AN OFFER YOU CAN'T REFUSE? UNITED STATES V. SINGLETON AND THE EFFECTS OF WITNESS/PROSECUTORIAL AGREEMENTS

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I. INTRODUCTION

Traditionally, federal prosecutors have had great power and freedom in deciding against whom to bring a case.[1] In our system, it has long been established that the prosecutor possesses sole discretion to bring charges before the court.[2] It is commonplace for the government to make bargains shortening defendants' sentencing in exchange for their cooperation in testifying against other defendants.[3] In making these deals, prosecutors offer various incentives to defendants to convince them to become government witnesses in other criminal trials.[4] The gathering of this type of testimony is often crucial to the outcome of many prosecutors' cases as the federal court system allows for a criminal conviction to stand based solely on accomplice testimony.[5]

The practice of granting an individual party immunity or leniency in exchange for testimony has been used recently in many widely publicized cases. The conviction of Timothy McVeigh for the Oklahoma City Federal Building bombing offers a high profile example of these prosecutorial tactics.[6] The government

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[1] *See* Harry I. Subin et al., The Criminal Process: Prosecution and Defense Functions 50 (West Publishing 1993).

[2] *See, e.g.,* United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965)("[T]he courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.")

[3] *See* The Whiskey Cases (United States v. Ford), 99 U.S. 594, 596 (1878).

[4] *See* Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information From Scoundrels*, 8 Fed. Sent. R 292 (March/April 1996).

[5] *See* United States v. Anderson, 654 F.2d 1264, 1268 (8th Cir. 1981) (holding that accomplice testimony does not require corroboration and may by itself sustain a conviction. *See also* United States v. Fitts, 635 F.2d 664, 667 (8th Cir. 1980); United States v. Knight, 547 F.2d 75, 76 (8th Cir. 1976); Williams v. United States, 328 F.2d 256, 259 (8th Cir. 1964).

[6] *See* United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998) (allowing for cooperating witness to receive a lesser charge). U.S. prosecutors used similar language in their plea agreements with Michael Fortier, a co-defendant in the Oklahoma bombing plot and with co-

resorts to this method of obtaining accomplice testimony where equally compelling evidence from eyewitnesses, victims, documents or other traditional sources cannot be obtained.[7] The most likely situations for this practice include cases dealing with murder, corruption, organized crime, and narcotics prosecutions—all situations often containing secretive conduct and no available victim.[8]

This long practiced prosecutorial procedure of bargaining for testimony against other defendants has recently been questioned in the widely publicized[9] case *United States v. Singleton*.[10] In this case, the court considered whether a federal prosecutor should have the power to grant offers of leniency to individual defendants in exchange for testimony used to prosecute another defendant.[11] The facts of the *Singleton* case and the resulting outcome exemplify the potential problems these prosecutorial deals pose to the legal system; namely, that they create an incentive for informants to lie.

Singleton is a recent attempt of defense lawyers to question the deal-making powers of the prosecution. The case offers insight into the arguments on both sides of the issue of allowing prosecutors the ability to make deals about sentencing.[12] *Singleton* provides a clear look at the benefits gained in the pursuit of gathering information versus the danger posed to the judicial process and the defendant's constitutional rights. This Note will study *Singleton* as an example of the dangers posed by prosecutorial deal-making, and will question whether the practice of

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defendant Douglas Ransom. *See infra* note 24-29 and accompanying text. Fortier was sentenced to 12 years in prison after prosecutors argued he deserved some consideration for his cooperation. *See* Nolan Clay, *Ruling Undermines Nichols Appeal,* DAILY OKLAHOMAN, Jan. 9, 1999, at 3.

[7] *See* Richman, *supra* note 4.

[8] *See id.*

[9] The controversy created by *Singleton* went beyond the courthouses and was heard throughout the country, receiving substantial national coverage. *See, e.g., World News Tonight: Bombshell Ruling by Federal Appeals Court No More Buying Testimony With a Plea Bargain,* (ABC television broadcast, July 9, 1998); *Morning Edition, News; Domestic: Testimony Deals Banned* (NPR radio broadcast, July 10, 1998); Angie Cannon, *Prosecutors Shocked by Their Loss of Leverage, Now How Will They Get Criminals to Testify?*, SAN DIEGO UNION & TRIB., July 10, 1998, at A2; Joan Biskupic, *Justice Dept. to Appeal Court Ban on "Deals" With Witnesses,* WASH. POST, July 10, 1998, at A3; Steve Lash, *Justice Department to Appeal Outlawing of Deals With Suspects,* HOUS. CHRON., Jul. 10, 1998, at 19; Lyle Denniston, *Leniency: Is It a Break of a Bribe?*, BALT. SUN, July 12, 1998, at 2A; *Rewarding Criminals for Testimony Against Cohorts Illegal, Ruling Says*, DALLAS MORNING NEWS, July 14, 1998, at 10A; Larry Lebowitz, *Local Plea Deals Handed a Setback; Testimony Blocked in Two Drug Cases*, SUN-SENTINEL (FT. LAUDERDALE FLA.), July 24, 1998, at 1A; editorial, *Plea Bargains as "Bribery,"* DET. NEWS, July 31, 1998, at A10; Patricia Nealon, *Mass Lawyers Await Effects of Colo. Ruling*, BOSTON GLOBE, July 29, 1998, at B1.

[10] 165 F.3d 1297 (10th Cir. 1999).

[11] *See id.*

[12] *See Singleton*, 165 F.3d at 1302. (Henry, J., *concurring*, acknowledging the "excellent opinions" created by the various *Singleton* decisions).

informal immunity agreements should be allowed. It will examine the issues raised by informal immunity grants, a process that exemplifies the power a prosecutor has in creating a case, and consider how our legal system justifies this power. It argues against allowing prosecutors to offer deals contingent on testimony against co-defendants. This power is too great to remain unbridled. The ability to create informal contingent plea agreements jeopardizes the defendant's right to a fair trial. The Note will conclude that guidelines limiting prosecutorial procedures need to be created.

II. FACTUAL BACKGROUND OF THE *SINGLETON* CONTROVERSY

A. The Facts

In April 1992, Wichita's local police and the United States Department of Revenue began investigating a large number of Western Union money transfers thought to be linked to drug activity.[13] A detective had discovered multiple transfers that bore similar identifiers, including similar names of recipients, as well as similar names, addresses, and phone numbers of their senders.[14] These records led authorities to a group believed to be involved in a conspiracy to sell drugs.[15] Further investigation indicated that men from Wichita who had moved to California ran the smuggling business.[16] These men recruited women in Wichita to wire drug sale proceeds back to California, enabling the men to purchase more cocaine.[17] The authorities identified Sonya Singleton as one of the women who transferred and received money for the conspiracy.[18] Singleton was the common-law wife of Eric Johnson, a buyer, seller, and packager of cocaine.[19] Eight wire transfers suspected to be linked to the drug conspiracy[20] listed Singleton's name as either the sender or the recipient. Singleton was indicted on several counts of money laundering and conspiracy to distribute cocaine.[21]

While searching for more individuals involved in this drug trafficking activity, government agents uncovered evidence against Napoleon Ransom Douglas.[22] At

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[13] *See* United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), *vacated* and *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999).

[14] *See id.*

[15] *See id.*

[16] *See id.*

[17] *See id.*

[18] *See id.* at 1344.

[19] *See Singleton*, 144 F.3d at 1343.

[20] *See id.*

[21] The charges brought against Singleton consisted of money laundering in violation of Title 21 U.S.C. § 846, 18 U.S.C. § 2, 18 U.S.C. § 1965, and 18 U.S.C. § 2. *See* United States v. Singleton, Nov. 15, 1996, Crim A. No. 96-10054 at 2.

[22] *See Singleton*, 144 F.3d at 1344.

the time he was serving a prison sentence in a Mississippi detention center for conspiring to sell cocaine.[23]

Prior to the trial against Singleton for her activities, she moved to suppress the testimony of Napoleon Douglas on the grounds that the government had secured this evidence illegally.[24] In consideration for promises made by the Assistant United States Attorney, Douglas provided information concerning Singleton and her group's distribution of cocaine and money laundering plans.[25] The agreement made between Douglas and the government contained three specific promises made to Douglas in return for his explicit agreement to testify.[26] First, the government promised not to prosecute Douglas for any other violations of the Drug Abuse Prevention and Control Act arising from his activities currently under investigation.[27] Second, the government promised to advise the sentencing court of the "nature and extent" of Douglas' cooperation.[28] Third, the government promised to similarly inform the Mississippi parole board of the nature and extent of Douglas' assistance.[29] Douglas agreed "to testify truthfully in state and/or federal court" in consideration of these agreements.[30]

Prior to the trial against Singleton for her activities, Singleton moved to suppress Douglas's testimony on the grounds that it had been secured illegally by the United States.[31] Singleton claimed that the relevant statute made it illegal to give a party something of value in exchange for testimony.[32] The court denied Singleton's motion, holding that the statute at question, 18 U.S.C. § 201 (C)(2), was not applicable to the federal government when functioning within the official scope of the office.[33]

B. The District Court Decision

The trial proceeded with the government's case against Singleton resting predominantly on Douglas's testimony.[34] Douglas testified that he was a convicted

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[23] *See id.*

[24] *See id.*

[25] *See id.*

[26] *See id.*

[27] This immunity was to be based solely on the transactions under investigation and was not to include immunity from perjury and related offenses. *See id.*

[28] *See Singleton,* 144 F.3d at 1344.

[29] *See id.*

[30] *Id.*

[31] *See id.* The motion to suppress Douglas's testimony was based on 18 U.S.C. § 201(c)(2) and Rule 3.4(b) of the Model Rules of Professional Conduct as adopted by the state of Kansas.

[32] *See id.*

[33] *See id.* at 1358.

[34] *See id.* The prosecution, in its brief (Brief of Appellee at 14, United States v. Singleton, 144 F.3d 1297 (10th Cir. 1998)(No. 97-3179), indicates various evidentiary facts offered in the conviction of Singleton. While it is impossible to show what the jury based its decision upon, a strong argument is made by the defense in its reply brief (Appellant's Reply Brief at

cocaine distributor and money launderer and that the United States had made him multiple promises in consideration of his cooperation in the case against Singleton.[35] He explained the intricacies of money laundering; however, Douglas never testified as to having seen Singleton sell, handle, or package drugs.[36] Furthermore, he did not testify as to ever seeing her transfer drug money or in possession of such money.[37]

On cross-examination, Douglas testified that he had been convicted in California for shooting an individual over a dispute involving a car and that he was ultimately convicted of conspiracy to sell cocaine.[38] Douglas admitted to lying to various government detectives on at least two occasions.[39] He also admitted lying to detectives when he told them that Singleton had transported cocaine from Kansas to California.[40]

The trial court found Singleton guilty of one count of conspiracy and seven counts of money laundering.[41] She was sentenced to forty-six months in prison.[42] Douglas was sentenced to sixty months in prison.[43] The charges against Singleton's boyfriend, the individual originally suspected of drug trafficking, were dismissed.[44]

C. The Uproar: The Tenth Circuit's July 31, 1998 Singleton Decision

In an appeal heard before the Tenth Circuit, the attorney for Singleton, John Wachtel, again argued that the government had offered Douglas "something of value"—a promise to reduce his sentence—in exchange for his assistance in convicting Singleton.[45] Wachtel argued that this activity violated 18 U.S.C. § 201(C)(2).[46] This section states that:

> Whoever . . . directly or indirectly, gives, offers, or promises anything of value to any such person, of 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 . . . authorized by the laws of the United States to

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7, United States v. Singleton, 144 F.3d 1297 (10th Cir. 1998)(No. 97-3179)) [hereinafter Appellant's Reply Br.] that the conviction rests on Douglas's testimony. *Id.* It is important to note that in a federal criminal trial a conviction can rest solely on unsupported accomplice testimony.

[35] *See Singleton*, 144 F.3d at 1344.

[36] *See* Appellant's Reply Br. at 5.

[37] *See id.*

[38] *See id.*

[39] *See id.*

[40] *See id.*

[41] *See Singleton*, 144 F.3d at 1343.

[42] *See id.*

[43] *See* Debra Saunders, *Immunity Deals Unfair, Ineffective*, THE IDAHO STATESMAN, Nov. 24, 1998, at 7b.

[44] *See id.*

[45] *See id.*

[46] *See id.*

> hear evidence or take testimony. . . shall be fined under this title or imprisoned for not more than two years, or both.[47]

Singleton argued that the statute, designed to prevent criminal activity that provided incentives for false testimony, applied to the government.[48] The plain language of the statute did not allow for the government to offer leniency to Douglas in exchange for his testimony against Singleton.[49]

In reaching its decision to reverse and remand the lower court's conviction of Singleton, the Court of Appeals panel found that section 201(C)(2) did not limit the class of persons affected by the statute.[50] The court supported this conclusion by relying on various time-honored methods of statutory interpretation.[51] It gave strong weight to the statute's plain language, reasoning that there is a "strong presumption" that plain language expresses congressional intent, and that contrary intent will be supported only in "rare and exceptional circumstances."[52]

In reversing the district court and holding that the government would not be allowed to make deals trading leniency for testimony, the court stated, "The judicial process is tainted and justice cheapened when factual testimony is purchased whether with leniency or money."[53] The court believed that it was Congress's intention to "keep testimony free of all influences so that its truthfulness is protected."[54] This ruling gained widespread notoriety in the nation's courtrooms.[55] Numerous "Singleton Motions" were made across the country, and as a result of the clear effect that this case was going to have on the legal climate, the decision was vacated on July 10, 1998 and an en banc rehearing was scheduled.[56]

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[47] 18 U.S.C. § 201(C)(2).

[48] *See* Appellant's Reply Br. at 6.

[49] *See id.*

[50] *See Singleton*, 144 F.3d at 1344.

[51] *See id.*

[52] *Id.*

[53] *Id.* at 1347.

[54] *Id.*

[55] Within days of the July 8, 1998 *Singleton* panel decision, its effect of greatly limiting federal prosecutors' ability to make deals was seen in numerous courts. Nationwide, defendants and convicts began raising the issue to prior prosecutorial practices. Multiple cases soon appeared as defendants made motions alleging that the Government violated the law when promising leniency to co-defendants for testimony against another defendant. *See, e.g.*, United States v. Arana, 18 F. Supp.2d 715 (E.D. Mich. 1998) (decided July 24, 1998); United States v. Reid, 19 F. Supp.2d 534 (E.D. Va. 1998) (decided July 28, 1998). The logic of the July 8, 1998, *Singleton* decision, however, was upheld by federal courts. *See, e.g.*, United States v. Lowery, 15 F. Supp.2d 1348, 1360 (S.D. Fla. 1998) ("Purchased testimony is inherently unreliable and will only serve to taint and obscure the entire judicial process.").

[56] *See Singleton*, 144 F.3d at 1343.

D. The Tenth Circuit's January 8, 1999 en banc Singleton Decision

The Tenth Circuit, in an en banc rehearing of Singleton, supported the District Court's holding that the government was not restricted by section 201(c)(2).[57] In reaching its decision, the court focused its analysis on "the long standing practice sanctioning the testimony of accomplices against their confederates in exchange for leniency."[58] The court reasoned that this power traditionally confers on the government a sovereign prerogative in the practice, and it provides criteria considered by the Supreme Court when deciding whether a statute should be applicable to the government.[59] The court concluded that in light of this long history, Congress would be presumed to have considered federal criminal prosecutors' activities outside the jurisdictional scope of the statute.[60] In light of the lack of specific language stating a congressional intent to exclude prosecutors from the statute's grasp, the court refused to support the defendant's motion.[61]

III. THE HISTORY OF PLEA AGREEMENTS IN THE AMERICAN LEGAL SYSTEM

The Tenth Circuit's panel decision on the *Singleton* case brought national attention to the question of whether our political system should give prosecutors the power of informal deal-making for testimony.[62]

The logic relied upon by the Tenth Circuit in its en banc rehearing is representative of our legal system's reasoning on the issue of the prosecutorial right to make deals with co-defendants in exchange for testimony. A wide berth has long been given to prosecutors in making deals with co-defendants throughout the United States' legal history.[63] In many ways this freedom is part of the very role

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[57] *See Singleton*, 165 F.3d at 1297, 1298.

[58] *Id.* at 1301 (citing Hoffa v. United States, 385 U.S. 293, 310-12 (1966)).

[59] *See id.* In Nardone v. United States, the Supreme Court held that the government was not deprived of a "recognized or established prerogative title or interest," an established exemption allowing the government to be excluded from the statute. 302 U.S. 379, 383-84 (1937) (holding that the federal government is included in the statutory term "anyone" as used in 1934 federal wiretap statute forbidding the wiretapping of phones). Within this category where the statute deprives the government of an established prerogative, two exemptions exist. Addressed here, the relevant exception states that the government is subject to a statute, even if it infringes on the government's sovereign power, so long as the goal of the statute is to prevent fraud, injury or wrong. *See Singleton*, 165 F.3d at 1300-01.

[60] *See Singleton*, 165 F.3d at 1301.

[61] *See id.*

[62] *See id.* Plea bargains and immunity agreements occur between an individual linked to crime and the government where the prosecutor, as the sole representation of the government, offers either a reduced charge or immunity from prosecution for certain offenses in consideration for assistance in the prosecution of another party. *See* U.S. DEPARTMENT OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION 1 (1980). When obtaining testimony is a goal of the agreement, the government will make a condition of the agreement that the testimony be truthful. *See id.*

[63] The Whiskey Cases are an early example of the Supreme Court addressing the issue of the powers of the prosecution to make deals with co-defendants in criminal proceedings. *See*

the prosecutor has always had in the criminal process. The legal system has granted prosecutors great discretion,[64] due in part to the courts' inability to adequately decide against whom a prosecutor should bring suit.[65] Seen to be the party with the best understanding of the specific factors of the case, the prosecutor

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Ford, 99 U.S. at 595. There, the Court noted the important function that prosecutorial discretion serves in deciding when the prosecutor should offer a grant of immunity to a defendant in exchange for testimony. "Of all others, the prosecutor is best qualified to determine that question, as he alone is supposed to know what other evidence can be adduced to prove the criminal charge." *Id.* at 603. Similarly, in Hoffa v. United States, 385 U.S. 293 (1966), the Supreme Court supported Judge Learned Hand's statement:

> Courts have countenanced the use of informers from time immortal; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly . . . .

Id. at 311 (quoting United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1966).

Additionally, in Benson v. U.S., 146 U.S. 325 (1892), the Supreme Court held that co-defendant testimony is admissible when offered by the state. Here, the Court held that "an accomplice is a competent witness for the prosecution, although his expectation of pardon depends on the defendant's conviction, and although he is a co-defendant." *Id.* at 327. The court rationalized this action by stating its goal to defer to the jury on the validity of evidence. *See id.*

[64] *See, e.g.,* Wayte v. United States, 470 U.S. 598, 607 (1985). "In our criminal justice system, the Government retains "broad discretion" as to whom to prosecute"; United States v. Goodwin, 457 U.S. 368, 380, n. 11 (1982); *accord,* Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

[65] *See Wayte,* 470 U.S. at 607:

> This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.

Id.

is typically viewed as having a monopoly on the power of the government[66] and is given great discretion in bringing suits against defendants.[67]

The courts use these same traditional rationalizations to justify deals for testimony with co-defendants. Often times, such testimony is extremely useful for the purpose of gaining information on defendants, especially in situations where it would otherwise be very difficult to obtain such evidence.[68] Sadly, numerous recent cases have repeatedly favored the government's deal-making ability.[69] While the July 1, 1998 *Singleton* decision saw the dangers inherent in this reasoning, the subsequent *Singleton* decision relied on this faulty logic.

IV. HISTORICAL MISTAKES COMPOUNDED BY RECENT LEGISLATION: MANDATED SENTENCING

The dangers raised in *Singleton* have resulted not only from the traditional discretion allocated to prosecutors, but may have also been exacerbated as a result of congressional activity. The effect of various legislative actions in the last twenty years have both purposely and inadvertently furthered the dangerous power of federal prosecutors.[70] Over the last few decades, legislation has shown a tendency to restrain the discretion of the judiciary.[71] First, Congress has enacted sentencing guidelines, creating a tightly regulated process for sentencing defendants, thereby greatly reducing the discretion of federal judges, corrections administrators, and parole boards.[72] Second, those guidelines have been passed requiring that courts

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[66] *See* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1472-73:

> Prosecutors are the agents of a monopsonist, the government: they represent the sole purchasers of the convictions and incriminating information that a multitude of criminal defendants have to sell. As a result, prosecutors hold great bargaining power over defendants and are able to obtain exchanges of pleas at subcompetitive prices.

Id.

[67] *See* WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 13.2 at 10 (2d ed. 1999).

[68] *See supra* note 8 and accompanying text discussing situations where evidence of a crime may be more difficult to collect.

[69] *See, e.g.*, United States v. Evans, 697 F.2d 240, 245-246 (8th Cir. 1983) (conviction may be based on uncorroborated accomplice testimony as long as a jury is made aware of witness's incentives to testify); United States v. Rogers, 91 F.3d 53, 57 (8th Cir. 1996) (holding that it is up to the jury to decide if testimony put forth is credible); United States v. Moeckly, 769 F.2d 453, 463 (8th Cir. 1985) (ruling that accomplice testimony is admissible because the plea agreement was not determined to be contingent on success of the prosecution); United States v. Moody, 778 F.2d 1380, 1384, (9th Cir. 1985) (ruling that the government may impose a duty to give truthful testimony as a condition of favorable treatment without action being seen as coercive and warranting a limitation on executive discretion).

[70] *See* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61 (1993).

[71] *See id.*

[72] *See id.*

sentence criminals convicted of statutorily designated crimes to significantly heightened sentences. [73] Prevalently selected for mandatory harsh sentences are acts such as violent crime and drug-related activity.[74]

The Sentence Reform Act of 1984 is an example of a statutorily commanded minimum guideline that has changed the criminal justice system's sentencing process. [75] The Act established the United States Sentencing Commission, an independent agency of the judicial branch, whose purpose was to create sentencing guidelines for district courts to follow.[76] It established a complex framework to prescribe federal crimes, greatly limiting the discretion of judges in sentencing to a narrowly specified range of allowable sentences.[77] Its purpose was to bring into being a more uniform sentencing distribution among the circuit courts.[78]

Coupled with the loss of discretionary power in determining lengths of sentences, the judiciary has been further restrained by mandatory minimum sentencing legislation. Mandatory penalties have been created for various drug-related offenses,[79] and a trend toward the increased use of statutorily mandated sentencing has developed.[80] Currently, more than 100 mandatory minimum sentence provisions exist in the federal system,[81] greatly affecting the power of the judicial branch to determine sentencing.

The 1986 Anti-Drug Abuse Act offers an example of the inflexible effects of these legislative enactments.[82] The Anti-Drug Abuse Act, in addition to implementing mandatory minimum sentences, removes a defendant's possibility of probation or parole, and increases his or her liability for monetary penalties.[83] In practice, when a party is convicted of possession of illegal drugs with intent to

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[73] *See id.* at 62.

[74] *See id.*

[75] *See* Sentencing Reform Act of 1984 (SRA) ch. 2, § 3551, § 3559, 98 Stat. 1987 (1984).

[76] *See* 28 U.S.C. § 994 (1988).

[77] *See* John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1118 (April 1995).

[78] *See* UNITED STATES SENTENCING COMMISSION, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM: A SPECIAL REPORT TO CONGRESS at I (1991)[hereinafter COMMISSION]:

> [The Sentencing Reform Act] was part of the Comprehensive Crime Control Act, whose purpose was to address the problem of crime in society. The goals of the Sentencing Reform Act were to reduce unwarranted disparity, increase certainty and uniformity, and correct past patterns of undue leniency for certain categories of serious offenses.

Id.

[79] *See, e.g., id.* at 8 & nn.26-29, 10.

[80] *See* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 201 (1993).

[81] *See* COMMISSION, *supra* note 78, at 10 & n.40.

[82] *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C. § 841 (b)(1)(1994)).

[83] *See* 21 U.S.C. § 841(b)(1)(A)(1994).

distribute, the amount of illegal controlled substance is considered.[84] If the amount possessed is above statutorily determined amounts designated to indicate drug trafficking activity, the guideline prescribes a firm sentencing that must be followed.[85] In practice, when the defendant is convicted of drug possession in excess of a statutorily determined amount and is found to have intended to distribute the substance, a judge must sentence the convicted party to at least ten years, without opportunity for parole or probation.[86] This sentence may not be reduced, even if the defendant had no prior criminal history.[87] For defendants with prior drug trafficking convictions, the mandated minimum sentence is doubled.[88]

The Sentencing Guidelines and the various acts creating high mandatory sentences create a cumulative effect resulting in intense fear for any party being charged. Together, these factors create a bleak future for a party brought up on charges – one indicated by the fact that since the passage of the laws, the number of people incarcerated in prisons and jails in the United States has more than doubled in the past twelve years.[89] During this time period, the prison population grew from 744,208 inmates to 1.8 million.[90] Incarceration rates for the United States are presently at 668 inmates per 100,000 people, up from 313 inmates per 100,000 people in 1985.[91] These increases result from the increased pressure to incarcerate produced by the combined effects of these drug policies.[92]

The Sentencing Guidelines contain only one way to avoid its mandatory sentences: a section allowing for a reduction in sentence to parties assisting the government in its cases against other defendants. Going into effect on November 1, 1987,[93] the Sentencing Guidelines enacted section 5K1.1[94] as a way to avoid

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[84] *See* 21 U.S.C. § 841(b)(1)(A)(1994). Possession of quantities found large enough for harsher penalties were at least 100 grams of heroin, 500 grams of cocaine mixture, 5 grams of crack, 100 grams of PCP, 10 gram of LSD, or 100 kilograms of marijuana. *See id.*

[85] *See id.* The guidelines mandate that when a person is convicted of possession of an amount in excess of the statutorily determined threshold, "such a person shall be sentenced to a term of imprisonment which may not be less than 10 years . . . ." *Id.*

[86] *See id.*

[87] *See id.*

[88] *See id.* The Act mandates that if the defendant has been previously convicted of a felony drug offense, the defendant shall be sentenced to a term no less than 20 years.

[89] *See* BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 1998 (1999).

[90] *See id.*

[91] *See id.*

[92] Many directly attribute this vast increase in numbers of people incarcerated to the advent of the Sentencing Guidelines and the various drug-related mandatory sentencing requirements. *See, e.g.*, Timothy Egan, *Less Crime, More Criminals: The U.S. Crime Rate Is Plunging, But Its Prison Population Is Exploding*, VIRGINIAN-PILOT & LEDGER STAR (NORFOLK VA.), March 9, 1999, at A4. ("In the federal system, nearly 60% of all people behind bars are doing time for drug violations . . . . "). Egan notes that the mandatory minimum sentences leave no room for judges to consider the circumstances behind the activity or to look at options other than incarceration. *See id.*

[93] The Reform Act was modified in 1986 and subsequently in 1988.

mandatory sentencing.[95] Section 5K1.1 allows a court to sentence a defendant to less than the statutorily mandated sentence required for a given crime if, in the government's evaluation, the defendant has offered the government assistance which is determined to warrant a departure from the statutes.[96] The amount of reduction available to the court as a result of the government's motion is significant.[97]

As a result of section 5K1.1, the fate of the defendant lies in large part at the mercy of the prosecution.[98] Clearly, a system arranged in this way creates an incentive for the defendant to want to be of substantial benefit to the government.[99] The danger of such an incentive is that a defendant may say whatever it takes to convince the government that he is a cooperative party deserving a lessened sentence.

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[94] 18 U.S.C. § 3553 (e) allows the government limited authority to impose a sentence below a statutory minimum when, in its opinion, the individual being sentenced has provided significant assistance to its work.

[95] Section 5K1.1 provides:

> 5K1.1. Substantial Assistance to Authorities (Policy Statement)
>
> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
>
> (a) The appropriate reduction shall be determined by the court for the reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance.

UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 5K1.1 (November 1, 1992) (West 1993) [hereinafter GUIDELINES].

[96] *See id.* at § 5K1.1 (a)(1).

[97] *See* Jeffries & Gleeson, *supra* note 11, at 1119. "There is no limit to the degree of departure; a defendant whose guideline range is 324 to 405 months may be sentenced to any lesser term or not incarcerated at all." *Id.*

[98] *See id.*

[99] *See, e.g., Singleton,* 144 F.3d at 1343 (stating the idea that an incentive is created).

As similar federal legislation on mandatory minimum sentences various crimes has been enacted, many legal scholars and defense attorneys have begun to question the effect these mandates will have on the criminal justice system.[100] Many argue that prosecutors have gained too much power from these provisions.[101] Prosecutors have enjoyed increased bargaining capabilities as options for length and number and severity of charges have fallen further out of the scope of judicial discretion.[102]

V. PROBLEMS RAISED BY THE PROSECUTORIAL RIGHT TO MAKE CONTINGENT PLEA AGREEMENTS

The ability of the prosecutor to select not only when, but also whether to bring charges at all is a tremendous power and influence over those subject to the criminal justice system.[103] This places the prosecutor in a position of great bargaining power.[104] In light of the mandated guidelines and the increase in legislatively required minimum sentences, prosecutors have the ability to buy the cooperation of one co-defendant and use it against another.[105] As seen in the *Singleton* case, the use of such influence while making a case against a defendant raises questions of fairness.

A. Prosecutor's Unlimited Discretion Offering Plea Agreements Leads to False Guilty Pleas/Provides Incentive to Plea Incorrectly

Recent statistics show that approximately 90% of criminal defendants plead guilty to their crimes.[106] Many of these defendants, as Douglas did in *Singleton*,

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[100] *See, e.g.*, David Boerner, *Sentencing Guidelines and Prosecutorial Discretion*, 78 JUDICATURE 196 (1995), quoting Albert Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 926 (1991), "[I]n reality, the guidelines are bargaining weapons-armaments that enable prosecutors, not the sentencing commission, to determine the sentence in most cases." *Id.*

[101] *See* Stephen J. Schulhofer, *supra* note 80, at 202. The author warns that "[m]andatories then become little more than a bargaining chip, a 'hammer' which the prosecutor can invoke at her option, to obtain more guilty pleas under more favorable terms." *See id.*

[102] *See id. See also* Boerner, *supra* note 100, at 197.

[103] *See* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471-72 (1993). ("[Prosecutors] possess substantial power to overwhelm criminal defendants in the plea bargaining process.").

[104] Linda Drazga Maxfield & John H. Kramer, UNITED STATES SENTENCING COMMISSION, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 16 (1998) [hereinafter SENTENCING COMMISSION]. Citing a survey done by the Federal Judicial Center, the report states that of the parties surveyed, 86% find that the sentencing guidelines give prosecutors too much discretion. *See id.*

[105] *See* Standen, *supra* note 103, at 1472. Standen states that the Sentencing Guidelines have "substantially eliminated the discretion of federal judges to determine final sentences" and as a result, has curtailed the ability of judges to "constrain prosecutors." *Id.*

[106] *See* J. Bond, PLEA BARGAINING AND GUILTY PLEAS § 1.02, at 2 (1975).

make deals to testify against their co-conspirators in exchange for leniency.[107] Courts have consistently supported such actions[108] as falling within the scope of prosecutorial discretion and have allowed decisions that relied on such deals to stand.[109] As a result, the use of this practice is widespread. In the last five years, the U.S. Attorney's Office for the Southern District of New York, using nearly exclusively accomplice witness testimony, solved more than 250 murders in New York City and convicted individuals for more than 300 violent crimes.[110]

While this process offers significant benefits, the dangers it poses are numerous and far-reaching. Knowing that an individual defendant can greatly reduce his sentence if he cooperates with the government by providing testimony, all parties involved in a crime will aim to make a deal with the federal prosecutor.[111] As a result of this desire to gain the favor of the prosecution, a "competition" occurs. Among defendants, all want to offer enough testimony to the prosecutor to satisfy the Sentencing Guideline provision 5K1.1's definition of substantial assistance and thereby receive a more lenient sentence.[112] The power of this incentive to please the prosecutor is dangerous. The prosecutor, solely holds "the key to the jailhouse door" in light of the effect that the federal Sentencing Guidelines have on judicial discretion.[113]

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[107] *See Singleton*, 165 F.3d at 1298.

[108] *See, e.g.*, United States v. Bavers, 787 F.2d 1022 (6th Cir. 1985) (defendants were not entitled to mistrial when co-defendant pled guilty and became a government witness during the course of the trial).

[109] *See infra* Part V, Section C, showing examples where courts have followed this rationale. *See also, e.g.*, Lyles v. United States, 249 F.2d 744-45 (5th Cir. 1957) (holding "it is not for the judge but for the jury to say whether testimony of witnesses is entitled to credence and should be believed"); United States v. Garcia Abrego, 141 F.3d 142, 151 (5th Cir. 1998) (holding that the government's use of inducements to obtain favorable testimony from a witness does not skew adversarial process so far that a defendant is deprived of due process), stating:

> [A conspiracy] conviction may be sustained solely on the basis of the testimony of a co-conspirator—even a co-conspirator who testifies on the basis of a plea bargain or promise of leniency—so long as that testimony is not incredible as a matter of law—that is, so long as it does not defy the laws of nature or relate to matters that the witness could not have observed.

Id. at 155-56.

[110] *See* Steven M. Cohen, *"Singleton" Turns Tables Too Far*, 21 NAT'L L.J. A27 (1998).

[111] *See NPR Morning Edition: Dispute Over "Bargained Testimony"* (NPR radio broadcast, Nov 17, 1998). Steven Zeidman, a professor of criminal law at New York University, said on the subject of multiple defendants in turn running to offer information to the prosecutor: "All the prosecutor has to do is either open the door or pick up the phone and their case is being made for them." *Id.*

[112] *See id.*

[113] Jeffries & Gleeson, *supra* note 77, at 1119.

Singleton offers a strong example of this phenomenon. In Douglas's agreement to testify against Singleton for the government, the prosecution offered to file a motion for a reduction of sentence below that of the statutorily mandated minimum.[114] The deal was prefaced on determining if, in the prosecution's sole discretion, Douglas's cooperation amounted to substantial assistance.[115] The danger of this type of agreement is that the government has unconstrained discretion in making its determination on both what is substantial assistance and whether the defendant has reached the required level of assistance.[116]

It is not difficult for one to understand the pressure felt by a co-defendant in these situations. A prosecutor, because of the Sentencing Guidelines and the numerous mandatory sentencing laws, has the ability to sit down with a defendant and "calculate" the mandated sentence for the criminal activity of which the party is accused.[117] Understanding that the bottom range of the estimate is the best that he can possibly hope for, a defendant's incentive to make a deal favorable to the prosecutor is incredibly persuasive.[118] In Douglas's situation in *Singleton*, it had been brought to his attention that the deal offered could greatly reduce his sentence,[119] with the deal depending on the "nature and extent"[120] of his cooperation. In light of the grim prospects accompanying a conviction, the temptation to tell the court what he thought the government wanted to hear must have been very strong.[121]

B. Inequity Arising From Leniency Deals: The Most Corrupt Benefit

Adding to the injustice that contingent leniency deals both create and promote perjurious testimony, *Singleton* offers an example of the individual with the most testimony to offer the prosecutor having the best chance of making a deal. In situations where multiple parties are being brought up on charges for criminal activity, the individuals most entrenched in criminal activity[122] have, as a result of

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[114] *See Singleton*, 144 F.3d at 1343-44. This motion was filed under USSG § 5K1.1 or 18 U.S.C. § 3553(e). *See* USSG § 5K1.1, *supra* note 95.

[115] *See Singleton*, 144 F.3d at 1343-44.

[116] *See* Jeffries & Gleeson, *supra* note 77, at 1119.

[117] *See id.* at 1121.

[118] *See id.*

[119] *See Singleton*, 165 F.3d at 1297.

[120] *Id.*

[121] *See Singleton*, 144 F.3d at 1350 ("[T]he obvious purpose of the government's promised actions was to reduce [Douglas's] jail time, and it is difficult to imagine anything more valuable than personal physical freedom.").

[122] An example of a party entrenched in criminal activity, in comparison to a party with lesser connection, is seen in the differences between a crime boss and a drug delivery boy. The leader of the operation, by definition of his position, will be equipped with more information about the parties involved in illegal activity, the extent of the criminal activity at issue, and the resources used. As a result of this knowledge (information that the government might not otherwise be able to acquire), the crime boss has a bargaining chip in the event that he is charged with criminal activity. In contrast the delivery boy, basically

their ability to make a deal, an escape hatch.[123] Individuals who are less ingrained in the criminal process, thereby having less to "exchange" for an offer of leniency, are left with little or no opportunity to better their situation through offering assistance to the government.[124]

A party heavily active in criminal activity will have, as a result of this closer association, more information about who was involved in the activity, for how long, and to what extent.[125] In the case of Sonya Singleton, the deal made by the prosecution with Douglas, a convicted drug dealer known to be physically dangerous,[126] led to a jury conviction.[127]

Singleton raises the question of whether it is wise to allow prosecutors, in light of their positions of immense power, to acquire testimony by using offers of leniency as an exchange.[128] A recent study issued by the U.S. Sentencing Commission has shown great inequity in sentencing when comparing the crime committed to the sentence served. The report found that nearly 40% of the drug trafficking conspiracies studied had more culpable defendants receiving sentences shorter or equal to at least one less culpable defendant.[129] Evidence of this nature suggests that many defendants are willing to provide "substantial assistance" for an

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removed from the operations of the organization, will have less to offer to the government when bargains are made. As a result the crime boss, by being more involved in criminal activity, may be able to get a lighter sentence than the party far less criminally culpable.

[123] Imagery of defendant's "escape hatch" is taken from Schulhofer, *supra* note 80 at 212.

[124] *See, e.g.*, Howard Troxler, *Prosecutor Deals With Crooks Are Dealt Blow*, ST. PETERSBURG TIMES, Aug. 10, 1998, at 1B. (Barry Cohen, a Tampa defense lawyer, comments on the irony of system allowing a person with less "crime on his resume" to be unable to get a break).

[125] *See* John Cloud, *A Get-Tough Policy That Failed*, TIME, Feb. 1, 1999, at 48 (raising questions about the problems of mandatory sentencing). The article showed the problems resulting from such rules and gave evidence of how these laws are being worked around. In Michigan, a 1978 law (the "650 Lifer Law") mandated a life without parole term for possession with intent to deliver at least 650 grams of cocaine or heroin. *See id.* at 50. Of those parties sentenced under the law, 86% had never previously done time. *See id.* The article notes that small time players in drug trafficking do not possess enough information about the operation to plea bargain for sentence reductions. *See id.* at 49.

[126] *See* Appellant's Br. at 6, *Singleton*, 165 F.3d at 1297 (stating that Douglas, upon cross-examination, testified that he had been convicted of shooting an individual over a dispute over a car worth $1000).

[127] *See* United States v. Singleton, No. 96-10054-05 (Kan. D.C. Jan. 27, 1998).

[128] *See Singleton*, 143 F.3d at 1347. ("Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizens;" "The public policy against payments to fact witnesses is expressed in the majority of states both in the law of contracts and in ethical rules . . . .").

[129] *See* Maxfield & Kramer, *supra note* 104, at 16 . In a study of 21 drug trafficking conspiracies containing parties of varying levels of involvement, eight of the conspiracies had a more culpable defendant receiving a shorter sentence than a less culpable defendant. *See id.* In six of the eight instances, this was because the more culpable defendant received §5K1.1 departures. *See id.*

exchange of a lesser sentence.[130] In light of the incentive to provide "substantial" assistance and the contingent nature of the assistance leading to a desire to assure the usefulness of the assistance offered, the process threatens the constitutional rights of the defendant subjected to the testimony.

C. *Due Process Is Violated by Contingency Plea Agreements for Testimony*

In *Singleton*, Douglas's testimony, in light of the agreement reached and the motivation behind it, arguably violated Sonya Singleton's Fifth Amendment right to a fair trial.[131] The agreement reached between Douglas and the federal prosecutors did not clearly describe what it required of Douglas.[132] This is not surprising, as the very nature of informal plea agreements and immunity pleas generally describe little about the specifics of the deal reached.[133] From the language selected in drafting this agreement, both the panel and en banc *Singleton* decisions suggested that the prosecution retained at least considerable control over what benefits would be conferred on Douglas.[134] It is not a stretch of the imagination to assume that wishing to minimize his sentence, the consideration for his testimony would be in the front of Douglas's mind. In this way Douglas had a

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[130] *See, e.g.*, Saunders, *supra* note 43 (stating that the decision in *Singleton* shows that the court thought the "reduced-sentences-for-testimony process was being sorely abused." *Id.*).

[131] The Fifth Amendment of the United States Constitution states, "No person shall . . . be deprived of life, liberty, or property, without due process of law."
It is questionable whether a process allowing a conviction based on testimony of a co-defendant co-defendant motivated by self-interest is in fact due process.

[132] *See Singleton*, 144 F.3d at 1343-44:

> [Douglas] stated that the government, through an assistant United States Attorney, had promised to file a motion for a downward departure if he testified truthfully. (Citation omitted). His testimony of the government's promise in this regard is somewhat confused, however, and in Mr. Douglas's written plea agreement *the government made no firm promise to file a motion for a downward adjustment* (emphasis added). The agreement merely stated the government would file a motion under USSG § 5K1.1 or 18 U.S.C. § 3553(e) if, in its sole discretion, Mr. Douglas's cooperation amounted to substantial assistance.

Id.
See also Singleton, 165 F.3d at 1297 (ruling that the government promised to inform state parole board of the "nature and extent" of Douglas's cooperation).

[133] Unlike a formal immunity grant where a prosecutor will apply to the court to grant a defendant immunity, an informal immunity agreement such as that reached in *Singleton* often leads to disagreements between what the parties agreed to or whether the terms of the agreement were reached. *See* Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 9 (1992) (stating that disagreements occur between a defendant and the prosecution as to whether defendant has fulfilled his obligations and whether he is susceptible to prosecution).

[134] See supra note 125.

great incentive to "produce" evidence for the prosecution.[135] A trial that is arranged in a manner allowing the government to entice false testimony from a defendant and aims to rely on a jury to sift through the lies to obtain the truth cannot be within the confines of constitutionally required due process.

Previous cases have addressed this issue. In *United States v. Waterman*, John Waterman appealed a conviction on five counts of mail fraud related to an arson for profit scheme.[136] In the district court case, Eugene Gambst, the orchestrator of the arson scheme, was indicted on eighteen related counts.[137] The government offered to drop fifteen counts against Gambst if he agreed to plead guilty to the remaining three charges and to testify before the grand jury about his knowledge of the operation.[138] Gambst testified at Waterman's trial, stating that Waterman had played an active role in the criminal activity.[139] After being convicted, in large part because of Gambst's testimony, Waterman appealed the decision on constitutional grounds and, as in *Singleton*,[140] under a violation of 18 U.S.C. § 201.

The *Waterman* court held that the damage to due process caused by vaguely worded contingency agreements was unacceptable.[141] Although a letter from the government to the cooperator's counsel stated that the defendant was only required to testify truthfully to honor the proposed deal,[142] the panel decision held that the influence of the proposed benefits was so great as to promote perjurious testimony.[143] In *Waterman*, as in *Singleton*, evidence of the deal attained only vaguely hinted at the contingent nature of the agreement.[144]

In *Waterman*, the court reasoned that where the cooperator's benefits where dependent on the outcome of future indictments, the temptation to assure success by way of more powerful testimony was too great.[145] This same reasoning is what led to the Tenth Circuit's panel decision in *Singleton*.[146] Both courts saw a danger that the jury might have assumed that the government was committed to helping the informer in the same manner regardless of the fruitfulness of his cooperation.[147]

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[135] See *infra* Part V, for a discussion of the pressures placed on a defendant to make a deal with the prosecutor.

[136] *See* United States v. Waterman, 732 F.2d 1527, 1528 (8th Cir. 1984).

[137] *See* United States v. Waterman, 704 F.2d 1014, 1016 (8th Cir. 1983).

[138] *See id.*

[139] *See id.*

[140] *See id.*

[141] See *id.*

[142] *See Waterman*, 732 F.2d at 1529, n.2 (1984).

[143] *See id.* at 1530.

[144] *See id.* The court summarized the vague agreement between the parties as one that guaranteed Gambst a recommendation of a sentencing reduction of two years if his testimony led to further indictments, and that some other form of arrangement would be made if the agreement did not lead to further indictments. *See id.*

[145] *See Waterman*, 732 F.2d at 1531.

[146] *See Singleton*, 144 F.3d at 1343.

[147] *See id. See also Waterman*, 732 F.2d at 1532 (stating that the government's disclosure of its dealings with Gambst's attorney was insufficient to clearly notify the jury of the nature of the deal reached).

Informal plea agreements contingent on testimony are sufficiently unclear in the terms of the agreement to provide the jury with a full understanding of the effect that the agreement may have on the truthfulness of the testimony.[148]

The *Waterman* court made an effort to distinguish this form of agreement from an immunity deal where the substantive quality of the assistance had no effect on the nature of the deal.[149] The court stated that in an immunity deal, the agreement is made and binding upon the government before the party testifies; it is not contingent upon the government's satisfaction with the content of the testimony.[150] In the case of a contingency agreement, full disclosure of the government's encouragement and reward of bias is not enough.[151] While a defendant and the jury are made aware of the deal struck, this disclosure is insufficient to overcome the inherent due process problems in the contingency agreement itself.[152]

Other courts have supported this approach, finding deals for leniency made contingent on the testimony of defendants to be inappropriate. In *United States v. Meinster* the court, on the subject of paid witnesses in criminal cases, stated: "We think it obvious that promises of immunity or leniency premised on cooperation in a particular case may provide a strong inducement to testify falsely in that case."[153]

In *United States v. Cervantes-Pacheco*, a similar form of agreement was found to produce testimony that was "inherently untrustworthy."[154] The court reasoned that to allow testimony for which payment is dependent on the information proffered was impermissible.[155] In such an agreement, "the entrepreneurial informant [is given] a splendid opportunity to 'write his own ticket.'"[156] The court found this to be unacceptable because:

> One of the basics of our jurisprudence is the search for truth, and this is meant not to be purchased truth, the bartered-for truth, but the unvarnished truth that comes from the lips of a man who is known for his integrity . . . . The government in its prosecutorial efforts should be like Caesar's wife, above and beyond reproach . . . . It may be that we must live with informers. It may be that we must live with bargained-for pleas of guilty. But we do not have to give a receipt stamped "paid in full for your damaging testimony" or "you will be paid according to how well you can convince the jury even though it be in the face of lies."[157]

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[148] *See Waterman*, 732 F.2d at 1532.

[149] *See id.*

[150] *See id.*

[151] *See id.*

[152] *See id.* Eventually, however, the case was reheard en banc and a split court vacated the panel decision. *See id.* at 1533.

[153] United States v. Meinster, 619 F.2d 1041, 1045 (4th Cir. 1980).

[154] *See* United States v. Cervantes-Pacheco, 800 F.2d 452, 258 (5th Cir. 1986).

[155] *See id.* at 458.

[156] *Id.* at 460.

[157] *Id.* at 460-461, quoted by Samuel A. Perroni & Mona J. McMutt, *Criminal Contingency Fee Arrangements: How Fair Are They?*, 16 U. ARK. LITTLE ROCK L.J. 211, 219 (1994).

This view makes sense, and today with the advent of severe sentencing guidelines and stiff mandatory sentencing, the need for such caution is even greater than it was at the time of trial for *Cervantes-Pacheco*. When a defendant is faced with extended incarceration at the hands of the present system, allowing the prosecution to entice a defendant with a way out contingent on the usefulness of his or her testimony simply creates too much of an incentive to offer false testimony. For the legal system to create such strong incentives for defendants to lie offends its goal of seeking justice.[158]

The government offered a motion for a reduction in sentence for a defendant under section 5K1.1(a)(1) in *United States v. Dailey*.[159] There, a federal grand jury indicted the defendant, Kevin Dailey, in a conspiracy to smuggle drugs.[160] His conviction resulted from the government's deal with a co-conspirator which offered to the witness, in exchange for full cooperation, a sentence of less than twenty years.[161] Additionally, the government offered to recommend a sentence of ten years if the value of the provided testimony was, based on the government's discretion, high enough to warrant such a decrease.[162] The district court held that this activity violated due process, as the offer of assistance made by the government was "contingent on the success of the government's prosecutorial effort."[163]

The district court's reasoning did not persuade the First Circuit. The court concluded that the government's agreements did not create a risk of perjurious behavior severe enough to violate the defendant's due process rights.[164] In reaching this decision, the court relied on the ambiguous nature of the agreement.[165] It reasoned that there was a sufficiently vague correlation between the benefit to the witness and the testimonial value to the government such that the contingency agreement would not promote perjury.[166]

This argument fails to consider the true effect of an incentive offered by the government to a defendant. To argue that a promise of assistance does not create an incentive to supply the government with information is to miss the fact that it is the benefit sought that motivates a government witness.[167] If the defendant is

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[158] *See, e.g.*, AMERICAN BAR ASSOCIATION, 1 STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980).

[159] 759 F.2d 192 (1st Cir. 1985).

[160] *See id.* at 193.

[161] *See id.* at 194.

[162] *See id.*

[163] United States v. Dailey, 589 F.Supp. 561, 564 (D.Mass. 1984).

[164] *See Dailey*, 759 F.2d at 200. (holding that the jury instruction was correct and adequate to ensure a fair outcome).

[165] *See id* at. 196. The court distinguished *Dailey* from *Waterman*. Unlike *Waterman* where the plea agreement rested on whether the testimony led to further convictions, *Dailey's* sentencing recommendation rested upon something "rather indefinite, i.e., the 'value' or 'benefit' of the accomplice's cooperation to the government." *Id.*

[166] *See id.* at 197.

[167] *See Singleton*, 144 F.3d at 1350. The court states that in viewing the deal between the

testifying in consideration for the agreement, it does not follow that the agreement will motivate the party to provide powerful testimony.[168]

Sadly, other courts have relied on the *Dailey* rationale. In *United States v. Fallon*, the government also made a contingent plea agreement with a co-defendant.[169] In *Fallon*, the government stated that it would suspend three charges against the defendant, and if he cooperated satisfactorily, it would recommend reduced charges and no incarceration as part of his sentencing.[170] The Seventh Circuit supported this action by reasoning that Fallon's due process rights were protected because the jury was informed of the deal, the defense team had an ability to cross examine, and the judge gave a proper jury instruction.[171] Such assumptions about these and other supposed procedural safeguards do not withstand scrutiny.

VI. FLAWS IN THE ARGUMENTS USED TO SUPPORT INFORMAL CONTINGENT AGREEMENTS

The numerous rationalizations offered to defend the practice of contingent plea agreements do not justify this risky practice. Proponents of contingent plea agreements claim that the procedural safeguards that a trial provides maintain the integrity of the criminal process and protect it from the dangers of perjurious testimony.[172] Advocates contend that any proffered testimony gained through agreements is both subject to cross-examination at trial and thoroughly scrutinized by a properly instructed jury.[173] Further, the prosecution is required to disclose to the defense all promises that have been made to the witness to ensure that the jury is fully aware of dealings that have occurred.[174] Finally, as a deterrent to the unethical use of contingent plea agreements for testimony, a prosecutor who has

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government and Douglas, Douglas clearly valued the vague agreements. *See id.* Further, the court was comfortable in determining that Douglas subjectively valued the promises from the government and that these promises were what he bargained for in return for his testimony and guilty plea. *See id.*

[168] *See id.* Further, the *Singleton* court was comfortable in determining that Douglas subjectively valued the promises from the government and that these promises were what he bargained for in return for his testimony and guilty plea. *See id.*

[169] *See* 776 F.2d 727, 729 (7th Cir. 1985).

[170] *See id.*

[171] *See id.* at 734.

[172] *See, e.g.*, Hoffa v. United States, 385 U.S. 293, 311 (1966) ("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 will be determined by a properly instructed jury.").

[173] *See id. See also Fallon*, 776 F.2d at 733 ("In our legal system, the danger of perjured or unreliable testimony from immunized accomplices is minimized not by excluding that testimony but through the use of procedural safeguards.").

[174] *See* Graham Hughs, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 23 (1992).

knowingly procured false testimony is subject to prosecution for subordination of perjury.[175]

The safeguards championed to protect against the potential dangers of contingency agreements for testimony do not satisfactorily ensure procedural fairness. A jury is not necessarily able to understand the subtle effects that such a deal has had on the testimony of the witness[176] and whether a thorough cross-examination brings to light the dangers of this process is questionable.[177] Additionally, threats of prosecution for subordination of perjury offer little deterrence to a prosecutor.[178] The vagueness inherent in contingency deals makes it unlikely that much evidence will exist to be brought forward.[179] As a result, the likelihood of conviction is minimal and the number of prosecutors actually brought to face charges are incredibly small.[180]

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[175] *See* 18 U.S.C. § 1621 (1999).

[176] *See Waterman*, 732 F.2d at 1532 (holding that disclosure of letters between defendant's lawyer and the government concerning the proposed deal were insufficient to overcome "the due process problems inherent in the contingency agreement itself"); *see also* Frank Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L.REV. 49, 51 (1997) (stating that jurors often are incapable of comprehending a judge's instructions).

[177] See Strier, *supra* note 176, at 51.

[178] *See generally* Douglas J. McNamara, *Buckley, Imbler and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to Its Absolute Means*, 56 ALB. L. REV. 1135 (1996) (discussing the weaknesses of checks on prosecutorial discretion and the resulting minimal penalties.) McNamara states:

> [Convicted Prosecutor] willfully deprived an individual of his constitutional rights [by] subordinating perjury; fabricat[ing] evidence and materials and introduc[ing] at state proceedings knowingly false, misleading and perjured testimony'. . . . All this got him a $500 fine.

Id. at 1187 (citing United States v. Brophy, No. CR-79-65 (W.D.N.Y. 1979)).

Additionally, courts have found prosecutors to be immune from civil liability for subordination of perjury under 42 U.S.C.A. § 1983 (granting immunity from civil actions for deprivation of rights to a judicial officer acting in the officer's official capacity). *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (holding that a prosecutor is absolutely immune from suit for malicious prosecution, even when such immunity leaves the genuinely wronged defendant without civil redress).

[179] *See Singleton*, 144 F.3d at 1344. In describing his agreement with the government, Douglas was described by the court as "somewhat confused." If the defendant who has bargained for and accepted the deal is unsure of its specifics, it is likely that the jury will be equally confused by his descriptions of it. *See also* Lisa C. Harris, *Perjury Defeats Justice*, 42 WAYNE L. REV. 1755, 1774 (1996) Harris claims that perjury is difficult to prove because it is "a crime that where there is often no physical evidence and the prosecutor must not only prove that the statement was false, but that the witness believed that the statement was false." *Id.* If this is accomplished, the prosecutor must then "prove that the false statement was material to the case." *Id.*

[180] *See* Harris, *supra* note 179. *See generally* Walter W. Steele, *Unethical Prosecutors and Inadequate Discipline*, 38 SW L.J. 965 (1984).

Finally, while the jury system does exist to determine the validity and truthfulness of the testimony offered, it is not the purpose of the jury to "weed out the seeds of untruth planted by the government."[181] In cases such as *Singleton*, contingent offers of leniency create temptations that place a great burden on the jury to assess the reliability of co-defendant testimony.[182] In light of this, the jury's purpose in hearing testimony obtained in this way changes the jury's duty from weighing the general believability of testimony offered to determining the extent to which the government's plea agreements have distorted witness testimony and the trial proceedings.[183]

In addition, defenders of contingent plea agreements requiring testimony insist that prosecutors need these bargaining tools, including offers of immunity from prosecution or reduced charges, to persuade witnesses to testify.[184] Only with the help of these incentives, argue supporters, is the prosecutor able to convince the co-defendant to testify. Without these incentives, parties with information would otherwise have little reason to cooperate and multiple reasons to remain silent.[185] Proponents contend that allowing prosecutors to make such deals facilitate convictions in crimes for which it is difficult to gather evidence.[186] If the ability to convict drug conspirators in cases factually similar to *Singleton* depended on evidence that the government could obtain by other means, conviction rates would drop immensely.[187]

This argument does not withstand constitutional scrutiny. It is constitutionally impermissible to allow a prosecutor to create an incentive for a witness to testify[188]

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[181] *Waterman*, 732 F.2d at 1532.

[182] *See id.* On the topic of the dangers of contingent plea agreements for testimony, the *Waterman* court stated that the case "involve[d] not the undisclosed possibility of bias, but the disclosed encouragement and reward of bias." *Id.* In *Waterman*, where the government made both the defendant and the jury aware of letters between the co-defendant Gambst's attorney and the government, the court found this disclosure insufficient to overcome the due process problems inherent in contingency agreements themselves. *See id.*

[183] *See id.* The *Waterman* court noted the injustice in this shift in the jury's purpose. While acknowledging that a witness may indeed lie while giving testimony, the court "saw no reason for the government to give [a defendant] further incentive to selectively remember past events in a manner favorable to the indictment or conviction of others." *Id.*

[184] *See, e.g., note, A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 HARV. L. REV. 887, 888-89 (1981).

[185] *See* Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 77-78. (1995). Author lists loyalty, fear of retaliation, and shame as reasons that will keep a party from testifying for the prosecution.

[186] *See* Jeffries & Gleeson, *supra* note 77, at 1123.

[187] *See, e.g.*, Edward Fitzpatrick, *Albany Judges Say That Offering Leniency in Exchange for Testimony Amounts to Bribery*, TIMES UNION (ALBANY), Dec. 6, 1998, at A5. Assistant U.S. Attorney William C. Pericak said that the number of drug prosecutions and convictions would plunge if the courts elsewhere upheld the *Singleton* decision. "You'd only catch guys who would sell to a cop," he said. "You'd catch two categories: The utterly stupid, and the utterly reckless." *Id.* at A5.

[188] *See Waterman*, 732 F.2d at 1532. While acknowledging that a witness indeed lied while

if this incentive violates the defendant's Fifth Amendment right to a fair trial.[189] To allow the government to gather and use evidence that is tainted by a co-defendant's self interest[190] violates the defendant's rights.[191] Clearly, the admission of such testimony endangers both the fairness and the reliability of the criminal process. In light of these risks, while the courts' need to have all of the evidence is clearly a pressing societal interest, it hardly justifies the government's practice.[192]

Finally, for even broader public policy reasons, the practice of contingent plea agreements as an incentive for testimony is irrational. Traditionally, the law has imposed a fundamental duty on all parties as citizens to testify.[193] Today, this duty is enforced by threats of prosecution for perjurious conduct.[194] In light of this, it is illogical and unnecessary to allow a prosecutor an offer of leniency in exchange for testimony as a bargaining tool. Coercing testimony from a co-defendant brings an

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giving testimony, the court "saw no reason for the government to give [a defendant] further incentive to selectively remember past events in a manner favorable to the indictment or conviction of others." *Id.*

[189] *See supra* note 131, citing the Fifth Amendment.

[190] *See, e.g., Meinster,* 619 F.2d at 1045. "Obviously, promises of immunity of leniency premised on cooperation in a particular case may provide a strong inducement to testify falsely." *See also Singleton,* 165 F.3d at 1310. "Leniency in exchange for testimony can create a powerful incentive to lie and derail the truth seeking purpose of the criminal justice system." *Id.*

[191] *See id.*

[192] See *Singleton,* 165 F.3d at 1309 (Kelly, C.J., dissenting). The dissent in *Singleton* cleanly summed up the dangers created by the procedure, stating that "[i]n the real world of trial and uncertain proof, a witness's demeanor and actual testimony are simply too important to hinge upon promises of leniency." See *id.*

[193] *See, e.g.,* Kastigar v. United States, 406 U.S. 441, 443 (1972). ("The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence.").

[194] *See* 18 USC § 401 (1976):

> Power of court:
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> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Charges for refusing to testify are brought under subsection (3). *See, e.g.,* United States v. Brady, 168 F.3d 574 (1st Cir. 1999) (charges of criminal contempt brought under 18 U.S.C. § 401(3) for failing to testify after having been granted immunity); United States v. Doe, 125 F.3d 1249 (9th Cir. 1997) (charges of criminal contempt brought under 18 U.S.C. § 401(3) for failing to testify after having been granted immunity).

incentive to provide false testimony,[195] and it therefore is potentially detrimental to the fairness of a defendant's trial.[196]

Disallowing contingent plea agreements for testimony would restrict only one of the many ways a prosecutor may gather evidence against the accused.[197] In the January 8, 1999 *Singleton* dissent, Chief Judge Kelly argued that favoring the agreements based on a fear that their absence would jeopardize law enforcement is merely to argue that the ends produced by the practice justify the means.[198] As a public policy issue, this is frightening. The power of a government lawyer does not arise from a right of the government, but rather from a power entrusted to the government.[199] If this power is abused by a prosecutor choosing to gain testimony through the purchase of testimony, Judge Kelly rightfully concluded that such action "inflicts damage beyond calculation to our system of justice."[200]

The fundamental problem with contingent plea agreements dealing with testimony is that it, unlike the numerous other options available to the government, promotes false evidence.[201] Those arguing that the practice is similar to other statutorily sanctioned practices offered to defendants[202] fail to see the differences in

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[195] *See supra* Part IV, discussing the incentives caused by contingent plea agreements for testimony.

[196] Logically, a system that creates incentives for defendants, such as defendant A, to testify against a co-defendant B by way of prosecution threats under 18 USC § 401(3) forces defendants to bear the true costs of their decisions to cooperate with the government. Alternatively, a procedure which bases A's incentive to testify against B on a benefit that A will receive is far more likely to promote an unfair and unreliable outcome. In the second example, the cost of complying places a great incentive on A to testify, even if the testimony offered is false. The first system is inherently more likely to be fair and reliable as it does not intertwine A's duty to testify with the government's case against B. *See Singleton,* 165 F.3d at 1309 *(dissent,* citing Yvette A Beeman, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L.REV. 800, 802 (1987) ("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. Further, an accomplice may wish to please the prosecutor to ensure lenient prosecution in his own case.").

[197] *See Singleton,* 165 F.3d at 1312.

[198] *See id.*

[199] *See id.*

[200] *Id.*

[201] *See id.* at 1658. (Henry, C. J., dissenting) (quoting Washington v. Texas, 388 U.S. 14, 22-23 (1967)):

> Common sense would suggest that [an accused accomplice] often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution is indeed to clothe the criminal class with more nobility that one might expect to find in the public at large.

See id.

[202] Proponents of plea agreements including testimony often argue that the plea agreements fall in line with other statutorily granted powers such as witness relocation. These powers are different in that they are offers that enable a party to fulfill his mandated duty to testify.

the practices. Payment for testimony is not the same as assisting a party in testifying via offers of protection.[203] In such cases, such as situations where a party is placed within a federal witness relocation program, the deals offered are made to assist a party in fulfilling their civic duty.[204] This rationale is far different from a deal made to further encourage a party to act as required by law. In *Singleton*, Douglas had a civic duty to testify as to his knowledge of the conspiracy to sell drugs.[205] By enticing Douglas to testify with conditional offers of immunity, rather than threatening to exert its right to punish him for failing to do so,[206] the government lessened the believability of the evidence tendered.[207]

Another argument for the use of contingent agreements is that the general use of plea bargaining is the only way in which the courts have the resources to handle their heavy docket load.[208] They rightfully acknowledge that the modern court system cannot support the present caseloads without allowing for plea bargaining and prosecutorial agreements.[209] An example of the caseloads burdening our court systems can be seen in the number of cases in any major metropolitan area. The

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The agreements in the present situation, however, offer nothing to the party other than an incentive to provide false testimony.

[203] *See* Brief Amicus Curiae of National Association Of Criminal Defense Lawyers at 4, United States v Singleton, 165 F.3d 1297 (10th Cir. 1999)(No. 97-3178). In its amicus curie brief, the National Association of Criminal Defense Lawyers (hereinafter NACDL) contends that the Witness Relocation and Protection Act does not create a reward for a party because of testimony. *See id.* Rather, the NACDL maintains that the protection is motivated not because of testimony but rather because of fear of threats against the witness. *See id.*

[204] Witness relocation and duty.

[205] *See Kastigar*, 406 U.S. at 443-44 (finding that "[t]he Federal Government [has] the broad power to compel residents to testify in court or before grand juries or agencies." (citation omitted)).

[206] *See id.*

[207] *See* Brief Amicus Curiae of National Association of Criminal Defense Lawyers at 7, United States v Singleton, 165 F.3d 1297 (10th Cir. 1999) (No. 97-3178) (citing 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1430 (1962):

> In extreme cases, such a bargain amounts to a crime of subordination of perjury; but many bargains made with no criminal intent are illegal because of their tendency to affect injuriously the administration of justice. A bargain to pay compensation, to a witness who is in the jurisdiction and subject to subpoena, in addition to the fees to which he is entitled, is illegal . . . because such extra compensation is almost certain to affect the attitude of the witness and to color his testimony, consciously or unconsciously . . . .

Id.

[208] *See* David E. Rovella & Gail Daine Cox, *Fallout From "Singleton" Bribe Ruling*, NAT'L L. J., August 24, 1998, at 1A. The authors quote Martin H. Belesky, former prosecutor and dean of the University of Tulsa College of Law: "Without plea bargains, the courts would not have time in every case, and you'd have to multiply resources fifty fold to get the job done that's being done today." *Id.*.

[209] *See id.*

number of arraignments brought in the Manhattan Court system in the mid 1990's averaged 125,000 per year.[210] Of these, 12,000 to 14,000 have resulted in yearly indictments.[211] Statistics of national trends show that in 1992, a staggering 89% of all federal cases were disposed of by plea agreements.[212] Arguments are made for plea bargaining and the deals that accompany it by the fact that the present legal system simply cannot afford to try every case that is arraigned and that only by allowing defendants to plea bargain can the system be made to function.[213] While acknowledging that this is a massive workload, it is unthinkable to allow the rights of individuals to be reduced because it is cheaper to allow such behavior than it is to readjust the court system to deal with these problems. While changes are needed to the system, the rights of the people using the system should not be the resource drawn upon to make the system function.

Finally, proponents support the use of contingency plea agreements and informal bargaining practices by suggesting that, because a prosecutor is not focused on winning cases, but rather upon upholding justice, there is little motivation to abuse the power which the position carries.[214] This view is based on the idea that prosecutor's emphasis is on promoting justice rather than on gaining an acquittal as found among defense lawyers.[215] In light of the fundamental differences between the positions of prosecutor and defendant, supporters of the contingency agreements argue, a prosecutor can be trusted with such responsibility.[216]

Although prosecutors have discretion in deciding when to prosecute and under what statute to bring the charge,[217] the granting of leniency contingent on testimony goes too far. In light of a lack of procedure to ensure that the decisions made are correct, the conduct poses great risks.[218] A process which relies on little more than

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[210] *See* HAROLD J ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 144 (1996).

[211] *See Id.*

[212] Brief Amicus Curiae of National Association of Criminal Defense Lawyers at 6, United States v. Singleton, 165 F.3d 1297 (10th Cir. 1999) (No. 97-3178) (citing United States v. Mezzanatto 513 U.S. 196, 209 n.6 (1995).

[213] *See id. See also* Rothwax, *supra* note 210, at 146.

[214] *See* Graham Hughs, *Supra* note 133, at 11.

[215] *See id.*

[216] *See id.* Footnote 39 of Hugh's article directs the reader to United States v. Carter, 454 F.2d 426, 428 (8th Cir. 1972):

> There is more at stake than just the liberty of this defendant. At stake is the honor of the government[,] public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government.

Id..

[217] *See* LAFAVE, *supra* note 67, at 10. "The notion that the prosecuting attorney is vested with a broad range of discretion in deciding when to prosecute and when not to is firmly entrenched in American law." *Id.* at 10.

[218] *See id.* at 167. "Absent procedures which ensure that the 'right' decisions are being reached regarding who should receive leniency and when, society at large and also individuals dealt with by the criminal justice system are jeopardized." *Id.*

the prosecutor's honor operating as a self-regulating procedural check on the power to bring charges against a party is insufficient.[219] It is not hard to imagine a prosecutor acting out of self-promotion while making a deal to capture a more active participant in crime at the expense of the rightful conviction of a lesser but deserving criminal. Common sense indicates that such factors conceivably could play a part in such deal-making. As with any procedure, procedural safeguards should always be promoted. The "honor" relied upon does not provide adequate protection against prosecutors looking to increase the number of wins on their record. The strong likelihood of favorable evidence resulting from promises of leniency contingency on testimony[220] is too powerful to leave in the hands of individual prosecutors.

VII. CONCLUSION

As we have seen in cases, most recently in *Singleton*, the modern judicial system is embracing the expanded use of prosecutorial discretion in making deals with defendants for testimony under contingency agreements.[221] As with *Singleton*, courts appear more and more willing to place the duty of keeping false testimony out of the courtroom in the hands of the jury, as opposed to requiring government lawyers to function as an additional screen for potentially dangerously misleading practices.[222] Further, the legislative climate also appears to be headed down this dangerous path.[223] The enactment of additional mandatory sentencing acts only further strengthens the power of the prosecutorial office.[224] In light of the great effects that making offers of leniency contingent on testimony, changes need to be implemented to limit the use of this tactic.

Congress needs to pass legislation enacting limitations on prosecutorial discretion when making deals for testimony from co-defendants. Additionally, safeguards need to be institutionalized so as to create a uniform and regulated procedure for prosecutors.[225] The power to regulate what deals are made needs to

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[219] *See* Hughes, *supra* note 133, at 10-11.

[220] See *supra* Part V, discussing the incentives provided by contingency plea agreements for testimony.

[221] See *supra* Part V, Section C, discussing cases finding for granting broader discretion to prosecutors. *See also, e.g.*, various cases relying on the Jan. 8, 1999 *Singleton* decision; United States v. Hunt, No. 98-6232, 1999 WL 140415 (10th Cir.(Okla.) Mar. 17, 1999); United States v. Condon, No. 97-3378, 1999 WL 118719 (7th Cir. (Ill.) Mar. 9, 1999); United States v. Navarro, No. 97-41162, 1999 WL 118338 (5th Cir.(Tex.) Mar. 8, 1999).

[222] *See id.*

[223] *See* Rovella & Cox, *supra* note 208, at A1. Their article quotes a National Association of Criminal Defense Lawyers official: "Even if we get all the way to the Supreme Court and Scalia [cannot] manage to get four others, Congress will have certainly changed the statute." *Id.*.

[224] *See supra* Part IV, listing the Sentencing Reform Act and various mandatory sentencing statutes.

[225] While beyond the scope of this Note, various ideas have been presented about changes to the criminal system that would places limits on prosecutorial discretion in the realm of deal-

be placed back in the hands of the judiciary branch, setting standards as to what a prosecutor can and cannot offer to a defendant. To continue to allow unbridled discretion is to leave the legal system open to bribery.

Such a change would not mean the end of the criminal procedure as it exists today. While the original *Singleton* panel decision led prosecutors to "portray [the decision] as the death knell for the criminal justice system as we now know it . . .",[226] such doomsday fears appear as symptomatic of change. Comparing the outraged reaction to the proposed changes following the Supreme Court decision of *Miranda v. Arizona*, Chief Judge Kelly states that no one today would claim that our legal system was damaged by the Court's decision to effectuate changes designed to "promote a more reliable outcome in criminal proceedings."[227] Change in the procedure for obtaining testimony from co-defendants would surely achieve such an outcome.

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making. A better plan of operation will be one that does not make the assistance contingent on the "substantial" nature of the help offered. There are numerous other alternatives to contingency plea agreements for testimony.

In *Singleton,* 165 F.3d 1297 (10th Cir. 1999), Judge Kelly suggests that information can be gained from plea agreements that do not make assistance in sentencing contingent of testimony. *See id.* at 1310. He suggests a procedure where a defendant would plead guilty and subsequent talks would be recorded. In the event that the prosecution wants the party to testify, the party may be subpoenaed. *See id.* If, while on the stand, the party offers differing testimony, the government could impeach him with the record of the previous discussions. *See id.*

Additionally, the creation of standards that would clearly state what type of assistance could be offered to a potential government witness would help to harness prosecutorial behavior that will create too great an incentive to offer false testimony. *See* LaFave, supra note 67, at 171. Such options could set mandatory meetings between both parties to make sure that both sides of the litigation were informed as to the deals offered and help to provide adequate information on the witness's culpability. *See id.*

Likewise, procedural safeguards could be implemented to limit the free reign that presently exists in our system. Proponents of change have suggested that a hierarchy within the office of the prosecutor be created that allows for a system of review. *See id.* at 174. While such practice is commonplace to varying degrees in many prosecutors' offices, the practice needs to be standardized. *See* Maxfield & Kramer, *supra* note 104, at 20 ("Frequently cited reasons to explain empirical differences in substantial assistant rates include differential policies of the U.S. Attorney offices. Each U.S. Attorney office is permitted to establish its own internal §5K1.1 processes . . . ."). In light of the great variance in the policies, and the variance of which each individual office follows its own internal processes, there appears to be little systematic procedure in place to guide decisions on deals for substantial assistance. *See id.*

[226] *Singleton*, 165 F.3d at 1497 (Kelly, J., dissenting).

[227] *Id.*