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Toward a Level Playing Field: Challenges to Accomplice Testimony in the Wake of United States v. Singleton

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* This Note is dedicated to the memory of Zeta Elizabeth Haldin (1945-1986) whose devotion to my education made this opportunity possible. I would also like to acknowledge Justin D. Flamm, James M. Phemister, and Ellen M. Wasilausky for their encouragement and guidance in the development of this Note.

> [T]his course of admitting of approvers hath long been disused, and the truth is, that more mischief hath come to good men by these kind of approvements by false accusations of desperate villians, than benefit to the public by the discovery and convicting of real offenders.[1]

> They're telling me what to say. And I have to please them, I got to help myself.[2]

I. Introduction

Consider the following scenario: Watts is the organizer of a conspiracy. Watts buys large quantities of powder cocaine from Chisholm, converts the powder cocaine into crack cocaine, and with the help of Hines, distributes the crack cocaine. Agents from the Federal Bureau of Investigation (FBI) arrest Watts, Chisholm, and Hines for conspiracy to distribute cocaine. An Assistant United States Attorney offers Watts prosecutorial leniency in exchange for Watts's full cooperation and his testimony against all co-conspirators. Watts, who has an extensive criminal record and faces the possibility of life imprisonment, accepts the offer and leads authorities to Aaron. Aaron had introduced Watts to Chisholm but is otherwise completely removed from the activities of the conspiracy. FBI agents arrest Aaron for conspiracy to distribute cocaine.

Upon his arrest, authorities pressure Aaron to disclose additional information about the conspiracy. However, because authorities arrested Aaron last and he was the least involved in the conspiracy, Aaron cannot provide any information that the other co-conspirators have not already revealed. Pursuant to an agreement promising prosecutorial leniency, Watts testifies against Aaron at trial. Watts's testimony is the only direct evidence linking Aaron to the conspiracy. A jury convicts Aaron, and although he has no prior criminal record, the court sentences him to life imprisonment without parole. Watts, however, in accordance with the terms of his agreement, does not serve a single day.

The above scenario, like the case from which it arises,[3] highlights several critical issues that currently plague the federal criminal justice system. First,

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1. 2 MATTHEW HALE, PLEAS OF THE CROWN *226.

2. *Frontline: Snitch* (PBS television broadcast, Jan. 12, 1999) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/snitch/etc/script.html>) (quoting 23-year-old Cedric Jones, who pled guilty to drug charges and then testified for prosecution against family members, friends, and acquaintances in order to secure sentence reduction).

3. *See* United States v. Chisholm, 73 F.3d 304, 305-06 (11th Cir. 1996) (discussing details of conspiracy that involved four individuals and 24 kilograms of powder cocaine); *Frontline*, *supra* note 2 (exploring several cases, including *United States v. Chisholm*, in which justice system rewarded most culpable individuals with reduced sentences and punished less culpable individuals). The facts underlying the scenario arise from the story of 23-year-old

the scenario is a powerful reminder of the severity of mandatory minimum sentences.[4] Second, the scenario suggests that under the federal drug conspiracy law, courts have license to judge people solely by the company they keep.[5]

Clarence Aaron, a former student-athlete at Southern University in Baton Rouge, Louisiana. *See Frontline, supra* note 2 (discussing Aaron's background). Aaron's cousin, Marion Watts, was a drug dealer in Mobile, Alabama. *Id.* In 1992, Watts lost his cocaine source and his subsequent search for a new source led to Aaron's involvement in the conspiracy. *Chisholm*, 73 F.3d at 305. Aaron had endeavored to stay clear of drugs, but when Watts called and asked Aaron to introduce him to someone in Baton Rouge who might supply cocaine, Aaron decided to help. *Frontline, supra* note 2. Aaron drove Watts and Robert Hines, one of Watts's associates, from Mobile to Baton Rouge and back in order to introduce them to Elwyn Chisholm. *Id.* Chisholm, through a source in Houston, provided a significant amount of powder cocaine to Watts, who converted it to crack cocaine and distributed it. *See Chisholm*, 73 F.3d at 305-06 (describing first of two drug transactions that involved total of 24 kilograms of powder cocaine). Watts, who was facing the possibility of a life sentence because of his extensive criminal record, used Aaron as a bargaining chip in the negotiation of his plea agreement. *Frontline, supra* note 2. In exchange for a plea agreement that promised prosecutorial leniency, Watts testified against Aaron at trial. *See Chisholm*, 73 F.3d at 305 (discussing Watts's guilty plea on lesser charge and Watts's testimony against Aaron at trial). Watts's testimony was the only direct evidence linking Aaron to the conspiracy. *See Frontline, supra* note 2 (discussing government's case). The government did not introduce any cocaine into evidence, nor did it produce any scientific evidence that incriminated Aaron. *See id.* (stating that accomplice testimony formed basis for entire case). A jury convicted Aaron, and although he had no prior criminal record, the court sentenced him to life imprisonment. *Chisholm*, 73 F.3d at 306. Watts, however, in accordance with the terms of his plea agreement, did not serve a single day. *See Frontline, supra* note 2 (discussing fate of other co-conspirators).

4. *See* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 221 (1993) (stating that "[s]entences that seemed fair when judged in the abstract from Washington often seem too harsh as applied in context to a particular case"); Karen Lutjen, Student Article, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 389, 465 (1996) (arguing that mandatory minimum sentencing is conceptually flawed because it does not allow court to assess culpability within context of both offense and offender); John Cloud, *A Get-Tough Policy That Failed*, TIME, Feb. 1, 1999, at 49 (discussing severity of mandatory minimum sentences). Cloud stated that "[m]ost mandatory sentences were designed as weapons in the drug war, with an awful consequence: we now live in a country where it's common to get a longer sentence for selling a neighbor a joint than for, say, sexually abusing her." *Id. But see* Michael M. Baylson, *Mandatory Minimum Sentences: A Federal Prosecutor's Viewpoint*, 40 FED. B. NEWS & J. 167, 167 (1993) (justifying mandatory minimum sentences as legitimate limitations upon judicial discretion).

5. *See* United States v. Shabani, 513 U.S. 10, 15 (1994) (stating that in order to establish that defendant violated 21 U.S.C. § 846, federal drug conspiracy statute, "the Government need not prove the commission of any overt acts in furtherance of the conspiracy"). One scholar has suggested that the fundamental effect of *Shabani* is to encourage the government to attempt to convict defendants in drug conspiracy cases solely through accomplice testimony, which is simply not reliable enough to prove beyond a reasonable doubt that a defendant conspired to violate federal drug laws. *See* Kevin Jon Heller, *Whatever Happened to Proof Beyond a Reasonable Doubt?: Of Drug Conspiracies, Overt Acts and* United States v. Shabani, 49 STAN. L. REV. 111, 142 (1996) ("Unless overruled, *Shabani* will ensure that drug conspiracy prosecutions convict both the guilty and the innocent alike.").

Finally, it illustrates the government's increased dependence upon accomplice testimony[6] and the gross inequity that can result from this dependence.[7] Recent criticism of this inequity has revitalized the classic debate about the admissibility of accomplice testimony offered in exchange for prosecutorial leniency.[8]

In *Crawford v. United States*[9] the Supreme Court stated that courts should view accomplice testimony with suspicion and that juries should not evaluate accomplice testimony according to the same rules that govern more credible witnesses.[10] Yet, in the ninety years since *Crawford*, not only has the

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6. *See* Mark Curriden, *Secret Threat to Justice*, NAT'L L.J., Feb. 20, 1995, at A1 (discussing criminal justice system's addiction to informants and corresponding potential for abuse); Paul Craig Roberts, *Skewed Scales of Justice*, WASH. TIMES, Jan. 15, 1999, at A16 (discussing marked increase in criminal cases built around accomplice testimony); Mark Rollenhagen, PLAIN DEALER (Cleveland), Jan. 3, 1999, at 1B (discussing recent increase in prosecutorial use of accomplice testimony). As Patrick A. Tuite and Ronald D. Menaker observed:

> It is becoming increasingly prevalent in both the state and federal systems for prosecutors to cut deals with those either charged with or suspected of committing crimes with the defendant. The prosecutor's objective in such a case is clear: to secure the testimony at trial of that person against the defendant.

Patrick A. Tuite & Ronald D. Menaker, *Court Slams Testimony-for-Leniency Deals*, CHI. DAILY L. BULL., July 15, 1998, at 6. Accomplices are those individuals whom the government has or could have indicted for the same crime with which it has charged the defendant. *See* Lester B. Orfield, *Corroboration of Accomplice Testimony in Federal Criminal Cases*, 9 VILL. L. REV. 15, 25 (1962) (stating that accomplice is one who is liable for identical statutory offense government has charged against defendant).

7. *See* Harvey A. Silverglate, *Use of Informers Hurts Accuseds' Rights*, NAT'L L.J., Jan. 30, 1995, at A21 (arguing that routine use of accomplice testimony offered pursuant to plea agreements is fundamentally unfair and may violate due process); *Frontline*, *supra* note 2 (investigating how fundamental shift in federal antidrug laws has bred culture that, in many cases, rewards guiltiest individuals while punishing less guilty individuals).

8. *See* Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 7-8 (1992) (discussing "ancient roots" of modern practice of procuring accomplice testimony with leniency); Yvette A. Beeman, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800, 800-01 (1987) (describing long history of offering prosecutorial leniency in return for accomplice testimony); Case Note, *Accomplice Testimony Under Conditional Promise of Immunity*, 52 COLUM. L. REV. 138, 139-40 (1952) [hereinafter Case Note, *Conditional Promise*] (detailing history of obtaining accomplice testimony through prosecutorial inducements); Neil B. Eisenstadt, Note, *Let's Make a Deal: A Look at* United States v. Dailey *and Prosecutor-Witness Cooperation Agreements*, 67 B.U. L. REV. 749, 761-62 (1987) (discussing historical origins of accomplice witness agreements).

9. 212 U.S. 183 (1909).

10. *See* Crawford v. United States, 212 U.S. 183, 204 (1909) (asserting that accomplice testimony "ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses"). In *Crawford*, the Supreme Court considered the appeal of a defendant convicted of conspiracy to defraud the United States. *Id.* at 188-92. According to the *Crawford* Court, the trial court improperly excluded evidence that tended to prove the defendant's innocence. *Id.* at 205. First, the trial court erred by not sustaining defendant's challenge to a

federal criminal justice system failed to detect and curtail accomplice perjury,[11] but it also has adopted a statutory scheme wherein the government, through its prosecutors, seemingly solicits accomplice perjury by offering inducements for testimony.[12] Recently, many scholars and commentators have criticized federal courts for their reluctance to exclude, to limit, or even to scrutinize accomplice testimony offered in exchange for prosecutorial leniency.[13] Scholars have argued that admission of accomplice testimony

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juror who was a government employee. *Id.* at 197. Second, the trial court erred by limiting the scope of defendant's testimony. *Id.* at 202. Although the Court refused to assign error to the admission of an accomplice's testimony, it cautioned that juries should not consider such testimony as equal to that of an ordinary witness. *Id.* at 204. After finding that the questionable accomplice testimony was the only evidence tending to establish the defendant's guilt, the Court concluded that the government had failed to rebut the presumption of harm that arises from the erroneous exclusion of material evidence. *Id.* Consequently, the *Crawford* Court reversed the defendant's conviction. *Id.* at 208.

Since *Crawford*, the Supreme Court consistently has indicated its distrust of accomplice testimony. *See* Bruton v. United States, 391 U.S. 123, 136 (1968) ("Not only are the [accomplice's] incriminations devastating to the defendant but their credibility is inevitably suspect. . . ."); On Lee v. United States, 343 U.S. 747, 757 (1952) (stating that use of accomplice witnesses may raise "serious questions of credibility"); Caminetti v. United States, 242 U.S. 470, 495 (1917) (stating preference that courts "caution juries against too much reliance upon testimony of accomplices and . . . require corroborating testimony before giving credence to such evidence").

11. *See* Lisa C. Harris, Note, *Perjury Defeats Justice*, 42 WAYNE L. REV. 1755, 1777 (1996) ("[F]ew offenders of this serious crime are ever punished and perjury in the courtrooms continues to skyrocket seemingly out of control."); Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 788 (1990) (discussing pervasiveness of perjury in criminal justice system).

12. *See* 18 U.S.C. § 3553(e) (1994) (authorizing reduction of sentences for "substantial assistance"); 28 U.S.C. § 994(n) (1994) (mandating that sentencing guidelines allow sentence reductions to take into account defendant's "substantial assistance"); *infra* notes 286-95 and accompanying text (discussing statutory scheme). Federal courts repeatedly have recognized that the chances of perjury increase when an accomplice testifies in exchange for consideration. *See, e.g.*, Boone v. Paderick, 541 F.2d 447, 451 (4th Cir. 1976) (discussing accomplice's incentive to please promisor); McMillen v. United States, 386 F.2d 29, 36 (1st Cir. 1967) (stating that in plea negotiations, accomplices are subject to both carrot and stick); United States v. Baresh, 595 F. Supp. 1132, 1137 (S.D. Tex. 1984) (stating that state attorneys created situation that invited perjury from accomplice).

13. *See* Hughes, *supra* note 8, at 65 (urging courts to prevent dangers that accomplice plea agreements pose); Beeman, *supra* note 8, at 826 (arguing that failure of courts to exclude accomplice testimony results in erosion of truth-seeking function of criminal justice system); Eisenstadt, *supra* note 8, at 781-72 (criticizing reluctance of courts to rein in prosecutors by limiting use of accomplice plea agreements); Saverda, *supra* note 11, at 787-88 (discussing reluctance of courts to scrutinize uncorroborated accomplice testimony); Case Note, *Conditional Promise*, *supra* note 8, at 140-41 (stating that lack of judicial scrutiny increases burden on defense counsel to explore plea agreement and to discredit accomplice witness); Silverglate, *supra* note 7 (criticizing inactivity of federal courts in area of accomplice plea agreements); *infra* Part III (discussing scholarship dealing with exclusion or limitation of accomplice testimony).

offered in exchange for prosecutorial leniency violates the defendant's constitutional due process rights.[14] These scholars also have argued that courts should exclude accomplice testimony pursuant to their supervisory powers to reject unreliable evidence[15] or that courts should limit the effectiveness of the testimony by requiring corroborating evidence of testimony offered in exchange for prosecutorial leniency.[16]

In *United States v. Singleton* (*Singleton I*),[17] the United States Court of Appeals for the Tenth Circuit offered yet another basis for excluding or limiting the use of testimony arising from accomplice plea agreements.[18] A unanimous panel of the court concluded that offering prosecutorial leniency in exchange for testimony violated the antigratuity provision of the federal witness bribery statute[19] as well as a Kansas rule of professional conduct.[20]

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14. *See* Hughes, *supra* note 8, at 35 (stating that due process considerations should prevent prosecutors from bargaining for specific testimony); Beeman, *supra* note 8, at 826 (concluding that admission of unreliable accomplice testimony violates due process); Eisenstadt, *supra* note 8, at 781-82 (suggesting that accomplice testimony offered pursuant to certain plea agreements is utterly at odds with due process); Silverglate, *supra* note 7 (arguing that use of accomplice testimony offered pursuant to plea agreements is fundamentally unfair and may violate due process); *infra* Part III.A (discussing due process scholarship).

15. *See* Beeman, *supra* note 8, at 823 (suggesting that courts should exclude accomplice testimony pursuant to their supervisory powers in order to prevent impairment of defendant's right to fair trial); Eisenstadt, *supra* note 8, at 779 (arguing that courts could rely on their supervisory powers to exclude accomplice witnesses' testimony); *infra* Part III.B (discussing supervisory power scholarship).

16. *See* Saverda, *supra* note 11, at 804 (concluding that corroboration requirement for accomplice testimony is both desirable and viable method of reform in federal courts).

17. 144 F.3d 1343 (10th Cir.), *vacated and reh'g granted*, 144 F.3d 1343, 1361 (10th Cir. 1998), *reh'g en banc*, 165 F.3d 1297 (10th Cir. 1999).

18. United States v. Singleton, 144 F.3d 1343, 1352 (10th Cir.) [hereinafter Singleton I] (concluding that government's promise of leniency in exchange for testimony violated federal witness bribery statute), *vacated and reh'g granted*, 144 F.3d 1343, 1361 (10th Cir. 1998), *reh'g en banc*, 165 F.3d 1297 (10th Cir. 1999). In *Singleton I*, the court considered whether offering prosecutorial leniency in exchange for testimony violated 18 U.S.C. § 201(c)(2), the federal witness bribery statute. *Id.* at 1344. According to the *Singleton I* court, a limited canon of construction provides that statutes do not apply to the government unless the text expressly includes the government. *Id.* at 1345. Even so, the *Singleton I* court determined that the statute did not implicate the limited canon of construction for two reasons. *Id.* at 1345-48. First, application of § 201(c)(2) would not deprive the government of a recognized prerogative. *Id.* at 1346. Second, application of § 201(c)(2) to the government would not work an obvious absurdity. *Id.* at 1347-48. Therefore, the *Singleton I* court concluded that § 201(c)(2) applies to federal prosecutors. *Id.* at 1348. The *Singleton I* court also concluded that the promises of leniency made to the accomplice witness fell within the statutory term "anything of value." *Id.* at 1351. Consequently, the court held that offering prosecutorial leniency in exchange for testimony violated § 201(c)(2). *Id.* at 1352.

19. *Id.*; *see infra* Part IV.A (discussing reasoning of *Singleton I*).

20. *Singleton I*, 144 F.3d at 1359; *see infra* Part IV.A (discussing reasoning of *Singleton I*).

The *Singleton I* court reasoned that the purpose of the federal bribery statute is to preserve the reliability of testimonial evidence by eradicating a significant incentive to provide false testimony.[21] The court therefore concluded that purchasing factual testimony, whether with money or with leniency, violates the federal bribery statute.[22] The Tenth Circuit vacated *Singleton I*[23] and later reached a contrary conclusion sitting en banc.[24] Nevertheless, *Singleton I* triggered an unprecedented national examination of accomplice testimony[25] and offered a new analytical framework for analyzing accomplice testimony.[26]

This Note considers whether accomplice testimony offered in exchange for prosecutorial leniency is so unreliable that federal courts should exclude the testimony from evidence or otherwise limit its admissibility. Part II recounts the history of accomplice cooperation agreements and the recent developments in this area.[27] Part III surveys the current scholarship concerning accomplice cooperation agreements and the testimony arising out of these agreements.[28] Part IV analyzes *Singleton I* and the Tenth Circuit's en banc decision.[29] Part IV also examines the decisions of other federal courts that faced challenges to accomplice testimony in the wake of *Singleton I*.[30] Part V discusses how federal courts, in their haste to reject the holding of *Singleton I*,

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21. *See Singleton I*, 144 F.3d at 1346 ("The anti-gratuity provision of § 201(c)(2) indicates Congress's belief that justice is undermined by giving, offering, or promising anything of value for testimony.").

22. *See id.* at 1347 ("The judicial process is tainted and justice cheapened when factual testimony is purchased, whether with leniency or money.").

23. *See id.* at 1361 (vacating panel's opinion).

24. *See* United States v. Singleton, 165 F.3d 1297, 1300 (10th Cir. 1999) (en banc) [hereinafter Singleton II] (finding that § 201(c)(2) does not prohibit offering prosecutorial leniency in exchange for testimony).

25. *See* William Glaberson, *Legal World Shaken by Ruling Barring Witness Leniency*, DENV. POST, Dec. 3, 1998, at A33 ("The decision, which some lawyers say may be the first successful challenge under the federal bribery law to the practice of offering witnesses leniency, a centerpiece of the legal system since Colonial times, has triggered an unprecedented national examination in the courts, in Congress and among legal scholars.").

26. Although several scholars had asserted that offering prosecutorial leniency in exchange for testimony ran afoul of bribery statutes, no one had taken the argument seriously until *Singleton I*. *See* United States v. Ramsey, 165 F.3d 980, 987 n.10 (D.C. Cir. 1999) ("Until *Singleton*, no other court in the thirty-six year history of section 201(c)(2) had applied its prohibition to a prosecutorial grant of leniency in exchange for truthful testimony."); Stuart Taylor Jr., *Sauce for the Goose*, N.Y. L.J., July 13, 1998, at 2 (stating that before *Singleton I*, no one had taken bribery argument seriously).

27. *See infra* Part II (explaining background of accomplice cooperation agreements).

28. *See infra* Part III (considering accomplice cooperation agreements and corresponding scholarship).

29. *See infra* Part IV.A-B (analyzing *Singleton I* and *Singleton II*).

30. *See infra* Part IV.C (analyzing decisions of various federal courts addressing accomplice testimony).

failed to address the inherent dangers of accomplice testimony offered in exchange for prosecutorial leniency.[31] Finally, Part VI concludes that the dangers of accomplice testimony offered in exchange for prosecutorial leniency, in some circumstances, warrant exclusion of the testimony under Rule 403 of the Federal Rules of Evidence.[32]

II. Overview of Accomplice Cooperation Agreements

A. Historical Practice

Early common law recognized approvement, a procedure whereby a person arraigned for a felony could accuse another of the same crime.[33] Authorities usually pardoned the accuser upon the accused's conviction or convicted the accuser upon the accused's acquittal.[34] Approvement later fell into disuse because conditioning the accuser's pardon upon the conviction of the accused was so conducive to perjury that it outweighed its value as an incentive to cooperate.[35] Eventually, the practice of "turning king's evidence" evolved,[36] whereby an accomplice became eligible for a pardon simply by testifying fully and fairly, independent of a resulting conviction.[37] The practice initially faced challenge in the treason trials of the seventeenth century, when the English courts held that accomplice testimony given in exchange for

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31. *See infra* Part V (describing federal courts' failure to address inherent dangers of accomplice testimony that arises out of plea agreements).

32. *See infra* Part VI (suggesting exclusion under Rule 403 as solution to dangers of accomplice testimony offered in exchange for prosecutorial leniency).

33. 2 HALE, *supra* note 1, at *226; *see* The Whiskey Cases, 99 U.S. 594, 599 (1878) (discussing ancient practice of approvement (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *330)).

34. *See* 2 HALE, *supra* note 1, at *226 (explaining practice of approvement).

35. *See id.* ("[T]his course of admitting of approvers hath long been disused, and the truth is, that more mischief hath come to good men by these kind of approvements by false accusations of desperate villians, than benefit to the public by the discovery and convicting of real offenders. . . ."); Case Note, *Conditional Promise*, *supra* note 8, at 139 (stating that practice of approvement fell into disuse around 1500 because conditioning accomplice's pardon upon conviction of defendant was thought to be so conducive to perjury as to outweigh its value as incentive to "squealing").

36. In the United States, the phrase "turning king's evidence" came to be known as "turning State's evidence." *See* Crawford v. United States, 212 U.S. 183, 203 (1909) ("[A] confessed accomplice, was thus produced by the Government as a witness for the purpose of proving its case against defendant, the witness having, as it would appear, in popular language, turned 'State's evidence'. . . .").

37. *See* Case Note, *Conditional Promise*, *supra* note 8, at 139 (stating that practice of turning king's evidence "differs from approvement in that the accomplice witness is granted a right to pardon conditioned not upon the defendant's conviction but upon the accomplice's testifying fully and fairly").

a pardon was competent, despite its diminished credibility.[38] This view prevailed in the eighteenth and nineteenth centuries and was incorporated into the standard treatises on criminal law, evidence, and procedure.[39] Relying on these treatises with only a cursory analysis of the underlying cases, American courts unanimously have followed the rule of the English treason trials, expanding it to cover promises of pardon as well as bargains for leniency and immunity from prosecution.[40]

B. Modern Practice

Today, prosecutors routinely offer agreements for immunity or leniency to accomplices in exchange for testimony.[41] Prosecutors enjoy wide latitude in the type of promises they can make, presumably in order to overcome the obstacles that otherwise would prevent evidence from reaching the fact finder.[42] Prosecutors may promise immunity from prosecution,[43] dropped or

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38. *See id.* (stating that "practice of turning king's evidence was apparently first challenged in treason trials of seventeenth century, in which accomplice testimony given under promise of pardon was held to be competent though of diminished credibility").

39. *See, e.g.*, 1 SIMON GREENLEAF, EVIDENCE § 379 (1842) (discussing competency of accomplice witnesses); 2 WILLIAM HAWKINS, PLEAS OF THE CROWN 432 (2d ed. 1724) (same); FRANCIS WHARTON, CRIMINAL EVIDENCE § 439 (9th ed. 1884) (same). These texts had a significant influence on the development of law in the United States. *See* Eisenstadt, supra note 8, at 762-63 (suggesting that such treatises shaped law in United States).

40. *See* Case Note, *Conditional Promise*, *supra* note 8, at 139-40 ("Relying on these texts with but superficial examination of the cases, American decisions have unanimously followed the rule of the English treason trials, adapting it to cover not only promises of pardon but also bargains for leniency and immunity from prosecution.").

41. *See* Hughes, *supra* note 8, at 2 (stating that cooperation agreements have acquired considerable importance at both federal and state level). Approximately 90% of all criminal defendants plead guilty. JAMES E. BOND, PLEA BARGAINING AND GUILTY PLEAS § 1.2 (2d ed. 1983); *cf.* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS – 1998, at 402 tbl. 5.16 (Kathleen Maguire & Ann L. Pastore eds., 1999) (stating that 79.3% of criminal defendants brought before United States district courts in fiscal year 1996 pled guilty). An uncertain but substantial percentage of these defendants agree to testify against their co-defendants or co-conspirators in return for prosecutorial leniency. BOND, *supra*, § 1.8.

42. *See* Hughes, *supra* note 8, at 8 (discussing prosecutors' unrestricted discretion to purchase testimony through agreements); Note, *A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 HARV. L. REV. 887, 889 (1981) [hereinafter Note, *Duty to Disclose*] ("[P]rosecutors are granted the power to make these promises in order to remove obstacles that would otherwise prevent crucial evidence from reaching the trier of fact.").

43. *See, e.g.*, Giglio v. United States, 405 U.S. 150, 152 n.2 (1972) (discussing agreement in which prosecutor agreed not to indict accomplice); United States v. Hoover, 727 F.2d 387, 390 (5th Cir. 1984) (stating that decision not to prosecute similarly situated persons lies within discretion of executive branch); United States v. Mayo, 705 F.2d 62, 77 (2d Cir. 1983) (stating

reduced charges,[44] monetary payments,[45] or a commitment to recommend probation or a lenient sentence.[46] In contrast, defendants may not offer any inducements to a witness in order to obtain favorable testimony.[47] The only tool at defendants' disposal is the Sixth Amendment's compulsory process doctrine,[48] which grants defendants the right to subpoena witnesses to testify on their behalf.[49] Society's assumption that different motivations guide the prosecutor and the defendant has served as the traditional justification for this disparity in power.[50]

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that prosecutor had discretion not to bring perjury charge against government witness); *see also* Hughes, *supra* note 8, at 4-7 (discussing nature and function of informal immunity grants). In addition to offering informal promises not to prosecute, federal prosecutors can offer "use" immunity under the Witness Immunity Act of 1970. *See* 18 U.S.C. §§ 6001-6005 (1994) (authorizing offers of use immunity). Use immunity allows a prosecutor to compel the testimony of a witness over a Fifth Amendment claim, but prohibits the use of the compelled testimony to develop or to try a case against the witness. 18 U.S.C. § 6002 (1994). Formerly, federal prosecutors offered transactional immunity, in which the government afforded the witness complete immunity from prosecution for any transaction mentioned in the compelled testimony. *See* Narcotic Control Act of 1956, ch. 629, sec. 201, § 1406, 70 Stat. 574 (repealed 1970). With the advent of use immunity, requests for immunity have surged. *See* Saverda, *supra* note 11, at 789 (stating that prosecutors immunized more witnesses under Witness Immunity Act of 1970 during first 10 months of its existence than they had immunized during preceding 50 years of transactional immunity).

44. *See* United States v. Butler, 567 F.2d 885, 886-87 (9th Cir. 1978) (discussing dismissal of narcotics charges in exchange for testimony); Blankenship v. Estelle, 545 F.2d 510, 512 (5th Cir. 1977) (discussing dismissal of armed robbery and attempted murder charges in exchange for testimony).

45. *See* United States v. Jackson, 579 F.2d 553, 555 (10th Cir. 1978) (discussing $300 payment to unindicted accomplice in exchange for testimony); Sanders v. United States, 541 F.2d 190, 192 (8th Cir. 1976) (detailing repeated payments to informant-witness).

46. *See* Napue v. Illinois, 360 U.S. 264, 267-68 & n.3 (1959) (stating that prosecutor promised reduction of 199-year sentence in exchange for testimony); Campbell v. Reed, 594 F.2d 4, 6 (4th Cir. 1979) (discussing details of prosecutor's agreement to drop all remaining charges against accomplice and to file recommendation for lenient sentencing in exchange for accomplice's testimony).

47. *See* 18 U.S.C. § 201(c)(2) (1994) (prohibiting bribery of witnesses); *see also* Note, *Duty to Disclose*, *supra* note 42, at 889 ("[A] defendant may not offer a witness money or favors in exchange for his testimony or threaten him with dire consequences if his testimony is not 'cooperative.'").

48. *See* Washington v. Texas, 388 U.S. 14, 19 (1967) ("The [defendant's] right to offer the testimony of witnesses, and to compel their attendance, if necessary is . . . a fundamental element of due process of law.").

49. *See id.* at 23 (stating that Texas denied petitioner's right to compulsory process "because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying"). Compulsory process does not, however, assure the defendant that the witness will provide favorable testimony once the witness is in court.

50. *See* Note, *Duty to Disclose*, *supra* note 42, at 889-90 (stating that disparity in roles and duties between prosecutor and defendant justifies disparity in power).

When life or liberty is at stake, human nature leads a defendant to take almost any step to avoid conviction.[51] For this reason, granting defendants the power to encourage others to testify in their favor would invite widespread abuse.[52] The prosecutor, on the other hand, has not only a duty to seek a conviction, but also an overriding duty to ensure that "justice shall be done."[53] This duty creates an underlying assumption that, because prosecutors must temper their zeal to convict, they will not abuse the power to make promises of favorable treatment.[54] Because a similar duty to ensure justice does not constrain defendants, the justice system deprives them of this power.[55]

The separation of powers doctrine generally prevents judicial interference with the prosecutor's broad discretion in initiating and conducting criminal prosecutions.[56] As early as 1878, federal courts acknowledged that traditional accomplice plea agreements[57] are within the boundaries of prosecutorial discretion.[58] Traditional accomplice plea agreements typically require the witness to promise to testify "fully and fairly" or "truthfully."[59] If the accom-

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51. *See id.* (discussing assumption that defendants will use any means to avoid conviction).

52. *See id.* (stating that defendants would abuse power to coerce favorable testimony).

53. *See* United States v. Agurs, 427 U.S. 97, 110-11 (1976) ("[T]hough the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done.' He is the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.'" (citing Berger v. United States, 295 U.S. 78, 88 (1935))).

54. *See* Note, *Duty to Disclose*, *supra* note 42, at 890 ("Because of this 'higher' duty it is assumed that the prosecutor will not abuse the power to make promises of favorable treatment.").

55. *See id.* ("The defendant is denied this power because he is not, and realistically could not be, subject to a similar duty."); *see also* United States v. Turkish, 623 F.2d 769, 774-75 (2d. Cir. 1980) ("[I]n the context of criminal investigation and criminal trials, where accuser and accused have inherently different roles, with entirely different powers and rights, equalization is not a sound principle on which to extend any particular procedural device.").

56. *See* United States v. Greene, 697 F.2d 1229, 1235 (5th Cir. 1983) (stating that reluctance of courts to review prosecutorial decisions is grounded in separation of powers).

57. *See* The Whiskey Cases, 99 U.S. 594, 599-606 (1878) (discussing practice of offering pardon to accomplices who testify fully and fairly to their own and their associates' actions in case).

58. *See id.* at 603 ("[I]t is regarded as the province of the public prosecutor and not of the court to determine whether or not an accomplice, who is willing to criminate himself and his associates in guilt, shall be called and examined for the State."); *see also* United States v. Librach, 536 F.2d 1228, 1230 (8th Cir. 1976) ("An agreement not to prosecute an accomplice who is cooperating in the conviction of others is recognized as a proper exercise of [prosecutorial] authority." (citing ABA STANDARDS FOR CRIMINAL JUSTICE § 3.9(b)(vii) (1971))).

59. *See* Note, *Accomplice Testimony and Credibility: "Vouching" and Prosecutorial Abuse of Agreements to Testify Truthfully*, 65 MINN. L. REV. 1169, 1170 (1981) ("When testimony is the object of the agreement, the individual usually must promise to testify 'fully and fairly' or 'truthfully.'").

plice witness does not testify fully and truthfully, the prosecutor may refuse the leniency promised in the bargain.[60]

In recent years, prosecutors have tested the limits of their discretion by experimenting with the simple quid pro quo format of traditional accomplice plea agreements.[61] Some prosecutors have begun to offer accomplice witnesses contingent plea agreements in exchange for their testimony.[62] In contingent plea agreements, the immunity or leniency is contingent upon success in obtaining further indictments or a conviction, or upon the value to the prosecution of the testimony or information provided.[63] A number of state courts have censured contingent plea agreements, overturning the resulting convictions on both due process and policy grounds.[64] Federal courts, however, consistently have rejected challenges to both traditional and contingent accomplice plea agreements.[65]

III. The Case for Exclusion or Limitation

The Supreme Court has determined that the testimony of accomplices who receive lenient treatment is not per se unreliable.[66] Federal courts have

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60. *See id.* ("Th[e] truthfulness agreement becomes part of the plea bargaining agreement, and if the witness does not testify truthfully he or she may lose the benefits of the plea bargain.").

61. *See* Beeman, *supra* note 8, at 800 ("In recent years, some prosecutors have further conditioned the accomplice's reduction in sentence upon the defendant's indictment or conviction or the prosecutor's satisfaction with the accomplice's testimony.").

62. *See id.* at 809 (discussing contingent plea agreements).

63. *See id.* (explaining operation of contingent plea agreements).

64. *See, e.g.*, People v. Medina, 41 Cal. App. 3d 438, 455 (1974) ("[A] defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion."); People v. Green, 228 P.2d 867, 871-72 (Cal. Dist. Ct. App. 1951) (reversing conviction that rested solely upon testimony of accomplice when government had conditioned accomplice's promise of immunity upon defendant's conviction); Franklin v. State, 577 P.2d 860, 862 (Nev. 1978) ("[I]f the circumstances of the plea bargain would reasonably cause the alleged accomplice to believe he must testify in a particular fashion, then a less explicit arrangement [than that in *Medina*] also violates defendant's due process rights.").

65. *See* United States v. Wilson, 904 F.2d 656, 657 (11th Cir. 1990) (finding that contingent agreement did not violate defendant's due process rights); United States v. Spector, 793 F.2d 932, 936-37 (8th Cir. 1986) (rejecting defendant's due process argument); United States v. Risken, 788 F.2d 1361, 1374 (8th Cir. 1986) (sanctioning contingent agreement); United States v. Fallon, 776 F.2d 727, 734 (7th Cir. 1985) (stating that contingent plea agreement did not violate due process); United States v. Dailey, 759 F.2d 192, 196 (1st Cir. 1985) (finding that contingent plea agreement did not violate due process); United States v. Waterman, 732 F.2d 1527, 1533 (8th Cir. 1984) (en banc, 4-4 decision) (affirming district court's judgment that contingent plea agreement did not violate due process); *infra* Part III.A (discussing due process line of cases). *But see* United States v. Baresh, 595 F. Supp. 1132, 1137 (S.D. Tex. 1984) (concluding that contingent plea agreement violated due process).

66. *See* Caminetti v. United States, 242 U.S. 470, 495 (1917) ("[T]here is no absolute rule

allowed convictions based on uncorroborated testimony of accomplices to stand when the testimony was not "incredible or unsubstantial on its face."[67] Indeed, courts have upheld convictions based on accomplice testimony even when the accomplice is an admitted perjurer.[68] The reluctance of federal courts to impose any limits on prosecutorial use of accomplice plea agreements has limited the debate concerning accomplice testimony to the narrow discussion of contingent plea agreements.

Until *Singleton I*, debate concerning accomplice testimony focused on testimony arising out of contingent plea agreements.[69] Two interrelated factors caused most scholars to reserve their criticism for contingent plea agreements. First, federal courts' repeated pronouncement that traditional accomplice plea agreements are constitutionally unobjectionable limited the scope of scholars' reliance on due process arguments.[70] Second, the reluctance of federal courts to impose any limits on prosecutorial use of accomplice plea agreements forced scholars to illustrate the dangers of unreliability with contingent plea agreements, which subject accomplices to more coercive pressure than traditional plea agreements do.[71]

Although scholars appropriately identified contingent plea agreements as the "worst case scenarios" in which the danger of perjury is so severe that courts should exclude the testimony, *Singleton I* moved the debate beyond the narrow discussion of contingent plea agreements.[72] Now, courts and scholars

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of law preventing convictions on the testimony of accomplices . . . ."). *But see infra* note 75 and accompanying text (explaining that Supreme Court has found all accomplice testimony suspect).

67. *See* Haakinson v. United States, 238 F.2d 775, 779 (8th Cir. 1956) ("[T]he testimony of an accomplice, though uncorroborated, can legally constitute a sufficient basis for a conviction, if it is not otherwise incredible or unsubstantial on its face.").

68. *See* United States v. Miceli, 446 F.2d 256, 259 (1st Cir. 1971) (stating that testimony of admitted perjurer, who had long history of criminal convictions and made advantageous deal with government, was not "incredible or unsubstantial on its face").

69. *See* Hughes, *supra* note 8, at 35-36 (arguing that contingency requirements irretrievably taint testimony); Beeman, *supra* note 8, at 826 (concluding that courts must prohibit contingent agreements between accomplices and prosecutors); Eisenstadt, *supra* note 8, at 767 (suggesting that pressures in contingency agreement make witness's proposed testimony so inherently tainted and unreliable as to render jury incapable of performing its truth-seeking function); *see also* Samuel A. Perroni & Mona J. McNutt, *Criminal Contingency Fee Agreements: How Fair Are They?*, 16 U. ARK. LITTLE ROCK L.J. 211, 230-31 (1994) (concluding that courts must place limits on use of contingency fee agreements).

70. *See supra* note 58 (quoting *The Whiskey Cases* and *United States v. Librach*).

71. *See infra* notes 78-79 and accompanying text (summarizing scholars' contention that contingent plea agreements encourage perjury by explicitly indicating nature of testimony that government expects).

72. *See* Singleton I, 144 F.3d 1343, 1344 (10th Cir.) (discussing specific promises that government made, none of which were contingent upon defendant's conviction), *vacated and reh'g granted*, 144 F.3d 1343, 1361 (10th Cir. 1998), *reh'g en banc*, 165 F.3d 1297 (10th Cir. 1999).

must examine the broader assertion that accomplice plea agreements in any form tend to produce dangerously unreliable testimony.[73] Existing scholarship dealing with contingent plea agreements, however, is still relevant in today's broader debate because the coercive pressure that a contingent plea agreement produces differs only slightly from that which a traditional plea agreement produces.[74]

The Supreme Court repeatedly has recognized that all accomplice testimony is inherently suspect.[75] This recognition reflects the fact that accomplices have a natural tendency to lie in order to minimize their own culpability.[76] A promise of leniency in exchange for testimony encourages that natural inclination.[77] Scholars have argued that an agreement requiring the procurement of an indictment or a conviction strongly suggests to the accomplice witness the nature of the testimony that the government expects.[78] These scholars have contended that such a requirement directs an unacceptable amount of coercive power at an accomplice witness, and therefore, courts should exclude the resultant testimony.[79] Indeed, judicial censure of promises

73. One of the primary reasons that *Singleton I* sparked so much controversy is that it threatened prosecutors' ability to enter into *any* agreement, contingent or otherwise, in which the government offered something of value in exchange for testimony. *See* Sarah Huntley, *Court to Rule if Aiding Informants Is Illegal*, TAMPA TRIB., Dec. 28, 1998, at A1 ("The [*Singleton*] issue is one that strikes at the heart of thousands of federal prosecutions."); David E. Rovella, *10th Circuit: Plea Deals Aren't Bribery*, NAT'L L.J., Jan. 25, 1999, at A8 ("Federal prosecutors breathed a collective sigh of relief Jan. 8 when the [Tenth Circuit] helped settle a two-year debate over whether prosecutor plea deals are in fact bribes.").

74. *See infra* notes 75-84 and accompanying text (discussing similarity between pressure that contingent plea agreements and traditional plea agreements produce).

75. *See* Bruton v. United States, 391 U.S. 123, 136 (1968) ("Not only are the [accomplice's] incriminations devastating to the defendant but their credibility is inevitably suspect . . . ."); On Lee v. United States, 343 U.S. 747, 757 (1952) (stating that use of accomplice witnesses "may raise serious questions of credibility"); Caminetti v. United States, 242 U.S. 470, 495 (1917) (stating preference that courts "caution juries against too much reliance upon testimony of accomplices and . . . require corroborating testimony before giving credence to such evidence").

76. *See* Hughes, *supra* note 8, at 35 (stating that accomplices have tendency to lie in order to deemphasize their role in criminal act); Beeman, *supra* note 8, at 820-21 (suggesting that witnesses may lie to downplay their own culpability).

77. *See* Hughes, *supra* note 8, at 35 (stating that promises of leniency increase accomplices' tendency to lie); Beeman, *supra* note 8, at 820 (discussing likelihood that bargain will heavily influence content of testimony).

78. *See* Hughes, *supra* note 8, at 35 ("The witness is being crudely told that he will get no reward unless his testimony is of a certain nature."); Beeman, *supra* note 8, at 802 (suggesting that contingent plea agreements provide "virtually irresistible temptation" for witness to say whatever prosecutor desires).

79. *See* Hughes, *supra* note 8, at 35 ("This [requirement] imposes a very high degree of pressure and influence and, thus, should render the testimony tainted."); Beeman, *supra* note

of leniency conditioned upon indictment or conviction of the defendant arises from the belief that these promises exert so great a pressure upon a witness to perjure himself that courts cannot uphold a conviction based on the testimony.[80]

Only a slight difference, however, separates this pressure from that exerted upon a witness by a traditional plea agreement that promises immunity or leniency in exchange for testifying fully and fairly.[81] In either case, an accomplice must persuade the prosecutor that the accomplice's testimony at least will tend to incriminate the defendant before the prosecutor will consider an offer of immunity or leniency.[82] Moreover, an accomplice has a significant incentive to tailor his testimony to the prosecutor's case in order to secure the benefits of either a contingent or a traditional plea agreement.[83] Therefore, accomplice testimony offered pursuant to any prosecutorial agreement is open to suspicion.[84]

A. Due Process

Although the Supreme Court has upheld traditional accomplice plea agreements as constitutional, the exact limitations upon prosecutorial discretion remain unclear.[85] In light of this broad discretion, many scholars have attacked the use of contingent plea agreements as a violation of the defendant's right to due process.[86] The Due Process Clauses of the Fifth and Four-

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8, at 821 ("[A]greements contingent upon the prosecution's satisfaction or the outcome of the case pressure witnesses in an unpredictable manner.").

80. *See* Beeman, *supra* note 8, at 802 ("Courts prohibit [contingent] agreements because they provide a virtually irresistible temptation for the witness to say whatever will satisfy the prosecution."); Case Note, *Conditional Promise*, *supra* note 8, at 140 (discussing judicial censure of contingent agreements).

81. *See* Case Note, *Conditional Promise*, *supra* note 8, at 140 ("[B]ut a slight and purely quantitative difference exists between this pressure and that exerted upon a witness promised immunity for testifying fully and fairly.").

82. *See id.* ("[T]he accomplice doubtless feels that no immunity will be proffered unless the prosecuting attorney believes that his testimony will at least tend to incriminate the defendant.").

83. *See* Beeman, *supra* note 8, at 802 (discussing incentive to please prosecutor in order to ensure prosecutorial leniency).

84. *See* Case Note, *Conditional Promise*, *supra* note 8, at 140 ("[A]ll accomplice evidence is open to suspicion.").

85. *See id.* (discussing uncertainty of prosecutorial limitations); Silverglate, *supra* note 7 (stating that federal case law on due process limitations "yields a mixed rather than a clear picture"); *see also* Hughes, *supra* note 8, at 9-12 (indicating that prosecutors may not have unfettered prosecutorial discretion).

86. *See* Hughes, *supra* note 8, at 35 (stating that due process considerations should prevent prosecutors from bargaining for specific testimony); Beeman, *supra* note 8, at 826 (concluding that admission of unreliable accomplice testimony violates due process); Eisenstadt, *supra* note

teenth Amendments to the United States Constitution guarantee a defendant's right to fair procedures in state and federal courts.[87] Although the Supreme Court has articulated an array of standards in determining the exact requirements of procedural due process, the concept of fundamental fairness has been a consistent theme.[88] This concept traditionally has operated to exclude involuntary confessions[89] and unreliable identification testimony.[90] Exclusions are necessary when the usual methods of exposing unreliability, cross-examination, impeachment, and the jury's independent assessment of credibility cannot sufficiently protect a defendant's interest in being prosecuted upon reliable evidence.[91]

Scholars have contended that these institutional safeguards are insufficient because they cannot adequately reveal the extent to which the prosecutorial leniency has influenced the testimony.[92] These scholars typically direct this argument at contingent plea agreements.[93] A traditional plea agreement contemplates a reasonably determinate exchange between the parties – leniency (fees) for testimony (services) – which, upon careful instruction, a jury readily can understand.[94] A contingent plea agreement, however, involves a far more subtle exchange of leniency for value because the amount of the leniency is contingent, in some cases, upon the results of the proceeding in

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8, at 781-82 (suggesting that admission of accomplice testimony is antithetical to due process); Silverglate, *supra* note 7 (arguing that use of accomplice testimony offered pursuant to plea agreements is fundamentally unfair and may violate due process).

87. *See* Beeman, *supra* note 8, at 803 (stating that due process requires fair procedures).

88. *See id.* (pointing out that fundamental fairness is constant theme in due process jurisprudence).

89. *See* Mincey v. Arizona, 437 U.S. 385, 401-02 (1978) (finding that defendant's statements were result of "virtually continuous questioning of a seriously and painfully wounded man on the edge of unconsciousness" and should have been excluded); Rogers v. Richmond, 365 U.S. 534, 540 (1961) ("Our decisions under th[e] [Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions that are involuntary . . . cannot stand.").

90. *See* Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (stating that, under due process, reliability is "linchpin" in determining admissibility of identification testimony).

91. *See* Beeman, *supra* note 8, at 803-04 (stressing importance of exclusions when customary methods of exposing unreliability are inadequate).

92. *See id.* at 821 ("Neither judge nor jury can assess accurately the subjective nature of the impact and ascertain the extent to which the terms of the agreement have altered the content of the testimony.").

93. *See id.* (discussing jury's inability to determine witness's motivation under contingent agreement); Eisenstadt, *supra* note 8, at 767 (casting doubt on jury's ability to comprehend subtleties of contingent agreement).

94. *See* Beeman, *supra* note 8, at 820 ("Traditional agreements involve straightforward exchanges which juries can competently evaluate."); Eisenstadt, *supra* note 8, at 767 (stating that traditional agreements are subject to jury analysis).

which the witness provides the testimony. Arguably, this subtlety creates pressures that are more difficult for a jury to comprehend.[95]

In *United States v. Waterman*,[96] the United States Court of Appeals for the Eighth Circuit considered a due process challenge to a contingent plea agreement.[97] In *Waterman*, the government agreed to recommend a sentence reduction for an accomplice witness if he gave truthful testimony before the grand jury and if that testimony led to further indictments.[98] A panel of the Eighth Circuit concluded that this agreement amounted to an offer of favorable treatment contingent on the success of the prosecution[99] and therefore reversed the conviction.[100] The court suggested that the agreement was an "invitation to perjury."[101] On rehearing, however, the en banc court divided equally without any opinion, thereby restoring the conviction.[102]

During the brief period in which *Waterman* stood,[103] a federal district court in Massachusetts became the second federal court to sustain a due process challenge to a similar contingent plea agreement.[104] In *United States*

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95. *See* Beeman, *supra* note 8, at 821 ("Under contingent agreements, the witness aims not to exculpate himself, but to incriminate the defendant. Jurors likely have more difficulty quantifying the force of this motivation.").

96. 732 F.2d 1527 (8th Cir. 1984).

97. United States v. Waterman, 732 F.2d 1527, 1531-32 (8th Cir.) (concluding that contingent agreement with government witness violated due process), *rev'd en banc*, 732 F.2d 1527, 1533 (8th Cir. 1984). In *Waterman*, the court considered the defendant's due process challenge to admission of testimony offered pursuant to a cooperation agreement. *Id.* at 1528. According to the *Waterman* court, the substance of the agreement was that the government would file for a two-year sentence reduction on the witness's behalf if his testimony before the grand jury resulted in further indictments. *Id.* at 1530. The government argued that the jury, which received notice of the contingency agreement, could weigh the credibility of the cooperating witness. *Id.* at 1531. The court refused to accept the government's argument for two reasons. *Id.* at 1531-32. First, the prosecutor only vaguely disclosed the contingent nature of the agreement to the jury. *Id.* at 1532. Second, the prosecutor cannot, consistent with due process, rely on the jury to investigate and weigh the additional incentive to lie that arises from the government's promise. *Id.* Consequently, the *Waterman* court found that the contingent agreement violated the defendant's due process right to fundamental fairness. *Id.* at 1533.

98. *Id.* at 1530. The grand jury indicted the defendant after hearing the accomplice witness's testimony. *Id.* The accomplice witness later testified at the defendant's trial. *Id.*

99. *Id.* at 1531.

100. *Id.* at 1532.

101. *See id.* at 1531 ("Such an agreement is nothing more than an invitation to perjury having no place in our constitutional system of justice.").

102. *Id.* at 1533.

103. The Eighth Circuit decided *United States v. Waterman* on May 2, 1984. *Id.* at 1527. The Eighth Circuit sitting en banc overruled that decision on September 20, 1984. *Id.*

104. *See* United States v. Dailey, 589 F. Supp. 561, 561 (D. Mass. 1984) (concluding that witness plea agreements violated defendant's due process rights), *rev'd*, 759 F.2d 192 (1st Cir. 1985).

v. Dailey,[105] the court stated that contingent agreements impose an intolerable level of subjective pressure upon witnesses, "whose only interest is supposed to be in telling the truth."[106] Consequently, the court concluded that the "potentially coercive"[107] plea agreements violated the defendant's due process rights under the Fifth Amendment and suppressed the testimony of three witnesses.[108]

Although the United States Court of Appeals for the First Circuit shared the district court's concern in *Dailey* regarding the coercive potential of the plea agreements,[109] it vacated the district court's ruling.[110] The First Circuit concluded that the agreements were noncontingent because the available leniency was independent of the prosecution's success.[111] Furthermore, the court stated that the government had established a legitimate interest in making the plea bargain contingent.[112] Because authorities suspected the first two witnesses of being major drug importers with many connections, the government could encourage full cooperation more effectively by using contingent agreements.[113] The *Dailey* court regarded these circumstances as fairly compelling reasons for the government to make somewhat open-ended plea agreements,[114] implying that the government interest in the agreements outweighed the possible harm of perjured testimony.[115] The court found no due process violation

105. 589 F. Supp. 561 (D. Mass. 1984).

106. *Dailey*, 589 F. Supp. at 564. In *Dailey*, the court considered defendant's due process challenge to three agreements in which the government offered leniency in exchange for testimony. *Id.* According to the *Dailey* court, the agreements gave the government three distinct sentence recommendations, each option having a different triggering point. *Id.* at 563-64. First, the government could recommend 20 years if the witnesses fully cooperated. *Id.* at 563. Second, the government could recommend 10 years depending upon the value of the witnesses' cooperation. *Id.* Finally, if the witness did not fully cooperate, the government could recommend 35 years. *Id.* at 563-64. The court reasoned that to receive the 10-year sentence, he must do something more than fully cooperate. *Id.* at 564. Consequently, the *Dailey* court concluded that the agreements violated due process because they required that the witnesses provide value to the government rather than just the truth. *Id.*

107. *Id.*

108. *Id.* at 564-65.

109. United States v. Dailey, 759 F.2d 192, 196 (1st Cir. 1985).

110. *Id.* at 201. By the time *Dailey* reached the First Circuit, the Eighth Circuit sitting en banc had vacated *Waterman*. United States v. Waterman, 732 F.2d 1527, 1533 (8th Cir. 1984). Nevertheless, the First Circuit considered the Eighth Circuit's *Waterman* opinion to be inapposite. *Dailey*, 759 F.2d at 196.

111. *Dailey*, 759 F.2d at 197.

112. *Id.*

113. *Id.*

114. *Id.*

115. *See* Beeman, *supra* note 8, at 811 (suggesting that court valued government's interest in contingent agreements above risk of perjured testimony).

and therefore admitted the testimony.[116]

Since *Waterman* and *Dailey*, only one federal court has deemed a plea bargain agreement so conducive to perjury that it tainted the witness's testimony beyond any possibility of redemption.[117] In *United States v. Baresh*,[118] a contingent plea agreement provided the witness with a pardon and permission to keep assets he obtained with his narcotic profits if his testimony led to the arrest and indictment of two specified defendants.[119] If the testimony did not lead to arrest and indictment, however, the witness probably would receive a fifteen-year sentence even if he told the full truth.[120] The district court concluded that the witness's uncorroborated testimony against a defendant whom the government originally had doubted that it could indict was so unreliable that its admission violated the defendant's due process rights.[121]

Two additional federal appellate court decisions have found contingent plea agreements constitutional.[122] In *United States v. Fallon*,[123] the United States Court of Appeals for the Seventh Circuit concluded that the government could condition the charges brought against a co-conspirator upon the level of his cooperation at the defendant's trial.[124] The agreement at issue stated

116. *Dailey*, 759 F.2d at 200. The court did note, however, that contingency agreements should be reserved for exceptional cases "where the value and extent of the accomplice's knowledge is uncertain but very likely to be great." *Id.* at 201.

117. *See* United States v. Baresh, 595 F. Supp. 1132, 1137 (S.D. Tex. 1984) (concluding that agreement with co-conspirator violated defendant's due process rights).

118. 595 F. Supp. 1132 (S.D. Tex. 1984).

119. *See Baresh*, 595 F. Supp. at 1134 (discussing terms of agreement). In *Baresh*, the court considered defendant's due process challenge to a plea agreement in which the government offered defendant's co-conspirator significant rewards in exchange for testimony. *Id.* According to the *Baresh* court, the agreement provided that the government would drop a pending charge in state court, would provide immunity for any subsequently disclosed narcotic violations, and would not seek forfeiture of the witness's assets that were obtained with narcotic profits. *Id.* However, these rewards were contingent on whether the witness's testimony resulted in indictments against two specific individuals. *Id.* The court reasoned that the government's largess created an invitation to the witness to commit perjury. *Id.* at 1137. Consequently, the *Baresh* court held that the admission of testimony offered pursuant to the agreement violated the defendant's right to due process. *Id.*

120. *Id.* at 1135 n.2.

121. *Id.* at 1136-37.

122. *See infra* notes 123-30 and accompanying text (discussing decisions by two courts of appeals that have found contingent plea agreements constitutional).

123. 776 F.2d 727 (7th Cir. 1985).

124. *See* United States v. Fallon, 776 F.2d 727, 733 (7th Cir. 1985) (stating that jury's consideration of co-conspirator's testimony, delivered pursuant to contingent plea agreement, did not deny defendant fair trial). In *Fallon*, the court considered the defendant's claim that he had been denied a fair trial because the government's witness testified pursuant to an agreement in which leniency was contingent upon the value of the witness's cooperation. *Id.* According to the *Fallon* court, the government agreed that if the witness's cooperation was adequate it would

that the government would recommend that the witness remain free if, in its sole discretion, the government believed that the witness's level of cooperation was adequate.[125] In *United States v. Spector*,[126] the Eighth Circuit upheld a similar agreement that was contingent upon a witness's cooperation in solving and prosecuting crimes.[127] Both the *Spector* court and the *Fallon* court noted the factual similarity between *Dailey* and their cases.[128] Both courts found *Dailey*'s reasoning persuasive.[129] The courts concluded that limiting instructions to the jury, witness impeachment, and cross-examination were procedurally adequate to safeguard against any dangers to the defendant's due process rights.[130]

Recent cases confirm this trend.[131] In *United States v. Risken*,[132] the informant-witness entered into an agreement whereby the government might give the witness a post-trial payment depending upon whether or not it obtained a conviction.[133] The court found no constitutional objection to the

limit the number of charges brought against the witness and upon sentencing would recommend that he remain free. *Id.* The court acknowledged that the agreement created the danger of perjured testimony. *Id.* at 734. Even so, the court decided that procedural safeguards, including cross-examination and jury instruction, were adequate to minimize the danger of perjury. *Id.* Consequently, the *Fallon* court concluded that the defendant had no due process grounds for a mistrial. *Id.*

125. *Id.* at 733.

126. 793 F.2d 932 (8th Cir. 1986).

127. *See* United States v. Spector, 793 F.2d 932, 936-37 (8th Cir. 1986) (rejecting defendant's due process challenge to testimony of informant who testified pursuant to contingent plea agreement). In *Spector*, the court considered defendant's due process challenge to testimony offered in exchange for prosecutorial leniency and money. *Id.* According to the *Spector* court, the government agreed to immunize the witness and his family. *Id.* at 934. The government also agreed to give the witness $1000 if his testimony resulted in a conviction. *Id.* at 937 n.3. The court found that this type of contingent agreement was unobjectionable based upon a review of applicable authorities. *Id.* at 936. In addition, the court noted that the government had a strong case without the witness's testimony. *Id.* Consequently, the *Spector* court concluded that admission of the testimony did not violate the defendant's due process rights. *Id.* at 937.

128. *See id.* at 936-37 (discussing facts of *Dailey*); *Fallon*, 776 F.2d at 733 (same).

129. *See Spector*, 793 F.2d at 936-37 (discussing reasoning of *Dailey*); *Fallon*, 776 F.2d at 733 (same).

130. *See Spector*, 793 F.2d at 936-37 (pointing out that cross-examination was effective procedure to elicit contingent nature of witness plea agreement); United States v. Fallon, 776 F.2d 727, 734 (7th Cir. 1985) ("The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." (quoting Hoffa v. United States, 385 U.S. 293, 311 (1966))). *But see Spector*, 793 F.2d at 939-40 (Heaney, J., dissenting) (arguing contingent nature of agreement was "just too much").

131. *See infra* notes 132-37 and accompanying text (discussing recent cases in which federal courts rejected constitutional challenges to accomplice cooperation agreements).

132. 788 F.2d 1361 (8th Cir. 1986).

133. *See* United States v. Risken, 788 F.2d 1361, 1372-73 (8th Cir. 1986) (discussing

testimony.[134] In *United States v. Wilson*,[135] the government promised the witnesses immunity and informed them that, depending on their testimony at trial, they might be eligible to receive a substantial monetary reward from the government, perhaps as much as eleven million dollars, for aiding in the detection and punishment of tax offenders.[136] The court decided that the witnesses' testimony was unobjectionable because the government had fully disclosed the terms of the agreement and the court had given a cautionary instruction to the jury.[137]

Despite the tendency of federal courts to reject constitutional challenges,[138] many scholars continue to attack the legality of accomplice plea

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implied agreement in which government promised witness $5000 contingent upon successful prosecution of defendant). In *Risken*, the court considered whether an implied agreement between the government and a witness warranted reversal of defendant's conviction. *Id.* at 1363. According to the *Risken* court, the FBI and the witness had an implied understanding that the FBI might pay the witness in exchange for his testimony. *Id.* at 1373. Furthermore, the FBI had indicated to the witness that the FBI amount of his payment might depend on whether the defendant was convicted. *Id.* Even so, the *Risken* court found that the contingent agreement between the FBI and the witness did not warrant reversal of the conviction. *Id.* at 1374. In addition to challenging the deal itself, defendant also challenged the government's nondisclosure of the contingent agreement. *Id.* at 1372. Although the court determined that the government should have disclosed the implied agreement, it found that even had the government disclosed the agreement no reasonable probability existed that the result of the trial would have been different. *Id.* at 1374-75. Consequently, the *Risken* court upheld the defendant's conviction. *Id.* at 1375.

134. *See id.* at 1373 (stating that contingent nature of agreement did not require reversal of defendant's conviction).

135. 904 F.2d 656 (11th Cir. 1990).

136. *See* United States v. Wilson, 904 F.2d 656, 657 (11th Cir. 1990) (finding that agreement in which government promised witnesses immunity and indicated they were eligible to receive substantial monetary reward based upon value of their testimony did not violate defendant's due process rights). In *Wilson*, the court considered whether the testimony of two witnesses motivated by contingent agreements violated defendant's due process rights. *Id.* According to the *Wilson* court, the government promised its key witnesses immunity and informed them that they could anticipate substantial monetary awards. *Id.* The government based its promise upon a statute that allows the Secretary of the Treasury to pay individuals who help detect and bring to trial persons guilty of violating the internal revenue laws. *Id.* at 658. The court found that the government had indicated that the two witnesses might expect as much as $11,000,000 depending upon the result of the prosecution and the amount recovered from the defendant. *Id.* The *Wilson* court recognized the potential for misuse of the statute as a means of obtaining favorable testimony. *Id.* Even so, the court reasoned that the jury was able to determine the credibility of the informant witnesses. *Id.* at 660. Consequently, the *Wilson* court held that the defendants were not deprived of due process. *Id.*

137. *See id.* at 658-59 (stating that disclosure and cautionary instruction allowed jury accurately to weigh credibility of government witnesses).

138. *See supra* notes 96-137 and accompanying text (discussing decisions of First, Seventh, Eighth, and Eleventh Circuit courts rejecting constitutional challenges to accomplice cooperation agreements). State courts are generally more sensitive than their federal counter-

agreements on due process grounds.[139] They have argued that due process requires courts to impose limits upon the level of pressure that prosecutors may bring to bear on a witness in order to induce favorable testimony.[140] These scholars have suggested that the courts' failure to impose appropriate limitations upon prosecutorial practices diminishes the integrity of the fact-finding process that is at the heart of the Due Process Clause.[141]

B. Supervisory Powers

Some scholars have contended that even if courts do not hold contingent plea agreements unconstitutional, they should exercise their inherent supervisory powers to exclude testimony obtained pursuant to these agreements.[142]

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parts to the inherent constitutional defects in certain accomplice plea agreements. *See, e.g.*, People v. Medina, 41 Cal. App. 3d 438, 455 (1974) ("[A] defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion."); People v. Green, 228 P.2d 867, 871-72 (Cal. Dist. Ct. App. 1951) (reversing conviction that rested solely upon testimony of accomplice whose promise of immunity was conditioned upon conviction of defendant); Franklin v. State, 577 P.2d 860, 862 (Nev. 1978) ("[I]f the circumstances of the plea bargain would reasonably cause the alleged accomplice to believe he must testify in a particular fashion, then a less explicit arrangement [than that in *Medina*] also violates defendant's due process rights.").

139. *See* Hughes, *supra* note 8, at 35 (stating that due process considerations should prevent prosecutors from bargaining for specific testimony); Beeman, *supra* note 8, at 826 (concluding that admission of unreliable accomplice testimony violates due process); Eisenstadt, *supra* note 8, at 781-82 (suggesting that accomplice testimony offered pursuant to certain plea agreements is utterly at odds with due process); Silverglate, *supra* note 7 (arguing that use of accomplice testimony offered pursuant to plea agreements is fundamentally unfair and may violate due process).

140. *See* Hughes, *supra* note 8, at 35 (suggesting that courts introduce guiding standards and supervise prosecutorial use of cooperation agreements); Beeman, *supra* note 8, at 824 ("Preserving the integrity of the judicial system requires appropriate limitations upon prosecutorial discretion."); Eisenstadt, *supra* note 8, at 781 ("The tolerance of the due process clause for prosecutorial manipulation and abuse in the cooperation agreement process is not without its necessary limits."); Silverglate, *supra* note 7 (suggesting that Supreme Court "draw a line between permissible inducements to a witness and tactics that offend due process"); *see also* Perroni & McNutt, *supra* note 69, at 231 ("Courts could set standards that delineate options for the prosecution to include in any given agreement.").

141. *See* Hughes, *supra* note 8, at 35 ("These practices weaken the concept of the trial as a truth-finding process . . . ."); Beeman, *supra* note 8, at 814-15 (discussing how contingent plea agreements pose danger to reliability of fact-finding process); Eisenstadt, *supra* note 8, at 766 ("The preservation of the fair trial process by the exclusion of manifestly unreliable evidence lies at the heart of the due process clause, which has as its essence the 'integrity of the fact-finding process,' and the 'truth-seeking function of the trial process.'"); *see also* Ohio v. Roberts, 448 U.S. 56, 64 (1980) ("[T]he absence of proper confrontation at trial 'calls into question the ultimate integrity of the fact-finding process.'" (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973))).

142. *See* Beeman, *supra* note 8, at 823 (suggesting that courts should exclude accomplice

Although the Supreme Court has not specifically identified the origin and nature of the lower federal courts' supervisory powers,[143] the Court's decisions suggest that the authority to regulate judicial procedure is an incidental or ancillary power implied in the Article III[144] grant of judicial power.[145] Regardless of the origin of the power, courts of appeals as well as district courts commonly invoke the supervisory power doctrine for a wide range of purposes.[146]

A court may use its supervisory power whenever the administration of justice is tainted, and thus it need not wait until a government attorney's conduct offends due process to use its power.[147] Courts have used their supervisory power to regulate procedure in the trial courts, to promote the search for the truth in adversarial proceedings, to impose sanctions in response to governmental misconduct, and to protect the integrity of the courts.[148] Scholars have argued that exclusion of testimony offered in exchange for prosecuto-

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testimony pursuant to their supervisory powers in order to prevent impairment of defendant's right to fair trial); Eisenstadt, *supra* note 8, at 779 (arguing that courts could rely on their supervisory powers to exclude accomplice witnesses' testimony).

143. The Supreme Court's initial decision explicitly recognizing the lower federal courts' supervisory authority simply asserted that both the Supreme Court and the courts of appeals have broad powers of supervision over federal proceedings. *See* Bartone v. United States, 375 U.S. 52, 54 (1963) (per curiam) ("[T]he situation is different in federal proceedings, over which both the Courts of Appeals and this Court have broad powers of supervision." (citation omitted)). The Court's more recent decisions refer only generally to the supervisory authority of the federal courts. *See* United States v. Hasting, 461 U.S. 499, 505-07 (1983) (discussing general principles underlying supervisory authority); United States v. Payner, 447 U.S. 727, 734-36 & n.7 (1980) (discussing societal interests underlying supervisory authority).

144. Article III provides in relevant part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

145. *See* Eisenstadt, *supra* note 8, at 779 (stating that Supreme Court's decisions suggest that supervisory power is ancillary power implied in Article III). The Supreme Court has recognized that every constitutional grant of authority implicitly includes at least the incidental or ancillary authority that is absolutely necessary to permit the exercise of the expressly granted powers. *See* Anderson v. Dunn, 19 U.S. (6 Wheat) 204, 225-26 (1821) (recognizing ancillary powers even though "the genius and spirit of our institutions are hostile to the exercise of implied powers").

146. *See* Burton v. United States, 483 F.2d 1182, 1187-88 (9th Cir. 1973) (discussing 30 cases in which lower federal courts have exercised supervisory power).

147. *See* McNabb v. United States, 318 U.S. 332, 340 (1943) ("Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' . . . .").

148. *See* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1456-60 (1984) (discussing exercise of supervisory power by lower federal courts).

rial leniency will curtail prosecutors' efforts to solicit favorable testimony and thereby will promote the search for truth and protect the integrity of the courts.[149]

C. Bribery

Several scholars have argued that the practice of offering prosecutorial leniency in exchange for testimony violates at least the spirit, if not the letter, of the federal witness bribery statute.[150] Section 201 of Title 18 of the United States Code addresses bribery of public officials and witnesses,[151] and subsection 201(c)(2) specifically states that it is a felony offense to offer anything of value to a witness for or because of testimony.[152] The plain language of § 201 prohibits the well-established practice of paying prosecution witnesses for their testimony, either with cash or, more typically, with favorable plea bargains.[153] Scholars have asserted that excluding government prosecutors

149. *See* Beeman, *supra* note 8, at 823-24 ("Excluding testimony made pursuant to a contingent agreement will improve the accuracy and integrity of the fact-finding process."); Eisenstadt, *supra* note 8, at 781 (stating that contingent plea agreements present "a significant threat to the integrity of the judicial system and must not be countenanced"). One scholar admitted that little, if any, precedent exists for courts using their supervisory powers to exclude unreliable evidence. *See id.* at 780 n.198 ("[N]o cases could be found in which supervisory power has been invoked specifically to regulate the use of unreliable evidence.").

150. *See* J. Richard Johnston, *Paying the Witness: Why Is It OK for the Prosecution But Not the Defense?*, CRIM. JUST., Winter 1997, 21, at 21 (arguing that when government either promises or gives anything of value to prosecution witnesses for their testimony, it violates 18 U.S.C. § 201(c)(2)); Beeman, *supra* note 8, at 826 (stating that contingent plea agreements "are, in effect, bribes passing from the government to accomplices in return for specific testimony"). Interestingly, Johnston's article, *supra*, prompted defense counsel in *Singleton I* to use § 201(c)(2) in a motion to suppress accomplice testimony that incriminated his client. *See generally* Mark Hansen, *Shot Down in Mid-Theory*, 85 A.B.A. J. 46 (May 1999) (discussing defense counsel's reliance on logic of Johnston's article).

151. *See* 18 U.S.C. § 201 (1994) (prohibiting bribery of public officials and witnesses).

152. Section 201(c)(2) provides in relevant part:

> (c) Whoever –
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> ....
>
> (2) 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 of 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.

Id.

153. *See* Johnston, *supra* note 150, at 21 ("Despite this provision, the DOJ has a well-established practice of paying prosecution witnesses for their testimony, either in cash or by favorable plea bargains, or both."); Beeman, *supra* note 8, at 826 (stating that contingent plea

from the application of the bribery statute undermines its statutory purpose, which is to preserve the truth-seeking function of the judicial system by prohibiting individuals from inducing favorable testimony.[154]

In conjunction with this bribery argument, scholars also have argued that the American Bar Association's Model Rules of Professional Conduct prohibit prosecutors from offering leniency in exchange for testimony.[155] Model Rule 3.4(b) states that a lawyer shall not offer to a witness an inducement that the law prohibits.[156] Prosecutors' promises arguably violate either the federal witness bribery statute or the common-law rule against the payment of occurrence witnesses, and therefore the Model Rules prohibit those promises.[157]

In *Singleton I*, the United States Court of Appeals for the Tenth Circuit breathed life into contentions that offering prosecutorial leniency in exchange for testimony violates the federal bribery statute as well as the rules of professional conduct.[158] Before *Singleton I*, both courts and scholars had focused largely on the potential constitutional infirmities of accomplice cooperation agreements.[159] Over time, the reluctance of federal courts to sustain due process challenges clearly indicated that due process challenges to accomplice testimony were unlikely to be successful.[160] The federal courts had, for all intents and purposes, ended the debate surrounding the government's offering of leniency in exchange for accomplice testimony.[161] Thus, *Singleton I*

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agreements "are, in effect, bribes passing from the government to accomplices in return for specific testimony").

154. *See* Johnston, *supra* note 150, at 24 ("[C]ompensating a witness for testifying involves an identical threat to the integrity of the judicial system whether the witness testifies for the prosecution or the defense."); Beeman, *supra* note 8, at 826 ("Judicial tolerance of these agreements obstructs legislative intent as codified in 18 U.S.C. § 201(c)(2) and inhibits the search for truth.").

155. *See* Johnston, *supra* note 150, at 23-24 (discussing rules of professional conduct); Beeman, *supra* note 8, at 826 (discussing ABA Standards and Code of Professional Responsibility).

156. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) (1999) ("A lawyer shall not: . . . (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law . . . .").

157. *See* Johnston, *supra* note 150, at 23 ("The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.").

158. *See* United States v. Ramsey, 165 F.3d 980, 987 n.10 (D.C. Cir. 1999) ("Until *Singleton*, no other court in the thirty-six year history of section 201(c)(2) had applied its prohibition to a prosecutorial grant of leniency in exchange for truthful testimony."); Taylor, *supra* note 26 (stating that before *Singleton*, no one had taken bribery argument seriously).

159. *See supra* Part III.A (explaining due process scholarship and jurisprudence).

160. *See supra* notes 96-137 and accompanying text (discussing reluctance of federal courts to sustain due process challenges to accomplice testimony).

161. *See* Silverglate, *supra* note 7 ("[T]he effort by defendants to attack the fundamental fairness of this tactic appears to have been given up for dead.").

prompted a line of cases that once again forced federal courts to confront the issue of accomplice testimony.[162]

IV. The Rise and the Fall of a Legal Theory

A. The Rise: Singleton I

In April 1992, the Wichita Police Department began to suspect that drug dealers were using a local Western Union office to transfer drug money.[163] Through their investigation, the police uncovered a large drug conspiracy run by several men who had moved to Wichita from California.[164] These men had recruited local women to wire proceeds from drug sales back to California, to receive wire transfers on behalf of the conspiracy, and to transport cocaine from California to Wichita.[165] Authorities identified Sonya Singleton as one of the women who had both transferred and received money for the conspiracy.[166] Wichita police and federal agents arrested Singleton, along with dozens of others who allegedly were involved in the conspiracy.[167]

Prosecutors indicted Singleton and others on multiple counts of money laundering and conspiracy to distribute cocaine.[168] Before trial, Singleton moved to suppress the testimony of Napoleon Douglas, a convicted cocaine dealer and one of Singleton's co-conspirators.[169] The thrust of Singleton's motion was that the government, by entering into a plea agreement with Douglas, had impermissibly promised Douglas something of value – leniency – in return for his testimony.[170] This promise, according to Singleton, violated the federal bribery statute, 18 U.S.C. § 201(c)(2), and Kansas Rule of Profes-

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162. *See infra* Part IV.C (considering decisions of other federal courts facing challenges to accomplice testimony after *Singleton I*).

163. Singleton I, 144 F.3d 1343, 1343 (10th Cir.), *vacated and reh'g granted*, 144 F.3d 1343, 1361 (10th Cir. 1998), *reh'g en banc*, 165 F.3d 1297 (10th Cir. 1999).

164. *Id.*

165. *Id.* at 1343-44.

166. *Id.* Singleton's name appeared as either the sender or the recipient on eight wire transfers allegedly sent on behalf of the conspiracy. *Id.* at 1344. The government produced handwriting experts at trial that verified the presence of her handwriting on paperwork that accompanied the eight wire transfers. *Id.*

One commentator suggested that "Sonya Singleton's name may soon go down in legal history – right beside Ernesto Miranda, Dred Scott and Jane Roe as people whose battles in the courts dramatically changed American society." Mark Curriden, *Court to Decide Legality of Rewarding Informants: Experts Say Thousands of Cases Could Be Jeopardized*, DALLAS MORNING NEWS, Nov. 17, 1998, at A1.

167. *See* Curriden, *supra* note 166 (discussing multiple arrests).

168. *Singleton I*, 144 F.3d at 1344.

169. *See* Curriden, *supra* note 166 (discussing Douglas's conviction).

170. *Id.*

sional Conduct 3.4(b).[171] The district court denied the motion[172] with an eight-word ruling: "This statute [18 U.S.C. § 201(c)(2)] does not apply to the government."[173]

At trial, Douglas testified against Singleton.[174] Indeed, he was the only witness able to identify Singleton as part of the conspiracy.[175] The court sentenced her to almost four years in a federal prison.[176] Singleton appealed her conviction and again asserted that the prosecutorial bargain with Douglas violated 18 U.S.C. § 201(c)(2) and Kansas Rule of Professional Conduct 3.4(b).[177] A three-judge panel of the United States Court of Appeals for the Tenth Circuit unanimously agreed with Singleton.[178] Like a stone thrown into a still pond, the panel's holding in *Singleton I* created a disturbance that rippled throughout the federal criminal justice system.[179]

The panel highlighted the terms of the written plea agreement, finding that it included three specific promises that the government made to Douglas

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171. *Id.*

172. *Id.*

173. *See* William Glaberson, *Leniency Ruling Jolts U.S. Legal Procedures*, J. REC. (Okla. City), Nov. 4, 1998, at A1 (quoting trial judge's ruling).

174. *Singleton I*, 144 F.3d at 1344.

175. *See* Curriden, *supra* note 166 ("During her trial, the only witness able to identify Ms. Singleton as part of the conspiracy was Napolean Douglas, a convicted cocaine dealer who had cut a deal with prosecutors.").

176. *See Singleton I*, 144 F.3d at 1343 (noting Singleton's 46-month sentence).

177. *Id.*

178. *See id.* at 1358-59 (concluding that government's promise violated 18 U.S.C. § 201(c)(2) and Kansas Rule of Professional Conduct 3.4(b)).

179. *See* Marcia Coyle & David E. Rovella, *Stunning Rulings Curtail Prosecutors' Power*, NAT'L L.J., July 20, 1998, at A1 (stating that *Singleton I* "dealt a stunning blow to prosecutors"); Richard Grossman, *A Blow to Deal-Making Prosecutors*, POST-STANDARD (Syracuse, NY), Aug. 24, 1998, at A6 ("[T]he decision sent the Justice Department into a frenzy in anticipation of mass motions by defense lawyers seeking to suppress testimony from any cooperating witness."); Laurie E. Levenson, *Prosecutors Beware*, NAT'L L.J., Oct. 19, 1998, at B5 ("The *Singleton* court sent shock waves through the criminal justice system . . . ."); David E. Rovella & Gail Diane Cox, *Fallout from* Singleton *Bribe Ruling*, NAT'L L.J., Aug. 24, 1998, at A1 (describing fallout from *Singleton I* as "something between a serious disruption and total upheaval"); Harvey A. Silverglate, *Immunity Is Not for Sale, Says the 10th Circuit*, NAT'L L.J., Aug. 17, 1998, at A19 (describing *Singleton I* as "revolutionary" legal development). In addition to causing a stir in legal newspapers and journals, *Singleton I* triggered a wide range of reactions in the popular press. *See, e.g.*, Paul C. Roberts, WASH. TIMES, July 14, 1998, at A18 ("The ruling is important in itself for its defense of innocents against false testimony and for its expos[é] of the government's practice of obtaining convictions through purchased testimony."); Editorial, WASH. POST, July 8, 1998, at A16 ("Every now and then, a federal appeals court issues a ruling that is, at once, so wrongheaded and so sweeping that it results in a brief period of uncertainty in the legal world before being reversed. The decision . . . [in *Singleton I*] is one such bombshell.").

in return for his testimony.[180] First, the government promised not to prosecute Douglas for any violations of the Drug Abuse Prevention and Control Act stemming from his involvement in the conspiracy other than perjury or related offenses.[181] Second, the government promised to file a motion under 18 U.S.C. § 3553(e)[182] or under § 5K1.1 of the United States Sentencing Guidelines[183] if, in its sole discretion, Douglas's cooperation amounted to substantial assistance.[184] Finally, the government promised to inform the Mississippi parole board about the level of cooperation Douglas provided.[185] In consideration for these promises, Douglas agreed to testify truthfully in federal and state court.[186] Thus, the question before the panel was whether this agreement violated 18 U.S.C. § 201(c)(2) or Kansas Rule of Professional Conduct 3.4(b).[187]

The first controversial issue that the *Singleton I* panel decided was whether § 201(c)(2) applies to an Assistant United States Attorney, acting on behalf of the government.[188] In *Nardone v. United States*,[189] the Supreme Court recognized a limited canon of construction which provides that statutes do not apply to the government or affect governmental rights unless the text expressly includes the government.[190] The *Singleton I* panel, however, ob-

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180. *Singleton I*, 144 F.3d at 1344.

181. *Id.*

182. The federal criminal sentencing statute, 18 U.S.C. § 3553(e), provides, in relevant part: "Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as the minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. § 3553(e) (1994).

183. Section 5K1.1 of the United States Sentencing Guidelines provides that the government may move for a downward departure from the sentencing guidelines if it determines that the defendant has "provided substantial assistance in the investigation or prosecution of another person who has committed an offense . . . ." U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1995).

184. *Singleton I*, 144 F.3d at 1344.

185. *Id.*

186. *Id.*

187. *Id.* The agreement at issue in *Singleton* is typical of those that federal and state prosecutors enter into daily. *See* Gerald Walpin, *The Tenth Circuit's* Singleton *Decision Wrong and Uniformly Rejected*, N.Y. L.J., Oct. 29, 1998, at A1 ("The plea agreement that the prosecutor signed with Singleton's co-conspirator was a run-of-the-mill cookie cutter form of cooperation agreement used thousands of times each year for many years . . . .").

188. *Singleton I*, 144 F.3d at 1344. The word "whoever" qualifies the statutory class under § 201(c)(2). *See supra* note 152 (providing relevant text of § 201(c)(2)).

189. 302 U.S. 379 (1937).

190. United States v. Nardone, 302 U.S. 379, 383 (1937) (discussing canon of statutory construction). In *Nardone*, the Supreme Court considered whether evidence that a federal

served that this canon is applicable to only two classes of cases: statutes that deny the government an established interest and statutes that would result in an absurdity if applied to the government.[191]

The class of statutes that would deprive the government of an established interest includes, for example, a statute of limitation applied to the government.[192] The panel found that two exceptions removed the federal bribery statute from that first class of cases.[193] First, the presumption that the statute excludes the government does not apply if the law merely affects governmental agents and not the government itself.[194] The panel determined that § 201(c)(2) only affected governmental agents by limiting the way in which the agents pursue the government's interest.[195] The panel also found that the statute fell within a second exception which provides that a statute applies to the government if the statute's purpose is to prevent fraud, injury, or wrong.[196] Thus, because § 201(c)(2) operates to prevent fraud upon the federal courts in the form of inherently unreliable testimony, the panel concluded that the proscription of § 201(c)(2) must apply to the government.[197]

Having exempted the statute from the first class of cases, the panel turned to the issue of whether the statute fell within the second class of cases to which the canon applies: statutes that if applied to the government would create an "obvious absurdity." This class of statutes includes, for example, a speed limit applied to a policeman in pursuit.[198] According to the panel, the purchase of testimony, whether with leniency or with money, taints the judicial process and

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officer procured by tapping telephone wires and intercepting messages was admissible in a federal criminal trial. *Id.* at 380. The statute provided that "no person" shall intercept a telephone message and divulge its substance. *Id.* at 382. According to the *Nardone* Court, the general words of a statute do not include the government or affect its rights unless such an intent is clear from the text of the act. *Id.* at 383. The *Nardone* Court noted the two categories of cases in which courts have applied that canon. *Id.* First, courts apply the canon when a statute would deprive the sovereign of a recognized or an established prerogative. *Id.* Second, courts apply the canon when a reading that includes the government would create an obvious absurdity. *Id.* at 384. However, the Court concluded that the canon did not apply in this case to exclude the government. *Id.* at 383. The *Nardone* Court also found that another principle required it to apply the statute to the government, stating that a statute intended to prevent injury and wrong embraces the government. *Id.* Consequently, the Court concluded that the wire-tapping statute applied to the government and reversed the defendant's conviction. *Id.* at 384-85.

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

192. *See id.* at 1346 (quoting *Nardone*, 302 U.S. at 383).

193. *Id.*

194. *Id.* (citing *Nardone*, 302 U.S. at 383).

195. *Id.*

196. *Id.* (citing United States v. Nardone, 302 U.S. 379, 384 (1937)).

197. *Id.*

198. *Id.* (quoting *Nardone*, 302 U.S. at 384).

cheapens justice.[199] The panel then reasoned that because the government has an obligation to strictly obey the law in the course of a prosecution, it is particularly appropriate to apply the strictures of § 201(c)(2) to its activities.[200] Therefore, the panel concluded that the statute applied to the government's officials.[201]

The next issue the panel confronted was whether the promises that the government offered to Douglas fell within the "anything of value" classification of the statute.[202] The panel followed the decisions of other circuits that have determined that the test of value is whether the recipient subjectively attaches value to the thing received.[203] The panel noted that not only were the promises all that Douglas bargained for in return for his testimony and guilty plea, but Douglas also testified that he wanted the government's assistance to help "everything work out for [him]."[204] Therefore, the panel concluded that the promises met the test.[205]

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199. *Id.* at 1347.

200. *Id.*

201. *See id.* at 1347-48 ("We conclude the statute's application to government officials, far from being absurd, is at the center of our legal tradition."). The panel noted that if the statutory term "whoever" did not include an Assistant United States Attorney, the statute would not prohibit the attorney from bribing a witness with money in exchange for favorable testimony. *Id.* at 1348. Recognition of this same concept later formed the main gap between the majority and the concurring opinion in the en banc consideration of this appeal. *See infra* notes 233-57 and accompanying text (discussing majority and concurring opinions in en banc decision).

202. *Singleton I*, 144 F.3d at 1348-49. Section 201(c)(2) prohibits offering "anything of value" to a witness. *See supra* note 152 (providing relevant text of § 201(c)(2)).

203. *Singleton I*, 144 F.3d at 1349.

204. *Id.* at 1350-51.

205. *Id.* at 1351. In addition to applying the test of value, the panel identified four further considerations that supported their conclusion that the promises were within the meaning of "anything of value." *Id.* at 1349-50. First, the use in § 201 of "anything of value" indicates an even broader coverage than that discussed in the precedent that construing the phrase "thing of value." *Id.* at 1349. Second, much of the precedent construed statutory language in which the term appears at the end of a series of enumerated specifics. *Id.* In contrast, "anything of value" in § 201(c)(2) stands by itself, unlimited by any enumeration. *Id.* at 1350. Third, the purpose of the statute – to promote truthfulness by prohibiting efforts to influence testimony – confirms Congress's broad language. *Id.* The panel noted that the promise of intangible benefits threatens truthfulness just as much as a cash payment. *Id.* Finally, § 201(c)(1) has an introductory clause stating "otherwise" than as provided by law for the proper discharge of official duty. *Id.* In contrast, § 201(c)(2) does not contain this exemption. *Id.* In light of these considerations, the panel found no reason to limit "anything of value" to things reducible to monetary or tangible value. *Id.* Indeed, the panel referred to Justice Holmes's admonition that "there is no canon against using common sense in construing laws as saying what they obviously mean." *Id.* (quoting Roschen v. Ward, 279 U.S. 337, 339 (1929)).

To answer the government's argument that an overriding policy should prevent the application of this statute to the government's conduct, the panel raised sua sponte the law enforcement authority justification.[206] The panel explained that this justification allows a private citizen to violate a criminal statute to the extent necessary to prevent the commission of a crime if the violation is reasonable in relation to the harm threatened by the crime.[207] The panel found that the government's conduct did not fall within this justification for at least two reasons.[208] First, the prosecutor was not a police officer or one acting in that capacity.[209] Second, obtaining a conviction was not tantamount to an exigent need to prevent a crime.[210]

In the following portion of its opinion, the *Singleton I* panel addressed the argument that its construction of § 201(c)(2) was inconsistent with other federal statutes.[211] The panel noted that the federal criminal sentencing statute, 18 U.S.C. § 3553(e),[212] § 5K1.1 of the United States Sentencing Guidelines,[213] and Federal Rule of Criminal Procedure 35(b)[214] provide for the possibility that a defendant's "substantial assistance" in the investigation or the prosecution of another person will result in a reduced sentence.[215] In order to reconcile these provisions with § 201(c)(2), the panel found that "substantial assistance" does not include testimony.[216] The panel reasoned that this reading of the statutes

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206. *Id.* at 1352.

207. *See id.* at 1353 (citing PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 142(a) (1984)).

208. *Id.*

209. *Id.*

210. *Id.* The court went on to address the Supreme Court's statement that criminal prohibitions generally are inapplicable to reasonable enforcement actions by officers of the law. *Id.* In doing so, the panel found that the above rule embraced only field enforcement activity. *Id.* Thus, although courts may evaluate the conduct of police, investigators, and law enforcement agents under a reasonableness standard, courts have not granted prosecutors a justification to violate generally applicable laws. *Id.* The court noted that the law enforcement justification exists to allow field officers a practical means to detect and prevent crime and to apprehend suspects and is necessary because of the difficulties inherent in detecting certain crimes. *Id.* The court declined to expand the meaning of enforcement action beyond this historical scope. *Id.* at 1353-54.

211. *Id.* at 1354.

212. *See supra* note 182 (quoting 18 U.S.C. § 3553(e) (1994)).

213. *See supra* note 183 (quoting U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1995)).

214. Federal Rule of Criminal Procedure 35(b) provides, in relevant part: "The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense . . . ." FED. R. CRIM. P. 35(b).

215. *Singleton I*, 144 F.3d at 1354-55.

216. *Id.* at 1355.

would not impair the substantial assistance provisions because a defendant can substantially assist an investigation or prosecution in many ways other than by testifying.[217] Furthermore, the panel suggested that the government still may make deals with accomplices for providing assistance other than testimony, and it still may put accomplices on the stand.[218] The government simply may not attach any promise, offer, or gift to their testimony.[219]

The court then addressed the government's alleged violation of Kansas Professional Rule 3.4(b).[220] Rule 3.4(b) provides that "[a] lawyer shall not... offer an inducement to a witness that is prohibited by law."[221] Having already established that intangible value can be equivalent to financial value and that a promise of leniency can provide an equal or greater incentive to lie than payment, the court concluded that the government violated Rule 3.4(b).[222]

Finally, the panel considered the appropriate remedy for the government's violation of the federal statute.[223] Noting that to deter unlawful conduct courts have applied the exclusionary rule to constitutional, statutory, and procedural violations, the panel reasoned that the violation at bar demanded the exclusion of the testimony obtained in violation of § 201(c)(2).[224] Furthermore, the panel found that the benefits of deterrence outweighed the evil of excluding relevant evidence because excluding the testimony removed the sole incentive for violating § 201(c)(2).[225] Furthermore, the panel reasoned that the admission of tainted testimony directly impugns judicial integrity;[226] in contrast, applying the exclusionary rule furthers "the imperative of judicial integrity."[227]

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217. *Id.*

218. *Id.*

219. *Id.* Because the question was not directly before the panel, it declined to decide whether §5K1.1(a)(2) of the United States Sentencing Guidelines exceeds statutory authority or conflicts with § 201(c)(2) by making testimony, as opposed to other forms of cooperation, a basis for a finding of substantial assistance. *Id.*

220. *Id.* at 1358-59.

221. *Id.* at 1359 (quoting KANSAS RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) (1997)). Section 3.4(b) of the American Bar Association's Model Rules of Professional Conduct provides that "[a] lawyer shall not: ... (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law...." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) (1999).

222. *Singleton I*, 144 F.3d at 1359.

223. *Id.*

224. *Id.*

225. *Id.* at 1359-60.

226. *See id.* (noting that courts become "party to lawlessness" when they allow "unhindered use of the fruits of illegality").

227. *Id.* (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)).

Notwithstanding the exclusion of Douglas's testimony, the panel concluded that a rational jury could have found Singleton guilty beyond a reasonable doubt of both the conspiracy and the money laundering charges.[228] Therefore, the panel reversed and remanded for a new trial.[229] On July 10, 1998, a mere nine days following the panel's opinion, the Tenth Circuit acted on its own motion[230] and ordered the court to rehear Singleton's appeal en banc.[231] Pending the decision of the en banc court, the court vacated the July 1, 1998 opinion of the original panel.[232]

B. The Fall: Singleton II

On rehearing, the en banc court decided that the dispute between Singleton's position and the government's position revolved around the meaning of "whoever" in the statute.[233] The court reasoned that because Congress did not add to or redefine the meaning of any word in § 201(c)(2), the court must presume that Congress intended to employ the common meaning of the word "whoever."[234] Relying on *Webster's Third New International Dictionary*, the court decided that the word "whoever" connotes a being.[235] Thus, because the United States is an inanimate entity, not a being, construing "whoever" to include the government would be semantically erroneous.[236] Although the court could have ended the dispute on this note, it went on to discuss how rules of statutory construction led to the same conclusion.[237]

Like the panel that previously had considered the appeal, the *Singleton II* court began with *Nardone v. United States*.[238] The court found that the case at bar fell within both categories of cases set forth in *Nardone*.[239] First, to sup-

228. *Id.* at 1361.

229. *Id.*

230. *Id.* The Tenth Circuit acted on its own motion pursuant to Rule 35(a) of the Federal Rules of Appellate Procedure. *Id.*

231. *Id.*

232. *Id.* at 1361-62. In its July 10 order, the Tenth Circuit ordered the parties to file supplemental briefs. *Id.* The Tenth Circuit directed the parties to address, in addition to any other arguments pertinent to the case, whether any opinion reversing the district court would have prospective or retrospective application. *Id.* at 1361-62.

233. Singleton II, 165 F.3d 1297, 1299 (10th Cir. 1999) (en banc); *see supra* note 152 (quoting § 201(c)(2)).

234. *Singleton II*, 165 F.3d at 1300.

235. *Id.*

236. *Id.*

237. *Id.* at 1300-01.

238. *Id.*; *see supra* notes 188-201 (recounting *Singleton I*'s analysis of canon of construction discussed in *Nardone*).

239. *Singleton II*, 165 F.3d at 1301.

port its decision that Singleton's proposed construction was patently absurd, the court extended the argument to its logical conclusion.[240] The court found that Singleton was implying that Congress intended to subject the United States to the provisions of § 201(c)(2) and, consequently, like any other violator, to criminal prosecution.[241] Second, to bolster its decision that Singleton's proposed construction would deprive the government of an established interest, the court surveyed the history of calling accomplice witnesses to testify under a plea bargain that promises the witness a reduced sentence.[242] The court found that this "ingrained practice of granting leniency in exchange for testimony" has created an established government interest.[243] Moreover, in light of the longstanding practice, the court presumed that if Congress had intended that § 201(c)(2) overturn this aspect of the criminal justice system, it would have done so in clear, unmistakable language.[244]

Thus, although the court agreed with the shibboleth that the government is not above the law, it concluded that this particular statute does not apply to the government.[245] Accordingly, the court affirmed the district court's denial of the motion to suppress on § 201(c)(2) grounds.[246] However, the court adopted the ruling of the panel that the evidence in the record was sufficient to sustain the judgment of conviction, notwithstanding the panel's conclusion that the district court should have suppressed Douglas's testimony.[247]

In his concurring opinion, Judge Lucero stated that he disagreed with the majority's holding that the word "whoever" in § 201(c)(2) cannot include the government or its agents.[248] He pointed out that the majority's interpretation would permit the conclusion that a United States Attorney may pay a witness for false testimony.[249] Furthermore, Judge Lucero suggested that the majority's holding was inconsistent with *Nardone v. United States*.[250] Just as § 201(c)(2) used a term that generally applied to a being, the statute under review in *Nardone* used "no person" to encompass the class of persons subject to the law.[251] Thus, the majority's conclusion that "whoever" in § 201(c)(2)

240. *Id.*
241. *Id.*
242. *Id.* at 1301-02.
243. *Id.*
244. *Id.*
245. *Id.* at 1302.
246. *Id.*
247. *Id.*.
248. *Id.* at 1303 (Lucero, J., concurring in judgment).
249. *Id.* (Lucero, J., concurring in judgment).
250. *Id.* at 1304 (Lucero, J., concurring in judgment).
251. *Id.* (Lucero, J., concurring in judgment).

cannot refer to the government because it connotes a being and not an entity is inconsistent with the statutory construction used in *Nardone*.[252]

Judge Lucero relied on an elementary tenet of statutory construction which provides that without a "clear intention otherwise, a general statute will not control or nullify a specific one."[253] After examining the statutory framework authorizing various incentives for cooperating witnesses, Judge Lucero concluded that, in totality, these statutes construct both a substantive and a procedural framework for bargaining between government agents and potential witnesses.[254] The result is a coherent, narrowly-defined body of law that operates in the same area as the more general prohibitions of § 201(c)(2).[255] Thus, because the specific statute creating incentives conflicts with the general bribery statute, the latter must give way, at least to the extent it would prohibit that which the narrow statute would allow.[256] For this reason, Judge Lucero merely concurred with the majority's result.[257]

The three judges who signed the unanimous opinion in *Singleton I* dissented in *Singleton II*.[258] Judge Kelly began the opinion by addressing the critical commentary that arose following the court's prior opinion.[259] He compared the grave forecasts made by prosecutors that the panel's opinion was the "death knell for the criminal justice system" to those that prosecutors made after the Supreme Court's decision in *Miranda v. Arizona*[260] and the advent of

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252. *Id.* (Lucero, J., concurring in judgment).

253. *See id.* at 1305 (Lucero, J., concurring in judgment) (quoting Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 375 (1990)).

254. *See id.* at 1307 (Lucero, J., concurring in judgment) (discussing statutory schemes authorizing various incentives for cooperating witnesses).

255. *Id.* (Lucero, J., concurring in judgment).

256. *Id.* (Lucero, J., concurring in judgment).

257. *Id.* (Lucero, J., concurring in judgment).

258. *Id.* at 1308 (Kelly, J., dissenting).

259. *Id.* (Kelly, J., dissenting).

260. 384 U.S. 436 (1966). In *Miranda*, the Supreme Court considered the admissibility of statements solicited from a defendant while detained or in custody. Miranda v. Arizona, 384 U.S. 436, 445 (1966). According to the *Miranda* Court, authorities failed to warn each of the defendants in the consolidated cases of their rights at the outset of the interrogation process. *Id.* In all of the cases, authorities secured oral admissions and, in three of them, signed statements. *Id.* The *Miranda* Court found that the admission of all these statements at trial violated the Constitution. *Id.* at 467. The *Miranda* Court determined that the Fifth Amendment protects persons in all settings from being compelled to incriminate themselves. *Id.* In order to protect this privilege, the Court decided that the government must sufficiently inform the accused of his rights and must fully honor the exercise of those rights. *Id.* Consequently, the *Miranda* Court concluded that "authorities must warn an accused prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be

the exclusionary rule.[261] Judge Kelly asserted, however, that no one seriously could contend that the criminal justice system has become inoperable because the Court or Congress has effectuated constitutional or statutory guarantees to ensure a more reliable outcome in criminal proceedings.[262]

Although Judge Kelly went on to reposit the rationale behind the panel's first opinion, the most revealing part of his opinion precedes the statutory analysis.[263] He noted that the concern for the integrity and fairness of our criminal justice system that § 201(c) was intended to protect was largely missing from the debate that had occurred since *Singleton I*.[264] Judge Kelly recognized that the government's obligation to disclose exculpatory information and the cross-examination of accomplice witnesses partly ameliorate the problem, but noted that these devices have limitations.[265] He concluded that in the uncertain world of trial, and in view of § 201(c), a witness's demeanor and testimony are simply too important to hinge upon promises of leniency.[266] By barring an exchange for testimony, he concluded, Congress in § 201(c) sought to prohibit the most obvious incentive for false testimony.[267]

C. *The Aftermath*

Singleton I forced federal courts everywhere to deal with the "Singleton issue."[268] An overwhelming majority of the district courts have rejected the reasoning of the panel in *Singleton I*.[269] Similarly, nine circuits have declined

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appointed for him prior to any questioning if he so desires." *Id.* at 479. Unless the government demonstrates these warnings at trial, the *Miranda* court stated that prosecutors cannot use any evidence obtained as a result of interrogation against the accused. *Id.*

261. *Singleton II*, 165 F.3d at 1308 (Kelly, J., dissenting).

262. *Id.* (Kelly, J., dissenting).

263. *Id.* (Kelly, J., dissenting).

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

265. *Id.* (Kelly, J., dissenting).

266. *Id.* (Kelly, J., dissenting).

267. *Id.* After *Singleton II*, defense counsel filed a petition for certiorari with the U.S. Supreme Court. However, the Court denied certiorari. Singleton II, 165 F.3d 1297 (10th Cir. 1999) (en banc), *cert. denied*, 119 S. Ct. 2371 (1999).

268. *See* United States v. Lowery, 166 F.3d 1119, 1120 (11th Cir. 1999) ("[T]his appeal involves what has come to be known as 'the *Singleton* issue,' after the now-reversed Tenth Circuit panel decision in *United States v. Singleton*."). *Singleton I* has been cited in nearly two hundred federal court decisions.

269. *See, e.g.*, United States v. Stillo, No. 97 C 2920, 91 CR 795, 1999 WL 89660, at *5 (N.D. Ill. Feb. 12, 1999) (rejecting reasoning of *Singleton I*); United States v. Streater, No. 3:97CR232(EBB), 1999 WL 66534, at *2 (D. Conn. Jan. 19, 1999) (same); United States v. Percan, No. 98 CR. 392(AGS), 1999 WL 13040, at *2 (S.D.N.Y. Jan. 13, 1999) (same); United States v. Terry, Nos. CIV.A. 98-CV-1566, CRIM. 92-CR-51, 1999 WL 20911, at *4 (N.D.N.Y.

to adopt the *Singleton I* reasoning.[270] Although several courts dismissed the issue without analysis,[271] most courts either agreed with other decisions[272] or offered their own reasoning.[273] Nearly all of the courts offering their own

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Jan. 12, 1999) (same); United States v. Johnson, 34 F. Supp. 2d 535, 538 (E.D. Mich. 1998) (same); United States v. Jennings, No. 5-98-CR-418, 1998 WL 865617, at *6 (N.D.N.Y. Dec. 8, 1998) (same); Hall v. United States, 30 F. Supp. 2d 883, 895 (E.D. Va. 1998) (same); United States v. Clark, 29 F. Supp. 2d 569, 569-71 (S.D. Ohio 1998) (same); United States v. Abraham, 29 F. Supp. 2d 206, 207-08 (D.N.J. 1998) (same); United States v. Roque-Acosta, 28 F. Supp. 2d 1256, 1258 (D. Haw. 1998) (same); United States v. White, 27 F. Supp. 2d 646, 649 (D. Colo. 1998) (same); United States v. Hammer, 25 F. Supp. 2d 518, 535-36 (M.D. Pa. 1998) (same); United States v. Crumpton, 23 F. Supp. 2d 1218, 1218-19 (D. Colo. 1998) (same); United States v. McGuire, 21 F. Supp. 2d 1264, 1266 (D. Kan. 1998) (same); United States v. Reid, 19 F. Supp. 2d 534, 535-38 (E.D. Va. 1998) (same); United States v. Arana, 18 F. Supp. 2d 715, 716-21 (E.D. Mich. 1998) (same); United States v. Dunlap, 17 F. Supp. 2d 1183, 1184-88 (D. Colo. 1998) (same); United States v. Eisenhardt, 10 F. Supp. 2d 521, 521-22 (D. Md. 1998) (same); United States v. Gabourel, 9 F. Supp. 2d 1246, 1246-47 (D. Colo. 1998) (same).

270. *See* United States v. Stephenson, 183 F.3d 110, 118 (2d Cir. 1999) (declining to adopt reasoning of *Singleton I*); United States v. Lara, 181 F.3d 183, 197-98 (1st Cir. 1999) (same); United States v. Flores, 172 F.3d 695, 699-700 (9th Cir. 1999) (same); United States v. Johnson, 169 F.3d 1092, 1097 (8th Cir. 1999) (same); United States v. Lowery, 166 F.3d 1119, 1122-23 (11th Cir. 1999) (same); United States v. Carroll, 166 F.3d 334, 334 n.4 (4th Cir. 1998) (same); United States v. Ramsey, 165 F.3d 980, 986-87 (D.C. Cir. 1999) (same); United States v. Haese, 162 F.3d 359, 366-68 (5th Cir. 1998) (same); United States v. Ware, 161 F.3d 414, 418-25 (6th Cir. 1998) (same). Thus, the *Singleton I* holding has not been the law of any circuit since the Tenth Circuit vacated the panel's opinion on July 10, 1998.

271. *See, e.g.*, United States v. Bess, No. 98-4112, 1999 WL 10024, at *2 (4th Cir. Jan. 12, 1999) (unpublished table opinion) (stating simply "[w]e decline to adopt as the rule in this circuit the decision in *United States v. Singleton*"); United States v. Masciandaro, No. 97 CR 305(SHS), 1998 WL 814637, at 1 (S.D. N.Y. Nov. 19, 1998) ("This Court will be as concise in denying defendant's motion as defendant was in making it: this Court declines to adopt the reasoning of the vacated opinion in *Singleton* and denies defendant's post-trial motion."); United States v. Eisenhardt, 10 F. Supp. 2d 521, 521-22 (D. Md. 1998) ("The 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.").

272. *See, e.g.*, United States v. Lowery, 166 F.3d 1119, 1123 (11th Cir. 1999) ("In joining the cavalcade – or perhaps we should say stampede – of courts that have considered and rejected the *Singleton* panel's holding, we see no point in replowing ground that has been thoroughly tilled by the other courts whose decisions we have already cited."); United States v. Streater, No. 3:97CR232(EBB), 1999 WL 66534, at *1 (D. Conn. Jan. 19, 1999) ("This Court is not persuaded by the reasoning in the original *Singleton* decision and joins Judges Nevas and Hall of this Court in rejecting that reasoning."); United States v. Hammer, 25 F. Supp. 2d 518, 536 (M.D. Pa. 1998) ("We concur with the reasoning and analysis of Judge Rosen [in *United States v. Arana*].").

273. *See, e.g.*, United States v. Clark, 29 F. Supp. 2d 869, 870-71 (S.D. Ohio 1998) (offering reasoning for its rejection of *Singleton I*); United States v. Abraham, 29 F. Supp. 2d 206, 209-14 (D.N.J. 1998) (same).

reasoning adhered to the rationale relied upon in the majority opinion of *Singleton II*,[274] concluding that the government was not within the statutory class of § 201(c)(2).[275] These courts, relying on *Nardone*, declared that application of § 201(c)(2) would deprive the government of an established interest and create an obvious absurdity.[276]

The logical extension of this argument, however, caused at least one court to reject this rationale.[277] The Northern District of Oklahoma agreed with the authors of the concurring opinion in *Singleton II*,[278] reasoning that such a reading would exempt from § 201(c)(2) an Assistant United States Attorney who corruptly pays money to a prosecution witness for false testimony.[279] Thus, the Oklahoma court concluded that the government was within the statutory class and § 201(c)(2) technically restricted its activities.[280] However, the court recognized that the judiciary must read § 201(c)(2) in conjunction with subsequent statutes that allow prosecutors to confer benefits in exchange for testimony.[281] In short, the court agreed with Judge Lucero's

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274. *See infra* notes 275-76 and accompanying text (discussing cases adhering to reasoning offered in majority opinion in *Singleton II*). *But see* United States v. Lowery, 15 F. Supp. 2d 1348, 1350-60 (S.D. Fla. 1998) (adopting reasoning of *Singleton* panel in its entirety), *rev'd*, 166 F.3d 1119 (11th Cir. 1999); United States v. Fraguela, No. CRIM. A. 96-0339, 1998 WL 560352, at *1 (E.D. La. Aug. 27, 1998) (adopting rationale of "original panel decision in *Singleton* as well as Judge Zloch's district court decision in *United States v. Lowery*"), *vacated*, No. CRIM. A. 96-0339, 1998 WL 910219, at *2 (E.D. La. Oct. 7, 1998). Judge Zloch issued his decision in *Lowery* less than a month after *Singleton I* and kept legal scholars and commentators guessing about the longevity of the *Singleton I* reasoning. *See* Rovella & Cox, *supra* note 179 ("Even though many thought *Singleton* would go nowhere, in Florida, U.S. District Judge William J. Zloch, a Reagan appointee, became the first federal judge to cite the case in nixing three plea deals with defendants in a drug case.").

275. *See, e.g.*, United States v. Ramsey, 165 F.3d 980, 980 (D.C. Cir. 1999) (concluding that § 201(c)(2) does not apply to government); United States v. Ware, 161 F.3d 414, 419 (6th Cir. 1998) (same); *Clark*, 29 F. Supp. 2d at 870 (same).

276. *See, e.g.*, *Ramsey*, 165 F.3d at 988-90 (concluding that § 201(c)(2) would deprive government of established prerogative and create obvious absurdity); *Ware*, 161 F.3d at 419 (same); *Clark*, 29 F. Supp. 2d at 870 (same).

277. *See infra* notes 279-82 and accompanying text (discussing *Revis* decision, which rejects reasoning of majority in *Singleton II*).

278. *See supra* notes 248-57 and accompanying text (discussing Judge Lucero's concurring opinion in *Singleton I*).

279. *See* United States v. Revis, 22 F. Supp. 2d 1242, 1254 (N.D. Okla. 1998) ("[I]t is too plain for argument that if a United States Attorney corruptly pays money to a prosecution witness for false testimony, such conduct would be covered under the bribery and gratuity provisions in 18 U.S.C. § 201. This result is not absurd; indeed a contrary outcome would be absurd.").

280. *See id.* at 1257 ("Having concluded that the United States Attorney . . . gave leniency . . . 'because of testimony' in this case, the Court finds that such actions come within the language of § 201(c)(2).").

281. *See id.* ("[U]nder the applicable rules of statutory interpretation, the analysis turns to

conclusion that the general prohibition of § 201(c)(2) could not nullify the extensive statutory framework authorizing prosecutorial leniency and other incentives for cooperating witnesses.[282]

V. Accomplice Testimony and Unfair Prejudice

A. Advancing the Issue

Although federal courts resolved the statutory issue framed by *Singleton I*, they failed to respond to the underlying issue of whether accomplice testimony offered in exchange for prosecutorial leniency is so unreliable that it should be inadmissible.[283] Judge Lucero's opinion in *Singleton II*[284] offered a rationale that is a coherent and appropriate resolution of the statutory issue.[285] The federal criminal sentencing statute, 18 U.S.C. § 3553(e), authorizes courts, upon motion of the government, to reduce sentences for individuals who provide "substantial assistance in the investigation or prosecution of another."[286] In addition, 28 U.S.C. § 994(n) instructs the United States Sentencing Commission to ensure that the guidelines reflect the appropriateness of imposing a reduced sentence because a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense."[287]

These statutes expressly contemplate that a defendant may render substantial assistance in connection with either the investigation or the prosecution of another.[288] No legislative history construes the words "investigation"

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whether the instant conduct by the United States Attorney was specifically authorized by other laws such that the general prohibition in § 201(c)(2) must give way.").

282. *See id.* at 1264 ("When the conduct of the government conforms to the specific law, as it did in this case, a claim that it violated the general prohibition in § 201(c)(2) cannot be maintained."); *supra* notes 254-57 and accompanying text (discussing Judge Lucero's conclusion).

283. *See* Singleton II, 165 F.3d 1297, 1308 (10th Cir. 1999) (Kelly, J., dissenting) ("[L]argely missing from the debate since the panel opinion was issued is any concern for the other deeply held values that § 201(c)(2) was intended to protect .... Those concerns center on maintaining the integrity, fairness, and credibility of our system of criminal justice.").

284. *See supra* notes 248-57 and accompanying text (discussing concurring opinion of *Singleton II*).

285. *See infra* notes 286-97 and accompanying text (discussing appropriateness of this resolution).

286. *See* 18 U.S.C. § 3553(e) (1994) (authorizing reductions below statutory minimum sentence); *see also supra* note 182 (quoting § 3553(e)).

287. *See* 28 U.S.C. § 994(n) (1994) (requiring consideration of defendant's "substantial assistance in the investigation or prosecution of another").

288. *See* 18 U.S.C. § 3553(e) (1994) (authorizing reduction of sentences for defendant who provides "substantial assistance in the investigation or prosecution of another"); 28 U.S.C.

and "prosecution" as these statutes use them.[289] However, their plain meaning suggests that information that a defendant provides with respect to another person prior to either a grand jury hearing or a trial constitutes assistance in the "investigation."[290] Therefore, assistance after a grand jury hearing or in conjunction with a prosecution of that person must be in the form of testimony. To construe the statutes as rewarding assistance in the prosecution of another person and at the same time to declare that such assistance does not include testimony would take the word "prosecution" out of the statute.[291] Thus, the statutes' reference to assistance in the prosecution of another person must include testimony.[292] Section 5K1.1 of the United States Sentencing Guidelines further supports this interpretation because it specifically directs a court to consider testimony as part of a defendant's substantial assistance when determining whether to grant a downward departure.[293]

In totality, §§ 3553(e) and 994(n) construct a framework for bargaining between government agents and potential witnesses.[294] They describe what the government may offer an accomplice witness and clarify the roles that the prosecution and the courts play.[295] The result is a coherent, narrowly-defined body of law that operates in the same area as the more general prohibitions of

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§ 994(n) (1994) (mandating that court take into account defendant's "substantial assistance in the investigation or prosecution of another"); *see also* FED. R. CRIM. P. 35(b) (authorizing post-sentencing reductions "in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code").

289. *See* United States v. Revis, 22 F. Supp. 2d 1242, 1259 (N.D. Okla. 1998) (finding no legislative history construing words "investigation" and "prosecution" as 18 U.S.C. § 3553 and 28 U.S.C. § 994 use them).

290. *See id.* (indicating that defendant's pre-trial assistance is assistance in "investigation").

291. *See* Singleton II, 165 F.3d 1297, 1306 (10th Cir. 1999) (Lucero, J., concurring in judgment) ("Although there are some forms of assistance in prosecution that are neither testimonial nor duplicative of investigatory assistance, it stretches credulity to suppose that Congress intended to exclude cooperative testimony from 'substantial assistance' as used in these statutes.").

292. *See id.* (Lucero, J., concurring in judgment) ("There can be little doubt that Congress intended to include the provision of cooperative testimony under the rubric of 'substantial assistance.'").

293. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1(a)(2) (1995) (directing court, in determining appropriate reduction, to consider "the truthfulness, completeness, and reliability of any information or testimony provided by the defendant").

294. *See Singleton II*, 165 F.3d at 1307 (Lucero, J., concurring in judgment) (stating that statutes "create both a substantive and procedural framework for bargaining between government agents and potential witnesses").

295. *See id.* (Lucero, J., concurring in judgment) (stating that statutes "limit the 'something of value' that the government may offer, and detail the roles of both the prosecution and the courts in determining sentences, providing immunity, and granting other forms of assistance").

§ 201(c)(2).[296] Under well-established principles of statutory construction, a general statute such as § 201(c)(2) must yield to a specific statute to the extent that they conflict.[297]

However, even if most accomplice plea agreements fall within the limits that the "substantial assistance" statutes define, that fact does not bolster the reliability of evidence offered pursuant to such agreements. The underlying issue in *Singleton I* was whether promises of leniency and immunity tend to produce evidence that is so unreliable that disclosure and cross-examination cannot ameliorate the problem.[298] The resolution of the statutory construction issue raised in *Singleton I* does not speak to this broader issue.

B. Playing by the Rules

The federal courts' response to *Singleton I* forecloses the possibility of successful statutory challenges to accomplice testimony.[299] Similarly, recent decisions in the due process line of cases indicate that due process challenges to accomplice testimony are likely to be unsuccessful.[300] Also, the likelihood

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296. *See id.* (Lucero, J., concurring in judgment) (stating that statutes "operate in the same field as the more general prohibitions of § 201(c)(2)").

297. *See id.* at 1305 (Lucero, J., concurring in judgment) ("It is an elementary tenet of statutory construction that '[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one.'" (quoting Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 375 (1990) (alteration in original))).

298. *See id.* at 1309 (Kelly, J., dissenting) ("Testifying witnesses may be cross-examined. Their credibility may be impeached, and the jury is instructed that it may regard such testimony with caution. However, all of these devices have limitations.").

299. *See supra* Part III.C (discussing federal courts' near unanimous rejection of reasoning in *Singleton I*). Although the federal courts have spoken clearly on the applicability of the federal bribery statute to cooperation agreements, those decisions have not foreclosed the possibility of challenges based on state ethical rules. *See* Singleton II, 165 F.3d 1247, 1302-03 (10th Cir. 1999) (Henry, J., concurring) (noting possibility that *Singleton I* issue may arise again in context of state rules of ethics). Indeed, since Congress passed the Citizen's Protection Act of 1998, subjecting government attorneys to the ethical rules of the state in which they practice, a challenge based on state ethical rules has more force. *See id.* (Henry, J., concurring) (indicating that Citizen's Protection Act repeals Thornburgh Memorandum, which asserted that federal prosecutors are not subject to rules of professional conduct in force in states where prosecutors practice). However, at least one federal court of appeals has concluded that state rules of professional conduct cannot trump the Federal Rules of Evidence, and therefore the ethical rules are irrelevant to admissibility decisions. *See* United States v. Lowery, 166 F.3d 1119, 1124 (11th Cir. 1999) ("State rules of professional conduct, or state rules on any subject, cannot trump the Federal Rules of Evidence."). *Cf.* Erica M. Landsberg, Comment, *Policing Attorneys: Exclusion of Unethically Obtained Evidence*, 53 U. CHI. L. REV. 1399, 1431 (1986) (suggesting that courts should exclude evidence obtained through violations of rules of professional responsibility).

300. *See supra* notes 96-137 and accompanying text (discussing decisions in due process line of cases).

of successfully persuading courts to invoke their supervisory powers to exclude accomplice testimony is remote.[301] Scant precedent suggests that courts use their supervisory power to exclude unreliable evidence,[302] and the Supreme Court has relied upon the Federal Rules of Evidence to determine admissibility.[303] However, the Federal Rules of Evidence provide an independent basis for challenging accomplice testimony offered in exchange for prosecutorial leniency.[304]

Rule 403 of the Federal Rules of Evidence is part of a code intended to promote truth and fairness in the judicial process.[305] Labeled the "most fundamental rule of inadmissibility,"[306] Rule 403 presents a balancing test for trial courts to apply when deciding whether to exclude certain evidence.[307] After determining that evidence is relevant under Rules 401 and 402,[308] the trial court then must exercise its sound discretion in ruling on whether to exclude the

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301. *See infra* note 302 and accompanying text (noting virtual absence of precedent suggesting that courts use their supervisory power to exclude unreliable evidence and such use of supervisory power is unlikely because of Federal Rules of Evidence).

302. *See* Eisenstadt, *supra* note 8, at 780 n.198 (stating that "no cases could be found in which supervisory power has been invoked specifically to regulate the use of unreliable evidence").

303. *See* United States v. Lowery, 166 F.3d 1119, 1124 (11th Cir. 1999) ("When it comes to the admissibility of evidence in federal court, the federal interest in enforcement of federal law, including federal evidentiary rules, is paramount.").

304. *See infra* notes 305-33 and accompanying text (discussing Rule 403).

305. *See* FED. R. EVID. 102 (describing goal of Federal Rules of Evidence as being "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined"); *see also* Jon R. Walz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U.L. REV. 1097, 1098 (1985) (noting "high, if somewhat vague, purpose" drafters of Federal Rules of Evidence intended).

306. *See* Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1336 (1992) (stating that Rule 403 is "most fundamental rule of inadmissibility"); *see also* Walz, *supra* note 305, at 1110 (identifying Rule 403 as "one of the most, if not *the* most important of the Federal Rules of Evidence").

307. *See* FED. R. EVID. 403 ("Although 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.").

308. *See* FED. R. EVID. 401 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); FED. R. EVID. 402 (stating that "[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").

evidence under Rule 403.[309] The rule requires the court to weigh the probative value of the evidence against the "danger of unfair prejudice, confusion of the issues, or misleading the jury" and "considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[310] In the process of conducting the balancing test set forth under Rule 403, the rules grant the trial court great discretion.[311]

In the context of a Rule 403 challenge to accomplice testimony, the court should focus on the danger of "unfair prejudice" to the criminal defendant.[312] Of course, courts cannot interpret "unfair prejudice" to refer to all evidence that harms the defendant's case.[313] Rule 403 requires the balancing of probative value against prejudice only if the latter is "unfair."[314] The Advisory Committee's Note gives only slight assistance in its interpretation: "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis . . . ."[315] This definition suggests that at least two categories of evidence warrant a court's attention. First, evidence that seems likely to encourage a decision on an incorrect basis may create a danger of unfair prejudice.[316] Second, evidence that the trier of fact is likely to overvalue in assessing its probative force may create a danger of unfair prejudice.[317]

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309. *See* Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 231 (1976) (stating that Rule 403 "need only be applied to evidence which is otherwise admissible rather than to the larger category of all relevant evidence").

310. FED. R. EVID. 403.

311. *See* 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5212, at 251 (1978) (noting that even though Rule 403 does not use word "discretion," it nevertheless almost undoubtedly confers discretionary power on trial judge); *see also* Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 414-15 (1989) (indicating that drafters intentionally built flexibility into Federal Rules of Evidence).

312. *See* FED. R. EVID. 403 ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

313. *See* David Robinson, Jr., Old Chief, Crowder, *and Trials by Stipulation*, 6 WM. & MARY BILL RTS. J. 311, 325 (1998) (stating that this construction would be inconsistent with requirement that evidence be relevant).

314. *See* FED. R. EVID. 403 ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

315. FED. R. EVID. 403 advisory committee note.

316. *See* Robinson, *supra* note 313, at 326 (stating that unfair prejudice "may result from evidence that seems likely to encourage a decision on an incorrect basis").

317. *See id.* (stating that unfair prejudice "may be created by evidence likely to be overvalued by the trier of fact in assessing its probative force"); *see also* Michelson v. United States, 335 U.S. 469, 475-76 (1948) ("The inquiry is not rejected because [it] is irrelevant; on the contrary, it is said to weigh too much with the jury . . . . The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent . . . undue prejudice.").

Accomplice testimony falls within this second category for two reasons, and it therefore creates a danger of unfair prejudice. First, an accomplice witness has a significant interest not only in minimizing his role in the criminal activity, but also in incriminating the defendant.[318] An offer of prosecutorial leniency enhances the natural tendency of an accomplice to lie by providing an incentive to offer testimony that is favorable to the prosecution.[319] Under the substantial assistance provisions, the prosecutor has unilateral discretion to make or to refuse to make a motion for a downward departure after the accomplice witness has testified.[320] Thus, the witness must satisfy the prosecutor in order to obtain the benefit of his bargain. Moreover, this tendency to please increases proportionally with the value of the benefit offered to the accomplice witness: The more valuable the benefit offered to the accomplice witness, the greater the danger that the witness will commit perjury. The greater the danger that the witness will commit perjury, the greater the danger of unfair prejudice to the defendant.

Second, accomplice witnesses insulate themselves from jury evaluation because they claim to have participated in the intricacies of the crime alleged.[321] An accomplice witness holds himself out as the witness most capable of relating the details of the criminal activity to the jury because of his firsthand knowledge of the illegal act.[322] This claim of inside knowledge, coupled with the fact that his testimony is usually the most damaging evidence against the defendant, allows the accomplice to deviate from the truth without arousing the jury's suspicion.[323] Because the accomplice alone knows about the pattern of criminal events, he can manipulate the details of those events without risking blatant discrepancies.[324] In effect, little room remains to ques-

318. *See* Washington v. Texas, 388 U.S. 14, 22-23 (1967) ("To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large."); Saverda, *supra* note 11, at 786 ("It is in his interest not only to implicate others but to minimize his own role and exaggerate the roles of his co-conspirators.").

319. *See* Beeman, *supra* note 8, at 802 ("Accomplice plea agreements tend to produce unreliable testimony because they create an incentive for the accomplice to shift blame to the defendant or other co-conspirators.").

320. *See* Taylor, *supra* note 26, at 2 ("Under current practice, a prosecutor can wait until witnesses have finished testifying and then decide unilaterally whether they have performed well enough to earn their rewards.").

321. *See* Saverda, *supra* note 11, at 786 ("[A]n accomplice claims to have participated in the intricacies of the crime alleged.").

322. *See id.* (stating that accomplice witnesses portray themselves as having firsthand knowledge of illegal act).

323. *See id.* at 786-87 (suggesting that accomplice witnesses can embellish their narrative without arousing juries' suspicions).

324. *See id.* at 787 (stating that accomplice witness can manipulate details without blatant discrepancies).

tion the veracity of his testimony.[325] Thus, accomplice testimony "poses a unique danger": The increased probability that a jury will, unquestioningly and with little scrutiny, accept a story as true because of its inherent believability.[326]

Even so, the danger of unfair prejudice of accomplice testimony must "substantially outweigh" its probative value under Rule 403,[327] and admittedly, accomplice testimony is potentially highly probative. Thus, in many instances, the danger of unfair prejudice will not "substantially outweigh" the probative value of the accomplice witness's testimony. However, the Supreme Court has stated that the determination of admissibility under Rule 403 requires a complete contextual assessment of all evidence available in a particular case.[328] Thus, a court must properly consider, for example, the absence of evidence that independently corroborates the challenged accomplice testimony. Although most states have established corroboration requirements for accomplice testimony in criminal trials in order to reduce an accomplice's opportunity to fabricate testimony,[329] the federal system has steadfastly refused to impose such a requirement.[330] Consequently, many federal prosecutions often rely heavily, if not solely, upon uncorroborated accomplice testimony.[331] In these situations, the outcome of the case depends entirely upon the testimony of the accomplice witness. It is precisely these cases in which the danger of unfair prejudice will substantially outweigh the admittedly high probative value of the accomplice testimony and thus warrant exclusion of the testimony.

VI. Conclusion

Singleton I was a bold attempt to level the playing field between the government and the defendant in a criminal case. Regrettably, the response *Singleton I* elicited from federal courts was largely devoid of concern for this laudable goal. Many courts blindly cited tradition as a justification for offer-

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325. *See id.* (suggesting inability to question veracity of accomplice witness).

326. *See id.* (discussing unique danger accomplice testimony poses).

327. *See* FED. R. EVID. 403 ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

328. *See* Old Chief v. United States, 519 U.S. 172, 182-85 (1997) (adopting contextual approach for Rule 403 determinations); *see also* D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 318-19 (1989) (supporting drafter's recognition that assessments of unfair prejudice and probative value should be contextual).

329. *See* Saverda, *supra* note 11, at 790-91 (stating that many states have enacted statutes mandating corroboration of an accomplice's testimony).

330. *See id.* at 804 (noting lack of federal legislative provisions and judicial standards addressing corroboration of accomplice testimony).

331. *Id.* at 795 (discussing federal cases in which uncorroborated accomplice testimony served as major portion of convicting evidence).

ing leniency in exchange for testimony. The Supreme Court, however, has never spoken on the propriety of modern prosecutorial practices, which have begun to resemble the historically rejected practice of approvement rather than the model the Court tacitly condoned in the late nineteenth century.[332]

Until the Supreme Court weighs in decisively on this practice, Rule 403 provides a legitimate basis for challenging the admissibility of accomplice testimony. At least in cases in which no independent evidence corroborates the accomplice testimony, defendants should contend that the danger of unfair prejudice outweighs the probative value of the testimony. If the "quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law,"[333] federal courts have a responsibility to sustain those challenges.

332. *See supra* Part II.A (discussing historical practice of approvement).

333. *See* Miranda v. Arizona, 384 U.S. 436, 480 (1966) (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956)).