MAKING A DRUG TRAFFICKER

RANDY'S STORY: HOW A 50-YEAR-OLD PROFESSIONAL PHOTOGRAPHER WHO HAD NEVER BEEN TO PRISON RECEIVED NEARLY TWO DECADES IN FEDERAL PRISON (WITH NO PAROLE) AFTER PLEADING GUILTY TO A SINGLE $250 DRUG DEAL

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INTRODUCTION

BACKGROUND

Part One: The investigation

Despite a massive, four-year-long, multimillion-dollar investigation centered on more than 30 people suspected of participation in a drug distribution ring in Graham, Texas (spearheaded by top government agencies), there was not a single piece of evidence against Randy: no drugs, no controlled buys, no telephone wire taps, no surveillance, not even an incriminating text message. Instead, the centerpiece of the so-called case against Randy consisted of uncorroborated accusations made by an inmate who had racked up roughly ten state felony charges and had a very large tab to clear with the federal government.

Part Two: The accusations

Meet inmate John Moore. He has a penchant for guns and methamphetamine. After speaking to John, who had been arrested yet again for yet another felony charge, federal agents got a lead: "a guy named Randy." In a jailhouse interview, John Moore was advised that in addition to the many state felony charges he had racked up, the federal government had evidence that he was selling a massive amount of methamphetamine. Welcome to the big leagues, Mr. Moore: a massive amount of methamphetamine + harsh federal sentencing guidelines + no parole in the federal system = a very concerned inmate. He couldn't talk fast enough. John was effectively told that the more names he could deliver, the less time he would receive. One of the names he provided was Randy’s. Although the inmate (John) detailed the full names of other alleged drug suppliers and customers, he could only tell the federal agents Randy's first name: the inmate didn't know Randy's last name nor what he did for a living, nor could he show the agents where the drug deals occurred on a map.

Instead, the inmate talked generally about his many drug deals with Randy as well the presold drug distribution network in which Randy allegedly participated. The inmate said that Randy had been selling him methamphetamine for two years. As for details, the inmate claimed that he would pool money from his drug customers in Graham, Texas, place a drug order with Randy, and then he and his wife (Crystal Moore) would drive to Dallas to pick up the presold drug order from Randy. He maintained that after picking up the drugs, he would drive back to Graham, Texas, whereupon he would sell the presold drugs to his individual drug customers.

Beyond the accusation of participation in a presold drug distribution network, the inmate told federal agents that Randy had been selling methamphetamine regularly for years to other people; he then provided the names of Randy's alleged drug customers to the agents. To bolster his accusations, the inmate provided the agents with a list of people who had witnessed the alleged drug deals first-hand (a.k.a eyewitnesses) and had intimate knowledge of the presold drug distribution network.

Part Three: The follow-up investigation

Federal agents had a lead; naturally they followed up on that lead. The agents spoke to all of the witnesses identified as having first-hand knowledge of the drug deals with Randy, including Randy's other alleged drug customers, as well as the people who executed the Western Union money transfers (to Randy) to pay for the presold drugs. The government's inmate-turned-witness even provided the name of the person (his own wife) who he maintains accompanied him on his trips to Dallas to pick up the presold drugs from Randy. The problem is, most of the supposed witnesses that were interviewed didn't even know Randy. Alleged eyewitness after alleged eyewitness told stories that didn't involve Randy. Moore's wife recounted the drives to Dallas and the drug pick-ups, but she didn't know Randy, had never met him, and although she maintained that the drug pick-ups did occur, it was evident that they occurred with someone else. Randy was not involved.

Not a single person named by the inmate could corroborate his accusations against Randy. For clarity, all of the alleged witnesses (including the inmate's wife) fully cooperated with the federal agents, naming their customers and suppliers and talking openly about the inner workings of John's drug network. In short, John's story fell apart; his credibility was destroyed, and his flagrant lies were exposed. Put differently, the follow-up investigation yielded overwhelming evidence, but it wasn't evidence that corroborated the inmate's accusations or pointed to Randy's guilt; rather, it was overwhelming exculpatory evidence that rendered the inmate's accusations demonstrably false and strongly militated in favor of Randy's innocence (regarding the inmate's accusations).

Part Four: A new government witness tells a story that is inconsistent with the first government witness, John Moore

As part of the follow-up investigation, federal agents also spoke to Melinda Neal. She, too, was on the hook for selling pounds and pounds of methamphetamine; and she, too, was told that she could trade information in exchange for her freedom. During the interview, she was caught lying to agents and was found to be in possession of drugs. Melinda made vague accusations against Randy, but nothing that she said was ever confirmed by a third-party witness or a single piece of physical evidence. When asked about Randy and John, Melinda advised the agents that John had been *her* customer, not Randy's.

The federal agents also learned that Melinda had just introduced John (the inmate) to Randy about six months before John's jailhouse interview, making it logically impossible for the inmate's (John) accusations—that Randy had been selling him methamphetamine for more than *two years*—to be true. It was no wonder that beyond Randy's first name, John didn't know anything about Randy; and it was no wonder that the people who were intimately familiar with John's drug suppliers didn't know Randy. (For clarity, although John told federal agents that Randy had been selling him drugs for years, it was revealed that John had only recently been introduced to Randy via Melinda Neal, another drug-dealer-turned-government-witness.)

What about the presold drug network? According to Melinda, a government witness, it did not involve Randy. That would explain why, when interviewed, none of the people involved in the presold drug network knew who Randy was.

In short, this explained a lot. The agents had combed John's phone, but there was no trace of contact with Randy. When asked to point out the location where the drug pick-ups occurred on a map, John couldn't do it. Despite maintaining that to buy presold drugs, he wire transferred money to Randy for years, John didn't know Randy's last name, and there were no phone records linking Randy to John, nor were there any Western Union records, and so on.

But back to Melinda. After making federal agents believe that she was going to help them build a case against Randy and others, Melinda surreptitiously tipped the targets off about the investigation. Had Randy's judge learned that Melinda essentially flipped into a double agent, her credibility as a government witness would have been destroyed. Thus, to ensure that the prosecution could use Melinda's out-of-court accusations against Randy, the federal government hid this information from the judge, so as to preserve its witness's credibility. Almost immediately after tipping off the targets of the investigation—and revealing the federal agents' plans to catch them conducting drug deals under surveillance—Melinda tried to kill herself but ended up in a coma. After recovering, she fled to Asia until she was eventually recaptured. Incredibly, all of her lies and other transgressions were swept under the rug so that the government could use her statements against Randy.

Part Five: The interview

Without reviewing a single piece of evidence or even cracking the case file, Randy's defense attorney told him to confess to everything and to throw himself at the mercy of the federal government—otherwise, he was told, he would "die in federal prison."

Despite the fact that most of the accusations against Randy proved to be false upon federal agents' follow-up investigation, the agents pushed on. They had their man. John said that Randy had sold him drugs, as did Melinda. Never mind the fact that given the inconsistencies in their stories, it was logically impossible for both of them to be telling the truth; and never mind that while some information proved to be patently false, other statements were so vague that not even law enforcement itself could verify them.

This is perhaps the most blatantly unfair aspect of the entire case, and Randy's attorney's role in the injustice that played out in his sentencing cannot be underscored too dramatically or emphatically. Randy's attorney never read the case file. Had she bothered to look, she would have discovered a treasure trove of exculpatory evidence that sharply undercut the federal agents' accusations against her client, Randy. The evidence screamed that the government witnesses had lied—*their stories didn't even match*.

Outrageously, even though Randy had not been federally charged, even though he vehemently denied the accusations, even though his attorney had not seen a single piece of evidence or read a single witness interview, his attorney dragged him to a meeting with federal agents and told him to stop lying and confess to his crimes. Randy's own attorney relentlessly fired more than 350

questions at him. During the meeting, it became glaringly obvious that Randy's attorney was utterly ignorant of the lack of physical evidence, nor did she have the faintest idea what the government witnesses said or whether their statements were corroborated or uncorroborated. In fact, she didn't even know who the witnesses were!

Without reading a single witness interview or laying eyes on a single piece of evidence, *a defense attorney with 40 years of experience* just took federal agents at their word, and when her client, Randy, steadfastly denied the accusations, attorney Dunbar shamelessly called her client a liar. Randy was never confronted with any evidence—just dogmatic assertions made by federal agents and his own defense attorney, all of whom were obviously angered by Randy's denials.

As Randy's attorney said in an affidavit filed in postconviction litigation: "Randy...claimed over and over that he was just a user and that his dealer (whom he gave information about) should be the one prosecuted."

To add insult to injury, one of the federal agents become vulgar in closing the meeting and took a cheap shot at Randy and his family.

Part Six: The bluff—the indictment waiver and guilty plea to a single $250 drug deal

Although Randy denied the many accusations levied against him—both on and off the record—and maintained his involvement in a singular petty drug deal, which was for personal use, his attorney left him with two impossible choices: waive all of your Constitutional rights, plead guilty, and put yourself at the government's mercy, or rot in prison. There was no discussion of the evidence nor any other options. There certainly wasn't a discussion of the compelling exculpatory evidence that sharply undermined the government's case. Scared and overwhelmed, Randy waived his Constitutional right to indictment-by-jury by pleading guilty to a single $250 drug deal that yielded a sentencing range of probation to 18 months in prison—*a single $250 drug deal.*

What about the powerful exculpatory evidence that rendered the government's so-called case worthless? It was never so much as discussed with Randy.

Part Seven: Sentencing surprise! A four-year drug enterprise

Randy was blindsided at sentencing. A punch-drunk Randy watched as the federal government crushed him with nearly 20 years in federal prison, with no parole. "For a $250 drug deal?" you might be wondering? Not exactly. Although Randy pled guilty to a $250 drug deal, the government had a little surprise waiting for him at sentencing. The surprise? The government casually pinned a four-year drug enterprise that comprised more than 50 drug deals and related activities on Randy. Hello, legal loophole. The additional uncharged conduct caused Randy's sentencing range to leap from a maximum of 18 months in prison to nearly 20 years with no parole. You can figure out the rest.

Part Eight: No evidence, no problem. Manufacture it.

Given that there was no physical evidence against Randy, the federal government resorted to uncorroborated, out-of-court hearsay accusations from two drug-dealers-turned-government witnesses. Remember the inmate, John? The liar? And Melinda. Remember, Melinda? The drug dealer who was caught lying to her handlers (federal agents)? The government used their out-of-court accusations to support the additional 50 drug deals and related activities pinned on Randy at sentencing. If you remember the details of this story, then you'll remember that everything that John said was easily proven false, and nothing that Melinda said was ever confirmed. And didn't the two government witnesses (John and Melinda) contradict each other? Yep. No worries. If there was evidence that one of the government witnesses lied, it was simply excluded from the sentencing report (filed with Randy's judge) no matter how strong, because it undermined the government's one-sided narrative. The deception hardly ends there. The full extent of the manipulation will be detailed in the following pages.

Part Nine: Reward the high-level-drug-dealers-turned-government-witnesses (against Randy); Punish the low-level addict, Randy

Even though John and Melinda were high-level drug traffickers on the hook for selling a massive amount of methamphetamine and Randy was a low-level addict, Randy received a prison sentence 10 to 14 years longer than the sentences that they received. Both government witnesses received significant sentence reductions and other off-the-record benefits that reduced their sentences even further.

LEGAL ANALYSIS

You just read the factual background of the case. In the next sections, we will walk you through the legal nuances of Randy's case and examine exactly how the government parlayed a single $250 drug deal that merited probation to 18 months in prison into a four-year drug enterprise which comprised more than 50 drug deals and related activities and that merited nearly two decades in federal prison—oh yeah, with no parole.

Spoiler alert: Randy's extreme prison sentence is a product of incredible manipulation, abusive practices, and other devious tactics that will shock you. What you've read so far is hardly the whole story. To truly understand the gross injustices that permeate Randy's case, one must gain a nuanced understanding of the legal loopholes at play—and how savvy prosecutors and federal agents exploit them.

In short, Randy's case embodies everything that is wrong with the modern-day criminal justice system.

Now for the crux of Randy's case for Clemency.

RANDY'S CASE

Make no mistake—Randy admitted to being a drug addict. He was candid about his involvement in substance abuse. Sadly, Randy had been plagued with addiction practically his entire life, and as part of the natural ebb and flow of his drug use, he abused with other users. Even before he was federally charged, Randy came clean about sharing very small amounts of drugs with others. So in the name of transparency, over the course of his addiction, did Randy ever sell a very small amount ($20 to $80 worth) of methamphetamine to offset the cost of his addiction? Yes. The instances were isolated, however, but they certainly were not the norm.

Although Randy was happy to talk openly about his drug use and the small amounts he shared with other users, as the transcript of the May 22 interview (which predated federal charges) with federal agents demonstrates, he vehemently denied the accusations pinned on him by the federal government: a four-year drug operation that utilized a presold drug distribution network and encompassed more than 50 drug deal and related activities. As the federal agents' own investigation revealed, this was quite simply, fiction.

There is a vast difference between a low-level addict who, over the course of his addiction, might have swapped small amounts of drugs with other users on a handful of occasions, and a real-deal drug dealer in the traditional sense who makes a living selling drugs—such as Melinda Neal and John Moore, the two high-level drug traffickers who used vague information about Randy as a get-out-of-jail-free card. The distinction is an important one. Randy was a professional photographer who used his skill to earn a legitimate living.

With that in mind, Randy is not blameless. We do not want to paint him in that light. Randy has some dirt on his hands. It was because of his proximity to methamphetamine that he was an easy mark for the federal government. But Randy is not what the government created him to be. What Randy was—a low-level addict—was not good enough for the federal government. So, through overt manipulation, corner-cutting, and other abusive and devious practices, the government manufactured a four-year drug enterprise that ballooned Randy's prison term to the extreme, just shy of the statutory maximum sentence.

To that end, a statutory maximum sentence or a near-statutory-maximum sentence, is expressly designed to incapacitate the worst of the worst, i.e., the irredeemably bad—e.g., high-level drug cartel bosses and drug kingpins. Our intention is to provide insight and clarity and to spotlight the truth, not to obfuscate it. But what was pinned on Randy, stretches well beyond Randy's involvement with drugs.

For perspective, the same federal judge who crushed Randy with nearly two decades in prison, sentenced drug cartel kingpin Tony Hernandez to about 15 years. Randy was a 50-year-old professional photographer who had never been to prison and who pleaded guilty to a single $250 drug deal; Tony's drug empire imported 1500 kilograms of 100 percent pure methamphetamine Ice to the U.S. each month—hundreds of millions of dollars' worth—and then flooded communities with the drug. He was also caught with an arsenal of automatic weapons, body armor, grenades, and so on. (According to a U.S. Attorney's Press-Release.)

It cannot seriously be argued that Randy is in the same league as drug cartel bosses and drug kingpins. Especially long prison terms exist to warehouse high-ranking drug players, not low-level addicts who have never even been to prison. There is no good that can come from the sentence imposed in Randy's case.

IF THE PROTECTIONS EXTENDED TO CRIMINAL DEFENDANTS BY THE BILL OF RIGHTS CAN BE SO EASILY CIRCUMVENTED, MOST OF THEM WOULD BE...VAIN AND IDLE ENACTMENTS, WHICH ACCOMPLISHED NOTHING...

– U.S. Supreme Court Justice Antonin Scalia –

The late U.S. Supreme Court Justice Antonin Scalia's thoughts on prosecutors and judges who exploited legal loopholes by waiting until the laxed sentencing phase to pile on the entire case, when the vital Constitutional procedural safeguards afforded to the criminally accused no longer applied.

PART ONE

THE AMERICAN SYSTEM OF JUSTICE PARADIGM: THE CONSTITUTIONAL PROCEDURAL SAFEGUARDS IN THE U.S. SYSTEM OF JUSTICE WERE CREATED BY THE FOUNDERS TO MAINTAIN THE INTEGRITY OF THE JUSTICE SYSTEM AND TO ENSURE FAIRNESS TO THE ACCUSED

The United States Constitution makes some fundamental promises when it comes to the criminally accused. It's both axiomatic and elementary that only a jury, acting on proof of the demanding beyond-a-reasonable-doubt standard, may take a person's liberty. The Fifth and Sixth Amendment guarantees of due process and the right to trial by jury for those accused of a crime are fundamental to the American criminal justice system. As aptly pointed out by the nation's eminent expert on sentencing, Douglas Berman, "John Adams famously declared, 'Representative government and trial by jury are the heart and lungs of liberty.'" Mr. Berman emphatically underscored the paramount importance of this constitutional safeguard: "The jury trial was designed as an indispensable structural check on government. A safeguard the framers of the Constitution considered so paramount to a free people that is was enshrined in the Sixth Amendment."

In other words, before the government can strip a man of his liberty and throw him in prison, it must present a compelling case that leaves no doubt of his guilt; and in doing so, the defendant is afforded vital constitutional procedural protections—for instance, the right to face his accuser in court so as to subject the accusations to intense scrutiny and testing. Those constitutional procedural safeguards exist to maintain the integrity of the proceedings, to ensure fairness as well as a high-quality result, and to mitigate against factual error when someone's liberty is at stake.

Simple enough.

A. How the Prosecutors Exploited a Legal Loophole During Sentencing, Thereby Skirting the Vital Constitutional Safeguards Afforded to Randy

To understand the depth of the injustice in this case, one must first understand the federal sentencing scheme and how canny prosecutors exploit it.

Legislatures set ranges for criminal sentences: probation to 20 years in prison, for instance, or five years to 40 years. In determining the exact sentence within a wide range, a judge can consider uncharged criminal conduct presented during the sentencing stage, called aggravating factors or sentencing factors. The sentencing factors presented to a single judge are supposed to incrementally increase a defendant's prison term and allow the presiding judge to differentiate between different degrees of wrongdoing. This is because the law requires a jury to convict beyond a reasonable doubt but allows the sentencing judge to add time to a defendant's prison term based on the less demanding standard of preponderance of the evidence (more likely than not).

During the sentencing stage, however, the vital constitutional procedural safeguards that were expressly designed to protect the accused by maintaining the integrity and fairness of a criminal trial, are inapplicable. At this stage, they nullify the demanding standard of beyond a reasonable

doubt and replace it with the flimsy standard of preponderance of the evidence (a standard used in small claims courts regarding petty financial disputes); remove the constitutional right to face one's accuser in court, which allows the accused to defend himself by having defense counsel test the government witnesses' (his accusers) stories and credibility through extensive cross-examination; remove 12 jurors and replace them with a single judge; remove the right to hear formal charges detailed in an indictment; remove the Federal Rules of Evidence, which protect defendants against flimsy, inadmissible, out-of-court hearsay accusations. This is what a federal sentencing hearing looks like. It's no more than a skeleton system where the vital constitutional procedural safeguards are no longer in place—*and that is when opportunistic prosecutors strike: when the defendant is a sitting duck.*

In other words, given that the rules are markedly more relaxed during the sentencing stage, calculating prosecutors can exploit the different rules and standards between a criminal trial and a sentencing hearing. They see it as an opportune time to short-circuit the entire process. So instead of convicting a defendant of the gravamen of a crime during a trial or as part of a guilty plea, the government can convict a defendant of something petty and insignificant, and then wait until the relaxed sentencing stage to sneak in—for all practical purposes—its entire case. For instance, in Randy's case, he pled guilty to just a single $250 drug deal, only to have more than 50 uncharged drug deals and related activities pinned on him at the much more relaxed sentencing stage, fundamentally changing the nature of his crime and leaving him defenseless against the accusations. This sneaky maneuver caused Randy's sentencing range to leap from just probation to 18 months in prison to nearly 20 years in prison, *with no parole.*

Under this paradigm of justice, the conviction is nothing more than a shell, a shell that the government fills to the brim at sentencing, which increases disproportionately a defendant's prison term.

By doing so, the government essentially disarms the defendant of his fundamental constitutional procedural protections, disguising what is really the crux of its case as mere "sentencing factors"—which can easily add many years and even decades to a defendant's prison term—and increasing the magnitude of the crime to a different order of severity altogether, as is the case with Randy.

This loophole compounds unfairness upon unfairness: first, the conduct introduced at sentencing is uncharged conduct (or uncharged crimes); second, the uncharged conduct is supported by unsworn, uncorroborated, out-of-court hearsay; third, since there is no right to face one's accuser during sentencing, the defendant cannot fairly defend himself against the out-of-court accusations through cross-examination; fourth, it is the uncharged conduct supported by out-of-court hearsay, which cannot be scrutinized or tested, that really drives the length of the prison sentence. Thus, rather than using real evidence and live testimony to prove the charges beyond a reasonable doubt, the government uses unsworn, out-of-court hearsay accusations (not subject to cross-examination or any real scrutiny) to prove (if you want to call it that) uncharged conduct by a preponderance of the evidence—uncharged conduct that has a grossly disproportionate effect on the length of the prison term.

This slippery practice destroys the integrity of the criminal "justice" process.

In fact, the practice has become something of a blueprint for crafty prosecutors who want to side-step the Constitution's pesky promises to the criminally accused. This is what one court called, "justice on the cheap." In the simplest terms, the government is sneaking through the backdoor what it cannot bring through the frontdoor.

With all of that in mind, what is left is a flimsy, heavily watered-down version of justice that is one-sided and inherently unfair. No doubt, such corner-cutting causes the margin of error to skyrocket while the quality of justice takes a nosedive.

In his book, Douglas Berman—a law professor at Ohio State's Meritz School of Law and arguably the nation's most respected legal scholar regarding sentencing law and policy—highlighted a highly relevant sentiment from a landmark Supreme Court case:

> *The jury could not function as a circuit breaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish.*[1]

B. Uncharged Conduct and Uncharged Crimes Tacked on at Randy's Sentencing Fundamentally Altered the Nature of His Case, Increasing His Sentencing Range by 1000 Percent, a Different Order of Severity Altogether

To be sure, this is not some abstract scenario about which we are pontificating. Mr. Bookout's case exemplifies this unjust practice and his sentence serves as an egregious example of this abuse.

Using Charged Conduct to Turn a Single $250 Drug Deal into a Ready-Made, Four-Year Drug Enterprise, Unveiled at Sentencing

Randy was convicted of a *single $250* drug transaction, which produced a sentence of about 18 months in prison. But once he was convicted of something—no matter how small or insignificant—the rules changed, and he lost his constitutional procedural protections. This allowed the government to then use the much more relaxed sentencing stage to pile on a massive amount of uncharged conduct and uncharged crimes (dubbed "sentencing factors"), which it snuck into a Presentence Report (that the Probation Department prepared for the sentencing judge).

More specifically, Bookout pleaded guilty to a single $250 drug deal, only to find out during sentencing that he was accused of engaging in more than 50 additional drug deals, representing a quantity of drugs that was over 70 times the amount underlying Randy's guilty plea! Moreover, at sentencing Randy was also accused of and sentenced for using Western Union money transfers to receive money for presold drug orders, using his photography studio/residence to store and sell methamphetamine, and much more—all of which, when combined with the other so-called "sentencing factors," increased Bookout's sentencing range from 18 *months* in prison to nearly 20 *years* in prison, a 1000 percent increase and a different order of severity altogether. Simply put,

[1] Co-author Douglas Berman in his 2018 book, *Sentencing Law and Policy,* quoting Blakely v. Washington, 542 U.S. 296 (2004).

this is a classic bait-and-switch. And it's hard to imagine a more dramatic example of this sneaky practice.

U.S. Appeals Court Judges have called this practice "repugnant"; we call it a dirt-cheap brand of justice—an abusive practice that has not gone unnoticed by the legal community.

In a Supreme Court case, Supreme Court Justice Scalia voiced his concern about such a model of justice, calling it "sinister." In a hypothetical punishment paradigm, the Justice posited a nightmare scenario. The Justice said, "suppose that a state repealed all of the violent crimes in its criminal code and replaced them with only one offense, 'knowingly causing injury to another,' bearing a penalty of 30 days in prison, but subject to a series of 'sentencing enhancements' authorizing additional punishment up to life imprisonment, or death on the basis of various levels of mens rea, severity of injury and other surrounding circumstances." With that in mind, Justice Scalia asked, "Could the state then grant the defendant a jury trial, with requirement of proof beyond a reasonable doubt, solely on the question [of] whether he 'knowingly cause[d] injury to another,' but leave it for the judge to determine by a preponderance of the evidence whether the defendant acted intentionally or accidentally, whether he used a deadly weapon, and whether the victim ultimately died from the injury [that] the defendant inflicts?"

In a powerful closing statement, Justice Scalia emphasized, "**If the protections extended to criminal defendants by the Bill of Rights can be so easily circumvented, most of them would be...vain and idle enactments, which accomplished nothing…."**

In short, Justice Scalia was concerned that the American system of justice could be cheapened and the Constitution's promises rendered meaningless if the government could essentially use a defendant's conviction as a shell, wait until the defendant loses his precious constitutional procedural safeguards, and then pile on uncharged conduct and uncharged crimes at the relaxed sentencing stage, thereby dramatically increasing his prison term and skirting the pesky Constitutional rights of the criminally accused. Justice Scalia's warning rings true, as this is exactly what unfolded in Randy's case. In the same vein, Justice Scalia hit the mark when he called this effect, "sinister."

But Justice Scalia wasn't alone. Since his prescient nightmare hypothetical scenario in 1998, America's most respected legal minds—including the two most recently appointed Supreme Court Justices—have openly and repeatedly denounced this sneaky practice, calling it "unconstitutional" and "fundamentally unfair" (and even "perverse"), as you will see in the following section.

C. The Backlash: The Most Highly Regarded Legal Minds in America Overwhelmingly and Increasingly Express Their Collective Disgust Concerning The Exploitation of Uncharged Relevant Conduct

In an interview with "The News," Mark Allenbaugh—an expert on sentencing issues and one of America's most respected legal minds)—called this underhanded practice "an end-run around the Constitution," adding that "Defendants don't realize this when they go to trial or plead guilty." Allenbaugh was talking about a classic bait-and-switch tactic, where a defendant such as Randy pleads guilty to a single $250 drug deal, only to be sentenced to nearly two decades in federal prison for more than 50 uncharged drug deals and related activities, pinned on him at

sentencing. Allenbaugh and his law partner Alan Ellis—whose accomplishments are too many to note here, as they are two of the brightest legal minds and accomplished members of the legal community in America—have repeatedly criticized this unfair practice.

What's more, it was Supreme Court Justice Scalia who coined the phrase, "the tail which wags the dog of the substantive offense," an apt metaphor that captures the perverse effect of the uncharged sentencing conduct and its disproportionate effect on a defendant's prison term.

And in fact, Scalia's concern continued to spread. Soon, legal scholars began to take notice of this abusive practice, questioning the constitutionality of the process as well as repudiating it, calling it fundamentally unfair and contrary to the Constitution's fundamental promise.[2] To that end, in a comprehensive study titled, "Deconstructing the Relevant Conduct Guideline," Yale legal scholars Amy Baron-Evan and Jennifer Niles Coffin (2008) dismantled the practice of using uncharged conduct and uncharged crimes slipped in at sentencing to the pile on prison time, shedding light on and closely examining the nuances of the sneaky practice, and explaining how America's court system has devolved into a heavily diluted system of justice.

Justice Scalia was struck by the unfairness of the practice, and other U.S. Appeals Court judges have weighed in, denouncing the shady practice and calling it "repugnant," as well.[3] To that sentiment, the Judge added that if such a thing happened in the "former Soviet Union or [within a] third world country… human rights observers would condemn those countries."

The Supreme Court has repeatedly expressed its concern over a nightmare scenario where a defendant can be convicted of something superficially simple or petty and inconsequential, only to have his sentence increased radically because of uncharged conduct conveniently slipped in at sentencing.[4]

There's more. Importantly, the two most recently appointed Supreme Court Justices share these concerns. Both Justice Gorsuch and Justice Kavanaugh have previously spoken out against this sentencing practice. In a 2014 Tenth Circuit opinion, now Supreme Court Justice Gorsuch (then-U.S. Appeals Court Judge) questioned the constitutionality of judicial fact-finding at federal

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[2] *See* Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts,* pp. 66-77 (1998); David Yellen, *Illusion, Illogic and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, p. 78 Minn. Law Rev. 403 (1993).

[3] "[A]rguing that sentencing for uncharged conduct was not was not authorized by Congress is a 'political aberration of our times and repugnant to the basic principles of fair process and procedure traditionally thought to be indigenous to our federal criminal laws." See Judge Lay dissenting in U.S. v. Galloway, 976 F.2d 404, 428-36, 431 (8th Cir. 1992).

[4] In a 2006 Supreme Court case, the Supreme Court raised this concern yet again, positing an extreme hypothetical scenario: in the scenario, the defendant convicted of robbery is facing a possible sentence of 33 to 41 months under the Sentencing Guidelines. But, at sentencing, the judge recognizes additional [uncharged] aggravating factors not found by the jury, including "that a firearm was discharged, that a victim incurred serious bodily injury, and that more than $5 million was stolen..." Rita 551 U.S. at 371-72. The judge's findings yield a sentencing range of 235 to 293 months—six times or more than it would have been based solely on the jury's robbery conviction without judge-found facts enhancing the sentence. The Supreme Court Justices concluded that, as the judge-found facts "are legally essential predicate for his imposing of the 293-month sentence..., the 293 months sentence...would surely be reversed as unreasonably excessive." *Id.*

sentencing, as opposed to fact-finding by a jury. Then-Judge Gorsuch explained that "[i]t is far from certain whether the Constitution allows" a judge to "increase a defendant's [sentence] (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or the defendant's consent" (Sabillon-Umana, 772 F.3d at 1331).

Likewise, there's now-Supreme Court Justice Brett Kavanaugh's notable statement when he was a U.S. Appeals Court judge:

> Allowing judges to rely on...uncharged conduct to impose a higher sentence than they otherwise would impose seems a dubious infringement of the rights of due process and a jury trial. If you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don't you have a right to have a jury find beyond a reasonable doubt the facts that increase that five-year sentence to, say, a 20-year sentence?
>
> See U.S. v. Bell, 803 F.3d 926, 928 (D.C. Cir. 2015).

Contemporaneous with then-Judge Kavanaugh's statement, Justice Scalia, joined by Justice Thomas and Justice Ginsburg, authored a powerful dissent from the Supreme Court's denial of a certiorari in Jones, pointing out that "any facts necessary to prevent a sentence from being substantively unreasonable and thereby exposing the defendant to a 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." (135 S. Ct. at 9, Scalia, J. dissenting from denial of certiorari, joined by Thomas and Ginsburg, JJ.)

The Justice added that "the Court of Appeals have uniformly taken our continuing silence to suggest that the Constitution does permit otherwise unreasonable sentences supported by judicial fact-finding, so long as they are within the statutory range," stressing, "*this has gone on long enough*" (emphasis added).

D. Summary

In sum, Randy's case is a shocking and egregious example of what the best and brightest legal minds in the U.S. are gravely concerned about—by skillfully circumventing inconvenient constitutional procedural protections afforded to the criminally accused and exploiting a legal loophole at sentencing, the government can render the fundamental promises and protections of the Constitution, meaningless. The outcry presages a change in the law. The problem is, such a change could take many years or decades to unfold. By then, the harm will have already been done.

CROSS-EXAMINATION IS BEYOND DOUBT THE GREATEST LEGAL ENGINE INVENTED FOR THE DISCOVERY OF TRUTH.

- John Henry Wigmore -

Famous American lawyer and legal scholar John Henry Wigmore on the importance of the right to face one's accuser via cross-examination.

PART TWO

REMOVING THE RIGHT TO FACE ONE'S ACCUSER IN THE AMERICAN JUSTICE SYSTEM PARADIGM: HOW UNSWORN, UNCORROBORATED, OUT-OF-COURT HEARSAY (WHICH IS NOT SUBJECTED TO THE INTENSE SCRUTINY OF CROSS-EXAMINATION) ACCUSATIONS WERE USED TO MANUFACTURE A FOUR-YEAR DRUG ENTERPRISE

Of course, we just explained at length the big picture concerning how the constitutional procedural safeguards afforded to the criminally accused are side-stepped by prosecutors for an easy score, but it is critical that you understand the nuances of the federal punishment paradigm and the procedural unfairness that underlies it; that is, to fully grasp the degree of injustice that underlies Randy's case, it is critical that you have a nuanced-understanding of the inner-workings of the federal punishment paradigm.

As previously discussed, the Federal Rules of Evidence do not apply in federal court during the sentencing stage (thus making unreliable, out-of-court hearsay that would be inadmissible during a criminal trial, perfectly admissible during sentencing). Now couple that with the fact that defendants do not have a right to confront their accusers in court (through cross-examination) at sentencing, and you have a situation ripe for abuse, something of a perfect storm—for federal prosecutors, that is. The introduction of supplementary information at sentencing might not immediately seem unfair, but the unfairness becomes glaring when one realizes that the government has introduced its entire case at sentencing.

As explained earlier, there were no third-party witnesses, nor was there any corroborating physical evidence with respect to the uncharged conduct pinned on Randy at sentencing. Instead, the accusations were based solely on unsworn, uncorroborated, out-of-court hearsay accusations made by an inmate and another drug dealer (whose stories were conflicting, not corroborative). Pinning more than 50 drug deals (and related activities) on Randy at sentencing ultimately drove his extreme prison sentence up to nearly 20 years. In such a situation, the credibility of the government witnesses is everything—and so is the process of testing the accusers' story and credibility through vigorous cross-examination. When that vital constitutional protection is removed, and a man is imprisoned for many years or decades based on out-of-court accusations against which he cannot fairly defend himself, you have the opposite of due process. Such a one-sided model of justice is hard to reconcile with the Due Process Guarantee of the Constitution.

It is beyond the realm of possibility that the founders of this country imagined a system of justice where *out-of-court* accusations are used as so-called evidence to support *uncharged* conduct and *uncharged* crimes that will be used to strip a man of his liberty and imprison him for many years or even decades, not even granting him the opportunity to defend himself against the accusations by facing his accuser. But through clever corner-cutting, that is precisely what the system has devolved into. It's hardly a stretch to say that any system of justice that imprisons men and women using unsworn, out-of-court accusations without allowing them to face their accusers in court and fairly defend themselves, is a worthless counterfeit—a system of justice in name only.

We are stunned by this.

A. Using Out-of-Court Hearsay Accusations at Sentencing to Support the Gravamen of its Case Allowed the Government to Gloss Over the Gross Deficiencies in Its Case

It is equally important that by waiting until the sentencing stage, when Randy lost his right to face his accuser, the government was allowed to fill in the gaping holes and gloss over the gross deficiencies in its case. No evidence against Randy? No problem. Shaky witnesses whose stories don't match? No worries. There's no real scrutiny.

Plainly, this allowed the government to build a multiyear drug enterprise that encompassed more than 50 drug deals upon the back of a guilty plea to a single $250 drug deal, even though the government didn't have a single credible witness or a single piece of physical evidence to support even the initial drug deal. In short, the gross deficiencies in the government's case are inconsequential—the backdoor is wide open. The prosecutor in Randy's case exploited this dangerous legal loophole.

If that does not rock the readers' faith in the integrity of the American justice system, then nothing will. It's hardly unfair to say that this model of justice is not merely incompatible with the Constitution's fundamental promises to the accused but is also antithetical to the founders' vision of the Constitutional framework that underpins the American system of justice.

In Randy's case, cross-examination of the government witnesses would have been a treasure trove, as their stories were logically inconsistent, incredibly vague, and contradictory, and their credibility was highly questionable, hence the government's timing in waiting until sentencing to unveil its entire case.[5]

B. The Right to Face One's Accuser in Court Lies at the Heart of the American System of Justice. It is of Paramount Importance, and is the *Sine Qua Non* of Due Process and Procedural Fairness

In the famous words of John Henry Wigmore, cross-examination is "beyond doubt the greatest legal engine invented for the discovery of truth." In a section titled, "In Federal Sentencing Hearings, 'Facts' Are Not Facts," Chief Judge for the First Circuit echoed this sentiment in a compelling summation of the federal sentencing scheme:

> Fact finding in a criminal case is grounded in the United States on constitutional bedrock. The right of confrontation of government witnesses, the right to compulsory process are all designed to guarantee the integrity of the fact-finding determination. In short, courts find facts based on evidence. Under the Guidelines, however, a criminal defendant is utterly stripped of these rights at sentencing, even though determinations there made may theoretically double or triple the sentence he receives upon the offense of conviction. When appellate courts speak of 'facts' found during a sentencing hearing, therefore, they are guilty of far more than misnomer; they are evoking a constitutional process which they must know has no place in

[5] One witness racked up 13 felony charges and continued to use methamphetamine during his so-called cooperation; the other witness turned into a double agent and began tipping suspects off about the investigation, then tried to kill herself before fleeing the country.

today's federal sentencing. (Chief Judge William G. Young in U.S. v. Richard Green 1st Cir. 2004.)

What's more, the Supreme Court has many times emphasized this fundamental necessity of basic fairness.[6] The high court underscored that "cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested...The cross examiner is not only permitted to delve into [a] witness' story to test the witness' perception and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness." Yet again, the Supreme Court made clear that "[t]he opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process" (Kentucky v. Stincer 482 U.S. at 736).

To borrow the words of Yale legal scholars on this sentencing practice, "[t]he equivalent of a conviction is obtained without the basic rudiments of due process assumed to apply in our criminal justice system, based on information that is often unreliable, as the Sentencing Commission has recognized" (See Amy Baron-Evans and Jennifer Niles Coffin's study "Deconstructing the Relevant Conduct Guideline, 2008).

More to the point, in a section titled, "In Federal Sentencing Hearings, 'Evidence' is not Evidence," Chief Judge for the First Circuit maintained that "courts today must base their conclusion [at sentencing] on a mishmash of data including blatantly self-serving [out-of-court] hearsay largely served up by the Department [of Justice]." The Chief Judge went on to note that "[c]ourts have little chance to independently review [the information in a defendant's Presentence Investigation Report]," and emphasized that "some data presented at sentencing hearings is so far-fetched that the appellate courts seem almost embarrassed to uphold reliance upon it," adding "[y]et it must do so, for in sentencing the traditional norms simply do not apply. We ought not to pretend otherwise" (See U.S. 1st Cir. Mass., 2005 Chief Judge William G. Young in U.S. v. Green 426 F.3d 64, 2005).

At its core, the Chief Judge of a U.S. Appeals Court’s point is that the current sentencing system strips the words "burden of proof," "evidence," and "facts" of any real meaning. At sentencing, anything is considered a "fact" or "evidence," no matter how vague, flimsy, or untested.[7]

In sum, this punishment paradigm is a prosecutor's dream and, we're sure, the founders' worst nightmare. So, while America is touted as the world's gold standard concerning how a justice system is supposed to operate, such justice is illusory—and there's no better way to dispel an illusion than with a dose of reality and scrutiny, which we are hopeful that we have done here.

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[6] See California v. Green, 399 U.S. 149, 158 26 L.Ed. 2d 489 (1970).

[7] See e.g. Edward R. Becker, “Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation Clause Be Applied?” 151 F.R.D. 153, 154 (1993). District court judge for twelve years before the Guidelines asserting that judges typically discounted unreliable evidence); U.S. v. Galloway, 976 F.2d 414, 444 (8th Cir. 1992).

C. Summary

The blueprint is simple: in a case devoid of concrete evidence or credible witnesses, the government patiently waits until sentencing to use unreliable and flimsy out-of-court hearsay to support the uncharged conduct (mindful that it cannot be tested). As such, the government managed to parlay a single $250 drug deal into a multiyear drug operation that encompassed more than 50 drug deals and related activities. Such a calculated maneuver solves for the government the pesky problems of evidence and proof.

Under this model of justice, there is simply no need for a costly and time-consuming investigation that employs search warrants, drug seizures, controlled buys, telephone wire taps, surveillance, and so on. All that is needed is the uncorroborated word of a criminal who wants out of prison. Case closed. That said, this is a so-called system of justice that pretends to be in search of truth, when in reality, it is a system designed to obscure the truth, a system in which trickery and deceit have a moat that serve as protection.

Where is the line drawn? Can the government convict a man or woman of a nonviolent petty crime, only to use out-of-court hearsay to impose a sentence of death? Most would scoff at that notion.

Given the current state of affairs, however, that's hardly a radical idea. The government has exploited this loophole to sentence a man to decades in federal prison for a murder he was never charged with, tried for, or convicted of, after he was convicted of a petty nonviolent white-collar crime: he was convicted of illegally withdrawing money, but his sentence was increased by more than two decades based on an uncharged murder. U.S. Fitch (9th Circuit).

Manipulation of evidence and lying to a court is a far cry from justice.

PART THREE

THE GROSS AND OVERT MANIPULATION OF THE EVIDENCE IN RANDY'S PRESENTENCE INVESTIGATION REPORT

After Randy pled guilty to a single $250 drug deal, a Presentence Report was prepared for his sentencing judge. This is where more than 50 drug deals and many other related activities over the course of four years (in the form of uncharged sentencing factors) were unveiled. The report was prepared by a probation officer and was presented to the judge as an "objective" third-party report of all of Randy's criminal conduct. The report was allegedly based on raw investigative reports as well as conversations with the government agents in charge of the investigation. After receiving this report, the judge in Randy's case then used the accusations therein to fashion an extreme prison sentence of nearly two decades.

But Randy's Presentence Report was not based on a fair and objective review of the investigation and its consequent reports. As is reflected in the raw investigative reports, the investigation yielded overwhelming evidence that rendered the many accusations (in Randy's Presentence Report) unreliable and even demonstrably false.

It is true, however, that the accusations in Randy's Presentence Report were really based on conversations with the federal law enforcement agents who spearheaded the underlying investigation. Therein lies the problem. And here's where it gets tricky. The probation officer technically penned and filed the report with the court, but make no mistake about it: the report was a carefully crafted, one-sided narrative that comported with government agents' narrative—not a true third-party objective report based on the actual investigation. Plainly, the investigating government agents coached the probation officer, distorting the picture and tainting the process as a result.

This is particularly devious and crafty because the report is presented to the sentencing judge as an objective report filed by a neutral party. The U.S. Probation Department in reality is an extension of the prosecutors' office. The truth is, the government agents dictated the report by cherry-picking and omitting key information, all designed to jibe with the government's/law enforcement's version, which is a grossly distorted account compared to the actual investigation. To that end, if there was evidence that a government witness lied, it was simply omitted, no matter how overwhelming, because it undercut the government's one-sided narrative. For clarity, what unfolded is not a couple of innocent omissions. The manipulations are extensive, glaring, and shocking.

In addition to burying overwhelming evidence that rendered the accusations unreliable or demonstrably false, the government took logically inconsistent and contradictory statements from two different drug-dealer-turned-government-witnesses and omitted the inconsistent parts, creating the illusion of consistency and corroboration, when in actuality, it was a logical impossibility for both accounts to be true.

The deceit and trickery don't stop there. Practically everything that the government's star witness (an inmate) told them turned out to be a lie. To legitimize his lies, the report was cleverly written

to make the judge believe the accusations were corroborated by third-party witnesses, when the opposite is true: the alleged witnesses rendered the inmate's accusations demonstrably false and actually corroborated Randy's version of events.

But one would never know it by reading the report. When Randy's judge read it, it detailed paragraph after paragraph and page after page of accusations of drug trafficking, painting Randy as a real deal drug distributor, all backed up by many witnesses whose stories were corroborated. It was an illusion. Through overt manipulation, the federal government manufactured "credible evidence" in the name of destroying a father, son, dad, grandfather, and friend. A 50-year-old man who had never served a day in prison may very well die there because of these devious tactics.

To be sure, at all levels of the criminal justice system, mistakes happen. Sometimes, incompetent people can produce sloppy work in good faith. Good faith mistakes are inescapable. And that's bad enough. But this is fundamentally different. Here, what happened was a sinister manipulation done in bad faith, as it cuts to the heart of the PSR's *raison d'etre*: to provide accurate information to the judge about a defendant's culpability so the judge can make critical findings of credibility and impose a sentence proportional to the severity of the crime.

In a nutshell, since there was no physical evidence against Randy, the government relied on uncorroborated, out-of-court hearsay accusations, and when the hearsay proved unreliable and in large part demonstrably false, the government resorted to manipulation so as to invent credible evidence while at the same time burying the overwhelming evidence that strongly pointed to Randy's innocence. It's clever. It's also evil, but it was clever.

Summary

In sum, this is not an instance of one little omission on a Presentence Report that slanted the truth a little. This was quite the undertaking. The sophistication of this elaborate lie that was *sold* to the court as an objective Presentence Report can only be understated. Plainly, this allowed the government agents to peddle their narrative under the guise of an objective third-party Presentence Investigation Report.

There is nothing worse than the government knowingly using false information for the sole and express purpose of stripping a man of his life and liberty so that it can ratchet up the years he must spend in a prison cell.

If we remove the uncharged crimes and other uncharged criminal conduct snuck in at sentencing, the government is left with a single $250 drug deal that merits probation to just 18 months in prison. Thus, more concerned with the size of its case than with the integrity of the sentence or the damage to a man's life, the federal government cruelly manufactured a four-year drug enterprise so it could crush Randy and tout its big bust.

IF [YOU] DEFRAUDED A BANK, [YOU ARE] GOING TO GET 10 YEARS IN JAIL OR 20 YEARS IN JAIL. BUT [IF YOU] SAY SOMETHING BAD ABOUT DONALD TRUMP … TWO YEARS OR THREE YEARS, WHICH IS THE DEAL [YOU] MADE … IN ALL FAIRNESS TO [YOU], MOST PEOPLE ARE GOING TO DO THAT.

– President Donald Trump –

President Donald Trump speaking about Michael Cohen and criminals-turned-federal-government-witnesses.

PART FOUR

CRIME PAYS—AND PAYS WELL: HOW THE HIGH-LEVEL DRUG TRAFFICKERS IN RANDY'S CASE WERE EFFECTIVELY REWARDED WHILE THE LOW-LEVEL GRUNT, RANDY, WAS EFFECTIVELY PUNISHED

First, Randy vehemently maintained that the allegations against him are false, as explained throughout this petition. But, for the sake of this argument, we will take the allegations in Randy's Presentence Report as true. That said, even if, for the sake of argument, we take all of the accusations against Randy at face value, he is worlds apart from Melinda Neal and John Moore—two high-level drug traffickers on the hook for selling massive amounts of methamphetamine, according to the federal government investigative reports—in the drug hierarchy.

We've talked extensively about the two high-level drug traffickers (Melinda Neal and the inmate, John Moore) who made the uncorroborated, out-of-court accusations against Bookout,[8] which were then used as evidence of Bookout's "drug-trafficking activities," in turn used as the basis for Bookout's lengthy prison term—just shy of the statutory maximum.

So, how did things pan out for them? Now we turn to the fruits of their labor: Melinda Neal and John Moore were not nickel-and-dime low-level drug dealers supporting their habits. As investigative reports in this case reflect, they were high-level drug traffickers who distributed methamphetamine on a grand scale. Melinda Neal worked hand-in-hand with her high-ranking gangster boyfriend (as the investigative material reflects, Neal's main methamphetamine supplier was her boyfriend, who also happened to be a high-ranking member of the notorious street gang, the vicious "Mexican Mafia"). But even though investigative reports reflect that Melinda Neal and John Moore were the high-level drug players responsible for distributing no fewer than 10 pounds of methamphetamine (versus Bookout's 494 *grams* of methamphetamine), it wouldn't be unreasonable to say that they both came out smelling like roses.

For her role in working with high-ranking gang members to flood the streets with pounds and pounds of methamphetamine, high-level drug trafficker Melinda Neal is not serving a near-two-decades-long prison term like Bookout is serving. Oh, no. In exchange for the information about Bookout (and, presumably, others) that Neal (who was caught red-handed lying to agents about information) provided to the government, she received a massive sentence reduction, resulting in a 48-month prison sentence, 14 *years* shorter than Bookout's![9]

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[8] The two government witnesses, Neal and Moore, provided details that were logically inconsistent, making it impossible for both of them to be telling the truth.

[9] Neal was caught lying to the government agents. And it was undisputed that while she was ostensibly cooperating with law enforcement in this case, she turned into a spy (against the government) or a double agent. (While Neal was supposedly cooperating with law enforcement, she was feeding the suspects of the investigation information about the investigation, using her insider government cooperator status to play both sides, which destroys her credibility. This was hidden from the sentencing judge). And a couple of days after she provided vague information about Randy to law enforcement, using her insider government cooperator status, she tipped off suspects, then tried to commit suicide, resulting in a coma and hospitalization. (Right after Melinda Neal tipped off the suspects of the investigation, she tried to commit suicide, betraying the agents' trust). After her suicide attempt failed, she fled the country. It was only after her failed suicide attempt and her departure to another country that she was found. Even though she was a proven liar who turned on the government agents, lied to them, tried to commit suicide, and fled the country, her uncorroborated,

So, a high-level drug trafficker (Melinda Neal) who was caught red-handed, who sold an estimated 10 to 30 pounds of methamphetamine (possibly more), and who the government had overwhelming evidence against, received a sentence 14 years shorter than a low-level grunt (Bookout) who was never caught with drugs, who reluctantly pled guilty to a single $250 drug deal, and against whom the government had not a single iota of physical evidence. Melinda Neal served a couple of years at a cushy federal prison camp. Not surprisingly, she almost immediately returned to her life of crime and methamphetamine use upon her release, as evidenced by her positive drug tests, on supervised release, and new drug charges within the first month or so of her freedom.

What about John Moore (the inmate who pinned a drug operation on Bookout)? For his role in flooding the streets with pounds and pounds of methamphetamine, high-level drug trafficker John Moore is not serving decades behind bars or a prison term even close to the length of Mr. Bookout's extreme sentence either. Instead, in exchange for the information that he provided to the government about Bookout (and, presumably, others), John Moore, like Melinda Neal, received a massive sentence reduction, resulting in a relatively light 87-month prison term—never mind that the vague information (about Bookout) provided by John Moore proved to be blatantly false.

As was discussed earlier, if you can believe this, by the time John Moore's case went to sentencing, he had racked up about 13 additional felony charges. And, incredibly, after he was sentenced to a greatly reduced prison term because of his so-called cooperation (with the government) in this case, John Moore went on one last violent crime spree before he could self-surrender to prison authorities, collecting a mélange of fresh charges (four, in all), culminating in a violent confrontation with law enforcement, which involved a firearm. But he had no reason to fret. No doubt because of his golden government cooperator status and his many tête-à-têtes with government agents eager for easy information, those gravely serious state and federal charges were dismissed, and he was transferred to federal prison to serve his 87-month sentence. (Moore will serve about four short years and be back on the street). The slate was wiped clean for John Moore. Yet another perk for a dangerous, high-level-criminal-turned-government-witness whose value comes from his willingness to provide the government with vague information about other alleged criminals, which in turn allows the government to call the information "evidence" and leverage it to coerce lay-down convictions.

Melinda Neal and John Moore provided the government with vague information about Bookout for dramatically reduced prison sentences. The result is as perverse as it is bizarre: the high-level drug traffickers traded false information about Bookout to reduce their own prison sentences significantly; meanwhile, Bookout received a harsh prison sentence that is usually reserved for high-level drug traffickers such as Melinda Neal and John Moore. In the end, Bookout received a prison sentence *14 years longer* than Melinda Neal received, and *10 years longer* than John Moore received.

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out-of-court accusations (about Randy selling her methamphetamine) were unsupported by physical evidence or third-party witnesses—just *her* unsworn, uncorroborated, out-of-court accusations.

The cherry on top? The stories concocted by Melinda Neal (government witness #1) and John Moore (government witness #2, referred to as the "inmate" throughout this petition) were logically inconsistent and flatly contradictory—in other words, it was a logical impossibility for both to have been telling the truth.

The lesson here? Someone can be a dangerous, high-level criminal, and so long as he is willing to provide information—no matter how flimsy or vague—about other alleged criminals so that the government can weaponize said statements to get a cheap conviction, all is forgiven. In his book *Snitch: Informants, Cooperators & the Corruption of Justice*, author Ethan Brown (who writes about crime and drug policy for national publications) hit the nail on the head:

> There was also concern that Section 5K1.1 [the section used to grant massive sentence reductions to criminals in exchange for information about other alleged criminals] provided too generous rewards to cooperators, who could then feel emboldened to return to the streets to commit even more crime. While 5K1.1 was an invaluable tool to federal prosecutors, it also created a huge incentive for defendants to fabricate evidence, particularly when faced with harsh prison terms.

And in the most comprehensive study on the matter, legal scholar/law professor Alexandra Natapoff detailed what she had learned after speaking to veteran government agents, prosecutors, and federal judges. One government agent explained to the prominent law professor, "You're only as good as your informant. Informants are running today's drug investigations, not the agents." Then, he added to that sentiment, noting that "agents have become so dependent on inform[ants] that the agents are at their mercy." Similarly, the study highlighted federal District Judge Marvin Shoobs' remarks: "Most of the time...[the informants] are worse criminals that the defendant on trial." And as noted in the study, even prosecutors complain: "These [drug] cases are not very well investigated....Often, in DEA, you have little or no follow up so when a cooperator comes and begins to give you information outside of the particular incident, you have no clue if what he says is true...." Another DEA agent aptly pointed out that "reliance on informants has replaced good, solid, police work like undercover operations and surveillance."

This is consistent with U.S. Court of Appeals judge (and former prosecutor) Stephen Trott's view. In his commentary on incentivized witnesses titled, "Words of Warning for Prosecutors Using Criminals as Witnesses," he stressed that "[c]riminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law." So, it's no surprise that 46 percent of wrongful death penalty convictions can be attributed to false information provided by "incentivized witnesses," according to a study by Northwestern University Law School's Center of Wrongful Convictions.

While Melinda Neal provided government agents with (false) information about Bookout that they could never verify, and while John Moore provided vague information about Bookout that the investigation proved to be demonstrably false, Melinda Neal and John Moore did provide information about other drug dealers. We are sure that Melinda Neal and John Moore did have some valuable information about other drug dealers. That is to be expected.

So, because John Moore and Melinda Neal were so centrally involved in the Young County drug operation, because they were so hands on with so many drug customers and suppliers and played

an integral role in the Young County drug machine, they were able to cultivate these valuable relationships with all of the drug players involved in the operation, allowing them to obtain the government's golden endorsement because their information would help them prosecute others. They were totally immersed in this world, and they were generously rewarded as a result.

This allowed Melinda Neal and John Moore to leverage their high-level positions and essentially cash-in all of the relationships they built through drug deals. As a result, both Melinda Neal and John Moore received massive sentencing reductions.

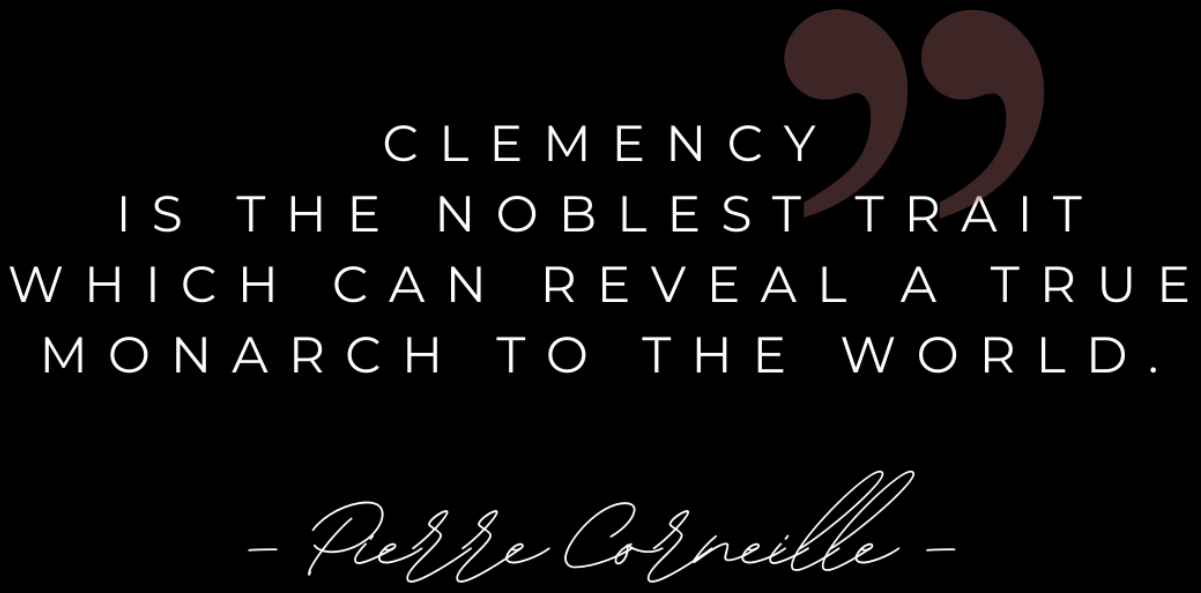
While this perverse phenomenon is not limited to Bookout's case, Bookout's case brings to life the concerns of the legal community. New York University law professor Stephen J. Schulhofer, in the *Wake Forest Law Review*, succinctly captures this phenomenon:

> Defendants who are most in the know, and thus have the most substantial assistance to offer, are often those who are most centrally involved in conspiratorial crimes. Minor players, peripherally involved and with little knowledge or responsibility, have little to offer and thus can wind up with far more severe sentences than the boss."

And in a 2010 paper submitted to the U.S. Sentencing Commission in Washington D.C., legal scholars and law professors Stephen J. Schulhofer and Robert B. Mckay Professor of Law at New York University School of Law, maintain that a "small fry can wind up with more severe sentences than the principal culprit in the offense," (p.15), noting that "only the [high-level players] can benefit from the escape hatch, and the sentencing concessions they receive tend to increase with the depth of their involvement in the offense." (p.16). He ultimately concludes that "the result is an inverted pyramid, with stiff sentences for the many minor players and much more modest punishment for the few knowledgeable insiders who can cut favorable deals." (p.16).

What's more, as noted in their 2010 paper to the U.S. Sentencing Commission, Law Professors Schulhofer and McKay cite a Seventh Circuit Court of Appeals ruling. In that case, three Court of Appeals Judges in the Seventh Circuit echoed this sentiment: "The more serious the defendant's crimes, the lower the sentence—because the greater his wrongs, the more information and assistance he has to offer" (United States v. Bringham, 977 F.2d 317, 318 (7th Cir. 1992)).

And in his book, *Snitch: Informants, Cooperators & the Corruption of Justice*, Ethan Brownprovides a comprehensive overview of how cooperators who are desperate to avoid harsh prison sentences, provide information to law enforcement—which is equally desperate to take easy information to make an easy, lay-down case. He, too, recognizes this disturbing trend: "In our cooperator-coddling system, the little fish face the most severe punishment while the big fish get off the hook." (p.53). He also maintains that "there is genuine outrage that cooperators often lie about defendants and commit far worse crimes than those they are cooperating against...."



Pierre Corneille speaking about the importance of clemency.

PART FIVE

THERE IS NO VIOLENCE IN RANDY'S CASE

There is a world of difference between a nonviolent drug offender and a violent drug offender. Advocates champion the release of nonviolent drug offenders who have been unfairly sentenced too harshly; conversely, advocates don't go near violent drug offenders; and for good reason—violence crosses the line. And nobody, including our team here at the Justice Project, wants violent criminals to be out running the streets. Perhaps if someone cannot keep their hands to themselves, they should be removed from society. We all have sons and daughters and wives and husbands and moms and dads to protect, so none of us wants violent people to be in a position to commit more violence.

Randy, however, is a nonviolent drug offender. Still, there is an 800-pound pink elephant in the room that needs to be addressed.

Randy's own attorney told law enforcement that Randy had traded a small amount of methamphetamine for an antique gun. The show gun was a collector's item. As the record reflects, he sold the gun (at a profit) a week later. The government did not maintain that Randy ever used the gun. More specifically, the government did not maintain that Randy ever used the gun to facilitate a single drug sale. This fact is paramount, because if Randy is unfairly perceived as a violent offender, it will destroy his case for Clemency. There is no violence in Randy's case. Even the government witnesses who pinned more than 50 drug deals on Randy maintained that over the entire four-year period, they had never seen a gun. So to be absolutely clear, we are *not* saying that the government wrongly accused Randy of using a gun to facilitate his drug sales; we *are* saying that outside of Randy's initial purchase of the collector's item, the record of the case as it exists does not allege or show that Randy ever used the gun in any way. Instead, the record shows the opposite.

Perversely, the information about the gun came from Randy's own attorney! Let me rephrase that: naturally believing that the communication between himself and his attorney was protected under the sacred attorney-client privilege blanket, Randy (a gun aficionado who had a history of collecting such guns) disclosed to his attorney that he had traded a small amount of methamphetamine for an antique collector's edition gun, which wasn't even functioning, and which the record shows that he got rid of at a profit a week later.

To group Randy—someone who bought and sold an old collector's edition gun that didn't even function, within a week—with violent drug dealers who used a gun to facilitate their drug sales, is fundamentally unfair. We implore you to consider the ways that this gross injustice compounds the unfairness of Randy's circumstances.

A defense attorney's cardinal sin is to take privileged information that his or her client shares with them in confidence and to breach that trust by giving the information to law enforcement, such that law enforcement can give it to the prosecutor and in turn, use it to punish the defendant with time in prison. If that were allowed, the U.S. criminal justice system would come to a

grinding halt. But that's what happened here. This is not our "version." This disclosure is undisputed by the government.

Outrageously, the only person who told law enforcement about Randy taking possession of the antique gun (for about a week), was Randy's own defense attorney—the government did not have this information when the attorney told them, nor were they ever able to verify this information through an independent source once they had it. Not a single witness had ever seen Randy with a gun. To be absolutely clear, the *sole* source was Randy's attorney. Unbelievably, this information was then used to add about four additional years to Randy's prison sentence! That should blow you away.

Fortunately, the egregious breach of trust was captured via transcripts of the May 22nd, 2014 meeting with law enforcement, which predated federal charges. For clarity, when Dunbar mentioned the gun, there was no prior discussion about it; she just blurted it out, out of the blue:

Attorney Dunbar: What about the Colt 45? When was that? Do you remember?
Attorney Dunbar: Rob [one of the federal agents at the interview], he traded some meth for a handgun.
Agent: Okay. When, where, who, amounts? All that good stuff.
Attorney Dunbar: Yeah. Is—why don't you do that?
Bookout: Um.
Attorney Dunbar: You've got to tell them here.

Again, this was the sole information provided about the gun. Notably, attorney Dunbar didn't pull Randy aside, didn't discuss this with him, didn't ask him for his consent—she just blurted it out. Even after the meeting, the agents tried to verify it, to no avail. Not only did attorney Dunbar tell law enforcement about this, but when the government used it, she didn't object. Because she didn't object, Randy's judge had no idea that the information about the gun stemmed from Randy's own defense attorney's confession of privileged information. In the end, Randy's own attorney is directly responsible for an extra four years of his life spent in prison. So much for that whole attorney-client privilege nonsense.

Imagine if attorneys routinely just blurted out privileged information and it was used against the client. The attorney in Randy's case confessed. We are incredulous that this was allowed, as attorney-client privilege was here clearly trampled upon.

To bar Randy from candidacy for a Clemency because of an antique gun that didn't even work, which had nothing to do with drug sales, would be unjust—and when you consider that it was Randy's own attorney who gave this information to law enforcement, it would be a travesty.

There is no allegation of violence in Randy's case; there is no allegation that he ever used the out-of-service antique gun after purchase—just an attorney who shared privileged information about the purchase of a gun. Again, all of the government witnesses who were questioned about the matter maintained that they had never seen Randy with a gun.

Summary

This author has noticed a trend: in the context of sentencing commutations granted by the President of the United States, most of the attention is focused on people who are serving life in prison. That is a direct product of the attention given to prisoners who are serving life in prison. In their shadow, it seems that other unjust sentences are discounted. Although we agree with the fight for the freedom of our brothers and sisters who are unfairly serving life in prison, we implore you to not discount the nearly two decades in federal prison that Randy must serve. There is no parole in the federal system. Thus, such a long sentence may very well be life for Randy.

However you look at it, it's a long, long time. It's incapacitation. And incapacitation is supposed to be used to warehouse murderers and rapists and other dangerous criminals who must be separated from the public. Randy hardly fits that profile: a 55-year-old professional photographer who has never been to prison. What's more, while we spotlighted the legal loophole that the opportunistic prosecutors in Randy's case exploited, there was a darker dimension to the injustices at play. To that end, we also deconstructed the gross manipulation of evidence in Randy's Presentence Investigation Report, on which the judge based Randy's prison sentence.

In addition to the loopholes, manipulation, and deception, there was Randy's attorney. Her misconduct was probably the most shocking of all. Prosecutors and federal agents playing dirty isn't all that surprising. But a *defense attorney* facilitating the injustice? Well, that's a different animal altogether. It is simply unthinkable that a licensed attorney who has been practicing law for 40 years would browbeat her client into confessing to federal law enforcement agents without first looking at the evidence! Now add to that, that had the attorney actually cracked the case file, she would have discovered overwhelming exculpatory evidence that destroyed the government's so-called case and supported Randy's story. That coupled with the fact that Randy vehemently denied the accusations makes Randy's defense attorney's actions doubly indefensible. What she did was crazy, plain and simple.

Attorney Dunbar was instrumental in Randy Bookout's demise. Her brazen misconduct and indifference to human life as well as her duty as a defense attorney plainly perverts the role of an attorney, an advocate of the accused. Attorney Dunbar embodies everything that a defense attorney should not be.[10]

At all levels—the attorney, the prosecutor, the Probation Department, and the federal agents—the federal justice system failed Randy. The judge, well, the judge was reduced to a calculator. It's not his fault; he based Randy's prison sentence on the Presentence Investigation Report that was given to him, then used the algorithm produced by the U.S. Sentencing Guidelines to crush

[10] The attorney's conduct is doubly appalling as prisoners are not allowed to sue for misconduct that constitutes or flows from malpractice. An attorney can do whatever he or she pleases with impunity; they can charge exorbitant fees, only do sloppy and shoddy work, lie, cheat, whatever. There is no recourse (under Texas Law, at least). Randy's team filed a highly detailed, sworn brief outlining her gross misconduct; in response, the attorney failed to even attempt to rebut the claims. She offered unsworn, conclusory remarks that Randy was lying, but failed to actually answer any of the detailed accusations.

Randy. Case closed. Next case. (In)Justice served.

We would file this Clemency Petition with the Pardon's Office, but it would be futile. The fox is guarding the hen house. The prosecutors who work at the Pardon's Office will only pull Randy's Presentence Investigation Report, which is the federal government's one-sided manufactured version. We implore you to help us call attention to the striking injustices that resulted in Randy's imprisonment for nearly two decades.

The worst part about all of this is that everything was done with impunity. No wonder everyone from the attorney to the federal agents to the probation officer to the prosecutor cut corners and employed abusive practices. Why not? I can imagine that they are only emboldened to continue this pattern of highly troubling conduct.

Randy was stripped of his liberty and freedom and robbed of his life. The federal government did not come with a mask and a gun, but make no mistake about it, it stole Randy's life from him just the same.