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THE FEDERAL BRIBERY STATUTE AND THE ETHICS OF PURCHASING TESTIMONY

CAMILLE KNIGHT*

INTRODUCTION

For eleven years, prosecutors paid Leslie White for his testimony.¹ Mr. White, a convicted kidnapper and bank robber, testified against several fellow inmates with whom he was housed while awaiting trial for various charges.² Los Angeles County prosecutors must have thought he was an extremely good listener, since most of the time the inmates he testified against confessed their crimes to him.³ With this information, White contacted prosecutors, who gave him leniency in exchange for his testimony.⁴ In the process, he helped put at least a dozen accused murderers, burglars, arsonists, and other felons in jail.⁵ The only problem was that, in all of those cases, White lied.⁶

In 1988, White described conversations he had with fellow inmates during which he learned what charges they faced and the details of their cases. He used the facts obtained in order to fabricate the "confessions" of others he later provided to prosecutors.⁷ He even demonstrated his technique for an audience of law enforcement officials.⁸ In their presence, White telephoned a district attorney and, falsely posing as a police officer, was able to obtain detailed information about a murder case.⁹ After this startling demonstration, a review of Los Angeles County criminal

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1. Ted Rohrlich, *Jail Informant Owns Up to Perjury in a Dozen Cases*, L.A. TIMES, Jan. 4, 1990, at A1.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Rohrlich, *supra* note 1, at A1.

7. *Id.*

8. *Id.*

9. *Id.*

cases revealed that dozens of people might have been convicted on the basis of perjured testimony provided by White and other savvy inmates employing similar techniques.¹⁰

Ten years after White's demonstration, a federal district court in Kansas convicted Sonya Singleton of conspiracy to distribute cocaine and money laundering.¹¹ The evidence against Singleton included records of several wire transfers bearing her signature and the testimony of Napoleon Douglas, an alleged co-conspirator.¹² In return for Douglas' testimony against Singleton, the prosecutors promised him that they would 1) request a downward departure¹³ below his mandated sentence, 2) not prosecute Douglas for drug-related activities currently under investigation, and 3) advise the sentencing court and the Mississippi Parole Board of his cooperation.¹⁴

On July 10, 1998, the Court of Appeals for the Tenth Circuit overturned Singleton's conviction, holding that the government violated 18 U.S.C. § 201(c)(2)¹⁵ by entering into the plea agreement with Douglas and effectively offering him what the court deemed a bribe in exchange for his testimony.¹⁶ The three-judge panel found

10. Philip Hager & Ted Rohrlich, *Justices Limit Access to Informant Files*, L.A. TIMES, Dec. 4, 1990, at A3.

11. *United States v. Singleton*, 144 F.3d 1343, 1343 (10th Cir. 1998), *vacated and overruled by United States v. Singleton*, 165 F.3d 1297, 1297 (10th Cir. 1999). Singleton was convicted of one count of conspiracy and seven different counts of money laundering. *Singleton*, 165 F.3d at 1297. She received 46 months imprisonment on each count, to be served concurrently, followed by three years of probation. *Id.*

12. *Singleton*, 144 F.3d at 1344.

13. *Id.* The Sentencing Reform Act of 1984 (as amended) contains provisions allowing prosecutors to motion courts to reduce sentences below mandatory minimums if a defendant has provided assistance in the prosecution of other individuals. See 18 U.S.C. § 3553(e) (Supp. 1999) (allowing for reducing sentences below the mandatory minimum). See also FED. R. CRIM. P. 35(b) (allowing for reduction for post-sentencing assistance).

14. *Singleton*, 144 F.3d at 1344. The government retained sole discretion to determine whether Douglas' cooperation constituted "substantial assistance." *Id.* For this reason, Douglas had a motive to provide as much testimony as possible against his co-conspirators. In the written plea agreement, the government did not explicitly promise to move for a reduced sentence. *Id.*

15. 18 U.S.C. § 201(c)(2) states:

[w]hoever . . . directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee or either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom . . . shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 201(c)(2) (Supp. 1999).

16. *Singleton*, 144 F.3d at 1344.

that the government offered something of value—its promise not to charge Douglas for certain crimes and to intervene on his behalf in front of the sentencing court and the parole board—in exchange for his testimony.¹⁷ The court noted that the statute covered whomever makes such offers in exchange for testimony, and that the government was included in the class of people the statute intended to regulate.¹⁸ Finally, the court stated that even though the government's promises were made in exchange for "truthful" testimony, the statute did not distinguish between true and false testimony nor did it justify such promises.¹⁹

The ruling sparked widespread controversy. Prosecutors, shocked by the ruling, proclaimed that the decision was contrary to precedent and common practice.²⁰ Attorneys for defendants across the country applauded the ruling and rushed to file motions to exclude testimony of co-conspirators and other witnesses

17. *Id.*

18. *Id.* at 1358.

19. *Id.* at 1360.

20. See Mary Hladky, *Prosecutors Eager to Fight Exclusion of Testimony Derived from Leniency*, BROWARD DAILY BUS. REV., July 30, 1998, at A1 (citing a motion filed by federal prosecutors in the Southern District of Florida in response to a defendant's motion to exclude testimony in *United States v. Lowery*). The prosecutors argued that the *Singleton* ruling was a radical departure from traditional prosecutorial power, and that application of *Singleton* would make criminals out of federal prosecutors and judges across the country. *Id.* Furthermore, the rule would force suppression of important evidence and cripple law enforcement agencies. See also Shannon P. Duffy, *Bombshell Singleton Ruling Vacated by 10th Circuit*, THE LEGAL INTELLIGENCER, July 14, 1998, at 3 (citing a brief filed by the Department of Justice in response to a defendant's motion to exclude testimony pursuant to the decision in *Singleton*). Assistant U.S. Attorney Robert Zauzmer stated that the *Singleton* ruling could have a devastating prospective application in many criminal investigations if followed, and that the court's ruling was contrary to a prosecutorial practice that has flourished for centuries. *Id.* See also Shannon P. Duffy, *Local Defenders Quickly Jump on 10th Circuit's Singleton Bandwagon. Prosecutors: Decision Wrong; Cite Volumes of Precedent*, THE LEGAL INTELLIGENCER, July 13, 1998, at 1 (citing a response by the U.S. Attorney's Office to a defendant's motion to exclude evidence filed in the Eastern District of Pennsylvania). Assistant U.S. Attorneys Peter F. Schenck and Frank R. Costello, Jr. argued that the *Singleton* opinion was without precedent, and that Congress never intended for § 201(c)(2) to apply to prosecutors, because it would then conflict with other congressional grants of authority allowing common prosecutorial practices. *Id.* Furthermore, Schenck and Costello argued that volumes of precedent supported the well-known prosecutorial practice of promising witnesses leniency in exchange for testimony. *Id.* See also David E. Rovella & Gail Diane Cox, *Fallout from 'Singleton' Bribe Ruling*, NAT'L. L.J., Aug. 24, 1998, at A1 (stating Assistant U.S. Attorney Sean Connelly's opinion that the ruling "works absurd results," and setting the prosecutors' main argument that without the use of plea bargains, caseloads of courts would multiply greatly and strain court resources).

testifying pursuant to plea agreements.²¹ Within days, two separate Senate bills were proposed to amend the statute so as to exempt prosecutors from its application.²² Prosecution and defense bar organizations lobbied Congress with regard to the pending legislation.²³ Commentators opined that the ruling would not stand, and that even if it did, § 201(c)(2) would be amended by Congress to exempt prosecutors.²⁴

The *Singleton* panel's statement that testimony provided pursuant to a plea agreement²⁵ is inherently unreliable is not a new concept.²⁶ In the background of the controversy sparked by *Singleton* is a longtime debate, in both constitutional and ethical contexts, regarding how much discretion prosecutors should have and how they should be allowed to utilize it.²⁷ Prosecutors defend

21. See Rovella & Cox, *supra* note 20, at A1 (stating that defense lawyers across the country began to file motions to exclude evidence after the *Singleton* ruling came down). See also Marcia Coyle & David E. Rovella, *Stunning Rulings Curtail Prosecutors' Power*, NAT'L L.J., July 20, 1998, at A1 (stating that "jubilant defense lawyers claimed vindication after years of complaints about such arrangements," and quoting Larry Pozner, President-elect of the National Association of Criminal Defense Lawyers, as stating that the ruling directly addressed "decades of government-sanctioned bribery").

22. S. 2311, 105th Cong. § 201 (1998); S. 2314, 105th Cong. § 201 (1998).

23. Robert Schmidt, *Bills Would Negate Ruling Against Deals for Leniency*, FULTON COUNTY DAILY REP., Aug. 3, 1998. Senator Kohl consulted the Justice Department office with regard to Senate Bill No. 2311, but the Justice Department "had not decided how to approach the bills." *Id.* The defense bar began efforts to slow introduction or passage of the legislation. *Id.* Gerald Lefcourt, president of the National Association of Criminal Defense Lawyers, thought that Congress should wait to amend the bill until after the Tenth Circuit held its en banc hearing. *Id.* Also, Lefcourt stated that Congress should take its cue from *Singleton* and hold hearings for prosecutors, defense lawyers, and judges to express their views on the issue. *Id.*

24. See Naftali Bendavid, *Ruling on Leniency Deals Raises Outcry*, CHI. TRIB., July 15, 1998, at A1 (quoting University of Chicago law professor Albert Alschuler as stating that he would be "willing to bet 99-1 that this decision will not be the law in a year").

25. Testimony provided pursuant to a plea agreement is hereinafter referred to as "accomplice testimony." While "accomplice" is a term defined by some courts, it is used here for purposes of grammatical simplicity. In this Comment, "accomplice testimony" may include, but is not limited to, testimony by accomplices, co-conspirators, confidential informants, jailhouse informants, and other persons testifying pursuant to plea agreements.

26. See Cynthia L. Cooper, *Let's Not Make a Deal*, A.B.A. J., Sept. 1998, at 34-35 (stating that what is new about the argument in *Singleton* is that Ms. Singleton's lawyer, John Val Wachtel, relied on the statutory construction of § 201(c)(2) instead of due process grounds). Wachtel states he adopted the argument from an article by J. Richard Johnston. *Id.* at 34. See also J. Richard Johnston, *Paying the Witness: Why is it OK for the Prosecution, but Not for the Defense?*, CRIM. JUST., Winter 1997, at 21.

27. See Coyle & Rovella, *supra* note 21, at A1 (stating that "few people" were aware of this issue, although it has been "lurking" in the wording of § 201(c)(2) for the past 36 years, and despite the fact that the issue was addressed in regard to defendants' Sixth Amendment rights).

their powers to offer plea agreements to witnesses by arguing that without such incentives, large criminal conspiracies would never be infiltrated.²⁸ Attorneys for defendants respond that suspects may be wrongly convicted on the basis of unreliable testimony tendered by accomplices, co-conspirators, or others motivated to gain leniency; these people frequently gain vastly reduced sentences.²⁹

This Comment examines *Singleton*, its progeny, and the arguments for and against the panel's decision. It then reviews the longtime debate over testimony given pursuant to plea agreements, focusing on both the inherent unreliability of testimony that such agreements produce and previous attacks on such testimony under due process and ethical principles. This Comment suggests that the current remedies to combat the unreliability of accomplice testimony are ineffective, and then explores the argument against accomplice testimony in relation to the rules of ethics governing the Bar. This Comment concludes that the admission of accomplice testimony pursuant to plea agreements is adverse to the stated interests of the American justice system, and that such plea agreements violate the rules of ethics. Finally, this Comment offers various remedies geared toward allowing prosecutors to investigate and prosecute crimes, while at the same time ensuring defendants' rights to a fair trial and enforcing the rules of ethics.

I. BACKGROUND

A. *The Facts in Singleton*

In 1992, investigators for the Wichita Police Department contacted Western Union agents to determine whether that wire service was being used to transfer the proceeds of drug sales.³⁰ The investigators discovered several wire transfers of more than \$1,000 that bore similar names and addresses of senders and recipients.³¹ The investigative trail led police to a group of local women who allegedly were recruited to wire the proceeds of cocaine sales to California, where the money would be used to

28. See Supplemental Brief for the United States at 15-16, *United States v. Singleton*, 144 F.3d 1343, 1343 (10th Cir. 1998) (No. 97-3178) (arguing that absent testimony pursuant to plea agreements, the government would not be able to prosecute conspirators in drug and RICO cases).

29. See, e.g., Rohrllich, *supra* note 1, at A1 (describing how several defendants were convicted on the basis of allegedly perjured testimony provided pursuant to plea agreements).

30. *Singleton*, 144 F.3d at 1343. It is unclear from the appellate decision exactly how the Wichita Police Department received information that the conspirators used Western Union to transfer drug money. *Id.*

31. *Id.*

purchase more cocaine.³² Singleton was identified as one of the wire senders after handwriting experts confirmed that her signature appeared on paperwork for several of the suspect wire transfers.³³

Singleton and others were charged with multiple counts of conspiracy to distribute cocaine and money laundering.³⁴ The government's evidence against Singleton included the testimony of her alleged co-conspirator, Douglas, who agreed to a plea agreement with the United States Attorney in exchange for his statements.³⁵ His agreement was not unique, but rather resembled thousands like it that are used every day by prosecutors across the country.³⁶

Under the agreement, the prosecution would not charge Douglas with violations of the Drug Abuse and Prevention Act arising out of the conspiracy under investigation.³⁷ He would plead guilty to money laundering.³⁸ If he testified against Singleton, the government would then move for downward departure of his sentence under 18 U.S.C. § 3553(e), and advise the Mississippi Parole Board of his cooperation.³⁹ However, the plea agreement clearly stated that the government retained sole discretion in determining whether Douglas' cooperation amounted to "substantial assistance."⁴⁰

Singleton was convicted on all charges. On appeal, the three-judge panel of the Court of Appeals for the Tenth Circuit considered whether the plea agreement with Douglas was prohibited either by § 201(c)(2) of the United States Code or Kansas Rule of Professional Conduct 3.4(b).⁴¹ If his testimony was

32. *Id.*

33. *Id.* at 1344.

34. *Id.*

35. *Singleton*, 144 F.3d at 1343.

36. See Stuart Taylor, Jr., *Cashing in the Coin of Leniency*, CONN. L. TRIB., July 13, 1998 (stating that the *Singleton* ruling, although unprecedented, was not an instance of a judge "straining for a pretext to invalidate an especially smelly deal. This was a routine deal.") See also Cooper, *supra* note 26, at 34 (stating that "[t]he agreement with the witness against Singleton is so ordinary that few would blink at it"); Emily Heller, *Defenders Saw Snitch Ruling as Too Good to be True—and It Was*, FULTON COUNTY DAILY REP., July 15, 1998 (quoting former U.S. Attorney Kent B. Alexander as stating: "[y]ou could not have come up with a more vanilla plea agreement," than the one offered to Douglas).

37. *Singleton*, 144 F.3d at 1344.

38. *Id.*

39. *Id.*

40. *Id.* Douglas' testimony about his understanding of the terms of the agreement was "somewhat confused." *Id.* However, Douglas understood that the actual award of a reduction in his sentence would be granted at the discretion of the sentencing court. *Id.*

41. Rule 3.4(b) of the *Kansas Rules of Professional Conduct* states: "[a] lawyer shall not . . . offer an inducement to a witness that is prohibited by

prohibited under either the statute or the ethical rule, it should have been suppressed.⁴² The court found that the government's conduct violated both the statute and the ethical rule.⁴³ Applying the language and plain meaning of § 201(c)(2), the court held that "the class of persons who can violate the statute is not limited."⁴⁴ The term "whoever," as it applies to § 201(c)(2), includes everyone who "either directly or indirectly gives, offers or promises [something] of value to [a witness], for or because of sworn testimony" before a court.⁴⁵ The government, therefore, violated the statute by promising things of value, such as not to prosecute Douglas for drug offenses and to intervene on his behalf in front of the sentencing court and the parole board.⁴⁶ The court reasoned

law." KANSAS RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) (1999). The rule is adopted from Rule 3.4 of the *ABA Model Rules of Professional Conduct*. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) (1999). See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7-28 (1999) which states:

[a] lawyer shall not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. *But in no event should a lawyer pay or agree to pay a contingent fee to any witness.* A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards.

Id. (emphasis added). The Model Code states:

there certainly can be no greater incentive to perjury than to allow a party to make payments to its opponents [sic] witnesses under any guise or on any excuse, and at least attorneys who are officers of the court to aid it in the administration of justice, must keep themselves clear of any connection which in the slightest degree tends to induce witnesses to testify in favor of their clients.

Id. at n.48 (citing *In re Robinson*, 103 N.E. 160 (1913)). Compare SUPREME COURT OF ILLINOIS RULES OF PROFESSIONAL CONDUCT, Art. VIII, Rule 3.3(15) (1999), which states that a lawyer shall not:

[p]ay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness' testimony or the outcome of the case, but a lawyer may advance, guarantee, or acquiesce in the payment of expenses reasonably incurred in attending or testifying, and a reasonable fee for the professional services of an expert witness.

Id.

42. *Singleton*, 144 F.3d at 1343.

43. *Id.* at 1359.

44. *Id.* at 1345.

45. 18 U.S.C. § 201(c)(2) (Supp. 1999).

46. *Singleton*, 144 F.3d at 1345. *Singleton* discussed a limited canon of construction recognized by the Supreme Court in *Nardone v. United States*, 302 U.S. 379, 383 (1937) and *United States v. Herron*, 87 U.S. 251, 255 (1873). *Singleton*, 144 F.3d at 1345-46. This canon provides that statutes do not apply to the government unless the text expressly includes the government. *Id.* at 1345. However, the court stated that this canon applies in only two classes of cases. *Nardone*, 302 U.S. at 383, cited in *Singleton*, 144 F.3d at 1345-46. The first class involves statutes that would deprive the government of established

that because Congress intended to “prevent fraud upon the federal courts in the form of inherently unreliable testimony,” the statute applied to the government.⁴⁷ The plea deal the government offered Douglas met the elements enumerated in the statute.⁴⁸ Specifically, the government’s promises were given “for or because of” his testimony; Douglas agreed to testify “in consideration of” the promises.⁴⁹ Indeed, the government’s promises were “things of value,” according to abundant precedent.⁵⁰ The court supported its conclusion by stating that if the statute’s purpose was to further justice in the American system, § 201(c)(2) logically applied to all parties within the system.⁵¹ Purchased testimony averted justice, thereby rendering the purchaser’s identity irrelevant.⁵²

Nine days after the *Singleton* decision was issued, the ruling

interests, such as statutes of limitation. *Id.* at 1346. The second class involves statutes that would be absurd if applied to the government, such as subjecting police officers to speed limits when chasing suspects. *Id.* The court found that even if § 201(c)(2) would deprive the government of an established interest, the canon of construction exempting the government from its application still did not apply. *Id.* Statutes apply to the government in cases where the operation of law is upon agents of the sovereign rather than on the sovereign itself, and in cases where a statute’s purpose is to prevent fraud, injury, or wrong. See *United States v. Arizona*, 295 U.S. 174, 184 (1935) (holding that the Secretary of the Interior was subject to a law prohibiting “any person” from constructing a dam on navigable waterways without the consent of Congress). See also *Nardone*, 302 U.S. at 384 (holding that federal agents were subject to the 1934 federal wiretap statute, which applied to “anyone”).

47. *Singleton*, 144 F.3d at 1346.

48. *Id.* at 1348.

49. *Id.*

50. *Id.* at 1350. The *Singleton* court went on to cite several cases supporting the proposition that “the promise of intangible benefits imports as great a threat to a witness’ truthfulness as a cash payment,” including *United States v. Cervantes-Pacheco*, 826 F.2d 310, 316 (5th Cir. 1987), *United States v. Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980), and *United States v. Kimble*, 719 F.2d 1253, 1255-57 (5th Cir. 1983). *Id.* at 1350.

51. *Singleton*, 144 F.3d at 1346-47. The court also quoted Justice Brandeis’ dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (1928):

[d]ecency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled [sic] if it fails to observe the law scrupulously. Our Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Olmstead, 277 U.S. at 485.

52. *Singleton*, 144 F.3d at 1347.

was vacated on the court's own initiative.⁵³ The Tenth Circuit then held an en banc hearing.⁵⁴ During oral arguments, U.S. prosecutors argued that the *Singleton* ruling would paralyze federal prosecutors' abilities to do their jobs.⁵⁵ John Val Wachtel, Sonya Singleton's attorney, countered that witnesses could provide alternative types of assistance to prosecutors in developing a case, and that prosecutors did not need accomplice testimony in order to prosecute criminals successfully.⁵⁶

The court, however, reversed the panel's decision.⁵⁷ The majority held that the statute was inapplicable to prosecutors acting as the "alter-ego" of the United States.⁵⁸ The court reasoned that if Congress intended to apply § 201(c)(2) to the United States as an "inanimate entity," it would have used the word "whatever" in the statute, rather than "whoever."⁵⁹ Furthermore, the court held that general statutes do not apply to the government unless Congress makes the application "indisputable" by statutory language.⁶⁰ The court concluded that Congress did not intend to deprive the government of its "ingrained practice of granting lenience in exchange for testimony" in the absence of such "clear, unmistakable, and unarguable language."⁶¹ One concurring justice felt the statute was inapplicable in light of the existence of more specific statutes in the Sentencing Reform Act of 1984, which allowed prosecutors to exchange leniency for testimony.⁶² Additionally, he disagreed with the majority's reasoning by noting that under *Nardone v. United States* and the Dictionary Act, the term "whoever" does apply to the government.⁶³

The original panel dissented, stating that the majority's holding ignored the effect that exchanging leniency for testimony has on the "integrity, fairness, and credibility" of the criminal justice system.⁶⁴ The dissent went on to discuss the tradition,

53. *Id.* at 1343, *rehearing en banc granted, opinion vacated* (July 10, 1998).

54. *Id.*

55. Sandy Shore, *Plea-deal Ban is 'Paralyzing,' U.S. Court Told*, CHI. DAILY L. BULL., Nov. 19, 1998, at A1. Andrew Cohen, a legal analyst who observed the oral arguments, stated that the ruling, if upheld, could substantially change criminal prosecutions. *Id.*

56. *Id.* Wachtel noted his disagreement with prosecutors' argument by stating that "[prosecutors have] got to be smarter than your average drug dealers." *Id.*

57. *United States v. Singleton*, 165 F.3d 1297, 1297 (10th Cir. 1999).

58. *Id.* at 1300.

59. *Id.*

60. *Id.*

61. *Id.* at 1301-02.

62. *See Singleton*, 165 F.3d at 1301 (Lucero, J., concurring) (citing 18 U.S.C. § 3553(e), 28 U.S.C. § 994(n), 18 U.S.C. § 6001-05, and 18 U.S.C. § 3521-28).

63. *Id.* at 1304-05 (citing 1 U.S.C. § 1).

64. *Id.* at 1309 (Kelly, J., dissenting).

codified in state rules of ethics, of prohibiting payments to fact witnesses.⁶⁵ Since the rules bind federal prosecutors, the majority's focus on statutory construction ignored other compelling reasons for applying § 201(c)(2) to them as well.⁶⁶

B. *Singleton's Progeny*

Immediately after the original panel's decision, defense attorneys across the United States rushed to file motions to suppress testimony.⁶⁷ Several other courts declined to follow *Singleton*, arguing that the precedent had no effect while it awaited rehearing, and moreover that the Tenth Circuit Court's decision was not binding on other circuits.⁶⁸ In Florida, however, U.S. District Court Judge William J. Zloch agreed with *Singleton*, and in August 1998, he relied on it as a basis to suppress

65. *Id.* at 1313.

66. See *id.* at 1302-03 (Henry, J., concurring) (noting that legislation holding federal prosecutors subject to state rules of ethics may, at some point, require prosecutors to utilize other means of garnering testimony from accomplices); *id.* at 1311 (Kelly, J., dissenting) (noting that prosecutors could prosecute accomplices first, then compel their testimony by subpoena, or could ask a court to compel testimony by a grant of immunity).

67. See cases cited *infra* note 68 for examples of such motions to suppress.

68. See *United States v. Arana*, 18 F. Supp. 2d 715, 715 (E.D. Mich. 1998) (holding that § 201(c)(2) did not apply to the government because of the canon of construction set forth in *Nardone v. United States*, 302 U.S. 379 (1937)). The court held that the *Singleton* panel read *Nardone* too narrowly. *Id.* at 717. The court also held that application of the statute would create an absurdity when applied to federal prosecutors, noting that other statutes seem to authorize grants of leniency in exchange for testimony. See 18 U.S.C. §§ 6001-6005 (authorizing federal prosecutors to grant immunity from prosecution in exchange for testimony); 18 U.S.C. § 3553(e) (allowing the government to make a motion for downward departure of sentences for people who substantially assist in investigation or prosecution of others); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1997) (authorizing the government to make motions for reductions of sentences). See also *United States v. Gabourel*, 9 F. Supp. 2d 1246, 1246 (D. Colo. 1998) (rejecting the defendant's assertion that a government's plea agreement with a witness violated the defendant's due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963)); *United States v. Barbaro*, No. 98 CR. 412 (JFK), 1998 WL 556152, at *3 (S.D.N.Y. Sept. 1, 1998) (citing *United States v. Ford*, 99 U.S. 594 (1878) and noting that the practice of offering cooperating accomplices leniency dates back to the common law of England); *United States v. Eisenhardt*, 10 F. Supp. 2d 521, 521 (E.D. Md. 1998) (noting that defendants' motions to suppress relied solely on *Singleton*). The court held that since the ruling was vacated pending an en banc hearing, the ruling had no legal authority. *Eisenhardt*, 10 F. Supp. 2d at 521. The court further concluded that the *Singleton* decision was "amazingly unsound, not to mention nonsensical," since the ruling prevents the admission of testimony from federal witnesses who cooperate. *Id.* The Court further stated: "[t]he chances of either or both the Fourth Circuit and the Supreme Court reaching the same conclusion as the *Singleton* panel are, in this Court's judgment, about the same as discovering that the entire roster of the Baltimore Orioles consists of cleverly disguised leprechauns." *Id.*

testimony in several drug cases.⁶⁹ Judge Zloch also granted two other motions to suppress.⁷⁰

In the first of those decisions, *United States v. Lowery*,⁷¹ the trial court found that the plea agreements granted to co-defendants were in clear violation of § 201(c)(2), adopting the reasoning presented in *Singleton* in its entirety.⁷² In *Lowery*, the government argued that § 201(c)(2) did not apply to prosecutors.⁷³ The government further argued that the Eleventh Circuit's decision in *Golden Door Jewelry v. Lloyds Underwriters*⁷⁴ previously determined that § 201(c)(2) applied only to false testimony.⁷⁵ The government also contended that the more specific provisions of other statutes granting authority to prosecutors to reduce charges or recommend shorter sentences should prevail over the general language of § 201(c)(2).⁷⁶ Finally, it argued that offering leniency in exchange for testimony was an established practice of the executive branch and that such agreements did not violate the Florida Bar Rules of Professional Conduct.⁷⁷

The *Lowery* trial court concluded that the wording of § 201(c)(1) reveals no evidence of any legislative intent to exempt prosecutors. Specifically, § 201(c)(1) limits its application to

69. *Eisenhardt*, 10 F. Supp. 2d at 521.

70. See *United States v. Lowery*, 166 F.3d 1119, 1120 (11th Cir. 1999) (noting that Judge Zloch granted motions to suppress testimony in two separate criminal trials). At issue in the consolidated appeal of three cases were eight separate plea agreements granted to co-conspirators in exchange for testimony. *Id.* at 1120-22. In *Lowery*, the agreements of four co-conspirators explicitly stated that the government would not recommend leniency if the witnesses offered false testimony. *Id.* at 1120. In two other cases, none of the four plea agreements entered into by co-conspirators explicitly referenced any consequences for giving false testimony. *Id.* at 1122.

71. *United States v. Lowery*, 15 F. Supp. 2d 1348, 1348 (S.D. Fla. 1998).

72. *Id.* at 1351.

73. *Id.* The court noted that the government did not, however, argue that the clear language of § 201(c)(2) excluded the government from its application. *Id.*

74. *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 117 F.3d 1328, 1328 (11th Cir. 1997).

75. *Lowery*, 15 F. Supp. 2d at 1356. In *Golden Door*, the court concluded that when leniency or payments were offered to witnesses for *truthful* testimony, the government did not violate § 201(c)(2). *Golden Door*, 117 F.3d at 1335. The court based its decision on its prior holding in *United States v. Moody*, 977 F.2d 1420, 1420 (11th Cir. 1992). In *Moody*, a defendant clearly offered a bribe to a witness in exchange for testimony. *Moody*, 977 F.2d at 1421. The court rejected the defendant's argument that § 201(c)(2) was vague, and stated that it "obviously proscribes a bribe for false testimony; persons of ordinary intelligence would come to no other conclusion." *Id.* at 1425. The *Lowery* court noted that *Moody* never intimated that § 201(c)(2) applied *only* to false testimony, and therefore the *Golden Door* decision stretched the *Moody* holding too far. *Lowery*, 15 F. Supp. 2d at 1356.

76. *Lowery*, 15 F. Supp. 2d at 1356.

77. *Id.*

persons not acting in accordance with other laws for the proper discharge of duty.⁷⁸ Yet, the limiting language does not appear in § 201(c)(2).⁷⁹ This distinction debunked arguments used in cases refusing to follow *Singleton*—that the statute created an absurdity when applied to the government by conflicting with other statutes such as 18 U.S.C. §§ 6001-6005, 18 U.S.C. § 3553(e), and U.S.S.G. § 5K1.1, that give the government authority to move for downward reductions of sentences.⁸⁰ The statute logically applies to the government as well as to the defense because the statute aims to combat inherently unreliable testimony.⁸¹ The trial court also held that prosecutors violated the Florida Rules of Professional Conduct by offering leniency in exchange for testimony, an act prohibited by Rule 3.4 of the Florida Rules of Professional Conduct.⁸²

78. *Id.* at 1357-58.

79. *Id.* Section 201(c)(1) also applies to “whoever”, but when actions are “otherwise . . . provided by law for the proper discharge of duty,” its application is limited. *Id.* The court stated that since Congress clearly exempted the Executive Branch from the reach of § 201(c)(1), Congress intentionally chose not to exclude the Executive Branch from § 201(c)(2). *Id.* The court agreed with the *Singleton* ruling, and stated that it was not proper to create such an exemption judicially when Congress intentionally did not include one. *Id.*

80. The *U.S. Sentencing Guidelines Manual* states: “[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines . . .” U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1997). The *Lowery* court was not convinced that § 201(c)(2) conflicted with these other statutes, and proposed the following reconciliation: Congress intended the substantial assistance statutes to apply to forms of substantial assistance other than testifying at trial. *Lowery*, 15 F. Supp. 2d at 1357. Section 201(c)(2) would therefore be left to apply specifically to testimony under oath at judicial proceedings. *Id.* This is a logical harmonization of not allowing accomplice testimony because it is inherently unreliable. However, accomplices can offer information to prosecutors and investigators, thereby allowing conspiracies to be infiltrated.

81. *Lowery*, 15 F. Supp. 2d at 1353. In support of this proposition, the district court stated that “if the judicial process is tainted by the admission of unreliable testimony induced by a defendant’s promises, it is no less tainted by the identical actions of the prosecutor.” *Id.* The district court further stated that when witnesses, for either side, know that promises for leniency or other valuable things are highly intertwined with testimony, incentives to lie are tremendous. *Id.* at 1354. Application of § 201(c)(2) to all parties, therefore, does not work an absurdity, but works to preserve the integrity of the judicial system. *Id.* From the district court’s point of view, it is not the judiciary’s job to “rewrite Congressional intent simply because the plain meaning of a statute, ignored for fifty years, suddenly has profound implications.” *Id.* at 1355.

82. *Id.* at 1358. Rule 4-3.4(b) of the *Rules of Professional Conduct for the Florida Bar* (modeled on ABA Model Rule 4.3) states: “[a] lawyer shall not . . . fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness . . .” *Id.* The court stated that nothing in the *Rules*

Lowery was subsequently reversed on appeal.⁸³ In its reversal, the Eleventh Circuit Court of Appeals held that § 201(c)(2) did not apply to federal prosecutors, mainly because the statute was not used as a basis for motions to suppress testimony until decades after its inception.⁸⁴ The Eleventh Circuit also rejected the argument that federal prosecutors violated the Florida Rules of Professional Conduct by promising leniency in exchange for testimony.⁸⁵ While recognizing that federal law now subjects federal prosecutors to state ethical rules, the court held that violations of those rules did not warrant exclusion of evidence.⁸⁶ Reasoning that federal law governed the admissibility of evidence in federal courts, the court stated that Rule 402 of the Federal Rules of Evidence⁸⁷ did not mention state or local ethical rules as bases for excluding otherwise relevant evidence.⁸⁸ The court concluded that the federal interest in law enforcement was paramount to the states' interest in regulating professional conduct.⁸⁹ Therefore, even though 28 U.S.C. § 530B explicitly holds federal prosecutors to state ethical standards, the court held that Congress did not intend to render evidence garnered in violation of those standards inadmissible.⁹⁰

exempted the government from their application, and that the *Rules* did not distinguish between truthful and false testimony in prohibiting offers of inducements for testimony. *Id.*

83. *United States v. Lowery*, 166 F.3d 1119, 1119 (11th Cir. 1999).

84. *Id.* at 1123-24. The court noted that testimony pursuant to plea agreements was a "commonplace feature of trials . . . happen[ing] every work day in federal trial courts all around [the] country." *Id.* at 1124.

85. *Id.* at 1124-25.

86. *Id.* at 1124. The court stated it was "far from clear" whether the Florida Rules of Professional Conduct barred prosecutors from promising leniency for testimony, even though the rules forbid attorneys from "offering an inducement to a witness." *Id.*

87. FED. R. EVID. 402. Rule 402 states: "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." *Id.*

88. *Lowery*, 166 F.3d at 1124-25.

89. *Id.* at 1124-25.

90. *Id.* at 1125. 28 U.S.C. § 530B may be an "Act of Congress" that would render evidence inadmissible under Rule 402 of the Federal Rules of Evidence. FED. R. EVID. 402. Furthermore, Rule 402 states the basic standard for *relevant* evidence. *Id.* Rule 403 more properly addresses the issue of exclusion. FED. R. EVID. 403. It reads: "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* Because testimony in exchange for leniency is inherently unreliable, its probative value is arguably substantially outweighed by the dangers of unfair prejudice and misleading the jury.

II. ANALYSIS

A. *History of the Statutory Argument Used in Singleton*

The defendant in *Singleton* took her argument from a letter sent in May of 1995 by Attorney J. Richard Johnston to Michael E. Shaheen, Counsel for the U.S. Department of Justice Office of Professional Responsibility in Washington, D.C.⁹¹ Johnston pointed out that the language of § 201(c)(2) made it an offense for anyone to pay witnesses for testifying, and asked Shaheen whether the Justice Department believed that the statute applied to federal prosecutors.⁹² Johnston noted that while the language of the statute explicitly included federal prosecutors, the Justice Department had a long-standing practice of giving informants money or favorable treatment in exchange for testimony.⁹³ Courts traditionally admitted informant testimony, even when the payment or favorable treatment was contingent upon conviction of a defendant.⁹⁴ Johnston unsuccessfully argued that, despite those traditions of admitting paid informant testimony, § 201(c)(2), as well as the Model Rules of Professional Conduct, now prohibited such conduct on the part of prosecutors.⁹⁵ Counsel for Sonya

91. Johnston, *supra* note 26, at 21.

92. *Id.* The Department of Justice claimed that it was not subject to rules of professional conduct in 1989, when former Attorney General Richard Thornburgh issued "The Thornburgh Memorandum." THORNBURGH MEMORANDUM, in *In re Doe*, 801 F. Supp. 478, 489 (D.N.M. 1992); ELKAN ABRAMOWITZ, *Ex Parte Contacts from the Justice Department*, N.Y.L.J., vol. 219, No. 40 (Mar. 3, 1998). In the memorandum, Thornburgh stated that an "authorized by law" exception existed for federal prosecutors, which exempted them from state rules of ethics. THORNBURGH MEMORANDUM, in *In re Doe*, 801 F. Supp. at 489. The District Court of New Mexico disagreed, and instituted disciplinary actions against a federal prosecutor who contacted a defendant in a murder case while knowing that the defendant was represented by counsel. *Id.* The Justice Department later sought an injunction in the disciplinary proceedings, arguing that the Department's rules superceded stated ethical standards because of the supremacy of the federal government. *United States v. Ferrara*, 847 F. Supp. 964, 964 (D.C. 1993), *aff'd* 54 F.3d 825, 825 (D.C. Cir. 1995). The New Mexico Supreme Court also disagreed with the Justice Department's argument and publicly censured the prosecutor. *In re Howe*, 940 P.2d 159, 159 (N.M. 1997). The Department of Justice's position regarding state rules of ethics seems to have been mooted, however. On October 20, 1998, Congress passed an amendment to 28 U.S.C. Chapter 31. 28 U.S.C. § 530B(a) (1998). The amendment directs that United States Attorneys be subject to state ethical rules, as well as local federal court rules governing attorneys in their respective states. *Id.* See also J. Richard Johnston, *Plea Bargaining in Exchange for Testimony: Has Singleton Really Resolved the Issues?*, CRIM. JUST., Fall 1999, at 24, 26 (stating that Johnston received a "non-responsive reply" from the Justice Department).

93. Johnston, *supra* note 26, at 21.

94. *Id.* at 23.

95. *Id.* at 24.

Singleton made the same arguments in her motion to suppress evidence.⁹⁶

The *Singleton* panel opinion analyzed the problems inherent in the use of accomplice testimony relative to the clear language of the federal bribery statute.⁹⁷ While many members of the Bar were surprised by the logic advanced in *Singleton*,⁹⁸ this reasoning was not new.⁹⁹ As early as 1974, defendants argued that plea agreements exchanging leniency for accomplice testimony violated the federal bribery statute.¹⁰⁰ The *Singleton* panel was simply the first court to hold that prosecutors' actions were illegal.¹⁰¹

96. *Singleton*, 144 F.3d at 1344.

97. *Id.* at 1348, 1352-54.

98. See Cooper, *supra* note 26, at 34 (citing attorneys surprised by the *Singleton* ruling).

99. See *United States v. Blanton*, 700 F.2d 298, 298 (6th Cir. 1982) (using the same reasoning and logic as *Singleton* later used).

100. *United States v. Barrett*, 505 F.2d 1091, 1091 (7th Cir. 1974). In *Barrett*, the defendant argued that the government violated former § 201(h) (the identical predecessor to § 201(c)(2)) by entering into a plea agreement with an accomplice. *Id.* at 1101. The defendant argued that by the terms of the plea agreement, the government effectively paid the accomplice \$1 million, recommended a very light sentence for the accomplice, and urged the IRS to exempt the accomplice from civil tax liability. *Id.* Since the government gave the accomplice civil immunity in return for testimony, the government acted in violation of the bribery statute by offering something of value for the accomplice's testimony. *Id.* The defendant conceded that the government was allowed to give immunity for criminal prosecution in exchange for testimony by virtue of 18 U.S.C. § 6002, which arguably authorized the government to do so. *Id.* The court, *sua sponte*, found justification for the prosecution's actions in 18 U.S.C. § 7122, which authorized prosecutors to grant exemption from civil tax liability in cases arising under the Internal Revenue Code. *Id.* at 1101-02. The defendant also argued that the accomplice's civil immunity, added to the huge sums of money he was able to keep tax free, heightened the normal unreliability of accomplice testimony. *Id.* at 1102. The defendant concluded that presentation of the accomplice's testimony was therefore a violation of defendant's due process rights. *Id.* The court disagreed and affirmed the defendant's conviction. *Id.* at 1103.

101. *Singleton*, 144 F.3d at 1360-61. See, e.g., *United States v. Blanton*, 700 F.2d 298, 298 (6th Cir. 1982) (holding that the government had not made an improper arrangement with a testifying accomplice). In *Blanton*, Tennessee's governor was prosecuted for a scheme involving the illegal issuance of liquor licenses. *Id.* at 300. The testifying accomplice received a liquor license illegally. *Id.* One of the terms of his plea agreement was that prosecutors would recommend that his liquor license not be revoked. *Id.* at 310. The defendant argued that prosecutors, through this agreement, violated former § 201(h) (the identical predecessor to § 201(c)(2)) by giving something of value to the accomplice in exchange for his testimony. *Id.* The court held that prosecutors did not give a thing of value to the accomplice. *Id.* at 311. The court reasoned that prosecutors merely preserved the status quo of the accomplice having the liquor license, and therefore did not give anything to the accomplice. *Id.* Furthermore, the court held that neither the liquor license nor the prosecutor's persuasion in urging the state liquor licensing agency not to revoke the license were things of value. *Id.*

B. Construction of 18 U.S.C. § 201(c)(2)

Prosecutors opposing subsequent motions to suppress evidence filed in *Singleton's* wake argued that the court misconstrued § 201(c)(2).¹⁰² Such arguments relied upon, in part, two canons of statutory construction recognized in *Nardone v. United States* that restricted application of certain statutes to the government.¹⁰³ The first of these arguments states that statutes that would deprive the government of recognized or established titles or interests do not apply to the government.¹⁰⁴ The second similarly declines to interpret statutes working "obvious absurdities" as applicable to the government.¹⁰⁵ Based upon these restrictions, various district courts held that § 201(c)(2) did not apply to federal prosecutors.¹⁰⁶ The *Singleton* court found that neither of these canons of construction exempted prosecutors from the reach of § 201(c)(2).¹⁰⁷ Instead, the court noted that if prosecutors were exempt from the statute's application, they would not be prevented from actually bribing witnesses.¹⁰⁸ *Singleton* also relied on the plain language of the statute to justify its application to federal prosecutors, stating that the term "whoever" applied to everyone.¹⁰⁹ This construction of § 201(c)(2) was in line with the United States Supreme Court's construction of statutes with similar language.¹¹⁰

102. See, e.g., *United States v. Reid*, No. 3:98CR64, 1998 U.S. Dist. LEXIS 12675, at *3 (E.D. Va. July 28, 1998) (declining to follow *Singleton*).

103. 302 U.S. 379, 383 (1937).

104. *Id.*

105. *Id.* at 384. For example, requiring police to follow a speed limit while chasing down a suspect is absurd. *Id.*

106. See, e.g., *Reid*, 1998 U.S. Dist. LEXIS 12675 at *5 (stating that application of § 201(c)(2) to federal prosecutors would work an obvious absurdity).

107. *Singleton*, 144 F.3d at 1345-46.

108. *Id.* at 1348. The *Nardone* court came to a similar conclusion, and held that a federal wiretapping statute applied to federal agents. *Nardone v. United States*, 302 U.S. 379, 382-83 (1937). In light of the holding in *Nardone*, it seems that reliance on the canons of statutory construction recognized by the *Nardone* court is misplaced. After discussing the canons of statutory construction exempting the government from certain statutes, the *Nardone* court rejected the application of those canons to the federal wiretapping statute, which also included "any person." *Id.* at 384. The court stated that the plain words of the statute included every person, so as to include federal agents. *Id.* at 382. The government's argument that Congress did not intend that the statute apply to the government did not persuade the court. *Id.* at 383. Instead, the court inferred that exempting federal agents from the wiretapping statute would allow them to invade citizens' privacy, thereby resorting to unethical standards in order to obtain evidence against suspected criminals. *Id.*

109. *Singleton*, 144 F.3d at 1345-46, 1348.

110. See *Brogan v. United States*, 118 S. Ct. 805, 808-09 (1997) (interpreting 18 U.S.C. § 1001 as including any false statement, and rejecting defendant's

The question of whether accomplice testimony is inherently unreliable has also been raised in relation to defendants' guarantees of due process of law.¹¹¹ The argument asserted in such cases is that contingent plea agreements give accomplices strong motives to perjure themselves.¹¹² These plea agreements offer leniency to accomplices in exchange for testimony, usually dependent upon conviction of co-defendants or upon prosecutors' satisfaction with the testimony given.¹¹³ Such agreements are not dissimilar from the plea agreement in *Singleton*, which was contingent upon both Douglas' full cooperation and the prosecutor's decision whether to recommend a lesser sentence.¹¹⁴

Where challenges based upon defendants' due process rights have been raised, courts have held that contingent agreements do not violate due process rights, if certain procedural safeguards are followed.¹¹⁵ Such safeguards include 1) reading the plea agreement to the jury and making the agreement available during deliberations, 2) allowing the defense lengthy cross-examination of

argument that the statute had an exception for the "exculpatory no" doctrine). In *Brogan*, the defendant challenged his conviction for making a false statement within the jurisdiction of a federal agency. *Id.* at 805. Section 1001 proscribes the making of any false statement. *Id.* at 808. The court rejected the defendant's argument that an exception to the statute existed when a person made a false statement while denying guilt. *Id.* The court stated that it could not insert Congressional intent into a plainly worded statute. *Id.* at 809. The court further reasoned that it was illogical to read criminal statutes more narrowly than they are written by subjecting them to case-by-case review. *Id.* at 811. The court held that reading such statutes more narrowly created a problem of not having a way of knowing when to invoke "user-friendly" readings of statutes. *Id.* Finally, the court argued that even when attractive policy arguments exist, courts may not read in limitations to statutes when no limitations exist within the text of statutes. *Id.* at 811-12.

111. See *Hoffa v. United States*, 385 U.S. 293, 311 (1966) (Warren, C.J., dissenting) (stating that the government's grants of leniency and payment of monies to an informant did not violate defendant's due process rights).

112. See generally Yvette A. Beeman, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800, 800 (May 1987) (arguing that courts should prohibit contingent plea agreements to accomplices to obtain testimony).

113. *Id.*

114. *Singleton*, 144 F.3d at 1344.

115. See, e.g., *United States v. Dailey*, 759 F.2d 192, 200 (1st Cir. 1985) (holding that as long as the procedural safeguards are followed, accomplices are allowed to testify). In *Dailey*, the government appealed from a district court ruling that excluded the testimony of three accomplices. *Id.* at 193. The First Circuit noted that the lower court was correct in holding that the contingent agreements offered to the accomplices provided some inducement to lie in testimony against the defendant. *Id.* at 197. However, the circuit court determined that the inducement created was no worse than that created by other agreements upheld by other courts. *Id.* The First Circuit Court reversed the district court's ruling and remanded the case for a new trial, directing that the three accomplices be permitted to testify against the defendant. *Id.* at 201.

the accomplice about the plea agreement, and 3) issuing cautionary instructions to the jury explaining the nature of the agreement and the possibility that the accomplice had a motive to commit perjury.¹¹⁶ Even when plea agreements created substantial motives¹¹⁷ for accomplices to testify in a manner highly damaging to defendants,¹¹⁸ or when testimony was uncorroborated¹¹⁹ and given by known perjurers, courts still admitted the testimony.¹²⁰

116. *Id.* at 200. The *Dailey* court stated that cautionary instructions to the jury were especially warranted in cases where the accomplice's testimony was uncorroborated by other evidence. *Id.*

117. Rohrllich, *supra* note 1, at A1. See *supra* Introduction and accompanying notes (describing the facts of Leslie White and his false testimony).

118. See *Saavedra v. Thomas*, No. 96-2113, 1997 U.S. App. LEXIS 35017, at *7 (10th Cir. 1997) (holding that since accomplice was subjected to cross-examination and because trial court issued a general credibility instruction, accomplice testimony was not unconstitutionally inadmissible). In *Saavedra*, an accomplice who faced 74 years imprisonment in connection with charges of armed robbery and aggravated assault testified against his co-defendant in exchange for a recommendation of a three-year sentence from the government on his guilty plea. *Id.* at *3. The government retained discretion to reject his guilty plea if his testimony was not satisfactory. *Id.* at *4. See also *United States v. Wilson*, 904 F.2d 656, 659-60 (11th Cir. 1990) (holding that testimony of accomplices did not deprive defendant of due process because the trial court followed procedural safeguards). In *Wilson*, the court acknowledged that the accomplices' plea agreements "contingently motivated" the accomplices to testify. *Id.* at 659. In addition to immunity, the accomplices stood to gain financially. *Id.* at 658. The court noted that plea agreements, in fact, offered strong motives for accomplice witnesses to lie. *Id.* at 660. However, the court further noted that the practice of offering plea agreements in exchange for testimony was an ingrained practice. *Id.* at 660. The court also stated that issues regarding favorable treatment, leniency, and payments of money related to issues of credibility that were properly judged by the jury. *Id.* Only in circumstances in which the jury could not accurately weigh witnesses' credibility, such as an absence of procedural safeguards, could such testimony deprive defendants of due process. *Id.*

119. See *United States v. Garcia*, 66 F.3d 851, 857 (7th Cir. 1995) (stating that witnesses' motives for testifying do not make the subject matter of their testimony inherently unreliable). In *Garcia*, the defendant argued that the sentencing court placed too much weight on the unreliable testimony of an accomplice witness. *Id.* at 855. The appellate court stated that such arguments rarely sway courts of appeals, because district court findings regarding credibility of witnesses will only be disturbed if such findings were completely baseless. *Id.* at 856. The court noted that trial courts may rely on the testimony of an admitted felon and perjurer who sold drugs on a large scale and was a paid government informant, even if such testimony was entirely uncorroborated. *Id.* at 857 (citing *United States v. Molinaro*, 877 F.3d 1341, 1347 (7th Cir. 1989)). See also *Dailey*, 759 F.2d at 198 (stating that courts have allowed uncorroborated testimony by accomplices who were admitted perjurers, even when the testimony was inconsistent).

120. See, e.g., *United States v. Kimble*, 719 F.2d 1253, 1256-57 (5th Cir. 1983) (holding that testimony of an admitted perjurer was sufficiently believable to be admitted into evidence). In *Kimble*, the accomplice testifying

Appellate courts are unlikely to reverse convictions based on testimony obtained through contingent plea agreements. For example, courts have held that cautionary instructions regarding uncorroborated accomplice testimony need not be given, as long as the testimony is internally consistent.¹²¹ While recognizing that contingent plea agreements may offer accomplices an inducement to lie,¹²² courts state that such agreements are necessary and justified in some cases.¹²³ Assuming that the use of accomplice testimony is necessary to ensure the conviction of criminals, courts refuse to exclude the testimony in most cases, rationalizing that an accomplice's motive for perjury arising from a plea agreement goes to the weight of the testimony, not its admissibility.¹²⁴

Criticisms of the current safeguards surrounding accomplice testimony start from the fundamental premise that such testimony is inherently unreliable.¹²⁵ In those few cases where

against the defendant received immunity from charges stemming from his involvement in a conspiracy to violate RICO statutes. *Id.* at 1255. The accomplice admitted he lied in over 30 different statements because he was trying to obtain favorable treatment from prosecutors. *Id.* at 1256-57. The defense cross-examined the accomplice and confronted him with prior inconsistent statements. *Id.* at 1257. The trial judge also instructed the jury several times to exercise caution in considering the accomplice's testimony and in determining his credibility. *Id.* at 1255. The appellate court stated that the issue of credibility properly went to the weight of the accomplice's testimony and did not affect its admissibility. *Id.* at 1257.

121. See *United States v. Fernandez*, 145 F.3d 59, 62 (1st Cir. 1998) (stating that it was not plain error to not give a cautionary instruction regarding uncorroborated testimony so long as the testimony appeared to be internally consistent).

122. See *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (stating that there may be no greater motivation to lie for an accomplice than an offer of a reduced sentence).

123. See *Dailey*, 759 F.2d at 197 (stating that the use of open-ended and vague contingent plea agreements was justified because accomplices were assumed to know vast amounts of information, and the government wanted to ensure that their cooperation was forthcoming).

124. See *United States v. Insana*, 423 F.2d 1165, 1168-69 (1970) (stating the importance of observing the established safeguards when accomplice testimony is admitted). See, e.g., *United States v. Grimes*, 438 F.2d 391, 396 (6th Cir. 1971) (noting that courts have not seriously attacked either the practice of paying informants for testimony or the practice of giving reduced sentences to accomplices for testimony, and that potential abuses exist in a system that regularly pays witnesses, in some form or another, for testimony).

125. See *Grimes*, 438 F.2d at 395-96 (stating that similar contingent fee agreements for informants may provide motives to lie in order to ensure payment). The *Grimes* court stated that while contingent agreements for witness testimony provide an "obvious potential for abuse," an exclusionary rule would not be adopted. *Id.* at 396. Rather, agreements are disclosed to the jury, who may consider the entirety of the witness' testimony and possible motives for perjury. *Id.* The court stated that this procedure would adequately protect defendants from the risk of unfair trials because witnesses would undergo rigorous cross-examination. *Id.*

accomplice testimony has been excluded, courts allude to the unreliability of testimony motivated by leniency, money, or both.¹²⁶ In 1986, the Court of Appeals for the Fifth Circuit stated that the search for truth, central to the American justice system, could not be reconciled with the use of testimony that was paid, bartered, or bargained for.¹²⁷ Similarly, in 1984, the Eighth Circuit Court of Appeals questioned whether exchanging leniency for damaging testimony created a risk of perjury so great that established safeguards could not protect the defendant's due process rights.¹²⁸ The court answered in the affirmative, stating that full disclosure of the agreement to the jury was insufficient to overcome the due process violation inherent in the agreement itself.¹²⁹

The weaknesses of the current safeguards are evident in other instances as well. For example, some scholars note that because trial courts do not always require corroboration of accomplice testimony, jurors cannot fairly evaluate the credibility of the witnesses, even where full disclosure of their plea agreements is provided.¹³⁰ Likewise, disclosure of agreements and cross-examination of accomplices by defense counsel may not send clear messages to juries to weigh such testimony carefully.¹³¹ While case law¹³² and the rules of ethics¹³³ prohibit prosecutors

126. See, e.g., *United States v. Cervantes-Pacheco*, 800 F.2d 452, 460 (5th Cir. 1986) (holding that testimony of a government informant was "inherently untrustworthy" and should have been excluded at trial). In *Cervantes-Pacheco*, a government instructed an informant to infiltrate a drug ring and gather information on a certain member of that ring. *Id.* at 454. The informant's fee was contingent upon the conviction of the targeted individual. *Id.* at 458. The informant's employer, the Drug Enforcement Agency (DEA), had discretion over how much money the informant would be paid. *Id.* at 459. The DEA did not pay the informant until the case was over. *Id.* The court stated the terms of the agreement between the DEA and the informant gave him a strong financial incentive to provide damaging testimony. *Id.* at 459-60. 127. *Id.* at 460-61.

128. See *United States v. Waterman*, 732 F.2d 1527, 1528, 1530 (8th Cir. 1984) (holding that the plea agreement violated the defendant's rights under the Due Process Clause of the Constitution). In *Waterman*, the agreement offered to the defendant's accomplice was contingent upon continued cooperation, and the indictment and conviction of others involved in an arson scheme. *Id.* at 1528.

129. *Id.* at 1531. In addition to arguing that the plea agreement violated his constitutional rights, the defendant argued in the district court that the agreement violated the spirit of § 201(c)(2). *Id.* at 1530. The appellate court did not address this argument. *Id.*

130. Christine J. Saverda, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 796 (1990).

131. See *United States v. Romer*, 618 F.2d 530, 536 (9th Cir. 1980) (holding that juries may believe the prosecutor is presenting "the truth," even where the prosecutor informs them of the plea agreement).

132. See, e.g., *United States v. Brown*, No. 96-4679, 1998 U.S. App. LEXIS 12310, at *13 (4th Cir. Apr. 7, 1998) (noting that the government is prohibited from bolstering or vouching for its witnesses).

from vouching for the truthfulness of witnesses, prosecutors are allowed to refer to the terms of plea agreements requiring "truthful" testimony during direct examination.¹³⁴ This could alter the effectiveness of defense counsel's cross-examination, as juries may assume that the government is vouching for its witnesses.¹³⁵

The denial of effective cross-examination destroys both a defendant's Confrontation Clause rights¹³⁶ and guarantees of reliability.¹³⁷ Admission of testimony not subject to cross-examination, however, is reviewed under a harmless error standard,¹³⁸ leaving little room for reversal of convictions. In the relatively few instances where reversals were granted due to admission of accomplice testimony, courts cited atypical, and sometimes even outrageous, procedures as reasons for reversal.¹³⁹

133. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(e) (Discussion Draft 1983) (stating that a lawyer shall not state personal opinions as to the credibility of witnesses).

134. See, e.g., *Romer*, 148 F.3d at 369 (stating that courts generally allow the prosecution to introduce the plea agreement offered to an accomplice on direct).

135. See, e.g., *United States v. Roberts*, 618 F.2d 530, 536 (9th Cir. 1980) (noting that when a prosecutor offers a plea agreement into evidence on direct of his witness, the jury may erroneously infer that the prosecutor knows "the truth" and is presenting "the truth" to the jury via the witness). Courts have sought to protect against this danger by limiting the prosecutor's ability to refer to plea agreements on direct by: 1) directing that questions by prosecutors may not imply that the government has any special knowledge about the witness's character; 2) issuing cautionary instructions to the jury regarding the credibility of accomplice witnesses; and 3) directing that the prosecutor may not improperly refer to the witness' promise that she will testify truthfully. *Id.* at 536.

136. See *United States v. Stavroff*, 149 F.3d 478, 481 (6th Cir. 1998) (stating that the Sixth Amendment guarantees an accused the right to confront witnesses testifying against him).

137. For example, hearsay testimony may not be admitted if an accused will not have an opportunity to effectively cross-examine a witness against him, unless the hearsay comes within a firmly rooted hearsay exception. *Idaho v. Wright*, 110 S. Ct. 3139, 3149-50 (1990). If indicia of reliability are not present, and the accused is not afforded the opportunity to cross-examine the declarant, the hearsay statement is inadmissible because it is presumed to be unreliable. *Id.* at 3150.

138. See *id.* at 3150-51 (stating that whether a hearsay statement overcomes the presumption of unreliability with corroborating evidence is indicative of whether admission of the statement was harmless error). See also *Stavroff*, 149 F.3d at 481 (stating that the absence of effective cross-examination may be harmless when other corroborative evidence is present).

139. See, e.g., *Washington v. Texas*, 388 U.S. 14, 14 (1967) (involving the denial of defendant's right to compulsory process to confront accomplice witnesses testifying against him); *Machibroda v. United States*, 368 U.S. 487, 487 (1962) (involving a coerced guilty plea); *Napue v. Illinois*, 360 U.S. 264, 264 (1959) (involving the knowing use of perjured testimony by prosecutors); *Swartz v. Iowa*, 506 N.W.2d 792, 792 (Iowa Ct. App. 1993) (involving the passive use of perjured testimony by prosecutors).

The current safeguards, therefore, are inadequate because they do not right the imbalance created when the government procures accomplice testimony. The *Singleton* panel decision recognized that government prosecutors have an unfair advantage over defendants in the adversarial trial process¹⁴⁰ because of the power afforded them in charging, obtaining evidence, and sentencing.¹⁴¹

Another case presented a similar argument to the Fifth Circuit a few months before *Singleton*.¹⁴² In *United States v. Garcia-Abrego*, the defendant argued that he was denied due process because the government employed various tools at its disposal to obtain accomplice testimony against him.¹⁴³ The

140. *Singleton*, 144 F.3d at 1358. See also Brief Amicus Curiae of National Association of Criminal Defense Lawyers at 10-11, *Singleton*, 144 F.3d at 1343 (noting the increase in prosecutorial discretion and power over time in the American system). The National Association of Criminal Defense Lawyers argued that prosecutors stretching the limits of due process and the hesitance of courts to intervene increase the inherent inequalities between prosecutors and defendants in the adversarial system. *Id.* Additionally, the Association argued that the increased number of federal crimes and the push for minimum mandatory sentencing, which has in turn solidified prosecutors' power to induce plea-bargaining, exacerbates the problem of inequality. *Id.* at 10. See also Roberta K. Flowers, *A Code of Their Own: Updating that Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 925 (1996) (stating that the number of federal crimes grew from 115 in 1975 to 3,000 in 1994).

141. See ABRAHAM S. GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA* 38-39 (1981) (stating that adopting rules and procedures governing plea negotiations, such as Rule 11(e) of the Federal Rules of Criminal Procedure legitimized prosecutors' plea-bargaining powers); T. KENNETH MORAN & JOHN L. COOPER, *DISCRETION AND THE CRIMINAL JUSTICE PROCESS* 60-61 (1983) (stating that a prosecutor decides whether to charge an accused person with crimes, and is motivated to seek plea bargains in order to assure the public that prosecutors are doing a good job in punishing criminals). Abraham Goldstein states that the judiciary has been hesitant to review discretion exercised by prosecutors acting for the executive branch because of a misconception of the separation of powers, a fear of being overwhelmed by enlarged dockets, and widespread resistance from prosecutors. GOLDSTEIN, *supra*, at 57-58, 68. See also Robert H. Jackson, *The Federal Prosecutor*, 24 J. OF AM. JUDICATURE SOC'Y 18, 19 (1940) (stating that prosecutors have more power over the lives and liberty of American citizens than anyone else in the judicial system). Then Attorney General, and future Supreme Court Justice, Jackson further stated that prosecutors' powers are enormous. *Id.* Prosecutors decide whether to investigate or charge people and need not justify reasons for doing so to any reviewing authority. *Id.* Discretion thus leads to selective enforcement of the law, a practice that is firmly entrenched in American jurisprudence. *Id.*

142. *United States v. Garcia-Abrego*, 141 F.3d 142, 142 (5th Cir. 1988).

143. *Id.* at 151. The government used its power to make motions for downward departure pursuant to § 5k1.1 of the *U.S. Sentencing Guidelines* and to recommend reductions in sentences and its influence in obtaining immigration permits, cash payments, and grants of immunity to induce testimony against Garcia-Abrego. *Id.*

defendant claimed that the adversarial process was so skewed against him that his constitutional rights were violated, since he could not offer similar incentives to obtain testimony in his favor.¹⁴⁴ Interestingly, the defendant in *Garcia-Abrego* did not seek to suppress the testimony; he merely argued that the lack of equality between the parties' ability to entice witnesses led to a constitutional violation.¹⁴⁵

The defendant's argument in *Garcia-Abrego* is consistent with the reasoning behind ethical rules.¹⁴⁶ The *Singleton* panel recognized the same logic in holding that prosecutors violated the rules of ethics by paying a witness for testimony.¹⁴⁷ The panel observed that cases applying ethical rules to federal prosecutors supported its ruling, and that federal courts had uniformly denounced attempts to exempt federal prosecutors from ethical standards.¹⁴⁸ Assuming that the adversarial model followed by the American justice system seeks to bring out the truth in a manner most fair to both sides, neither side should be afforded any undue advantage. The American Bar Association (ABA) Model Rules of Professional Conduct recognize this assumption.¹⁴⁹ The ABA

144. *Id.*; MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) (1999).

145. *Garcia-Abrego*, 141 F.3d at 152. The court rejected the defendant's argument. *Id.* Alternatively, *Garcia-Abrego* argued that the court erred in not giving his proposed jury instruction regarding the prosecution's ability, and defendant's inability, to induce witnesses. *Id.* The proposed jury instruction detailed the ways in which prosecutors could induce testimony from accomplice witnesses. *Id.* The prosecution's ability to enter a § 5k1.1 motion recommending a downward departure before sentencing was mentioned, as well as the prosecution's ability to file a motion pursuant to Rule 35 of the *Federal Rules of Criminal Procedure* after sentencing. *Id.* The court rejected this argument as well, stating that pattern cautionary instructions sufficed in such instances. *Id.* at 153-54.

146. *Id.*

147. *Singleton*, 144 F.3d at 1360. J. Richard Johnston, in his article relied on by Sonya Singleton, stated that allowing prosecutors to violate state rules of ethics was a threat to judicial integrity. Johnston, *supra* note 26, at 21, 24.

148. *Singleton*, 144 F.3d at 1354. The court noted that the Department of Justice twice attempted to exempt its prosecutors from state ethical rules: first by way of the *Thornburgh Memorandum*; and second through federal regulations. *Id.* The memorandum and regulation both attempted to exempt federal litigators from ex parte communications with unrepresented parties, and courts uniformly rejected both. *Id.* Congress recently agreed with court decisions by requiring federal prosecutors to adhere to state rules of ethics. 28 U.S.C. § 530B(a).

149. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) cmt. 1 (Discussion Draft 1983) states:

[t]he procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in the discovery procedure, and the like.

Id.

Model Rules also note that it is improper for prosecutors to pay any occurrence witness, with the exception of reimbursement for reasonable witness expenses.¹⁶⁰ Similar state rules of ethics have been incorporated into the local rules of some federal district courts.¹⁶¹ The ABA has further stated that reimbursements to fact witnesses for expenses may not include payments for the substance of the witness' testimony nor serve as an inducement for testimony.¹⁶² Courts also allude to the disparity between the practice of allowing prosecutors to pay witnesses for testimony while not permitting defendants to do the same.¹⁶³ In the civil context, courts have consistently held that payments for non-expert testimony violate the rules of ethics.¹⁶⁴

Ethical rules governing the Bar are promulgated to ensure a fair trial process. Prosecutors are regarded differently from defense counsel in this process because, as government representatives, they have an ethical duty to seek justice.¹⁶⁵ Individual prosecutors have duties to ensure fair trials for defendants and take care that innocent people are not convicted.¹⁶⁶ Employment of those duties is consistent with the government's interest in the administration of its own justice system.¹⁶⁷ Professor Fred Zacharias believes that the inclusion of prosecutors in the Model Rules of Professional Conduct suggests that they can seek justice while operating within the ethical constraints imposed

150. ABA CRIMINAL JUSTICE STANDARDS Standard 3-3.2 (1993) states that a prosecutor should not compensate witnesses for giving testimony, with the exception of compensation for things such as transportation and loss of income.

151. See LOCAL RULES OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS Rule 3.3(15) (1999) for an example of a federal local rule adopting a state rule of ethics.

152. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-402 (1996).

153. See, e.g., *United States v. Cervantes-Pacheco*, 826 F.2d 310, 316 (5th Cir. 1987) (Rubin, J., concurring) (stating that prosecuting attorneys are allowed to present evidence in criminal cases that is obtained by breaching ethical rules). Judge Rubin stated that to properly balance adverse parties' abilities, defendants should be allowed to pay witnesses contingent upon acquittal. *Id.* However, Judge Rubin felt that this practice would result in a perversion of the trial process. *Id.*

154. See, e.g., *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 865 F. Supp. 1516, 1525 (S.D. Fla. 1994) (holding that payment by plaintiff's counsel to non-expert witnesses for testimony, while not in violation of § 201(c)(2), clearly violated the Rules of Professional Conduct). Incidentally, the government relied on this case in *Singleton* to support its view that payment for truthful testimony did not violate § 201(c)(2). *Singleton*, 144 F.3d at 1358.

155. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1) (1999) (stating that government lawyers are "minister[s] of justice").

156. Fred C. Zacharias, *Structuring that Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 50 (1991).

157. *Id.*

on all other lawyers.¹⁵⁸ Prosecutors have a duty to ensure some semblance of parity within the justice system because, as government representatives, they are charged with protecting the fairness of that system.¹⁵⁹

III. PROPOSAL

A. *The Conviction Conundrum*

Federal courts rejecting the panel's application of § 201(c)(2) to prosecutors have ignored the significance of the ethical violations that accompany agreements such as the one at issue in *Singleton*.¹⁶⁰ Even if courts adopt the government's construction of § 201(c)(2), the concomitant ethical violations should produce the same result as that in the panel decision.¹⁶¹ The *Singleton* panel's ultimate conclusion that prosecutors violated the rules of ethics is consistent with the plain language of Rule 3.4(b) of the Model Rules of Professional Conduct.¹⁶² The panel's finding is also consistent with congressional intent concerning the duties of prosecutors.¹⁶³ Finally, the *Singleton* panel's finding is consistent with the spirit of the adversarial system.¹⁶⁴

Prosecutors argue that the practice of giving things of value to witnesses in exchange for testimony is well established and that the practice should not be questioned.¹⁶⁵ They claim that many convictions will not be obtained absent testimony from

158. *Id.* at 52.

159. *Id.* at 77-78.

160. *United States v. Lowery*, 166 F.3d 1119, 1124 (11th Cir. 1999).

161. *Zacharias*, *supra* note 156, at 50.

162. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) (1999); *Singleton*, 144 F.3d 1343, 1360 (10th Cir. 1998).

163. *See* 28 U.S.C. § 530B(a) (directing that federal prosecutors conform to the rules of ethics in states where they practice); *supra* note 92 (explaining how 28 U.S.C. § 530B(a) applies state ethical and local rules to federal prosecutors).

164. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) cmt. 1 (1999) (stating that fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like).

165. *See, e.g., United States v. Ford*, 99 U.S. 594, 599 (1878) (discussing the history of plea agreements in exchange for testimony). Justice Clifford noted that the modern practice of plea agreements probably evolved from the "ancient and obsolete" practice called approvement. *Id.* Approvement was allowed only in capital cases. *Id.* Where a person accused of a capital crime accused an accomplice of the same crime, the accusation was effectively an indictment. *Id.* The accused accomplice had to answer and defend the charge. *Id.* If the accomplice was acquitted, the approver, the person originally charged with the crime, was "condemned." *Id.* If, however, the accomplice was found guilty and convicted of the capital offense, the approver was entitled to a pardon. *Id.*

accomplices.¹⁶⁶ They cite precedent holding that existing safeguards adequately protect defendants' rights.¹⁶⁷ Attorneys General have even gone so far as to suggest that prosecutors should not be held to ethical rules.¹⁶⁸

1. Prosecutors Should Not Use Leniency as a Crutch for Weak Cases

Admittedly, the practice of giving immunity to witnesses does have a long history.¹⁶⁹ Granting immunity in order to compel testimony, however, is different from the kind of plea agreements more recently used by prosecutors to obtain convictions. Immunity is a tool used to compel testimony from people who exercise their Fifth Amendment right not to incriminate themselves. It is most effective in cases where the government has insufficient evidence to obtain a conviction absent the testimony of an accomplice. In such cases, prosecutors must forego one prosecution in order to succeed in another. Theoretically, the conviction sought must be important enough to justify the immunity given to another culpable person. Modern plea agreements that prosecutors use differ. The agreements typically offer accomplice witnesses immunity from prosecution for the crime at issue, and additionally may offer other benefits such as immunity from prosecution for other unrelated crimes, breaks in sentences, monetary incentives, favorable treatment during incarceration, or reductions of jail sentences. Modern practices raise several questions, such as whether one conviction is important enough to justify granting immunity for several crimes committed by a culpable person,¹⁷⁰ whether paying sometimes very large amounts of money to a person who may be culpable is

166. See, e.g., *United States v. Grimes*, 438 F.2d 391, 396 (6th Cir. 1971) (holding that accomplice testimony does not violate a defendant's due process rights when the plea agreement between the accomplice and the prosecution is disclosed).

167. *Id.*

168. ABRAMOWITZ, *supra* note 92, at 3 (stating that the memorandum advised Justice Department attorneys that they were not bound by the rules of ethics applicable to all other attorneys in regard to communications with represented parties). The memorandum suggested that communications with represented persons were important to law enforcement. *Id.* The government argued the "law enforcement justification" in *Singleton* and its progeny as a justification for exempting prosecutors from the federal bribery statute and from state ethical rules. See *Singleton*, 144 F.3d at 1352-53 (stating that the government put forth a "vague argument that some overriding policy should prevent application of [§ 201(c)(2)] to the government's conduct").

169. See *Ford*, 99 U.S. at 599 for further discussion.

170. See *Singleton*, 144 F.3d at 1344 (stating that the agreement given to Douglas to testify included promises that he would not be prosecuted for crimes unrelated to the wire fraud investigation at issue).

ethical,¹⁷¹ and whether the law should encourage practices that allow prisoners to avoid the punishments society has deemed appropriate for their crimes.¹⁷² Furthermore, if a prosecutor's case is so weak that he must resort to offering a generous plea agreement, one wonders whether charges should be filed at all.¹⁷³

As defense attorneys have pointed out, accomplices can provide substantial assistance to law enforcement officers and prosecutors without actually testifying.¹⁷⁴ The use of informers¹⁷⁵ undoubtedly predates the practice of granting immunity and modern plea agreements. Informers differ from accomplices in terms of motivation. Informers are often motivated by patriotism, morals, money, or other personal reasons. Accomplices testifying pursuant to plea agreements, however, are often motivated by self-preservation. Deals allowing accomplices to stay out of jail, get out of jail, or keep money that was illegally obtained may create pressure to lie. This fact reveals the danger of using accomplice testimony. When a culpable person is offered a choice between seventy-four years in prison or three years' probation with the stipulation that she will help a prosecutor make a case against her accomplice, she will often opt for the latter choice.¹⁷⁶

171. See *United States v. Wilson*, 904 F.2d 656, 657 (11th Cir. 1990) (holding that leniency and payment of up to \$11 million to government witnesses did not compromise trial so much as to violate the due process rights of defendants).

172. See Ted Rohrlich & Robert W. Stewart, *Jailhouse Snitches; Trading Lies for Freedom*, L.A. TIMES, Apr. 16, 1989, at A1 (stating that in addition to reduced sentences, jailhouse informants sometimes receive other rewards as well). The story of Sidney Storch is one example of a jailhouse informant receiving a reduced sentence by testifying about other inmates' alleged confessions. *Id.* Storch received at least three felony convictions in California. *Id.* By informing on other inmates, Storch spent only seven months in state prison. *Id.* Rewards received by informants include increased access to "creature comforts" in jails, opportunities to participate in field trips outside of jail (otherwise known as undercover operations with police), and cash payments ranging from five dollars from police officers to thousands of dollars from witness protection funds. *Id.*

173. See Ted Rohrlich, *Bar Launches Probe on Use of Jail Informants*, L.A. TIMES Nov. 30, 1988, at B1 (discussing an investigation of Los Angeles County Prosecutors by the State Bar of California). Trev Davis, the Bar's Assistant Chief Trial Counsel, stated that the main issue being investigated was whether prosecutors knowingly used unreliable informants in a quest to obtain as many convictions as possible. *Id.*

174. See generally Rohrlich, *supra* note 1, at A1 (explaining that law enforcement authorities do not rely solely on informant's testimony but compare the informant's story with facts known only to the criminal and the police).

175. For purposes of this Comment, "informers" are people who do not participate in the crimes about which they give information.

176. See *Saavedra v. Thomas*, No. 96-2113, 1997 U.S. App. LEXIS 35017, at *1-2 (10th Cir. Dec. 12, 1997) (arguing that the government violated defendant's due process rights by inducing his co-defendant to testify against

2. *Unreliable Testimony Should Be Excluded*

Courts have used the following remedies to protect against convictions possibly based on perjury. First, the plea agreement must be disclosed to the jury so that the defendant may impeach the witness with his motive for testifying.¹⁷⁷ This rule, while appearing sufficient in the abstract, is effectively skirted when the prosecution is able to allude to the plea agreement in its case in chief, thereby downplaying the effect of cross-examination of an accomplice witness.¹⁷⁸ Furthermore, a savvy witness will not likely be tripped up on cross-examination about his agreement.

Second, some courts require that limiting instructions be given to the jury when accomplice testimony is unreliable.¹⁷⁹ However, as noted above, not all courts require such instructions, even when the testimony is uncorroborated.¹⁸⁰ Since there is no clear rule on whether to give cautionary instructions or how specific they should be, this remedy is currently insufficient. Juries may not get cautionary instructions at all, or may get

him). The co-defendant faced 74 years of imprisonment if convicted of all charges against him. *Id.* at *3. If the co-defendant pleaded guilty, the government agreed to recommend a sentence of 18 years imprisonment. *Id.* If the co-defendant pleaded guilty and testified against the defendant, the government agreed to recommend a sentence of three years probation. *Id.*

177. *See, e.g.,* United States v. Bagley, 473 U.S. 667, 675 (1985) (stating that evidence favorable to the accused, such as plea agreements, must be disclosed to the defendant as impeachment evidence). The Supreme Court stated that the reason for requiring production of impeachment evidence is to ensure that a miscarriage of justice does not occur. *Id.* The court further noted that a jury's judgment of the reliability of a witness may determine the guilt or innocence of the accused, and for that reason, impeachment evidence must be made available to the defendant. *Id.* at 676 (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

178. *See* United States v. Roberts, 618 F.2d 530, 536 (9th Cir. 1980) (stating that a jury's impression of the prosecution vouching for the truth of an accomplice witness may, in reality, preclude effective cross-examination).

179. *See, e.g.,* State v. Ott, 217 Wis. 2d 290, 293 n.2 (1998) (citing WIS. JURY INSTRUCTIONS CRIMINAL § 245 (1991)) (regarding accomplice testimony). The pattern instruction states:

[a] verdict of guilty may be based upon this testimony provided it is of such a character, taken in connection with all the other evidence in the case, as to satisfy you of the guilt of the defendant beyond a reasonable doubt. But ordinarily, it is unsafe to convict upon the uncorroborated testimony of an accomplice. Therefore, you should examine this evidence with the utmost care and caution, scrutinize it closely, and weigh it in the light of all the attending evidence. You should not base a verdict of guilty upon it alone, unless after such scrutiny and consideration it satisfies you of the guilt of the defendant beyond a reasonable doubt.

Id.

180. *See* United States v. Fernandez, 145 F.3d 59, 62-63 (1st Cir. 1998) (stating that cautionary instructions do not have to be given when accomplice testimony is uncorroborated, as long as the testimony is internally consistent).

instructions that are worded so generally that they fail to clearly signal the suspicion of accomplice testimony that jurors should harbor in such situations.

The current remedies do not level the playing field in pursuit of the fundamental fairness that the adversarial justice system theoretically aims to achieve. They do not overcome the fact that accomplice testimony is inherently unreliable. The easiest solution, therefore, is to do away with the problem. When accomplices give information to prosecutors, they should not be allowed to testify.

3. *Courts Should Demand Fairness*

More than one hundred years ago, the United States Supreme Court held that plea agreements were enforceable¹⁸¹ and stated that accomplice witnesses had equitable rights to leniency when giving information.¹⁸² At the same time, however, the Court noted the importance of judges as gatekeepers of evidence.¹⁸³ The Court stated that judges must be satisfied by the veracity of accomplices' statements before allowing such testimony.¹⁸⁴ The same holds true today. Judges, under rules of evidence, have the discretion to exclude evidence that may lead juries to draw inferences based on the assumption that the evidence is reliable when, in fact, it is not.¹⁸⁵ Such unreliable evidence includes accomplice testimony.¹⁸⁶ There is no guarantee for its truth¹⁸⁷ and no real deterrent for accomplices who are inclined to lie. Exclusion of this evidence on this basis is both justified and rational.

Barring this controversial approach, extremely detailed and explicit jury instructions can be uniformly required in cases where

181. See *United States v. Ford*, 99 U.S. 594, 605 (1878) (stating that public policy required that agreements between prosecutors and accomplices should be carried out).

182. See *id.* at 604 (stating that an accomplice witness is equitably entitled to a pardon when he 1) gives information to prosecutors, 2) is informed of his right not to incriminate himself, 3) testifies about his own acts, and 4) testifies about the acts of his accomplices in the crime charged).

183. See *id.* at 603, cited in 1 PHIL. EVID. 87 (1868) (stating that "the court, in view of all the circumstances [surrounding the plea agreement], will admit or disallow the evidence as will best promote the ends of public justice . . .").

184. See *Ford*, 99 U.S. at 603 (discussing whether accomplices testifying pursuant to plea agreements were entitled by equity to mercy). The Court inferred that if a judge were not satisfied with the accomplice's integrity or the veracity of his testimony, the accomplice should not be admitted as a witness. *Id.*

185. See FED. R. EVID. 801-07 (explaining the requirements of and the exceptions to the Hearsay Rule).

186. *Id.*

187. FED. R. EVID. 807 (stating that hearsay testimony, which is generally inadmissible, may be admitted when supported by circumstances that guarantee its trustworthiness).

accomplices testify in exchange for leniency or other valuable incentives. Judges have the power both to allow such detailed cautionary instructions and to set precedent requiring them. Courts acknowledge that they may exercise such supervisory powers to preserve individual rights and to preserve judicial integrity.¹⁸⁸ At the very least, cautionary instructions clearly announcing the need for juries to examine the possible motives of witnesses are superior to the current instructions, which are often haphazardly given and oftentimes vague. Detailed instructions will ensure fairness to defendants in a more consistent manner, and will ensure that juries base convictions on fully informed decisions.¹⁸⁹

B. The Ethical Conundrum

1. Prosecutors Must Be Held to the Same Ethical Standards as All Other Attorneys

Recently, Congress amended 28 U.S.C. § 530B, the statute that governs the actions of federal prosecutors, requiring federal prosecutors to adhere to state ethical standards.¹⁹⁰ The statutory addition requires the Department of Justice to make new rules and alter old ones in an effort to ensure compliance with state rules of ethics.¹⁹¹ As Congress clearly sought to deter the government from using unethical methods to gain convictions, the amendment should end any debate about what Congress intended by failing to exclude prosecutors from the scope of § 201(c)(2).¹⁹² Since the federal bribery statute and state rules of ethics apply to prosecutors, the practice of bargaining for accomplice testimony is, in fact, rendered illegal at the federal level.¹⁹³

188. See *United States v. McClintock*, 748 F.2d 1278, 1285-86 (9th Cir. 1984) for further discussion.

189. See *United States v. Lopez*, 4 F.3d 1455, 1463 (9th Cir. 1992) (stating that preserving judicial integrity includes ensuring that convictions are based on "appropriate considerations validly before the jury," and that federal courts have an "independent interest in ensuring that criminal trials . . . appear fair to all who observe them").

190. 28 U.S.C. § 530B(a) (1990).

191. *Id.*

192. *But see United States v. Lowery*, 166 F.3d 1119, 1125 (11th Cir. 1999) (stating the belief that Congress, while subjecting federal prosecutors to state rules of ethics, did not intend to render evidence obtained in violation of those rules inadmissible).

193. While many state witness bribery statutes explicitly exclude bargains for "truthful" testimony, state rules of ethics still preclude state prosecutors from bargaining for testimony. See, e.g., 720 ILL. COMP. STAT. § 5/32-4c (West 1997) (articulating the Illinois rule on witness bribery); N.M. STAT. ANN. § 30-24-2 (Michie 1978) (articulating the New Mexico rule on witness bribery). The Illinois statute states:

[a] person who, after the commencement of a criminal prosecution, has

Payments to fact witnesses—aside from reasonable expenses of travel, lost work, etc.—are prohibited in civil cases.¹⁹⁴ As noted in the *Singleton* panel decision, courts have excluded such testimony procured in violation of ethical rules, regardless of whether the purchased testimony was true or false.¹⁹⁵ In the criminal context, however, courts continue to allow prosecutors to purchase testimony by turning a blind eye to ethical rules expressly prohibiting the practice. Courts thus effectively exempt prosecutors from the very rules designed to promote fairness in the adversary system. The only argument in support of this practice is that prosecutors are charged with convicting bad people. But the argument fails, however, because government prosecutors also have a duty to ensure that innocent people are not convicted.¹⁹⁶ It is understandable, therefore, to expect prosecutors to adhere to the same ethical rules as other attorneys. For these reasons, the exclusion of accomplice testimony is not only rational, it is required.

been identified in the criminal discovery process as a person who may be called as a witness in a criminal proceeding shall not accept or receive, directly or indirectly, any payment or benefit in consideration for providing information obtained as a result of witnessing an event or occurrence or having personal knowledge of certain facts in relation to a criminal proceeding This Section does not apply to any of the following circumstances To the lawful compensation or benefits provided to an informant by a prosecutor or law enforcement agency

720 ILL. COMP. STAT. § 5/32-4c. The New Mexico statute states:

[b]ribery or intimidation of a witness consists of any person knowingly:

(1) giving or offering to give anything of value to any witness or to any other person likely to become a witness in any judicial, administrative, legislative or other official cause or proceeding to testify falsely or to abstain from testifying to any fact in such cause or proceeding

N.M. STAT. ANN. § 30-24-2.

See also MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 133 (restricting attorneys from expressing personal opinions about the credibility of witnesses).

194. See, e.g., *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 865 F. Supp. 1516, 1524-25 (S.D. Fla. 1994) (holding that payments by plaintiff's counsel to fact witnesses violated the *Florida Rules of Professional Conduct*). The fact that the payments were conditioned upon *truthful* testimony made no difference; the payments were illegal. *Id.* at 1525. The court stated that the proper remedy was exclusion of all evidence "tainted by the ethical violation." *Id.* at 1526.

195. See, e.g., *id.* at 1526.

196. See *Zacharias*, *supra* note 156, at 57 (noting that prosecutors are simultaneously responsible for protecting the community, representing victims of injustice, and ensuring that defendants have a "fair opportunity for vindication").

2. *Exclusion of Unethically Obtained Testimony Is an Appropriate Remedy*

The purpose of the exclusionary rule is to deter conduct deemed antithetical to the individual rights the rule seeks to protect.¹⁹⁷ Courts have recognized that the exclusionary rule protects those rights in a systematic fashion.¹⁹⁸ Some courts hold that suppression of unethically obtained evidence is the proper remedy for ethical violations.¹⁹⁹ Other courts state that the proper remedy for ethical violations is disciplinary action against individual attorneys.²⁰⁰

Disciplinary proceedings against individual prosecutors who violate ethical rules, however, are rare.²⁰¹ This is especially apparent when the widespread, systematic acceptance of allowing prosecutors to purchase testimony is considered. The practice of giving things of value in exchange for testimony is an institutional practice followed by prosecutors' offices around the country. Discipline of individual attorneys is unlikely to achieve the systematic protection of rights and substantive fairness envisioned by the rules of ethics. "The Bar does not discipline institutions."²⁰² Exclusion of purchased testimony is an appropriate and logical remedy for ethical violations. It can be easily implemented in a uniform manner, thereby addressing ethical violations on institutional levels. Exclusion of purchased testimony is also more apt to deter unethical conduct by individual prosecutors.

CONCLUSION

The *Singleton* panel decision was correct. The panel based its decision on the clear language of § 201(c)(2), which precludes prosecutors from giving, offering or promising anything of value to witnesses in exchange for testimony. It promotes ethical rules

197. *United States v. Guerrerio*, 675 F. Supp. 1430, 1434 (S.D.N.Y. 1987).

198. *Id.*

199. See *United States v. Hammad*, 846 F.2d 854, 857-59 (2d Cir. 1988) cited in *Guerrerio*, 675 F. Supp. at 1436 (finding that a prosecutor's violation of state rules of ethics required suppression of evidence as a remedy).

200. See *Guerrerio*, 675 F. Supp. at 1435-36 (holding that disciplinary action is a better deterrent than exclusion of evidence). The court, however, noted that the exclusionary rule was not intended to punish, but to create an incentive to uphold individual constitutional rights. *Id.* at 1434.

201. See Kenneth Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, § 1, at 1 (stating that since 1963, at least 381 people convicted of murder in the U.S. have had their convictions overturned due to prosecutorial misconduct). In many of those cases, prosecutors either concealed exculpatory evidence, or knowingly allowed false evidence to be admitted. *Id.* None of those prosecutors were barred from practicing law; only one prosecutor out of the 381 cases discussed had his law license suspended. *Id.* His license was reinstated after 59 days. *Id.*

202. Editorial, *The Bar Looks at Informants*, L.A. TIMES, Dec. 1, 1988, at B6.

that preclude prosecutors from compensating fact witnesses for testimony. The panel also based its decision on the goal of the adversarial justice system—to get to the truth of matters in a manner that is fair to both sides.

Prosecutors may still garner information from accomplices. This information can be used to investigate crimes and to obtain reliable evidence. Because law enforcement will still have such information available, its efforts will not be unduly hampered by exclusion of accomplice testimony.

Even if § 201(c)(2) is amended by Congress to allow an exception for prosecutors, and even if the Supreme Court at some point holds that procedural considerations should allow prosecutors to give leniency or other consideration in exchange for testimony, the rules of ethics will remain. There should not be one set of ethical standards for prosecutors and another set for defense attorneys. The interests of justice dictate that trials be fair, which means that both sides must play by the same rules and that convictions must be based on reliable evidence.

