No. ____

October Term, 2020

IN THE
Supreme Court of the United States

LERONE BUTLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

LAW OFFICES OF HOWARD J. SCHUMACHER, P.A.
HOWARD J. SCHUMACHER, ESQUIRE
Attorney for Appellant
One East Broward Boulevard
Suite 700
Ft. Lauderdale, Florida 33301
(954) 356-0477
Florida Bar No: 776335

QUESTION PRESENTED FOR REVIEW

I. WHETHER THE VERDICT OF GUILT WAS SUPPORTED BY SUFFCIENT EVIDENCE TO SUSTAIN A CONVICTION, AND THE EVIDENCE, VIEWED IN A LIGHT MOST FAVORABLE TO THE GOVERNMENT, WITH ALL REASONBLE INFERENCES AND CREDIBILITY CHOICES IN FAVOR OF THE JURY'S VERDICT, WAS SUFFICIENT SUCH THAT ANY RATIONAL TRIER OF FACT COULD NOT HAVE FOUND THAT THE ESSENTIAL EVIDENCE REQUIRED FOR THE GOVERNMENT TO PROVE THE OFFENSES OF CONSPIRACY AND/OR POSSESSION WITH THE INTENT TO DISTRIBUTE COCAINE, HEROIN AND FENTANYL.

II. DID THE DISTRICT COURT ERR IN FAILING TO DISMISS THE SUPERSEDING INDICTMENT WHEN APPELLANT SUFFERED DEMONSTRABLE PREJUDICE FROM A CONSTITUTIONAL VIOLATION OF LAW AS A RESULT OF LAW ENFOCEMENT'S INVESTIGATIVE TECHNIQUES, THAT WERE SO OUTRAGEOUS AS TO BE FUNDAMENTALLY UNFAIR AND SHOCKING TO THE UNIVERSAL SENESE OF JUSTICE PROTECTED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION.

III. DID THE DISTRICT COURT COMMIT CLEAR ERROR IN JUDGMENT IN WEIGHING THE 18 U.S.C. Sec. 3553(a) FACTORS WHEN IT ARRIVED AT A SENTENCE THAT, ALTHOUGH WITHIN THE GUIDELINES, WAS NEVERTHELESS OUTSIDE THE RANGE OF REASONABLE SENTENCES DICTATED BY THE FACTS OF THE CASE AND THE PERSONAL HISTORY AND CHARACTERISTICS OF APPELLANT.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED CASES

There are no related cases.

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PETITION FOR WRIT OF CERTIORARI

Mr. Lerone Butler respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 19-11812 in that the court on September 28, 2020, *United States v. Butler,* which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on September 28, 2020. This petition is timely in that this Honorable Court has extended the time period for filing a Petition for Writ of Certiorari to 150 days due to the COVID-19 pandemic, thereby making the Petition for Certiorari to be due not later than February 25, 2021. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provision:

U.S. Const., amend. V:

No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

Statement of the Case

A. Course of the case in the Court below

On July 3, 2018, the Appellant, LERONE BUTLER, was arrested by law enforcement following their investigation beginning in October of 2015 of a "long-term" narcotics investigation into the Appellant and a co-defendant named Larry Earl Weems, as well as others. (R.163:173). Law enforcement was using a confidential source to initiate buys of varying amounts and types of narcotics. The confidential witness happened to be the brother of Appellant. Appellant was charged in an Indictment along with Larry Weems, Terrence Ewell and Juan Tyrone Dixon, returned on June 29, 2018 in the Southern District of Florida.[1] The Superseding Indictment charged the Defendant with one count of Conspiracy to Possess with the Intent to Distribute more than 5 kg of cocaine, 100 grams or more of heroin and a detectable amount of fentanyl, and three counts of possessing with the intent to distribute cocaine, heroin and fentanyl.

Appellant filed a Motion to Dismiss the Superseding Indictment, alleging a 5th Amendment violation of his Constitutional rights in that the Government had knowingly used information that was tainted following the C.I.'s use of narcotics, the skimming of narcotics, and the fact that agents knew, in advance that there was possession of a firearm by the C.I.'s wife during at least one meeting during the investigation when the C.I. and his wife were meeting with Appellant in his very home. Further, that agents instructed the C.I. to entice/entrap his brother into producing a weapon in the C.I.'s presence in an effort to expand charges against Appellant

[1] A Superseding Indictment was later returned on November 8, 2018.

Appellant was released on bond pending trial, but was remanded into custody following the jury's finding of guilt on January 11, 2019, and remained incarcerated throughout the sentencing process. He is presently incarcerated and serving his sentence at Coleman Low FCI, located in Coleman, Florida.

Appellant proceeded to trial, with jury selection beginning on January 3, 2019 before the Hon. Beth Bloom in Miami, Florida. On January11, 2019, the Jury returned a verdict of Guilty as to Counts I, II & III, and not guilty as to Count IV. On April 22, 2019, the Defendant was sentenced for the crime for 175 months as to Counts I, II & III, each to concurrently with the others; 36 months Supervised Release as to Counts I, II & III; and was ordered to pay a special assessment of $300.00.

A Notice to Appeal was timely filed on May 6, 2019 (R.153) and the undersigned was CJA appointed to represent Appellant on direct appeal. The 11th Circuit Court of Appeals affirmed the district court's verdict of guilt and judgment entered thereon on September 28, 2020.

Statement of Facts

Beginning in October of 2015 the FBI commenced a "long-term" narcotics investigation into the Appellant and a co-defendant named Larry Earl Weems, as well as others. (R.163:173). Law enforcement was using a confidential source to initiate buys of varying amounts and types of narcotics. The confidential witness happened to be the brother of Appellant. (Id. @ 180). Despite the close connection between Appellant and the C.I., the latter never was called to testify for the Government. There were consensual telephone calls made between the C.I. and Weems and Butler (Id. @ 175), physical and video surveillance and a Title III wire intercept. This later investigative tool was employed in June of 2016, and was directed to a cell phone numbers being used by co-defendant, Weems.

The first transaction in which the C.I. was used, was one occurring in a McDonald's parking lot in Hallandale, FL on or about December 17, 2014. The C.I. purchased cocaine from co-defendant Weems. Testimony from S/A Tom Greenaway of the FBI suggested that the owner of the narcotics was an unindicted co-conspirator named "G," a/k/a Grady or Graylin Kelly – an individual who was, at that time, incarcerated. (R.166:164-5). On or about October 29, 2015, the C.I. set up a controlled purchase of an ounce of cocaine from co-defendant Weems (Id. @ 201-02). $3,300.00 in investigative funds was delivered to the C.I. Surveillance was conducted as the C.I. and Weems met. This meeting was audio/video recorded. Appellant was not present for this transaction. This was the first transaction that the Government asserted in its Superseding Indictment that began the conspiracy (R:73). Following this consummated transaction on October 29th, there were additional controlled transactions between the C.I. and Mr. Weems (a/k/a "Big Man). (R.163:231). Nevertheless, the C.I. was instructed by his

controlling agents to attempt to involve the C.I.'s brother (Appellant) into negotiations for additional drugs. Agent John McGrath testified that: "The FBI directed the source to proceed with a controlled transaction of one ounce of heroin to be purchased [sic] by Mr. Butler and Mr. Dixon." Id. @ 232. And again, Agent McGrath, stated in testimony of the following day that: "The confidential source in this investigation was tasked to set up a heroin transaction with Mr. Butler." (R.164:15).

On February 3, 2016, the C.I. was provided $2,400.00 in investigative funds and instructed by agents to negotiate the purchase of an ounce of heroin. The C.I. responded to Appellant's residence. He waited there an hour, then advised handling agents that he was directed to a Hooter's Restaurant by his brother. The Government introduced into evidence an aerial video that had been taken by a surveillance plane circling overhead. Although outfitted with an audio/video device to record the transaction, the agent testified that the machine malfunctioned. The C.I. ended up in the Hooter's parking lot, where he identified Appellant's Chevy van, and parked close to one another in the parking area of the Big Lots Store. (Id. @ 10). Although the video is of questionable quality, Agent McGrath testifies that his review of the video showed the C.I. reach into his pocket to retrieve Governmental funds, and hand it to Butler. The C.I. is then seen getting into Appellant's van where, the agent again concludes that the video shows co-defendant Dixon sliding over and providing an ounce of heroin to the C.I. This is not clear on the video. The C.I. then responds back to a staging area where he produced an ounce of heroin to his handling agents.

The Government continues to have the C.I. make controlled calls after this February 3, 2016 transaction. These include conversations between the C.I. and Mr. Weems talking in code

about cocaine, i.e. "white bitches" "white girls" and "dog food" beginning on February 18, 2016. (R.164:35-36). These calls continue between February 28th and March 7th, 2016. Id. @ 40.

On March 9, 2016, the C.I. has a recorded telephone conversation with co-defendant Dixon, talking in code about a one-ounce heroin transaction to occur later that day. The agents equip the C.I. with recording equipment and provide him with investigative funds totaling $2,400.00. Id. @ 46. The encounter occurs in a Sam's Club parking lot. The C.I. is seen on video getting into a Jeep SUV being driven by Appellant. The agent narrates that as part of the video from this encounter, money is seen in the hands of the Appellant after the C.I. gets into the car. Id. @ 49. The conclusory statement is made with no ability to observe serial numbers or any other distinguishing characteristics. Nowhere on the video are narcotics seen being delivered hand-to-hand by Appellant to the C.I. Following this meeting, the agents meet up with the C.I. and retrieve a controlled substance from the C.I. This is the last charged substantive conduct involving Appellant and the C.I. It is also this Count for which the jury returned a verdict on Count IV of "not guilty."

After this transaction, the Government introduced additional evidence of drug transactions between the C.I. and co-defendants Weems and Ewell. Following those deals, the Government applied for a Title III wire intercept on a phone number being utilized by co-defendant Weems in June of 2016. Id. @ 81. One of these conversations includes Appellant stating: "I am fucked up, too, Weems. I'm waiting on these motherfucking -- they -- these motherfucking Mexicans going up and down with this shit, man. They ain't nothing come through. All of us fucked up. I ain't been doing nothing, man." Id. @ 101. The particular subject of this conversation is unknown, but it followed after the Government's introduction of a

conversation between Appellant and the C.I. wherein Butler is heard stating that he doesn't have any weed.

Following the last transaction on June 22, 2016, the C.I. produced what was to have been two ounces of heroin to agents after the controlled delivery by co-defendant Weems. These narcotics proved to be "short" (i.e. less than the amount expected). Two ounces of heroin would have been expected to weigh 56 grams. The scale shown in the Government's photo showed the packaging of the heroin and the narcotics inside, all of which cumulatively weighed 52 grams according to the digital scale. (R.164:121-22). Later, a forensic chemist testified that the actual amount of narcotics was 45.2 grams.[2] Incidentally, this was the amount of narcotics to have been present inside the bag, without the packing, i.e. the narcotics, themselves were to have been 56 grams of heroin, plus the packaging material. This resulted in the FBI asking the C.I. questions about the shortage. None of these questions were produced on the audio/video recordings made by the C.I. (Id.) The C.I. was never searched more than in a cursory fashion. A K-9 was never tasked with evaluating either the C.I. or his vehicle for the missing narcotics (Id. @ 128). Moreover, there was a conversation preserved on the audio/video recordings where the C.I. is asking Weems in the middle of the drug transaction: "You ain't got a spoon? (Id. @ 133). Special Agent McGrath, on cross-examination, states that they inquired of the C.I. why he had requested a spoon. He advised that as part of the ruse, the C.I. was claiming to divide the 2 ounces of heroin into two separate equal packages for resale. Problematically, however, the original package returned to the agents included only one baggie of heroin.

> Q. Sir, you've already testified that when you received Government's Exhibit 39, it was more or less packaged the way that it was, correct?

[2] In essence, the narcotics delivered back to the control agents by the C.I. were over 11 grams "light."

A. That's correct.

Q. There was not two separate bags full of heroin, correct?

A. That's correct.

Q. They are all in one bag?

A. That's correct.

Id. @ 135

In that same conversation, supra, the C.I. is asked by Weems:

> Q: Yeah. I had to get smart. I had to get smart, man. You need a plastic bag or you have your own plastic bag?
>
> A: I need one. I got to get smart, man."
>
> Id. @ 137

In later testimony, Detective Derek Rodriguez of the City of Miami Gardens Police Department testified that he also was a handling agent, through the ATF, for C.I. Butler. He testified that: "I'm aware of transactions that the narcotics were short, yes." (R.165:146). Special Agent Jamie Stranahan testified that there were two incidents when narcotics came back lighter than anticipated once the C.I. had been involved. Those occurred on June 22, 2016 and November 10, 2016. (R.165:192). Other irregularities and indicia that the C.I. was unreliable included testimony from S/A Jamie Stranahan that the C.I.'s wife had called him to tell him "that the source's husband (C.I. Butler) had hit her in the fact and was forcing her to drive to a – potentially a drug dealer's residence." Id. @ 194. The C.I.'s wife had told S/A Jamie Stranahan, while the C.I. was still working for law enforcement that: "...he was trying to purchase crack cocaine." In fact, the evidence showed the C.I. was using Percocet as early as November of 2014 in transcripts and recorded conversations (R.165:217).

Agent McGrath also testified that the C.I. was routinely prodded to mention Lerone Butler by name to his co-defendants in efforts to obtain inculpatory information about

him, and to target him in the C.I.'s phone calls and in-person conversations. Conspicuously, in the nine months Agent McGrath is the case agent, there are no phone calls initiated from Appellant to the C.I., but instead, all of the communications are initiated by Lerone Butler's brother. Beside the use of his brother, surveillance at Appellant's home showed no evidence of narcotics activity despite five or more incidents of surveillance. (R.164:149). Many times, during the course of a 15-month investigation, the C.I. had to reach out to other co-defendants in an effort to obtain a telephone number for his brother, Lerone (R.165: 9-10)

Evidence was introduced that the C.I. had been "signed up" as an agent for ATF. The C.I.'s wife, Paula Butler was also a confidential human source for the FBI. (R.165:139). After being terminated as a source, Det. Derek Rodriguez testified that the C.I. would call him for money. Testimony at trial was that the C.I. had been paid at least $21,000.00 in connection with the transactions made as part of this conspiracy investigation (R.163:126). He was also paid a relocation fee of $5,000.00 (Id. @ 195). On November 10, 2016, on his way to do a controlled purchase from co-defendant Terrence Ewell, the C.I. was caught with a prescription bottle of pills located in his car with the label torn off. (Id. @ 200). In addition to all of the other violations of confidential source protocols noted above, it was learned early in the conspiracy investigation that the C.I. had accompanied Appellant to Jacksonville in what the C.I. claimed was a trip to meet with Appellant's source of supply. The C.I. never advised his handling agents of this fact, in advance of its happening. (R.166:173). This was in violation of admonishments that had been given to the C.I. (Id. @ 175). Finally, evidence showed that during one of the meeting between the C.I. and Appellant, C.I. can be heard on the same transmission that the agents are monitoring, speaking with his wife who is in the car with him on the way to meet with

his brother. (R.167:27) The wife is carrying a firearm on her person, thereby belying the notion that anyone had been searched by law enforcement prior to going to a meeting with Appellant.

Most disturbingly, during a recorded conversation that is occurring real-time with the agents monitoring the transmitter worn by the C.I., the C.I. tells his wife on the drive over to meet with Lerone Butler on June 4, 2016: "And damn, try to see if he get me to show them damn guns he just bought, him and Drew. Because I know he just bought the Mossberg" (Id. @ 30). S/A Greenaway tells the jury that the C.I. had told agents about the guns before the meeting had been set up. Agent Greenaway goes further and admits that he instructed the C.I. to try to get Appellant to produce the weapons. Presumptively the agent did this in an effort to entrap Appellant into possessing a firearm in furtherance of a drug trafficking crime,[3] thereby subjecting Appellant to a five-year minimum mandatory sentence to be consecutive to any sentence for any drug trafficking offense.

The final three witnesses called by the Government concerned alleged evidence arising under F.R.E. 404(b). This evidence was introduced over objection by defense.[4] The first witness was Task Force Officer John Combas of the Winter Park Police Department. He testified he had been working there in the summer of 2013 and was approached by a confidential source indicating he had someone who wanted to purchase cocaine. This source was directed by Combas to contact him when the people were in the area to do the deal. The agent was to play the role of seller for 4 kilograms of cocaine, and would be introduced by the Central Florida

[3] Based upon this testimony, defense requested and received at the time of trial a jury instruction of entrapment.

[4] R.167:63 & 167:88 & 167:89

source of information to the buyers. The price of the kilos was to be $30,000.00/kg. Id. @ 69. The meeting was to occur in Orlando at a McDonald's on International Drive.

Agents stopped a black 2008 C300 Mercedes Benz in the McDonald's parking lot. The Mercedes was owned by Appellant. The CHS was inside this vehicle along with Appellant and Mark Quinones. The CHS had described the person with whom he had been speaking to on the telephone only as "Mark." There were two other individuals stopped in the parking lot: Cedric Andrews and Whitney Eubanks. These two individuals were driving a Dodge Ram truck where approximately $120,000.00 was seized. Nothing incriminating was found inside the Mercedes. All four gentlemen were released at the scene and the money was forfeited. The CHS source testified. His name is Javier Morales Ortiz. He stated that he had never met Appellant and did not really know him. (R.168:14-16). He had taken photos of the money inside the truck and sent it to the agents before they arrived at the McDonald's and initiated a detention of the four individuals in the two vehicles.

ARGUMENT

I. THE VERDICT OF GUILT IS NOT SUPPORTED BY SUFFCIENT EVIDENCE TO SUSTAIN A CONVICTION, AND THE EVIDENCE, VIEWED IN A LIGHT MOST FAVORABLE TO THE GOVERNMENT, WITH ALL REASONBLE INFERENCES AND CREDIBILITY CHOICES IN FAVOR OF THE JURY'S VERDICT, WAS INSUFFICIENT SUCH THAT ANY RATIONAL TRIER OF FACT COULD NOT HAVE FOUND THAT THE ESSENTIAL EVIDENCE REQUIRED FOR THE GOVERNMENT TO PROVE THE OFFENSES OF CONSPIRACY AND/OR POSSESSION WITH THE INTENT TO DISTRIBUTE COCAINE, HEROIN AND FENTANYL.

Appellant properly preserved his challenge to the sufficiency of evidence at the close of the trial court level when he moved for a Motion for a Judgment of Acquittal pursuant to F.R.Cr. P. 29 at the close of the Government's case and again at the close of the defense. Once raised in a Motion for Judgment of Acquittal, the sufficiency of evidence challenge is properly preserved for the Appellate Court as annunciated in U.S. vs. Williams, 144 F.3d 1397 (11th Cir. 1998).

Where a claim is made challenging the sufficiency of evidence following the verdict of guilt, the reviewing court must study the sufficiency of the evidence de novo. During the course of this review, the reviewing court must sustain the evidence in a light most favorable to the government, drawing all reasonable inferences and credibility choices in favor of the jury's verdict. U.S. vs. Trujillo, 146 F.3d 838 (11th Cir. 1998). See also, U.S. vs. Lumley, 135 F.3d 758 (11th Cir.

1998); U.S. vs. Chirinos, 112 F.3d 1089 (11th Cir. 1997); U.S. vs. Farris, 77 F.3d 391 (11th Cir. 1996).

The evidence did not support a finding of guilt in that there was insufficient evidence that Appellant committed the offenses conspiracy to possess with intent to distribute cocaine, heroin and fentanyl, nor did it support the underlying substantive counts of possession of a detectable amount of Cocaine (Count II) nor a detectable amount of heroin (Count III).[5] Appellant's home was surveilled on at least five occasions. Never is there evidence suggesting that he was involved with nor was his house associated with drug activity.

The manner in which the undercover transactions were handled in the instant case were, at least unprofessional, at worst, conducted in a manner demonstrating an indifference to a modicum of control by police over their confidential source. The entire fifteen months of proactive investigation was treated with an unusually casual approach by agents with no oversight. It was the "old west," right down to the notion of the C.I.'s wife carrying a firearm while meeting with the Appellant during and in the course of conducting the investigational directions of the agents in their pursuant of the Appellant. This fact that was directly known to the agents since they were monitoring this particular conversation in "real time." The fact that she is carrying the firearm is in violation of her instructions as a confidential source, it underscores that the agents were not really conducting any search of the sources' persons or those things within their control, and it shows a reckless indifference to a fact that may have proven dangerous to Appellant and the

[5] Appellant was found "Not Guilty" of Count IV (possession of a detectable amount of fentanyl

confidential sources that were allowed to proceed to a controlled meeting without the agents removing the weapon from their operatives.

The source, Andre Butler, was the brother of the Appellant. In 2014 he walked into the Miami Gardens Police Department and stated that his brother was involved in narcotics trafficking and that he wanted to cooperate for financial remuneration. $26,000.00 later, and after routinely being directed by his handlers to continually mention his brother in recorded calls with the other defendants, as well as consensually monitored meetings between these others, he delivered information sufficient to be the basis for an Indictment. Problematically, he provided initial details stating that he and his wife were at that time, living with Appellant, yet a short time after he is "signed up" as a source by the ATF, he and his wife, while on surveillance tape, are inside their vehicle and she routinely is asking for directions to the home of the Appellant – a place where she and her husband was allegedly living.

Law enforcement is aware as early as 2014 that their C.I. is using powerful prescription narcotics, allegedly for pain, as he is heard discussing that with a co-defendant on tape, yet control agents make no effort to determine the source of these pills or their effect on their source. They later find a prescription bottle in the C.I.'s car with the label removed. They take it away from the C.I. before he meets with Appellant. They take no steps to see if the C.I. actually has a prescription from a doctor. They agree if he is illegally in possession of the Percocet, that he would have to be arrested and terminated as a source. Once he returns from his investigative duties, he is rewarded with return of the controlled substance. Never is the agents' suspicions alerted to the common sense notion that

their C.I. was a drug user and was therefore unreliable because he is being productive for them. All of this, despite testimony of case agent Jamie Stranahan of the FBI:

A. Because we don't utilize people who are addicted to drugs to conduct drug purchases.

Q. Why not?

A. Because it's illegal.

Q. Because it's unreliable, right?

A. And unreliable.

(R.165:234) S/A Jamie Stranahan

Other superficial facts fail to support a finding of guilt by a rational trier of facts. The C.I. is routinely heard on tape asking other co-defendants to provide him his brother's telephone number – an oddity in and of itself. More peculiarly, Appellant never originates a conversation with the C.I., who is his brother, over the course of 15 months. The C.I. failed to follow advisements by his case agents, including making them aware of any participation in criminal activity. He had advised agents that Appellant's source of narcotics was located in Jacksonville. Agents testified at trial that nothing was done to investigate this fact since it presented logistical problems in surveilling and protecting the C.I. over the course of the drive from Broward County to Jacksonville, a distance of approximately 230, miles, and spanning two separate districts in the state of Florida. Nevertheless, the C.I. advised agents, after the fact, that he had accompanied his brother to Jacksonville to negotiate the purchase of narcotics. Since the Government never called Andre Butler as a witness, it is unknown if he truly did make such a trip, and if so, was it done at his own behest in an effort to satiate his own drug use. In either

case, the C.I. was never terminated from further use by agents for such non-compliance with his instructional cautions.

Other irregularities and indicia that the C.I. was unreliable included testimony from S/A Jamie Stranahan that the C.I.'s wife had called him to tell him "that the source's husband (C.I. Butler) had hit her in the fact and was forcing her to drive to a – potentially a drug dealer's residence." (R.165:194). The C.I.'s wife had told S/A Jamie Stranahan, while the C.I. was still working for law enforcement that: "...he was trying to purchase crack cocaine." All of the agents testifying at the time of trial were either experienced federal law enforcement officers or a task force officer cross-designated with the Miami Gardens P.D. The claim that none of these officers observed any visual cues that the C.I. was a drug addict is inane.

There was direct evidence that the C.I. was skimming narcotics on at least two occasions. Control agents literally conducted no investigation regarding these shortages. Following the last transaction on June 22, 2016, the C.I. produced what was to have been two ounces of heroin to agents after the controlled delivery by co-defendant Weems. These narcotics proved to be "short" (i.e. less than the amount expected). Two ounces of heroin would have been expected to weigh 56 grams. The scale shown in the Government's photo showed the packaging of the heroin and the narcotics inside, all of which cumulatively weighed 52 grams according to the digital scale. (R.164:121-22). Later, a forensic chemist testified that the actual amount of narcotics was 45.2 grams.[6]

The only resultant investigation was that the FBI asked the C.I. questions about the shortage. None of these questions were produced on the audio/video recordings made by the law

[6] In essence, the narcotics delivered back to the control agents by the C.I. were over 11 grams "light."

enforcement. The C.I. was never searched more than in a cursory fashion. A K-9 was never tasked with evaluating either the C.I. or his vehicle for the missing narcotics (Id. @ 128). Moreover, there was a conversation preserved on the audio/video recordings where the C.I. is asking Weems in the middle of the drug transaction: "You ain't got a spoon? (Id. @ 133). Special Agent McGrath, on cross-examination, stated that they inquired of the C.I. why he had requested a spoon. He advised that as part of the ruse, the C.I. was claiming to divide the 2 ounces of heroin into two separate equal packages for resale. Problematically, however, the original package returned to the agents included only one baggie of heroin.

> Q. Sir, you've already testified that when you received Government's Exhibit 39, it was more or less packaged the way that it was, correct?
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> A. That's correct.
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> Q. There was not two separate bags full of heroin, correct?
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> A. That's correct.
>
> Q. They are all in one bag?
>
> A. That's correct.
>
> Id. @ 135
>
> In that same conversation, supra, the C.I. is asked by Weems:
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> Q: Yeah. I had to get smart. I had to get smart, man. You need a plastic bag or you have your own plastic bag?
>
> A: I need one. I got to get smart, man."
>
> Id. @ 137

The standard of this Court's review, stated another way, requires the reviewing court to ask whether a rational trier of fact, when choosing among reasonable construction of the evidence, could have found the Appellant guilty beyond a reasonable doubt. U.S. vs. DelGado, 56 F.3d 1375 (11th Cir. 1997).

The construction of the evidence was that the C.I. was a narcotics user; that he and his wife routinely violated protocols and directions that made them a demonstrated unreliable source of information – a factor that ultimately led to his dismissal as a source, albeit after the investigation was concluded in the present case. They carried weapons to meetings with the knowledge of agents that were monitoring the very conversation in real time where the firearm was mentioned. The C.I. was allowed to possess controlled substances that he was using, with the direct knowledge of agents who found the prescription bottle with an eradicated label. The agents knew the C.I. was attempting to buy for his own use crack cocaine, a fact that his wife told them. She also mentioned that he had battered her when she refused to drive him to a known drug dealer.

The construction of the evidence was additionally, that he had been instructed by his handling case agent to try to get Appellant to produce a firearm during their meeting so as to entrap Appellant into possessing a firearm during and in furtherance of a drug trafficking offense. The case agent admitted to this fact, and there is a transcript that verifies that the C.I. is advising his wife on the drive over to meet with Lerone Butler on June 4, 2016:

> "And damn, try to see if he get me to show them damn guns he just bought, him and Drew. Because I know he just bought the Mossberg" (R.167:30).

S/A Greenaway tells the jury that the C.I. had told agents about the guns before the meeting had been set up. Agent Greenaway goes further and admits that he instructed the C.I. to try to get Appellant to produce the weapons. Presumptively the agent did this in an effort to entrap Appellant into possessing a firearm in furtherance of a drug trafficking crime, thereby subjecting Appellant to a five-year minimum mandatory sentence to be consecutive to any sentence for any drug trafficking offense.

II.

THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE SUPERSEDING INDICTMENT WHEN APPELLANT SUFFERED DEMONSTRABLE PREJUDICE FROM A CONSTITUTIONAL VIOLATION OF LAW AS A RESULT OF LAW ENFOCEMENT'S INVESTIGATIVE TECHNIQUES, THAT WERE SO OUTRAGEOUS AS TO BE FUNDAMENTALLY UNFAIR AND SHOCKING TO THE UNIVERSAL SENESE OF JUSTICE PROTECTED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION.

A) The Grand Jury is verily believed to have been presented with evidence that was factually inaccurate and evidence which left them with the notion that Defendant, Butler, had been the source of narcotics recovered during the investigation.

According to discovery provided by the Government, on several occasions, a confidential source was used to meet with Defendant and others charged in the underlying conspiracy. The confidential source had a familial relationship with Defendant Butler. It was represented that prior to the C.I. going out to meet with Butler, the C.I.'s person and his car were previously searched for "weapons and/ or contraband." On at least two occasions, the C.I. was accompanied by his wife for the meetings with Defendant. In each such transaction, the C.I. was wearing a audio and video recorder, with the latter believed to be mounted on a hat he was wearing. The entire conversation is recorded, including conversations with law enforcement

before the C.I. is set out to meet with the defendant. In both situations, there was never a female officer present, and no search was done of her person.

For instance, on January 26, 2015 after law enforcement had done a search "for weapons and/or contraband," yet there is no notation that she is ever searched. No female officer is present. During the ensuing drive from the staging location to meet with Butler, the video reflects the following conversation between the C.I. and his wife:

"Keep your gun, put it in your pocket book."

The agents clearly had never conducted a search of the wife, and permitted a related source to go into an alleged controlled buy while armed. Even after reviewing the tape, they continued to represent that a thorough search for firearms and contraband was done. Their reports indicated this false fact. The representation was made at the bond hearing and undoubtedly also falsely misrepresented before the Grand Jury. She was not searched for weapons, nor was she searched for money or narcotics prior to accompanying her husband to the meeting with Butler. The source of the narcotics, ultimately provided to law enforcement was attributed to Butler, but the reality was that it may well have come from another source – the C.I.'s wife. The Grand Jury was never made aware of this fact, but rather was presumably told, consistent with the Government's representations in open court, that all alternative sources (other than Butler) were searched before the meeting. This was not true.

J. **The Government was aware of the intentions of the Confidential Source to attempt to entrap Butler into committing crimes he was not directed to investigate and for which Butler had not shown a propensity to commit.**

The C.I. was recorded on consensually monitored recordings having conversations with his wife, who was accompanying him on the meetings with Butler. In one of those

conversations, occurring on or about June 4, 2015, he tells her of his plan to "set Lerone up" with a gun. He goes on to explain that Lerone has recently come into possession of a Mossberg and a 9 mm and an A/R assault rifle. He states to her: "I want to get the guns in Lerone's hands." The two ultimately meet up with Butler and while inside the house, the C.I. attempts to get Butler to handle the firearms that he claims are present in the house, stating: "Where that Mossberg at? Let me see it." [7] Moreover, all of this behavior was done with the express knowledge and consent of Agent Jamie Stranahan and/or Thomas Greenaway

Appellant sought dismissal of the Superseding Indictment[8] based upon a corruption of and a violation of the U.S. Constitution's Fifth Amendment's guarantee of procedural due process and the requiring an investigative body to act independently of either prosecuting attorney or judge; see, *United States v. Dionisio*, 410 U.S. 1, 18, 93 S. Ct. 764, 773, 35 L. Ed. 2d 67 (1973) (finding that a grand jury "must be free to pursue its investigations unhindered by external influence"); *Wood v. Georgia*, 370 U.S. 375, 390, 82 S. Ct. 1364, 1373, 8 L. Ed. 2d 569 (1962) (recognizing "the necessity to society of an independent and informed grand jury"); *John Roe, Inc. v. United States* (In re: Grand Jury Proceedings), 142 F.3d 1416, 1425 (11th Cir. 1998) (explaining that although a grand jury relies on the judiciary when it seeks subpoenas or contempt sanctions, it "performs its investigative and deliberative functions independently." *Id.*

In the case of *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir. 1982) the Court held that an indictment may be dismissed "when prosecutorial misconduct amounts to overbearing the will of the grand jury so that the indictment is, in effect, that of the prosecutor rather than the grand jury." Federal courts possess the power and duty to dismiss federal

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[7] Butler is a previously convicted felon, and the possession of any such firearm would have been chargeable as a separate federal offense. This was known to the C.I.

[8] (R.88)

indictments obtained in violation of the Constitution or laws of the United States. In addition, federal courts have a "supervisory power over the administration of justice to regulate the manner in which grand jury investigations are conducted." *U.S. v. Pabian,* 704 F.2d 1533, 1536 (11th 1983). See also *United States v. Basurto*, 497 F.2d 781 (9th Cir.1974); *In re Grand Jury Proceedings*, 486 F.2d 85 (3d Cir.1973); *United States v. Estepa*, 471 F.2d 1132 (2d Cir.1972).

This investigation was nothing short of completely lacking any oversight by law enforcement. It was the Wild West. Civilians, acting at the direction of federal law enforcement and with their direct knowledge, were carrying guns into purposely staged controlled buys without any notion of law enforcement that such things are occurring. After reviewing the tapes, reports are made that do not reflect that one of the civilians (i.e. the wife of the C.I.) is carrying a gun, or that she is being instructed by the C.I. to keep it on her person during her husband's meeting with Butler. In fact, their reports and statements in court during the bond hearing and presumably to the Grand Jury suggest something they knew was not true. That is, she was known to have accompanied her husband on at least two meetings. She was never searched. We know this because had law enforcement turned up the gun she possessed on January 26th, 2015, they would presumably not allowed her to carry it into a controlled delivery, and certainly wouldn't have falsely averred that the car and the C.I. had been searched for weapons and contraband. She obviously could not be ruled out as the source for anything that was subsequently produced to law enforcement.

In *United States v. Ofshe*, 817 F.2d 1508 (11th Cir. 1987), the Eleventh Circuit analyzed a motion to dismiss an indictment based on government misconduct under both the Sixth and Fifth Amendments. Id. at 1515-16. With regard to violations of a defendant's right to counsel under the Sixth Amendment, the Eleventh Circuit noted that, pursuant to Supreme Court

precedent, dismissal is "plainly inappropriate" if there is no "demonstrable prejudice." Id. at 1515 (citing United States v. Morrison, 449 U.S. 361, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981)). With regard to violations of due process rights under the Fifth Amendment, the Eleventh Circuit stated that, "[t]o constitute a constitutional violation the law enforcement technique must be so outrageous that it is fundamentally unfair and 'shocking to the universal sense of justice mandated by the Due Process Clause of the Fifth Amendment.'" Ofshe, 817 F.2d at 1516 (citing United States v. Russell, 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973)). See also United States v. Merlino, 595 F.2d 1016, 1018 (5th Cir. 1979) ("[I]n the case of even the most egregious prosecutorial misconduct . . . the dismissal of an indictment in such a case must depend upon a showing of actual prejudice to the accused.")

Prejudice has inured to Defendant Butler in that he was targeted by family members that had shown a propensity to break the law while acting as agents for the Government. They possessed firearms when they knew they were not supposed to be in possession of such instrumentalities. The agents knew this after the fact, and covered it up, instead stating that they had searched the "C.I. and the vehicle for firearms and contraband." They knew and should have known if they had searched the wife, that a firearm was being taken to what was hoped to be a controlled delivery of narcotics. Both the C.I. and his wife are known narcotics users and were so at the time. The C.I. was a drug dealer and had access to narcotics. The agents knew his record, and knew they needed to dispel the notion that he had produced drugs he subsequently turned in to law enforcement, stating that the drugs had originated from Butler. Law enforcement knew that their agent, i.e. the C.I. intended to entrap Butler into possessing a firearm so as to commit another offense for which he was not directed to investigate. Law

enforcement knew from a review of the tapes that he had suggested to his wife that he was going to try to "set Lerone up" with a gun so that he could be charged.

This conduct on the part of the Government was plainly inappropriate and supported the lower Court in dismissing the Indictment based upon the overall taint to the underlying investigation.

III.

THE DISTRICT COURT COMMITTED CLEAR ERROR IN JUDGMENT IN WEIGHING THE 18 U.S.C. Sec. 3553(a) FACTORS WHEN IT ARRIVED AT A SENTENCE THAT, ALTHOUGH WITHIN THE GUIDELINES, WAS NEVERTHELESS OUTSIDE THE RANGE OF REASONABLE SENTENCES DICTATED BY THE FACTS OF THE CASE AND THE PERSONAL HISTORY AND CHARACTERISTICS OF APPELLANT.

Using a two-step process, the 11th Circuit reviews the reasonableness of a district court's sentence for an abuse of discretion. *United States v. Cubero*, 754 F.3d 888, 892 (11th Cir. 2014). First, it is necessary to determine whether a sentence is procedurally reasonable. Id. "A sentence may be procedurally unreasonable if the district court improperly calculates the Guidelines range, treats the Guidelines as mandatory rather than advisory, fails to consider the appropriate statutory factors, selects a sentence based on clearly erroneous facts, or fails to adequately explain the chosen sentence." *United States v. Gonzalez*, 550 F.3d 1319, 1323 (11th Cir. 2008).

After determining that a sentence is procedurally sound, the Court must then examine whether the sentence is substantively reasonable in light of the totality of the circumstances and the 18 U.S.C. § 3553(a) factors. See, *Cubero*, 754 F.3d at 892. The party challenging the sentence bears the burden of showing that it is unreasonable. *United States v. Pugh*, 515 F.3d

1179, 1189 (11th Cir. 2008). The 11th Circuit has said that it will only vacate a defendant's sentence if we are "left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *United States v. Irey*, 612 F.3d 1160, 1190 (11th Cir. 2010) (en banc) (quotation omitted).

Butler suffered a devastating physical injury while under lawful employment after he was struck by a forklift from behind. The resulting injuries had caused him to be permanently disabled. He had endured 8 surgeries to stabilize his back. Agents saw a motorized wheelchair and handicap van during surveillance, and during the time of his arrest at his residence. While being electronically intercepted in this case, he often spoke of the pain he was in and was seen during certain filming remaining confined in his bed inside of his home. He received a sizeable personal injury settlement for the workers' compensation claim, and used that to purchase his home and automobiles discussed at trial. He also received approximately disability from SSI. Additionally, medical records turned over to probation by the defense showed a significant history of having survived two separate brain aneurysms, that necessitated him learning to learn how to walk and talk again. The medical records from FDC Miami corroborated these prior hospitalizations. He is, in a word, a broken man physically.

The Presentence Investigation Report prepared in this matter reflected a calculation of 3 criminal history points which placed the Defendant in a criminal history category II range. The prior conviction reflected at Paragraph 93 of the PSI for Conspiracy to Distribute Cocaine from the middle district of Florida occurred 17 years prior to the earliest charged conduct in connection with this investigation. It is correctly scored since the 94 month BOP sentence and the conclusion of supervised release in 2008 allow for its inclusion. Nevertheless, the qualitative

and quantitative effects of utilizing the prior criminal convictions to enhance the Defendant's criminal history category should have been favorably considered by the Court at sentencing. Although Section 4A1.2(e)(2) authorized the conviction to be used to determine the Defendant's criminal history, no consideration was given for the remoteness of the conviction nor passage of time since the criminal activity by the District Court.

The lower court erringly failed to consider the argument of counsel concerning the disparity of sentences between the other co-conspirators, despite the court's declaration: "And when the Court looks at Mr. Weems and Mr. Dixon, I do certainly see a difference in terms of their roles, the amount of drugs that they were held responsible for, and their involvement as compared to yours over the course of that long period of time." (R.170:64). The Court went on to find, however, that Appellant was not deserving of a variance, finding:

"As such, Mr. Butler, I do not believe that your actions, taking into consideration your personal history and characteristics and the goals of sentencing, would warrant a variance in this case. But I do believe that a sentence within the guideline range is certainly appropriate to promote to goals of sentencing." Id. @ 66.

Larry Earl Weems was equally involved in the activities surrounding the conspiracy. His conduct spanned the entire range of the conspiracy, being involved in the late 2014 purchase by the C.I. at the McDonald's parking lot, and up to the last charged conduct represented by Count IX of the Indictment, occurring in the latter part of 2016. He was sentenced by this Court to serve 50 months imprisonment to be followed by three years of supervised release. The sentence was imposed in spite of him having pled to conduct summarized as 10 separate sales or attempted sales to the C.I., and whose Factual Proffer required 8 pages to accurately summarize his involvement in the PSI. Juan Tyrone Dixon, despite being a career offender, was sentenced to 82

months imprisonment, followed by 3 years of supervised release, due to the district court varying from the guidelines. While Defendant agrees Mr. Dixon was less culpable than most of the other defendants, his sentence warranted an increased sentence due to the severity of his priors. Mr. Ewell was sentenced to 60 months of incarceration.

Even though the Guidelines are no longer mandatory, "a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications." *Gall v. U.S.*, 552 U.S. 38, 46 (2007). "A sentence may be substantively unreasonable where the district court select[s] the sentence arbitrarily, bas[es] the sentence on impermissible factors, fail[s] to consider pertinent § 3553(a) factors or giv[es] an unreasonable amount of weight to any pertinent factor." *United States v. Martinez*, 588 F.3d 301, 328 (6th Cir. 2009). Butler's sentence was substantively unreasonable. As it related to the nature and circumstances of the offense, Appellant never contacted his brother, the C.I., other than when he was contacted. Andre Butler did not even know the telephone number on which to reach Appellant, but is heard on tape asking other co-conspirators for this number. Appellant is on tape in the later part of 2014. The C.I. then continues to speak with Weems thereafter. In fact, Appellant never materializes in 2015 on any tape or consensually monitored conversations. It is only after prodding by the agents that the C.I. again initiates contact with Appellant. These, along with Appellant's devastating injuries were pertinent considerations that the lower court erred in failing to consider.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

Howard J. Schumacher
CJA-Appointed Counsel

By: _____
Howard J. Schumacher, Esquire

Fort Lauderdale, Florida

CERTIFICATION

As required by Supreme Court Rule33.1(h), I certify that the document contains 8,235 words, excluding the parts of the document that are exempted by Supreme Court Rule33.1(d). I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of February, 2021.

HOWARD J. SCHUMACHER, P.A.
1 E. Broward Blvd.
Suite 700
Ft. Lauderdale, FL 33301
(954) 356-0477
FL Bar No: 776335
Papaschuz_2000@yahoo.com

By: _____
Howard J. Schumacher, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of February, 2021 to the SOLICITOR GENERAL OF THE UNITED STATES, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

By: _____

HOWARD J. SCHUMACHER, ESQ.