, certainly shows that he does have potential.

I would also note that the driving force in this sentence is not what he's been convicted of, actually. It's the relevant conduct. I thought it was interesting in a different *Jones*, not the same one that was cited by the government, but in a different *Jones* decision that went before the United States Supreme Court, where, in review of a denial of cert, Justice Scalia wrote, because of the relevant conduct and the driving force of what was going to be denied -- driving that sentence, he wrote, "It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable -- thereby exposing the defendant to the longer sentence -- is an element that must be either admitted by the defendant or found by the jury." It may not be found by a judge.

[30] The cases that are -- have been cited with regard to relevant conduct have gone back and forth to whether it's clear and convincing or a preponderance. I understand what the standard is. I think in this particular case, the Court can certainly take into account the acquittal, the fact that the sentence was being driven by the relevant conduct, that is, only by a preponderance of the evidence,

it's not been fully litigated, and that the youth of Mr. McClinton is a mitigating circumstance.

Again, I also would argue that I did not have any -- or could not make any legal objections to the criminal history category, but I think it's overstated when we're talking about a 17-year-old having three points from juvenile adjudications, where if he was an adult and had been 22, those wouldn't have counted at all. So I think that criminal history category of III is a little high considering the actual offenses that he has committed in his past up to this point.

And we would ask the Court to take into account that you do have to impose a consecutive sentence on Count 2, and that needs to also be considered in the reasonableness of the entire sentence when put together with Count 1's sentence. Thank you.

THE COURT: Thank you, Mr. Baldwin. Mr. Blackett?

MR. BLACKETT: Thank you, Your Honor. Your Honor, I [31] know this Court has a lot of robberies that come in front of you. This one, from the moment I saw the surveillance footage, and I'm sure the Court thought the same way, this one was particularly egregious. When you have people who are working at a pharmacy, people who are shopping at a pharmacy, and who are getting put down at the ground on gunpoint -- at gunpoint, guns being put in people's back, guns being, you know, directed towards people's heads, it was a horrific robbery.

In sitting down in preparation for this trial and meeting with all the victims, sometimes when you get a letter or you have a phone call, it just -- it doesn't equal sitting down and really talking to someone face to face. And, you know, a couple of things that stuck by -- with me, one of the CVS employees, who still

works at that CVS in Broad Ripple, he said that there is an indent in the table, in the pharmacy table, and that came from the gun that [M.G.] had where he slammed it on the table because the drugs were taking too long because the safe wouldn't open up. And he says he sees that every single day he goes to work, and he thinks about the robbery; that when people make quick movements, he gets freaked out. And so this robbery, which happened years ago, is still affecting him today as he is attempting to work and get over what occurred.

The other -- the pharmacist who was there quit his [32] job. He literally said, "I am not working in retail pharmacy anymore after that robbery." He went to do other type of pharmacy work, where he could do research work, as opposed to standing by a counter. And he told me, during that meeting, he became a pharmacist to help people, and here he is with a gun being pointed at his head and him thinking, "I'm not doing that." And then the whole community ends up suffering, because now someone who is in pharmacy for the correct reasons is no longer serving people in that community.

You have people who are shopping at the pharmacy, it was their local pharmacy where they go to shop, and who, as the Court would note in one of the victim impact letters, one of the victims said she couldn't go back in for months, and she could only go back in with the help of her father standing with her.

And so you take all of these together -- and I know Mr. Baldwin is making an argument that the driving force is relevant conduct. It's not just the relevant conduct. It was that this was a horrific robbery that really affected people. And then you add on the fact that someone died at the end of this. And I understand that his conduct was egregious in that pharmacy, as well, but just because he was acting like that, he was acting in the course of this

robbery, does not mean that he deserved to lose his life either. So that's why the penalties are so high.

[33] I have to take into account, just as Mr. Baldwin pointed out, the fact that Mr. McClinton is a juvenile, so I'm not asking for an above-guideline sentence considering the fact that he was a juvenile during this. I'm asking for 324 months, which is the 20 years, which is the guidelines on the robbery, plus the seven years, the 84 months, for the brandishing a firearm during and in connection with the robbery.

I would also point out, during the course of this case, while Mr. McClinton was incarcerated, I pointed out in my sentencing memorandum, there was some pretty awful behavior while locked up. When you're taking -- when you're putting people in the hospital because you're beating them up that badly while you're locked up, and it happens more than once in separate jails, I think the Court should consider that, as well.

And then you take into account -- I don't know if the Court remembers this, but when Mr. Rudolph was about to take the stand, he and Mr. McClinton were having this back-and-forth where Mr. McClinton is squaring up to him, and the Court has to say, "Hey, calm down." The behavior of Mr. McClinton throughout the course of this case has been awful, in addition with the awful conduct. And, again, that's why we're asking for such a high sentence.

That high sentence is within the guidelines. We're [34] not asking for above the guidelines. We would ask for the 324 months. We believe that that is appropriate, Your Honor. Thank you.

THE COURT: Okay. All right, you get the final comments. And your client is raising his hand, Mr. Baldwin. Do you want to talk to him or just let --

THE DEFENDANT: I would --

THE COURT: -- him talk?

THE DEFENDANT: I would like to speak on that and speak on behalf of my conduct to while I've been incarcerated. I've been incarcerated nearly four years now, and, like, it has been times where I have been in trouble. The times that he speak of is, in number, two times where I've had altercations where people went to the hospital. And it's been times where I've been out of trouble, where I didn't get in trouble. Like, most of my time in jail, I didn't get in trouble.

And then I would just like to say that I'm opposed to what he's saying altogether, because what's on paper, what's on black and white, would make me look like a bad person, but the things I do day to day and the way I live, you wouldn't -- you wouldn't be able to determine that I am a bad person, because I am not a bully, and I don't just go around hitting on people and beating on people.

And I would like to just note that I am 5'4" in [35] size. Like, I never -- this whole time, I didn't fight anyone that was my size. Like -- it's just like -- I'm just like being made out to be a bad person by the things that have happened to me while I've been in these circumstances, and I'm really not.

And then, like, I would like to refer to the incident he's talking about when I was in trial and I was on the stand. I was called out of my name and I said something, but I didn't say much, because I was stopped by the judge, which is you. But, like, I wasn't trying to argue with anyone, I wasn't trying to be looked at as bad as I already was made out to be. Like -- and it's just a lot of stuff there.

I just feel like I shouldn't be, like, determined as this bad person because of -- like, because I'm not.

And while I -- I'm under all of this scrutiny and like my offense level being so high, I just like -- I like -- I would like you to consider that on this case, I am the only person that has went through this type of stuff. I'm the only person that has been acquitted of any offense, but I am the one that has the offense level of 43. And everybody on my case, they have more than one robbery. I got one robbery.

While I agree with the government, that this robbery was a bad robbery, I do not agree with me being railroaded like -- basically, like me used as a scapegoat to all these other people who are -- if I'm a bad person, they must be a [36] bad person, as well. Like -- and I don't feel like it's fair. Like, two of my co-defendants are at home right now, and one of them has 12 years. And he got 12 years for, I think, one robbery, but he's responsible for more than one robbery, as he pled guilty to that in his plea.

And I just don't -- I just feel like it's a disparity, because, like, I'm sitting here with a guideline of 43, and then the government is making me out to be this bad person and trying to get me all this time, but no one involved in this case, and then on a much bigger indictment that this case is attached to, has this much time. I'll stop there.

* * * *

THE COURT: Okay. All right, the Court is -- did [37] you have anything, Mr. Baldwin? I see you looking.

MR. BALDWIN: I got interrupted somehow. I think it was by my client, but I think it was my turn.

THE COURT: Go ahead, Mr. Baldwin.

MR. BALDWIN: Judge, I will just briefly disagree with Mr. Blackett's argument that the relevant conduct is not driving this. We go from a level 23 to a 43 based on relevant conduct. So that's obviously driving it.

I'm not going to say that this wasn't an egregious robbery or that it wasn't particularly fearful for those involved, because, obviously, there was the guns, there was the stomping of the -- the beating on that, but to say that then -- to -- to not say it's being driven by relevant conduct, you must be saying if you want the maximum sentence for that robbery, it has to be the worst robbery that's ever been committed, and it simply wasn't, nor is Mr. McClinton the worst robber ever. So to say it's not being driven by relevant conduct is a little disingenuous when he's asking for the maximum sentence.

I think that fails to take into account, as we've said, the 3553 factors of his age, his being acquitted of two counts, and the fact that he is going to be sentenced to significantly more than anyone else that was involved in any of this. I think when that's taken into account, then the maximum sentence is not appropriate in this matter.

[38] THE COURT: Okay. All right, the Court is prepared to state what the sentence will be. And, lawyers, you will each have a final opportunity to state any legal objections before sentence is finally imposed.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Dayonta McClinton, is hereby committed to the custody of the Bureau of Prisons, to be imprisoned for a term of 144 months on Count 1 and 84 months on Count 2, which is consecutive, for a total of 228 months. This sentence is a downward variance based on the age of the defendant and to avoid unwarranted disparities among the defendants, or the co-robbers.

The defendant shall pay to the United States a fine of $1,000. The Court is departing from the guideline fine range based on the defendant's financial resources and future ability to pay. The Court finds the defendant does not have the ability to pay interest, and waives the interest requirement. The defendant shall notify his probation officer of any material change in economic circumstances that might affect his ability to pay the fine.

The defendant shall pay restitution to the following victims: CVS Pharmacy. They only got $68 worth of products. And he's jointly and severally liable for that amount with Larry Warren and M.G. The payment is to be made directly to the Clerk, United States District Court, for disbursements to [39] the CVS victims.

* * * *

[40] THE COURT: * * * [41] The sentence that the Court intends to impose is a variance, a downward variance, from the guideline, with the relevant conduct cross-reference. The Court -- the Court finds that -- first of all, the Court is going to state that it's mindful that a sentence should be sufficient, but not greater than necessary, to accomplish the goals of sentencing. Federal judges do not sentence based on emotions, public sentiment, or the judge's personal beliefs or philosophy. Instead, the Court must impose a sentence using the context of the policy goals and empirical data of the United States Sentencing Commission as determined by the advisory sentencing guidelines. The Court is not bound by the guidelines, because they are advisory in nature.

Upon consideration of the 3553(a) factors, the Court has determined that a below-guideline range sufficiently accounts for the scope of the defendant's

criminal conduct. The Court has considered the nature and circumstances of the offense, the defendant's criminal history, his characteristics, the need for the sentence to reflect the seriousness of the offense, promote respect for the law, [42] provide just punishment, as well as adequate deterrence.

And, also, a goal of sentencing is to provide an offender with correctional training through treatment to assist him in abstaining from new criminal behavior. The Court is to consider, first of all, the history and characteristics of the defendant. Mr. McClinton is a 20 -- are you 22 or 23 now?

THE DEFENDANT: Twenty-two.

THE COURT: -- a 22-year-old man coming before the Court after committing -- participating in a very terrifying CVS robbery with four others while brandishing firearms. The Court does agree with the government that this was a particularly aggravating robbery. One of the factors that the Court has to consider is that there was a dispute among the robbers, and it did result in the death of Mr. Malik Perry, who was shot and killed over a dispute as to how to divide the proceeds of the robbery.

The seriousness of the offense cannot be overstated. Robbery -- in and of itself, these armed robberies require the perpetrator to confront and use force or the threat of force, and they are especially troubling when firearms are involved, because innocent victims do fear for their lives.

In this case, I don't know if you have seen it, Mr. Baldwin, but the video is dramatic and frightening. Five hooded individuals with firearms brandished, pointed, rushed [43] into the drugstore. Again, the robbery was committed by the defendant, [M.G.], Yates, Mr. Perry, and Larry Warren. Yates did testify as to the identities of the five robbers. The robbers demanded that everyone lay

on the floor face down. The defendant is identified as one of the persons who we see take a customer's cell phone and stomp on it.

Another customer -- this is really frightening to the Court. There was another customer who ran out of the store, and Mr. McClinton and Mr. Yates terrified this woman and chased after her, Mr. Baldwin. She was able to -- I don't know if she jumped the fence or she went behind a fence, but somehow she escaped. But that was particularly horrifying that, you know, you're fleeing and they don't just let you flee. They chase after you. Yates and Mr. McClinton then returned to the store and continued to aid and assist in the robbery.

The Court spoke earlier about the pharmacy employees. The government has noted that there's still a dent in the -- on the counter where the robbers were frustrated because the time delay safe wouldn't let them get the safe open.

Following the robbery, the five robbers traveled towards a location where they could divide the proceeds, and this is when Malik Perry states that he's keeping everything and he exits the vehicle, and he ends up murdered. He was [44] shot three to five times.

Regarding the defendant's criminal history, the defendant was convicted of -- well, he had an adjudication for possessing a firearm and possession of marijuana when he was just 14 years old. He continuously got into trouble throughout his teenage years.

He was convicted as an adult of criminal recklessness when he was 16. In this case, he entered a woman's car and struck her in the head with a handgun while attempting to steal her purse.

He was adjudicated for resisting law enforcement twice and possessing cocaine on another occasion, and escaped from a juvenile court facility when he was 17. He was also 17 when he committed the instant armed robbery that is the basis for the instant offense. His criminal activity did not end until he was taken into custody when he was 19 years old.

Regarding his characteristics, Mr. McClinton was born into the nonmarital union of his parents. The defendant and his sister were raised by their mother and stepfather. It appears that his mother made great efforts to keep him out of trouble. According to the defendant, the family moved multiple times throughout his childhood to different neighborhoods for his protection and to offer him a better education.

Mr. McClinton's father, unfortunately, was mostly [45] absent due to incarcerations. However, he says his stepfather filled the paternal role, and he says that his stepfather was -- is a good man.

Mr. McClinton reports that he was expelled from school for fighting while in the 11th grade. And we know Mr. McClinton is intelligent from the many letters he's written to the Court, as well as his allocution statement today. Unfortunately, he's been unsuccessful in attempts to earn his GED, and maybe that's because of the COVID and he can't continue to do his studies, and he kept being moved around because he was a juvenile.

The defendant has never married, but he is the father of a two-year old son. Is he two? Three?

THE DEFENDANT: A three-year old daughter.

THE COURT: A three-year old daughter. The defendant reports good health despite having had a heart murmur since birth. He has no history of mental illness or other mental health disorders.

The defendant denies any substance abuse problems. However, he admits that he smoked marijuana for the first time when he was 15, and he was smoking daily. He says his use ended when he was 18 years old. He says he's only consumed alcohol on two occasions and has not used any other illicit drugs, and has never abused prescription drugs.

The Court next considers the need to protect the [46] public from further crimes of the defendant and to afford adequate deterrence. The defendant's family writes that he's a good father, he's a great son, he's a good brother, but the defendant admits, himself, that he was raised better. So there's no explanation as to how this defendant allowed himself to spiral out of control and become a menace, not only to himself and his family, but to society.

The defendant continued to participate in acts of violence during the pendency of this case. While in the Henderson County Detention Center on June 16th of last year, a deputy observed Mr. McClinton and Jaylen Davis striking a victim several times in the face. McClinton and Davis were restrained after OC spray was administered. A witness said that Mr. McClinton and Davis came to the cell to beat up the victim because a hit was over his head because the victim and his father were snitches.

According to a Marion County Jail deputy, on September 2nd, 2019, while on pretrial detention, a deputy found two inmates who had suffered injuries. One inmate had two black eyes with blood around his left eye, and the other inmate was covered with blood. One of the victims said that Mr. McClinton came into his room and struck him with a hard object inside of a sock repeatedly in the face. And there was a video

to show Mr. McClinton and Julian Watts assaulting this victim.

[47] The Court has considered the relevant factors that were presented by the defendant and believes it has given them appropriate weight. The Court does recognize this defendant's very young age when he committed this crime, and the Court considers the defendant's allocution statement today.

While he does apologize for what has happened and sympathize with the victims, the Court considers, also very importantly, the 3553(a) factor to avoid unwarranted sentencing disparities. The maximum term for imprisonment is 20 years for this offense, Count 1. The guideline, but for the relevant conduct, would be 57 to 71 months, but with the relevant conduct cross-reference, the guideline is 240 months on Count 1. With respect to Count 2, the minimum term of imprisonment is seven years, with the maximum term being up to life.

The Court considers that Larry Warren, M.G., and Willonte Yates were all participants in the October 13th, 2015, robbery of the CVS, and these three have been sentenced. Warren pled guilty and was convicted of conduct related to drug distribution and two additional robberies. He was sentenced to 151 months' imprisonment. M.G. was convicted as a juvenile, and he was sentenced to time served. Yates was not convicted for conduct related to the October 13th, 2015, robbery.

Based on this defendant's age at the time of the [48] robbery, and to avoid unwarranted sentencing disparities among the co-robbers, the defendant (sic) believes that the sentence of 144 months on Count 1 and the total sentence of 228 months is sufficient, but not greater than necessary.

And, lawyers, those are the reasons the Court intends to impose the stated sentence. Government, do you know

of any reasons, other than those already argued, why sentence should not be imposed as stated?

MR. BLACKETT: No, Your Honor.

THE COURT: And do you, Mr. Baldwin?

MR. BALDWIN: No, Your Honor.

THE COURT: The Court now orders the sentence as stated to be imposed.

* * * *

[50] THE COURT: * * * The defendant is remanded to the custody of [51] the United States Marshal.

THE COURTROOM DEPUTY: All rise.

(Proceedings adjourned at 3:06 p.m.)