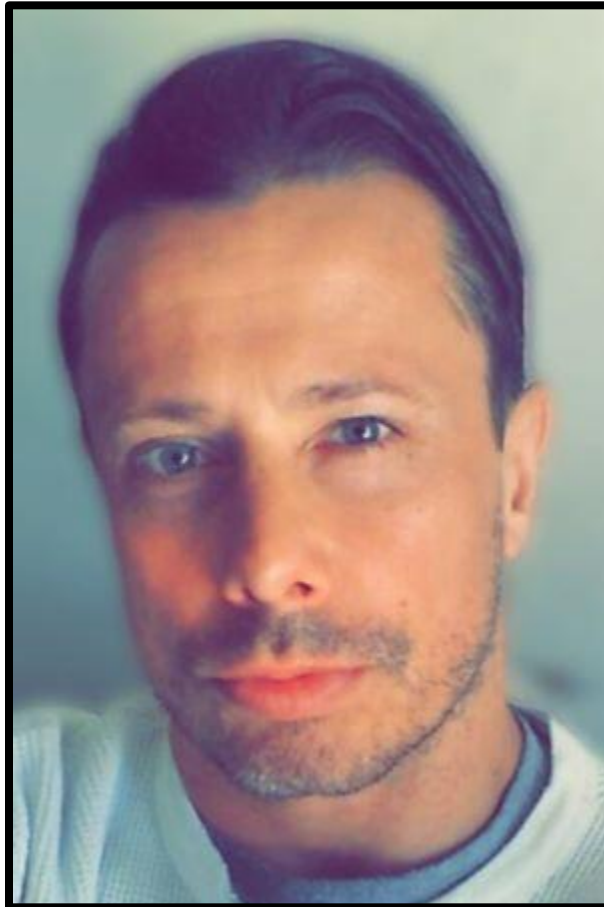


Clemency for Joshua Bevill



Northern District of Texas, Dallas Division: Case Nos. 3:10-cr-326 (earlier case); 3:11-cr-082 (present case)

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I. Overview

A. One in (About) Two Million

Joshua Bevill has been in federal prison for nearly 12 years. He's serving 30 years in federal prison. He pleaded guilty in his earlier case and entered an effective guilty plea in his present case. (See Joint Stipulation of Evidence in which Bevill expressly admitted that he was guilty. Doc.181, 4-6-13.)

Joshua Bevill's case is one in about two million, a rough estimate of the number of cases to flow through the federal system of justice since the advent of the U.S. Sentencing Guidelines in the 1980s. What played out in Bevill's case had never happened before.

This is not an overstatement. It even triggered *federal prosecutors* to ask for a 60- to 90-percent downward variance, based purely on the 3553 sentencing factors, to help offset the unprecedented sentencing anomaly or an illegal application of uncharged relevant conduct (or both). (See Prosecutors' March 1, 2012 Sentencing Memorandum.)

This is a white-collar case, but it's not the headline-grabbing variety that involved hundreds of millions, or even *billions* of dollars in losses. People did not lose their life savings or pension funds.

This is low-level securities fraud case that involved a little more than \$100,000 in losses and 3 investor/victims. In Joshua Bevill's present case, he committed a relatively minor nonviolent offense: he made misrepresentations to 3 investors/victims who lost a combined \$106,000 as a result. He was sentenced to 90 years, of which 30 are to be served in federal prison. (The investors/victims in Bevill's case were high-net-worth, sophisticated investors who lost a small fraction of their total net worth.)

Through manipulation of the U.S. Sentencing Guidelines or an unprecedented sentencing anomaly (or both, depending on how one looks at it), Bevill's U.S. Sentencing Guideline range was artificially inflated by a lifetime, a fact that struck federal prosecutors as unfair. ***In a March 1, 2012 Sentencing Memorandum prosecutors maintained that a sentence greater than 10 - 12 years in the present case would be greater than necessary to satisfy the goals of punishment, and, what's more, emphasized that a 25-year sentence would serve to unfairly warehouse Bevill, but would not serve a legitimate purpose, a position based purely on the 3553 sentencing factors.***

In short, in that Sentencing Memorandum prosecutors believe a sentence exceeding 10 - 12 years would be purely punitive and a brutal sentence spanning two and a half *decades* would serve to unfairly incapacitate a man who committed a \$106,000 securities fraud that involved 3 investor/victims.

But in the end, the final product was a prison sentence that is grotesquely disproportionate to the seriousness of Bevill's crime of conviction and radically disproportionate to any real harm done by his present case: making misrepresentations to 3 investor/victims, resulting in a combined loss of \$106,000. In short, Bevill's prison sentence in his present case has little connection to his present case.

B. Why Joshua's Prison Sentence in His Present Case is Grossly Disproportionate to the Seriousness of His Present Case

This case is a jackpot case. There is not just one reason that makes Bevill a prime candidate for Clemency. Rather, his radically disproportionate sentence is a product of many abuses, flaws, and illegal practices that taken together provide a compelling case for Clemency.

First, Bevill has two cases, both predate prison time. In his earlier securities fraud (2006 - 2008) case, under a *five-year* securities fraud statute Bevill was held responsible for \$4 million in losses + 100 investor/victims + leader role + violating an administrative order . He pleaded guilty, received *the harshest* sentence allowed under the law—five years in federal prison—and has served that sentence. Fair enough. Bevill paid his debt in full.

Now in Bevill's present securities fraud (2011) case, Bevill was held responsible for \$106,000 in losses (the intended loss was \$212,000) + 3 investor/victims + *no* leader role + *no* violating an administrative order. Bevill's present case is *much smaller* and less severe.

At sentencing in Bevill's present case, however, the judge took all of conduct (\$4 million in losses + 100 investor/victims + leader role + violating an administrative order) from Bevill's *earlier* (2006 - 2008) case and piled it onto his present (2011) case (\$106,000 in losses + 3 investor/victims), ***which caused his U.S. Sentencing Guideline range to leap by a lifetime, from about 5 years in prison to 30 years to life in prison, a different order of severity altogether.***

Problem is, although there was a five-year statutory maximum ceiling in Bevill's earlier case, in Bevill's present case he was charged with a greater 20-year securities fraud statute, as well as other greater 20-year fraud statutes. As a result, in Bevill's earlier (2006 - 2008) case the \$4 million in losses + 100 investor/victims + leader role + violating an administrative order was used to give Bevill the harshest sentence allowed under the law (five years in prison); then in his present case the *same* \$4 million in losses + the *same* 100 investor/victims + the *same* leader role + the *same* violating an administrative order was used to punish Bevill under greater 20-year statutes, and ordered to run consecutively, for a total of 30 years in prison—even though *Bevill's present (2011) case is \$106,000 + 3 investor/victims + no leader role + no violating an administrative order.* This grossly overstated the seriousness of Bevill's present (2011) case: \$106,000 in losses + 3 investor/victims. A U.S. Sentencing Guideline range of 30 years to life in prison for a \$106,000 fraud should suggest that something is afoot.

This kind of double punishment is unprecedented, a position that the prosecutors themselves took in a March 1, 2012 Sentencing Memorandum, prompting prosecutors to ask for a massive downward variance, down to 10 - 12 years. There is not another federal defendant in the history of the Guidelines who has ever had to serve a statutory maximum sentence of five years only to have the same conduct used in a separate case to increase his second sentence by decades, from 5 years in prison to 30 years in prison. In short, Bevill pleaded guilty, received the harshest sentence allowed under the law, and served a statutory maximum five-year sentence; then in his present (2011) case, he must serve *another 25 years*, but his sentence in his present (2011) case is based almost entirely on the same conduct from his earlier (2006 - 2008) case. The same conduct increased his total sentence by 600 percent. Bevill paid his debt in his earlier case. It's unfair to crack him over the head with the same \$4 million in losses + 100 investor/victims + leader role + violating an administrative order, under a different (2011) case that was much less severe, \$106,000 in losses + 3 investor/victims + *no* leader role + *no* violating an administrative order. It grossly *distorts* the severity of Bevill's *present case.*

Second, to calculate the U.S. Sentencing Guideline range in Bevill's present (2011) case, as *the core of criminality punished* the court used entirely separate (2003 - 2004) crimes that he was *never* charged with, tried for, nor convicted of—uncharged (2003 -2004) crimes that allegedly

occurred some *seven years* before the conduct in the present (2011) case even started and, worse still, that aren't even remotely related to the present case. Importantly, of the \$4 million in losses and 100 investor/victims used in Bevill's present case, ***\$3 million in losses and 60 investor/victims are tied to the entirely separate uncharged (2003 - 2004) Pointer Group crimes, which he was never charged with.*** This too is unprecedented and, quite simply, radical. The uncharged (2003 - 2004) Pointer Group crimes are not connected to Bevill's present (August 2010 - January 2011) case, yet they were still used as the *core of criminality punished* in Bevill's present case.

Third, regarding the ***\$3 million in losses and 60 investor/victims tied to the entirely separate uncharged (2003) Pointer Group crimes***, when Bevill was 21, he only worked at The Pointer Group as a low-level grunt for *three months* and made very little, *less than one percent* of the total \$3 million raised by The Pointer Group over its life, most of which was raised by other people either before or after Bevill worked at the company. This was never disputed. Yet the entire \$3 million in losses and all 60 investor/victims tied to the uncharged (2003) Pointer Group crimes were hitched to Bevill's present (2011) case, ballooning the perceived size of the present case. Notably, although he took full responsibility in the present case by entering an effective guilty plea, Bevill vehemently denied being involved in the alleged Pointer Group fraud. This, too, grossly overstates the severity of the present case. It's strange: Because seven years before (2003) Bevill committed the crimes in his present case (August 2010 - January 2011) he worked at a company for three months as a low-level grunt, he is responsible for the entire \$3 million and all 60 investor/victims, even though those uncharged (2003 - 2004) crimes have nothing to do with the present (2011) case? Yes, the \$3 million in losses and 60 investor/victims tied to the *uncharged, untried* crimes is a lot of money. But as Bevill emphasized in his written objections to his Presentence Investigation Report—which was undisputed—he worked at that company for three months and made very little, *less than one percent of the \$3 million raised*. By hitching the \$3 million in losses and 60 investor/victims tied to the uncharged (2003 - 2004) crimes to Bevill's present (2011) case, it makes his present case (\$106,000 in losses + 3 investor/victims) appear much worse.

Fourth, the *federal prosecutors* were so taken aback and struck by the probation department's calculation of Bevill's U.S. Sentencing Guideline range that they asked for a massive *60 to 90 percent* downward variance based purely on the 3553 sentencing factors. (Prosecutors in that Sentencing Memorandum maintain that a sentence exceeding 10 - 12 years would be punitive and a sentence spanning two and a half decades would serve only to unfairly incapacitate Bevill. This is compelling objective evidence of the unfairness of Bevill's case, as even federal prosecutors recognized that his Guideline range had little connection to the severity and degree of harm of the present case. What's more, federal prosecutors called the double punishment "a unique situation presented by the Guidelines in this case," taking the position that the perverse effect grossly overstated the seriousness of Bevill's present case.

Fifth, the conduct in Bevill's earlier (2006 - 2008) case should not have been considered uncharged relevant conduct in Bevill's present (2011) case, no small thing considering nearly all of the conduct used to sentence Bevill in his present case (\$106,000 in losses + 3 investor/victims) was the conduct (\$4 million in losses + 100 investor/victims + leader role + violating an administrative order) from the earlier case, *radically* increasing the Guideline range. Bevill's judge herself emphasized that "beyond the superficial fact that both cases involved purported investments in oil and gas projects, they are wholly unrelated." The U.S. Court of Appeals and virtually every U.S. Court of Appeals have made clear time and again over the last 25 years that "[t]o determine whether a defendant's earlier [uncharged relevant conduct] conduct is sufficiently similar to the offense of conviction, we inquire whether there are distinct similarities between the offense of conviction and the remote conduct that signal that they are part of a common scheme or plan or course of conduct ***rather than isolated, unrelated events that happen only to be similar in kind.***" (Emphasis added.)

Sixth, this nation's most highly regarded legal minds—from U.S. Supreme Court Justices to U.S. Appeals Court Judges to well respected legal scholars and law professors—denounce the practice of using uncharged crimes slipped in at the relaxed sentencing phase to dramatically inflate a defendant's prison sentence, which presages a change in the law.

Seventh, scores of federal judges routinely refuse to impose draconian prison sentences yielded by the Fraud Guidelines, calling them, among others, "irrational," "a black stain on common sense," and "absurd on their face,"—a point that the most highly regarded legal scholars have voiced as well. The fraud Guidelines are so absurdly high even in run of the mill cases that they are "universally recognized as so high as to be practically worthless."

Eighth, Bevill's prison sentence—for a relatively minor, low-level securities fraud crime—is either worse than or on par with frauds that are 100, 250, 500, or even 1000 times larger than his; that is, we will demonstrate not only the disproportionality of Bevill's sentence relative to his crime but will also demonstrate the shocking degree of disparity between Bevill's sentence and similarly situated defendants' sentences.

Ninth, as a matter of Bevill's procedural case history he originally pleaded guilty to a ten-year offense, which insulated him from a greater sentence. But because of Bevill's attorney's and *judge's* incompetence the district court was legally required to toss out the illegal guilty plea, which it did, resulting in a lost opportunity and a much longer sentence.

Tenth, Bevill's sentence in the present case *illegally exceeds* the statutory maximum for the offenses by *five years*, a miscarriage of justice under the law.

Eleventh, Bevill's judge ignored a *mandate* that *requires* courts to order the sentences in his earlier case and the present case concurrently.

Noteworthy as well, it's true that Bevill has two cases, but there was no intervening prison time between them; that is, Bevill did not commit a crime, serve time, get out, then reoffend. The conduct giving rise to both cases occurred before his prison sentence, as he was sentenced on the same day in both cases. Bevill did, however, deposit money from two investors *after* pleading guilty in his earlier case.

Joshua Bevill has been in federal prison for nearly 12 years. All of his appeals are exhausted, and now he makes a well-reasoned plea for Clemency.

In the end, the question is simple: does the punishment fit the crime? How can the punishment fit the crime in the present (2011) case when Bevill's U.S. Sentencing Guideline range was inflated by a lifetime based on crimes from his earlier (2006 - 2008) case and largely on uncharged (2003 - 2004) crimes he was *never* charged with? Bevill's punishment in his present case has little connection to his present case. In truth, Bevill's present case was an empty vessel—an empty vessel that was filled to the brim with the conduct from his *earlier case*, most of which constituted entirely separate, unrelated remote crimes that he was *never* charged with.

II. A Tale of Two Cases: Unprecedented Double Punishment

Bevill has two cases. There was no intervening prison time in between the cases—both predated prison time. Put differently, Bevill did not go to prison, get out, and then re-offend.

Further, Bevill took full responsibility in both cases. He pleaded guilty in his earlier case and entered an effective guilty plea in his present case. (Bevill, on a piece of paper, stipulated his conduct *and* his guilt, the government agreed, and the judge signed it. It was called a *stipulated* —bench trial, but it was an effective guilty plea, as Bevill admitted his conduct and expressly admitted that he was guilty.) Notably, both cases occurred in the same federal district, the Northern District of Texas, Dallas Division. (Although Bevill took responsibility in both cases, he vehemently denied the remote uncharged crimes pinned on him, dating many years before his present case, *unrelated* remote uncharged, untried (2003 - 2004) crimes that, bizarrely, served as the core of criminality punished in his present (2011) case.

A. Bevill's Earlier (2006-2008) Case: Under a Five-Year Securities Fraud Statute, Bevill Receives a Statutory Maximum Five Years in Prison in His Earlier Case

Before you can understand why the prison sentence in Bevill's present case is grossly disproportionate to the severity of his crimes, you must first understand his earlier case.

In an earlier (2006 - 2008) case, under a *five-year* securities fraud statute, Bevill received the harshest punishment allowed under the law, five years in prison. Although Bevill pleaded guilty to making misrepresentations to 40 investor/victims from 2006 - 2008 (under North Texas Partners and United Star Petroleum), causing a combined loss of \$750,000, Bevill was held responsible for a total of \$4 million in losses garnered from 100 investor/victims, ***most of which stemmed from uncharged crimes dating to 2003 - 2004, under an unrelated company, The Pointer Group.*** (Bevill worked for The Pointer Group as a low-level cold caller for about three months when he was about 22 years old.) Of the \$4 million in losses and 100 investor/victims from his earlier (2006 – 2008) case, *\$3 million in losses and 60 investor/victims* constituted entirely separate uncharged—2003 - 2004—crimes under The Pointer Group.

Thus, in all in his *earlier* case, Bevill was held responsible for \$4 million in losses + 100 investor/victims + a leader role sentencing enhancement + a violating an administrative order sentencing enhancement = a statutory maximum sentence of five years in prison.

B. Bevill's Present (2011) Case: Under Greater 20-Year Statutes, the Same Conduct from Bevill's Earlier (2006-2008) Case is Yet Again Applied to His Present (2011) Case, Increasing His U.S. Sentencing Guideline Range by a Literal Lifetime

1. Bevill's Present (2011) Securities Fraud Case is Much Smaller and Less Severe Than His Earlier (2006-2008) Case

Bevill's present securities fraud case (\$106,000 in losses garnered from 3 investor/victims) is much smaller and less serious than his earlier case (\$4 million in losses garnered from 100 investor/victims + leader role sentencing enhancement + violating an administrative order sentencing enhancement). For perspective, in terms of the loss amount, Bevill's earlier case is 40 times greater than his present case: \$4 million in losses vis-a-vis \$106,000. Similarly, regarding investor/victims, there were *100* in Bevill's earlier case and *3* in his present case.

At any rate, in his present case, from August 2010 until January 2011, Bevill made misrepresentations to 3 high-net-worth investors, causing a combined loss of \$106,000. (Although the actual loss was \$106,000, the intended loss was \$212,000. Although Bevill raised \$212,000, \$106,000 was returned to investors.) And unlike in his earlier case, Bevill was neither a leader nor violated an administrative order in his present case.

The contrast in the degree of harm and seriousness between the cases is striking:

Bevill's earlier (2006 - 2008) case: \$4 million in losses + 100 investor/victims + leader role sentencing enhancement + violating an administrative order sentencing enhancement.

Bevill's present (2011) case: \$106,000 in losses + 3 investor/victims.

This is indeed a big difference. Bevill's present case is a low-level, nonviolent offense—far from a massive headline-grabbing securities fraud that involved tens of millions or hundreds of millions or billions in losses.

C. At Sentencing in Bevill's Present (2011) Case, the Judge Piles on all the Conduct from Bevill's Earlier (2006-2008) Case, Making His Present Case Appear 40 Times Larger and Much More Serious, Disproportionately Ratcheting Up His U.S. Sentencing Guideline Range by a Literal Lifetime—Grossly Overstating the Seriousness of His Present Case

At sentencing in Bevill's present (2011) case (\$106,000 in losses + 3 investor/victims), the court piled on all the conduct used in his earlier (2006 - 2008) case (the \$4 million in losses + 100 investor/victims + leader role sentencing enhancement + administrative order sentencing enhancement).

This was no small addition. Piling on all of the conduct from Bevill's earlier (2006 - 2008) case with the present (2011) case caused Bevill's U.S. Sentencing Guideline range in his present case to leap from about 5 years in prison to 30 years to *life in prison*, a dramatic shift.

Thus, nearly *all* the conduct used to drive Bevill's U.S. Sentencing Guideline range in his *present* (2011) case was the conduct from his *earlier* (2006 - 2008) case, for which Bevill was already punished:

- * **The sentencing enhancement for the \$4 million is from Bevill's *earlier case***
- * **The sentencing enhancement for the 100 investor/victims is from Bevill's *earlier case***
- * **The leader role sentencing enhancement is from Bevill's *earlier case***
- * **The violating an administrative order is from Bevill's *earlier case***

Earlier Case	Present Case
Loss amount: \$4 million	Loss amount: \$106,000 (intended loss of \$212,000)
Investor/Victims: 100	Investor/Victims: 3
Role sentencing enhancement: leader	A sentencing enhancement under
Violated an administrative order	U.S.C. 3147 for accepting money
sentencing enhancement	from two investors while on release
<p><i>Noteworthy as well, in both cases Bevill received a four-level sentencing enhancement for not being a registered broker/dealer. This was wrong. The Guidelines unequivocally state that if one is selling securities and one is a registered broker dealer, then the four-level sentencing enhancement applies. In a strange twist, the judge gave Bevill the four-level sentencing enhancement even though he was not a registered broker/dealer. The judge said because he was not a broker/dealer that he still received the four-level sentencing enhancement, because he should have been. According to his judge, the four-level sentencing enhancement is inherent; that is, it always applies, whether the defendant was or was not a broker/dealer, the defendant still receives the four-level sentencing enhancement. The Guidelines unambiguously states if the defendant was a broker/dealer he receives a four-level sentencing enhancement. Nowhere in the Guideline does it state that even if the defendant was not a broker/dealer, he still receives the enhancement. This was the judge's personal opinion, a position based not on the plain language of the Guidelines or case law, but rather on something the judge just said was so, so it was so. This was yet another subtle trick to inflate Bevill's Guideline range, resulting in a range of life in prison.</i></p>	

There is a massive difference between a securities fraud that involved \$106,000 in losses + 3 investor/victims and a securities fraud that involved \$4 million in losses + 100 investor/victims + leader role + violating an administrative order. By hitching Bevill's earlier (2006 - 2008) case to his present (2011) case, it grossly overstated the severity of his present case, producing a disproportionately harsh (and irrational on its face) sentencing range of 30 years to life in prison...for a \$106,000 securities fraud. Is a low-level, nonviolent \$106,000 fraud illegal? It is. Immoral? Certainly. But it's not an egregious fraud that merits such a punitive punishment, 25 years in a box.

The truth is, Bevill's present case was an empty vessel; his earlier case was the "tail that wagged the dog." And it radically overstated the seriousness of his present case, a securities fraud that comprised a little more than \$100,000 in losses.

D. A New Label is Put on the Same Conduct, Allowing the Court to Recycle the Same Conduct in Bevill's Earlier (2006-2008) Case to Increase His Prison Sentence in His Present (2011) Case by Decades

That the same conduct was used in two different federal prosecutions is in and of itself not that significant. What makes Bevill's case unprecedented is that the same conduct from his earlier (2006 - 2008) case was used in the second (2011) case to increase his total sentence by 25 years, or by 600 percent: from 5 years in prison to 30 years to life in prison. *How?* Of the millions of cases to flow through the federal system since the advent of the U.S. Sentencing Guidelines, this has never happened, a new (greater) label put on the same conduct to radically increase the defendant's second sentence by decades—a *point sympathetic federal prosecutors emphasized in a March 1, 2012 Sentencing Memorandum, calling the perverse effect, "a unique situation presented by the guidelines in this case."*

1. Bevill Pays the Same Debt Again—Under Greater Statutes

As was explained previously, in his earlier securities fraud (2006 - 2008) case, Bevill was charged with a five-year securities fraud statute. After applying the \$4 million in losses + 100 investor/victims + leader role + administrative order, he received the harshest punishment under the law, five years in prison. He pleaded guilty and paid his debt by serving the *harshest sentence allowed under the law*, five years in prison.

In his present securities fraud (2011) case, he was charged with greater 20-year statutes. But his present case involved just \$106,000 in losses + 3 investor/victims. Yet when the conduct from Bevill's earlier (2006 - 2008) case (\$4 million in losses + 100 investor/victims + leader role + administrative order) was applied to his present (2011) case (\$106,000 in losses + 3 investor/victims), it allowed the court to take the same conduct under a new vehicle (20-year statutes) and use it to impose an additional 25 years in prison, for a total of 30 years in prison.

This is irrational, a point federal prosecutors pointed out in a March 1, 2012 Sentencing Memorandum.

Think about what we are saying—because Bevill committed a different (2011) crime in a separate case, he must serve a new sentence; however, the second sentence in the separate (2011) present case isn't even based on the present case (\$106,000 in losses + 3 investor/victims). Rather it's based almost entirely on the conduct from his earlier (2006 - 2008) case (**\$4 million in losses + 100 investor/victims + leader role + violating an administrative order**), for which he's already been punished. Thus, Bevill's present sentence has little connection to his present case and is disproportionately harsh. Putting a *new* label (greater statutes) on the *same* conduct allowed the government to snap its fingers and have a ready-made 25-year sentence—out of what just carried a statutory maximum of 5 years in prison.

That the high-end (life in prison without the possibility of parole) of Bevill's U.S. Sentencing Guideline range recommended that Bevill *die in federal prison* for committing a \$106,000 securities fraud should at the very least suggest that something is afoot.

In the end, Bevill was punished for the \$4 million in losses + 100 investor/victims + leader role + administrative order under a *five-year* securities fraud statute; then, in a separate case, he was punished (*another two and a half decades*) for the same \$4 million in losses + 100 investor/victims + leader role + violating an administrative order under a greater (20-year) securities fraud statute (as well as similar mail fraud and wire fraud statutes). This is unprecedented.

Notably, this is fundamentally different from the judge using the prior *conviction*. That is perfectly fair and normal. This is the judge recycling the same *conduct*.

E. To State the Obvious, Bevill Should Not Get a Free Pass in His Present Case; However, the Punishment Should Fit the Crime

Are we saying that Bevill should get a free pass in his present case? No, not at all. Absolutely not. The point is, Bevill's present (2011) case comprised \$106,000 + 3 investor/victims. He committed new crimes. He broke the law. But what sense does it make to take a \$106,000 fraud

and punish it the same as a \$100 million fraud, a \$500 million fraud, or a *multibillion*-dollar fraud?

Bevill's 25-year sentence in his present case does not fit the \$106,000 fraud that he committed. In his earlier case, everyone agreed (even the judge who accepted the guilty plea to a five-year securities fraud charge) that the *maximum* sentence for \$4 million in losses + 100 investor/victims + leader role + violating an administrative order was five years. With that in mind, how can a securities fraud that comprised \$106,000 in losses + 3 investor/victims suddenly merit incapacitation—**25 years in federal prison**, where there is no parole? It's disproportionately harsh.

You would be hard-pressed to find another fraud defendant in the history of the Guidelines who committed a similar fraud (a little more than \$100,000 in losses garnered from 3 investor/victims) who received a sentence anywhere close to 25 years. We doubt such a case exists, and if it does, then there aren't many.

Simply put, the punishment should fit the crime—not be a product of some unprecedented sentencing anomaly that has happened in 1 and about 2 million cases. Bevill paid his debt for the \$4 million + 100 investor/victims + leader role + administrative order. He served the harshest sentence allowed under the law. The conduct was recycled.

Make no mistake, Bevill should pay his debt for the \$106,000 + 3 investor/victims. But it makes little sense to artificially inflate his sentence so high that it serves only to unfairly incapacitate a man who committed a low-level, nonviolent offense.

This allowed the government to slap a *new* label on the *same* conduct, using the *same* conduct to add decades of prison time.

In sum, if a defendant is sentenced to a five-year *statutory maximum* sentence for \$4 million in losses + 100 investor/victims + leader role + violating an administrative order, he should not have to serve *another* 25 years in a separate case, *for the same \$4 million in losses + 100 investor/victims + leader role + violating an administrative order*, simply because he committed a different securities fraud that involved \$106,000 in losses + 3 investor/victims. Again, this is fundamentally different from a prior *conviction* being used against a defendant. That's perfectly normal and fair. Here, the conduct was recycled under *greater statutes*.

If all of this weren't bad enough, the judge ignored the 5G1.3(b)(1) mandate by ordering the sentences in both cases to run consecutively, compounding the unfairness, a point detailed in a later section.

III. Federal Prosecutors Are Struck by the Unfairness of the Unprecedented Double Punishment, Prompting Them to Ask for a Massive Downward Variance to Help Offset the Unprecedented Anomaly or Illegal Application of Uncharged Relevant Conduct (Depending on How One Looks at It)

In a March 1, 2012 Sentencing Memorandum, federal prosecutors called this a "unique situation presented by the Guidelines in this case." In that same Sentencing Memorandum, prosecutors

explained to the court that, by twice using the same conduct and multiplying the length of Bevill's sentence in his second case, it created a U.S. Sentencing Guideline range that grossly overstated the seriousness of Bevill's present case. The prosecutors pointed out the obvious: Bevill's U.S. Sentencing Guideline range in his present case was only inflated so high because of the conduct from his earlier case, for which he was already punished. Prosecutors were effectively arguing that it would be irrational to give Bevill a maximum five-year sentence under the law for his earlier case, which is much larger, only to sentence Bevill to decades in his present case, which represents a small fraction of the size of Bevill's earlier case. Thus, depending on how one looks at it, in that same Sentencing Memorandum, federal prosecutors asked for a massive 60- to 90-percent downward variance from Bevill's U.S. Sentencing Guideline range, based purely on the 3553 sentencing factors. Prosecutors maintained that a sentence greater than ten to 12 years would be greater than necessary to satisfy the goals of sentencing, and that a sentence spanning decades—as recommended by the U.S. Sentencing Guidelines—would serve only to unfairly warehouse Bevill, who, according to prosecutors, was neither likely to reoffend upon release nor a danger to the public upon release. Put differently, although Bevill certainly needed to be punished for his crimes, tossing him in prison for decades because he made misrepresentations to 3 high-net-worth investors, causing a total loss of \$106,000, is senseless, a point even federal prosecutors believed was clear, as evidenced by their March 1, 2012 Sentencing Memorandum.

Basically, prosecutors were struck by the fact that Bevill was facing a statutory maximum punishment of five years in prison in his earlier case, which involved about \$4 million in losses and 100 investor/victims. By contrast, in his present case, which is much smaller, the amount of incarceration recommended by the Sentencing Guidelines was 30 years to life in prison. The problem prosecutors had was, Bevill's present case involved just \$106,000 in losses garnered from 3 investor/victims. Yet he was facing a prison sentence that was a lifetime greater than his earlier case. It was irrational. Human wisdom was being used to see the unfairness of a deeply flawed algorithm. Prosecutors understood that it was the conduct from Bevill's *earlier case* that was driving his U.S. Sentencing Guideline range to the moon.

It can be boiled down to this: sure, because of this sentencing anomaly or illegal application of so-called relevant conduct (depending on how one looks at it), the U.S. Sentencing Guidelines wanted Bevill to spend the rest of his life in federal prison. But when humans (federal prosecutors) looked at *why* the U.S. Sentencing Guidelines yielded that recommended outcome, they saw a serious flaw that produced a recommended sentence grotesquely disproportionate to the seriousness of Bevill's present case (a \$106,000 fraud) and had little connection to any real harm done by the offense, prompting prosecutors to ask for an extraordinary downward variance to offset an extraordinary flaw.

Find us another case in which a federal prosecutor (and his office) filed a Sentencing Memorandum in which it asked for such an extraordinary downward variance based not on a plea agreement or cooperation agreement but based *purely* on the 3553 sentencing factors, and we will be shocked. It's like spotting a kangaroo in Texas: it doesn't happen. That fact alone is compelling, as it speaks to the degree of unfairness in this bizarre case.

IV. There Was No Intervening Prison Time Between the Two Cases

Most of the conduct in Bevill's present case (August 2010 - January 2011) predated his January 6, 2011 guilty plea in his earlier case, but while on bond, Bevill deposited money in a bank account.¹ Notably, Bevill did not serve prison time in his earlier case and then reoffend in his

¹ As part of his effective guilty plea, Bevill attached an uncontested affidavit that stressed that he shut down Progressive Investment Partners *before* his January 6, 2011 guilty plea in his earlier case.

present case. The conduct in both cases began before Bevill's guilty plea in his earlier case—there were no intervening prison time or arrests. As part of his effective guilty plea in his present case, Bevill's attached affidavit emphasizes that he shutdown Progressive Investment Partners (the company in his present case) *before* or pleading guilty in his earlier case. He did, however, deposit money from two investors *after* pleading guilty in his earlier case. But there was no intervening prison time.

V. The Core of Criminality Punished in Bevill's Present Case Constitutes Entirely Separate Unrelated Crimes That Bevill Was *Never* Charged with, Tried for, or Convicted of: the Uncharged Pointer Group Crimes (2003 – 2004) That Allegedly Occurred About Seven Years Before the Conduct in Bevill's Present Case (August 2010 – January 2011) Even Began

This is perhaps the most vital part of Bevill's clemency request, which is why we highlighted it at the very beginning of this brief. Thus, this section merits special attention.

Outside of Bevill's case, there is not a single judge in the country who has ever used entirely separate *unrelated* crimes a defendant was never even charged with that allegedly occurred some *seven years* before the conduct in his present case even began as the crux of the case so as to add a lifetime to his U.S. Sentencing Guideline range.

The conduct, time periods, and different companies must be distinguished, not conflated—as they are all unrelated, a point Bevill's sentencing judge pointed out. Yes, nearly all of the conduct used to calculate Bevill's U.S. Sentencing Guideline range in his present case is indeed conduct from his earlier case. That's bad enough. But that's hardly the worst part. Most of that conduct constitutes entirely separate crimes that Bevill was *never* charged with, tried for, or convicted of: the uncharged Pointer Group crimes (2003 - 2004), totaling \$3 million in losses garnered from 60 investors/victims. Thus, the core of criminality punished in Bevill's *present case* constitutes the uncharged Pointer Groups crimes (2003 - 2004), which the court itself maintained had had no relation to Bevill's present case (August 2010 - January 2011).

Again, Bevill's present case (Progressive Investment Partners, August 2010 - January 2011) comprised \$106,000 in losses garnered from 3 investors/victims, a low-level, white-collar offense. (Notably, Bevill carried out his earlier case alone.) In stark contrast, Bevill's earlier case involved nearly \$4 million in losses garnered from 100 investors/victims. (Bevill was a leader in his earlier case.)

It's key that we dive into the details. Of the \$4 million in losses and 100 investors/victims in Bevill's earlier case, which was used in his present case as well, about \$3 million in losses and 60 investors/victims actually stem not from the charged conduct underlying Bevill's earlier case, but from the uncharged (2003 - 2004) Pointer Group crimes. ***Thus, most of the conduct used in Bevill's present case constitutes entirely separate crimes that Bevill was never charged with, tried for, or convicted of:*** uncharged Pointer Group crimes (2003 - 2004). *Worse still, the uncharged crimes weren't even remotely related to Bevill's present case. Even worse still, the unrelated, uncharged crimes allegedly occurred some seven, eight years before the conduct in Bevill's present case even began, a massive time gap between the end of the uncharged crimes and the beginning of the charged conduct in Bevill's present case.*

In case you missed that—in *both* Bevill's earlier case (2006 - 2008) and his present case (August 2010 - January 2011), the core of criminality punished wasn't even the charged conduct; it was entirely separate uncharged Pointer Group crimes (2003 - 2004) that had absolutely no connection or relation to either case. Thus, Bevill is serving two statutory *maximum* prison sentences in two separate cases, but the sentences are based largely on

entirely separate uncharged, untried (2003 - 2004) crimes that aren't even remotely related to Bevill's present case (August 2010 - January 2011) or his earlier case (2006 - 2008). It's one thing for a judge to impose a sentence that fits the crime; it's another matter entirely for the judge to impose a sentence for one charged crime that actually fits entirely separate unrelated, uncharged crimes that allegedly occurred many years before the crime of conviction. Such an unconstitutional practice perverts the reason for sentencing as well as cheapens the entire justice system. This might be the most brazen and extreme abuse of uncharged relevant conduct in the history of the U.S. Sentencing Guidelines. We have not found a worse case.

A. Bevill Worked as a Low-level Grunt at The Pointer Group for Three Months and Made Very Little—About One Percent or Less—of the Total \$3 Million Raised

It's 2002, and Bevill is 22. He's sleeping on a friend's couch. Aside from not having a place to live, he doesn't have a car or any money. He comes across a "salesman wanted" ad in the newspaper. He takes a bus to the job interview and talks to the owners of The Pointer Group, William Fuqua and Leroy Pritchard. William, in his 80s, was a Southern Methodist University alumnus and a large-scale donor. Like William, Leroy, in his 60s, was heavily involved in his church. Neither man had a criminal record. Bevill takes the job and receives a \$300 advance. Subsequently, he shows up every day and makes cold calls, asking potential investors if they would be interested in looking at an investment prospectus. Bevill didn't have any managerial duties or control any bank accounts. Bevill took a bus to work and continued to live on his friend's couch.

Bevill worked at The Pointer Group for three months. He made very little money. The then-22-year-old Bevill was jailed and sentenced to shock probation, regarding an alcohol-related incident that occurred when he was 21.

The Pointer Group, however, over its entire life (with its entire sales force) raised about \$3 million from 60 investors/victims (2003 - 2004). Bevill's take of the \$3 million: *less than one* percent. Most of the \$3 million was raised either before Bevill worked at the company or after he left.² Bevill left The Pointer Group. He was never charged with a crime. He was never questioned by anybody. He went on with his life.

But why are we talking about the \$3 million raised by The Pointer Group (2003 - 2004)? Again, Bevill was never charged with a crime. Notably, regarding The Pointer Group (2003 - 2004), there was a parallel civil trial based on the same \$3 million and the same 60 investors/victims, but Bevill was not part of it. In fact, Bevill wasn't even questioned or summoned as part of the depositions—again, Bevill only worked at The Pointer Group for about three months as a grunt.

Bevill vehemently denied any involvement in The Pointer Group's crimes. The owners of The Pointer Group were never charged with a crime, despite the government insisting that they were the masterminds and pocketed millions. The owners—William and Leroy—did not cooperate. They simply were not charged.

What do the uncharged Pointer Group crimes (2003 - 2004) have to do with Bevill's present case (August 2010 - January 2011)? Nothing.

Now, for Bevill's present case (August 2010 - January 2011): from The Pointer Group (2003 - 2004), fast-forward about seven years, to the end of 2010, to the conduct in Bevill's present case. Under his company Progressive Investment Partners, from August 2010 until January

² About a year after leaving The Pointer Group, Bevill worked for Reunion Resources—Tracy Poole—for about two months. He made very little money.

2011, Bevill made misrepresentations to 3 high-net-worth investors/victims, causing them to lose a combined \$106,000. He entered an effective guilty plea regarding this conduct. In all, over a six-month period, Bevill raised \$212,000 from 3 investors/victims, causing an actual loss of \$106,000, a relatively minor nonviolent offense.

At Bevill's sentencing in his present case, the judge hitched the \$3 million in losses and the 60 investors/victims from the uncharged Pointer Group crimes (2003 - 2004) to Bevill's present case. By bundling the uncharged Pointer Group crimes (2003 - 2004) with Bevill's present case (August 2010 - January 2011), Bevill's present case looks much, much worse than it really is, helping to drive his U.S. Sentencing Guideline range from about five years in prison to life in prison without the possibility of parole, which is grotesquely disproportionate to Bevill's present case: making misrepresentations to 3 high-net-worth investors/victims, causing a combined \$106,000 loss. That's worth repeating. Bevill's amount of incarceration recommended by the U.S. Sentencing Guideline range was ballooned to *life in prison without the possibility of parole*.

What's more, the judge herself emphasized that "outside of the superficial fact that to both involved purported investments in oil and gas projects, the two are wholly unrelated." The judge is correct. There is no connection between the uncharged Pointer Group (2003 - 2004) crimes (\$3 million in losses garnered from 60 investors/victims) and Bevill's (August 2010 - 2011) present case (\$106,000 in losses garnered from 3 investors/victims): no common victims or accomplices. The modus operandi is different. Among other critical distinctions, at The Pointer Group, Bevill was a low-level grunt who made cold calls, while Bevill owned Progressive Investment Partners and used different methods. Perhaps most striking, there was a grand-canyon-sized seven-year time gap between the uncharged Pointer Group crimes (2003 - 2004) and the conduct in Bevill's present case (August 2010 - January 2011).

The "evidence" that Bevill is responsible for the uncharged Pointer Group crimes—uncharged crimes that have nothing to do with Bevill's present case: Bevill's Presentence Investigation Report states that, in an out-of-court interview, another low-level salesman who worked at The Pointer Group maintained that he told Bevill that what was going on with the owners of the company was illegal, but that Bevill shrugged it off. The accusations weren't even that Bevill was in on the Pointer Group fraud, but that someone suspected that the owners were engaged in fraud and told Bevill as much, but Bevill shrugged it off.

In Bevill's case, the judge took the uncharged relevant conduct loophole too far. Rather than using uncharged crimes and other uncharged criminal activity that was actually a characteristic of Bevill's crime of conviction in his present case to determine the degree of harm and severity of Bevill's present case, the judge used entirely separate unrelated, uncharged crimes to *distort* the degree of harm and severity of Bevill's present case—no matter how remote or unrelated.

To reiterate: the owners (who were in their 60s and 80s, respectively) of The Pointer Group were never charged with a crime. So, the men who the government maintains masterminded the fraud, provided the office and phone, controlled the bank accounts, furnished the offices and leads, and pocketed millions were never charged with a crime. Instead, the 22-year-old grunt (Bevill) who made cold calls for three months and made very little, must spend decades in federal prison for the uncharged crimes because about seven years later he committed a separate unrelated crime (his present case)—never mind that Bevill's take as a grunt was less than one percent of the total \$3 million raised, and never mind that the uncharged Pointer Group crimes weren't even remotely related to Bevill's present case.

Outside of the separate uncharged crimes having absolutely no relationship to Bevill's present case and allegedly occurring some seven years prior, when one considers that, of that \$3 million, Bevill's take as a grunt was less than one percent, then it *really* overstates the seriousness of his present case.

VI. The Illegal Application of So-called Uncharged Relevant Conduct in Bevill's Case Increased His U.S. Sentencing Guidelines Range by a Literal Lifetime, Thereby Radically Altering His Sentence

Again, Bevill's present case (Progressive Investment Partners, August 2010 - January 2011) involved only \$106,000 in losses garnered from 3 investors/victims. Bevill carried out the fraud alone. But once the court attached the conduct used in Bevill's earlier case (including the charged—2006 - 2008—and uncharged conduct, 2003 - 2004) to his present case, it caused his present fraud case to appear to be *40 times larger*, resulting in his U.S. Sentencing Guideline range ballooning by a literal lifetime, from about five years in prison to life in prison without the possibility of parole.

A. The Weaponization of So-called Uncharged Relevant Conduct

What *is* uncharged relevant conduct, and what is it *not*?

Uncharged relevant conduct is "offense characteristics." Courts are allowed to consider uncharged crimes and other uncharged criminal acts that the defendant carried out in the course of committing his crime of conviction. There's one requirement: the uncharged crimes or uncharged criminal activity must be related to or substantially connected to the crime of conviction.

Moreover, allowing courts to consider the offense characteristics of the crime of conviction by taking into account uncharged crimes and other uncharged criminal conduct the defendant carried out in the course of committing his crime of conviction is supposed to allow the court to fashion a prison sentence tailored to the factual nuances of the crime of conviction, so as to capture its seriousness and degree of harm.

But a court using uncharged crimes and other uncharged criminal conduct that might be superficially similar to the crime of conviction but is wholly *unrelated* to ratchet up a defendant's prison sentence by decades actually results in a prison sentence that is grotesquely disproportionate to the degree of harm and seriousness of the crime of conviction, as the sentence does not fit the crime—it *distorts* the conviction. The trick artificially inflates the perceived severity of the crime of conviction and, consequently, artificially inflates the corresponding prison sentence, resulting in a prison sentence that has little connection to the seriousness of the crime of conviction.

As touched on above, there is a string of cases dating back more than 20 years in which virtually every U.S. Court of Appeals defines what is and what is not uncharged relevant conduct.

In the late 1990's, for instance, in *United States v. Wall*, the defendant pleaded guilty to a 1992 offense, possessing 0.1 kilograms (four ounces) of marijuana with the intent to distribute. At sentencing, however, the judge piled on an additional 78.9 kilograms of marijuana from an uncharged 1996 offense (58 kilograms of marijuana) and an uncharged 1997 offense (20.8 kilograms of marijuana), increasing dramatically the perceived seriousness of the crime, from 0.1 kilograms of marijuana to 78.9 kilograms of marijuana. The Court of Appeals for the Fifth Circuit reversed the district court's finding. In doing so, the Fifth Circuit held that just because the uncharged conduct (78.9 kilograms of marijuana) is superficially similar in that the uncharged conduct and the charged conduct (four ounces of marijuana) both involved drug distribution, it does not mean it constitutes uncharged relevant conduct—instead, the uncharged conduct just happens to be superficially similar to the charged conduct, not actually related to it so as to be an offense characteristic.

Then, in a 2009 case, *United States v. Rhine*, the offender was convicted of trying to carry out a \$5 crack transaction. At sentencing, however, he was blindsided. The court said that about 18 months before the \$5 crack transaction (underlying his offense of conviction) he had sold 4.5 kilograms of crack (uncharged conduct). This caused his U.S. Sentencing Guideline range to balloon from a couple years in prison to more than 30 years in prison. He was crushed with 33 years in federal prison as a result. But yet again, the U.S. Court of Appeals for the Fifth Circuit reversed the ruling. In doing so, the Fifth Circuit held that although the uncharged conduct (4.5 kilograms of crack) was superficially similar to the charged conduct (a \$5 crack deal), the two weren't actually related or connected—but rather were "isolated, unrelated events that happen only to be similar in kind."

In a recent 2020 case, *United States v. Lindsey*, the Court of Appeals for the Fifth Circuit once again continued to emphasize its longstanding view on what does and does not constitute uncharged *relevant* conduct, opining in pertinent part, "*While Lindsey may have regularly committed comparable crimes, the earlier offenses were not 'directly link[ed]' to his offense of conviction.*"

In each case, the conduct underlying the crime of conviction was relatively minor. And, in each case, the district court tried to pile on a large amount of uncharged criminal activity that might have been superficially similar to the crime of conviction but that was entirely unrelated to it, which disproportionately increased the defendants' sentences.

This is precisely what happened in Joshua Bevill's case. The court hitched to Bevill's present case (August 2010 - January 2011) \$106,000 in losses garnered from 3 investors/victims) and all of the uncharged conduct (\$4 million in losses garnered from 100 investors/victims + leader role + violating an administrative order) from 2006 - 2008 and 2003 - 2004, which was already used in an earlier case.

Here's a comprehensive overview of uncharged relevant conduct jurisprudence and a nuanced examination of more than 20 years of cases centered on this issue, including cases from the U.S. Court of Appeals for the Fifth Circuit, Seventh Circuit, Fourth Circuit, Eleventh Circuit, and more. Notably, according to our exhaustive research, all of the U.S. Courts of Appeals are in harmony regarding this issue.

United States v. Wall

Starting more than 20 years ago, the Fifth Circuit Court of Appeals and virtually all of the other U.S. Appeals Courts began to define more precisely the limitations of *relevant* conduct. In a 1999 case³ brought before the U.S. Court of Appeals for the Fifth Circuit, the case facts are as follows: the offender was arrested in April of 1992 (the 1992 offense) for possession of approximately 0.1 kilograms (about four ounces) of marijuana. Four years later, in April 1996 (the 1996 offense), he was arrested with 58 kilograms of marijuana. Yet again, in March of 1997 (the 1997 offense), he was arrested with 20.8 kilograms of marijuana. (All of the crimes took place near the Mexican border.)

In 1998, the offender pleaded guilty to the 1992 offense, possessing 0.1 kilograms (four ounces) of marijuana—a relatively minor crime. At sentencing, however, the offender was in for a surprise: the probation officer (who prepares the Presentence Report of the judge) took the liberty of tossing on the 58 kilograms of marijuana from the uncharged 1996 offense, as well as the 20.8 kilograms of marijuana from the uncharged 1997 offense, for a total of 78.9 kilograms of marijuana (the crime of conviction). With the flick of a pen, four ounces of

³ *United States v. Wall*, 180 F.3d 641 (1999)

marijuana turned into 78 *kilograms* of marijuana.

The rationale: the uncharged crimes and the crime of conviction were relevant conduct because they all involved the importation of marijuana for distribution. Thus, they were part of a common scheme or plan, or the same course of conduct. Not so fast. The U.S. Court of Appeals stepped in, reversing the district court's ruling. In doing so, the Fifth Circuit held that although the uncharged crimes were superficially similar in that they both involved the importation of marijuana for distribution, they were entirely unrelated. The Fifth Circuit stressed, "As the Eleventh Circuit stated, 'We do not think that two offenses constitute a single course of conduct [a.k.a. "relevant conduct"] simply because they both involve drug distribution.'" The Fifth Circuit went on to underscore, "To do so would be, in the words of the Fourth Circuit, to describe [the defendant's] conduct at such a level of generality as to eviscerate the evaluation of whether uncharged criminal activity is part of the 'same course of conduct or common scheme or plan' as the offense of conviction."

Most notably, the Fifth Circuit hammered home this point by concluding, "***With a brushstroke that broad, almost any uncharged criminal activity can be painted similar in at least one respect to the charged criminal conduct.***" (Emphasis added)⁴

To support its holding, the Fifth Circuit Court of Appeals maintained that (1) the offenses did not share any common accomplices, (2) there was no common modus operandi (the marijuana crime of conviction involved a small amount of marijuana, whereas the uncharged marijuana crimes involved large quantities of marijuana concealed in pick-up trucks, and the "only common purpose between the offenses was importing marijuana for distribution in the U.S.," which, the Appeals Court held, standing alone is "insufficient to establish a common scheme or plan).⁵

Significantly, the Appeals Court also zeroed in on the time gap between the crime of conviction (1992) and the uncharged crimes (1996 & 1997), underscoring that fact with the extreme statement that the cases "are separated by an unprecedented lapse of time." Some of the uncharged crimes in Bevill's case allegedly occurred some *eight years* before his present case even began, almost twice as long as the gap in *United States v. Wall*, as will be explained later in this brief.

In short, although superficially similar, the uncharged marijuana crimes were not part of a common scheme or plan (relevant conduct) or the same course of conduct (relevant conduct), but rather were simply "isolated, unrelated events that happen only to be similar in kind." Thus, the uncharged crimes did not constitute relevant conduct.

The *Wall* court closed by pointing out that "[relevant conduct] is not a limitless concept."

United States v. Rhine

In *United States v. Rhine*, they tried the same trick. Rhine was arrested after a traffic stop. His crime? Trying to carry out a "\$5 crack cocaine transaction" (about one ounce). But yet again, he was in for a little so-called "uncharged relevant conduct" surprise at the sentencing phase. The probation officer, who prepares his Presentence Report for the judge, casually tossed on an additional 4.5 *kilograms of crack cocaine*, causing his sentencing range to jump

⁴ *U.S. v. Wall*, 180 F.3d 641, 646 (5th Cir. 1999) (quoting *U.S. v. Mullins*, 971 F.2d 1138, 1145) (4th Cir.1992); see also *U.S. v. Hill*, 79 F.3d at 1011 (stating that where the relevant conduct is separated by more than one year, a relevant conduct finding generally may not be premised on superficial similarities)

⁵ *United States v. Wall*, supra (citing *United States v. Hill*, 79 F.3d 888, 895 5th).

from about 30 months in prison to more than 30 years in federal prison. Again, with the flick of a pen, the probation office transformed a relatively petty drug case into a gravely serious drug trafficking crime.

In particular, at sentencing in *Rhine*, the prosecutors maintained that about 18 months before Rhine was caught trying to carry out a \$5 crack deal, he sold a total of 4.5 kilograms of crack cocaine (based on untested, out-of-court hearsay). As a result, Rhine was crushed with a 30-year federal prison sentence—30 *years in federal prison without the possibility of parole*—after being convicted of a \$5 crack transaction.

But yet again, the U.S. Fifth Circuit Court of Appeals put its foot down, reversing the district court's overreaching and abusive practice, relying on a string of earlier cases. The Fifth Circuit re-emphasized the heart of its earlier holdings: "To determine whether a defendant's earlier conduct is sufficiently similar to the offenses of conviction, we inquire whether there are distinct similarities between the offense of conviction and the remote conduct that signal that they are part of a common scheme or plan or course of conduct rather than *isolated, unrelated events that happen only to be similar in kind*." (Emphasis added.)

The Appeals Court went on to make this powerful statement, yet again reaffirming its long-held view on what does not constitute relevant conduct: "As we have previously cautioned, 'courts must not conduct [the relevant conduct] analysis at such a level of generality as to render it meaningless.'"⁶ Aside from relying on its own precedent and the Courts of Appeals for the Eleventh and Fourth Circuits, the *Rhine* court also pointed to the Court of Appeals for the Seventh Circuit's position on the government endeavoring to stretch the concept of relevant conduct to cover unrelated crimes and other unrelated criminal acts that are superficially similar: "Describing the defendant's earlier offense as 'relatively stale,'" the Seventh Circuit warned that courts must remain "cautious and exacting in permitting such...dealings to be included in the same course of conduct as the offense of conviction."

In the end, the Appeals Court's conclusion that the uncharged 4.5 kilograms of crack cocaine was not relevant conduct in relation to the \$5 crack deal that was the crime of conviction hinged on a straightforward analysis: There were no common accomplices. The suppliers were different. The modus operandi was different in that the uncharged crack involved "a large-scale supplier to mid-level dealers; by contrast, in the offense of conviction, [Rhine] attempted to sell a small quantity of crack to an individual buyer for five dollars." The Appeals Court added, "[the only common purpose linking the two offenses is Rhine's motivation to profit from the distribution of crack cocaine, which—like the marijuana importation in *[United States v.] Wall*—is by itself insufficient to connect the offenses as separate parts of a common scheme or plan."⁷ And the Appeals Court yet again put special emphasis on the 18-month time gap

⁶ (*United States v. Culverhouse*, 507 F.3d at 896 (1997) ("The act that [the uncharged crimes and the crime of conviction] both involved methamphetamine is not enough.") (quoting the U.S. Fourth Circuit Court of Appeals, *United States v. Mullins*, 971 F.2d 1138, 1145 (4th Cir. 1992); see also *Wall*, 180 F.3d at 646-47 (1999) ("We do not think that two offenses constitute a single course of conduct [relevant conduct] simply because they both involve drug distribution."); *United States v. Miller*, 179 F.3d at 967 (concluding that similarity was lacking because "[t]he only real similarity between the two [offenses] is that they both involved a transaction for the sale of cocaine").

⁷ *Wall*, 180 F.3d at 645; see also *Culverhouse*, 507 F.3d at 896 (concluding that the temporal proximity was lacking where offenses were separated by almost three years).

between the uncharged crack and the crime of conviction.⁸

Similarly, at The Pointer Group (2003 - 2004), Bevill was a low-level grunt. At North Texas Partners/United Star Petroleum (2006 - 2008), he owned the companies and was a leader. In Progressive Investment Partners (August 2010 - January 2011), Bevill acted alone.

Back to Rhine. In short, just because Rhine allegedly sold crack (4.5 kilograms) 18 months before his crime of conviction (\$5 crack deal) doesn't mean that the federal government can just piggyback that conduct on the crime of conviction and get a free ride. That's not how the American criminal justice system is supposed to work.

Like in Bevill's case, the *Rhine and Wall* courts tried to bundle entirely unrelated conduct—that happened to be superficially similar—with his crime of conviction for one purpose: to artificially inflate the perceived severity of the crime and to manipulate the U.S. Sentencing Guidelines, launching the sentencing range to the moon.

United States v. Benns

In 2014, in *United States v. Benns*, the Court of Appeals for the Fifth Circuit once again had to re-emphasize what it had been emphasizing for about 20 years: "We caution the concept of a 'common scheme or plan [relevant conduct],' while expansive, 'cannot be too broad, otherwise almost any uncharged criminal activity can be painted as similar in at least one respect to the charged criminal conduct.'"⁹

Benns was a white-collar case that involved defrauding banks. Yet again, at the heart of the Appeals Court's relevant conduct analysis was the Fifth Circuit's finding that the uncharged frauds in relation to the charged fraud did not share a common accomplice or victims, nor a similar modus operandi. Again, superficially similar frauds don't give the trigger-happy federal government a blank check to use a conviction for one crime to punish a defendant for separate unrelated, uncharged crimes. But that doesn't mean greedy federal prosecutors out for an easy score are not going to keep trying to exploit this dangerous legal loophole.

United States v. Lindsey

Consider one more case—a 2020 case: *United States v. Lindsey*, 969 F.3d 136 (2020). At this point, the Appeals Court for the Fifth Circuit was just parroting the same thing it has been saying for nearly three decades, making its longstanding position unmistakably clear: The relevant conduct analysis turns on "whether there are distinctive similarities between the offense of conviction and the remote [relevant] conduct that signal that they are part of a course of conduct rather than isolated, unrelated events that happen only to be similar in kind."¹⁰ There, the Appeals Court opined that, "*while Lindsey may have regularly committed comparable crimes, the earlier offenses were not 'directly link[ed]'* to his offense of conviction."

B. The Lesson: Joshua Bevill's Earlier Case Does Not Constitute Relevant Conduct in Relation to His Present Case

Again and again, year after year, virtually every U.S. Court of Appeals in the federal system

⁸ See also *United States v. Miller*, 179 F.3d 961, 966 (5th Cir. 1999) (holding that offenses separated by 21 months were temporally remote); see also *Wall*, *supra* (holding that a four-year time gap is "unprecedented").

⁹ *U.S. v. Benns*, 740 F.3d 370 (5th Cir. 2014) (quoting *United States v. Ortiz*, 613 F.3d 550, 557 (5th Cir. 2010).

¹⁰ *Lindsey* quoting *United States v. Rhine*, 583 F.3d 878, 88 (5th Cir. 2009).

has made abundantly clear that relevant conduct does not include superficially similar but unrelated crimes or other superficially similar but unrelated criminal acts.

In *Wall*, the district court hitched 78 kilograms of marijuana (uncharged conduct) to the four ounces of marijuana underlying his crime of conviction. Similarly, in *Rhine*, the district court bundled 4.5 kilograms of crack (uncharged conduct) with the \$5 crack transaction underlying his crime of conviction. But, in both cases, this was an illegal application of uncharged relevant conduct. Bevill's case is no different. There was a two-year time gap between Bevill's present case (August 2010 - January 2011) and the charged conduct underlying Bevill's earlier case (2006 - 2008), but there was about a seven-year time gap between the conduct in Bevill's present case (August 2010 - January 2011) and the uncharged Pointer Group crimes (2003 - 2004), which constitute the core of criminality punished in Bevill's present case—a *seven-year time gap*. In *United States v. Wall*, the U.S. Appeals Court for the Fifth Circuit called a three-year time gap unprecedented. The time gap in Bevill's case is more than twice as long and is longer than any case in the 30-plus-year history of the U.S. Sentencing Guidelines.

It was Bevill's sentencing judge herself who emphasized that "beyond that superficial fact that both cases involved purported investments in oil and gas projects, the two cases are wholly unrelated."

Here's the breakdown in Bevill's case.

The Uncharged Pointer Group Crimes (2003 - 2004): Bevill Works as a Low-level Cold-caller for Three Months

Bevill worked for The Pointer Group (2003 - 2004) as a low-level salesman for three months. He did not have any managerial duties. He made very little money, about one percent of the total (\$3 million) raised by the company. The uncharged Pointer Group crimes constituted the core of criminality (\$3 million in losses garnered from 60 investors/victims) punished in Bevill's earlier case *and* in his present case. The Pointer Group used a real investor and accounting and banking references. Bevill adamantly and consistently denied being involved in the alleged uncharged Pointer Group fraud.

The Conduct Underlying Bevill's Earlier Case (2006 - 2008): Bevill Owns and Operates North Texas Partners/United Star Petroleum

Years later, Bevill owned two wholly unrelated companies, United Star Petroleum and North Texas Partners (2006 - 2008). He and his sales force raised \$750,000 from 40 investors/victims. United Star Petroleum and North Texas Partners were not connected to The Pointer Group (2003 - 2004). There were no common accomplices or victims. The modus operandi was much different: among other significant differences, at The Pointer Group, Bevill was a low-level grunt who made cold calls; he owned United Star Petroleum and North Texas Partners and used different methods.

Bevill's Present Case (August 2010 - January 2011): Bevill Acts Alone

Years after that, Bevill owned Progressive Investment Partners (August 2010 - January 2011). He worked alone, and over a six-month period, he raised \$212,000 from 3 investors/victims. Progressive Investment Partners (August 2010 - 2011) was not related to North Texas Partners and United Star Petroleum (2006 - 2008), the conduct underlying Bevill's earlier case. There were no common accomplices or victims. There was a two-year time gap. Even the modus operandi was different. And Progressive Investment Partners (August 2010 - January 2011) certainly was not related to the uncharged Pointer Group crimes (2003 - 2004). There was a

seven-year time gap between the uncharged Pointer Group crimes and the conduct in Bevill's present case, Progressive Investment Partners (August 2010 - January 2011). There were certainly no common accomplices or victims. And the modus operandi was vastly different. Bevill's role was even different—he was a low-level grunt at The Pointer Group, but a leader under North Texas Partners and acted alone under Progressive Partners.

This is worth repeating: it was Bevill's sentencing judge herself who emphasized that "beyond the superficial fact that both cases involved purported investments in oil and gas projects, the two cases are wholly unrelated."

As was discussed earlier, it is true that The Pointer Group (2003 - 2004), North Texas Partners & United Star Petroleum (2006 - 2008), and Progressive Investment Partners (August 2010 - 2011) shared the very general goal of investments centered on oil and gas projects. But that fact alone does not make the uncharged conduct an offense characteristic of Bevill's *present fraud*: making misrepresentations to 3 investors/victims, resulting in a combined \$106,000 (actual) loss (a \$212,000 intended loss).

As virtually every U.S. Court of Appeals has cautioned, to find that uncharged crimes or other uncharged criminal conduct constitutes uncharged relevant conduct simply because it is superficially similar in one respect or another to the charged conduct would be such a "level of generality as to eviscerate the evaluation of whether uncharged criminal activity is part of the same course of conduct or common scheme or plan as the offense of conviction" and "[w]ith a brushstroke that broad, almost any uncharged criminal activity can be painted similar in at least one respect to the charged criminal conduct." In short, as many Courts of Appeals have stressed, there is a difference between uncharged conduct that is actually related to the charged conduct and "isolated, unrelated events that happen only to be similar in kind."

The rationale of Bevill's sentencing judge to conclude that the earlier case was uncharged relevant conduct represents a fundamental misunderstanding of what uncharged relevant conduct is. The court's rationale: both cases involved purported investments in oil and gas projects. This is where the court's analysis started and stopped. (The court adopted Bevill's Presentence Investigation Report's rationale.) This is an oversimplification that ignores the critical nuances of what does and does not constitute uncharged relevant conduct.

VII. The Most Highly Regarded Legal Minds in Our Nation Steadfastly Denounce the Uncharged Relevant Conduct Loophole, Characterizing It as Unconstitutional

The abusive practices flowing from the exploitation of the uncharged relevant conduct loophole have hardly gone unnoticed. The outrage has been sparked by the radical notion that by exploiting the uncharged relevant conduct loophole, the federal government can circumvent the vital constitutional safeguards afforded to the criminally accused—you know, the right to have the federal government charge the defendant via indictment-by-grand-jury and then prove its case to 12 jurors *beyond a reasonable doubt*. Nationally renowned federal sentencing expert and highly regarded law professor Douglas Berman eloquently and succinctly underscored the vital importance of the fundamental right to a jury trial: "John Adams famously declared, 'Representative government and trial by jury are the heart and lungs of liberty.'"

To that end, the Framers guaranteed an absolute right to trial by jury in both the original Constitution and the Bill of Rights.¹¹ Equally important, "[t]he Framers intended the jury to

¹¹ See U.S. Const. Art. III, 2, cl. 3., U.S. Const. Amend. 6.

'stand between the individual and the power of the government."¹² As the Supreme Court explained in *United States v. Gaudin*, the "right was designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors...as the great bulwark of their civil and political liberties."¹³ Importantly, to manifest the jury's purpose, "the truth of every accusation...should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors."¹⁴

In short, to say that the right to a jury trial in which the government must prove its case beyond a reasonable doubt is important is a radical understatement. What's more, as noted in a study that deconstructs the Relevant Conduct Guidelines, these punishment paradigms were "a radical departure from past practice in the federal courts and national experience in the states, were not adopted by Congress, and were adopted without empirical support."¹⁵

The uncharged relevant conduct loophole is dangerous in the same way a firearm is dangerous: in the wrong hands, it can be turned into a weapon used to hurt people.

What do the nation's best and brightest legal minds think about this slippery practice? They abhor it, calling it unconstitutional.

A. U.S. Supreme Court Justices

First up: the late, great U.S. Supreme Court Justice Antonin Scalia, one of the most respected legal minds in our nation's history. This is how Justice Scalia explained the federal government essentially using the conviction as an empty vessel, only to pile on, for all practical purposes, its entire case at the relaxed sentencing stage, thereby skirting the Constitutional procedural safeguards: "If the protections extended to the criminal defendants by the Bill of Rights can be so easily circumvented, most of them would be...vain and idle enactments, which accomplish nothing." Justice Scalia characterized such a paradigm as "sinister."¹⁶

What was he saying? The late Justice Scalia was saying that if the government could just disguise, for all practical purposes, its entire case as mere uncharged relevant conduct and sneak it in the backdoor at the relaxed sentencing phase, then the Bill of Rights is useless in the context of the criminally accused. His emphatic point was that if they are so easily skirted,

¹² *Deconstructing the Relevant Conduct Guideline: Challenges the Use of Uncharged and Acquitted Offenses in Sentencing*, Amy Baron-Evans and Jennifer Niles Coffin (2008).

¹³ *United States v. Gaudin*, 515 U.S. 506 (1995).

¹⁴ *United States v. Gaudin* quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) ("Blackstone").

¹⁵ *Id.*

¹⁶ *Mogne v. California*

then they are utterly meaningless.¹⁷

Next up are two recently appointed U.S. Supreme Court Justices—Gorsuch and Kavanaugh. When now-Justice Gorsuch was a U.S. Tenth Circuit Appeals Court Judge, he questioned the constitutionality of judges piling on uncharged relevant conduct at sentencing, as opposed to fact-finding by a jury: "known as relevant conduct, judge-found facts, which often include uncharged and even acquitted conduct driving federal sentences, often increasing terms of imprisonment by years and even decades."¹⁸ In questioning the constitutionality of relevant conduct in *Sabillon-Umana*, then-U.S. Appeals Court Judge Gorsuch highlighted Justice Scalia's strong dissent from the denial of Supreme Court review in *Jones v. United States* (See also, *Rita v. United States*, 127 S. Ct. 2456, 2466-67 (2007)), wherein Justice Scalia, joined by Justices Clarence Thomas and Ruth Ginsburg, stated that "any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime and must be found by a jury, not a judge." "The Court of Appeals have uniformly taken our [the U.S. Supreme Court] 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." "This," the Justices emphasized, "*has gone on long enough.*" (Emphasis added.)¹⁹

This concern is shared by U.S. Supreme Court Justice Kavanaugh. Fairly recently, Justice Kavanaugh has spoken out against this practice: "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 jury trial." Justice Kavanaugh went on to say, "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?"²⁰ Justice Kavanaugh observed that "it will likely take some combination of Congress and the Sentencing Commission to systematically change the federal sentencing to preclude use of...uncharged conduct."²¹

More to the point, in a landmark case, the Supreme Court summed up the backdoor approach of the government withholding its real case theory at trial or the guilty plea only to sneak in the gravamen of the government's case at the relaxed sentencing stage: "The jury could not act 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

¹⁷ In another 2006 U.S. Supreme Court case, the Supreme Court posited a nightmare scenario by way of an extreme hypothetical scenario. In particular, the Supreme Court said to consider a defendant who was convicted of robbery and is facing a possible sentence of 33 to 41 months as a result. But at sentencing, the judge uses uncharged criminal acts 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," increasing the defendant's sentencing range to 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, given that it was the uncharged criminal acts tacked on at sentencing that really drove the prison sentence, "surely the sentence would be reversed as unreasonably excessive."

¹⁸ *United States v. Sabillon-Umana*

¹⁹ *Jones v. United States*

²⁰ *United States v. Bell*, 803 F.3d 926, 928 (D.C. Circuit 2015).

²¹ *Id.*

judicial inquisition into the facts of the crime the State actually seeks to punish."²²

And when U.S. Supreme Court Justice Stephen Breyer was on the U.S. Sentencing Commission, he remarked that "[i]f too many facts [uncharged relevant conduct] were found in an informal way [at the sentencing hearing], it would threaten fairness."²³ Justice Breyer was talking about striking a fair balance, so that uncharged relevant conduct would not disproportionately affect a defendant's prison sentence, rendering, from a practical standpoint, the conviction an empty shell. Noteworthy as well is the fact that nowhere in his paper did he mention entirely separate uncharged crimes being used to ratchet up a defendant's prison sentence.

Combine all of this with the U.S. Supreme Court's recent decision in *Nelson v. Colorado*, in which, in the context of uncharged relevant conduct, the court emphasized the paramount importance of the presumption of innocence, and the practice of requiring individuals to languish longer in federal prison than the law allows could be coming to end.²⁴

B. Legal scholars

Law Professor Benjamin J. Priester maintained that uncharged conduct having a disproportionate effect on a defendant's prison sentence is "the most fundamental Constitutional issue in sentencing law post-Apprendi."²⁵ And we cannot leave out the preeminent expert on federal sentencing law, Ohio State University Law Professor Douglas A. Berman, who in his paper recommended various ways to improve the highly flawed and flimsy federal sentencing scheme using due process and the current existing Sixth Amendment framework. In another paper, he explained that "the current world of sentencing reform has become a puzzling blend of constitutional issues," a point echoed by legal scholar Frank O. Bowman in his own paper, in which he calls the sentencing scheme a "debacle."²⁶

Former Federal Judge (and current Harvard Law Professor) Nancy Gertner stepped down from the bench because of the unfair sentencing practices in federal court. In her paper titled "Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing," she shed light on the abusive practice of uncharged relevant conduct.²⁷ Professor Gertner also has a book—*Incomplete Sentences*—being released that spotlights the shocking chronic injustices that flourish in the federal justice system.

In one of the most comprehensive examinations of the relevant conduct loophole, Yale legal

²² *Blakely v. Washington*, 542 U.S. 296 (2004).

²³ See Stephen Breyer, "The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest," 17 *Hofstra L. Rev.* 1 (1998).

²⁴ *Nelson v. Colorado*, 137 S. Ct. 1249 (2017).

²⁵ "The Canine Metaphor and the Future of Sentencing Reforms: Dogs, Tails, and the Constitutional Law of Wagging," 12 *SMU L. Rev.* 201, 212 (2007).

²⁶ Douglas A. Berman, Tweaking Booker: "Advisory Guidelines in the Federal System," 432 *HOUS. L. REV.* 341, 386-87 (2005) & Douglas A. Berman, Rita, "Reasoned Sentencing, and Resistance to Change," 85 *DENV. U. L. Rev.* 7, 8 (2007); see also, Frank O. Bowman, Debacle: "How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended," 88 *U. CHI. L. REV.* 367, 472-76 (2010).

²⁷ *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 *SUFFOLD U. L. Rev.* 419, 425 1999.

scholars Amy Baron-Evans and Jennifer Niles Coffin put under a microscope the relevant conduct provision of the U.S. Sentencing Guidelines, meticulously dissecting it.²⁸ In their study, the scholars recount the history of the guideline provisions requiring district courts to calculate the guideline based on uncharged crimes, explaining that such a provision was not authorized by the Sentencing Reform Act (which the U.S. Sentencing Guidelines were born out of) or reviewed by Congress, and was adopted without empirical testing or support. They also highlight that the provision was not based on past practice, has not been revised in light of feedback or research, has failed to achieve its untested theoretical goals (and instead transfers sentencing power to prosecutors), and promotes disrespect for the law.

The study cogently explains the unconstitutionality of the slippery practice and in doing so makes a compelling case against the practice of using uncharged crimes tacked on at the relaxed sentencing phase to imprison people for many years or decades: "The extraordinary concept of punishing defendants for uncharged...crimes, and at the same rate as if charge and conviction were obtained, was gradually crafted and slipped into the commentary over the course of several years."²⁹ They went on to stress that the relevant conduct guideline "only said that such conduct be 'taken into account' to 'determine the seriousness of the offense conduct,' and made no reference to using offenses the government did not charge or failed to prove at trial to calculate the Guideline range."³⁰ In all, the study thoroughly dismantles the unconstitutional practice of using crimes a defendant was never charged with, tried for, nor convicted of to deprive him of his liberty.

Alan Ellis, national expert on federal sentencing law, and Mark Allenbaugh, former sentencing commission lawyer, explained in an interview with The News that the relevant conduct loophole is "an end run around the Constitution." "Defendants don't realize this when they go to trial or plead guilty." He added that "if the evidence against a defendant is strong enough, the government should charge the defendant with a crime and let a jury decide, rather than slip it in during sentencing."

More recently, in an insightful study titled "A Parade of Horribles: Uncharged Relevant Conduct, the Federal Prosecutorial Loophole, Tails Wagging Dogs" in *Fed. Sent. Law* (2012-2013), the tail-that-wags-the-dog metaphor refers to uncharged relevant conduct; the tail, having a disproportionate effect on the crime of conviction (the dog), walks the reader through exactly how the relevant conduct loophole scam works. There is no shortage of critics who "express their distaste that current sentencing jurisprudence permits the government to bypass the trial or plea-bargaining process to obtain an enhanced sentence based on uncharged conduct."³¹

c. **Federal Judges**

Scores of federal judges have time and again weighed in on the unconstitutionality of using uncharged crimes to enhance a defendant's sentence by many years or decades. U.S. Third Circuit Appeals Court Judge Ambro summed it up nicely: "The concept is simple: if our society, through its law, deems a certain fact worth punishing (or warranting additional punishment), then the Constitution commands certain procedural protections attending the finding of that fact." He goes on to say, "[r]ather than following this principle of fundamental fairness,

²⁸ See Amy Baron-Evan and Jennifer Niles, *Deconstructing the Relevant Conduct Guideline: Challenging the Use of Uncharged and Acquitted Offenses in Sentencing* (2008).

²⁹ *Id.* at p.6.

³⁰ *Id.* at p.7.

³¹ David Yellen, "Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing," 58 *Stan. L. Rev.* 267, 275 (2005).

however, our law—through the use of the Federal Sentencing Guidelines—criminalize[s] activity '**on the cheap.**'" Judge Ambro closed with this powerful statement, hitting the nail squarely on its head: "In effect, we have a shadow criminal code under which, for certain suspected offenses, a defendant receives few of the trial protections mandated by the Constitution."³² Another Chief Judge of the U.S. Court of Appeals for the First Circuit criticized the relevant conduct scheme, pointing out that, "[t]he result has been the routine sentencing of offenders on the basis of crimes with which they have never been charged, the commission of which they deny, without any evidence ever having been proffered against them."³³ Chief Judge William G. Young has explained that the Guidelines and relevant conduct are not tools meant to enable judges to use reliable and accurate information to impose appropriate prison sentences; they have been weaponized by federal prosecutors who have refined methods to manipulate and weaponize them.

In *United States v. Bell*, U.S. Court of Appeals Judges of the D.C. Circuit matter-of-factly said that the "whole reason the Constitution imposes that strict beyond-a-reasonable-doubt standard is that it would be constitutionally intolerable, amounting 'to lack of fundamental fairness,' for an individual to be convicted and then 'imprisoned for years on the strength of the same evidence as would suffice in a civil case,'" which is the standard used at a federal criminal sentencing hearing.³⁴

Consistent with this viewpoint, a handful of U.S. Court of Appeals Judges opined that "punishing separate uncharged crimes...found by a preponderance of the evidence deprives the defendant of fair notice, the right to a jury trial, and liberty on an inadequate standard of proof."³⁵ Another U.S. Appeals Court Judge aptly pointed out that sentencing for uncharged conduct is not authorized by Congress and 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."³⁶ Even more U.S. Appeals Court judges still went as far as to say that "punishment for uncharged or unconvicted conduct violates the Due Process Clause and exceeds congressional authorization of incremental punishment only for convicted offenses."³⁷

Perhaps most shocking is the U.S. Court of Appeals for the Eighth Circuit's powerful statement: "If the former Soviet Union or a third-world country had permitted [sentencing based on uncharged offenses], human rights observers would condemn those countries."³⁸

D. Bevill's Case Is a Particularly Egregious Exploitation of the Uncharged So-called Relevant Conduct Loophole

³² *United States v. Grier*, 475 F.3d 556 (3rd Circuit 2006).

³³ *United States v. Green*, 346 F. Supp. 2d 259 (2004).

³⁴ *United States v. Bell*, 808 F.3d 926 (D.C. Circuit 2015).

³⁵ *United States v. Galloway*, 976 F.2d 414, 428-36, 431 (8th Cir. 1992) (Judges Beam, Bright & McMillan)

³⁶ Judge Lay in *United States v. Galloway*.

³⁷ *United States v. Silverman*, 976 F.2d 1502, 1519-23, 1527 (6th Cir. 1992).

³⁸ *U.S. v. Galloway*, *supra*.

We believe that Joshua Bevill's case is one of the most—if not *the most*—extreme example of the unfair and unconstitutional exploitation of the uncharged relevant conduct loophole because (1) the uncharged crimes constituted the core of criminality punished, (2) the time gap is wide (about seven years) between the uncharged Pointer Group crimes (2003 - 2004) and Bevill's present case (August 2010 - January 2011), and (3) the uncharged crimes aren't even remotely related to the crime of conviction in Bevill's present case.

VIII. Relevant Conduct, Double Punishment, and the U.S. Supreme Court

Even if Bevill's earlier case constituted relevant conduct in relation to his present case— which it doesn't—it is still radically unfair and unprecedented to take exactly the same conduct already used to punish him via a *maximum* five-year sentence in his earlier case and use it a second time in a separate case so as to add another 85 years to the sentence, for a total of 90 years, 30 years to be served in federal prison. When a defendant is sentenced in a case and then is sentenced in a separate case for exactly the same thing (because the conduct does *legitimately* constitute "relevant conduct"), what does the U.S. Supreme Court say about it?

A. *Witte v. United States*: Double Jeopardy Jurisprudence

To put into perspective the fundamental unfairness of punishing a defendant for his crimes, only to use them a second time in a separate case to punish him again by adding decades to his second prison sentence, consider the U.S. Supreme Court case *Witte v. United States*.³⁹

Again, unlike in *Witte*, in Bevill's case, the conduct that was passed off as "relevant conduct" wasn't even related to his present case.

In any event, in *Witte* (a 1996 U.S. Supreme Court case), the defendant was convicted of a (1991) federal marijuana charge. At sentencing, the court also used uncharged (1990) cocaine, which occurred about a year before the marijuana offense, to enhance the defendant's prison sentence in his marijuana case. But after the defendant was sentenced in his marijuana case, he was indicted on the cocaine offense—the same cocaine that was already used as uncharged relevant conduct to enhance his prison sentence in his marijuana offense. He was then actually convicted of the cocaine offense. At sentencing for the cocaine offense, *Witte* was sentenced for exactly the same conduct already used in his earlier marijuana case. The court held that the two offenses were intrinsically related, as they were part of the same continuing conspiracy. That is, the cases and conduct were related.

There's more. In *Witte*, the majority of the Supreme Court held that it was not double jeopardy, noting that the "Guidelines include significant safeguards to protect [a defendant] against having the length of his second sentence multiplied by duplicative considerations of the same criminal conduct already considered as 'relevant conduct' [in an earlier case]." This was at the core of the court's opinion.

For instance, if a defendant is looking at, say, five years in prison, but uncharged relevant conduct enhances it to ten years in prison; and then in a separate case, the same conduct is used to enhance a five-year sentence to a ten-year sentence, to offset the unfairness of having the same conduct counted twice, the court would order the two ten-year sentences to run concurrently. In layman's terms: the court would impose two ten-year prison sentences, yes— but the defendant would serve only ten years, the same amount of time he would have served had the conduct been used in one case rather than two separate cases. In other

³⁹ *Witte v. United States*, 515 US 389 (1995).

words, because of this safeguard, 5G1.3(b), a defendant's second prison sentence in his second case would not be increased based on the same conduct already used in a separate (earlier) case.

This held true for nearly 30 years, until Joshua Bevill's case. Again, Bevill's case is one of a kind. The Supreme Court was wrong: the same conduct already used in his earlier case was used to increase the total prison sentence in Bevill's present case by 600 percent—more than two decades longer, the greatest increase in the history of the U.S. Sentencing Guidelines. Although the U.S. Sentencing Guidelines were written to prevent the government from manipulating indictments and separate prosecutions to artificially increase a defendant's sentence for the same criminal conduct, that is precisely what happened in Bevill's case: they sentenced him to a statutory maximum prison sentence of five years for his crimes. Then, in a separate case, they slapped a new label on the same conduct and squeezed another 25 years out of Bevill, for a total of 30 years, based on the exact same conduct. Bevill's case obliterated the so-called built-in safeguards of the U.S. Sentencing Guidelines and rendered the logic used in *Witte* patently fallacious.

This has never happened...ever. Not in *Witte*, not in any case. Bevill's case is the only case on the books where this perverse result has played out.

B. The Dissenting U.S. Supreme Court Justices in *Witte* Call Such Double Punishment a Clear Violation of the Double Jeopardy Clause

It's also especially important to consider what the dissenting Justices said in *Witte*, as they strongly believed such an effect constitutes a clear violation of the Double Jeopardy Clause. In *Witte*, Justice Scalia, with whom Justice Thomas joined, weighed in, "This is one of those areas in which I believe our jurisprudence is not only wrong but unworkable as well....We do not punish you twice as much for the same offense, 'says the Government,' but we punish you twice as much for one offense solely because you also committed another offense, for which we will also punish you later on....I see no real difference in that distinction and decline to acquiesce in the erroneous holding that drives us to it."

Similarly, Justice Stevens made his viewpoint clear in that "the Court's holding is incorrect and *unprecedented*." (Emphasis added.) He went on to say, "Under these facts, it is hard to see how the Double Jeopardy Clause is not implicated." Justice Stevens also characterized the ruling in *Witte* as an "unjust result" that is "a manifest violation of the Double Jeopardy Clause." Those Supreme Court Justices were struck by an increase in the second sentence that pales in comparison to Bevill's *600-percent increase*. And, again, the relevant conduct in *Witte* was actually related to the crime of conviction, unlike the unrelated conduct in Bevill's case masquerading as "relevant conduct."

Remember, in *Witte*, the court said that, given the safeguards in the Guidelines, what happened in Bevill's case could not happen. But it did happen. It might be the only case in the history of the U.S. Sentencing Guidelines in which it's ever happened, but it happened. That said, if Justices Stevens, Scalia, and Thomas thought what happened in *Witte* was "unjust," "incorrect," "unprecedented," and a "manifest violation of double jeopardy," then what does that say about what happened in Bevill's case, in which the unfair effect was radically more extreme?

IX. There Is a Massive Disparity Between the Prison Sentence Imposed in Bevill's Case and the Sentences Imposed in Similar Cases

Beyond innocence or guilt, there is perhaps no better way to judge the fairness of a prison sentence than to measure it against sentences imposed in cases that involved similar crimes and similarly situated offenders. If a sentence deviates too radically from the benchmark, then

it should probably be scrutinized. It is a subtle brand of justice, but it lies at the foundation of the American criminal justice system—equal punishment for equal crimes.

To that end, there is such a thing as proportionality. People who jaywalk don't get 20 years in prison, nor should convicted murderers receive only a few months in jail. The punishment should fit the crime, as well as the offender's background and characteristics. And similarly situated offenders who commit similar crimes are not supposed to receive wildly different prison sentences. Such a system of justice is pure chaos, as it flouts the principles on which this nation's criminal justice system is built.

With that in mind, to measure a prison sentence's reasonableness, one must measure the prison sentence against similar crimes regarding similarly situated offenders. The number-one rule of law is equal punishment for equal crimes. In fact, that is one of the overarching goals of the federal sentencing scheme—to avoid any unwarranted sentencing disparities (among similarly situated offenders). Offenders are never going to be identical. There are always going to be different factual wrinkles and distinctions that set offenders apart.

That said, it is our position that the injustice in Bevill's case is exemplified by the fact that his prison sentence is *radically* disproportionate to similar offenders who committed similar crimes.

As noted, in Bevill's present case, he made misrepresentations to 3 high-net-worth investors who lost a combined \$106,000. Bevill is certainly not minimizing his crime. But as a purely factual matter, Bevill did not wipe out thousands of pension funds, nor did he steal the life savings of everyday hardworking people, nor did he pillage the retirement accounts of the elderly. What Bevill did was illegal and even immoral, but nobody was devastated. Bevill's present case involved 3 *investors*, not 3000; it involved \$106 *thousand* in losses, not \$106 *million*. Their lives were not ruined or even changed. The 3 high-net-worth investors in Bevill's case had a collective net worth well into the millions. They lost a combined \$106,000, a small fraction of their net worth. To ignore the nature of Bevill's fraud and the degree of harm and to treat him worse than offenders who have committed frauds that are ten, 50, 100, or even 1000 times larger than Bevill's makes no logical sense. It's punitive.

It would be a challenge to find any nonviolent white-collar fraud case on the books in which there is a comparable punishment for a comparable crime. If one is found, it would be shocking, because the Justice Project team searched exhaustively, to no avail. Here's what was found:

- a) Gregory Rand (Case No. 3:09-CR-120), William Nicholas Rand, Mark Albert Rand, William Antony Rand, and Joel Peterson were named in a 38-count indictment filed on May 6, 2009, in the Northern District of Texas. Their oil and gas scheme encompassed \$106 *million* in losses garnered from more than 2000 investors/victims. Did they receive decades in prison? Nope. The sentences in that massive case ranged from just six years to 18 years in prison. The mastermind, Gregory Rand, received the 18 years and was ordered to pay \$106 million in restitution. The others received less than 12 years.

By contrast, Bevill's present fraud comprised \$106 *thousand* in losses garnered from 3 investors/victims. The Rands' oil and gas securities fraud scheme was nearly 100 times larger than Bevill's. Next to the Rand case, Bevill's case is pennies. It's like comparing a simple assault to a brutal string of murders. Yet Bevill received a prison sentence about three times as long as most of the offenders in the Rand case and 12 years longer than the mastermind, Gregory Rand.

- b) What about Bernie Ebbers? He was the ringleader of the WorldCom scandal that wiped out thousands of pension funds, totaling losses well into the *billions*. He

received 25 years in prison.

- c) Enron destroyed billions of dollars in retirement accounts, leaving destruction in its wake. Bevill received a prison term more than double what the mastermind of that gigantic fraud received and decades longer than most of the participants.
- d) Marc Dreier received a 20-year sentence for a \$400 million fraud.

It's also important to note that Bevill did not receive a stiff sentence after exercising his right to a trial. Bevill entered an effective guilty plea in his present case and expressly admitted his guilt on each count.⁴⁰

In *United States v. Parris*,⁴¹ the judge compiled a list of the most egregious frauds he could find. Then he compared those frauds to the defendant in the Bevill case.

None of these defendants cooperated with the government:

LOSS AMOUNT	SENTENCE
Bennet: \$100 million	14 years
John Rigas: over \$200 million	15 years
Timothy Rigas: over \$200 million	20 years
Skilling: over \$1 billion	14 years
Forbes: approximately \$14 billion	10 years
Kumar: \$2.2 billion	12 years
Ferrarini: \$25 million	12 years
Hotte: \$67 million	9 years
Formisano: \$9.8 million	6 1/2 years
Smirlock: \$12.6 million	4 years
Adelson: \$100 million	3 1/2 years
Joshua Bevill: \$106 thousand	25 years

To put the radical disparity of Bevill's sentence into perspective, if Gregory Rand (mentioned above)—whose fraud case encompassed more than \$100 million in losses garnered from more than 2000 investors/victims in comparison to Bevill's \$106,000 in losses garnered from 3 investors/victims—was sentenced at the same proportion, Gregory Rand would have received 2,500 years in prison, using the loss amount as a yardstick.

Those are similar fraud crimes, but even if we compare Bevill's sentence to the most heinous, violent crimes, Bevill's prison sentence nonetheless stands out. Bevill is absolutely serving a longer prison sentence than most murderers. Recent data demonstrates that the average prison sentence for murder is 253 months, much shorter than Bevill's sentence. Also, bear in mind that there is no parole in the federal system—so 30 years in prison is 30 years in prison, basically. If Bevill had taken a knife, murdered two people, and been sentenced in state court to two life sentences *with the possibility of parole*, with good behavior, he could likely make parole after 15 years. That there is no parole in the federal system is a significant fact that has

⁴⁰ It's misleading because it was a *stipulated*-bench trial. But a stipulated-bench trial is simply a defendant agreeing in writing that his or her actions constitute the crimes and that he or she is guilty of the crimes; the piece of paper was then given to the judge, and Bevill was adjudged guilty. It's tantamount to a guilty plea. It's not a traditional bench trial, so the name is misleading. Bevill expressly admitted guilt in writing. There was no trial.

⁴¹ *United States v. 573 F. Supp. 2d 744* (2nd Cir. 2008).

serious practical implications and ought not to be discounted or ignored.

But doesn't Bevill have a criminal history? He does. That shouldn't be ignored. But it's relatively petty. Even the federal prosecutors in Bevill's case characterized it as a few petty crimes that occurred from ages 17 to 22: "...[Bevill's] [prior convictions] were for relatively minor crimes that the Defendant committed between ages 17 and 22. Except for the cases that are now before the Court, the Defendant has not had a history of committing fraud on a large scale." The U.S. Attorney's Office for the Northern District of Texas went on to tell Bevill's judge this: "Therefore, despite the...conduct underlying the two pending cases, neither the facts of those cases nor the Defendant's background demonstrate that the Defendant will inevitably victimize investors or other members of the public when released from custody. Accordingly, the government does not view the need to incapacitate the Defendant, and thereby protect the public from further crimes, as justifying [a 25-year prison sentence]."⁴² Bevill's criminal history isn't composed of any robberies or crimes of violence or burglaries or assaults or drug trafficking. Alcohol and youth were involved in virtually every conviction.⁴³

X. The Irrationality of the U.S. Sentencing Guidelines for Fraud Cases

A. Both Federal Judges and Legal Scholars Alike Have Repeatedly Rejected the Prison Sentences Produced by the White-Collar Fraud Guidelines, calling them "Irrational" and "Absurd on Their Face".

If one traffics young children for the use of pornography, plots a terrorist attack, conspires to commit murder or commits murder, hijacks a plane, or kidnaps a child, the amount of prison time yielded by the U.S. Sentencing Guidelines will almost certainly be lower than a nonviolent white-collar securities fraud case such as Joshua Bevill's—hardly an egregious fraud. The greatest offense level on the U.S. Sentencing Chart is 43, life in prison without the possibility of parole. On its face, this should signal that something is amiss.

Bernie Madoff is rotting in prison for the rest of his life. But is a run-of-the-mill nonviolent securities fraud such as Bevill's present case really as bad as Bernie Madoff's \$50 *billion* fraud, the worst fraud in the history of the world? The U.S. Sentencing Guidelines think so: Bevill's sentencing range was life in prison without the possibility of parole, the highest possible. And is Bevill's present case really worse than trafficking children for the use of pornography, terrorism, murder, aircraft piracy, and kidnapping? The U.S. Sentencing Guidelines think so. To that end, the Fraud Guidelines routinely produce ranges of decades in prison or even life in prison with no parole for nonviolent fraud offenders, and federal judges have consistently refused to impose such sentences, calling the sentencing ranges

⁴² See Gov. March 1, 2012 Sentencing Memorandum Exhibit "A."

⁴³ For instance, when Bevill was 21, he received a DWI; at 22, he was convicted of Criminal Mischief (He threw a cologne bottle out of a car while driving); at 22, he was convicted of Possession of a Dangerous Drug (caught with a *single* Xanax pill while walking to the parking lot of a bar/restaurant on the lake); at 20, he was convicted of a terroristic threat (over the telephone, a verbal argument with another guy. It was a simple argument over a girl. He threatened Bevill, and Bevill threatened him. The person's mother was the District Attorney's legal assistant. Bevill has a misdemeanor conviction for this, yes, but he maintains his innocence regarding the elements of a terroristic threat. He is guilty of threatening, *over the phone*, to beat up the person, just as the person threatened him. But that is all that was said. It was two 21-year-old guys having a petty dispute. Bevill was arrested and held in the county jail. He pleaded guilty, because if he had not, he was going to be held in the county jail for up to a year awaiting trial. He was in college at the time and was unable to make bond. Rather than sitting in the county jail for six to 18 months for a misdemeanor, he pleaded guilty to time served and was released the same day. He vehemently denies that particular conviction, but he takes full responsibility for the others.

"irrational" and even "absurd on their face."

In fact, it has gotten so bad that the guidelines for white-collar crimes are universally recognized as "so high as to be practically worthless."⁴⁴ More specifically, there is a broad consensus among federal judges who have overseen the sentencing of white-collar fraud offenders: under the U.S. Sentencing Guidelines, the sentencing ranges produced in fraud cases "have so run amok that they are patently absurd on their face."⁴⁵ "Since Booker, virtually every judge faced with a top-level...fraud defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high."⁴⁶

Even more still, sentencing ranges yielded by the U.S. Sentencing Guidelines for fraud offenses are so "draconian that judges are unwilling to impose them even in the biggest and most publicly notorious cases."⁴⁷ This is a widely held view among federal judges: "[T]he Sentencing Guidelines for white-collar crimes can produce a black stain on common sense."⁴⁸ Indeed, courts have lamented "the utter travesty of justice that sometimes results from the guidelines' fetish with absolute arithmetic, as well as the harm that guideline calculations can visit on human beings if not combined with common sense."⁴⁹ And scores of highly regarded legal scholars have weighed in, explaining that "the Guidelines for fraud and other white-collar offenses are too severe and are greater than necessary to satisfy...traditional sentencing goals."⁵⁰ Preeminent expert on federal sentencing issues Douglas Berman sharply criticized the Fraud Guidelines in his 2015 study.⁵¹

Bevill's case exemplifies the irrationality of the Fraud Guidelines, as evidenced by his sentencing range of life in prison without the possibility of parole.⁵² Joshua Bevill is hardly Bernie Madoff. He did not destroy thousands of lives and steal billions of dollars. He didn't wipe out anyone's life savings. His victims were sophisticated, high-net-worth investors who lost a tiny fraction of their net worth, not elderly people who lost their entire life savings. Yet the U.S. Sentencing Guidelines treated Bevill the same as Bernie Madoff. To state the obvious, any Guideline that fails to distinguish between the worst of the worst and a relatively minor crime is inherently flawed, especially when the express purpose of the U.S. Sentencing

⁴⁴ Frank O. Bowman III, "Nothing is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System," 24 Fed. Sent'g Rep. 356, 360 (2012); See also Brief for Wash. Legal Found. Ad. Criminal Law Scholars as Amici Curiae Supporting Petitioner at 20-21, *Rubashkin v. U.S.* 133 S. Ct. 106, 184 L. Ed 2d 233 (2012) (No. 11-1203).

⁴⁵ *United States v. Adleson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006).

⁴⁶ FRANK O. Bowman III "Sentencing High-Loss Corporate Insider Frauds After Booker," 20 Fed. Sent. Rep. 167 (2008).

⁴⁷ Frank O. Bowman III, "Sentencing High-Loss Corporate Insider Frauds After Bookout," 20 Fed. Sent. Rep. 167 (2008).

⁴⁸ *United States v. Parris*, 573 F. Supp. 2d 744 (2008).

⁴⁹ *United States v. Adleson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006).

⁵⁰ Andrew Wiessman & Joshua A. "Block White-Collar Defendants and White-Collar Crimes," 116 *Yale L.J. Pocket Part* 286, 286 (2007).

⁵¹ Douglas A. Berman, *Fiddling with the Fraud Guidelines as Booker Burns*, 27 Fed. Sent'g Rep. 267 (2015).

⁵² There was some dispute as to whether Bevill's U.S. Sentencing Guideline range was 360 months to life (level 42) or life (level 43). Some parts of the record reflect level 42, others reflect level 43.

Guidelines is to allow judges to distinguish between different degrees of wrongdoing and harm.

Extending the argument regarding the irrationality of the Fraud Guidelines, many of our nation's most egregious fraud cases are brought forth in the Southern District of New York (think Wall Street). Here's a striking (and telling) fact: only 23.7 percent of defendants in fraud cases are sentenced within the Sentencing Guideline range; almost twice as many (43.5 percent) receive downward departures based on an application of the factors in section 3553(a).⁵³ Another 25.6 percent receive downward departures for aiding the federal government in the prosecution of others.

This means that a total of 69.4 percent of defendants are not being sentenced within the Guidelines in fraud cases, as the ranges produced are much longer than federal judges are willing to impose.

In short, because the Fraud Guidelines are fundamentally broken, most reasonable judges refuse to crush run-of-the-mill fraud offenders with many decades or even life in prison, dismissing such a recommendation as nonsense. Not Bevill's judge. Notably, the Fraud Guidelines are not a product of empirical evidence.⁵⁴

XI. If Joshua Bevill Were Sentenced Today, It Is Likely His Prison Sentence Would Be Substantially Lower

A. *Nelson v. Colorado*: The Culmination of Decades of Criticism of the Unconstitutional Practice of Using Uncharged Crimes to Imprison People

In this petition, we have walked you through a sea of judges', U.S. Supreme Court Justices', and legal scholars' opinions on the use of uncharged crimes to add many years or even decades to a defendant's prison sentence—powerful evidence that the uncharged relevant conduct hustle is unconstitutional. We didn't even scratch the surface. We could easily include another 100 pages. At any rate, *Nelson v. Colorado* is the culmination of decades of cases in which the legal community has grown increasingly hostile toward the flimsy, unfair, and most importantly, *unconstitutional* practice of using uncharged crimes to add many years or even decades to a defendant's prison sentence under the guise of a sentencing scheme that allows courts to consider all of the circumstances surrounding the crime of conviction.

In particular, the U.S. Supreme Court's recent (2017) decision in *Nelson v. Colorado* stands

⁵³ See U.S. Sentencing Commission, Statistical Information Packet for Fiscal Year 2016, Southern District of New York, Table 10.

⁵⁴ That the Fraud Guidelines are utterly broken is no surprise when one considers that, unlike other parts of the U.S. Sentencing Guidelines, the Fraud Guidelines provision is not based on the Sentencing Commission's findings or expertise; that is, it's not a product of empirical evidence. Rather, the Fraud Guideline was ratcheted up higher and higher based on congressional directives in Sarbanes-Oxley and other federal statutes. With this in mind, the Fraud Guideline is similar to the Crack Cocaine Guideline, which was eventually fixed and which the U.S. Supreme Court held was entitled to diminished regard because it was based on congressional mandatory minimums rather than the Commission's "characteristic institutional role" and did "not account of empirical data and national expertise." *Kimbrough v. United States*, 552 U.S. 85 (2007). This was echoed in Yale legal scholars' comprehensive study of relevant conduct, in which they zeroed in on this point, making the case that using uncharged crimes to punish people wasn't even part of the U.S. Sentencing Guidelines.

for the proposition that such a practice is indeed unconstitutional. In view of this, if Bevill were sentenced today, his sentence would likely be much shorter.

As many legal scholars have noted, a recent U.S. Supreme Court ruling demonstrates that using entirely separate crimes a defendant was never charged with to imprison him (or her) is unconstitutional, as it flouts the presumption of innocence.⁵⁵

Alan Ellis, a past president of the National Association of Criminal Defense Lawyers and Fulbright Award winner has 50 years of experience as a practicing lawyer, law professor, and federal law clerk. What's more, he is a nationally recognized authority in the fields of federal plea bargaining, sentencing, prison matters, appeals, habeas corpus 2255 motions, and more.

As pointed out in an article authored by Ellis and others that examines the rationale underlying *Nelson v. Colorado*, "As the [U.S. Supreme] Court has recognized for well over a century, '[t]he principle that there is a presumption in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.'"⁵⁶

Thus, at the heart of *Nelson v. Colorado* was the paramount importance of the presumption of innocence. As was observed in the scholars' article, *Nelson* entails not only that [a defendant] may not be penalized for acquitted conduct, but also that [a defendant] may not be punished for dismissed or even *uncharged conduct*." They added that *Nelson* made clear that "a state may not engage in an end-run around the Constitution by characterizing at sentencing (acquitted, dismissed, or uncharged) facts that are actually elements of a separate offense as mere sentencing factors." "To do so eviscerates the presumption of innocence," the scholars emphasized.

The scholars went on to say that "[t]he principle of *Nelson* thus is this: Only facts arising out of a final conviction which may not also be construed as elements of acquitted, dismissed, or *uncharged crimes* may be considered at sentencing." (Emphasis added.) Thus, *Nelson* can be distilled down to this: given the presumption of innocence, a defendant's relevant conduct is limited to the crime he was convicted of, but does not extend to entirely separate uncharged, untried crimes, as such a sentencing scheme is incompatible with the presumption of innocence, and is therefore at odds with the U.S. Constitution in the context of the criminally accused. In other words, in a system that is based on the bedrock principle of the presumption of innocence, courts cannot use crimes that a defendant was never charged with, tried for, or convicted of to imprison him, begging the question, how can such striking incongruity coexist? It can't, as the U.S. Supreme Court made clear in *Nelson*.

Simply skipping indictment by grand jury and a trial by jury and going straight to imprisoning someone for uncharged crimes—despite the strained logic and twisted legal reasoning used to justify it—is antithetical to the basic principle of the American system of justice, and if one is presumed innocent until proven guilty, then such a practice erodes such a safeguard.

B. Given That Bevill Is Presumed Innocent Under the Law, How Can the Court Legally Impose \$2.7 Million in Restitution for Uncharged Crimes?

⁵⁵ See Alan Ellis, Mark H. Allenbaugh & Doug Passion, "Reining in Relevant Conduct Through a Recent Restitution Ruling," 102 *Crim. L. Reporter* 366 (Jan. 17, 2018) (arguing that the rationale of *Nelson v. Colorado* effectively overrules *Watts*).

⁵⁶ Alan Ellis, Mark Allenbaugh, and Doug Passions, "Reining in Relevant Conduct Through a Recent Restitution Ruling" (2018) (quoting *Colorado v. Nelson*, 137 S. Ct. 1249 (2017) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

Nelson v. Colorado shed much-needed light on one of the bedrock principles of the American justice system—the presumption of innocence.

That said, how can Bevill be ordered to pay \$2.7 million in restitution for crimes he was never even charged with?

XII. Given the History and Purpose of a Grant of Clemency, Bevill Is a Prime Candidate for Clemency

A. To Offset an Abusive or Unfair Practice That Produced Unjust Prison Sentences for Thousands of Offenders, Former President Obama Commuted Sentences en Masse, Following the Path Blazed by the Founding Fathers

There are two men in the entire nation who are arguably the most sophisticated and well-versed when it comes to the shortcomings and striking deficiencies in the federal punishment machine. Douglas Berman is a criminal-law professor at the Ohio State University School of Law and is author of the blog *Sentencing Law and Policy*. Mark Osler is a criminal-law professor at the University of St. Thomas. Osler created the nation's first federal commutations-law clinic.

What is clemency? What purpose does it serve? Is it for people who simply don't want to sit in prison? A plea for mercy, perhaps? In a word, it's an antidote for injustice. There is an insightful article co-written by Berman and Osler in which they de-mystify the opaque world of clemency power by shedding light on its long and storied history.

In a July 27, 2015, *Star Tribune* article titled “Obama's Categorical Reduction of Sentences (via Clemency) Has Precedent,” they walked the reader through the history and purpose of clemency. At its core, the article focused on how clemency powers can be used to address broad categories of injustice or a specific class of offenders. Put differently, if there is a case that is the product of a flawed law or policy or some other fundamental problem that resulted in an excessive or otherwise unfair prison sentence, then clemency exists to remedy such an injustice—that, although it might or might not be *legal* under the letter of the law, is unfair nonetheless.

The scholars point to former President Obama's use of his clemency power to address excessive sentences from the war on drugs. Then-President Obama recognized that many prosecutors were abusing certain tools, turning them into weapons and using them to crush nonviolent drug offenders with radically unfair prison sentences. As a result, Obama commuted nearly 2000 prison sentences, most of which were nonviolent drug offenders whose sentences were a product of the old draconian crack law (which arbitrarily punished crack cocaine 100 times more harshly than powdered cocaine) or a prosecutor's abuse of something called an “851 enhancement,” which was designed to incapacitate habitual drug kingpins. Prosecutors have succeeded in weaponizing this enhancement to effectively impose extremely harsh mandatory minimum prison sentences for low-level nonviolent drug offenders, usually in retaliation for their having exercised a constitutional right to trial or some other pesky pretrial motion, resulting in draconian prison sentences stretching many decades or life without the possibility of parole.

1. A Historical Context for Clemency Powers

Further, Berman and Osler remind us that Alexander Hamilton “echo[ed] the sentiments of many framers” by “explaining the benefits of permitting the president to use the pardon power to

benefit classes of offenders." The scholars observe that the founding fathers' actions as presidents, too, showed they believed that clemency was a tool that could and should be used broadly for classes of offenders. George Washington was the first, they noted. And Thomas Jefferson pardoned all of those convicted under the Alien and Sedition Act because he believed the law was unconstitutional. Abraham Lincoln and Andrew Johnson also followed suit. And then there is Woodrow Wilson, who expressed his disagreement with the Volstead Act by granting clemency to hundreds of people convicted of alcohol-related offenses. And, of course, Gerald Ford granted 14,000 such clemencies in the wake of the Vietnam War.

All of these presidents have one thing in common: they spotted an injustice that flowed from a broken aspect of the criminal justice system. Clemency is a backstop for injustice, in that respect.

This should aptly illustrate why the president of the U.S. has clemency powers at his disposal—to reverse a certain brand of injustice that exists on the books.

The legal community has denounced the exploration of the uncharged relevant conduct loophole, which presages a change in the law. There are cases in which the government has abused the loophole, and then there is Joshua Bevill's case, which stands alone in its egregiousness. Thus, given it's the product of an unconstitutional practice that will quite likely be outlawed, Bevill prays that through clemency his sentence will be reduced.

XIII. Inherent Sentencing Enhancement

In Bevill's present case, he also received a four-level sentencing enhancement for selling securities without being a registered broker/dealer—a four-level sentencing enhancement is no small thing as it translates to actual years that a real person must sit in prison.

When a defendant commits securities fraud, there is a four-level sentencing enhancement if he was registered broker/dealer. The court acknowledged that Bevill was not a registered broker/dealer. Yet he still received the enhancement. Why?

According to Bevill's Presentence Investigation Report (PSR), which the court adopted, if a defendant is a registered broker/dealer, he receives the enhancement, as instructed by the U.S. Sentencing Guidelines. Simple enough. But Bevill's PSR put its own spin on this. According to Bevill's PSR, even if the defendant is not a registered broker/dealer, he receives the enhancement, because he should be registered. This language is found nowhere in the Guidelines.

Thus, accordingly to Bevill's PSR, if a defendant commits securities fraud, he always receives the enhancement. It's an inherent enhancement: if he was a registered broker/dealer, then he receives it; if he wasn't, he still receives it.

This is not what the Guidelines say. The Guidelines clearly state that if a defendant was a registered broker/dealer, he receives a four-level sentencing enhancement, *because he was a registered broker/dealer*. This is yet another trick that helped ratchet up Bevill's Sentencing Guideline range.

XIV. Because of the Attorney's and Judge's Incompetence Regarding Bevill's Guilty Plea, the Guilty Plea to an Offense with a Statutory Maximum 10-Year Sentence is Reversed by the District Court Before Sentencing

A. In Bevill's Present Case, in May 2011, He Pleaded Guilty to an Offense That Carried a Statutory Maximum Ten-Year Sentence

This is a matter of the factual and procedural case record. In his present case Bevill originally pleaded guilty to an offense that carried a statutory maximum sentence of ten years, a significant fact that merits special attention, **as it capped Bevill's sentence at ten years.** (See Doc. 21, 22, 25-26)(After entering an effective guilty plea, he ended up with 25 years in the present case.) The story doesn't end there, however. After Bevill pleaded guilty and after his Presentence Investigation Report was prepared, after objections and Sentencing Memorandums were filed, but before his sentencing hearing, it came to light that Bevill's guilty plea was illegal: the acts that Bevill pleaded guilty to did not constitute the crime, rendering his guilty plea illegal. Thus, the law required Bevill's judge to reverse the illegal guilty plea, which she did. (Doc. 97.)

Bevill's attorney didn't bother to ensure that his acts constituted the crime to which he pleaded guilty, and the judge neglected her *core duty* at Bevill's plea hearing by not ensuring that his guilty plea had a factual basis; that is, the judge's *core duty* at Bevill's plea hearing was to ensure that the acts that Bevill pleaded guilty to constituted the crime to which he pleaded guilty. Neither Bevill's judge nor his attorney exercised this minimal amount of competence that is required—both were shockingly incompetent regarding a rudimentary issue. Thus, they both allowed Bevill to enter an illegal guilty plea that had to subsequently be tossed out because of their incompetence. **"Rule 11(b)(1) requires the district court to determine that there is a factual basis for the plea prior to entering judgment against the defendant."** *United States v. Avalos-Sanchez*, 975 F.3d 436 (5th Circuit 2020) (quoting *United States v. Marek*, 238 F.3d 310 (5th Circuit 2001); short cite: *Avalos-Sanchez*, 975 F.3d at 439-40 (quoting *Merek*, 238 F.3d at 315.)

B. After the Judge is Required to Reverse Bevill's Guilty Plea, He Diligently Pursued a Comparable Replacement, But the New Plea Offer is Much Greater

But here's the problem. Any reasonable person would assume that after the judge reversed Bevill's guilty plea because of the *attorney's* and the *judge's* incompetence, the replacement plea offer would be comparable; that is, one would think that Bevill would be allowed to plead guilty to another offense that carried a statutory maximum sentence of ten years, which would insulate him from the incredibly high U.S. Sentencing Guideline range, *life in prison*.

But this is not what happened. Bevill was effectively punished for his attorney's and the judge's incompetence that resulted in Bevill's illegal guilty plea. As the record conclusively shows, after the court was required to toss out his guilty plea, Bevill did not use it as an opportunity to go to trial or change his position. Given the judge had to toss out his illegal guilty plea, the judge scheduled a hearing. During the hearing, on the record, Bevill made it crystal clear that he still wanted to enter a guilty plea: "Your Honor, I...*don't want a trial. I have admitted under oath to [committing the crimes charged].*" (Doc.147 at P.6.) (Emphasis Added.)

Then Bevill almost immediately reached out to federal prosecutors to explicitly reiterate and emphasize his guilt and his desire to enter a guilty plea:

You are the prosecuting attorney. I want to communicate to you that I have *never once said that I'm not guilty...a trial is nothing more than a waste of time, and I have no idea why everyone keeps talking about a trial or a trial date. If you read my memorandum and affidavit, I have more than admitted guilt.* (Emphasis added.) (See the August 10, 2012 letter to the prosecutor, which is part of the record: Doc.181 at P.6.)

This letter prompted new plea discussions. But the prosecutors turned malicious and vindictive. They were angry that the illegal plea had been tossed out given the plea had been entered, the PSR filed and objected to, Sentencing Memorandums filed and so on. In short, it was a burden for prosecutors. So they punished Bevill. (Again, it's not as though he refused a subsequent replacement plea offer or demanded a trial after his illegal guilty plea was reversed. That would be different. Rather, Bevill made unequivocally clear that he wanted a plea deal to replace the illegal guilty plea that the judge had to toss out, *because of her and his attorney's incompetence.*)

The prosecutors' replacement plea offer was *increased* dramatically, more than doubled. There was no bargain to the new plea offer. Instead of a 10-year offense, the new offer was a 20-year offense. Put differently, rather than just replace the illegal plea deal with a comparable plea deal, prosecutors *upped the ante*, which is punitive given the advantageous plea was reversed because of the judge's and attorney's incompetence and given Bevill still wanted to plead guilty.

Bevill resolved the case with an effective guilty plea, pleading guilty to the 20-year offenses. He did *not go to trial*. More precisely, in a legal document, Bevill stipulated to his criminal conduct and expressly admitted that it proved that he was guilty. The prosecutor signed it. And the judge stamped it. It was an effective guilty plea. (See Joint Stipulation Doc. 181 4-6-2013.)

Had Bevill's attorney and judge not botched his guilty plea, his sentence would have been much lower, given the statutory maximum ten-year offense that he originally pleaded guilty to.

Part II

I. The Court in Bevill's Case Imposed an Illegal Sentence, which is Different From a Mere Error Regarding the Calculation of the U.S. Sentencing Guidelines—and Which Constitutes a Complete Miscarriage of Justice Under the Law.

The first part of this Clemency was centered on three main issues.⁵⁷

However, Part Two of this clemency request is centered on something entirely different. Bevill has another compelling basis for Clemency, which we ask you to consider not merely independent of but in addition to everything we have already laid out.

"An unlawful or illegal sentence is one imposed without, or in excess of, statutory authority."⁵⁸

Because of two glaring errors committed by Bevill's judge, there was a miscarriage of justice—which is different from a simple error in calculating the Guidelines. Again, *this is not a problem centered on a simple miscalculation of the U.S. Sentencing Guidelines*. To that end, Bevill was given an *illegal* sentence that *exceeded* the *statutory maximum* sentence for the underlying offenses. On top of that, the court ignored the *mandatory* requirements under section 5G1.3(b)(1) of the Guidelines that *required* the court to order the sentence in Bevill's earlier case to run concurrent to the sentence in his present case, which was expressly designed to offset the inherent unfairness of having the same conduct already used in an earlier case increasing the sentence in a separate case. This is not a mere Guideline issue. As emphasized by different U.S. Courts of Appeal, "section 5G1.3(b)(1) does not affect the guideline range, so a refusal to apply that guideline cannot be deemed a 'variance' from the guideline range"—*it requires the judge to adjust a defendant's sentence after the proper guideline range is calculated.*"

The errors in Bevill's case are not garden-variety sentencing errors. That is, we are not talking about mere sentencing errors that affected Bevill's Guideline range. In those types of cases, even if the defendant was resentenced absent the erroneous Guideline calculation, he could receive the same sentence, as the Guidelines are advisory. In such a case, the judge might have made an error in calculating the defendant's guideline range, but the sentence is still lawful.⁵⁹

By contrast, the errors in Bevill's case constitute a complete miscarriage of justice under the law because they resulted in a sentence that exceeds the judge's authority. In other words, "if lawful

⁵⁷ (1) by adding the conduct from Bevill's earlier case to his present case, it grossly distorted the severity of his present case; (2) the core of criminality punished in Bevill's present case, constituted entirely separate uncharged (Pointer Group) crimes that weren't even remotely related to Bevill's present case and allegedly occurred some seven years before the conduct in his present case even began, which also distorted the severity of Bevill's present case; (3) of the \$3 million in losses and 60 investor/victims tied to the uncharged (Pointer Group) crimes used to calculate Bevill's U.S. Sentencing Guideline range in his present case, Bevill's take as a low-level salesman/cold-caller was less than 1 percent, as he worked at the company for three months, a fact that was never disputed at sentencing—so by pinning \$3 million in losses and 60 investor/victims on Bevill, it overstated the seriousness of his present case.

⁵⁸ *Sun Bear v. United States*, 644 F.3d 700 (8th Cir. 2011); see also *United States v. Vera*, 542 F.3d 457 (5th Cir. 2008); see also *United States v. Foster*, 504 F.3d 821, 824 (8th Cir. 2008).

⁵⁹ See *Gilbert v. United States*, 640 F.3d 1393, 1304 (11th Cir. 2011) (en banc); *Hawkins v. United States*, 706 F.3d 820, 825 (7th Cir. 2013); *Sun Bear v. United States*, 644 F.3d 700, 703 (8th Cir. 2011)(en banc).

sentences are those within the scope of a court's authority, then logic would dictate that unlawful sentences must be those outside the scope of that authority."⁶⁰

Thus, it's a fallacy to conflate the two kinds of errors. Bevill's *sentence is unlawful*.

In sum, because of these two issues combined, Bevill's sentence is 10 years longer than it should be—rather than serving 30 years in federal prison, Bevill should be serving 20 years in prison. Bevill has served nearly 12 years in prison thus far.

A. Bevill Received an Illegal Sentence That Exceeds His Statutory Maximum Prison Term by Five Years.

***"It is a miscarriage of justice to give a person an illegal sentence that increases his punishment, just as it is to convict an innocent person."*⁶¹**

There is not another federal defendant in the U.S. Sentencing Guidelines history who has received a prison sentence five years greater than the statutory maximum sentence for his underlying crimes. Only Bevill. In Bevill's earlier case, he pleaded guilty on January 6, 2011. He was never indicted or even arrested. He pleaded guilty to an Information. The conduct in Bevill's present case started in August 2010, before his guilty plea in his earlier case. As Bevill stressed in his affidavit attached to his effective guilty plea in his present case, he shut down Progressive Investment Partners (the company in his present case) before his January 6, 2011, guilty plea in his earlier case. But after Bevill's January 6, 2011, guilty plea in his earlier case, he deposited money in a bank account, which in part gives rise to his present case.

Thus, Bevill was given a sentencing enhancement pursuant to 18 U.S.C. 3147 for committing a crime while on release in his earlier case. Thus, in Bevill's present case, he was given four statutory maximum 20-year sentences, which were ordered to run concurrently; on top of that, however, the court imposed a consecutive five-year sentence under 18 U.S.C. 3147--which resulted in a sentence five years beyond Bevill's statutory maximum for the underlying offenses (in his present case).

As the Fifth Circuit Court of Appeals has made clear, "[o]ur precedent establishes that 3147 provides only a sentence enhancement and does not constitute an independent offense or element thereof."⁶² And "[r]egardless of the fact that 3147 enhancement calls for punishment 'in addition to the sentence prescribed' for the underlying offense, the 3147 enhancement can never result in a sentence in excess of the statutory maximum prescribed for the offense committed while on release..."

In Bevill's present case, it was undisputed that the court imposed a sentence that exceeded the statutory maximum for the underlying offenses by *five years*.

The Fifth Circuit relied in part on the D.C. Circuit. In *United States v. Samuel*, 296 F.3d 1169 (D.C. Circuit 2002), the court stated, "Under the Sentencing Guidelines, a court may impose a sentence anywhere within the applicable guideline range, 'provided that the sentence...is not greater than the statutory authorized maximum sentence (i.e., concerning the application of

⁶⁰ *United States v. Spencer*, 773 F.3d 1132 (11th Cir. 2014) (quoting *Sun Bear v. United States*, 644 F.3d 700, 705 (8th Cir. 2011)(en banc).

⁶¹ *United States v. Macedo*, 406 F.3d 778, 790 (7th Cir. 2005).

⁶² *United States v. Dison*, 573 F.3d 204 (5th Cir. 2009).

3147)."⁶³ In short, the Samuel Court explicitly held that the application of 3147 "can neither increase a defendant's sentence above the statutory maximum for the offense of conviction, nor expose him to the possibility of such an increase."

What's odd in Bevill's case is that there is in-circuit (5th Circuit) authority that makes clear that the 3147 sentencing enhancement can "never result in a sentence in excess of the statutory maximum prescribed for the offense committed while on release...." In a recent 2021 case, the Fifth Circuit yet again emphasized that the "3147 sentencing enhancement can never result in a sentence in excess of the statutory maximum for the underlying offenses."⁶³ Yet Bevill's judge relied on the only circuit that disagrees with this, the Third Circuit Court of Appeals. In *United States v. Lewis*, 660 F.3d 189 (3rd Circuit 2011), the court held that under 3147, an offender could receive a sentence greater than his statutory maximum. As a result, Lewis received a sentence that exceeded his statutory maximum by 18 months. Bevill is in the Fifth Circuit, not the Third Circuit.

What's more, Lewis is the only case we could find on the books in which a defendant did receive a sentence in excess of his statutory maximum for his underlying offenses, under 3147. The other circuits who have taken a position on the issue have made clear that the 3147 sentencing enhancement is an offense characteristic that cannot result in a sentence that exceeds the statutory maximum for the underlying offenses. Bevill's sentence exceeded his statutory maximum by *five years*, the greatest increase in the history of the U.S. Sentencing Guidelines, which is more than triple the 18-month sentence in Lewis.

B. Bevill's Sentence Was Illegal Under 5G1.3(b)(1), Which is Mandatory

The significant safeguard (5G1.3(b)(1)) to protect defendants against having the length of their second sentence multiplied by duplicative considerations of the same criminal conduct already considered as relevant conduct in an earlier case was demolished here in Bevill's case.

As the U.S. Supreme Court pointed out in *Witte v. United States*, "the concept of [uncharged] relevant conduct is reciprocal and that U.S.S.G. 5G1.3 mitigated the possibility that the fortuity of two separate prosecutions would grossly increase a defendant's sentence by requiring that the sentence resulting from an offense that was fully taken into account as relevant conduct in the later offense be imposed concurrently to the undischarged term of imprisonment."⁶⁴

In other words, if the same conduct is considered when calculating a defendant's U.S. Sentencing Guideline range in two separate cases, 5G1.3(b)(1) instructs the court to impose a concurrent sentence. This guidance helps to offset the unfairness of having the same conduct count twice. More specifically, as noted in *Witte*, the "Guidelines include significant safeguards [5G1.3] to protect [a defendant] against having the length of his second sentence multiplied by duplicative considerations of the same criminal conduct already considered as 'relevant conduct [in an earlier case].'"

It's simple. If conduct is used to calculate an offender's U.S. Sentencing Guideline range in one case and then in a separate case that same conduct is used a second time to calculate an offender's Guideline range in that case, then 5G1.1(b)(1) exists to mitigate the unfairness of having the same conduct used in two separate prosecutions. Imagine if a defendant were given a 10-year prison sentence in one case and then a consecutive 10-year sentence in a separate

⁶³ *United States v. Warren*, 986 F.3d 557 (5th Cir. 2021).

⁶⁴ *Witte v. United States*, 515 U.S. 389 (1995).

case, for a total of 20 years to be served, based on the same conduct. The Guidelines *mandate* regarding 5G1.3 *requires* the court, in such a situation, to order the sentences to run concurrently, for a total of 10 years to be served in prison.

1. It Was Undisputed That 5G1.3(b)(1) Governed in Bevill's Case

Here in Bevill's case, it was undisputed that 5G1.3(b)(1) governed. To that end, Bevill was given a statutory maximum five-year sentence in his earlier case, and then the exact same conduct was used a second time in his present case to impose an additional 25 years. Instead of ordering the two sentences to run concurrently as instructed by 5G1.3(b)(1) to help mitigate the unfairness of the double-counting, the court in Bevill's case ordered them to run consecutively, which *aggravated* the injustice.

In fact, 5G1.3 was designed for Bevill's case--as Bevill's case is the only one in the history of the U.S. Sentencing Guidelines wherein a defendant was given a statutory maximum sentence (five years) in one case and then given a sentence that is decades (600 percent) longer, *based on exactly the same conduct*—the exact problem that 5G1.3(b)(1) seeks to mitigate. This is precisely why 5G1.3(b)(1) exists. The same conduct was used to impose a five-year sentence in Bevill's earlier case and a 25-year sentence in his present case, for a total of 30 years to be served--thus, the second sentence was "grossly increased" based on the same conduct, the very evil 5G1.3 combats.

2. Even In a Post-Booker World, 5G1.3(b)(1) is Mandatory

It's simple. If a defendant is sentenced to a term of imprisonment in one case and then in a separate case that same conduct is used to sentence him to another term of imprisonment, under 5G1.3(b)(1), the judge is *required* to offset this unfairness by crediting the offender for time served as well as by running the sentences concurrently.

As explained in great detail in a recent 2020 case by the 11th Circuit Court of Appeals, *United States v. Henry*, 968 f.3d 1276 (11th Cir. 2020), which relied on other circuits. In an in-depth examination of 5G1.3(b), the 11th Circuit explained that 5G1.3(b)(1) "an adjustment is mandatory when its requirements are satisfied, and our precedent is consistent with Booker. "Importantly, relying on an 8th Circuit case, the 11th Circuit held that 5G1.3(b)(1) "does not reduce the defendant's guideline range." Henry citing *United States v. Helm*, 891 F.3d 740, 743 (8th Cir. 2018). "It instead mandates a sentence reduction for certain defendants 'after the court has determined the applicable range.'" "And the guideline *requires* district courts to 'adjust the sentence' imposed on a defendant, not the defendant's guideline range." (Emphasis added.) "*In short, this guideline mandates a sentence adjustment for a certain class of defendants; it has nothing to do with calculating a defendant's guideline range.*" (Emphasis added.)⁶⁵ Did you catch that? This is not about an improperly calculated Guideline range, as it "has nothing to do with calculating a defendant's guideline range." This distinction is paramount. Bevill's judge exceeded her authority by not ordering the sentences to run concurrently. And although Bevill's Sentencing Memorandum went into great detail about 5G1.3(b)(1) and its purpose, the judge failed to address it and ignored it altogether by imposing a consecutive sentence.

In Bevill's case, that means under 5G1.3(b)(1), the 25-year sentence in his present case should have been ordered to run concurrently to the five-year sentence in his earlier case, reducing it by five years. Instead, 5G1.3(b)(1), which is supposed to safeguard this, was disregarded, and Bevill's sentences were inexplicably ordered to run consecutively, which compounded the unfairness involved. This was a complete and total disregard for 5G1.3(b)(1) and the role it

⁶⁵ See also *United States v. Gonzalez-Murillu*, 852 F.3d 1329, 1338 (11th Cir. 2017); *United States v. Knight*, 562 F.3d 1314, 1329 (11th Cir. 2009).

plays as "a significant safeguard to protect against" this kind of unfairness. It's also an *illegal* application of a *mandatory* provision. And it resulted in an illegal sentence that exceeds the judge's authority.

C. Because of the Illegal Application of the 3147 Sentencing Enhancement and the Illegal Sentence Under 5G1.3(b)(1), Bevill's Illegal Sentence is 10 Years Greater Than it Should Have Been

The judge in Bevill's case imposed an illegal sentence in two different ways. Taken together, it resulted in a sentence a decade greater than it should have been—a *decade greater*.

Above, we discussed that under the 3147 sentencing enhancement Bevill received in his present case, Bevill received a sentence exceeding his statutory maximum for the underlying offenses *by five years*, which was undisputed. Then we discussed how the 5G1.3(b)(1) provision of the Guidelines requires the court to run the sentences concurrently, as it is expressly designed "to mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence." *Witte*. Taken together, instead of a total punishment of 30 years (five years in Bevill's earlier case to run consecutive to 25 years in his present case, for a total of 30 years), Bevill's total punishment should have been 20 years.

Here's why.

The illegal sentence: in Bevill's earlier case, he received a statutory maximum sentence of five years in prison. In his present case, he received four statutory maximum sentences of 20 years in prison, which were run concurrently, for a total of 20 years to be served. On top of that, in his present case, under the 3147 sentencing enhancement, he *illegally* received an additional five years, for a total of 25 years to be served in his present case, which exceeded the 20-year statutory maximum sentences for the underlying offenses. That's error number one.

Next, the court took the illegally calculated 25-year sentence in Bevill's present case (which should have been 20 years, the statutory maximum) and illegally ordered it to run *consecutive* (rather than concurrently) to his statutory maximum five-year sentence in his earlier case, which is based on the same conduct, for a total of 30 years. This is the second error.

The correct sentence: Given that "[r]egardless of the fact that the 3147 sentencing enhancement calls for punishment 'in addition to the sentence prescribed' for the underlying offense, the 3147 enhancement can *never* result in a sentence in excess of the statutory maximum prescribed for the offense committed while on release," Bevill's *statutory maximum* in his present case was 20 years on each count. The judge imposed four concurrent 20-year statutory maximum sentences as a result. But in Bevill's present case, the judge was not allowed to impose the additional five-year sentence under the 3147 sentencing enhancement, given it exceeded the statutory maximum for the underlying offenses. Thus, Bevill's sentence in his present case should have been four 20-year sentences, which were ordered to run concurrently for a total of 20 years to be served: the statutory maximum.

With that in mind, this leaves us with 20 years to be served in Bevill's present case (not 25).

Under the 5G1.3(b)(1) *mandate*, the court was *required* to run the 20-year sentence in Bevill's present case concurrently to the five-year sentence in his earlier case, given they are indisputably based on exactly the same conduct. Thus, the 20-year statutory maximum sentence in Bevill's present case would eat up the statutory maximum five-year sentence in his earlier case given the court was required to run them concurrently, for a total of 20 years to be served in federal prison: a 20-year statutory maximum sentence in Bevill's present case ordered to run concurrently to a statutory maximum five-year sentence in Bevill's earlier case.

D. Bevill is Deprived the Opportunity to File a Meritorious Appeal Challenging His Illegal Sentence: Bevill Fought to Include These Issues—3147 and 5G1.3—in his Direct Appeal, But his Court-Appointed Attorney Instead Filed a Single Issue That the Fifth Circuit Court of Appeals Found 'Frivolous', Thereby Botching Bevill's Appeal and Squandering his Chance to Correct the Miscarriage of Justice in his Case

Why didn't Bevill raise these issues in his direct appeal? *He tried.*

The docket sheet (regarding Bevill's direct appeal) reflects that when Bevill saw the appeal that his court-appointed attorney filed on his behalf, he immediately wrote the Fifth Circuit Court of Appeals and asked the court to strike the brief. This is part of the record, as Bevill filed a motion to strike his attorney's appeal and file his pro se. More precisely, Bevill wanted to add the 3147 issue and the 5G1.3(b)(1) issue detailed above—arguing that his sentence is illegal. The Fifth Circuit refused to strike the brief and stated that Bevill's appellate counsel has wide latitude in what *he* wants to appeal. Notably, in doing so, the Appeals Court did not comment on the merit of the issues. Instead, the Appeals Court stated that it was up to Bevill's court-appointed appellate attorney. When the Fifth Circuit Court of Appeals finally ruled on the single issue Bevill's court-appointed attorney did brief—which Bevill begged the Court to strike—the court found the issue frivolous.

Thus, even though Bevill wanted to raise two compelling issues, he was stuck with the frivolous appeal that his attorney filed—because it's up to his shockingly incompetent attorney to decide what to appeal.

1. Bevill's Court-Appointed Appellate Attorney Filed a Single Frivolous Issue

Notably, the record reflects that Bevill's appeal was the very first appeal that that attorney had ever filed. The appellate court had to send the brief back to the attorney no fewer than four times because of basic deficiencies. In other words, the attorney didn't have a grasp of the rudiments of the appeals process.

Thus, Bevill's golden opportunity to have the appellate court correct his illegal sentence was squandered. The docket sheet for Bevill's direct appeal details all of this. Bevill fought tooth and nail to strike his attorney's frivolous appeal and include the compelling issues--5G1.3(b)(1) & 3147--detailed above, to no avail. Instead of using his appeal to correct an illegal sentence that added *a decade* of prison time to Bevill's sentence, the attorney filed a single issue, which the Appeals Court found, in effect, to be frivolous--calling it "absurd."

Bevill hopes and prays that his arguments will finally be scrutinized.

Summary

Joshua Bevill is guilty. He deserves prison time. And he entered an effective guilty plea in his present case. He did not force the government to prove its case. He took full responsibility in both cases. Bevill has been in prison for nearly 12 years. A man having to spend 30 years in federal prison is no small thing. Where were you 30 years ago? Make no mistake, it's a *long time*—30 years. What good does three *decades* behind bars serve? It unfairly incapacitates Bevill; that is, it serves only to warehouse Bevill, a point federal prosecutors underscored in a March 1, 2012 Sentencing Memorandum (filed with Bevill's sentencing judge).

Further, Bevill's statutory maximum prison sentence is a product of his draconian U.S. Sentencing Guideline range, which was the product of unprecedented manipulation of the U.S. Sentencing Guidelines or an unprecedented sentencing anomaly (or both), depending on how one looks at it. In short, Bevill's U.S. Sentencing Guideline range was grotesquely disproportionate to the seriousness of Bevill's crime: life in prison without the possibility of parole for making misrepresentations to 3 high-net-worth investors, causing a combined loss of \$106,000. A prison sentence should fit the crime of conviction, not separate uncharged crimes that have nothing to do with his crime of conviction.

But it's not one reason that makes Bevill's prison term grossly disproportionate to the seriousness of his present case, giving him a compelling case for clemency. There are three chief reasons:

First, the double punishment in Bevill's case is unprecedented. Bevill pleaded guilty in his earlier case. He received the maximum sentence allowed under the law, five years in federal prison. He has paid that debt. But now he's serving a second sentence in a separate case, but the second sentence is still based on the earlier conduct, for which Bevill has already served a statutory maximum five-year sentence. This, among other things, caused his loss amount to jump by about 40-fold, his investors/victims to increase by about 35-fold, and his U.S. Sentencing Guideline range to leap by a multiple of 17—or by a lifetime. There is a reason that, of the roughly two million cases to flow through the federal system since the advent of the Guidelines in the 1980s, Bevill's case is one of a kind.

Second, it was actually the uncharged, untried Pointer Group crimes (2003 - 2004) that constituted the core of criminality punished in Bevill's present case (August 2010 - January 2011). We understand the concept of uncharged relevant conduct: to allow the judge to impose a sentence that reflects the "offense characteristics." This is different. This, in itself, is perverse—Bevill walks into the courthouse for sentencing on a relatively minor crime of conviction in his present case, but walks out of the courthouse with decades in prison because the court says that seven years prior it believes Bevill worked for The Pointer Group and is therefore responsible for those entirely separate uncharged crimes—which have nothing to do with Bevill's present case. The uncharged Pointer Group crimes are not characteristics of Bevill's present case—they are unrelated. Let that sink in. In the United States of America, a man can be imprisoned for crimes he was never even charged with, because he committed a separate unrelated crime for which he was convicted.

Third, of the \$3 million (tied to the uncharged Pointer Group crimes) piled onto Bevill at sentencing in his present case, Bevill's take was less than one percent; and of the 60 investors/victims, Bevill didn't even have contact with most of them—in fact, most of the money was raised by other people either before Bevill worked at the company or after he left.

Taken together, this produced a prison sentence that is radically disproportionate to any real harm done by Bevill's present case (making misrepresentations to 3 investors/victims, resulting in a loss of \$106,000) and is indicative of the punitive nature of the federal brand of justice.

Plainly, on the surface, it looks like Bevill is this big fraudster who stole millions of dollars, but the reality is a far cry from this illusion.

Additionally, at Bevill's sentencing hearing, his attorney was incredulous. With his voice strained with emotion, he told the judge, "My goodness, this is a case that involved \$100,000 in losses." Nobody could wrap their heads around how such a harsh punishment could be doled out for such a case. Bevill and his sentencing judge clashed many times during proceedings. Attorney Joseph Padian told Bevill, "They hate you. They fucking hate you." Bevill had pushed back on a litany of pretrial motions, as well as having called attention to the judge's error regarding his guilty plea. Attorney Padian told Bevill that it was "just the culture of the courthouse."⁶⁶

Nobody is saying that Bevill shouldn't be punished. But he's not Bernie Maddoff. He didn't cause hundreds of millions or billions in losses. He didn't wipe out pension funds and retirement accounts. He entered a guilty plea in his earlier case and an effective guilty plea in his present case. But making him spend 30 years in federal prison is overboard, given the specific facts of his case.

Bevill pleads for mercy. He was in his 20s when he committed his crimes. As of 2021, he's 41.

⁶⁶ Bevill pointed out that his guilty plea was illegally accepted by the judge, as the conduct did not constitute the crime. Bevill asked for a replacement guilty plea. Bevill was proved correct, and the guilty plea had to be tossed out because of the judge's error. This created more proceedings and delays, which, according to attorney Joseph Padian, upset the prosecutors and judge.

