CRIMINAL LAW — SENTENCING — SEVENTH CIRCUIT UPHOLDS USE OF ACQUITTED CONDUCT TO TRIPLE SENTENCING EXPOSURE ON A PREPONDERANCE OF THE EVIDENCE. — *United States v. McClinton*, 23 F.4th 732 (7th Cir. 2022).

In 1997, the Supreme Court explicitly sanctioned the use of acquitted conduct in sentencing,[1] a "Kafka-esque"[2] policy that judges, practitioners, and scholars have condemned ever since. Despite this backlash and evolving sentencing law, the Court has not revisited its original holding, issued in a per curiam opinion without the benefit of oral argument.[3] Recently, the Seventh Circuit confronted a case that brought into sharp relief the problems with the use of acquitted conduct at sentencing. In *United States v. McClinton*,[4] the Seventh Circuit had to assess whether the district court erred in considering the murder of a co-conspirator as relevant conduct when sentencing the defendant for a robbery conviction, even though the jury had acquitted him of a charge related to the co-conspirator's death. The district court found that the defendant had killed his co-conspirator under a simple preponderance of the evidence standard. The Seventh Circuit affirmed this use of acquitted conduct. But this decision was not mandated by precedent, which has acknowledged that in extreme cases like *McClinton*, district courts may use a higher standard of proof for acquitted conduct.

In October 2015, Dayonta McClinton and five others robbed a CVS pharmacy at gunpoint.[5] McClinton and company sought pharmaceutical drugs but were largely thwarted by a time-delay safe.[6] In an effort to appease the robbers, a pharmacist offered them a limited amount of drugs kept outside of the safe: one bottle of hydrocodone as well as promethazine syrup and acetaminophen, which contained codeine.[7] Fearful of how long the robbery was taking, McClinton and company fled the pharmacy before the safe opened.[8] Malik Perry, one of McClinton's co-conspirators, carried the few drugs that the group had obtained.[9]

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[1] *See* United States v. Watts, 519 U.S. 148, 157 (1997) (per curiam).

[2] Orhun Hakan Yalinçak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-Esque," "Repugnant," "Uniquely Malevolent" and "Pernicious"?*, 54 SANTA CLARA L. REV. 675, 679 (2014) (quoting Enag Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235, 298 (2009)).

[3] The Court implicitly upheld *United States v. Watts*, 519 U.S. 148, in *United States v. Booker*, 543 U.S. 220, 240 (2005).

[4] 23 F.4th 732 (7th Cir. 2022).

[5] *Id.* at 734.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

After leaving the pharmacy, McClinton allegedly shot Perry.[10] According to the government, the group had driven to a nearby alley where they intended to split the drugs after leaving the pharmacy.[11] Perry, in possession of the drugs, allegedly left the car and proclaimed: "Ain't nobody getting none."[12] The government alleged that McClinton followed Perry, shot him in the back four times, took the drugs, and fled.[13] At the time, McClinton was just shy of his eighteenth birthday.

In 2017, the United States filed a juvenile complaint against McClinton.[14] The government then moved to transfer McClinton to adult court, and the motion was granted.[15] McClinton was indicted on four counts: robbery of the CVS; brandishing a firearm during the CVS robbery; robbery of Perry; and using a firearm during and in relation to the robbery of Perry, causing death.[16] After a three-day trial, a jury found McClinton guilty of the first two counts but acquitted him of robbing Perry and causing Perry's death in the course of that robbery.[17]

In the sentencing proceeding, the government requested that the district court consider Perry's death "relevant conduct" that should enhance McClinton's sentence.[18] McClinton objected, arguing that the government had not met its burden of proving that he had caused Perry's death, especially given the jury's acquittal.[19]

The district court disagreed with McClinton. The court found that because Perry's murder occurred in close proximity to the robbery — in both a spatial and temporal sense — Perry's murder occurred in the course of the conduct for which McClinton had been convicted and for which he was now being sentenced.[20]

The district court noted that there was no conflict between the jury's acquittal of McClinton and the district court's consideration of Perry's murder.[21] McClinton was found not guilty on the charge of using a firearm during and in relation to the robbery of Perry, causing death.[22] The district court argued that the jury "did not consider a charge of

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[10] *Id.*

[11] Brief of the United States at 5, *McClinton*, 23 F.4th 732 (7th Cir. 2022) (No. 20-2860).

[12] Transcript of Sentencing at 18–19, United States v. McClinton, No. 18-cr-00252 (S.D. Ind. Dec. 7, 2020).

[13] *Id.* at 18.

[14] Criminal Complaint at 1, United States v. D.D.M., No. 17-mj-00297 (S.D. Ind. Apr. 21, 2017).

[15] Entry on United States' Motion for Transfer at 4, *D.D.M.*, No. 17-mj-00297.

[16] Criminal Complaint, *supra* note 14, at 1. McClinton was charged under 18 U.S.C. § 2 and 18 U.S.C. §§ 1951(a); 924(c)(1)(A)(ii); and 924(j)(1).

[17] Trial Transcript at 477–80, *McClinton*, No. 18-cr-00252 (S.D. Ind. Apr. 24, 2020).

[18] Defendant's Sentencing Memorandum at 2, *McClinton*, No. 18-cr-00252 (S.D. Ind. Mar. 13, 2020).

[19] *Id.* at 2–4.

[20] Transcript of Sentencing, *supra* note 12, at 19–21.

[21] *Id.* at 19.

[22] *Id.* at 21.

murder,"[23] and they might have thought "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."[24]

The charges for which McClinton was convicted brought him to a level twenty-three offense under the Federal Sentencing Guidelines, but by considering Perry's death, McClinton's offense level was raised to a forty-three[25] — forty-three is the highest possible level, with a suggested prison sentence of life.[26] Had the district court not considered Perry's death, McClinton's guidelines range would have been fifty-seven to seventy-one months.[27] However, by including consideration of Perry's death and taking into account the statutory maximum for the charges on which McClinton was convicted, the guideline sentence increased to 240 months, plus eighty-four months for the gun charge.[28] The district court sentenced him to 228 months, or nineteen years, of incarceration.[29]

The Seventh Circuit affirmed. In a short, unanimous decision, Judge Rovner[30] stated that *United States v. Watts*[31] allows a sentencing court to consider acquitted conduct "so long as that conduct has been proved by a preponderance of the evidence."[32] However, the court made clear that "McClinton's contention [was] not frivolous" and "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."[33] Judge Rovner documented myriad opinions in which judges have expressed hesitation and concern in applying *Watts* to allow acquitted conduct to be considered at sentencing,[34] but she reiterated that the court was bound by Supreme Court precedent.[35]

The Seventh Circuit further concluded that finding Perry's murder to be relevant conduct was not clear error.[36] Under the U.S. Sentencing Guidelines, when multiple people are a part of a criminal activity, relevant conduct must be in furtherance of the criminal activity and have

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[23] *Id.*
[24] *Id.* at 19.
[25] *Id.* at 22.
[26] U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 2021).
[27] *Id.*
[28] Transcript of Sentencing, *supra* note 12, at 23.
[29] *McClinton*, 23 F.4th at 734–35.
[30] Judge Rovner was joined by Judges Easterbrook and Wood.
[31] 519 U.S. 148 (1997) (per curiam).
[32] *McClinton*, 23 F.4th at 735 (quoting *Watts*, 519 U.S. at 157).
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 736.

occurred in the course of the criminal activity.[37] Judge Rovner observed multiple precedents holding that the "distribution of proceeds of a robbery" is an act in furtherance of that robbery.[38]

Judge Rovner further determined that Perry's murder was committed in the course of the robbery. Pointing to the fact that Perry was allegedly murdered over an argument on how to divide the drugs obtained from robbing the CVS not long after the robbery or far away from the CVS itself, Judge Rovner concluded that "Perry's murder clearly occurred in the course of the planned robbery."[39] The court concluded that "[t]here is no doubt that under *Watts*, the murder was relevant conduct that could be used to calculate McClinton's sentence."[40]

Finally, the court addressed McClinton's claim that his prior counsel had been ineffective for failing to appeal his transfer from juvenile to adult court.[41] At the court's prompting, McClinton's current counsel withdrew his ineffective-assistance claim; the court then denied McClinton's pro se motion for leave to file a supplemental brief as moot.[42] By withdrawing the claim, McClinton's current counsel had preserved the claim for later litigation, which Judge Rovner concluded was the "only competent strategy" at this stage.[43]

Precedent did not foreclose a different outcome in *McClinton*. The Seventh Circuit proclaimed to be strictly bound by the Supreme Court's holding in *Watts* — but *Watts* noted that where the use of acquitted conduct "dramatically increase[s] the sentence," the district court may be required to use a higher evidentiary standard.[44] The Seventh Circuit has recognized this exception. Additionally, the Seventh Circuit's own opinions have provided criteria that indicate that *McClinton* falls squarely within this exception. The court abdicated its power to assess the district court's use of acquitted conduct in favor of relying on the Supreme Court to address the issue. The Supreme Court is unlikely to provide guidance on this issue, which leaves a concerning lack of constraints on the use of acquitted conduct at sentencing in the meantime.

In *McClinton*, the Seventh Circuit proclaimed that it was strictly bound by the Supreme Court's decision in *Watts* to uphold the district court's use of acquitted conduct in sentencing McClinton. But the Seventh Circuit failed to consider an exception left open in *Watts*. In *Watts*, the Supreme Court held that, in the specific cases under review,

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[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 736–37.
[43] *Id.* at 737.
[44] United States v. Watts, 519 U.S. 148, 156 (1997) (per curiam).

the acquitted conduct did not disproportionately increase the defendants' sentences relative to the base.[45] The Court explicitly noted, however, that had the acquitted conduct "dramatically increase[d] the sentence," the evidentiary standard may have needed to be higher than a preponderance of the evidence, such as a "clear and convincing" standard.[46] Because the facts of the cases in *Watts* "d[id] not present such exceptional circumstances," the Court "therefore d[id] not address that issue."[47] The Court left open the question whether the Sixth Amendment may require a higher standard of proof at sentencing in these cases.[48]

No subsequent Supreme Court or Seventh Circuit decision has closed the door on this exception in *Watts*. Most circuits[49] have viewed the Court's decision in *United States v. Booker*[50] — "which invalidated the mandatory features of the [Sentencing] Guidelines"[51] — as eliminating any due process arguments that defendants might raise in response to the use of relevant conduct at sentencing, which conceivably includes acquitted conduct thanks to *Watts*. In the aftermath of *Booker*, the Seventh Circuit fell on this side of the debate.[52] However, while the Seventh Circuit broadly indicated that post-*Booker* "there [wa]s no need for courts of appeals to add epicycles to an already complex set of (merely) advisory guidelines by multiplying standards of proof" at sentencing,[53] the court seemed to leave open a carveout for *acquitted* conduct that dramatically increased a defendant's sentence.[54] That is, the Seventh Circuit acknowledged that "*Watts* survived *Booker*" and that *Watts* had left open the question "whether a sentence . . . that is based

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[45] In *Watts*, the Supreme Court upheld district courts' use of acquitted conduct in two cases. *Id.* at 149. The acquitted conduct increased the base offense level by two levels in *United States v. Watts*, 67 F.3d 790 (9th Cir. 1995), and increased the guideline sentence from between fifteen and twenty-one to between twenty-seven and thirty-three months in *United States v. Putra*, 78 F.3d 1386 (9th Cir. 1996). *Watts*, 519 U.S. at 163 & n.2 (Stevens, J., dissenting).

[46] *Watts*, 519 U.S. at 156 & n.2 (per curiam).

[47] *Id.* at 156–57.

[48] Justice Stevens confirmed that the Sixth Amendment demands a higher standard in *United States v. Booker*, 543 U.S. 220 (2005), noting that in *Watts* there wasn't "any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment." *Id.* at 240.

[49] All but the Ninth Circuit have rejected the idea post-*Booker* that "[w]hen conduct proven at a sentencing hearing accounts for more of the sentence than the crime of conviction," a clear and convincing standard of proof is required. *See* Anthony LoMonaco, Note, *Disproportionate Impact: An Impetus to Raise the Standard of Proof at Sentencing*, 92 N.Y.U. L. REV. 1225, 1227, 1254–56 (2017) (outlining this "lopsided split," *id.* at 1254).

[50] 543 U.S. 220.

[51] LoMonaco, *supra* note 49, at 1255 (quoting Irizarry v. United States, 553 U.S. 708, 713 (2008)).

[52] United States v. Reuter, 463 F.3d 792, 792–93 (7th Cir. 2006).

[53] *Id.* at 793.

[54] *See, e.g.*, United States v. Placido-Santos, 303 Fed. App'x 346, 347 (7th Cir. 2008); United States v. Hurn, 496 F.3d 784, 788 (7th Cir. 2007); United States v. Horne, 474 F.3d 1004, 1007 (7th Cir. 2007).

almost entirely on acquitted conduct, violates due process when the district court applies a preponderance of the evidence standard rather than requiring clear and convincing evidence."[55]

Until the Supreme Court rejects the *Watts* exception, the Seventh Circuit should fully embrace it. While the court has not rejected the exception, it has not applied it either, leaving lower courts without concrete guidelines to determine what situations warrant application of the exception. Prior to *Watts*, the court indicated that the threshold was quite high.[56] But post-*Booker*, the Seventh Circuit provided criteria that were less stringent. The increase in McClinton's sentence based on the acquitted conduct could constitute a "dramatic increase" under the more recent criteria. In *United States v. Hurn*,[57] the court indicated that a sentence "based almost entirely on acquitted conduct" might fall into the exception.[58] And in *United States v. Horne*,[59] the court provided a more mathematical criterion — the court looked to the "midpoint of the lower guidelines range" and compared it to the actual sentence.[60] In *Horne*, this comparison showed that the difference was "less than half the sentence," which the court deemed insufficient to trigger the *Watts* exception, but still "considerable."[61] Applying this same analysis to McClinton's sentence reveals a more significant difference. The midpoint of McClinton's original guidelines range was sixty-four months, and his actual sentence was 228 months[62] — the acquitted conduct increased McClinton's sentence by over three and a half times. This increase is almost double that contemplated in *Horne* and arguably meets the "almost entirely" standard set in *Hurn* as nearly seventy percent of McClinton's sentence was based on acquitted conduct. The panel should have analyzed the increase in McClinton's sentence under these criteria and found that it triggered the *Watts* exception; such an analysis and conclusion would have clarified the Seventh Circuit's stance on the *Watts* exception and provided guidance to the lower courts.

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[55] *Hurn*, 496 F.3d at 788. In *United States v. Reuter*, 463 F.3d 792 (7th Cir. 2006), the court rejected the idea that consideration of relevant, *uncharged* conduct at sentencing might require a higher evidentiary standard. *See id.* at 792–93. Subsequently, the court noted without deciding that relevant *acquitted* conduct may require a clear and convincing evidentiary standard at sentencing. *Hurn*, 496 F.3d at 788–89.

[56] *See* United States v. Rodriguez, 67 F.3d 1312, 1322 (7th Cir. 1995); United States v. Porter, 23 F.3d 1274, 1277 (7th Cir. 1994); United States v. Masters, 978 F.2d 281, 286–87 (7th Cir. 1992). These opinions all occurred in the early to mid-1990s, prior to both *Watts* and *Booker*.

[57] 496 F.3d 784.

[58] *Id.* at 788; *see also Placido-Santos*, 303 Fed. App'x at 347 (citing *Hurn* as an example of an extreme sentencing increase).

[59] 474 F.3d 1004.

[60] *Id.* at 1007.

[61] *Id.*

[62] *McClinton*, 23 F.4th at 735.

But the panel did not acknowledge the *Watts* exception, relying instead on the Supreme Court to remedy the injustices found in cases like *McClinton*.[63] This faith was misplaced. The Court has shown a distinct lack of appetite for reconsidering the use of acquitted conduct at sentencing, repeatedly denying certiorari in cases that bear a striking resemblance to *McClinton*[64] despite growing outcry from courts, legal scholars, and the public alike.[65] In the meantime, it is left to the lower courts to take action. And this action is within courts' discretion — as then-Judge Kavanaugh noted: "[E]ven in the absence of a change of course by the Supreme Court, or action by Congress or the Sentencing Commission, federal district judges have power in individual cases to disclaim reliance on acquitted or uncharged conduct."[66] But for district court judges to begin to exercise their discretion in this manner, guidance from circuit courts is necessary.

By not applying the *Watts* exception, the Seventh Circuit failed to provide any meaningful constraints on the district court's use of acquitted conduct at sentencing. *McClinton* is only one recent example of the Seventh Circuit's failure to require a higher evidentiary standard for the use of acquitted conduct at sentencing.[67] This practice threatens to undermine core values in our American criminal legal system: the right to a fair trial[68] and the role of the jury.[69] The Seventh Circuit itself has

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[63] The panel made clear that McClinton's claim had been "preserve[d] for Supreme Court review." *Id.* The court made similar remarks in *United States v. Bravo*, 26 F.4th 387 (7th Cir. 2022), noting that the defendant had "preserved this point for further consideration in the Supreme Court or Congress." *Id.* at 399. In March 2022, the House passed a bill, Prohibiting Punishment of Acquitted Conduct Act of 2021, H.R. 1621, 117th Cong. (2021), that would prohibit the consideration of acquitted conduct at sentencing. A similar bill has been advanced to the Senate. *See* Douglas A. Berman, *US House Overwhelmingly Votes, By a Margin of 405-12, For "Prohibiting Punishment of Acquitted Conduct Act of 2021*," SENT'G L. & POL'Y (Mar. 29, 2022, 8:44 AM), https://sentencing.typepad.com/sentencing_law_and_policy/2022/03/us-house-overwhelmingly-votes-by-a-margin-of-405-12-for-prohibiting-punishment-of-acquitted-conduct-.html [https://perma.cc/6JEP-77E4].

[64] *E.g.*, Bell v. United States, 137 S. Ct. 37 (2016), *denying cert. to* 795 F.3d 88 (D.C. Cir. 2015); Jones v. United States, 574 U.S. 948 (2014), *denying cert. to* 744 F.3d 1362 (D.C. Cir. 2014); Hurn v. United States, 552 U.S. 1295 (2008), *denying cert. to* 496 F.3d 784 (7th Cir. 2007).

[65] *See, e.g.*, Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, And What Can Be Done About It*, 49 SUFFOLK U. L. REV. 1, 42 (2016); Yalinçak, *supra* note 2, at 676; Mark T. Doerr, Note, *Not Guilty? Go to Jail. The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 COLUM. HUM. RTS. L. REV. 235, 252–56 (2009); Megan Sterback, Comment, *Getting Time for an Acquitted Crime: The Unconstitutional Use of Acquitted Conduct at Sentencing and New York's Call for Change*, 26 TOURO L. REV. 1223, 1224–25 (2011).

[66] United States v. Bell, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc).

[67] *See, e.g.*, *Bravo*, 26 F.4th 387; United States v. Rollerson, 7 F.4th 565 (7th Cir. 2021); United States v. Gonzalez, 765 F.3d 732 (7th Cir. 2014).

[68] *See Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in denial of rehearing en banc).

[69] *See, e.g.*, Yalinçak, *supra* note 2, at 717; Jim McElhatton, *"Juror No. 6" Stirs Debate on Sentencing*, WASH. TIMES (May 3, 2009), https://www.washingtontimes.com/news/2009/may/03/juror-no-6-questions-rules-of-sentencing [https://perma.cc/8U8Q-RDAS].

echoed these concerns; in *McClinton*, the court devoted significant space in its opinion to documenting the various objections to the use of acquitted conduct at sentencing.[70] The sparse and inconsistent evidence surrounding Perry's death used by the district court to increase McClinton's sentence highlights these concerns.[71] Requiring the district court to apply a higher standard of proof to evidence of acquitted conduct before it can be considered at sentencing is one way the Seventh Circuit can mitigate these concerns.

While the application of a clear and convincing evidentiary standard at sentencing may not be the ideal answer to the injustice of the use of acquitted conduct at sentencing,[72] it could be the first step in spurring movement toward the categorical exclusion of the consideration of acquitted conduct at sentencing. If more circuits are vocal about requiring a higher evidentiary standard for the use of acquitted conduct at sentencing in cases like *McClinton*, the Supreme Court may be more inclined to readdress the question it left open in *Watts*. Additionally, by adopting a clear and convincing standard, the Seventh Circuit would be signaling a more "symbolic goal" by "reflecting societal views about the gravity of depriving individuals of their liberty."[73] And most importantly, the application of a clear and convincing standard could prevent the multiplication of a defendant's sentence based on conduct for which they were acquitted.

The court was not bound to uphold McClinton's sentence because the *Watts* exception remains open in the Seventh Circuit. Under its own criteria, the Seventh Circuit should have remanded the case to the district court to apply a clear and convincing evidentiary standard before considering McClinton's acquitted conduct, but it failed to do so. Because the Supreme Court is unlikely to reevaluate the use of acquitted conduct at sentencing, the panel's decision in *McClinton* sends the dangerous message to district courts that the Seventh Circuit will not be enforcing constraints on the use of acquitted conduct at sentencing. The decision upheld the tripling of a man's carceral sentence based on a homicide he was never even charged with committing.

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[70] *See McClinton*, 23 F.4th at 735. This is not the only case where the Seventh Circuit has implied its disagreement with the practice. *See, e.g.*, United States v. Waltower, 643 F.3d 572, 578 (7th Cir. 2011) (stating that the court "underst[ood] why defendants consider it unfair to take acquitted conduct into account at sentencing").

[71] As McClinton's counsel pointed out, "direct testimony at trial regarding the killing could not have lasted more than five minutes" and "it was inconsistent among the witnesses." Defendant's Sentencing Memorandum, *supra* note 18, at 12. Only two witnesses were questioned on the killing. One testified McClinton shot Perry in the back; the other testified he shot Perry in the head. Trial Transcript, *supra* note 17, at 100–01, 212.

[72] See *United States v. Hurn*, 496 F.3d 784, 789 (7th Cir. 2007), as an example where a sentencing judge applied a clear and convincing standard, which truly did tie the hands of the panel on review. *See also* LoMonaco, *supra* note 49, at 1254 (noting limitations of clear and convincing standard).

[73] LoMonaco, *supra* note 49, at 1253.