

THE QUEST FOR FINALITY: FIVE STORIES OF WHITE-COLLAR CRIMINAL PROSECUTION

LUCIAN E. DERVAN†

I. INTRODUCTION

There are many perspectives one might take when examining the issue of finality and sentencing.¹ When I began contemplating the topic in response to an invitation to participate in the *Wake Forest Journal of Law & Policy* Symposium, I was drawn to consider a fundamental question in this regard. What does it mean to seek “finality” and what has that quest for “finality” done to our pursuit of justice in the criminal system?

The more I considered the complexities of finality, the clearer it became that prosecutors, defendants, and society as a whole are drawn to this concept in various ways during criminal adjudications.² Further, far from an aspirational summit, it became clear that some outgrowths of this quest for finality could be destructive and, in fact, obstructive to some of the larger goals of our criminal justice system, including the pursuit of truth and the protection of the innocent.³

Given the potential abstraction of these issues, it seemed appropriate to discuss the possible consequences of our quest for finality through examination of specific cases. Therefore, I have selected five stories of white-collar criminal prosecution in an effort to observe whether the concerns I identified were present in each. The five stories are ones in which the players sought to achieve finality in different ways and where finality came in

† Assistant Professor of Law, Southern Illinois University School of Law. Many thanks to Professor Ron Wright, Wake Forest University School of Law, and the *Wake Forest Journal of Law & Policy* for the invitation to present this piece at their symposium. Thank you also to the other participants in the symposium. Finally, thanks to my research assistant, Brian Lee, for his excellent work over the past few years.

1. See Symposium, *Finality in Sentencing*, 4 WAKE FOREST J.L. & POL'Y 1 (2014) (discussing varying views on the relationship between finality and sentencing).

2. See *infra* Part II.

3. See *infra* Part III.

different forms. Despite their differences, however, the stories share some important commonalities.

First, the stories demonstrate that we must be careful not to value finality over accuracy. As an example, though plea bargaining offers both the prosecution and the defense a mechanism by which to reach sentencing finality, it must not be used to mask unfounded criminal cases or offer overpowering incentives to innocent defendants to falsely confess in return for a promise of leniency.⁴ Second, the stories remind us that the government must be careful not to confuse achieving a victorious sentencing finality with achieving a just one. This is particularly true after indictment, where sometimes winning at any cost can become the primary focus.⁵ Third, the stories reveal that, in many ways, the quest for true finality in criminal cases is fleeting. While we have long been aware of the lingering collateral consequences present even after a sentence is concluded, we now must also recognize that even those who are acquitted face significant collateral consequences from indictment itself.⁶

Section two of this article will discuss, in detail, four cases of white-collar criminal prosecution, with particular focus on the quest for finality within each.⁷ Section three will elaborate on the observations described above through analysis of the stories previously examined. Section four will consider one final story of white-collar crime and contemplate what lessons it offers about our quest for finality.

4. See, e.g., Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 187 (2007); Rebecca Hollander-Blumoff, *Getting to Guilty: Plea Bargaining as Negotiation*, 1 HARV. L. REV. 115, 116 (1997).

5. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (describing “the right to be tried by a jury” as “an inestimable safeguard against the corrupt or overzealous prosecutor”).

6. See Mirian Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1036 (2008) (discussing “collateral consequences of a criminal indictment”); *National Inventory of the Collateral Consequences of Conviction*, ABA, <http://www.abacollateralconsequences.org> (last visited Sept. 7, 2013).

7. It is important to note that this article will not argue the actual factual guilt or innocence of any of the individuals discussed in the stories of white-collar crime contained herein. The justice system has spoken with regard to their legal guilt and this article will not attempt to re-litigate those decisions. Further, the actual factual guilt or innocence of each individual is not vital to the mission of this article, because this article does not focus on whether they actually did something wrong, but on the ways in which they were prosecuted, the ramifications of their indictments, and what these stories tell us about the state of our aspirations for the criminal justice system.

II. STORIES OF WHITE-COLLAR PROSECUTION

A. *Broadcom*

In 2006, the U.S. Securities and Exchange Commission (“SEC”) and the U.S. Department of Justice (“DOJ”) began investigating allegations that numerous corporations were improperly engaging in a practice known as “backdating” of stock options.⁸ As described by the SEC during Congressional testimony in 2006, fraudulent stock options backdating typically worked as follows:

They granted an “in-the-money” option—that is, an option with an exercise price lower than that day’s market price. They did this by misrepresenting the date of the option grant, to make it appear that the grant was made on an earlier date when the market value was lower. That, of course, is what is meant by abusive “backdating” in today’s parlance.

The purpose of disguising an in-the-money option through backdating is to allow the person who gets the option grant to realize larger potential gains—without the company having to show it as compensation on the financial statements.

Rather obviously, this fact pattern results in a violation of the SEC’s disclosure rules, a violation of accounting rules, and also a violation of the tax laws.⁹

8. *Events in the Broadcom Backdating Case*, L.A. TIMES, Dec. 16, 2009, <http://www.articles.latimes.com/2009/dec/16/business/la-fi-broadcom-timeline16-2009dec16> [hereinafter *Events*].

9. *Testimony Concerning Options Backdating Before the U.S. S. Comm. on Banking, Housing and Urban Affairs*, 109th Cong. 43 (2006) (statement of Christopher Cox, Chairman, U.S. Sec. & Exch. Comm’n), available at <http://www.sec.gov/news/testimony/2006/ts090606cc.htm>; *Id.* (statement of Christopher Cox, Chairman, U.S. Sec. & Exch. Comm’n) (“In our rulemaking, our provision of accounting and final regulatory guidance, and our enforcement programs, the SEC has been and will remain vigilant in the battle against fraudulent options backdating.”); *Events*, *supra* note 8 (“Stock options, typically used as incentive pay, allow employees to buy stock in the future at current prices. Broadcom Corp. and other companies also backdated the options to a previously lower price to give employees a little extra when they cashed in the options. Backdating was legal as long as the expense was disclosed publicly.”).

By 2007, more than eighty companies were under investigation by the government for potential securities violations, and more than one hundred companies had self-disclosed stock option backdating issues.¹⁰

As the investigations and disclosures continued to mount in 2007, Broadcom, a large semiconductor manufacturer in California, restated \$2.2 billion in charges because of stock option backdating issues.¹¹ This revelation led prosecutors to focus on the corporation and several executives, including Dr. Henry Samueli, co-founder and former Chief Technical Officer of the company, Dr. Henry T. Nicholas II, Broadcom's Chief Executive Officer and co-founder, and William Ruehle, Broadcom's Chief Financial Officer.¹² On June 4, 2008, the DOJ indicted Nicholas and Ruehle alleging each had engaged in a "stock-option backdating scheme that forced Broadcom to write-down \$2.2 billion in profits."¹³ Along with allegations related to the securities scheme, the government secured a second indictment alleging that Nicholas had "regularly maintained a supply of ecstasy, cocaine, methamphetamine and other controlled substances for use and distribution . . . [including] to spike the drinks of industry executives and Broadcom customers."¹⁴ According to the government press release regarding the indictments, the charges

10. Fernando L. Aenlle-Rocha, (White & Case, L.A., Cal.), *Stock Option Backdating – Crossing the Line*, CAL. LITIG. REP., Feb. 2007, available at http://www.whitecase.com/californialitigation_022007_4.

11. Peter J. Brennan, *Broadcom Restates \$2.2 Billion, Blames Former Chief (Update3)*, BLOOMBERG NEWS, Jan. 23, 2007, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=anU8JvmlWxCo&refer=home> ("Nicholas 'bears significant responsibility for the lack of adequate controls' in granting options, Irvine-based Broadcom, a maker of chips for consumer devices, said in a regulatory filing with the Securities and Exchange Commission. The filing also placed blame on former Chief Financial Officer William Ruehle and former Vice President of Human Resources Nancy Tullos.").

12. Press Release, U.S. Attorney's Office, Cent. Dist. Cal., Broadcom Co-Founder Pleads Guilty to Making False Statement to the SEC in Backdating Investigation (June 23, 2008) [hereinafter *Broadcom Co-Founder Pleads Guilty*]; Press Release, U.S. Attorney's Office, Cent. Dist. Cal., Former Broadcom CEO Henry Nicholas and Former CFO Indicted in Massive Stock-Options Backdating Case (June 5, 2008) [hereinafter *Former Broadcom CEO Henry Nicholas and Former CFO Indicted*]; see also Complaint, SEC v. Samueli, No. SACV08-539 CJC (C.D. Cal. 2008) (describing that in May 2008, the SEC filed a complaint against Nicholas, Samueli, and Ruehle alleging that the three Broadcom associates, as well as David Dull, Broadcom's Vice President of Business Affairs, General Counsel, and Secretary, had engaged in securities fraud with regard to the corporation's backdating of stock options).

13. Former Broadcom CEO Henry Nicolas and Former CFO Indicted, *supra* note 12.

14. *Id.*

in the case could result in sentences of 340 years in prison for Nicholas and 370 years in prison for Ruehle.¹⁵

While Samueli was not indicted along with Nicholas and Ruehle on June 4, 2008, he was referenced in the indictment as an “unindicted co-conspirator” in the securities scheme.¹⁶ Several weeks later, caving to intense pressure from the prosecution, Samueli pled guilty to “making a false statement in testimony before the Securities and Exchange Commission relating to that agency’s investigation into options backdating.”¹⁷ Under the original terms of Samueli’s plea agreement, he was to receive no prison time in exchange for payment of a twelve million dollar fine.¹⁸ This plea agreement, however, was rejected by the judge in the case, Judge Cormac J. Carney.¹⁹ Under the terms of the accepted plea, Samueli faced up to five years probation.²⁰ Compared to the sentences of almost half a millennia faced by his colleagues, the prospect of a maximum term of five years probation appears to have been sufficient to persuade him to plead guilty.²¹

As the criminal trial against Ruehle began, the prosecution’s cases against all of the defendants quickly unraveled.²² Ruehle requested that Samueli and Dull, the former General Counsel, testify on his behalf.²³ Both Samueli and Dull, however, informed the parties that they would “assert their Fifth

15. *Id.*

16. Indictment at 2, U.S. v. Nicholas, No. 08-00139 (C.D. Cal. June 4, 2008).

17. Broadcom Co-Founder Pleads Guilty, *supra* note 12; *see id.* (“Samueli admitted making a false statement to the SEC during a deposition he gave on May 25, 2007. In that testimony, Samueli stated that he was not involved in the process of granting options to Broadcom’s highest-ranking officers, known as ‘Section 16’ officers.”).

18. E. Scott Reckard, *Trial Begins for Former Broadcom Finance Chief*, L.A. TIMES, Oct. 24, 2009, <http://www.articles.latimes.com/2009/oct/24/business/fi-broadcom24>.

19. *Id.*

20. Broadcom Co-Founder Pleads Guilty, *supra* note 12.

21. *See* Lucian E. Dervan, *Bargained Justice: Plea Bargaining’s Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 63 (2012) [hereinafter *Bargained Justice*] (“Prosecutors have been successful in using their increased powers to create incentives that attract defendants to plead guilty by structuring plea agreements where the sentence a defendant receives in return for pleading guilty is far lower than the sentence he or she risks with a loss at trial.”).

22. *See generally* Peter J. Henning, *How the Broadcom Backdating Case Went Awry*, N.Y. TIMES DEALBOOK, Dec. 14, 2009, http://www.dealbook.nytimes.com/2009/12/14/how-the-broadcom-backdating-case-has-gone-awry/?_r=0.

23. *Id.*

Amendment privileges” unless afforded immunity.²⁴ Not particularly interested in having either individual testify for the defense that there was no illegal backdating, the DOJ refused to petition the court for immunity as required under 18 U.S.C § 6002.²⁵ Invoking a rare exception that permits a court to offer immunity to a witness if it appears the prosecution is attempting to hide relevant evidence from the jury, Judge Carney granted Samueli and Dull immunity to testify.²⁶ After hearing Samueli’s testimony, Judge Carney withdrew Samueli’s previous guilty plea, dismissed the charges against him, and informed the jury of what had occurred.²⁷ According to Judge Carney, Samueli’s testimony clearly indicated that at no time had he lied to the SEC.²⁸

On December 15, 2009, Judge Carney held a hearing in response to a request by Ruehle to dismiss the charges against him based on a lack of evidence and prosecutorial misconduct.²⁹ During the hearing, Judge Carney described in detail the extensive prosecutorial misconduct in the case, including conduct related to Samueli’s guilty plea:

Based on the complete record now before me, I find that the government has intimidated and improperly influenced the three witnesses critical to Mr. Ruehle’s defense. The cumulative effect of that misconduct has distorted the truth-finding process and compromised the integrity of the trial.

To submit this case to the jury would make a mockery of Mr. Ruehle’s constitutional right to compulsory process and a fair trial.

. . . .

[With regard to Dr. Samueli,] [t]he uncontroverted evidence at trial established that Dr. Samueli was a brilliant engineer and a man of incredible integrity. There was no evidence at trial

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*; see also Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 940–41 (2010) (discussing the Broadcom case).

28. Henning, *supra* note 22.

29. Reporter’s Transcript of Proceedings, *United States v. Ruehle*, No. 8008-00139-CJC 5192, 5194 (C.D. Cal. Dec. 15, 2009).

2014]

THE QUEST FOR FINALITY

97

to suggest that Dr. Samueli did anything wrong, let alone criminal. Yet, the government embarked on a campaign of intimidation and other misconduct to embarrass him and bring him down.

....

One must conclude that the government engaged in this misconduct to pressure Dr. Samueli to falsely admit guilt and incriminate [the other defendants] or, if he was unwilling to make such a false admission and incrimination, to destroy Dr. Samueli's credibility as a witness for [the other defendants].

Needless to say, the government's treatment of Dr. Samulei was shameful and contrary to American values of decency and justice.³⁰

During the hearing, Judge Carney went on to describe in greater detail additional acts of prosecutorial misconduct related to the guilty plea of Samueli:

Among other wrongful acts the government, one, unreasonably demanded that Dr. Samueli submit to as many as 30 grueling interrogations by the lead prosecutor.

Two, falsely stated and improperly leaked to the media that Dr. Samueli was not cooperating in the government's investigation.

Three, improperly pressured Broadcom to terminate Dr. Samueli's employment and remove him from the board.

Four, misled Dr. Samueli into believing that the lead prosecutor would be replaced because of misconduct.

Five, obtained an inflammatory indictment that referred to Dr. Samueli 72 times and accused him of being an unindicted coconspirator when the government knew, or should have known, that he did nothing wrong.

30. *Id.* at 5195-99.

And seven, crafted an unconscionable plea agreement pursuant to which Dr. Samueli would plead guilty to a crime he did not commit and pay a ridiculous sum of \$12 million to the United States Treasury.³¹

In concluding the hearing, Judge Carney dismissed with prejudice all of the backdating charges against Ruehle and also against Nicholas, who was scheduled to proceed to trial in 2010.³² After the three and a half year ordeal, Ruehle stated, “I think they wanted very badly to win and some people go over the top in their zeal to win.”³³

B. Africa Sting Case

In 2009, the Federal Bureau of Investigation began a unique undercover operation, later dubbed the Africa Sting Case, involving potential violations of the Foreign Corrupt Practices Act (“FCPA”).³⁴ The FCPA originated in the mid-1970s after the United States Congress discovered that numerous American business organizations were engaged in widespread bribery to secure international governmental business contracts.³⁵ As a result, in late 1977, the United States enacted the FCPA.³⁶ The new law contains two key provisions. First, the FCPA prohibits the bribing of foreign officials to obtain or retain business.³⁷ Second, the FCPA requires businesses to establish internal controls and maintain books and records to assist in the prevention and detection of illegal bribery by employees.³⁸ According to the DOJ,

31. *Id.* at 5198.

32. *Id.* at 5199; Stuart Pfeifer, *Nicholas Trial Delayed Until 2010*, L.A. TIMES, Feb. 3, 2009, <http://www.articles.latimes.com/2009/feb/03/business/fi-nicholas3>.

33. Michael Hiltzik, *Former Broadcom Executive Emerges Intact from Options Scandal*, L.A. TIMES, Sept. 21, 2012, <http://www.articles.latimes.com/2012/sep/21/business/la-fi-hiltzik-20120923>.

34. Press Release, Dep’t of Justice, *Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme* (Jan. 19, 2010), *available at* <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html> [hereinafter *Twesj*].

35. Koehler, *supra* note 27, at 911–12.

36. F. Joseph Warin et al., *The British are Coming!: Britain Changes its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT’L L.J. 1, 4 (2010).

37. Securities Exchange Act of 1934, 15 U.S.C. §§ 78dd-1 to -3 (2006).

38. *Id.* § 78(m)(b).

the Africa Sting Case investigation was the “first large-scale use of undercover law enforcement techniques to uncover FCPA violations and the largest action ever undertaken by the Justice Department against individuals for FCPA violations.”³⁹

The undercover investigation began after Richard Bistrong, a former defense industry official, was accused of violating the FCPA and was offered a generous plea bargain in return for his cooperation as an undercover informant.⁴⁰ After accepting the deal, Bistrong went back into the defense industry as an informant and began targeting executives and employees of various military and law enforcement companies.⁴¹ The operation, nicknamed the “Catch 22,” focused on twenty-two individuals who were approached by Bistrong and offered the opportunity to participate in a fictional business deal with Gabon.⁴² The government described the fictional contract as follows:

As part of the undercover operation, the defendants allegedly agreed to pay a 20 percent “commission” to a sales agent who the defendants believed represented the minister of defense for a country in Africa in order to win a portion of a \$15 million deal to outfit the country’s presidential guard. In reality, the “sales agent” was an undercover FBI agent. The defendants were told that half of that “commission” would be paid directly to the minister of defense. The defendants allegedly agreed to create two price quotations in connection with the deals, with one quote representing the true cost of

39. Twenty-Two Executives, *supra* note 34.

40. Sarah Oliver, *The Vegas Sting: A Cunning FBI Trap Set by a Cocaine-Addicted Stool Pigeon Ensnared this British Businessman and Destroyed His Life. The Only Problem? He was Innocent*, MAIL ONLINE (May 26, 2012, 6:52 PM), <http://www.dailymail.co.uk/news/article-2150326/The-Vegas-sting-A-cunning-FBI-trap-set-cocaine-addicted-stool-pigeon-ensnared-British-businessman-destroyed-life-The-problem-He-innocent.html>; *see id.* (describing how Bistrong was alleged to have engaged in bribery to secure a United Nations contract for body armor); *cf.* Christopher M. Matthews, *Cooperator Gets 18 Months in Complicated Bribery Case*, WALL ST. J. CORRUPTION CURRENTS BLOG (July 31, 2012, 3:39 PM), <http://www.blogs.wsj.com/corruption-currents/2012/07/31/cooperator-gets-18-months-in-complicated-bribery-case> (describing that although the prosecutor recommended probation for Bistrong, the court instead sentenced him to eighteen months in prison).

41. Oliver, *supra* note 40; *see* Twenty-Two Executives, *supra* note 34 (describing the indictment charges of those executives and employees Bistrong targeted).

42. Oliver, *supra* note 40.

the goods and the second quote representing the true cost, plus the 20 percent “commission.” The defendants also allegedly agreed to engage in a small “test” deal to show the minister of defense that he would personally receive the 10 percent bribe.⁴³

On January 18, 2009, twenty-one of the alleged conspirators were arrested while attending a trade conference in Las Vegas.⁴⁴ According to the DOJ, on the same day “approximately 150 FBI agents executed 14 search warrants in locations across the country.”⁴⁵ With twenty-two defendants indicted in the case, the government believed it had successfully executed the largest FCPA operation in history.⁴⁶

One of the individuals arrested by an FBI SWAT team that day was British businessperson David Painter, Chief Executive of Security Support Solutions, Ltd. (“3S”), which produced civilian armored vehicles.⁴⁷ According to an account of the arrest, he was approached by a heavily armed SWAT team, handcuffed, and taken at gunpoint to a holding area.⁴⁸ For Painter, however, his arrest was merely the beginning of a harrowing journey.⁴⁹ Specifically,

David Painter’s liberty, home and business were the collateral damage. After his arrest in January 2010 he was jailed for five weeks.

Once bailed, he had to sell his much-loved £1.5 million Surrey home and liquidate shares and pensions to pay legal fees and costs amounting to £1 million. 3S has ceased trading.⁵⁰

43. Twenty-Two Executives, *supra* note 34.

44. Mike Scarcella, *DOJ: Undercover Sting Nets 22 Arrests in Large Scale FCPA Case*, THE BLOG OF LEGAL TIMES (Jan. 19, 2010, 5:10 PM), <http://www.legaltimes.typepad.com/blt/2010/01/doj-undercover-sting-nets-22-arrests-in-large-scale-fcpa-case.html>.

45. Twenty-Two Executives, *supra* note 34.

46. *Id.*

47. Oliver, *supra* note 40; Twenty-Two Executives, *supra* note 34.

48. Oliver, *supra* note 40.

49. *See generally id.* (describing Painter’s legal and financial troubles after he was arrested).

50. *Id.*

In addition to the above, Painter was terminated from his employment.⁵¹

In early 2011, three of the defendants brought finality to their cases by pleading guilty to conspiracy charges.⁵² The conspiracy charges carried maximum sentences of only five years, as compared to the twenty-year sentences possible under the FCPA.⁵³ The remaining defendants continued to proclaim their innocence and proceeded to trial in groups.⁵⁴ According to Painter: “The Gabon deal was drip-fed to me by someone who had worked for a blue-chip defense company and whose then wife was a former American Ambassador to the UN.”⁵⁵ He went on to state: “There was nothing to make a decent man walk away from the table . . . over and over, with the complicity of the DOJ and FBI, I was told this deal had been approved by the US State Department.”⁵⁶ In May 2011, the first group of defendants went on trial, but the case ended in a mistrial after a hung jury.⁵⁷

In September 2011, the second set of defendants went on trial.⁵⁸ The presiding judge, Judge Richard Leon, had previously indicated that he had concerns about the government’s conspiracy charges.⁵⁹ At one preliminary hearing, he stated, “I read all sixteen indictments, and I didn’t see it. I have zero sense that there was an omnibus grand conspiracy.”⁶⁰ Nevertheless, the government continued to pursue the conspiracy charges, the same conspiracy

51. *Id.*

52. Richard L. Cassin, *Feds Drop case Against Final Africa Sting Defendants*, FCPA BLOG (Mar. 27, 2010, 1:41 PM), <http://www.fcpablog.com/blog/2012/3/27/feds-drop-caseagainst-final-africa-sting-defendants.html>.

53. Richard L. Cassin, *Feds Tidy Up Shot-Show Case*, FCPA BLOG (Apr. 20, 2010, 8:28 AM), <http://www.fcpablog.com/blog/2010/4/20/feds-tidy-up-shot-show-case.html>.

54. *See generally id.* (describing the prosecutors proposed groups for those defendants that had not pleaded guilty).

55. Oliver, *supra* note 40.

56. *Id.*

57. Joe Palazzolo, *Judge Declares Mistrial in FCPA Sting Case*, WALL ST. J. CORRUPTION CURRENTS BLOG (July 7, 2011, 4:38 PM), <http://www.blogs.wsj.com/corruption-currents/2011/07/07/judge-declares-mistrial-in-fcpa-sting-case>.

58. *Second Africa Trial Sting Begins*, FCPA PROFESSOR (Sept. 20, 2011), <http://www.fcpaprofessor.com/second-africa-sting-trial-begins>.

59. Richard L. Cassin, *DOJ Ends Africa Sting Prosecution*, FCPA BLOG (Feb. 12, 2012, 1:28 PM), <http://www.fcpablog.com/blog/2012/2/21/doj-ends-africa-sting-prosecution.html> [hereinafter *DOJ Ends*].

60. *Id.*

charges to which three defendants had already pled guilty.⁶¹ During the second trial, Judge Leon finally determined that the government had been permitted the leeway to advance this theory long enough and dismissed all the conspiracy counts mid-trial.⁶² The government ran into further difficulties when Bistrong, the undercover informant who worked for the government in return for leniency in his own FCPA case, took the stand and admitted, among other things, to lying to the defendants and misleading them.⁶³ It was also revealed that he had a cocaine addiction, that he had filed false income tax returns, and that he had committed other criminal offenses in addition to his FCPA conduct.⁶⁴ After a four-month trial, the case once again ended without a single conviction.⁶⁵ In commenting on the case later, the jury stated that the “defendants had acted in good faith and the FBI/DOJ in bad faith.”⁶⁶

In February 2012, the government moved to dismiss the charges against the nineteen defendants awaiting re-trial.⁶⁷ In granting the motion to dismiss all the remaining charges in the case, Judge Leon stated:

This appears to be the end of a long and sad chapter in the annals of white-collar criminal enforcement. Unlike takedown day in Las Vegas, however, there will be no front page story in the New York Times or the Post for that matter tomorrow reflecting the government’s decision today to move to dismiss the charges against the remaining defendants in this case. Funny isn’t it what sells newspapers.

. . . .

61. *Id.*

62. *Id.*

63. Oliver, *supra* note 40.

64. Tom Schoenberg, *First Foreign-Bribery Case Built From Sting Dropped by U.S.*, BLOOMBERG NEWS (Feb. 24, 2012), <http://www.businessweek.com/news/2012-02-24/first-foreign-bribery-case-built-from-sting-dropped-by-u-s.html>.

65. *DOJ Ends*, *supra* note 59.

66. Mike Koehler, *A Guest Post from the Africa Sting Jury Foreman*, FCPA PROFESSOR (Feb. 6, 2012), <http://www.fcpaprofessor.com/a-guest-post-from-the-africa-sting-jury-foreman>.

67. Leslie Wayne, *Bribery Case Falls Apart, and Tactics Are Doubted*, N.Y. TIMES, Feb. 23, 2012, at B1.

Two years ago, at the very outset of this case I expressed more than my fair share of concerns on the record regarding the way this case has been charged and was being prosecuted. Later, during the two trials that I presided over I specifically commented again on the record regarding the government's very, very aggressive conspiracy theory that was pushing its already generous elasticity to its outer limits. Of course, in the second trial that elastic snapped in the absence of the necessary evidence to sustain it.

In addition, in that same trial, I expressed on a number of occasions my concerns regarding the way this case had been investigated and was conducted especially vis-a-vis the handling of Mr. Bistrong. I even had an occasion, sadly, to chastise the government in a situation where the government's handling of the discovery process constituted sharp practices that have no place in a federal courtroom.⁶⁸

So deficient was the government's case that it eventually moved to dismiss the charges against the three defendants who had already pleaded guilty.⁶⁹ In his concluding remarks on the case, Judge Leon stated, "As for the defendants, I hope the healing process is a swift one and that they get back to their normal lives in the very near future."⁷⁰ For Painter and others, however, such desires would go unfulfilled.⁷¹ After losing his career, his home, and his savings, Painter was left to start again from a "borrowed desk in a borrowed office."⁷²

68. Mike Koehler, *Africa Sting – In the Words of Judge Leon*, FCPA PROFESSOR (Feb. 23, 2012), <http://www.fcpaprofessor.com/africa-sting-in-the-words-of-judge-leon> [hereinafter Koehler, *In the Words*].

69. Mike Koehler, *Africa Sting – DOJ Moves to Dismiss Charges Against Spiller, Geri and Alvarez*, FCPA PROFESSOR (Mar. 27, 2012), <http://www.fcpaprofessor.com/africa-sting-doj-moves-to-dismiss-charges-against-spiller-geri-and-alvarez> [hereinafter Koehler, *Africa Sting – DOJ Moves to Dismiss Charges*].

70. Koehler, *In the Words*, *supra* note 68.

71. See Oliver, *supra* note 40 (describing his life post-litigation as "like having a bomb dropped" on it).

72. *Id.*

C. Senator Ted Stevens

In 2008, the DOJ indicted U.S. Senator Theodore (Ted) Stevens of Alaska in the District of Columbia.⁷³ The indictment charged him with “seven counts of making false statements related to Stevens’s financial disclosure forms.”⁷⁴ In particular, the indictment alleged that for nearly eight years, Stevens had schemed to “conceal his receipt of more than \$250,000 in things of value from VECO Corporation, formerly a multi-national oil services company based in Alaska, and Bill J. Allen, the Chief Executive Officer of VECO at the time.”⁷⁵ The things of value included improvements to Stevens’s home, automobile exchanges in which Stevens received far more than what the vehicles were worth, and household goods.⁷⁶

Though Stevens was offered a plea bargain that would have afforded him sentencing finality in the form of no prison time in return for admitting guilt with regard to one felony count, he rejected the deal.⁷⁷ Stevens then moved for a quick trial in an effort to put the matter behind him and clear his name before an upcoming election in November 2008.⁷⁸

73. Press Release, Dep’t of Justice, U.S. Senator Indicted on False Statement Charges (July 29, 2008), *available at* <http://www.justice.gov/opa/pr/2008/July/08-crm-668.html> [hereinafter U.S. Senator Indicted]; *see also* Press Release, Dep’t of Justice, Transcript of Press Conference with Acting Assistant Attorney General Matthew Friedrich on Indictment of U.S. Senator (July 29, 2008), *available at* <http://www.justice.gov/opa/pr/2008/July/pin-stevens-pressconferencetranscript.pdf> [hereinafter Transcript of Press Conference] (“Earlier today, a federal grand jury, here in the District of Columbia, returned an indictment charging United States Senator Ted Stevens of Alaska with seven felony counts of making false statements.”).

74. U.S. Senator Indicted, *supra* note 73.

75. *Id.*

76. *Id.*; *see also* Transcript of Press Conference, *supra* note 73 (“The gifts Senator Stevens is alleged to have received include substantial amounts of material and labor used in the renovation of a private residence, which Senator Stevens and his wife own, located in the town of Girdwood, Alaska. These renovations are alleged to have included the addition of a new first floor with multiple bedrooms and a bathroom, as well as a finished, full basement. . . . The indictment also alleges that Senator Stevens received other gifts from VECO and its CEO, including household goods, furniture, a new Viking gas range, a tool-storage cabinet, and an automobile exchange in which Senator Stevens received a new vehicle worth far more than what he provided in exchange.”).

77. Neil A. Lewis, *Stevens Rejected Offer That Required Admission of Felony*, N.Y. TIMES, Apr. 15, 2009, at A16.

78. Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court’s Order at 2, Misc. No. 09-0198 (D.C. Cir. Mar. 15, 2012), *available at* <http://www.dcd.uscourts.gov/dcd/sites/www.dcd.uscourts.gov.dcd/files/Misc09-198.pdf> [hereinafter Report to Hon. Emmet G. Sullivan].

Trial began in the case on September 22, 2008.⁷⁹ At trial, Stevens alleged that he had in fact paid for the renovations conducted on his house and had never knowingly submitted a false financial statement.⁸⁰ Despite his defense, Stevens was convicted by the jury.⁸¹ Though he had served six consecutive terms in the U.S. Senate and was the longest serving Republican in Senate history, Senator Stevens lost his reelection bid shortly after his conviction.⁸²

On April 1, 2009, five months after the verdict, the DOJ asked that the charges against Stevens be dismissed because of the discovery of significant prosecutorial misconduct in the case.⁸³ Several days later, Attorney General Eric Holder issued a statement regarding the matter:

In connection with the post-trial litigation in United States v. Theodore F. Stevens, the Department of Justice has conducted a review of the case, including an examination of the extent of the disclosures provided to the defendant. After careful review, I have concluded that certain information should have been provided to the defense for use at trial. In light of this conclusion, and in

79. *Id.*

80. *Id.* at 5.

81. Neil A. Lewis, *Senator is Guilty Over His Failure to Disclose Gifts*, N.Y. TIMES, Oct. 28, 2008, at A1; see also Anthony S. Barkow & Beth George, *Prosecuting Political Defendants*, 44 GA. L. REV. 953, 977 (2010) (“Although mistrial motions were denied, the presiding judge severely admonished the department and its public integrity section, which handled the case, as allegations of misconduct surfaced.”).

82. See William Yardley, *Stevens Loses in Senate Re-Election Bid*, N.Y. TIMES, Nov. 19, 2008, <http://www.nytimes.com/2008/11/19/us/politics/19alaska.html> (noting that Stevens lost by less than 4000 votes out of over 315,000 votes cast).

83. See Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice, No. 08-231 (D.C. Cir. Apr. 1, 2009) (describing the various types of prosecutorial misconduct in the case); see also Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 416–17 (2010) (“Once the government initiated the criminal case against Ted Stevens, the landmark Supreme Court decision in *Brady v. Maryland* mandated that the trial prosecutors provide the defense with favorable information collected by the government during the course of its investigation, including information that either negated guilt or undermined the government’s case. The same constitutional principles of due process that compel the disclosure of *Brady* evidence likewise prohibit the government from securing a conviction with false testimony or concealing the fact that such tainted evidence has been introduced at trial.”).

consideration of the totality of the circumstances of this particular case, I have determined that it is in the interest of justice to dismiss the indictment and not proceed with a new trial.⁸⁴

After granting the request, Judge Emmet G. Sullivan stated that after twenty-five years on the bench, he had “never seen anything approaching the mishandling and misconduct that I’ve seen” here.⁸⁵ He went on to name a special prosecutor to investigate whether the prosecutors had engaged in criminal wrongdoing when they failed to disclose exculpatory evidence to the Stevens team.⁸⁶

On March 15, 2012, the special prosecutor appointed by Judge Sullivan released a 514-page report.⁸⁷ The report concluded that federal prosecutors had gone well beyond simply failing to conduct an adequate review for exculpatory information.⁸⁸ The report stated that “[t]he investigation and prosecution of U.S. Senator Ted Stevens were permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens’s defense and his testimony, and seriously damaged the testimony and credibility of the government’s key witnesses.”⁸⁹ As an example, the report noted that prosecutors had withheld evidence supporting the defense offered by Stevens at trial:

Mr. Sullivan [(defense counsel)] was not aware when he gave his opening statement, and never learned during or after the trial, that the prosecutors possessed evidence that directly corroborated Senator Stevens’s defense. At trial, Senator Stevens and his wife were the only witnesses who testified that the Christensen Builders’ bills

84. Press Release, Dep’t of Justice, Statement of Attorney General Eric Holder Regarding United States v. Theodore F. Stevens (Apr. 1, 2009), *available at* <http://www.justice.gov/opa/pr/2009/April/09-ag-288.html>.

85. Terry Frieden, *Sen. Ted Stevens’ Conviction Set Aside*, CNNPOLITICS.COM (Apr. 7, 2009, 4:31 PM), <http://www.cnn.com/2009/POLITICS/04/07/ted.stevens>.

86. *See id.* (appointing Henry Schuelke III to conduct the investigation).

87. Report to Hon. Emmet G. Sullivan, *supra* note 78.

88. *Id.*

89. *Id.* at 12.

included any VECO charges for the renovation. The prosecutors never disclosed that Rocky Williams, the foreman of the renovation who reported directly to Mr. Allen, had the same understanding and belief as Senator Stevens and his wife, that VECO's costs for its employees' work on the renovation were included in the Christensen Builders' bills.⁹⁰

In attempting to explain the government's conduct, the special prosecutor stated in testimony before Congress, "[t]he motive to win the case was the principal operating motive," not any "animus" toward Stevens.⁹¹

Despite his eventual victory in the case, Stevens had already lost his Senate seat.⁹² Tragically, Stevens and his former Chief of Staff were killed in a plane crash in Alaska in August 2010.⁹³

D. Roger Clemens

In 2007, Roger Clemens retired from baseball with a 354-184 record and a 3.12 ERA.⁹⁴ He had 4672 strikeouts to his name, the third highest ever, and seven Cy Young Awards.⁹⁵ At the time of his retirement, it was considered highly probable that Clemens would be elected into the baseball hall of fame on his first ballot.⁹⁶ In December 2007, however, everything changed. It was in this month that former Senator George Mitchell released a report detailing his investigation into the use of steroids in baseball.⁹⁷ The investigation, which focused on the use of anabolic steroids, HGH, and PED, had lasted twenty months and cost millions of

90. *Id.*

91. Chuck Neubauer, *Senator Rips Misconduct in Stevens Case*, WASH. TIMES, Mar. 28, 2012, <http://www.washingtontimes.com/news/2012/mar/28/senator-prosecutorial-misconduct-stevens-case-cann/?page=all>.

92. *Id.*

93. *Id.*

94. Houston Mitchell, *Roger Clemens Tweets He is Not Surprised by Hall of Fame Result*, L.A. TIMES, Jan. 9, 2013, <http://www.articles.latimes.com/2013/jan/09/sports/la-sp-sn-roger-clemens-hall-of-fame-20130109>.

95. *Id.*

96. Michael O'Keeffe et al., *Regardless of Verdict in Perjury Trial, Roger Clemens Cannot Win as Damage to Ex-Yankee's Reputation Already Beyond Repair*, N.Y. DAILY NEWS, June 13, 2012, <http://www.nydailynews.com/sports/i-team/verdict-perjury-trial-roger-clemens-set-loss-article-1.1095359>.

97. JEFF PEARLMAN, THE ROCKET THAT FELL TO EARTH 303 (Harper Collins 2009).

dollars.⁹⁸ When released, the report named eighty-nine players, including Clemens.⁹⁹ According to the report, and based in large part upon evidence provided by former Clemens personal trainer Brian McNamee, Clemens had utilized steroids and human growth hormone to lengthen his career.¹⁰⁰ In response to the report, Clemens's attorney, Rusty Hardin, immediately issued a statement denying the allegations.¹⁰¹

The issuance of the Mitchell Report led the U.S House Oversight and Government Reform Committee to initiate hearings on the matter.¹⁰² Among those subpoenaed to testify were Clemens and McNamee.¹⁰³ At the hearing, Clemens continued to deny the allegations contained in the Mitchell Report, stating: "Let me be clear. I have never taken steroids or HGH."¹⁰⁴ McNamee, however, disputed Clemens's contentions.¹⁰⁵ McNamee stated: "During the time that I worked with Roger Clemens, I injected him on numerous occasions with steroids and human growth hormone."¹⁰⁶ After a day of testimony, it appeared clear that much of the committee believed that Clemens was lying.¹⁰⁷ In weighing the men's conflicting testimony, it was perhaps significant that George Mitchell had earlier bolstered the credibility of McNamee during his testimony before the

98. See also Daniel Healey, *Fall of the Rocket: Steroids in Baseball and the Case Against Roger Clemens*, 19 MARQ. SPORTS L. REV. 289, 306–07 (2008) ("Released in December 2007, after a twenty-month investigation, 'the Mitchell Report' detailed the widespread proliferation of anabolic steroids, HGH, and other PEDs throughout baseball as early as the mid-1980s, and made recommendations for more effective and transparent testing.").

99. PEARLMAN, *supra* note 97, at 303–04.

100. *Id.* at 304 ("From pages 167 to 175, the portrait painted of Clemens is that of a desperate man eager to load up on steroids and human growth hormone in an attempt to prolong his career.").

101. *Id.* at 305 ("'He has not been charged with anything,' Hardin said. 'He will not be charged with anything and yet he is being tried in the court of public opinion with no recourse. That is totally wrong. There has never been one shred of tangible evidence that he ever used these substances and yet he is being slandered today.'").

102. See Healy, *supra* note 98, at 309 ("As Clemens challenged the Report's contents, the lawmakers on the House Oversight and Government Reform Committee 'felt compelled to respond,' subsequently issuing subpoenas to McNamee and the three men to whom he claimed he had administered PEDs: Clemens, Pettitte, and Knoblauch.").

103. *Id.*

104. Christian H. Brill & Howard W. Brill, *Take Me Out to the Hearing: Major League Baseball Players Before Congress*, 5 ALB. GOV'T L. REV. 90, 108 (2012).

105. *Id.*

106. *Id.*

107. PEARLMAN, *supra* note 97, at 312.

Committee.¹⁰⁸ Mitchell “noted that the ‘only penalty Mr. McNamee faced in dealing with federal prosecutors was perjury . . . mean[ing] . . . he faced legal jeopardy only if he lied.’”¹⁰⁹ At one point during the hearing, an exchange between Clemens and Representative Elijah Cummings of Maryland set the tone:

“Mr. Clemens,” Cummings said, “I’m reminding you that you are under oath.”

“Mr. Congressman,” Clemens replied at last, “Andy Pettitte [another player who confirmed that Clemens had utilized HGH] is my friend. He was my friend before this. He will be my friend after this. I think Andy has, uh, misheard. I think he misremembers our conversation.”

Cummings sighed. “It’s hard to believe you,” he said. “It’s hard to believe you, sir. You’re one of my heroes, but it’s hard to believe you.”¹¹⁰

Clearly believing McNamee’s version of events,¹¹¹ the Committee eventually instructed the DOJ to investigate whether Clemens had committed perjury in lying to them during the hearing.¹¹²

In 2010 a federal Grand Jury in the District of Columbia indicted Clemens for obstruction of Congress and perjury.¹¹³ Clemens was offered a plea bargain that would have offered him sentencing finality in the form of no prison time at all.¹¹⁴ Continuing to proclaim his innocence, however, he opted to proceed to trial in an effort to clear his name.¹¹⁵ If he lost, he

108. Healy, *supra* note 98, at 309.

109. *Id.*

110. PEARLMAN, *supra* note 97, at 312.

111. Brill & Brill, *supra* note 104, at 108.

112. *Id.*

113. Michael S. Schmidt, *Clemens Lied About Doping, Indictment Charges*, N.Y. TIMES, Aug. 19, 2010, http://www.nytimes.com/2010/08/20/sports/baseball/20clemens.html?_r=0.

114. Douglas A. Berman, *Clemens’ Counsel Says Client Was Offered Plea Deal for Probation Term*, SENT’G LAW & POL’Y (June 22, 2012, 11:52 AM), http://www.sentencing.typepad.com/sentencing_law_and_policy/2012/06/clemens-counsel-says-client-was-offered-pleadeal-for-probation-term.html.

115. *See id.* (“In the interview Thursday, Hardin [Clemens’ attorney] said his client was offered the deal in December 2009 and immediately rejected it. His reason was, ‘I didn’t lie to Congress,’ Hardin said.”).

faced a likely sentence of up to two years in federal prison under the federal sentencing guidelines.¹¹⁶

During Clemens's first trial, the judge ordered a mistrial after the government repeatedly revealed prohibited information to the jury.¹¹⁷ During Clemens's second trial in 2012, the government relied heavily on the testimony of Brian McNamee, despite having utilized 93 agents and having conducted 179 interviews during the investigation in hopes of finding someone more credible to support the prosecution's allegations.¹¹⁸ Clemens's defense team, led by Rusty Hardin, countered with damning evidence regarding McNamee, including that he had lied to criminal investigators during an incident in Florida.¹¹⁹ After a nine-week trial, Clemens was found not guilty.¹²⁰ According to one juror who was questioned after the proceeding, they "didn't see anything to be prosecuted."¹²¹

Despite having won acquittal in the matter, Clemens continues to suffer the collateral consequences of his indictment, both financial and reputational.¹²² Most notably, in January of 2013, Clemens was included on the ballot for election to the

116. *Lawyer says Roger Clemens Risked Prison by Rejecting Plea Offer*, THE SEATTLE TIMES (June 22, 2012, 7:00 PM), <http://www.seattletimes.com/text/2018495717.html>.

117. Juliet Macur, *Clemens Found Not Guilty of Lying About Drug Use*, N.Y. TIMES, June 18, 2012, <http://www.nytimes.com/2012/06/19/sports/baseball/roger-clemens-is-found-not-guilty-in-perjury-trial.html?pagewanted=all&r=0>.

118. Tom Verducci, *Despite Verdict, Clemens Still on Trial in Court of Public Opinion*, SPORTS ILLUSTRATED, June 19, 2012, available at http://www.sportsillustrated.cnn.com/2012/writers/tom_verducci/06/19/roger.clemens.verdict/index.html.

119. O'Keeffe et al., *supra* note 96.

120. Macur, *supra* note 117.

121. Teri Thompson & Nathaniel Vinton, *Roger Clemens Perjury Trial May Have Been Doomed from the Start, According to Jurors Who Heard Case*, N.Y. DAILY NEWS (June 20, 2012, 1:56 AM), <http://www.nydailynews.com/sports/i-team/roger-clemens-perjury-trial-doom-ed-start-jurors-heard-case-article-1.1098978>.

122. See Macur, *supra* note 117 ("All along, though, Mr. Clemens said he knew even an acquittal would not salvage his reputation, which he said had been permanently damaged by the government's accusations that he used performance-enhancing drugs."); James McCusker, *As Clemens Case Shows, Trial Costs Go Beyond Money*, HERALDNET (June 22, 2012, 12:01 AM), <http://www.heraldnet.com/article/20120622/BIZ/706229900> ("A federal trial is an costly pastime for defendants, and Clemens paid a multimillion-dollar price to maintain his innocence. The real economic cost of Clemens' two trials though, is not the marginal cost to taxpayers or the cash costs he paid for his defense. It is the cost to his reputation, which has significant economic value and is now diminished despite the verdict.").

Baseball Hall of Fame.¹²³ Though just a few years earlier he had been considered a sure thing for election on the first ballot,¹²⁴ he received only 37.6% of the votes—well short of the required 75% to be elected.¹²⁵ In response, he said, “After what has been written and said over the last few years, I’m not overly surprised. . . . To those who did take the time to look at the facts . . . we very much appreciate it.”¹²⁶

III. LESSONS LEARNED

There are many observations to make about the state of our criminal justice system from these four white-collar prosecutions.¹²⁷ For the remainder of this article I will focus on what these stories tell us about our quest for finality.

A. Plea Bargaining

First, we must be careful not to value finality over accuracy, an issue of particular importance when considering the role of plea bargaining as a tool to achieve sentencing finality for both the prosecution and the defense.¹²⁸ Consider that almost ninety-seven percent of convictions in the federal system today come from a plea of guilt.¹²⁹

The most telling examples of the power of plea bargaining from the above stories are the Broadcom and Africa Sting cases.¹³⁰

123. Press Release, Baseball Hall of Fame, 2013 Hall of Fame Vote a Shutout (Jan. 9, 2013), available at <http://www.baseballhall.org/news/press-releases/2013-hall-fame-vote-shutout>.

124. O’Keeffe et al., *supra* note 96.

125. Mitchell, *supra* note 94.

126. *Id.*

127. See *supra* Parts II.A–D.

128. See Lucian E. Dervan, *Plea Bargaining’s Survival: Financial Crimes Plea Bargaining, a Continued Triumph in a Post-Enron World*, 60 OKLA. L. REV. 451, 478–80 (2007) (discussing the rise of plea bargaining in the nineteenth and twentieth centuries); see also Dervan, *Bargained Justice*, *supra* note 21, at 61–64 (discussing “the force behind plea bargaining’s rise” in America); Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON. & POL’Y 645 (2011) [hereinafter Dervan, *Overcriminalization*] (illustrating the “co-dependent nature of plea bargaining and overcriminalization”).

129. U.S. SENTENCING COMM’N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C (2012), available at http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/FigureC.pdf.

130. See *supra* notes 8, 30, 34–36, 68 and accompanying text.

In neither of these matters did the government have adequate factual evidence of guilt to win at trial.¹³¹ Instead, the government tried to utilize the incentives it could offer defendants to plead guilty to bring these cases to finality and create even greater incentives for the remaining defendants to follow suit.¹³²

Though in the Broadcom matter Judge Carney later stated that Samueli had done nothing criminal, Samueli was willing to falsely confess guilt in an effort to achieve finality and certainty with regard to his sentence.¹³³ The government in the case was also willing to permit Samueli to plead guilty and testify, despite his repeated assertions of innocence. It appears that the government engaged in this activity to bring finality to Samueli's case and, perhaps, also create added incentive for the remaining defendants to take the same path and avoid a trial.¹³⁴ Fortunately for justice, the remaining defendants did not take the same path as Samueli and the trial revealed the truth.¹³⁵ Similarly, for three of the defendants in the Africa Sting case, the incentives to bring finality to the matter and plead guilty to a charge carrying a lower sentence were significant enough to cause them to admit guilt in a case so mired with factual and legal shortfalls that the government eventually moved to dismiss the entire case with prejudice.¹³⁶

It is disturbing to recognize that if all of the defendants in the Broadcom or Africa Sting cases had taken plea deals, we would likely never have learned just how tenuous the government's positions were in these matters.¹³⁷ Further, evidence demonstrates

131. *Id.*

132. *See, e.g.,* Dervan, *Bargained Justice*, *supra* note 21, at 64 (“[T]he incentives for defendants to plead guilty are greater than at any previous point in the history of our criminal justice system.”).

133. *See supra* notes 28–30, 33 and accompanying text (describing the overturning of Samueli's previous guilty plea).

134. *See id.* (noting that the government granted Samueli immunity to testify against another Broadcom executive even though he had already plead guilty).

135. *Id.*

136. *See supra* notes 52–53 and 67–69.

137. *See, e.g.,* Dervan, *Overcriminalization*, *supra* note 128, at 648 (describing a situation where all of the defendants plead guilty and controversial issues of law and fact went unresolved); *id.* (“Unfortunately, despite the grave concerns expressed from various corners of the legal establishment about the obstruction of justice charges in the Computer Associates case, the appellate courts never had the opportunity to scrutinize the validity of this novel and heavily criticized expansion of criminal law. The government's new legal theory went untested in the Computer Associates case due to the symbiotic relationship between plea bargaining and overcriminalization. Three of the five defendants in the Computer Associates case pleaded guilty immediately, while Kumar and

that it is not unlikely that all the defendants in such a case might plead guilty, even if they were innocent.¹³⁸ During 2011 and 2012, Professor Vanessa Edkins and I conducted a psychological study in which we placed students in a situation where they were accused of cheating.¹³⁹ All the students, regardless of factual guilt or innocence were then offered a deal.¹⁴⁰ Of the guilty participants, 89% took the plea deal. Of the innocent participants, 56% took the plea deal.¹⁴¹ Given the incentives plea bargaining creates for defendants to falsely admit guilt and the observed utilization of plea bargaining as a tool to mask flawed criminal cases where the evidence alone is insufficient for conviction at trial, perhaps it is time to reevaluate our reliance on bargained justice.¹⁴²

B. Winning at Any Cost

The second observation to make from the four stories is that the government must be careful not to confuse achieving a victorious sentencing finality with achieving a just one.¹⁴³ The

Stephens gave in to the pressures of plea bargaining two months after filing their unsuccessful motion to dismiss before the district court. As might be expected in today's enforcement environment, not even the corporation challenged the government in the matter. Computer Associates entered into a deferred prosecution agreement that brought the government's investigation to an end.”).

138. See, e.g., Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 28–48 (2013) [hereinafter Dervan & Edkins, *The Innocent Defendant's Dilemma*] (explaining the results of a psychological study of the relationship between plea bargaining and innocence); *id.* at 48 (“[M]ore than half of the study participants were willing to forgo an opportunity to argue their innocence in court and instead falsely condemned themselves in return for a perceived benefit.”); see also Vanessa A. Edkins & Lucian E. Dervan, *Pleading Innocents: Laboratory Evidence of Plea Bargaining's Innocence Problem*, CURRENT RESEARCH IN SOCIAL PSYCHOLOGY 14, 19 (2012), http://www.uiowa.edu/~grpproc/crisp/crisp21_2.pdf (“[I]n both of our ‘innocent’ conditions, participants were more likely to accept a plea than to take their case to trial.”).

139. Dervan & Edkins, *The Innocent Defendant's Dilemma*, *supra* note 138 at 28–33.

140. *Id.* at 31–33.

141. *Id.* at 34; see also *id.* at 36 (noting that “guilty defendants in Professor Covey’s mass exoneration cases acted almost exactly as did guilty students in our experiment” and indicating that Dervan and Edkins’ study might underrepresent the true extent to which innocent defendants will falsely confess in return for leniency when facing real prison time).

142. See generally, *Hearing on Stolen or Counterfeit Goods Legislation Before the Subcomm. On Crime, Terrorism, & Homeland Sec.*, 112th Cong. 2 (2012) (statement of Lucian E. Dervan, Assistant Professor of Law, Southern Illinois University School of Law).

143. See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 125–26 (2004) (discussing concern over the public’s perception that prosecutors care more about convictions than justice).

clearest example of the government making this mistake, though it is present to some degree in all of the stories examined herein, was in the Senator Stevens case.¹⁴⁴ According to the judge in the matter, the prosecutors committed various acts of significant misconduct, including knowingly using falsified business records, suppressing grand jury transcripts containing exculpatory information, and redacting exculpatory content from documents.¹⁴⁵ As the special prosecutor explained during Congressional hearings into the matter, these things were done because of the government's desire to win.¹⁴⁶ But the pursuit of justice in a case like the Stevens prosecution is not merely about bringing the case to finality once the indictment has been handed down.¹⁴⁷ Rather, the indictment is meant only to be the beginning of the true inquiry into whether criminal misconduct has occurred.¹⁴⁸

As the government's own press release announcing Stevens's indictment stated: "The indictment is part of an ongoing federal criminal investigation in the State of Alaska. An indictment is merely an allegation. Defendants are presumed innocent until and unless proven guilty in a court of law."¹⁴⁹ Today, however, whether it is through coercive plea agreements as evidenced in the Broadcom case or aggressive prosecutorial tactics as was seen in the Stevens prosecution, sometimes winning is the primary focus and justice is left on the sidelines.¹⁵⁰

The other cases examined herein offer additional examples of this phenomenon, including threatening Broadcom co-founder Nicholas with having his thirteen-year-old son testify about his father's drug habits.¹⁵¹ Furthermore, in Roger Clemens's

144. See *supra* Part II.C.

145. Jones, *supra* note 83, at 417–18.

146. Neubauer, *supra* note 91.

147. See *Berger v. United States*, 295 U.S. 78, 88 (1935) ("It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."); accord *Medwed*, *supra* note 143, at 134–36 (quoting the *Berger* case to show the injustices that arose with respect to the prosecution of Mr. Ruehle).

148. See U.S. Senator Indicted, *supra* note 73 (describing the indictment process of Senator Stevens).

149. *Id.*

150. See *supra* Parts II.A., II.C.

151. Michael Hilzik, *Judicial System Takes a Hit in Broadcom Case*, L.A. TIMES, July 18, 2010, <http://www.articles.latimes.com/2010/jul/18/business/la-fi-hilzik-20100718>

first trial the government presented prohibited evidence to the jury on the second day.¹⁵² In response, the judge declared a mistrial saying, “I am troubled by this. The government should have been more cautious.”¹⁵³ He added that he felt the prosecutors’ actions had ensured that “the ability of Mr. Clemens to get a fair trial with this jury would be very difficult, if not impossible.”¹⁵⁴ Though only the second day of trial, this incident represented the second time in two days that the prosecution had presented such prohibited evidence to the jury.¹⁵⁵ Given the significant ramifications and injustices that can flow from a focus by the government on winning at any cost and the difficulty that exists in quelling such sentiments in an adversarial system,¹⁵⁶ perhaps we should begin considering other mechanisms to assist in ensuring all defendants receive a fair trial, such as requiring universal open file discovery.¹⁵⁷

C. The Collateral Consequences of Victory

The final observation from the stories examined in this article is that, in many ways, the quest for true finality in criminal cases is fleeting.¹⁵⁸ While the legal profession often discusses the

(noting that in an attempt to pressure defendant Nicholas, the government had “threatened to force Nicholas’ 13-year-old son to testify about his father and drugs”).

152. Nina Totenberg, *Judge Declares Mistrial in Roger Clemens Case*, NPR (July 14, 2011, 7:40 PM), <http://www.npr.org/2011/07/14/137868888/judge-declares-mistrial-in-roger-clemens-case>.

153. Richard A. Serrano, *Judge Declares Mistrial in Roger Clemens Perjury Case*, L.A. TIMES, July 14, 2011, <http://www.articles.latimes.com/2011/jul/14/news/la-pn-clemens-mistrial-20110714>.

154. Totenberg, *supra* note 152.

155. *See id.* (“[D]uring opening statements, the prosecutor had told jurors he would call a series of baseball players to talk about their use of steroids and HGH. But the judge had previously said he would not allow that testimony because it would subject Clemens to guilty by association.”).

156. *See* sources cited *supra* note 6.

157. The discussion of prosecutorial misconduct contained in this article is not intended to imply the author believes there is rampant misconduct within the Department of Justice. Quite to the contrary, the Department of Justice has routinely demonstrated that such misconduct, if detected, will not be tolerated. However, as the consequences of even one prosecutor engaging in undiscovered misconduct can have grave and life-altering consequences for defendants, this article argues that consideration should be given to further mechanisms to ensure any misconduct that does occur is detected.

158. *See National Inventory of the Collateral Consequences of Conviction*, *supra* note 6 (discussing the consequences of conviction beyond sentencing).

collateral consequences of conviction,¹⁵⁹ today we must recognize that even the acquitted face the lingering collateral consequences of indictment itself.¹⁶⁰ Each defendant in the four cases examined today was eventually exonerated:

- Roger Clemens won an acquittal at trial.¹⁶¹
- The charges were dropped against Senator Stevens after it was revealed that significant exculpatory evidence supporting his version of events had been withheld by the government.¹⁶²
- All twenty-two of the Africa Sting defendants, including the ones who had already pleaded guilty, were vindicated after the government moved to dismiss the entire case with prejudice.¹⁶³
- The charges against Dr. Samueli and the other Broadcom defendants were dismissed and the judge went as far as to note that Samueli had not, in fact, engaged in wrongdoing based on the evidence presented.¹⁶⁴ He was, instead, the victim of an aggressive and flawed prosecution.¹⁶⁵

If one were to focus only on the collateral consequences of conviction, it would appear that these parties had none, because there were no convictions. Yet each of these defendants suffered significant and often irreparable collateral consequences from indictment alone. Roger Clemens lost years of his life and

159. *Id.*

160. See Baer, *supra* note 6 (discussing the collateral consequences of an indictment); David Glovin, *Stockman Reveals Reputations Don't Return When Prosecutors Walk*, BLOOMBERG MARKETS MAG. (June 23, 2010), <http://www.bloomberg.com/news/2010-06-23/stockman-reveals-no-way-to-get-reputations-back-when-prosecutors-walk-away.html> (“Though exonerated defendants may sue for fees, there is no legal provision for repairing a damaged reputation.”).

161. Macur, *supra* note 117.

162. Jones, *supra* note 83, at 418.

163. Koehler, *Africa Sting – DOJ Moves to Dismiss Charge*, *supra* note 69; Wayne, *supra* note 67.

164. Reporter’s Transcript of Proceedings, *supra* note 29, at 5197.

165. See *id.* at 5195 (holding that “the government ha[d] intimidated and improperly influenced the witnesses critical to Mr. Ruehle’s defense”).

extraordinary amounts of money defending against the government's allegations.¹⁶⁶ Despite his eventual victory, he continues to suffer the taint of the allegations and is unlikely to ever be elected to the baseball Hall of Fame.¹⁶⁷ Senator Stevens won his freedom, but still lost his senate seat.¹⁶⁸ Despite being the longest serving Republican member of the Senate at the time of his indictment, the weight of the allegations were too much and brought his career to an end.¹⁶⁹ All of the twenty-two Africa Sting defendants suffered as a result of their indictments, despite the charges eventually being dismissed.¹⁷⁰ In particular, we know that though the government was never able to prove that David Painter, former CEO of 3S, committed a crime, he lost his freedom for five weeks while awaiting release after arrest, as well as his home, his job, and his retirement in the ordeal.¹⁷¹ Today, he has been forced to start his career again;¹⁷² a punishment not for what he had done, but merely because he had been indicted.¹⁷³ And finally, even Samuelli suffered some long-term collateral consequences after the Broadcom matter.¹⁷⁴ Though he appears to have regained his original position more successfully than the others examined herein, he still lost several years of his life and untold amounts of money to the case, along with whatever personal consequences might have resulted from his decisions in the matter.¹⁷⁵ All of these examples demonstrate the spoils of victory for those accused of crimes in today's system. Given the significant collateral consequences that accompany indictment alone, perhaps it is time to begin increasing the rights of

166. McCusker, *supra* note 122.

167. *Id.*; O'Keeffe, *supra* note 96.

168. Yardley, *supra* note 82.

169. *Id.*

170. *See* Wayne, *supra* note 67 (describing how one of the defendants asked after the dismissal "where he goes to get his reputation and two full years of his life back").

171. Oliver, *supra* note 40.

172. *Id.*

173. *Id.*

174. *See* Helene Elliott, *NHL Reinstates Ducks' Owner Henry Samuelli*, L.A. TIMES (Nov. 12, 2009), http://www.latimesblogs.latimes.com/sports_blog/2009/11/new-york-november-12-2009-national-hockey-league-commissioner-gary-bettman-today-reinstated-henry-samuelli-as-owner-of-t.html (discussing how it took almost a year and a half for the NHL to reinstate Samuelli as owner of the Duck franchise).

175. *See* Rachanee Srisavasdi, *Judge Kills Samuelli's Guilty Plea*, ORANGE COUNTY REG. (Dec. 9, 2009, 1:17 PM), <http://www.oregister.com/articles/samuelli-223282-options-guilty.html> (describing how Samuelli felt the case "weighed him down the last few years").

defendants at the investigatory stage of proceedings and time to begin creating additional barriers to make the bar for indictment higher.

IV. CONCLUSION

In closing, let us consider one more story regarding the quest for finality—the story of Aaron Swartz.¹⁷⁶ At the age of fourteen, Aaron Swartz co-wrote the RSS specification.¹⁷⁷ The RSS specification is “a system that allows streaming of news from across the Internet onto a single reader.”¹⁷⁸ He then went on to develop Reddit, a social news website later bought by Conde Nast in 2006.¹⁷⁹ After this sale, Swartz began engaging in internet activism, focusing particularly on internet censorship and issues surrounding making information freely accessible to the public.¹⁸⁰ In 2009, the FBI investigated Swartz’s potential involvement in the hacking of PACER and the release of millions of federal court documents.¹⁸¹ At the time, PACER charged eight cents a page, resulting in an alleged loss of \$1.5 million.¹⁸² No charges were brought.¹⁸³

In 2011, in another apparent act in support of making information freely accessible on the internet, Swartz allegedly connected his laptop to the MIT computer network and downloaded copies of the JSTOR library, an online subscription service for science and academic articles.¹⁸⁴ According to the federal indictment later handed down in the case:

176. See Wesley Yang, *The Life and Afterlife of Aaron Swartz*, N. Y. MAG., Feb. 8, 2013, available at <http://www.nymag.com/news/features/aaron-swartz-2013-2>.

177. Michael Martinez, *Internet Prodigy, Activist Aaron Swartz Commits Suicide*, CNN.COM (Jan. 12, 2013, 11:41 AM), <http://www.cnn.com/2013/01/12/us/new-york-reddit-founder-suicide>.

178. Yang, *supra* note 176.

179. Martinez, *supra* note 177.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id. But cf.* Yang, *supra* note 176 (“Malamud described Swartz as having been ‘terrified’ by the FBI investigation into the pacer download. Resnick recalls him worrying that the FBI was going to break down his door at any moment. And yet it didn’t seem to deter him – he continued to plot and carry out hacktivist assaults on databases designed to withhold information behind a fairly steep paywall.”).

184. Press Release, U.S. Attorney’s Office, Alleged Hacker Charged with Stealing Over Four Million Documents from MIT Network (July 19, 2011), available at <http://www.justice.gov/usao/ma/news/2011/July/SwartzAaronPR.html>.

During November and December, 2010, Swartz used the “ghost laptop” (i.e., the Acer laptop) at MIT to make over two million downloads from JSTOR. This is more than one hundred times the number of downloads during the same period by all the legitimate MIT JSTOR users combined. Of the downloads, approximately half were research articles, with the remainder being reviews, news, editorials, and miscellaneous documents.

.....

In all, Swartz stole approximately 4.8 million articles, a major portion of the total archive in which JSTOR had invested. Of these, approximately 1.7 million were made available by independent publishers for purchase through JSTOR’s Publisher Sale Service.

Swartz intended to distribute a significant portion of JSTOR’s archive of digitized journal articles through one or more file-sharing sites.¹⁸⁵

Swartz never actually distributed any of the articles and eventually returned the materials to JSTOR and MIT.¹⁸⁶ In response to his actions, and although MIT never issued a formal statement regarding whether it wanted Swartz prosecuted or not, Swartz was indicted on thirteen counts, seven of which fell under the wire fraud and computer fraud statutes.¹⁸⁷ The indictment carried a potential sentence of several decades in prison.¹⁸⁸ According to published reports, however, the government offered Swartz a plea bargain that would offer him sentencing finality.¹⁸⁹ In return for an admission of guilt, the government would

185. Indictment at 8–9, *United States v. Swartz*, No. 11-cr-10260 (D. Mass. 2011), available at <http://www.documentcloud.org/documents/217117-united-states-of-america-v-aaron-swartz>.

186. Glenn Greenwald, *The Inspiring Heroism of Aaron Swartz*, THE GUARDIAN (Jan. 12, 2013, 4:25 PM), <http://www.guardian.co.uk/commentisfree/2013/jan/12/aaron-swartz-heroism-suicide>.

187. Superseding Indictment at 11–12, *United States v. Swartz*, 2012 WL 4341933 (D. Mass. 2012) (No. 11-cr-10260-NMG).

188. Yang, *supra* note 176.

189. *Id.*

recommend a sentence of six to eight months.¹⁹⁰ The government also made clear that if he refused the deal, they would seek a sentence of seven years if he was convicted at trial.¹⁹¹

Swartz's trial was scheduled to begin in February 2013.¹⁹² However, Swartz committed suicide in his Brooklyn apartment in January 2013.¹⁹³ According to his family, Swartz's death was the result of "a criminal justice system rife with intimidation and prosecutorial overreach."¹⁹⁴ Swartz's father even made striking comments alleging that his son had, in essence, been "killed by the government."¹⁹⁵ Shortly after his death, the DOJ quietly dismissed the charges against him, thus bringing finality to his case.¹⁹⁶ It is troubling that of all of the defendants examined herein, Swartz was the only one who could arguably be said to have achieved true "finality"—a finality achieved on his own terms.¹⁹⁷ The deep emotional and psychological reasons for his tragic suicide cannot be known, but, perhaps, it was in part fueled by the actions of the government as it sought finality in the case and by Swartz's realization that his quest for finality within the confines of our existing criminal justice system was, in some ways, fleeting.¹⁹⁸

190. *Id.*

191. *Id.*

192. Kevin Poulsen, *First 100 Pages of Aaron Swartz's Secret Service File Released*, WIRED (Aug. 12, 2013, 5:00 PM), <http://www.wired.com/threatlevel/2013/08/swartz-foia-release>.

193. Yang, *supra* note 176.

194. Greenwald, *supra* note 186 ("Decisions made by officials in the Massachusetts US Attorney's office and at MIT contributed to his death. The US Attorney's office pursued an exceptionally harsh array of charges, carrying potentially over 30 years in prison, to punish an alleged crime that had no victims. Meanwhile, unlike JSTOR, MIT refused to stand up for Aaron and its own community's most cherished principles.").

195. Yang, *supra* note 176.

196. Jessica Guynn, *Feds Drop Charges Against Late Internet Activist Aaron Swartz*, L.A. TIMES (Jan. 14, 2013), <http://www.articles.latimes.com/2013/jan/14/business/la-fi-tn-aaron-swartz-20130114>.

197. *See generally* Yang, *supra* note 176 (describing Swartz' life and eventual suicide).

198. *Id.*