PROGRAM MATERIALS
Program #3123
January 21, 2021

The Roadblock to a Fair Trial

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January 21, 2021

2:00 p.m. ET

The Roadblock to a Fair Trial

Presented by:

Jay Goldberg - Law Offices of Jay Goldberg, P.C.

Alex Huot - Law offices of Alex Huot

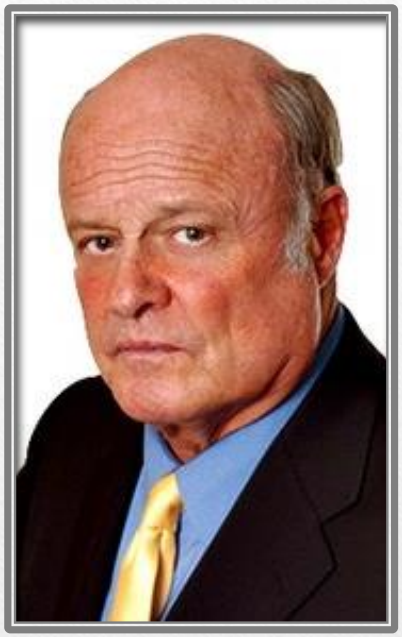
Goldberg began his career as an assistant district attorney in New York County right out of Harvard Law School working for district attorney Frank S. Hogan.

Jay Goldberg is a graduate of the Harvard Law School and was elected to Phi Beta Kappa, receiving his degree magna cum laude.

He was acting United States Attorney for the Northern District of Indiana, Special Attorney and Counselor to the United States Department of Justice, Washington D.C., an Assistant District Attorney, New York County and Special Assistant to James B. Donovan, an American hero, who effected the transfer of Russian spy Rudolph Abel for Francis Gary Powers (Bridge of Spies, with Tom Hanks).

He has been a past lecturer on trial advocacy at the Harvard Law School.

He is the author of four books: **Preparation and Trial of Criminal Cases within the Second Circuit** , (2009) (Amazon.com, 5 stars); Preparation and Trial of A Federal Criminal Case , (2010); Techniques in the Defense of a Federal Criminal Case , (2012); and, **The Courtroom is My Theater , (2018).**



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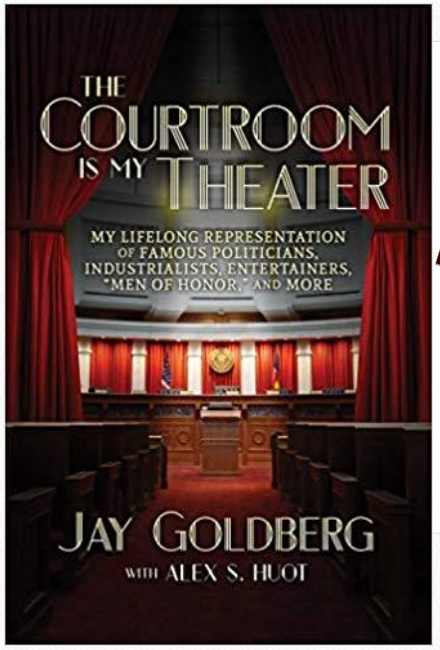
Books by Jay Goldberg

In The Courtroom Is My Theater, Jay Goldberg shows why he is one of the preeminent trial attorneys in America, as he shares stories of his high-profile courtroom drama as well as his adventures outside of the courtroom with some of the country's most prominent politicians, businessmen, entertainers, and "men of honor."



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- **One man's journey through the practice of law with some of the world's most powerful and colorful characters, including Donald Trump, Robert F. Kennedy, Willie Nelson, Miles Davis and Armand Hammer.**
- **Former President of the Criminal Bar Association Richard Levitt called Goldberg "one of the foremost litigators of this or any generation."**
- **Former Chief of the Criminal Division of the United States Attorney's Office S.D.N.Y. Frederick Hafetz said: "I consider you to have the best killer trial skills I have ever seen in my 47 years of practice, and I have worked with the best, courtroom presence, capturing the jury's attention through devastating cross and summations that have jurors on the edge of their seats."**
- **New York Supreme Court Justice Arthur Lonschein said: "[Jay Goldberg] holds the distinction of being one of the most skilled, if not the most skilled trial lawyer in the United States."**

Alex Huot practices criminal law in the Southern District of New York and Eastern District of New York, as well as in the New York State courts. He began his career working with Jay Goldberg and is a co-author of ***The Courtroom is My Theater.*** In September 2019, Alex represented one of the defendants that Daniel Hernandez aka Tekashi 6ix9ine testified against. He cross-examined Tekashi 6ix9ine and is likely the first attorney to have a witness define the word "trolling" on the record.

The Courtroom is My Theater - https://www.amazon.com/Courtroom-Theater-Representation-Industrialists-Entertainers/dp/1642930717

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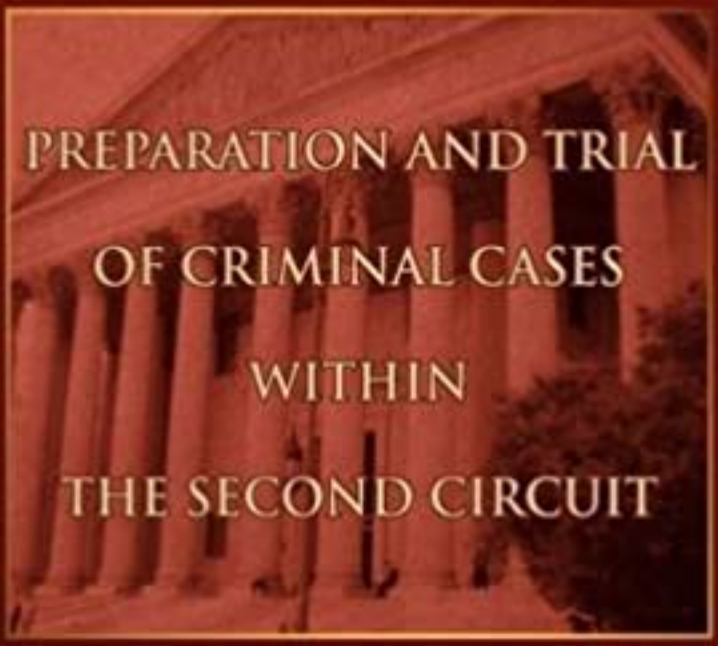

JAY GOLDBERG

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10. Informant Testimony and the Witness Cooperation Agreement

The Role of the Informant

It is important for the practitioner to seek remedies for what we describe below. In 1935, Victor McLaughlin gave

an award-winning performance in the now classic film "The Informant." Initially, the term "informant" had a pejorative connotation. However, over time, prosecutors embraced the term as a positive one. One may suspect that, from a prosecutorial standpoint, the term is well chosen and believed to embody a positive force.

In making *ex parte* applications to a court for search and arrest warrants and for authorization to conduct electronic surveillance, prosecutors refer to such witnesses as "confidential informants." In court, the government refers to such witnesses simply as "informants." Often, in the court's final jury instruction, such a witness is referred to as a government informer.

The Pattern Jury Instructions issued by the Federal Judicial Center advise against use of the term "informant" stating that it is "considered preferable to avoid it." The Center recommended that an "informant" simply be referred to as a government witness. Federal Judicial Center, *Proposed Instruction Number 25*. The dictionary defines the verb "to inform" as to tell, to familiarize, to brief, and to disclose. This, no doubt, accounts for the government's use of the term.

Lawyers, judges, and scholars possess substantial evidence regarding the unreliability of government informant testimony that should be imparted to the jury to assist it in assessing the credibility of such witnesses. Reliable data from a number of well-regarded sources reveals that, historically, informants will often say or do almost anything to avoid "doing time" for the

crimes they have committed. *United States v. Bernal-Obeso*, 989 F.2d 331 (9th Cir. 1993).

Studies regarding the reliability of informants are well within the purview of experts. Accordingly, an expert should be allowed to give his opinion, on the reliability of informants. However, this is not permitted. *Our premise is that what lawyers and judges know to be so, jurors should also know.*

Although cases have recognized there are serious problems associated with informant testimony, it appears, based upon an examination of Pattern Jury Instructions in all judicial districts, little is done to incorporate into jury instructions the extent of the dangers associated with such testimony. In *United States v. Bernal-Obeso*, the court cautioned that some "informants will stop at nothing to maneuver themselves into a position where they have something to sell." On the other hand, informants with nothing to sell sometimes embark on a methodical mission to manufacture evidence and to fabricate something of value. The *Bernal-Obeso* court warned that, "[f]requently . . . because they are aware of the low value of their credibility, criminals will even go so far as to create corroboration for their lies by recruiting others into the plot."

In *Commonwealth of Northern Mariana Islands v. Bowie*, 243 F.3d 1124 (9th Cir. 2001), the court stated that false testimony "corrupts the criminal justice system and makes a mockery out of the constitutional goals and objectives misleading jurors who have no prior experience with such criminals." It further

stated that: "by definition criminal informants are cut from unworthy cloth, and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent from manufacturing evidence against those under suspicion of crime and from lying under oath in the courtroom."

There has been prosecutorial support for this view, as witnessed by the efforts of Steven S. Trott, now a judge on the United States Court of Appeals for the Ninth Circuit. Following his earlier service as a United States Attorney for the District of California, he advanced to Chief of the Criminal Division in the Department of Justice, and the United States representative to Interpol. While at the Department of Justice, he authored a manual, which was circulated to United States Attorneys across the country, entitled *Prosecution of Public Corruption Cases* (1988) where he warned about the use of informants.

The studies of Professor Radelet in his article *Miscarriages of Justice in Potentially Capital Cases,* and in his book, *In Spite of Innocence: Erroneous Convictions in Capital Cases* highlight dangers inherent in using "informants." Radlet reported that "by far the most frequent cause of erroneous convictions" is "witness error and perjury in particular." The authors of *Actual Innocence* report that 21% of erroneous convictions are based at least in part on false or misleading testimony by jailhouse "informers." Barry Sheck et al., *Actual Innocence* (Signet 2000).

The Need for Proper Jury Instructions with Respect to Informant Testimony

Given these observations, it is essential that jurors be educated as to the risks of accepting informant testimony. It is one thing, as previously noted, for regular players in the criminal justice system not to know "a fact," but there is little justification for keeping known facts from the final arbiters whose function it is to mete out justice. It is simply unacceptable that "we all know, except the jury."

The Supreme Court recognized in *On Lee v. United States,* 343 U.S. 757 (1952) that the use of informers "may raise serious questions of credibility." To the extent it does, a defendant is entitled to have the issues submitted to the jury with careful instructions. However, the Court never elaborated on what is to be included in such "careful instructions." See *Hoffa v. United States*, 385 U.S. 293, 311-312 (1966).

In the Circuit, district court judges, following the recommendation of Judge Sand, refer in their final jury instructions to the witnesses as "government informants" despite the previously noted recommendation against this by the Federal Judicial Center. The jury is instructed that it is not improper for the government to use "informants." The jury is also told that an informant's testimony must be examined with greater scrutiny than is the testimony of other witnesses, and they are to determine if benefits or promises from the government have motivated the "informant"

to testify falsely based upon the belief that he will only receive benefits if he produces evidence of criminal conduct.

The Third Circuit has held that omitting such an instruction is not reversible error, absent a request to do so. *United States v. Hopkins*, 518 F.2d 152 (3d Cir. 1975). The Sixth Circuit "Pattern Jury Instruction" simply instructs the jury to exercise more caution with respect to informants than with respect to other witnesses. Sixth Circuit PJI 7.06A. The Seventh Circuit "Pattern Jury Instruction" requires only the instruction that the informant testimony is to be given such weight as the jurors feel it deserves, keeping in mind that it must be considered with caution and great care. Seventh Circuit PJI 3.13. The Eighth Circuit upheld a trial judge's refusal to include in his charge that the jury should consider the testimony of an informant with greater caution and care than that of the ordinary witness. *United States v. Ridinger*, 805 F.2d 818 (8th Cir. 1986). The Eleventh Circuit held that a court's instruction on the witness' plea bargain and grant of immunity, while sparse, was a sufficient replacement for the informer instruction. *United States v. Solomon*, 856 F.2d 1572 (11th Cir. 1988).

Such sparse instructions provide inadequate warning to a jury regarding the dangers posed by informant testimony. Although courts instruct the juries to exercise greater caution and care in assessing such testimony, they do not convey the specific dangers inherent in such testimony. The correct instruction should include the following:

> "At times, informants can be untrustworthy. They sometimes will stop at nothing to maneuver themselves into a position where they have something to sell. On the other hand, informants with nothing to sell sometimes manufacture evidence and fabricate something of value. They will even go so far as to create corroboration if they lie by recruiting others to go along with them in the plan to deceive."

The Witness Cooperation Agreement—Improper Bolstering of the Testimony of the Government Witness—Informant

We have touched on this before, but it bears emphasis since it comes up in virtually all cases. More than 30 years ago a number of so-called "racketeers" were scheduled for trial in the Southern District of New York. The lead government witness had a long and sordid criminal history, but he had not been prosecuted for these many crimes. The government allowed him to plead guilty to a limited number of crimes in return for his testimony. The government knew that the defense would capitalize on these benefits through cross-examination and considered ways to blunt the force of the cross-examination. What resulted were provisions in the cooperation agreement that, if disclosed at trial, would unfairly deliver prejudice to the defendant. However, reliance on these provisions also misleads the jury.

The first of the questioned provisions of the cooperation agreement requires the witness to be debriefed by an agency such as the FBI concerning his knowledge and participation in any criminal activity. The witness at the debriefing session must "give complete, truthful and accurate information." It is the government alone that determines whether the witness has given truthful and accurate information.

This provision was made a part of the cooperation agreement to wrongly convey the impression that when the government calls the witness to the stand, it has determined (through methods of verification not disclosed) that the witness has performed as agreed to in the debriefing session. This provision was inserted into the cooperation agreement for the prohibited purpose of allowing the government to vouch for the credibility of the witness. The undue harm to the defense is apparent.

What is most disturbing, as we have earlier noted, is the second questioned provision, commonly referred to by counsel as the "penalty provision." It provides, as we have noted, that if the witness gives false testimony he may be prosecuted for any and all crimes the government is aware of, which may be many more than those covered by the agreement.

At trial, the prosecutor invariably asks the witness whether he understands the penalty that would result from untruthful testimony. The witness responds that he understands the substantial penalty, lest there be complete, accurate, and truthful testimony. Anyone hearing this, or reading this provision in the

cooperation agreement, would be of the view that few witnesses would ever risk such harm. We have dealt with this problem earlier and counsel should make a vigorous argument against its use in court and in the jury room during deliberations.

However, the witness, government counsel, and defense counsel all know that this provision has never been enforced, but the jury does not know that this provision is more apparent than real. Few know that the real purpose of having this provision was to chill cross-examination.[12]

In 1978, Circuit Judge Henry Friendly concurring in *United States v. Arroyo Angulo,* 515 U.S. 1150 (1995) addressed the problems of the cooperation agreement, writing that it was unfair to give the jury the impression that the prosecutor has been able to "make sure" that the witness is telling the truth, and that the witness will be punished for untruthful testimony in the way provided for in the penalty provision of the agreement. A federal prosecutor carries a special aura of legitimacy about him. Testimony the prosecutor knows, or should know, is intentionally inaccurate or misleading, and nonetheless allows it to go uncorrected, acts in a way incompatible with rudimentary demands of justice.

District Judge Nickerson in *United States v. Kurzbam*, 703 F.Supp. 5 (E.D.N.Y. 1989), referred to the penalty provision in 1988.

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[12] Goldberg, *Government Witness Cooperation Agreements: A Defense Perspective*, N.Y.L.J. Nov. 5, 2003.

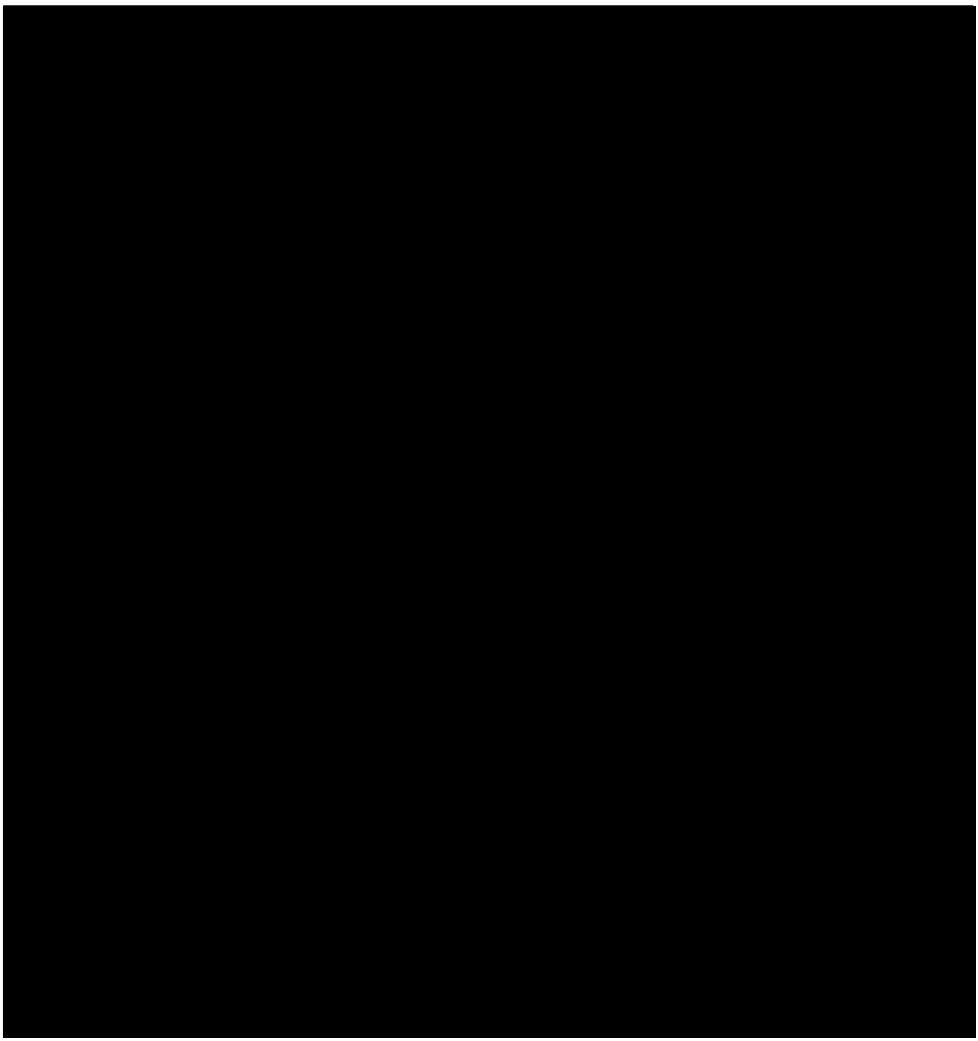
There, the government sought to read to the jury this provision of the cooperation agreement in order to demonstrate the Sword of Damocles that assured the witness' truth-telling. The court, at page 360 of the trial transcript, foreclosed the government from its typical approach, stating: "If you [the assistant U.S. attorney] emphasize this or have him [the witness] read it, I will tell you, you are going to get a charge. It is highly unlikely that the Government—and I take this from *United States v. Arroyo Angulo*—is going to declare an agreement null and void because someone gives testimony that's false and too favorable to the Government."

Given the purpose of these provisions and, in particular, the lack of enforcement of the so-called "penalty provision," the court should not permit reference to either provision by any witness, and the document should certainly not go into the jury room during deliberations. Were a court to disagree with this, the government should be required at a hearing pursuant to Fed.R.Evid. 104 to show whether any witness it had later determined to have given false testimony *was thereafter prosecuted for all crimes known to the government*. The government failing to do so—and it will fail even if the court has the prosecutor canvas all judicial districts in the United States—the court should then not permit testimony about these provisions or any reference to the agreement in the summation or permitted to go into the jury room during deliberations.

A jury should not be made to deliberate on the basis of inaccurate and misleading proof proffered by prosecutors who

are there, we are instructed, to serve truth and justice. *Berger v. United States*, 295 U.S. 77, 88 (1935).

There is no reason to keep from juries what judges know and lawyers know about the misuse of the witness cooperation agreement.



[redacted]

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

[redacted]

On the understandings specified below, the Office of the United States Attorney for the Southern District of New York ("this Office") will accept a guilty plea from defendant [redacted] to the four-count information referenced above (the "Information").

Count One charges the defendant with participating in the racketeering conspiracy known as [redacted] in violation of Title 18, United States Code, Section 1962(d). This charge carries a maximum term of twenty years' imprisonment; a maximum term of supervised release of three years; a maximum fine, pursuant to Title 18, United States Code, Section 3571, of the greatest of $250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense; and a mandatory $100 special assessment.

Count Two charges that from at least in or about [redacted] the defendant knowingly possessed a firearm, which was brandished and discharged, and aided and abetted the same, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, namely, the racketeering conspiracy charged in Count One, which possession, brandish, and discharge is in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), (ii), (iii) and 2. This charge carries a maximum term of imprisonment of life; a mandatory minimum term of imprisonment of ten years, which must run consecutively to any other term of imprisonment imposed; a maximum term of supervised release of five years; a maximum fine, pursuant to Title 18, United States Code, Section 3571, of the greatest of $250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense; and a mandatory $100 special assessment.

[redacted]

Count Three charges that on or about [redacted] the defendant participated in an assault with a dangerous weapon in aid of a racketeering conspiracy, and aided and abetted the same, in violation of Title 18, United States Code, Sections 1959(a)(3) and 2. This charge carries a maximum sentence of twenty years' imprisonment; a maximum term of supervised release of three years; a maximum fine, pursuant to Title 18, United States Code, Section 3571, of the greatest of $250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense; and a mandatory $100 special assessment.

Count Four charges that on or about [redacted] the defendant knowingly possessed a firearm, which was brandished, and aided and abetted the same, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, namely, the assault with a dangerous weapon charged in Count Three, which possession and brandish was in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), (ii) and 2. This charge carries a maximum term of imprisonment of life; a mandatory minimum term of imprisonment of seven years, which must run consecutively to any other term of imprisonment imposed; a maximum term of supervised release of five years; a maximum fine of the greatest of $250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense; and a mandatory $100 special assessment.

The total maximum sentence of incarceration on all counts is life, with a mandatory minimum term of 17 years' imprisonment.

It is further understood that at least two weeks prior to the date of sentencing the defendant shall file with the Internal Revenue Service, and provide copies to this Office, accurate amended tax returns, if necessary, for the years 2011 through 2018, and will pay, or will enter into an agreement to pay, past taxes due and owing by him to the Internal Revenue Service.

It is further understood that the defendant shall make restitution in an amount to be specified by the Court in accordance with 18 U.S.C. §§ 3663, 3663A, and 3664. This amount shall be paid according to a plan established by the Court.

The defendant hereby admits the forfeiture allegation with respect to Count One of the Information and agrees to forfeit to the United States pursuant to Title 18, United States Code, Section 1963, all money representing proceeds traceable to the commission of Count One of the Information. It is further understood that any forfeiture of the defendant's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon him in addition to forfeiture.

It is understood that the defendant (a) shall truthfully and completely disclose all information with respect to the activities of himself and others concerning all matters about which this Office inquires of him, which information can be used for any purpose; (b) shall cooperate fully with this Office, the New York City Police Department, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, the United States Department of Homeland Security, Homeland Security Investigations, and any other law enforcement agency designated by this Office; (c) shall attend all meetings at which this Office requests his presence; (d) shall provide to this Office, upon

[redacted]

request, any document, record, or other tangible evidence relating to matters about which this Office or any designated law enforcement agency inquires of him; (e) shall truthfully testify before the grand jury and at any trial and other court proceeding with respect to any matters about which this Office may request his testimony; (f) shall bring to this Office's attention all crimes which he has committed, and all administrative, civil, or criminal proceedings, investigations, or prosecutions in which he has been or is a subject, target, party, or witness; and (g) shall commit no further crimes whatsoever. Moreover, any assistance the defendant may provide to federal criminal investigators shall be pursuant to the specific instructions and control of this Office and designated investigators.

It is understood that this Office cannot, and does not, agree not to prosecute the defendant for criminal tax violations, if any. However, if the defendant fully complies with the understandings specified in this Agreement, no testimony or other information given by him (or any other information directly or indirectly derived therefrom) will be used against him in any criminal tax prosecution. Moreover, if the defendant fully complies with the understandings specified in this Agreement, he will not be further prosecuted criminally by this Office for any crimes, except for criminal tax violations, related to his participation in the following conduct to the extent that he has disclosed such participation to this Office as of the date of this Agreement:

[redacted]

This Agreement does not provide any protection against prosecution for any crimes except as set forth above, including any acts of violence. It is understood that all of the conduct set forth in the preceding paragraph constitutes either relevant conduct, pursuant to United States Sentencing Guidelines ("U.S.S.G.") Section 1B1.3, or other conduct of the defendant, pursuant to U.S.S.G. § 1B1.4, that the Court may consider at the time of sentencing.

It is understood that the defendant's truthful cooperation with this Office is likely to reveal activities of individuals who might use violence, force, and intimidation against the defendant, his family, and loved ones. Should the defendant's cooperation present a significant risk of physical harm, this Office, upon the written request of the defendant, will take steps that it determines to be reasonable and necessary to attempt to ensure his safety and that of his family and loved ones. These steps may include application to the Witness Security Program of the United States Marshals Service, whereby the defendant, his family, and loved ones, if approved, could be relocated under a new identity. It is understood, however, that the Witness Security Program is under the direction and control of the United States Marshals Service and of the Office of Enforcement Operations of the Department of Justice, not of this Office.

[redacted]

It is understood that this Agreement does not bind any federal, state, or local prosecuting authority other than this Office. This Office will, however, bring the cooperation of the defendant to the attention of other prosecuting offices, if requested by him.

It is understood that the sentence to be imposed upon the defendant is within the sole discretion of the Court. This Office cannot, and does not, make any promise or representation as to what sentence the defendant will receive, and will not recommend any specific sentence to the Court. However, this Office will inform the Probation Office and the Court of (a) this Agreement; (b) the nature and extent of the defendant's activities with respect to this case and all other activities of the defendant which this Office deems relevant to sentencing; and (c) the nature and extent of the defendant's cooperation with this Office. In so doing, this Office may use any information it deems relevant, including information provided by the defendant both prior to and subsequent to the signing of this Agreement. In addition, if this Office determines that the defendant has provided substantial assistance in an investigation or prosecution, and if he has fully complied with the understandings specified in this Agreement, this Office will file a motion, pursuant to Section 5K1.1 of the Sentencing Guidelines and 18 U.S.C. § 3553(e), requesting the Court to sentence the defendant in light of the factors set forth in Section 5K1.1(a)(1)-(5). It is understood that, even if such a motion is filed, the sentence to be imposed on the defendant remains within the sole discretion of the Court. Moreover, nothing in this Agreement limits this Office's right to present any facts and make any arguments relevant to sentencing to the Probation Office and the Court, or to take any position on post-sentencing motions. The defendant hereby consents to such adjournments of his sentence as may be requested by this Office.

It is understood that, should this Office determine either that the defendant has not provided substantial assistance in an investigation or prosecution, or that the defendant has violated any provision of this Agreement, such a determination will release this Office from any obligation to file a motion pursuant to Section 5K1.1 of the Sentencing Guidelines and 18 U.S.C. § 3553(e), but will not entitle the defendant to withdraw his guilty plea once it has been entered.

It is understood that, should this Office determine, subsequent to the filing of a motion pursuant to Section 5K1.1 of the Sentencing Guidelines and/or 18 U.S.C. § 3553(e), that the defendant has violated any provision of this Agreement, this Office shall have the right to withdraw such motion.

It is understood that, should the defendant commit any further crimes or should it be determined that he has given false, incomplete, or misleading testimony or information, or should he otherwise violate any provision of this Agreement, the defendant shall thereafter be subject to prosecution for any federal criminal violation of which this Office has knowledge, including perjury and obstruction of justice. Any such prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against the defendant, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed.

[redacted]

It is understood that in the event that it is determined that the defendant has committed any further crimes, given false, incomplete, or misleading testimony or information, or otherwise violated any provision of this Agreement, (a) all statements made by the defendant to this Office or other designated law enforcement agents, and any testimony given by the defendant before a grand jury or other tribunal, whether prior to or subsequent to the signing of this Agreement, and any leads from such statements or testimony shall be admissible in evidence in any criminal proceeding brought against the defendant; and (b) the defendant shall assert no claim under the United States Constitution, any statute, Rule 410 of the Federal Rules of Evidence, or any other federal rule that such statements or any leads therefrom should be suppressed. It is the intent of this Agreement to waive all rights in the foregoing respects.

The defendant hereby acknowledges that he has accepted this Agreement and decided to plead guilty because he is in fact guilty. By entering this plea of guilty, the defendant waives any and all right to withdraw his plea or to attack his conviction, either on direct appeal or collaterally, on the ground that the Government has failed to produce any discovery material, *Jencks* Act material, exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), other than information establishing the factual innocence of the defendant, or impeachment material pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), that has not already been produced as of the date of the signing of this Agreement.

The defendant recognizes that, if he is not a citizen of the United States, his guilty plea and conviction make it very likely that his deportation from the United States is presumptively mandatory and that, at a minimum, he is at risk of being deported or suffering other adverse immigration consequences. The defendant acknowledges that he has discussed the possible immigration consequences (including deportation) of his guilty plea and conviction with defense counsel. The defendant affirms that he wants to plead guilty regardless of any immigration consequences that may result from the guilty plea and conviction, even if those consequences include deportation from the United States. It is agreed that the defendant will have no right to withdraw his guilty plea based on any actual or perceived adverse immigration consequences (including deportation) resulting from the guilty plea and conviction. It is further agreed that the defendant will not challenge his conviction or sentence on direct appeal, or through litigation under Title 28, United States Code, Section 2255 and/or Section 2241, on the basis of any actual or perceived adverse immigration consequences (including deportation) resulting from his guilty plea and conviction.

[redacted]

This Agreement supersedes any prior understandings, promises, or conditions between this Office and the defendant. No additional understandings, promises, or conditions have been entered into other than those set forth in this Agreement, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

[redacted]

United States Attorney

[redacted]

AGREED AND CONSENTED TO:

[redacted]

[redacted]

580 F.2d 1137
United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,
v.
Wilson ARROYO-ANGULO, Hugo Gomez, Jaime Rayo-Montano and Guillermo Moreno, Defendants-Appellants.

Nos. 587, 588, 640 and 691, Dockets 77-1390, 77-1396, 77-1397 and 77-1398.
|
Argued Feb. 23, 1978.
|
Decided June 30, 1978.

Synopsis

Defendants were convicted in the United States District Court for the Southern District of New York, Kevin Thomas Duffy, J., for conspiracy to violate and for substantive violations of the federal narcotics laws, and they appealed. The Court of Appeals, Mulligan, Circuit Judge, held that: (1) in camera proceedings which were held with respect to motions of and conferences with various defendants, in which other defendants and counsel were not present, were justified by threats of violence which pervaded the trial among the various defendants and by the need to keep confidential a broad drug-smuggling investigation; (2) under the circumstances, right to a public trial was not violated; (3) defendants' confrontation rights were not violated where no defendant was excluded from any closed proceeding which developed testimony later utilized against him at trial; (4) right to effective assistance of counsel was not denied on ground that if counsel had been present at closed session he would have learned more about the Government's case, and (5) cooperation agreement between prosecution witness and the United States should not have been admitted on direct examination, in light of rule that no evidence to bolster credibility is admissible absent attack on the veracity of a witness, but under the circumstances of the case in which formidable assault was in fact made on credibility of the witness, no reversible error resulted.

Affirmed.

Friendly, Circuit Judge, filed a concurring opinion.

Attorneys and Law Firms

***1139** Constance Cushman, Asst. U. S. Atty., New York City (Robert F. Fiske, Jr., U. S. Atty., S. D. N. Y., Audrey Strauss, Asst. U. S. Atty., New York City, of counsel), for appellee.

Barry Bassis, New York City (Martin Erdmann, Legal Aid Society, New York City), for defendant-appellant Arroyo-Angulo.

Raphael H. Beauduy, New York City, for defendant-appellant Gomez.

Donald Nawi, New York City (David Blackstone, New York City), for defendant-appellant Rayo.

Ira Leitel, Brooklyn, N. Y., for defendant-appellant Moreno.

Before FRIENDLY, MULLIGAN and MESKILL, Circuit Judges.

Opinion

MULLIGAN, Circuit Judge:

This is an appeal by Wilson Arroyo-Angulo (Arroyo), Hugo Gomez, Jaime Rayo-Montano (Rayo) and Guillermo Moreno from judgments of conviction entered on July 21, 1977 in the United States District Court for the Southern District of New York, after a five-week trial before the Hon. Kevin T. Duffy, United States District Judge, and a jury. The indictment charged the four appellants and two others Jose Jeroncio Ahon-Casquete (Ahon) and "John Doe"[1] with federal narcotics law violations. Count one charged the appellants with conspiracy to violate the narcotics laws from December 20, 1975 until February 19, 1976. Count two charged each of the appellants with aiding and abetting the distribution of one kilogram of cocaine on February 19, 1976 in violation of 21 U.S.C. s 841(a)(1). The jury convicted each appellant on both counts and Judge Duffy sentenced them to the prison terms set forth in the margin.[2]

I

The Government's case rested primarily upon the trial testimony of Emilio Rivas, a co-conspirator, who testified that he had assisted the defendants in smuggling some 20 kilograms of cocaine estimated to be worth over $700,000 from a Gran Colombiana Line ship moored in San Francisco

FRIENDLY, Circuit Judge, concurring:

Although I agree that these convictions should be affirmed for the reasons stated in Judge Mulligan's thorough opinion, I cannot approve of the use made of the cooperation agreement in the summation of the Assistant United States Attorney. This included such remarks as the following:
That's what motivates Mr. Rivas in this trial to tell you the truth, not respect for the oath of office or for the oath that he took.

Now, he's motivated to tell the truth precisely to help himself. If he lies there is no agreement, there is no reduction of sentence. He's prosecuted, he's prosecuted for the crimes that he's admitted, for that swim, that pickup in October of 1975 with Cambindo.

He finally has a motive to tell the truth because he has no choice. The government has its foot on his throat. He is in jail for 20 years and he will be 60 years old before he gets out of jail unless he is doing something about it.

Do you think Judge Werker, the judge who sentenced him for 20 years while he was still saying, “Well, I was a delivery boy,” do you think Judge Werker is going to look kindly on a man who says, “I wasn't a delivery boy. I bought a kilo, sometimes two every six or eight weeks and I sold it as fast as I could get my hands on it.”

If he lies, if the government doesn't write a memorandum for him do you think Judge Werker is going to look kindly on his motion to reduce sentence?

***1150** Such remarks are prosecutorial overkill. They inevitably give jurors the impression that the prosecutor is carefully monitoring the testimony of the cooperating witness to make sure that the latter is not stretching the facts something the prosecutor usually is quite unable to do; that any significant exaggeration by the witness of what the prosecutor believes to be the truth will cause the latter to refrain from writing the promised memorandum recommending leniency; and, perhaps worst of all, that an acquittal may involve serious consequences to the witness by releasing the Government from its promise or even by causing an indictment for perjury. None of our cases supports a summation with respect to a cooperation agreement like that made here. United States v. Ricco, 549 F.2d 264, 274 (2 Cir.), Cert. denied, 431 U.S. 905, 97 S.Ct. 1697, 52 L.Ed.2d 389 (1977), comes the closest to doing so, but examination of the record reveals that the prosecutor's use of the cooperation agreement was nowhere near so extensive and offensive as here. (Ricco transcript, 1864-65). If proper objection had been made to the summation, the judge should have sustained it; if matters had gone too far to make a striking of the remarks an effective cure, the judge should have instructed that the promise in the cooperation agreement adds little to the truth-telling obligation imposed by the oath; that the prosecutor often has no way of knowing whether the witness is telling the truth or not; that the books are not filled with perjury indictments of Government witnesses who have gone beyond the facts; and that an acquittal would not mean that as a matter of course the Government would seek such an indictment or even fail to make its promised recommendation of leniency. If prosecutors know that such instructions will be given, they will hardly be tempted to the excesses committed here.

All Citations

580 F.2d 1137, 3 Fed. R. Evid. Serv. 421

Footnotes

1 The indictment against Ahon was dismissed at the close of the Government's case. “John Doe” has never been arrested.

2

	Count One	Count Two	
Guillermo Moreno:	15 years	15 years	Consecutive
Hugo Gomez:	15 years	15 years	Concurrent; consecutive to sentence of 15 years imposed in District of Oregon on July 8, 1977.
Wilson Arroyo:	15 years	15 years	Concurrent
Jaime Rayo:	7 years	7 years	Concurrent; concurrent with sentence of 15 years imposed in District of

No. 693, Docket 87-1412
United States Court of Appeals, Second Circuit

U.S. v. Cosentino

844 F.2d 30 (2d Cir. 1988)
Decided Apr 6, 1988

No. 693, Docket 87-1412.

Argued January 25, 1988.

Decided April 6, 1988.

Colleen P. Cassidy, Legal Aid Soc., Federal Defender Services Unit, New York City, for defendant-appellant.

Daniel C. Richman, Asst. U.S. Atty., S.D. N.Y., New York City (Rudolph W. Giuliani, U.S. Atty., and John F. Savarese, Asst. U.S. Atty., S.D.N.Y., New York City, of counsel), for appellee.

Appeal from the United States District Court for the Southern District of New York.

Before FEINBERG, Chief Judge, and MESKILL and MAHONEY, Circuit Judges.

MESKILL, Circuit Judge:

This is an appeal from a judgment of conviction entered in the United States District Court for the Southern
31 District of New York, Kram, J., following a jury trial. *31 Defendant-appellant Louis Cosentino was convicted of extortion in violation of 18 U.S.C. § 1951 (1982) and use of the mails to facilitate bribery in violation of 18 U.S.C. §§ 2, 1341 (1982). Two other counts were dropped prior to trial. Cosentino challenges the admission of witness cooperation agreements during direct testimony of government witnesses and claims that certain questions and comments by the prosecutor constituted prejudicial misconduct. For reasons that follow, we affirm.

BACKGROUND

Defendant-appellant Cosentino was a Project Superintendent for the New York City Housing Authority. As a superintendent, he had limited authority to purchase materials not available through the Housing Authority by placing "certificate for payment" orders with private vendors. Although Authority rules prohibited superintendents from placing more than $500 in such orders with any single vendor, Cosentino allegedly evaded this limitation by splitting orders among multiple companies owned by each vendor. He allegedly employed the same stratagem to circumvent another Authority rule that proscribed placement of more than one order with any single vendor in any thirty day period. According to the government, Cosentino solicited and received kickbacks from the vendors with whom he placed certificate for payment orders.

At trial, the government's case rested almost exclusively on the testimony of Alan Rappaport and Irving Eisenberg, two vendors who had dealt with Cosentino. They testified about the kickback scheme, explaining that Authority superintendents in general and Cosentino in particular placed orders only with vendors who

kicked back a percentage of each order to the superintendent. There was also testimony that Cosentino received a $1,000 loan that he "worked off" by placing $10,000 worth of certificate for payment orders without demanding his usual ten percent kickback.

Cosentino took the stand on his own behalf to explain that he had split orders only in order to obtain necessary supplies that could not readily be procured through the Authority. He had evaded the rules, he said, to provide better service to the projects under his supervision. He also explained that he had paid the loan back out of his own pocket and emphatically denied soliciting or accepting bribes.

Because the case against Cosentino depended so heavily on the testimony of Rappaport and Eisenberg, their credibility was the central battleground of the trial. As participants in the kickback scheme who had agreed to testify in return for guilty pleas on reduced charges, they were especially vulnerable to impeachment. As a result, both the prosecuting Assistant United States Attorney (AUSA) and Cosentino's counsel highlighted credibility issues in their respective opening statements to the jury.

In opening, the prosecutor outlined the case against Cosentino, alluding specifically to the witnesses' background and cooperation agreements as follows:

> I will tell you now about Rappaport and Eisenberg, the two vendors you will hear testify in this trial. They were not innocent victims. They acknowledge their participation in corrupt and criminal [a]ctivity. They pleaded guilty to felony charges and have been sentenced, but before they pled guilty they entered into a cooperation agreement with the U.S. Attorney's Office, an agreement to [sic] which the U.S. Attorney's office agreed to accept their pleas and in return they agreed to testify.
>
> Remember, people who engage in conspiracy don't act in the open, and, as the evidence in this case will show, they tried not to keep records of their dealings. They acted in secret.
>
> So for us to be able to show you what happened at Highbridge Houses [where Cosentino was superintendent], it's necessary that we bring people right from out of the muck to testify before you today.
>
> Because Rappaport and Eisenberg participated in corrupt activities and because they have an agreement
32 with the government, the government asks you to scrutinize *32 their testimony very carefully. You may not like a lot of the things they have done, but, remember, they are not on trial here today. Only Louis Cosentino is on trial, so when Alan Rappaport and Irving Eisenberg testify, you should be asking yourself one question: Are they telling you the truth today or tomorrow?
>
> Listen closely to what they say and see if what they say doesn't make sense in light of all the evidence in this case.

Tr. 11-12. Cosentino's counsel made a brief opening statement devoted almost entirely to the credibility issues. He focused on specific aspects of the cooperation deals that Rappaport and Eisenberg had struck with the government.

> The only evidence they [*i.e.,* the government] are going to give you are the words of Alan Rappaport and Irving Eisenberg, and, as [prosecuting AUSA] Mr. Richman says to you, they are raised up from the muck.

> The government says criminals will be testifying against the innocent man sitting at the defense table, Mr. Louis Cosentino.
>
> You will find out that they are men who received large amounts of money from the New York City Housing Authority. You will find out that these are men who are convicted felons; both pled guilty in the court to felonies.
>
> Cooperation agreements, they made deals with the government. A deal basically means: You give us what we want and we'll give you what you want.
>
> What the government wants is a conviction.
>
> So what are they going to do but come here and try to give the government what they want in exchange for which they will get lesser charges than originally exposed to, and, more importantly, their back is scratched by the government in a letter sent to the judge later on.
>
> Mr. Eisenberg has already been sentenced, but if it were found out he did not give the government what the government wanted here in contradiction to what he said earlier, he leaves himself open to all the rest of the charges that he could have been charged with, and the government will go after him.

Tr. 13-14. During the direct testimony of both Rappaport and Eisenberg, the government offered the full text of their written cooperation agreements. The district court admitted them over defense objection. The jury requested both agreements, in addition to other exhibits and testimony, during its deliberations leading to Cosentino's conviction on both counts.

On appeal, Cosentino principally argues that the admission of the cooperation agreements during direct examination constituted impermissible bolstering of the witnesses' credibility. He also argues that the agreements were misleadingly incomplete and that a limiting instruction should have been given. Finally, he contends that certain questions and statements by the AUSA constituted prosecutorial misconduct. We reject these contentions and affirm Cosentino's convictions.

DISCUSSION I.

This appeal requires us to define the circumstances in which witness cooperation agreements may properly be admitted into evidence during the direct testimony of government witnesses. The existence and contents of such agreements are inevitably of considerable interest to both prosecution and defense. They tend to support witnesses' credibility by setting out promises to testify truthfully as well as penalties for failure to do so, such as prosecution for perjury and reinstatement of any charges dropped pursuant to the deal. The agreements can impeach, however, by revealing the witnesses' criminal background. Defense counsel can also argue that such witnesses cannot be believed because they are under pressure to deliver convictions and correspondingly tempted to twist facts to do so.

Cooperation agreements accordingly demand careful treatment under principles governing attack on and
33 rehabilitation of witnesses' credibility. It is well settled *33 that absent an attack, no evidence may be admitted to support a witness' credibility. *See generally McCormick on Evidence* § 49 (E. Clearly 3d ed. 1984); 3 J. Weinstein M. Berger, *Weinstein's Evidence* ¶ 608[08] (1987). We have invoked this rule in considering the admissibility of cooperation agreements because of their tendency to support or bolster credibility. *See, e.g.,*

United States v. Smith, 778 F.2d 925, 928 (2d Cir. 1985); *United States v. Borello,* 766 F.2d 46, 56 (2d Cir. 1985); *United States v. Edwards,* 631 F.2d 1049, 1051 (2d Cir. 1980); *United States v. Arroyo-Angulo,* 580 F.2d 1137, 1146 (2d Cir), *cert. denied,* 439 U.S. 913, 99 S.Ct. 285, 58 L.Ed.2d 260 (1978).

A witness' credibility is often tested by a sequence of attack on cross-examination followed by rehabilitation on redirect. It may sometimes be useful, however, to develop impeaching matter in direct examination of a "friendly" witness in order to deprive an adversary of the psychological advantage of revealing it to the jury for the first time during cross-examination. We have accordingly held that impeaching aspects of cooperation agreements may be brought out in the government's direct examination of a witness who testifies pursuant to such an agreement. *See Borello,* 766 F.2d at 57; *Edwards,* 631 F.2d at 1051-52. *Cf. United States v. Fernandez,* 829 F.2d 363, 365 (2d Cir. 1987) (discussing scope of permissible reference to agreement in direct examination). Even in the absence of a prior attack on credibility, "the elicitation of the fact of the agreement and the witness' understanding of it, as a motivation for the witness to testify for the Government, should be permitted on direct examination in order to anticipate cross-examination by the defendant which might give the jury the unjustified impression that the Government was concealing this relevant fact." *Edwards,* 631 F.2d at 1052.

Because of the bolstering potential of cooperation agreements, however, we have permitted such agreements to be admitted in their entirety only after the credibility of the witness has been attacked. *See Smith,* 778 F.2d at 928. This restriction proceeds from our view that "the *entire* cooperation agreement bolsters more than it impeaches." *Edwards,* 631 F.2d at 1052; *see also Borello,* 766 F.2d at 56-57. Thus, although the prosecutor may inquire into impeaching aspects of cooperation agreements on direct, bolstering aspects such as promises to testify truthfully or penalties for failure to do so may only be developed to rehabilitate the witness after a defense attack on credibility.[1]

[1] Other courts, apparently less concerned with the precise balance between impeaching and bolstering aspects, have declined to impose comparable conditions on admission of evidence of agreements that include bolstering provisions. *See, e.g., United States v. Dadanian,* 818 F.2d 1443, 1445 (9th Cir. 1987); *United States v. Machi,* 811 F.2d 991, 1003 (7th Cir. 1987); *United States v. Townsend,* 796 F.2d 158, 162-63 (6th Cir. 1986); *United States v. Binker,* 795 F.2d 1218, 1223 (5th Cir. 1986), *cert. denied,* ___ U.S. ___, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987); *United States v. Oxman,* 740 F.2d 1298, 1302-03 (3d Cir. 1984), *vacated and remanded on other grounds,* 473 U.S. 922, 105 S.Ct. 3550, 87 L.Ed.2d 673 (1985); *United States v. McNeill,* 728 F.2d 5, 14 (1st Cir. 1984); *United States v. Henderson,* 717 F.2d 135, 137-38 (4th Cir. 1983), *cert. denied,* 465 U.S. 1009, 104 S.Ct. 1006, 79 L.Ed.2d 238 (1984). *But see United States v. Hilton,* 772 F.2d 783, 787 (11th Cir. 1985) (requiring attack on credibility before admission of bolstering aspects). Were we writing on a blank slate, we might have followed the other circuits that avoid the distinctions we have required judges and lawyers to make during the heat of trial.

Such an attack may come in a defendant's opening statement. If the opening sufficiently implicates the credibility of a government witness, we have held that testimonial evidence of bolstering aspects of a cooperation agreement may be introduced for rehabilitative purposes during direct examination. *See Smith,* 778 F.2d at 928; *United States v. Jones,* 763 F.2d 518, 522 (2d Cir.), *cert. denied,* 474 U.S. 981, 106 S.Ct. 386, 88 L.Ed.2d 339 (1985); *United States v. Maniego,* 710 F.2d 24, 27 (2d Cir. 1983) (per curiam). In such a situation the "rehabilitation" stage has already been reached on direct.

As a threshold matter, we must first decide whether the government's opening statement permissibly referred to
34 the *34 agreements in this case. Consistent with the foregoing principles, a prosecutor may refer to a witness cooperation agreement in opening only to the extent he or she could develop the same matter in direct

questioning of a witness whose credibility has not been attacked. The prosecutor thus may advert to the existence of the agreement and related impeaching facts such as the witness' criminal background, but may not raise bolstering aspects of the agreement such as truth telling provisions, charge reinstatement conditions or penalties of perjury clauses. Because the witness alone can testify to his or her understanding of the agreement, the prosecutor also cannot discuss this aspect in opening. The excerpt from the record set forth above makes plain that the government in this case properly restricted its opening to appropriate matters.

It is also plain that Cosentino's counsel sufficiently raised matters of credibility in opening that the government could develop the whole cooperation agreements on direct. Cosentino's counsel made representations about reduction of charges and government intervention on behalf of the witnesses in the sentencing process, as well as the possibility of prosecution for charges dropped in exchange for testimony in the event the witnesses failed to deliver convictions. These references clearly opened the door to rehabilitation on direct by evidence of bolstering aspects of the cooperation agreements.[2]

[2] Before either side presented any evidence, Cosentino's counsel objected to the government's stated intent to offer the agreements on direct. It is unclear, however, whether the objection included testimony or was limited to the documents themselves. He said that it was all right for the witnesses "to say that it's part of [their] agreement[s] to speak truthfully — but to have a piece of paper saying that, it's not necessary." Tr. 42. We need not decide, however, whether this apparent concession waived objection to testimony about bolstering aspects of the agreements. Because of the defense's opening statement, rehabilitation was in order and testimony about those aspects was clearly admissible. Under these circumstances, even a properly preserved objection would fall.

We thus arrive at the central issue in this appeal: if *evidence* of the whole agreement was admissible during direct examination, was it error to admit the agreement itself? We have not before squarely confronted a situation involving introduction of a whole cooperation agreement on direct following a sufficient attack on credibility in the defense's opening. Cosentino argues that our prior decisions establish a rule that cooperation agreements can be admitted in their entirety only on redirect, thus controlling the outcome of this case. We do not read those decisions so mechanically. It is true that some cases have addressed only the admission of testimony of bolstering aspects on direct examination. *See Jones,* 763 F.2d at 522; *Maniego,* 710 F.2d at 27. It is also true that in summarizing these cases and others, we stated in *Smith* that a prosecutor may "elicit *testimony* on the truth-telling portions . . . on direct," and may "introduce the *entire agreement* . . . on redirect examination to rehabilitate the witness." 778 F.2d at 928 (emphasis added). But the result in these cases is not, as Cosentino argues, the product of a distinction between direct and redirect examination. Rather, the event that renders the bolstering aspects of cooperation agreements admissible, on direct or redirect, is the attack on credibility that gives the bolstering evidence a rehabilitative purpose.

We hold that the written text of a cooperation agreement may be admitted during a witness' direct testimony whenever a defense attack on credibility in opening has made evidence of the whole agreement admissible. We see no reason to distinguish between the written text of the agreement and testimony about it if the rehabilitation stage has otherwise been reached by the time direct examination of the witness begins. The decision about the form evidence of the agreement should take lies within the trial judge's discretion under Fed.R.Evid. 403. In the exercise of that discretion, it may sometimes be appropriate to redact the agreement to eliminate potentially prejudicial, confusing or misleading matter. *See, e.g., Arroyo-Angulo,* 580 F.2d at 1145 n.
35 9 (deleting references to protective custody afforded witness' *35 family); *United States v. Koss,* 506 F.2d 1103, 1112-13 n. 8 (2d Cir. 1974) (deleting references to organized crime and threats against witness' life on account

of testifying), *cert. denied,* 421 U.S. 911, 95 S.Ct. 1565, 43 L.Ed.2d 776 (1975). No such redaction was necessary in this case. We conclude that there was no abuse of discretion in the district court's decision to admit the entire witness cooperation agreements during the direct testimony of the government witnesses.

II.

Cosentino's two remaining claims relating to the cooperation agreements merit only brief discussion. First, he argues that the agreements were misleadingly incomplete in that they omitted elements of the deals that would have undermined the witnesses' credibility. Specifically, Cosentino points out that each agreement stated that "[n]o additional promises, agreements and conditions have been entered into other than those set forth in this letter and none will be entered into unless in writing and signed by all parties," but neither agreement specified the charges dropped or mentioned that the witnesses were promised a choice among sentencing judges.

In general, there is little danger that significant terms will be omitted from cooperation agreements: the government and the defendant have considerable interest in seeing to it that the agreement spells out all terms of the bargain. Even though some minor details may occasionally be left out, the probative value of individual agreements, including their completeness, can most efficiently be evaluated by the trial judge in the exercise of discretion under Fed.R.Evid. 403. In the instant case, nothing suggests that that discretion was abused. Although the agreements apparently omitted some incidental matters, they contained the essential impeaching and bolstering information that Rappaport and Eisenberg had committed crimes, pled guilty and struck deals under which the government traded a degree of conditional prosecutorial lenience for "truthful" testimony. In any event, defense counsel brought out every one of the omitted matters on cross-examination and discussed them further in summation. Revelation of the other details in written form would have given Cosentino little added leverage in attempting to raise doubts in the jurors' minds about the witnesses' credibility. Under these circumstances, the decision to admit the full agreements had no adverse effect on Cosentino's defense and fell well within the ambit of sound discretion.

Second, Cosentino argues that a limiting instruction should have been given on the truth telling portions of the agreements. He seeks an instruction under which the jury could use the impeaching motive or bias aspects of the agreements to undercut credibility, but could not use the bolstering portions as support for credibility.

No request for such an instruction was made below, so we review only for plain error. *See* Fed.R.Crim.P. 30, 52(b). We discern no error of any kind in this respect. The proposed instruction would have been fundamentally at odds with the distinctions we have drawn between the impeachment and bolstering aspects of cooperation agreements. Although we have required a prior attack on credibility so that the whole agreement serves a rehabilitative function, we have never restricted use of an agreement to support credibility once that condition is satisfied. Our view presupposes that the agreement may and will be used to support credibility. The district court's treatment of the cooperation agreements was fully consistent with these principles.

III.

Cosentino raises three instances of allegedly improper questioning or comment by the prosecutor. He argues that the government improperly vouched for Rappaport's veracity by inquiring on redirect into his cooperation in other prosecutions. He also contends that the prosecutor improperly trapped him into stating that Rappaport and Eisenberg had lied in their testimony about the loan. He finally argues that certain rebuttal comments by
36 the prosecutor *36 in closing might have suggested to the jury that it could convict him without considering evidence of his good character on the issue of guilt.

We have considered these contentions and find them to be without merit. None warrants extended discussion.

CONCLUSION

For the foregoing reasons, Cosentino's conviction is affirmed.

No. 475, Docket 93-1425
United States Court of Appeals, Second Circuit

U.S. v. Gaind

31 F.3d 73 (2d Cir. 1994)
Decided Aug 3, 1994

No. 475, Docket 93-1425.

Argued November 15, 1993.

74 Decided August 3, 1994. *74

Paula Schwartz Frome, Garden City, N Y (James O. Druker, Kase Druker, of counsel), for defendant-appellant.

Marjorie Miller, Asst. U.S. Atty. for the S.D. of New York, New York City (Mary Jo White, U.S. Atty. for the S.D. of New York, Lisa Margaret Smith, Paul G. Gardephe, Asst. U.S. Attys. for the S.D. of New York, of counsel), for appellee.

Appeal from the United States District Court for the Southern District of New York.

Before: MINER, MAHONEY, and HEANEY,– Circuit Judges.

– The Honorable Gerald W. Heaney, United States Circuit Judge for the Eighth Circuit, sitting by designation.

MAHONEY, Circuit Judge:

Defendant-Appellant Arun Gaind appeals from a judgment entered June 14, 1993 after a jury trial in the United States District Court for the Southern District of New York, Vincent L. Broderick, *Judge,* that convicted Gaind of: one count of conspiracy to submit false statements to the Environmental Protection Agency (the "EPA"), to commit mail fraud, and to defraud the United States and an agency thereof in violation of 18 U.S.C. §§ 371, 1001, and 1341; one count of conspiracy to submit false statements to the EPA and to defraud the United States and an agency thereof in violation of 18 U.S.C. §§ 371 and 1001; seventeen counts of submitting false statements to the EPA in violation of 18 U.S.C. §§ 1001 and 2; two counts of mail fraud in violation of 18 U.S.C. §§ 1341 and 2; and one count of committing perjury before a grand jury in violation of 18 U.S.C. § 1623. The court sentenced Gaind to thirty-three months imprisonment, three years of supervised release, $1,100 in special assessments, and restitution to the EPA of $511,263.68.

On this appeal, Gaind raises three challenges to his conviction. He contends that: (a) the prosecutor improperly asked Gaind, during cross-examination, whether other witnesses whose testimony differed from his were "mistaken" or "lying;" (b) by eliciting testimony concerning the "truth-telling" provisions of nonprosecution and cooperation agreements entered into between the government and several government witnesses (the "Truth-telling Provisions"), the government improperly bolstered the testimony of government witnesses before their credibility had been challenged; and (c) his conviction on count twenty-two of the indictment should be reversed because it is logically inconsistent with the jury's verdict of acquittal on count eight of the indictment.

We conclude that neither the government's cross-examination nor the elicitation of testimony concerning the Truth-telling Provisions amounted to "plain error." We also reject Gaind's claim that his conviction on count twenty-two and his acquittal on count eight are inconsistent, concluding that (1) the two verdicts are not logically inconsistent, and (2) in any event, such an inconsistency would not provide a basis for challenging the conviction.

Accordingly, we affirm the judgment of conviction.

Background

From 1986 through 1988, Arun Gaind was the president of Nanco Environmental Services, Inc. also known as Nanco Laboratories, Inc. ("Nanco"), a testing laboratory in Dutchess County, New York. The charges against
75 Gaind center on false statements submitted *75 to the EPA by Nanco during that period.

Commencing in March 1985 and continuing through 1988, Nanco entered into and performed a series of contracts with the EPA for the environmental analysis of soil and water samples taken from Superfund sites throughout the United States by the EPA. Because of the volatility of the substances being tested, the contracts provided for time limits, ranging from seven days for volatile water samples and ten days for volatile soil samples to forty days for semi-volatile samples, within which the testing had to be completed. The contracts required Nanco to report the results of its analyses to the EPA on a form provided by the EPA setting forth, *inter alia,* the date on which each sample was analyzed. The gas chromatograph/mass spectrometer instruments used by Nanco to test the samples were connected to computer data systems equipped with internal clocks so that the time and date on the internal clock at the time the testing was completed would appear on the printout of the analysis. The computer system was also designed to keep a record of the testing, referred to as an archive, which would provide evidence of the actual testing performed. Neither of these systems was foolproof, however, because the archiving system could be turned off, and the internal clock could also be changed, by the person conducting the test.

It is undisputed that in the fall of 1986, Nanco became unable to complete the testing of volatile samples in accordance with the prescribed schedule. In order to be paid by the EPA without incurring the monetary penalties contractually provided for tardy performance, Nanco engaged in an elaborate scheme to "backdate" the reports submitted to the EPA in order to falsely represent that the tests had been completed within the specified periods. This scheme involved, *inter alia,* the resetting of the computer system's internal clocks and manually manipulating the archive numbering system so as to provide information consistent with the tests having been completed within the appropriate periods.

Sometime after October 1988, the EPA became suspicious about the tests being conducted by Nanco and arranged for an outside laboratory to audit Nanco's work. The outside audit furthered the EPA's suspicions concerning the deficiencies in Nanco's performance. Subsequently, a grand jury in the Southern District of New York commenced an investigation to determine whether Nanco had submitted false reports to the EPA. Gaind testified under oath before that grand jury on August 1, 1991 and denied "ever direct[ing] anyone to set the time back on computers." The grand jury subsequently returned a forty-count indictment against Gaind, charging him with the previously summarized charges of which he was convicted, as well as nine counts of submitting false statements to the EPA, five counts of mail fraud, and three counts of tampering with witnesses, as to all of which he was acquitted.

Gaind conceded at trial, as he does on this appeal, that the reports submitted by Nanco to the EPA were backdated to make it appear that samples were analyzed during the requisite holding times. The central issue at trial was the extent of Gaind's knowledge of the backdating. *See United States v. Gaind,* 832 F. Supp. 740, 741 (S.D.N.Y. 1993) (district court order denying Gaind's application for bail pending appeal).

Eleven former employees of Nanco testified for the government against Gaind. Many of these witnesses testified that backdating was discussed with Gaind, and that the backdating proceeded pursuant to Gaind's instructions. For example, George Odell and Sohail Jahani,[1] two former Nanco employees, testified that the backdating was done pursuant to Gaind's direction. Odell testified that after the backdating practice became
76 prevalent, he again discussed the situation with Gaind, who professed his *76 awareness of the situation but stated that the backdating would have to continue until Nanco was up to date in its testing. Kathleen McKeever, another former Nanco employee, testified that in October 1988, Gaind personally instructed several Nanco employees to submit backdated reports to the EPA concerning 250 samples, known collectively as EPA Case No. 3975-E. Gaind testified in his own defense, and called four witnesses. As we have noted, the jury found Gaind guilty on twenty-two of the forty counts with which he was charged.

[1] Jahani was originally charged in the same indictment and with the same offenses as Gaind. On May 4, 1992, Jahani pled guilty to count one of the indictment, which charged a conspiracy to submit false statements to the EPA, to commit mail fraud, and to defraud the United States and an agency thereof. On December 8, 1992, after the conclusion of Gaind's trial, the court sentenced Jahani principally to three years of probation, departing downward from the applicable guideline range pursuant to the government's motion.

In sentencing Gaind to thirty-three months imprisonment, the district court departed downward from the applicable guideline range of 41-51 months, primarily because of the destruction of Gaind's testing business as a result of his criminal prosecution. *See United States v. Gaind,* 829 F. Supp. 669, 670-71 (S.D.N.Y. 1993) (memorandum explaining downward departure). This appeal followed. Gaind applied to the district court to be released on bail pending appeal, and the district court denied the application. *See United States v. Gaind,* 832 F. Supp. 740 (S.D.N.Y. 1993).

Discussion

At the outset, we note that Gaind did not present either his claim based upon the prosecutor's cross-examination[2] or his claim based upon the introduction of testimony concerning the Truth-telling Provisions of the Cooperation Agreements to the trial court. Accordingly, these claims are reviewed for "plain error." *See* Fed.R.Crim.P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."). "[I]n most cases [the language of Rule 52(b)] means that the error must have been prejudicial: It must have affected the outcome of the District Court proceedings." *United States v. Olano,* ___ U.S. ___, ___, 113 S.Ct. 1770, 1778, 123 L.Ed.2d 508 (1993) (collecting cases); *see also United States v. Torres,* 901 F.2d 205, 228 (2d Cir.) (plain error rule ordinarily invoked only to prevent miscarriage of justice that denied defendant a fair trial), *cert. denied,* 498 U.S. 906, 111 S.Ct. 273, 112 L.Ed.2d 229 (1990).

[2] Gaind's trial counsel successfully objected to two of the prosecutor's attempts to ask Gaind whether other witnesses were "mistaken." Because these objections were sustained and no other objections or applications were made with respect to the line of cross-examination to which exception is taken on this appeal, the only questions forming the basis for this appeal were asked and answered without objection.

Gaind's contention regarding the inconsistency of the verdicts on counts eight and twenty-two, on the other hand, presents a question of law as to which our review is plenary.

A. *The Improper Cross-Examination.*

Gaind testified in his own defense, and asserted both that he was not aware of the backdating at Nanco, and that he had never instructed any Nanco employees to backdate reports submitted to the EPA. During her cross-examination of Gaind, the government attorney repeatedly directed Gaind's attention to the testimony of government witnesses that conflicted with Gaind's testimony, and asked him whether these witnesses were "mistaken." Further, after Gaind had responded to a previous question concerning quality controls at Nanco during his tenure by stating that "[w]e did not anticipate or believe that we would have people who will resort to lying to protect their positions, to protect their raises, to protect being beat up or whatever," the prosecutor twice asked Gaind if all the government witnesses were "lying." The prosecutor subsequently incorporated Gaind's characterization of the other witnesses' testimony as "mistaken" into her summation, reminding the jury that Gaind had testified that essentially all of the other witness were "mistaken," and added: "Isn't it funny how everyone is so mistaken but Arun Gaind?"

Gaind invokes *United States v. Richter,* 826 F.2d 206 (2d Cir. 1987), as requiring reversal on this record. In that case, the prosecution cross-examined James Richter, the defendant, regarding the contrasting accounts given by a testifying F.B.I. agent, Frank Lazzara, and Richter concerning an interview of Richter by Lazzara, and
77 repeatedly *77 asked Richter to testify that Lazzara "was either mistaken or lying." *Id.* at 208. The defense made no objection to this cross-examination, but did object when a second F.B.I. agent who had been present at the disputed interview was called as a rebuttal witness to corroborate Lazzara's testimony. *Id.* In summation, the prosecution mischaracterized Richter's testimony, emphasized the contradiction between his testimony and that provided by the F.B.I. agents, and asserted that the jury could "determine that Mr. Richter is not telling you the truth because if he is, then these two agents, over and over again, in this courtroom, committed perjury." *Id.* at 209.

We reversed Richter's conviction and remanded for a new trial. *Id.* at 210. We noted that because Richter was provided the alternative of describing Lazzara's testimony as mistaken or lying and no objection to this cross-examination was taken by defense counsel, "we might be inclined to overlook the impropriety if that were defendant's sole claim of error." *Id.* at 208. However, in view of the calling of the second agent, over defense counsel's objection, to corroborate Lazzara's testimony after Richter had been forced to describe that testimony as false, and the improprieties in the prosecutor's summation, we required a new trial. *Id.* at 208-09. In doing so, we noted that "prosecutors have been admonished time and again to avoid statements to the effect that, if the defendant is innocent, government agents must be lying." *Id.* at 209 (collecting cases).

We do not regard *Richter* as controlling the decision of this case. On every occasion but one (when Gaind's testimony introduced the proposition that his employees were liars), the prosecutor asked Gaind only whether the employees whose testimony contradicted his were "mistaken" in that testimony, and the summation also followed that course. As we recognized in *Richter,* 826 F.2d at 208, there is a significant difference between these formulations. Asking a witness whether a previous witness who gave conflicting testimony is "mistaken" highlights the objective conflict without requiring the witness to condemn the prior witness as a purveyor of deliberate falsehood, i.e., a "liar."

Further, the opposing witnesses in this case were former Nanco employees, not government agents. *See United States v. Scanio,* 900 F.2d 485, 493 (2d Cir. 1990) ("special concern" appropriate when defendant's testimony is contrasted with that of government agents); *see also United States v. Weiss,* 930 F.2d 185, 195 (2d Cir.) (same), *cert. denied,* ___ U.S. ___, 112 S.Ct. 133, 116 L.Ed.2d 100 (1991).

In addition, the only significant prosecution witness in *Richter* other than the F.B.I. agents was "an alcoholic who had been fired from numerous jobs for mismanagement and incompetence." 826 F.2d at 207. In this case, by contrast, a raft of Nanco employees contradicted Gaind's testimony. Thus, in reviewing for "plain error" involving a miscarriage of justice, we find no basis to gainsay the district court's conclusion, in denying bail pending appeal, that:

> When the prosecutor asked Mr. Gaind while on cross-examination whether these witnesses were wrong or lying, she was merely revisiting a contention Mr. Gaind had already articulated in numerous ways. There is no possibility that these questions altered the outcome of the trial.

Gaind, 832 F. Supp. at 743.

We note, finally, that defendants invoking *Richter* have not succeeded in obtaining reversal of their convictions when the starkly offensive prosecutorial delinquencies in *Richter* were not replicated. *See Weiss,* 930 F.2d at 195; *Scanio,* 900 F.2d at 492-93; *United States v. Kiszewski,* 877 F.2d 210, 217 (2d Cir. 1989); *United States v. Durrani,* 835 F.2d 410, 424 (2d Cir. 1987). The keynote of our decisions in this area has been that: "Determinations of credibility are for the jury, not for witnesses." *Durrani,* 835 F.2d at 424 (citing *Richter,* 826 F.2d at 208 (citations omitted)). We perceive no reversible violation of that axiom in this case.

B. *Evidence Concerning the Truth-telling Provisions.*

Eight of the eleven former Nanco employees who testified for the government entered into nonprosecution
78 agreements, by which the government agreed not to prosecute *78 them. Two entered into cooperation agreements, by which the government agreed to bring their cooperation to the attention of their sentencing judge. All these agreements contained Truth-telling Provisions making the benefits of the agreements to the witnesses contingent upon the witnesses testifying truthfully.

In her opening statement, the prosecutor informed the jury that many of the government's witnesses had entered into either cooperation or nonprosecution agreements with the government, but did not discuss the substantive terms of the witnesses' obligations under these agreements. Defense counsel responded with an attack upon the former Nanco employees who were expected to testify for the government. He asserted that they had "stabbed both the company and Dr. Gaind in the back for agendas of their own reasons, which we may or may not learn during the course of this trial." He went on to say: "I tell you, this is a case about a show. It isn't Dr. Gaind's show." He added: "[The Nanco employees] sure didn't do in the labs what they have been taught by Dr. Gaind to do. And if they tell us something different here, then we are going to have to discover their motives, their agendas, because their motives and their agendas are certainly not those of Dr. Gaind's [sic]."

Because truth-telling provisions are used by the government "primarily to bolster the credibility of a witness," *United States v. Barnes,* 604 F.2d 121, 151 (2d Cir. 1979), *cert. denied,* 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980), the admission of testimony concerning such provisions before the credibility of a witness has been challenged "`runs afoul of the well established rules of evidence that absent an attack on the veracity of a witness, no evidence to bolster his credibility is admissible.'" *United States v. Borello,* 766 F.2d 46, 56 (2d Cir. 1985) (quoting *United States v. Arroyo-Angulo,* 580 F.2d 1137, 1146 (2d Cir.), *cert. denied,* 439 U.S. 913, 1005, 99 S.Ct. 285, 618, 58 L.Ed.2d 260, 681 (1978), 439 U.S. 1131, 99 S.Ct. 1052, 59 L.Ed.2d 93 (1979)). However, such testimony is admissible after the credibility of the witness has been challenged. *See United States v. Cosentino,* 844 F.2d 30, 32-34 (2d Cir.), *cert. denied,* 488 U.S. 923, 109 S.Ct. 303, 102 L.Ed.2d 322 (1988); *see also Arroyo-Angulo,* 580 F.2d at 1146. Furthermore:

> Such an attack may come in a defendant's opening statement. If the opening sufficiently implicates the credibility of a government witness, we have held that testimonial evidence of bolstering aspects of a cooperation agreement may be introduced for rehabilitative purposes during direct examination. *See* [*United States v.] Smith,* 778 F.2d [925, 928 (2d Cir. 1985)]; *United States v. Jones,* 763 F.2d 518, 522 (2d Cir.), *cert. denied,* 474 U.S. 981, 106 S.Ct. 386, 88 L.Ed.2d 339 (1985); *United States v. Maniego,* 710 F.2d 24, 27 (2d Cir. 1983) (per curiam). In such a situation the "rehabilitation" stage has already been reached on direct.

Cosentino, 844 F.2d at 33. We went on to hold that the entire agreement, as well as testimonial evidence of its bolstering aspects, could be admitted on the government witness' direct testimony when the witness' credibility had been attacked in the defense's opening statement. *Id.* at 34-35.

This rule disposes of the present case. The government introduced both the witnesses' agreements and testimony concerning their Truth-telling Provisions only on the redirect examinations of its witnesses, and no objection was made to the introduction of this evidence. It seems clear, however, that Gaind's opening statement attacked the credibility of the prosecution witnesses, with the result that this evidence could have been admitted on their direct examinations. *A fortiori,* it was admissible on the government's rebuttal case. In any event, its admission surely did not constitute "plain error" on this record.

C. *The Claim of Inconsistent Verdicts.*

The jury acquitted Gaind on count eight of the indictment, which charged him with submitting a backdated report to the EPA concerning Nanco's analysis of EPA Case No. 7734 in (approximately) September, 1987 in violation of 18 U.S.C. § 1001. On the other hand, the jury convicted Gaind on count twenty-two, which charged him with mail fraud in violation of 18 U.S.C. § 1341 based upon the receipt of payment from the
79 United States on or about March 29, 1988 in *79 connection with the same EPA Case No. 7734. Gaind's argument that this alleged inconsistency requires the reversal of his conviction on count twenty-two is without merit.

Count eight and count twenty-two, although involving the same EPA case, relate to two distinct events occurring at distinct times — the submission of the backdated report in September 1987, and the receipt of payment therefor in March 1988. The jury could have concluded that although Gaind was not aware of the falsity of the report when it was submitted to the EPA by Nanco in September 1987, and thus did not knowingly tender a false statement to the EPA, he was aware of the backdating by the time payment was received in March 1988, and thus intentionally defrauded the EPA at that time. Accordingly, the conviction on Count twenty-two is not necessarily inconsistent with the acquittal on count eight.

Further, even assuming, *arguendo,* that the conviction on count twenty-two could not be reconciled with the acquittal on count eight, the conviction would stand. In *United States v. Powell,* 469 U.S. 57, 69, 105 S.Ct. 471, 479, 83 L.Ed.2d 461 (1984), the Supreme Court unanimously ruled that a defendant could validly be convicted of using a telephone to facilitate the commission of narcotics offenses, even though acquitted as to the underlying narcotics offenses. In doing so, the Court stated that: "[W]here truly inconsistent verdicts have been reached, `[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt.'" *Id.* at 64-65, 105 S.Ct. at 476 (quoting *Dunn v. United States,* 284 U.S. 390, 393, 52 S.Ct. 189, 190, 76 L.Ed. 356 (1932)); *see also United States v. Acosta,* 17 F.3d 538, 544-45 (2d Cir. 1994) (same); *United States v. Romano,* 879 F.2d 1056, 1060 (2d Cir. 1989) (same).

Conclusion

The judgment of conviction is affirmed.

A Better-Informed Approach to Informers' Testimony

I. Introduction

"Early [last] century, the Supreme Court apparently viewed accomplice testimony negatively, saying that it 'ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses.'" Graham Hughes, Agreements for Cooperation in Criminal Cases, 45 Vand. L. Rev. 1, 31 n.122 (1992) (quoting Crawford v. United States, 212 U.S. 183, 204 (1909). How far the Court had come (or gone?) by the mid-twentieth, when Justice Jackson in On Lee v. United States, though cautioning that "[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility," concluded that "[s]ociety can ill afford to throw away the evidence produced by the falling out, jealousies, and quarrels of those who live by outwitting the law. Certainly no one would foreclose the turning of state's evidence by denizens of the underworld." 343 U.S. 747, 756-57 (1952).

The embrace of this latter view is a triumph for the prosecution. To quote Stephen S. Trott, a federal judge with decades of experience as a prosecutor before joining the bench, "the fact of the matter is that police and prosecutors cannot do without them—period . . . . If a policy were adopted never to deal with criminals as prosecution witnesses, many important prosecutions—especially in the area of organized and conspiratorial crimes—could never make it court." Stephen S. Trott, The Use of a Criminal as a Witness: A Special Problem, Am. Civ. Liberties Union Lecture Supplement, at 16 (Oct. 2007), https://www.aclu.org/files/pdfs/drugpolicy/informant_trott_outline.pdf.

But from the perspective of a defense lawyer who has tried to unstack the deck for decades, the embrace of the informer is no matter of ambiguity, and certainly not a triumph. It is a disaster for defendants, jeopardizing their right to a just and accurate determination by a jury of their peers. And so too it upsets society's interests in a system of criminal law that gives defendants a fair shake.

What follows is a brief description of the problem and some modest suggestions that would greatly enhance the fairness to defendants in trials involving this type of testimony.

II. Handling informers' testimony: Problems and potential fixes

a. The risks posed by informers

The dubiousness of informers' testimony stems from their obviously self-interested motives. "Never has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is not only to have the best lawyer money can buy or the court can appoint, but to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration." Commonwealth of N. Mariana Islands v. Bowie, 243 F.3d 1109, 1123 (9th Cir. 2001) (Trott, J.). This personal stake encourages exaggeration or outright lying—especially if the witness is a routine snitch or fraudster.

The statistics track the intuition. Barry Scheck, the founder of the Innocence Project, writes that "[f]alse testimony by incentivized witnesses is a leading cause of wrongful conviction in capital cases nationally, a contributing factor in nearly half of such exonerations," and that "[o]f 349 DNA-based exonerations, 17 percent involved an incentivized witness." Justice Can Be Tainted by Use of Informants' Testimony, Seattle Times (May 2, 2017), https://www.seattletimes.com/opinion/justice-can-be-tainted-by-use-of-informants-testimony/.

"In all, there have been 111 death row exonerations since capital punishment was resumed in the 1970s. The snitch cases account for 45.9% of those. That makes snitches the leading cause of wrongful convictions in U.S. capital cases." Northwestern University School of Law Center on Wrongful Convictions, The Snitch System, at 3 (2004), https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/documents/SnitchSystemBooklet.pdf. Relatedly, in a study of 350 wrongful convictions for potentially capital crimes, Professors Bedau and Radelet found that more than one third involved perjurious witness testimony. Hugo Adam Bedau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 60 (1987).

Particularly destructive informants include Willie Kemp, "who, in return for money, trumped up criminal cases against 32 innocent people," Trott, supra, at 6; Paul Skalnik, who, after prosecutors stopped supporting him, "claimed to have given information or testimony in more than 50 cases and suggested that much of that evidence was tainted," Pamela Colloff, How This Con Man's Wild Testimony Sent Dozens to Jail, and 4 to Death Row, N.Y. Times Mag. (Dec. 4, 2019), https://nyti.ms/33PgQ9R; and Odell "Cookie" Hallmon, Jr., whose since-recanted testimony played a key role in Mississippi's obsessive prosecution of Curtis Flowers—tried six times for the same murder, convicted four times, and finally released from prison after 20 years after the Supreme Court vacated his conviction for the third time in Flowers v. Mississippi, 139 S. Ct. 2228 (2019), see The Life and Crimes of Odell Hallmon, APM Reports: In the Dark (May 22, 2018), https://www.apmreports.org/episode/2018/05/22/in-the-dark-s2e5 (The accompanying podcast is a must-listen.).

b. The inadequate approach to this risk

Any failures by the courts and prosecutors to police this problem probably do not stem from lack of recognition. The Supreme Court has, at least per its self-assessment, "long recognized the "serious questions of credibility" informers pose." Banks v. Dretke, 540 U.S. 668, 701 (2004). Similarly, the Department of Justice's Principles of Federal Prosecution require prosecutors to assess "whether the testimony or other information provided will be credible, [and] whether it can be corroborated by other evidence" before agreeing to a deal with an informer. Justice Manual 9-27.620 (updated July 2020).

But those warnings are mostly paper. In practice, there are few limits on informers' testimony. Unlike the treatment of the out-of-court statements of a co-conspirator under Federal Rule of Evidence 801(d)(2)(E)—as discussed by Mike Miller & Morgan Lucas, The Admissibility of Co-Conspirator Statements Revisited, N.Y.L.J. Oct. 26, 2020, at 4—federal courts, unlike the courts of sixteen states, admit accomplice testimony with no corroboration. See Hughes, supra, at 31 & nn.121, 122.

Perhaps more troubling, "the suggestion of some older cases that an agreement with a witness should only demand full and truthful testimony and should in no way be contingent on the success of the prosecution seems to have crumbled." Hughes, supra, at 25. Courts have upheld convictions based on the testimony of informers who anticipated payment in return for a conviction, had in fact been paid for results, and had been promised a sliding scale of compensation "on the basis of an appraisal of the extent and quality of [their] work." Id. at 25-26 (citing United States v. Valle Ferrer, 739 F.2d 545, 546-47 (11th Cir. 1984); Heard v. United States, 414 F.2d 884, 886 (5th Cir. 1969); United States v. Crim, 340 F.2d 980, 990 (4th Cir. 1965) (per curiam)). In addition to promises of payment, though the stated rule is that the government may not explicitly guarantee lenient sentencing to an informer pending favorable

testimony, see Shabazz v. Artuz, 336 F.3d 154, 165 (2d Cir. 2003), courts have approved arrangements that seem to any reasonable person to violate—or at least skirt—this principle, such as a prosecutor's recommendation for sentencing leniency "depending principally upon the value to the Government of the defendant's cooperation," United States v. Dailey, 769 F.2d 192, 194 (1st Cir. 1985); see also United States v. Waterman, 732 F.2d 1527 (8th Cir. 1984) (en banc) (affirming by an equally divided en banc court—and thus overturning a panel that had come out in favor of the defendant—when the government had promised to move to further reduce a witness's sentence if he procured further indictments).[1]

Instead of barring problematic arrangements or placing reasonable restrictions on testimony, courts have relied primarily on jury instructions, under the theory that the problems with informers' reliability is essentially a credibility issue that ought to be determined by a properly instructed jury. Justice Jackson in On Lee wrote that "a defendant is entitled to broad

[1] Of great concern to those who have sounded the alarm about the inadequate policing of the government's disclosure obligations under Brady v. Maryland, 373 U.S. 83 (1963) (for our perspective on this issue, see Jay Goldberg & Alex S. Huot, The "Brady" Obligation: A True Boost from District Judge Allison Nathan, N.Y.L.J. July 31, 2020, at __), the Supreme Court has held that failure to disclose a cooperation agreement does not require reversal without the demonstration of prejudice. See United States v. Bagley, 473 U.S. 667 (1985); see also Dawkins v. Kirkpatrick, No. 09CV5756-LAP-FM, 2016 WL 8738236, at *8 (S.D.N.Y. Jan. 27, 2016) (explaining that the Supreme Court's contrary result in Banks v. Dretke, 540 U.S. 668, applies only to the sentencing phase of death penalty cases, not to convictions themselves), report and recommendation adopted, No. 09-CV-5756 (LAP), 2017 WL 1403290 (S.D.N.Y. Apr. 18, 2017).

latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions," 343 U.S. at 757, an exhortation echoed by Hoffa v. United States, 385 U.S. 293, 311-12 (1966), and Banks, 540 U.S. at 701-02. But the Court has never elaborated on what is to be included in such "careful instructions." An inconsistent and ineffectual regime has ensued.

Though it is common for a circuit's pattern jury instruction to include some note of caution about informers' testimony, these instructions typically lack specifics, like a pack of cigarettes that says "smoking in excess may cause health problems" rather than "smoking kills." They also vary from circuit to circuit, sometimes substantially. For comparison,

- Second Circuit: The jury is instructed that, while it is not improper for the government to use informants, their testimony must be examined with greater scrutiny than that of a typical witness, and jurors should consider whether from the government have motivated the informant-witness to testify falsely in the belief that a benefit will follow only upon conviction. See, e.g., United States v. Jacobs, 735 F. App'x 739, 741–42 (2d Cir. 2018); accord 1 Modern Federal Jury Instructions-Criminal P 7.01 (2020).
- Seventh Circuit: The jury is merely told that the informant received a benefit and was involved in the charged crime and instructed to "give the witness's testimony whatever weight you believe is appropriate, keeping in mind that you must consider that testimony with caution and great care." Fed. Crim. Jury Instr. 7th Cir. 3.05 (2020 ed.).
- Eighth Circuit: The jury is merely told that it "may give [the informer's] testimony such weight as you think it deserves. Whether or not his information or

testimony may have been influenced by [the arrangement with the government] is for you to determine." Model Crim. Jury Instr. 8th Cir. 4.06 (2020).

Perhaps unsurprisingly given this variety, omitting a detailed instruction—or even a basic instruction to treat an informer's testimony with special care—is not grounds for reversal. See United States v. Vaughn, 430 F.3d 518, 522–23 (2d Cir. 2005) (upholding conviction where the trial court had given a general "interested witness" charge); United States v. Ridinger, 805 F.2d 818, 820–22 (8th Cir. 1986) (no "cautionary tail" of instruction to treat informer's testimony with special care); United States v. Solomon, 856 F.2d 1572, 1578–79 (11th Cir. 1988) (no mention in instruction of the witness's "credibility as an accomplice or a drug addict"); see also United States v. Hopkins, 518 F.2d 152, 155 (3d Cir. 1975) (holding that while an instruction on witness's drug addiction and status as a paid informant would have been proper, there was no error when defense counsel had not requested it).

Given the wide array of cooperation agreements courts permit and the lack of a corroboration requirement, this half-hearted approach to jury instructions does not adequately protect against the significant risk of perjury when an informer takes the stand.

c. A better approach

We propose a number of fixes that, if they would not solve the problem altogether, would greatly improve on the status quo.

First, in recognition of the heightened risk that an informer will lie on the stand, and in accordance with the treatment of co-conspirators' out-of-court statements as discussed above, courts should require corroboration of informers' testimony. It is simply inappropriate to convict on the basis of an informer's testimony alone. This is a modest suggestion because competent

prosecutors are already cautious about trying to prove crucial evidence with an informer's testimony and no further support.

Second, courts should allow expert testimony about the unreliability of informers, and especially the heightened risk that they might commit perjury. Our maxim here is that what lawyers and judges know to be so, jurors should also know. There is by this point simply too much research about the risk of informers for it to be said that a jury deliberating without the benefit of these findings has made a fully informed decision. Testimony by qualified experts, based on reliable research about informers and false convictions, should be viewed as "specialized knowledge [that would] help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a); see Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Opponents of this idea would no doubt contend that expert testimony would intrude on the jury's role of determining witnesses' credibility. However, under the Federal Rules, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704(a) & comment. Further, Rule 608(a), by shedding the common-law bar against opinion evidence regarding the truthful or untruthful character of a witness, has opened the door to expert character testimony relevant to a witness's credibility. See Anne Bowen Poulin, Credibility: A Fair Subject for Expert Testimony?, 59 Fla. L. Rev. 991, 1008–09 (2007). And this would not be the first time expert evidence has been used in the credibility context. Courts—though by no means universally—have held that expert testimony is admissible to prove the witness suffers from a psychiatric condition that creates a propensity to lie. See United States v. Shay, 57 F.3d 126, 131 (1st Cir. 1995); United States v. Gonzalez-Maldonado, 115 F.3d 9, 14-15 (1st Cir. 1997); but see United States v. Beasley, 72 F.3d 1518, 1528 (11th Cir. 1996); Bastow v. General

Motors Corp., 844 F.2d 506, 510-11 (8th Cir. 1988). Just as knowledge of a psychiatric condition can help a jury assess a witness's testimony, so too can knowledge of a widespread and well-documented trend. If there is a specific problem with the expert's proffered methods, let the government challenge them under Daubert. And of course the prosecutor would be free to cross-examine the expert witness or otherwise try to refute the expert testimony.

Third, jury instructions should be much sharper. We know of no instruction currently in use that sufficiently alerts the jury to the sharpness of the incentives informers have to lie and to the frequency with which they do. A better instruction would be the following, which borrows from Judge Trott's language in United States v. Bernal-Obeso, 989 F.2d 331, 334 (9th Cir. 1993):

> At times, informants can be untrustworthy. They sometimes will stop at nothing to maneuver themselves into a position where they have something to sell. On the other hand, informants with nothing to sell sometimes manufacture evidence and fabricate something of value. They may even go so far as to create corroboration if they lie by recruiting others to go along with them in the plan to deceive.

No doubt courts would balk at using language quite that pointed, but the general tenor is appropriate. What lawyers and judges know to be so, jurors should also know. It is unacceptable that judges, prosecutors, and defense lawyers alike understand how devious and dishonest informers can be, and yet this severe problem is cast in anodyne and innocuous terms to the extent a jury instruction addresses the issue at all. If the jury instruction is the defendant's shield, let it be made of steel, not silk.

III. The dilemma of cooperation agreements as evidence for the prosecution

a. The anomalous use of cooperation agreements to bolster informers' testimony

Prosecutors understand full well that defense counsel will take up On Lee's invitation to exercise "broad latitude to probe credibility by cross-examination." 343 U.S. at 757. To prevent the damage this might cause to the prosecution's case, the government routinely seeks to "pull the punch" by bringing out in the opening statement and on direct examination that the witness is a criminal who has pleaded guilty and is cooperating with the government, as well as details of the informer's crimes and past lies. Judge Trott advises prosecutors that "[i]f you under inform the jurors about the extent of the witness' negative baggage, a clever defense attorney might accuse you of hiding relevant information, or 'gilding the rotten lily.' . . . Bring out all the problems such as every benefit being extended to the witness in consideration of his testimony, previous inconsistent statements, etc., and confront the witness with them. Don't wait for the defense. You must control the manner in which the jury first hears of the dirt or the dirt will end up on you." Trott, supra, at 56, 61; see also Fed. R. Evid. 607 ("Any party, including the party that called the witness, may attack the witness's credibility.").

Serious problems arise, however, when the government goes beyond this sort of "self-impeaching" and attempts to rehabilitate the witness by using details of the cooperation agreement. It is boilerplate for cooperation agreements now to include a "truthfulness provision" and a "penalty provision," which are probably designed for exactly this scenario, despite their purported purpose of deterring misleading testimony. See Rajan S. Trehan, An "Unfortunate Bit of Legal Jargon": Prosecutorial Vouching Applied to Cooperating Witnesses, 114 Colum. L. Rev. 997, 1009–10 (2014). The "truthfulness provision" requires the witness to tell the truth in government interviews and when testifying—as determined by the prosecutors, while the "penalty provision" provides that if the witness lies, the government will no longer recommend a lenient sentence and may prosecute the witness for perjury. See id.; e.g., Plea Agreement, United

States v. Jorge Rivera, 18-CR-834 (S.D.N.Y. Feb. 15, 2019) (on file with authors). Introducing these provisions at trial—either through a verbal description by the witness or by sending the document itself to the jury—could make jurors think that the informer has a disincentive to lie and is therefore probably credible.

This practice runs headlong into the prohibition on vouching or bolstering. Prosecutors may not say or imply that they guarantee the truth of a witness's testimony and may not tie a witness's credibility to their own as public servants. See United States v. Smith, 962 F.2d 923, 933–36 (9th Cir. 1992). The rationale for this proscription is that "[t]he jury knows that [the prosecutor] has prepared and presented the case and that he has complete access to the facts uncovered in the government's investigation. Thus, when the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore his views, however biased and baseless they may in fact be." United States v. Freisinger, 937 F.2d 383, 386 (8th Cir. 1991) (citing United States v. Modica, 663 F.2d 1173 (2d Cir. 1981)).

Also relevant, the Rules of Evidence also tightly restrict how a party can use a witness's prior consistent statements to bolster that witness's testimony. Under Rule 801(d)(1)(B), the prior statement is admissible to rebut an attack on the witness's credibility or motive only if the witness made the prior statement before the motive to lie arose—in effect, before becoming involved with the police. See United States v. Forrester, 60 F.3d 52, 64 (2d Cir. 1995); United States v. Awon, 135 F.3d 96, 99–101 (1st Cir. 1998), abrogated on other grounds by United States v. Piper, 298 F.3d 47 (1st Cir. 2002).

The simplest and most obvious understanding of the truthfulness and penalty provisions of a cooperation agreement as evidence is that they bolster the witness in violation of both these principles. Showing the jury contractual language in which the government requires the witness

to tell the truth amounts to the government vouching that the witness will do so. The witness's promise to tell the truth and references to pre-trial statements to the government suggest the witness has been consistent about what he is saying, despite the motive to lie having arisen by the time he began providing information.

And yet, nationwide, the plea agreement, including these troublesome provisions, is admissible. In most circuits, there are no restrictions on admissibility at all. "Specifically, the First, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits have ruled that references to a requirement for truthful testimony are permissible whether or not the witness's credibility has already been attacked." Trehan, supra, at 1011 (citing United States v. Lewis, 110 F.3d 417, 421 (7th Cir. 1997); United States v. Spriggs, 996 F.2d 320, 324 (D.C. Cir. 1993); United States v. Lord, 907 F.2d 1028, 1031 (10th Cir. 1990); United States v. Drews, 877 F.2d 10, 12 (8th Cir. 1989); United States v. Townsend, 796 F.2d 158, 162-63 (6th Cir. 1986); United States v. Oxman, 740 F.2d 1298, 1303 (3d Cir. 1984), vacated on other grounds sub nom. United States v. Pflaumer, 473 U.S. 922 (1985); United States v. McNeill, 728 F.2d 5, 14 (1st Cir. 1984); United States v. Henderson, 717 F.2d 135, 137-38 (4th Cir. 1983); United States v. Edelman, 873 F.2d 791, 795 (5th Cir. 1989); United States v. Martino, 648 F.2d 367, 389 (5th Cir. June 1981), rev'd en banc on other grounds, 681 F.2d 952 (Former 5th Cir. 1982), aff'd sub nom. Russello v. United States, 464 U.S. 16 (1983)). Slightly more restrictive, the Second, Eleventh, and Ninth Circuits allow courts to admit the entire agreement if the defense has attacked the witness's credibility, the Second and Eleventh on the premise that this is permissible rehabilitative character evidence under Federal Rule of Evidence 608(a) and the Ninth Circuit on the grounds that any resulting prejudice caused by the plea agreement does not per se substantially outweigh its probative value so as to require exclusion under Rule 403. See United States v. Jones, 763

F.2d 518, 522 (2d Cir. 1985); United States v. Cruz, 805 F.2d 1464, 1480 (11th Cir. 1986); United States v. Roberts, 618 F.2d 530, 536 (9th Cir. 1980); see also Trehan, supra, at 1023-24 (noting that the Ninth Circuit's use of a balancing test rather than a bright-line rule makes it difficult to predict whether a plea agreement will be admissible in a particular case).

Thus, while there is some variation among circuits, the salient point is that the agreement is admissible nationwide—especially given that in a circuit that requires an attack by the defense first, it is pretty unrealistic to expect defense counsel to refrain from commenting on the weakest point in a key government witness's credibility. The cases offer a number of justifications for why this is not impermissible vouching, but they do not hold up:

First, that a plea agreement is a "double-edged sword" in that it lists the defendant's crime and guilty plea. United States v. Edwards, 631 F.2d 1049, 1051 (2d Cir. 1980) (quoting United States v. Arroyo-Angulo, 580 F.2d 1137, 1146 (2d Cir. 1978)). On the contrary, the sword is single-edged, as it is invariably the prosecution that seeks to unsheathe it. And the "double-edged sword" analysis does not apply to the obviously one-sided truthfulness and penalty provisions, which are at the heart of the problem.

Second, that an attack on the informer's credibility is inevitable. See 4 Weinstein's Federal Evidence § 607.09 & n.2 (2020). This could be a justification for jettisoning the requirement that the defense attack first, but it does not respond to the vouching problem. A line of attack by the defense, whether real or anticipated, does not permit the prosecutor to simply ignore strongly justified restrictions on what may be argued. (There is a similar response to the argument that the prosecution can rehabilitate a witness's character or reputation under Rule 608(a); even if rehabilitation is permissible generally, it must be done by proper means.)

Third, that the real evil to guard against is the prosecutor "telling or hinting to the jury that the prosecutor has reasons unknown to it for believing that a government witness is telling the truth." United States v. Edwards, 581 F.3d 604, 609 (7th Cir. 2009) (Posner, J.). From this perspective, a problem only arises if the prosecutor goes beyond offering the agreement and overdoes it, perhaps by referring excessively to the truthfulness and penalty provisions or by interjecting statements of personal opinion or independent verification. See United States v. Thornton, 197 F.3d 241, 251 (7th Cir. 1999); Freisinger, 937 F.2d at 386; United States v. Bowie, 892 F.2d 1494, 1498 (10th Cir. 1990).

The error with this view is that it is impossible to admit the truthfulness and penalty provisions without vouching, even if there is no improper comment beyond the terms of the document. The fact that the prosecutor signed an agreement about truthfulness with the witness inescapably suggests to the jury that the prosecutor believes the witness is someone the prosecutor trusts to keep his word—why else sign the agreement? Then, once the jury is aware of the truthfulness and penalty provisions, the prosecutor's active participation in and apparent approval of the witness's testimony give the appearance that, in the prosecutor's judgment, the witness is living up to the deal. It is vouching through and through.

And one more problem that the putative justifications do not address: Without more context and information, the plea agreement can leave jurors with an inaccurate picture of the informer's motives. In theory, the possibility of prosecution for perjury mentioned in the penalty provision should deter lying. But the jury never hears testimony or gets a jury instruction relating to how often the government prosecutes a witness for lying on the government's behalf. Certainly this is not common; we suspect it does not happen. Without this crucial context, the

jury is likely to overestimate the extent to which the plea agreement encourages honesty. So, it is not an acceptable solution to just "let the jury decide."

b. Better approaches

Ideally, courts should prohibit introduction of the truthfulness and penalty provisions as impermissible vouching. The Ninth Circuit seemed poised to go this route in its early Roberts opinion:

> A strong case can be made for excluding a plea agreement promise of truthfulness. The witness, who would otherwise seem untrustworthy, may appear to have been compelled by the prosecutor's threats and promises to come forward and be truthful. The suggestion is that the prosecutor is forcing the truth from his witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation.
>
> 618 F.2d at 536.

But the court pulled back from this strong language to settle on the milquetoast holding that "[t]he court should consider the phrasing and content of the promise to ascertain its implications and decide whether an instruction to the jury would dispel any improper suggestions." Id. The Ninth Circuit would later develop this vague direction into an impossibly complicated list of factors for balancing. See United States v. Necoechea, 986 F.2d 1273, 1278 (9th Cir. 1993). Instead, it should have stuck the landing.

If the plea agreement is to be admitted, the truthfulness and penalty provisions should be redacted. The Supreme Judicial Court of Massachusetts reached this result in Commonwealth v. Ciampa, 547 N.E.2d 314 (Mass. 1989): "The statement that the agreement was 'contingent upon the truthfulness of [the informer's] representation to the Commonwealth' . . . should have been redacted on request by a defendant. That statement can be read as asserting the Commonwealth's reasoned conclusion that [the informer's] representation was correct." Id. at 318. The Court also

held that the judge's instruction, which was similar to instructions on informers' testimony held to be sufficient by federal courts, see id. at 319 n.8, "failed adequately to direct the jury's attention to the potential influences of the plea agreement on [the informer's] credibility and failed as well to dispel any implication inherent in the plea agreement, and in the presentation of the informer as a government witness, that the government knew or was warranting that the informer was telling the truth." Id. at 319.

An even stronger approach to the instruction issue is found in Judge Friendly's concurrence in United States v. Arroyo-Angulo:

> [T]he judge should have instructed that the promise in the cooperation agreement adds little to the truth-telling obligation imposed by the oath; that the prosecutor often has no way of knowing whether the witness is telling the truth or not; that the books are not filled with perjury indictments of Government witnesses who have gone beyond the facts; and that an acquittal would not mean that as a matter of course the Government would seek such an indictment or even fail to make its promised recommendation of leniency.
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> 580 F.2d at 1150 (Friendly, J., concurring).

District Judge Nickerson followed Judge Friendly's lead in United States v. Kurzban, telling the assistant U.S. attorney, "If you emphasize this or have him [the witness] read it, I will tell you, you are going to get a charge. It is highly unlikely that the government—and I take this from United States v. Arroyo-Angulo—is going to declare an agreement null and void because someone gives testimony that's false and too favorable to the Government." Trial Tr. At 360, Case No. 88-CR-441 (E.D.N.Y. 1988).

By making clear that the government lacks special knowledge of the informer's truthfulness and that the penalty provision is uncertain to be enforced, this type of instruction would help prevent the jury from putting too stock in the most troubling provisions of the agreement.

Finally, a suggestion for defense attorneys: draft a witness cooperation agreement for your witness, which mirrors, as closely as possible, the government's agreement, only your witness will suffer the loss of a large amount of property if you determine he is not being accurate, complete and truthful. The government is certain to move for a hearing under Federal Rule of Evidence 104 to test the foundation of this agreement. This will put you in a position to argue that the government's agreement should be subject to similar scrutiny, especially on the issue of how often the government actually prosecutes cooperating witnesses for lying in a way that helps the government.

IV. Conclusion

Perjury by informers is not just a problem for defendants. "Such false testimony and false evidence corrupts the criminal justice system and makes a mockery out of its constitutional goals and objectives." Bowie, 243 F.3d at 1124. And it is even worse when a prosecutor ties the authority of the state to the witness. Multiple cases on vouching have cited the famous admonition in Berger v. United States:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> 295 U.S. 78, 88 (1935).

Similarly, permitting the introduction of dubious testimony, letting prosecutors bolster it, and sending the jurors to deliberate without proper instruction on the risks of accepting it violates

the judge's duty to "maintain and enforce high standards of conduct . . . so that the integrity and independence of the judiciary may be preserved." Code of Conduct for U.S. Judges, Canon 1.

With these stakes in mind, courts must adopt reforms to curb the misuse of informants' testimony.

CASES

It is misconduct for the prosecution to vouch for a witness personally or suggest that there are facts not known to the jury establishing the witness's credibility.

- United States v. Smith, 962 F.2d 923, 933–36 (9th Cir. 1992)
- United States v. Freisinger, 937 F.2d 383, 386 (8th Cir. 1991) (citing United States v. Modica, 663 F.2d 1173 (2d Cir. 1981))

The Supreme Court has recognized the "serious questions of credibility" these witnesses pose and encouraged jury instructions on this risk.

- Banks v. Dretke, 540 U.S. 668, 701 (2004) (more recent than On Lee and Hoffa)

The truthfulness and penalty provisions should have been redacted, and the judge's instruction was not sufficient to cure the prejudice from failing to redact.

- Commonwealth v. Ciampa, 547 N.E.2d 314 (Mass. 1989)

The Second and Eleventh Circuits allow the prosecution to offer the cooperation agreement or testimony about it into evidence only after the defense has attacked the witness's credibility.

- United States v. Jones, 763 F.2d 518, 522 (2d Cir. 1985)
- United States v. Cruz, 805 F.2d 1464, 1480 (11th Cir. 1986)

The Ninth Circuit uses a complicated balancing test with many factors to determine whether the cooperation agreement should be admitted.

- United States v. Necoechea, 986 F.2d 1273, 1278 (9th Cir. 1993).

An additional Second Circuit Case:

- United States v. Jones, 763 F.2d 518, 522 (2d Cir. 1985)

962 F.2d 923
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Shawn Joaquin SMITH, aka "S-Man", Defendant-Appellant.

No. 89-10649.
|
Argued and Submitted Nov. 4, 1991.
|
Decided April 24, 1992.

Synopsis

Defendant was convicted in the United States District Court for the District of Nevada, Philip M. Pro, J., of attempted possession of controlled substance with intent to distribute and use of a firearm in a drug trafficking crime, and he appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) evidence was sufficient to support convictions; (2) imposition of cumulative sentences did not violate double jeopardy; but (3) prosecutor's improper vouching for credibility of prosecution witness was plain error.

Reversed and remanded.

Poole, Circuit Judge, filed opinion concurring in part and dissenting in part.

Attorneys and Law Firms

***925** Annette R. Quintana, Las Vegas, Nev., for defendant-appellant.

Bradford R. Jerbic, Asst. U.S. Atty., Thomas R. Green, Asst. U.S. Atty., Las Vegas, Nev., for plaintiff-appellee.

Appeal from the United States District Court for the District of Nevada.

Before: POOLE, REINHARDT, and FERNANDEZ, Circuit Judges.

Opinion

REINHARDT, Circuit Judge:

Shawn Joaquin Smith appeals his conviction for attempted possession of a controlled substance with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846, and use of a firearm in a drug trafficking ***926** crime, in violation of 18 U.S.C. § 924(c)(1). Smith contends, *inter alia,* that the prosecutor's improper vouching during closing argument constituted plain error and warrants reversal of his conviction notwithstanding his failure to raise a contemporaneous objection. We agree.

I

In 1988, United States Customs agents together with the Las Vegas Metropolitan Police Department began a sting operation designed to attract prospective buyers of large quantities of narcotics. On December 3, 1988, one of the agents was contacted by Leonard Erivin, who negotiated a preliminary deal for five kilos of cocaine at $14,500 per kilo on behalf of his associates and then gave the agent a telephone number for George Brown. Another member of the undercover team, Detective Davis, contacted Brown and arranged a preliminary meeting at Carrows Restaurant. At the restaurant, Brown informed Davis that he represented another person, whom he identified as his "main man" or "money man".

On December 5, after obtaining a sample of the cocaine from Davis and Detective Orduno, who posed as the supplier, Brown drove to Lisbon Hall's house. When Brown arrived at the house, nobody was there. The officer who had followed Brown from the meeting with Davis and Orduno saw Brown drive to a nearby store and place a call. Shortly thereafter, Hall arrived at the house with appellant Smith, and the three men entered the house together. Brown subsequently called Davis and arranged to conduct the cocaine transaction at Carrows Restaurant. The surveillance officer observed Hall and Brown leave the house in Brown's car with two satchels, later found to contain $71,500. Slightly later, Smith emerged from the house and drove off in the car in which he and Hall had arrived.

When the two vehicles arrived at the restaurant, Smith circled the parking lot two times before parking in a spot halfway between Orduno's car and the car driven by Hall and Brown.

the shotgun in order to ensure that the cocaine transaction undertaken by Hall and Brown went as planned. *United States v. Mason,* 658 F.2d 1263, 1270-71 (9th Cir.1981) (upholding convictions under section 924(c) where, although the guns were never displayed, the evidence showed that the defendants "were brought along for protection and [that] the guns were an integral part of their function"). Accordingly, we decline to set aside his conviction on the weapons count on the ground that it is unsupported by the evidence.[5]

III

Next, Smith argues that the imposition of cumulative sentences for the attempted possession and firearms convictions violates the double jeopardy clause of the fifth amendment. The double jeopardy clause encompasses three protections. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969) (footnotes omitted). Smith contends that because the prosecution relied on the same conduct to establish both offenses, the imposition of cumulative sentences for those offenses violates the third principle stated in *Pearce.* We disagree.

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), sets forth the test that courts must follow to determine whether punishment under two separate statutory provisions violates the double jeopardy clause. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." *Id.* at 304, 52 S.Ct. at 182. However, the Court has also articulated a significant limitation on the *Blockburger* test. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter,* 459 U.S. 359, 366, 103 S.Ct. 673, 677, 74 L.Ed.2d 535 (1983). In other words, the *Hunter* Court recast the *Blockburger* test as a " 'rule of statutory construction' " which does not apply where there is " 'a clear indication of contrary legislative intent.' " *Id.* at 367, 103 S.Ct. at 678 (quoting *Albernaz v. United States,* 450 U.S. 333, 340, 101 S.Ct. 1137, 1142, 67 L.Ed.2d 275 (1981)).

Section 924(c)(1) of Title 18, quoted above, expressly authorizes the imposition of a five-year sentence "*in addition to* the punishment provided for [the] ... drug trafficking crime" that serves as the predicate offense. *Id.* (emphasis added). Smith concedes that it is clear that Congress intended to impose cumulative punishments for a substantive drug offense and a related firearm offense. *Cf. United States v. Browne,* 829 F.2d 760, 767 (9th Cir.1987) (double jeopardy clause does not prevent imposition of a cumulative sentence under section 924(c) for use of a firearm during armed bank robbery), *cert. denied,* 485 U.S. 991, 108 S.Ct. 1298, 99 L.Ed.2d 508 (1988); *United States v. Shavers,* 820 F.2d 1375, 1377-78 (4th Cir.1987) (same). However, he maintains that there is no evidence that Congress intended to punish cumulatively for an *attempt* offense and a related firearm offense. We find no basis for this distinction.

Section 924(c) authorizes the imposition of cumulative punishment for the use of a firearm in relation to any federal drug trafficking crime. 18 U.S.C. § 924(c)(1). Attempt ***933** to possess a controlled substance with intent to distribute is such a crime. 21 U.S.C. §§ 841(a)(1), 846. Moreover, the statute goes on to define "drug trafficking crime" to include any offense included in the Controlled Substances Act. 18 U.S.C. § 924(c)(2). That Act included a provision criminalizing attempt to commit a federal narcotics crime. Pub.L. No. 91-513, Title II, § 406, 84 Stat. 1236, 1265 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4595. We note that the Seventh Circuit has upheld the imposition of cumulative punishments for conspiracy to possess a controlled substance and a related firearm offense. *United States v. Powell,* 894 F.2d 895, 899-900 (7th Cir.), *cert. denied,* 495 U.S. 939, 110 S.Ct. 2189, 109 L.Ed.2d 517 (1990). Because a single statutory provision, section 846 of Title 21, criminalizes both conspiracy and attempt, it is singularly unlikely that Congress intended to authorize cumulative punishment in the case of one but not the other. Accordingly, we conclude that the cumulative punishments imposed on Smith are consistent with the principle set forth by the Court in *Hunter* and do not violate the fifth amendment.

IV

Finally, Smith contends that the prosecutor's closing remarks constituted improper prosecutorial vouching for Brown. He urges that the prosecutor's comments were so egregious that they rise to the level of plain error, and that his conviction

should therefore be set aside notwithstanding his counsel's failure to raise a contemporaneous objection.[6] *United States v. Wallace,* 848 F.2d 1464, 1473 (9th Cir.1988). Because the prosecutor vouched not only on behalf of the government in general but also on behalf of the court specifically, we are persuaded that plain error occurred.

Improper prosecutorial vouching occurs when the prosecutor "place[s] the prestige of the government behind the witness" by providing "personal assurances of [the] witness's veracity." *United States v. Roberts,* 618 F.2d 530, 533 (9th Cir.1980), *cert. denied,* 452 U.S. 942, 101 S.Ct. 3088, 69 L.Ed.2d 957 (1981). In the case before us, the prosecutor's response to Smith's counsel's attack on Brown's credibility constituted the sort of personal and institutional guarantee that the law forbids. By assuring the jury that Brown could not just "g[e]t up here and sa[y] whatever he wanted to say" because he would prosecute him for perjury if he did so, the prosecutor was in fact commenting on Brown's actual testimony. Those remarks made it clear that no such prosecution of Brown was intended. The conclusion that followed inexorably from the remarks was that in the prosecutor's opinion Brown's testimony was true.

The prosecutor reinforced this message with repeated comments aimed at establishing his own veracity and credibility as a representative of the government. He repeatedly assured the jury that his job was not to seek a conviction but rather to guarantee a fair trial and turn over any favorable ***934** evidence to the defense. Later, not content to rest on his previous efforts, he returned to this theme again, noting that "the government's job is to ... ferret through all the smoke screens and lead you to the truth." Finally, he stated: "[I]f I did anything wrong in this trial I wouldn't be here. The court wouldn't allow that to happen." The cumulative effect of these statements was to submit the prosecutor's personal conviction of Smith's guilt, together with the government's as a whole, as factors for the jury to consider in its deliberations along with the actual evidence. Because of the unique power that attends the prosecutor's special role, that is something he may not do. *United States v. Garza,* 608 F.2d 659, 665 (5th Cir.1979). " 'The prosecutor may neither dispense with the presumption of innocence nor ... sit as a thirteenth juror.' " *Id.* (quoting *Hall v. United States,* 419 F.2d 582, 587 (5th Cir.1969)). The prosecutor's statements were clearly improper.

Improper prosecutorial vouching also occurs when the prosecutor "indicate[s] that information not presented to the jury supports the witness's testimony." *Roberts,* 618 F.2d at 533. Under this standard, the prosecutor's statement that the court wouldn't allow him to do anything wrong was also clearly improper. That statement, in effect, attributed to the court some independent knowledge regarding the government's decision to prosecute Smith and its subsequent conduct of the trial. Moreover, it suggested to the jury that the court also was satisfied as to the truth of Brown's testimony. *Id.* at 534. Just as the prosecutor may not take advantage of his special role as representative of the sovereign to imply that the government's investigatory apparatus is satisfied of the defendant's guilt, even more so may he not abuse his position and his obligation to see justice done by imputing such satisfaction to the court.

The government, relying on *United States v. Young,* 470 U.S. 1, 12-13, 105 S.Ct. 1038, 1044-45, 84 L.Ed.2d 1 (1985), suggests that the prosecutor's comments were an excusable "invited response" to the statements made by Smith's counsel. We do not think that the transcript of those statements reveals anything other than a legitimate attempt by defense counsel to cast doubt on the credibility of a government witness who is testifying pursuant to a plea bargain. Smith's counsel accused Brown of wanting to please the government. At no time did he accuse the prosecutor of withholding evidence or suborning perjury. In fact, he made clear that it was not his intent to do so.[7] Attacks on the credibility of a defense witness are legitimate tools of advocacy and do not, standing alone, trigger the invited response rule. *United States v. Skarda,* 845 F.2d 1508, 1511 (8th Cir.1988). However, even if we were to conclude that Smith's lawyer's comments touched on the prosecutor's integrity as well as that of Brown and thereby invited a response, only a far more limited statement would have been justified.[8] *Young,* 470 U.S. at 12-13, 105 S.Ct. at 1044-45 (noting that the prosecutor may "d[o] no more than respond substantially in order to 'right the scale.' "). ***935** The prosecutor's recurrent harping on the issue of his special role was clearly improper. The repeated comments also demonstrate that the errors were not inadvertent; clearly, we are not dealing with a spontaneous comment that could be regretted but not retracted.

Having determined that the prosecutor's statements cannot properly be characterized simply as an invited response, we turn to the separate question whether those statements were sufficiently egregious to amount to plain error. The plain error doctrine allows reversal only for "those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' " *Young,* 470 U.S. at 15, 105 S.Ct. at 1046

(quoting *United States v. Atkinson,* 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936)). In other words, we may reverse Smith's conviction only if the prosecutor's improper conduct so affected the jury's ability to consider the totality of the evidence fairly that it tainted the verdict and deprived Smith of a fair trial. *Id.; see also United States v. Giese,* 597 F.2d 1170, 1199 (9th Cir.), *cert. denied,* 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979).

We are well aware of the rule that we must consider the challenged comments in the context of the entire trial, in order to avoid " 'turn[ing] a criminal trial into a quest for error.' " *Young,* 470 U.S. at 16, 105 S.Ct. at 1046 (quoting *United States v. Johnson,* 318 U.S. 189, 202, 63 S.Ct. 549, 555, 87 L.Ed. 704 (1943) (Frankfurter, J., concurring)); *see also United States v. Simtob,* 901 F.2d 799, 806 (9th Cir.1990). In this case, however, the jury's acceptance of Brown's testimony as true was of critical importance. As discussed above, Brown provided the only testimony indicating that Smith participated in a discussion between Hall and Brown regarding the transaction and, thus, the only evidence that Smith's role in the transaction was that of a joint venturer-and even that testimony was scanty and conclusory. In order for the jury to be convinced beyond a reasonable doubt that Smith was guilty of attempted possession, it was essential that it have no reasonable doubts regarding the accuracy and reliability of Brown's account of the events.

We doubt that the remaining evidence against Smith would have been sufficient to support his conviction for attempted possession. That evidence did not establish that Hall shared any part of the ability to exercise dominion and control over the cocaine with Smith. The evidence consisted solely of records of several telephone calls from Hall's cellular phone to the house where Smith lived, the fact that Smith was with Hall and Brown at Hall's house, the fact that Smith followed Hall and Brown to Carrows Restaurant and circled the parking lot twice before parking, and the fact that Smith was sitting in the car holding a shotgun when he was arrested. Absent Brown's testimony, Smith's connections with Hall would not have demonstrated that Smith's level of involvement in the attempted purchase was sufficient to establish beyond a reasonable doubt the existence of a joint venture.[9] *Arellanes,* 302 F.2d at 606. We must therefore consider the prosecutor's improper vouching on behalf of Brown with special care, and we cannot presume that those comments played only a minor role in a largely predictable calculus. *Simtob,* 901 F.2d at 806 (where the outcome of trial "depended greatly" upon the credibility of a particular government witness, prosecutorial vouching on behalf of that witness "could well have had critical influence").

Mere statements of personal opinion, when invited, do not rise to the level of plain error, even if reversal would have been required had the defendant's counsel interposed a timely objection. *Young,* 470 U.S. at 16-19, 105 S.Ct. at 1046-48. In ***936** another invited response case, we even declined to find reversible error in a prosecutor's statement, over objection, that in order to believe the defendant's accusations, "you have to believe the Government of the United States, in the person of the prosecutor standing before you ... have suborned that perjury." *United States v. Flake,* 746 F.2d 535 (9th Cir.1984), *cert. denied,* 469 U.S. 1225, 105 S.Ct. 1220, 84 L.Ed.2d 360 (1985). This case, however, differs from *Young* and *Flake* in two respects. First, as we have discussed, this is not an invited response case. Second, the prosecutor in this case did not confine himself to remarks about his role and that of the government in ensuring a fair trial.

The prosecutor in this case not only placed the prestige of the law enforcement branch of government behind his conduct of the trial and behind Brown's testimony, he also engaged in an additional and separate form of vouching that is qualitatively different than the statements involved in *Young* and *Flake.* In addition to invoking the integrity of the government, he invoked the integrity of the court. He stated: "But if I did anything wrong in this trial, I wouldn't be here. The court wouldn't allow that to happen." This final remark cannot be classified as simply an arguably invited comment on the prosecutor's special role. Rather, unlike the other comments that courts have on some occasions reluctantly overlooked, it placed the imprimatur of the judicial system itself on Brown's credibility. That is something we simply cannot permit.

Where the determination of a defendant's guilt or innocence hinges almost entirely on the credibility of a key prosecution witness, allowing a conviction to be obtained by a prosecutor's deliberately vouching for that witness on behalf of the court would pose a clear threat to the integrity of judicial proceedings. That particular form of vouching goes beyond the mere proffer of an institutional warranty of truthfulness; rather, it casts the court as an active, albeit silent, partner in the prosecutorial enterprise. In doing so, it strikes at two principles that lie at the core of our system of criminal justice. The first of these is that "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary...." *Coffin v. United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 402, 39

L.Ed. 481 (1895). The second, long elevated to constitutional significance because it is so closely intertwined with the first, is that "to perform its high function in the best way 'justice must satisfy the appearance of justice.' " *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) (quoting *Offutt v. United States,* 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954)). If the prosecution may invoke the court as the guarantor of its truthfulness when the veracity of its star witness is challenged and can then survive review for plain error, both the actual likelihood and the perception that an accused will receive a fair trial-a trial in which he is presumed innocent and in which the government must prove every element of the charge against him beyond a reasonable doubt-are severely diminished. That result is untenable. Smith's conviction is accordingly reversed for plain error.[10]

REVERSED AND REMANDED.

POOLE, Circuit Judge, concurring in part and dissenting in part:

The government certainly presented sufficient evidence to convict Smith of attempted possession of a controlled substance with intent to distribute and use of a firearm in a drug trafficking crime. However, the majority is plain wrong in holding that the prosecutor's conduct in this case constituted plain error. During a criminal trial defense counsel and the prosecutor frequently find themselves in sharp, even vitriolic, exchanges. Such are not too unusual given the high emotions that often surround the charges against the defendant and the atmosphere of the trial. Such emotion and gamesmanship, and the proffers ***937** of virtue by each side, do not justify unfairness or misconduct; however, I think this court should be careful about overestimating the actual impact of the prosecutor's comments upon a jury. Plain error is an extremely demanding standard, and I do not believe that any miscarriage of justice occurred in this case.

We can all agree that the prosecutor was out-of-bounds when he said that "the court wouldn't allow" him to do anything wrong. *See United States v. Roberts,* 618 F.2d 530 (9th Cir.1980) (government may not place its prestige behind a witness' testimony), *cert. denied,* 452 U.S. 942, 101 S.Ct. 3088, 69 L.Ed.2d 957 (1981); *United States v. Garza,* 608 F.2d 659 (5th Cir.1979) (improper for prosecutor to assert to jury that government has no interest in convicting innocent people). But he did not run off the reservation, and it is important to keep in mind what was happening here. Defense counsel had clearly hinted that the prosecutor would not mind if his witness "shaded the truth" a bit if that would help secure a conviction. This is an old tactic. Such insinuations are almost bound to trigger a response from the other side.[1]

Recognizing that the prosecutor made a mistake here does not lead to an inevitable conclusion that plain error should also be found. To reverse a conviction on this basis, we must find that the prosecutor's conduct "seriously affected the fairness, integrity, or public reputation of judicial proceedings," *United States v. Young,* 470 U.S. 1, 15, 105 S.Ct. 1038, 1046, 84 L.Ed.2d 1 (1985) (quoting *United States v. Atkinson,* 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936)), or effected a "miscarriage of justice." *United States v. Wallace,* 848 F.2d 1464, 1473 (9th Cir.1988). Unless the prosecutor's statements were clearly calculated to affect the jury's ability fairly to consider the totality of the evidence-that is, unless it tainted the verdict and deprived Smith of a fair trial-reversal is unwarranted. *Wallace,* 848 F.2d at 1473.

No such miscarriage of justice occurred here. In the first place, the majority's discomfort notwithstanding, substantial evidence other than Brown's testimony supported the jury's verdict. *See United States v. Simtob,* 901 F.2d 799, 806 (9th Cir.1990) (closeness of case against defendant is a factor to weigh when considering claim of prosecutorial misconduct). The jury knew that Smith followed his co-conspirators to the restaurant where the trade with the undercover agent occurred and that Smith was apprehended by the police while he was sitting in his car with a loaded shotgun lying on his lap. Regardless of the prosecutor's gratuitous comments, a rational juror could readily conclude that the government had proved beyond a reasonable doubt that Smith was guilty. That is enough to preclude a finding of plain error. *See United States v. Kessi,* 868 F.2d 1097, 1107 (9th Cir.1989) ("We will seldom find plain error when evidence against the defendant is so strong that the absence of the prosecutor's misconduct would not have changed the verdict.") (citing ***938** *United States v. Giese,* 597 F.2d 1170, 1199 (9th Cir.), *cert. denied,* 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979)).

In any event, it simply is not true that the prosecutor's comments were "so pronounced and persistent that [they] permeated the entire atmosphere of the trial." *Flake,* 746 F.2d at 542. But that is the level to which the entire case must have descended in order to warrant reversal of Smith's conviction. *Id.* (citing *United States v. Lichenstein,* 610 F.2d 1272, 1281 (5th Cir.), *cert. denied sub nom., Bella v. United States,* 447 U.S. 907, 100 S.Ct. 2991, 64 L.Ed.2d 856 (1980)).

Defense counsel's comments to the effect that hoarding money might be considered evidence of drug dealing, and that the prosecutor would not mind if his witness told a story that helped the government's case, were clearly provocative, and it is likely the jury even expected that the prosecutor would not let this go without response. The prosecutor's reply was inartful and ill-considered, but was not alone so out-of-bounds that a reasonable juror could not simply have concluded that what he really was saying was that he did not intend to risk his reputation and career by seeking convictions by any means possible. The prosecutor's conduct was isolated, and unlike the situation in *Roberts* and *Garza,* he did not drag in matters outside the record. Nor did he make any attempt during the conduct of *his side of the case* to place the prestige of his office behind the witness.

Assuming that the prosecutor's comments exaggerated the purport of defense counsel's statements, they were "an insignificant blemish on what otherwise was an entirely fair proceeding." *Skarda,* 845 F.2d at 1511. Accordingly, I do not believe that the incident complained of justifies reversal of Smith's convictions.

All Citations

962 F.2d 923

Footnotes

1 The full text of Smith's counsel's remarks regarding the telephone log reads as follows:

> Now, [the prosecutor] is going to come up here on his last chance and he's going to say, well, look at these telephone logs here, we got this phone call on the 4th to Shawn Smith, 4:00 o'clock in the afternoon. You see, you don't like to say these things, but that's a prosecutor's trick. I don't delight in saying that, I don't delight in saying to you that police officers make mistakes, but they do.
>
> But you see there's been not one scintilla of evidence ... that anyone called Shawn Smith at any time from any telephone.
>
> What there is evidence of, there's evidence that out of fourteen pages of telephone history, three calls were made on that telephone to a number in a home occupied by Shawn Smith. There has been no proof that Shawn Smith answered that phone .... And yet, [the prosecutor] continuously says, and he said it about Mr. Hall and he has said it about Mr. Smith that there were calls to Shawn Smith and I say, prove it ... because he hasn't at this point.

2 If such an individual is convicted of participating in a conspiracy to possess illegal narcotics, he may, of course, be convicted of an attempt offense based on the conduct of his co-conspirators. Thus, had Smith been convicted of conspiracy and had the appropriate *Pinkerton* instruction been given-which it was not-a conviction for attempted possession could have been founded on that ground. *Pinkerton v. United States,* 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).

3 We note that the evidence also might be sufficient to support Smith's conviction of attempted possession on an aiding and abetting theory. The record reveals that the district court gave the jury an aiding and abetting instruction. However, on appeal the government does not urge that we affirm on that basis.

4 The government argues that Smith failed to preserve this issue for appeal. The record indicates that at trial, Smith's counsel properly raised motions for acquittal under Fed.R.Crim.P. 29(a) as to Counts I and II. The court denied both motions. At the close of all evidence, Smith's counsel requested that the court note for the record "our appropriate 29(b)." The government contends that, in light of Smith's prior Rule 29(a) motion, this request should be construed as relating to Counts I and II only. We do not think it appropriate to construe Smith's Rule 29(b) motion in so grudging a manner.

5 Smith also contends that his conviction under section 924(c)(1) fails because there was insufficient evidence to support his conviction for attempted possession of a controlled substance with intent to distribute, and thus no predicate offense to support his weapons conviction. In light of our holding in Section A, *supra,* this argument also fails.

6 Smith also raises another claim of plain error. On the third day of the seven-day trial, the court suggested that current copies of the Los Angeles Times and the New York Times be placed in the jury room in order to allow the jurors access to news materials while at the same time shielding them from articles about the trial that might appear in the local newspapers. Although this practice is certainly undesirable, none of the attorneys involved in the trial raised any objection to it. Smith now contends that the court's decision to introduce news materials into the jury room constituted plain error and that reversal of his conviction is required in order to prevent a miscarriage of justice. *United States v. Giese,* 597 F.2d 1170, 1199 (9th Cir.), *cert. denied,* 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979).

> It is undisputed that Smith's counsel did not merely fail to object to the court's proposal, but affirmatively indicated his agreement by saying: "Let's try it." Thus, Smith may well have waived any claim of error. It is also undisputed that the

newspapers placed in the jury room contained articles relating to drug smuggling and drug trafficking, but that none of the articles related to the trial or to the Las Vegas sting operation. Accordingly, it is far from clear that Smith could establish plain error even assuming that no waiver occurred. However, in light of our conclusion that the prosecutor's closing remarks amounted to plain error and that reversal of Smith's conviction is required on that ground, we need not consider this issue further.

7 Smith's counsel said with regard to Brown's testimony:

> [L]et me tell you some of the instances where he tried to mislead you. Not the prosecutor. He's got a job to do. It's his job to ask the questions. It's [Brown's] job to answer them truthfully and he didn't.

Even Smith's counsel's remark about the probative value of the telephone log that showed calls to Smith's residence, in which he characterized any attempt to imply that Smith had in fact received those calls as a "prosecutor's trick", *see supra* note 1, amounted to no more than an attempt to undermine the government's case by an appeal to the jury to separate fact from inference.

8 The first part of the prosecutor's response to Smith's counsel was as follows:

> That [getting a conviction] isn't a prosecutor's job. A prosecutor's job is to guarantee that every criminal defendant receives a fair trial. That's my job. A prosecutor's job is to turn over every piece of evidence to the defense if it would assist them. That's the prosecutor's job.

Even were we to assume that this first comment, standing alone, would have qualified as an "invited response", the full exegesis could not properly be so characterized.

9 Smith's acquittal on the conspiracy count demonstrates that, even with Brown's testimony, the evidence implicating Smith in the scheme concocted by Hall and Brown was far from overwhelming. The fact that the jury was unable to agree on one of the charges against Smith supports our conclusion that the prosecutorial vouching on behalf of Brown rose to the level of plain error. *Cf. Simtob,* 901 F.2d at 806 n. 4 (noting that the inability of the jury to agree on one of the charges constituted further support for a finding of prejudice).

10 Smith's conviction on the weapons count also falls if for no other reason than that no predicate offense remains to support it.

1 I do not go so far as to insist that defense counsel in fact invited the prosecutor's responses. Defense counsel was certainly casting doubt on the government witness' testimony, although he did not, as in *United States v. Flake,* 746 F.2d 535 (9th Cir.1984), *cert. denied,* 469 U.S. 1225, 105 S.Ct. 1220, 84 L.Ed.2d 360 (1985), and *United States v. Skarda,* 845 F.2d 1508 (8th Cir.1988), accuse the prosecutor of suborning perjury or withholding evidence. There is a distinction between undermining a witness' veracity and accusing him of perjuring himself as part of a deal with the prosecutor. Given that distinction, courts have often refused to find "invitation" even where the defense lawyer has said things much worse than this. *See, e.g., United States v. Young,* 470 U.S. 1, 4-5, 105 S.Ct. 1038, 1040-41, 84 L.Ed.2d 1 (1985) (defense counsel called prosecutor's tactics "reprehensible" and "poison[ous]" and implied that prosecutor had not "acted with honor or with integrity."); *United States v. O'Connell,* 841 F.2d 1408, 1429 n. 19 (8th Cir.1988) (defense counsel labeled prosecutor's tactics "unfair," "wicked," and "poison [ous]"), *cert. denied,* 488 U.S. 1011, 109 S.Ct. 799, 102 L.Ed.2d 790 (1989); *Skarda,* 845 F.2d at 1510-11 (no invitation where defense counsel strongly implied that prosecutors manufactured witness testimony and induced witness to support government theory by threatening to recommend harsh sentence for witness in another case). Perhaps we are justified in making allowances for the defense but holding the prosecutor-the agent of justice-to a higher standard. Nonetheless, the whistle does not automatically blow with every overreaching.

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937 F.2d 383
United States Court of Appeals,
Eighth Circuit.

UNITED STATES of America, Appellee,

v.

Keith M. FREISINGER, Appellant.

No. 90–2084.
|
Submitted Jan. 11, 1991.
|
Decided June 24, 1991.

Synopsis

Defendant was convicted in the United States District Court for the Northern District of Iowa, David R. Hansen, J., of single drug-trafficking offense and of multiple counts of carrying firearm during commission of that offense. Defendant appealed. The Court of Appeals, Elmo B. Hunter, Senior District Judge, sitting by designation, held that: (1) prosecutor's improper closing-argument attempt to vouch for witnesses' credibility did not deprive defendant of fair trial; (2) evidence that firearms were in passenger compartment of defendant's car when he was stopped established that defendant "carried" those weapons; (3) firearm statute authorized prosecution for each firearm possessed in relation to single drug trafficking offense; but (4) firearm statute did not authorize multiple sentences under such circumstances.

Convictions affirmed; remanded for resentencing.

Attorneys and Law Firms

***385** Thomas J. O'Flaherty (as appointed counsel, on the appeal only), Cedar Rapids, Iowa, for appellant.

Daniel C. Tvedt (argued), and Timothy Gallagher, on brief, Cedar Rapids, Iowa, for appellee.

Before MAGILL, Circuit Judge, ROSS, Senior Circuit Judge, and HUNTER,[*] Senior District Judge.

Opinion

ELMO B. HUNTER, Senior District Judge.

This is an illegal drugs and firearms case. In August, 1989, an Iowa deputy sheriff placed appellant Freisinger under arrest for drunken driving. The deputy, along with other officers, confiscated from Freisinger's car a film container with a white residue in it, a gun case containing a rifle and ammunition, and $2,460 in cash. The officers also saw, but did not then search, two large plastic bags on the floor and passenger seat. After impounding the car, an inventory search uncovered a sunglasses case containing two plastic bags of nearly 81 grams of cocaine, a number of "bindles" or pharmacy folds used for delivery of cocaine, spoons which could be used to heat or "cook" drugs, and a loaded .32 caliber revolver and two .357 magnum revolvers, all three of which were in a knotted pillowcase which was inside one of the large plastic bags.

After four days of trial, a jury convicted Freisinger on one count of possession with intent to distribute cocaine, and four counts of carrying a firearm during the commission of a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1). The firearms convictions were based on Freisinger's carrying four firearms during the single drug trafficking offense. The district court sentenced Freisinger to 27 months imprisonment on the drug count and five years each on the firearms counts to be served consecutively to the 27–month sentence. Three of the sentences imposed on the firearm convictions, however, were to run concurrently to each other. Thus, Freisinger was sentenced to 27 months on the drug conviction, to be followed by three concurrent five-year sentences, all of those to be followed by the other five-year sentence, for a total of 147 consecutive months imprisonment. On appeal, Freisinger challenges: 1) the propriety of remarks which were part of the government's closing argument; 2) the sufficiency of the evidence on the issue of whether he was "carrying" a firearm in violation of section 924(c)(1); and 3) the multiple convictions and sentences for the firearms convictions despite the fact that there was but one drug trafficking offense. We affirm in part, reverse in part and remand with instructions.

I.

Freisinger complains that in closing arguments government counsel improperly injected his personal beliefs as to the credibility of government witnesses and personalized the arguments with the repeated use of the pronoun "I."[1] First we address Freisinger's contention that government counsel personalized the closing argument and overused the personal pronoun "I," in such phrases as "I suggest to you that" and

"I submit to you that." Freisinger suggests that flagrant use of that pronoun could be construed as improper commentary. Thus, he points out that government counsel used "I" 35 times during closing arguments. No such tallying is an indication of improper commentary nor can it measure the degree of impropriety if there is any. Use of the personal pronoun "I" is ***386** a normal and ordinary use of the English language. If courts were to ban the use of it, prosecutors would indulge in even more legalese than the average lawyer, sounding even more stilted and unnatural. As a simple illustration of how natural it is to use "I" in conversation—or more specifically, in arguments before a jury—defense counsel in this case himself used the pronoun 51 times. Of course, as discussed below, prosecutors have a duty to refrain from suggesting that they know something that the jury does not. That does not mean, however, that prosecutors should refrain from all use of the pronoun "I." We therefore find nothing improper in the Assistant United States Attorney's use of the pronoun "I."

On the other hand, it is improper for government counsel to vouch for a witness's veracity. *United States v. Peyro,* 786 F.2d 826, 831–32 (8th Cir.1986). The reason for the rule is articulated well in *United States v. Modica,* 663 F.2d 1173 (2d Cir.1981), *cert. denied,* 456 U.S. 989, 102 S.Ct. 2269, 73 L.Ed.2d 1284 (1982), where the court wrote:

> The American Bar Association Standards for Criminal Justice declare: "It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or guilt of the defendant." ABA Standards for Criminal Justice, Standard 3—5.8(b) (1980) [hereinafter cited as "ABA Standard (number)"]. The policies underlying this proscription go to the heart of a fair trial. The prosecutor is cloaked with the authority of the United States Government; he stands before the jury as the community's representative. His remarks are those, not simply of an advocate, but rather of a federal official duty-bound to see that justice is done. The jury knows that he has prepared and presented the case and that he has complete access to the facts uncovered in the government's investigation. Thus, when the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore his views, however biased and baseless they may in fact be.

Id. at 1178–79.

In efforts to circumvent the rule, counsel too often employ phrases such as "I suggest that" or "I submit that" (as was done in this case), which are no less improper when they convey personal belief as to a witness's credibility. Such improper commentary, however, rarely necessitates reversal because any resulting prejudice is usually not so great "as to deprive [the defendant] of a fair trial." *United States v. Pierce,* 792 F.2d 740, 742 (8th Cir.1986). The *Modica* court acknowledged the dilemma, noting that "this Court has often brandished the sword of reversal only to resheath it in the absence of substantial prejudice." 663 F.2d at 1182.

This Court has previously commented on the frequency with which it has had to address the "acceptable limits of closing argument." *Pierce,* 792 F.2d at 742. While reversal of convictions is not the proper remedy in cases where no substantial prejudice has resulted from inappropriate remarks made during closing argument, prosecutorial overreaching should not go unchecked. The *Modica* court outlined a catalog of sensible remedies which, in the future, should be utilized as a means of extracting compliance with ethical standards.

In the present case, government counsel's remarks during closing argument were clearly improper. He employed the "I submit that" device in arguments like, "I submit to you that there is no reason for Randy and Diane Herbst to drive here from Dubuque, Iowa and tell you anything but the truth," and "I submit to you that the testimony that you heard from the officers was the truth." Transcript of Final Arguments at 19, 23. Counsel also argued, "They came here and told the truth." Transcript of Final Arguments at 41. This kind of argumentation is not only improper, it is unnecessary. Counsel can just as easily argue issues of credibility without injecting personal views. The kind of arguments made here at the very least suggests that the government may know something ***387** that the jury does not. Government counsel must eschew that kind of argumentation, even when couching the argument in less brazen language.

Freisinger did not object to the improper remarks at trial and therefore asks us to review the matter for plain error under Rule 52 of the Federal Rules of Criminal Procedure. First, we simply note that because improper closing remarks are reversible only if they are so prejudicial as to deprive the defendant of a fair trial, there is no difference between improper remarks which require reversal where an objection to the remarks has been preserved and remarks which constitute plain error. If a prosecutor's remarks are so prejudicial that they deny the defendant a fair trial, then those remarks must, *ipso facto,* affect a substantial right of the defendant: the right to a fair trial. In this case, however, the government's remarks—while unquestionably improper—

124 S.Ct. 1256
Supreme Court of the United States

Delma BANKS, Jr., Petitioner,
v.
Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division.

No. 02–8286.
|
Argued Dec. 8, 2003.
|
Decided Feb. 24, 2004.

Synopsis

Background: Convicted capital murder defendant, 643 S.W.2d 129, petitioned for writ of habeas corpus. The United States District Court for the Eastern District of Texas granted relief with respect to death sentence, but not with respect to underlying conviction. The United States Court of Appeals for the Fifth Circuit, 48 Fed.Appx. 104, reversed on death sentence issue. Certiorari was granted.

Holdings: The Supreme Court, Justice Ginsburg, held that:

petitioner was entitled to present evidence in support of one *Brady* claim that had not been presented to state post-conviction court, and

petitioner was entitled to certificate of appealability on question of whether he adequately raised second *Brady* claim.

Reversed and remanded.

Justice Thomas concurred in part and dissented in part, and filed opinion in which Justice Scalia joined.

****1257 *668** *Syllabus*[*]

After police found a gun-shot corpse near Texarkana, Texas, Deputy Sheriff Willie Huff learned that the decedent had been seen with petitioner Banks three days earlier. When a paid informant told Deputy Huff that Banks was driving to Dallas to fetch a weapon, Deputy Huff followed Banks to a residence there. On the return trip, police stopped Banks's vehicle, found a handgun, and arrested the car's occupants. Returning to the Dallas residence, Deputy Huff encountered Charles Cook and recovered a second gun, which Cook said Banks had left at the ****1258** residence several days earlier. On testing, the second gun proved to be the murder weapon. Prior to Banks's trial, the State advised defense counsel that, without necessity of motions, the State would provide Banks with all discovery to which he was entitled. Nevertheless, the State withheld evidence that would have allowed Banks to discredit two essential prosecution witnesses. At the trial's guilt phase, Cook testified, *inter alia,* that Banks admitted "kill[ing a] white boy." On cross-examination, Cook thrice denied talking to anyone about his testimony. In fact, Deputy Huff and prosecutors intensively coached Cook about his testimony during at least one pretrial session. The prosecution allowed Cook's misstatements to stand uncorrected. After Banks's capital murder conviction, the penalty-phase jury found that Banks would probably commit criminal acts of violence that would constitute a continuing threat to society. One of the State's two penalty-phase witnesses, Robert Farr, testified that Banks had retrieved a gun from Dallas in order to commit robberies. According to Farr, Banks had said he would "take care of it" if trouble arose during those crimes. Two defense witnesses impeached Farr, but were, in turn, impeached. Banks testified, among other things, that, although he had traveled to Dallas to obtain a gun, he had no intent to participate in the robberies, which Farr alone planned to commit. In summation, the prosecution suggested that Banks had not traveled to Dallas only to supply Farr with a weapon. Stressing Farr's testimony that Banks said he would "take care" of trouble arising during the robberies, the prosecution urged the jury to find Farr credible. Farr's admission that he used narcotics, the prosecution ***669** suggested, indicated that he had been open and honest in every way. The State did not disclose that Farr was the paid informant who told Deputy Huff about the Dallas trip. The judge sentenced Banks to death.

Through Banks's direct appeal, the State continued to hold secret Farr's and Cook's links to the police. In a 1992 state-court postconviction motion, Banks alleged for the first time that the prosecution knowingly failed to turn over exculpatory evidence that would have revealed Farr as a police informant and Banks's arrest as a "set-up." Banks also alleged that during the trial's guilt phase, the State deliberately withheld information of a deal prosecutors made with Cook, which

Government is obliged to reveal the identity of an undercover informer the Government does *not* call as a trial witness. 353 U.S., at 55–56, 77 S.Ct. 623. The Court there stated that no privilege obtains "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused." *Id.,* at 60–61, 77 S.Ct. 623. Accordingly, even though the informer in *Roviaro* did not testify, we held that disclosure ***698** of his identity was necessary because he could have "amplif[ied] or contradict[ed] the testimony of government witnesses." *Id.,* at 64, 77 S.Ct. 623.

Here, the State elected to call Farr as a witness. Indeed, he was a key witness at both guilt and punishment phases of Banks's capital trial. Farr's status as a paid informant was unquestionably "relevant"; similarly beyond doubt, disclosure of Farr's status would have been "helpful to [Banks's] defense." *Id.,* at 60–61, 77 S.Ct. 623. Nothing in *Roviaro,* or any other decision of this Court, suggests that the State can examine an informant at trial, withholding acknowledgment of his informant status in the hope that defendant will not catch on, so will make no disclosure motion.

In summary, Banks's prosecutors represented at trial and in state postconviction proceedings that the State had held nothing back. Moreover, in state postconviction court, the State's pleading denied that Farr was an informant. App. 234; *supra,* at 1267. It was not incumbent on Banks to prove these representations false; rather, Banks was entitled to treat the prosecutor's submissions as truthful. Accordingly, Banks has shown cause for failing to present evidence in state court capable of substantiating his Farr *Brady* claim.

C

Unless suppressed evidence is "material for *Brady* purposes, [its] suppression [does] not give rise to sufficient prejudice to overcome [a] procedural default." *Strickler,* 527 U.S., at 282, 119 S.Ct. 1936 (internal quotation marks omitted). Our touchstone on materiality is *Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). *Kyles* instructed that the materiality standard for *Brady* claims is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." 514 U.S., at 435, 115 S.Ct. 1555. See also *id.,* at 434–435, 115 S.Ct. 1555 ("A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left ***699** to convict."); accord *Strickler,* 527 U.S., at 290, 119 S.Ct. 1936. In short, Banks must show a "reasonable probability of a different result." *Kyles,* 514 U.S., at 434, 115 S.Ct. 1555 (internal quotation marks omitted) (citing *Bagley,* 473 U.S., at 678, 105 S.Ct. 3375).

****1277** As the State acknowledged at oral argument, Farr was "paid for a critical role in the scenario that led to the indictment." Tr. of Oral Arg. 34. Farr's declaration, presented to the federal habeas court, asserts that Farr, not Banks, initiated the proposal to obtain a gun to facilitate the commission of robberies. See App. 442–443, ¶¶ 7–8; *supra,* at 1265. Had Farr not instigated, upon Deputy Sheriff Huff's request, the Dallas excursion to fetch Banks's gun, the prosecution would have had slim, if any, evidence that Banks planned to "continue" committing violent acts. App. 147.[17] Farr's admission of his instigating role, moreover, would have dampened the prosecution's zeal in urging the jury to bear in mind Banks's "planning and acquisition of a gun to commit robbery," or Banks's "planned violence." *Ibid.;* see Tr. of Oral Arg. 50.[18]

***700** Because Banks had no criminal record, Farr's testimony about Banks's propensity to commit violent acts was crucial to the prosecution. Without that testimony, the State could not have underscored, as it did three times in the penalty phase, that Banks would use the gun fetched in Dallas to "take care" of trouble arising during the robberies. App. 140, 144, 146–147; see *supra,* at 1266. The stress placed by the prosecution on this part of Farr's testimony, uncorroborated by any other witness, belies the State's suggestion that "Farr's testimony was adequately corroborated." Brief for Respondent 22–25. The prosecution's penalty-phase summation, moreover, left no doubt about the importance the State attached to Farr's testimony. What Farr told the jury, the prosecution urged, was "of the utmost significance" to show "[Banks] is a danger to friends and strangers, alike." App. 146.

In *Strickler,* 527 U.S., at 289, 119 S.Ct. 1936, although the Court found "cause" for ****1278** the petitioner's procedural default of a *Brady* claim, it found the requisite "prejudice" absent, 527 U.S., at 292–296, 119 S.Ct. 1936. Regarding "prejudice," the contrast between *Strickler* and Banks's case is marked. The witness whose impeachment was at issue in *Strickler* gave testimony that was in the main cumulative, *id.,* at 292, 119 S.Ct. 1936, and hardly significant ***701** to one of the "two predicates for capital murder: [armed] robbery,"

id., at 294, 119 S.Ct. 1936. Other evidence in the record, the Court found, provided strong support for the conviction even if the witness' testimony had been excluded entirely: Unlike the Banks prosecution, in *Strickler,* "considerable forensic and other physical evidence link[ed] [the defendant] to the crime" and supported the capital murder conviction. *Id.,* at 293, 119 S.Ct. 1936. Most tellingly, the witness' testimony in *Strickler* "did not relate to [the petitioner's] eligibility for the death sentence"; it "was not relied upon by the prosecution at all during its closing argument at the penalty phase." *Id.,* at 295, 119 S.Ct. 1936. In contrast, Farr's testimony was the centerpiece of Banks's prosecution's penalty-phase case.

Farr's trial testimony, critical at the penalty phase, was cast in large doubt by the declaration Banks ultimately obtained from Farr and introduced in the federal habeas proceeding. See *supra,* at 1265, 1268. In the guilt phase of Banks's trial, Farr had acknowledged his narcotics use. App. 36. In the penalty phase, Banks's counsel asked Farr if, "drawn up tight over" previous drug-related activity, he would "testify to anything anybody want[ed] to hear"; Farr denied this. *Id.,* at 110; *supra,* at 1266. Farr's declaration supporting Banks's federal habeas petition, however, vividly contradicts that denial: "I assumed that if I did not help [Huff] ... he would have me arrested for drug charges." App. 442, ¶ 6. Had jurors known of Farr's continuing interest in obtaining Deputy Sheriff Huff's favor, in addition to his receipt of funds to "set [Banks] up," *id.,* at 442, ¶ 7, they might well have distrusted Farr's testimony, and, insofar as it was uncorroborated, disregarded it.

The jury, moreover, did not benefit from customary, truth-promoting precautions that generally accompany the testimony of informants. This Court has long recognized the "serious questions of credibility" informers pose. *On Lee v. United States,* 343 U.S. 747, 757, 72 S.Ct. 967, 96 L.Ed. 1270 (1952). See also Trott, ***702** Words of Warning for Prosecutors Using Criminals as Witnesses, 47 Hastings L.J. 1381, 1385 (1996) ("Jurors suspect [informants'] motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable ...."). We have therefore allowed defendants "broad latitude to probe [informants'] credibility by cross-examination" and have counseled submission of the credibility issue to the jury "with careful instructions." *On Lee,* 343 U.S., at 757, 72 S.Ct. 967; accord *Hoffa v. United States,* 385 U.S. 293, 311–312, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). See also 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 15.02 (5th ed.2000) (jury instructions from the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits on special caution appropriate in assessing informant testimony).

The State argues that "Farr was heavily impeached [at trial]," rendering his informant status "merely cumulative." Tr. of Oral Arg. 49; see Brief for Respondent 26–28; *post,* at 1282, n. 3. The record suggests otherwise. Neither witness called to impeach Farr gave evidence directly relevant to Farr's part in Banks's trial. App. 124–133; *id.,* at 129 (prosecutor ****1279** noted that Kelley lacked "personal knowledge with regard to this case on trial"). The impeaching witnesses, Kelley and Owen, moreover, were themselves impeached, as the prosecution stressed on summation. See *id.,* at 141, 148; *supra,* at 1266, 1267. Further, the prosecution turned to its advantage remaining impeachment evidence concerning Farr's drug use. On summation, the prosecution suggested that Farr's admission "that he used dope, that he shot," demonstrated that Farr had been "open and honest with [the jury] in every way." App. 140; *supra,* at 1267.

At least as to the penalty phase, in sum, one can hardly be confident that Banks received a fair trial, given the jury's ignorance of Farr's true role in the investigation and trial of the case. See *Kyles,* 514 U.S., at 434, 115 S.Ct. 1555 ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in ***703** its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."). On the record before us, one could not plausibly deny the existence of the requisite "reasonable probability of a different result" had the suppressed information been disclosed to the defense. *Ibid.* (internal quotation marks omitted) (citing *Bagley,* 473 U.S., at 678, 105 S.Ct. 3375); *Strickler,* 527 U.S., at 290, 119 S.Ct. 1936. Accordingly, as to the suppression of Farr's informant status and its bearing on "the reliability of the jury's verdict regarding punishment," App. to Pet. for Cert. C44; *supra,* at 1269, all three elements of a *Brady* claim are satisfied.

III

Both the District Court and the Court of Appeals denied Banks a certificate of appealability with regard to his Cook *Brady* claim, which rested on the prosecution's suppression of the September 1980 Cook interrogation transcript. App. 422–423; App. to Pet. for Cert. A52, A78; *supra,* at 1270, 1271. See also Joint Lodging Material 1–36. The District Court and the Fifth Circuit concluded that Banks had not

406 Mass. 257
Supreme Judicial Court of Massachusetts,
Suffolk.

COMMONWEALTH
v.
Carmen G. CIAMPA (and
ten companion cases[1]).

Argued April 5, 1989.
|
Decided Dec. 14, 1989.

Synopsis
Defendants were convicted of offenses including first-degree murder, and robbery while armed and masked in the Suffolk Superior Court, Sandra L. Hamlin, J., and they appealed. The Supreme Judicial Court, Wilkins, J., held that: (1) trial judge improperly failed to redact portions of prosecution witness' plea agreement before allowing portions of agreement to be admitted into evidence; (2) prejudice arising from admission of plea agreement was not alleviated by charge to jury; and (3) evidence of threats made by third parties to witnesses could not be admitted to show defendant's consciousness of guilt unless prosecution presented evidence that threats were made with defendant's knowledge, consent or authorization.

Reversed and remanded.

Abrams, J., filed concurring opinion in which Liacos, C.J., joined.

O'Connor, J., filed dissenting opinion in which Nolan and Lynch, JJ., joined.

Attorneys and Law Firms

****316 *258** Daniel P. Leonard (Kenneth J. Fishman, with him), for Mark D. Orlandella.

Bernard Grossberg, Boston, for Carmen G. Ciampa.

Jane A. Donohue, Asst. Dist. Atty., for Com.

Before ***257** LIACOS, C.J., and WILKINS, ABRAMS, NOLAN, LYNCH, O'CONNOR and GREANEY, JJ.

Opinion

WILKINS, Justice.

In November, 1985, the defendants were convicted of murder in the first degree, robbery while armed and masked, assault with intent to murder while armed, assault by means of a dangerous weapon, and receiving a stolen motor vehicle.[2] Each has appealed from his convictions and from an order denying his motion for a new trial.

The case against the defendants depended greatly on the credibility of one William DeVincenzi, an admitted accomplice in the crimes, who testified for the Commonwealth pursuant to a written plea agreement in which the prosecution promised that it would recommend a specific sentence in return for DeVincenzi's truthful testimony in this and other cases. We reverse the convictions because of prejudicial errors in the handling of the plea agreement that were not cured by the judge's charge.

On April 11, 1983, during an armed robbery of Tello's, a store in the East Boston section of Boston, a security guard was shot and killed. One year later, DeVincenzi confessed to participating in the crimes (and in many others). In December, 1984, he signed a plea agreement. Under the plea agreement, in exchange for DeVincenzi's truthful cooperation, ***259** which was defined in part as the giving of "complete and honest testimony at any and all proceedings if called as a witness," the Commonwealth agreed to accept from DeVincenzi a plea of guilty to manslaughter in connection with the security guard's death and to ****317** recommend a sentence of from twelve to twenty years.[3] If DeVincenzi were not to cooperate truthfully and a judge were so to find by a preponderance of the evidence at the time of sentencing, the Commonwealth would be free to make any sentencing recommendation it wished.

DeVincenzi gave extensive trial testimony concerning preparations for the robbery, the robbery and shooting, and the participants' conduct following the event. The jury deliberated during four days before returning their verdicts. During that time the jury asked for further instructions on reasonable doubt, on determining the credibility of witnesses, and on circumstantial evidence. It seems a reasonable inference that the jury were concerned over the credibility of DeVincenzi's testimony.

Before testifying to the events of April 11, 1983, DeVincenzi testified, over objection, on direct examination by the Commonwealth that he came to an agreement with the Suffolk district attorney's office in exchange for his testimony in nineteen cases, including the ones on trial. He stated his understanding that, for his truthful testimony, the district attorney's office would recommend a sentence of from twelve to twenty years on all his cases. DeVincenzi testified to executing the plea agreement. The judge then, over objection, admitted the plea agreement, with certain parts redacted. Again over objection, the judge permitted the prosecutor on ***260** direct examination to read the agreement to DeVincenzi paragraph by paragraph and ask him if what was read to him was his understanding of each paragraph. Next, the prosecutor over objection was allowed to introduce DeVincenzi's testimony that his attorney signed a statement representing that DeVincenzi understood the agreement, that the attorney had reviewed the agreement with him, and that the attorney believed that DeVincenzi's decision to enter into the agreement was an informed and voluntary one.[4]

DeVincenzi then proceeded to describe the robbery of the Tello's store in East Boston during which, according to him, the defendant Orlandella drove a stolen brown Chrysler automobile, DeVincenzi sat in the front passenger seat, and the defendant Ciampa sat in the back seat with a sawed-off shotgun. In the course of the confrontation with the manager of the store and the security guard, who were crossing a parking lot to make a bank deposit, Ciampa shot the security guard and killed him.

The defendants advance a succession of arguments concerning the prosecution's use of the plea agreement in connection with DeVincenzi's testimony. They claim that admission of the agreement in evidence was in effect a representation by the prosecutor that DeVincenzi's testimony was credible, a form of vouching by the prosecutor who was not subject to cross-examination. We disagree and conclude that, if appropriately handled, such a plea agreement does not constitute improper prosecutorial vouching for a witness. Such an agreement does, however, present the possibility that the jury will believe that the witness is telling the truth, thinking that, because of the agreement's truthfulness requirement, the Commonwealth knows or can discover whether the witness is telling the truth. *United States v. Wallace,* 848 F.2d 1464, 1474 (9th Cir.1988) (the implication is "that the prosecutor can verify the witness's testimony ***261** and thereby enforce the truthfulness condition of its plea agreement"). We shall return to this problem.

We accept the rule, as do the United States Circuit Courts of Appeal generally, that testimony pursuant to a plea agreement, founded on a promise of truthful ****318** cooperation, and the plea agreement itself are admissible. See *United States v. Mealy,* 851 F.2d 890, 899 (7th Cir.1988); *United States v. Dadanian,* 818 F.2d 1443, 1445 (9th Cir.1987); *United States v. Martin,* 815 F.2d 818, 821 (1st Cir.), cert. denied, 484 U.S. 825, 108 S.Ct. 89, 98 L.Ed.2d 51 (1987); *United States v. Townsend,* 796 F.2d 158, 163 (6th Cir.1986); *United States v. Librach,* 536 F.2d 1228, 1230 (8th Cir.), cert. denied, 429 U.S. 939, 97 S.Ct. 354, 50 L.Ed.2d 308 (1976). The trial judge must study the agreement with care, however, and eliminate prejudicial and irrelevant provisions. See *United States v. Cosentino,* 844 F.2d 30, 34-35 (2d Cir.), cert. denied, 488 U.S. 923, 109 S.Ct. 303, 102 L.Ed.2d 322 (1988) (the judge should "eliminate potentially prejudicial, confusing or misleading matter"), citing cases involving redaction of references to protective custody for the witness's family and references to threats against witnesses; *United States v. Brown,* 720 F.2d 1059, 1073 (9th Cir.1983) (reference to polygraph should have been deleted).[5]

***262** The judge erred in the manner in which she handled the plea agreement. Various provisions of the agreement should have been redacted and were not. The statement that the agreement was "contingent upon the truthfulness of [DeVincenzi's] representation to the Commonwealth that he, personally, did not shoot [the victim]" should have been redacted on request by a defendant. That statement can be read as asserting the Commonwealth's reasoned conclusion that DeVincenzi's representation was correct. The judge should also have deleted references in the agreement that DeVincenzi would be placed in a program to protect his life and safety. The language was unfairly prejudicial to the defendants because it implied that the Commonwealth agreed that DeVincenzi reasonably believed his life and safety would be in jeopardy, if he testified against the defendants. See *Commonwealth v. Andrews,* 403 Mass. 441, 450, 530 N.E.2d 1222 (1988); *United States v. Arroyo-Angulo,* 580 F.2d 1137, 1145 (2d Cir.1978), cert. denied, 439 U.S. 1131 (1979). Repeated references to the witness's obligation to tell the truth should have been deleted. See *United States v. Mealy, supra* at 899. Although the judge properly directed that the statement signed by DeVincenzi's attorney should not go to the jury, over objection, she permitted the Commonwealth to obtain testimony from DeVincenzi that his attorney had signed a statement representing that DeVincenzi understood the agreement and that his attorney

believed that DeVincenzi's decision to make the agreement was an informed and voluntary one. The attorney's hearsay statement in effect indicated that he believed DeVincenzi was telling him the truth, thus justifying his advice to DeVincenzi to plead guilty and to testify ***263** against ****319** the defendants.[6] We emphasize that this opinion concerns only an agreement between a prosecutor and a witness expressed in a written plea agreement in which the Commonwealth promises a sentencing recommendation in exchange for truthful testimony.

The prejudice arising from admission of the plea agreement with damaging provisions not deleted and from DeVincenzi's testimony concerning his attorney's involvement with the plea agreement was not alleviated by the judge's charge. The charge failed adequately to direct the jury's attention to the potential influences of the plea agreement on DeVincenzi's credibility and failed as well to dispel any implication inherent in the plea agreement, and in the presentation of DeVincenzi as a government witness, that the government knew or was warranting that DeVincenzi was telling the truth.[7] The aspects of the charge most relevant to DeVincenzi's credibility are set forth in the margin.[8] That language insufficiently conveys a need for caution as to DeVincenzi's testimony. The charge did not tell the jury to weigh DeVincenzi's testimony with care and not to consider DeVincenzi's guilty plea as evidence against the defendants. It did not adequately ***264** focus the jury's attention on the incentives that could have influenced DeVincenzi's testimony. It did not warn the jury that, in entering into the agreement and presenting him as a witness, the government did not know whether DeVincenzi was telling the truth and did not emphasize that DeVincenzi's truthfulness was solely a question for the jury to decide. Only by a cautionary instruction covering these points could the jury have been in a position to evaluate the impact of the plea agreement and testimony presented pursuant to it.

We add a few observations intended to aid trial judges handling similar circumstances in the future. We accept the general rule that on direct examination the prosecution may properly bring out the fact that the witness has entered into a plea agreement and that the witness generally understands his obligations under it. See *United States v. Cosentino, supra* at 33; *United States v. McNeill,* 728 F.2d 5, 14 (1st Cir.1984). The timing of the admission of a plea agreement in evidence is in the judge's discretion, if it is clear from argument or comment by the defense that, because of the plea agreement, the defendant will challenge the witness's credibility on cross-examination. *United States v. Cosentino, supra.* It would be discretionary with a judge to defer admission of the agreement until redirect examination, after the defendant has undertaken to impeach the witness's credibility by showing that the witness had struck a deal with the prosecution in order to obtain favorable treatment. Any attempt at bolstering the witness by questions concerning his obligation to tell the truth should await redirect examination. Such a procedure would tend to mitigate the appearance of prosecutorial vouching that similar questions on direct examination might create. If there is ever a moment when the prosecutor should be allowed to read the agreement, paragraph by paragraph, and ask the witness ****320** successively whether each paragraph represents the witness's understanding (as happened in the case before us), it would be during redirect examination and not during direct examination.

***265** A prosecutor's position is a delicate one. The prosecutor must be free to argue that such a witness is credible, but may not explicitly or implicitly vouch to the jury that he or she knows that the witness's testimony is true. Vouching can occur if an attorney expresses a personal belief in the credibility of a witness (*Commonwealth v. Bourgeois,* 391 Mass. 869, 878, 465 N.E.2d 1180 [1984]), or if an attorney indicates that he or she has knowledge independent of the evidence before the jury verifying a witness's credibility (*Commonwealth v. Shelley,* 374 Mass. 466, 470, 373 N.E.2d 951 [1978], *S.C.,* 381 Mass. 340, 409 N.E.2d 732 [1980]). See *United States v. Wallace,* 848 F.2d 1464, 1473 (9th Cir.1980); *United States v. Martin,* 815 F.2d 818, 821-822 (1st Cir.), cert. denied, 484 U.S. 825, 108 S.Ct. 89, 98 L.Ed.2d 51 (1987).

A prosecutor in closing argument may restate the government's agreement with the witness and may argue reasonable inferences from the plea agreement's requirement of truthful testimony. See *United States v. Martin, supra* at 822-823; *United States v. Dennis,* 786 F.2d 1029, 1046-1047 (11th Cir.1986), cert. denied, 481 U.S. 1037, 107 S.Ct. 1973, 95 L.Ed.2d 814 (1987). If, however, a prosecutor goes beyond the terms and circumstances of the plea agreement and suggests that the government has special knowledge by which it can verify the witness's testimony, reversible error may occur. See *United States v. Brown,* 720 F.2d 1059, 1072, 1075 (9th Cir.1983); *United States v. Roberts,* 618 F.2d 530, 534, 536-537 (9th Cir.1980), cert. denied, 452 U.S. 942, 101 S.Ct. 3088, 69 L.Ed.2d 957 (1981). Certain arguments of a prosecutor to the jury would clearly be improper. See *United States v. Wallace, supra* at 1474 ("that would not have been the truth," and "she told the truth" were improper vouching); *United States v. Martin, supra* at 822 ("they told you the

truth," disapproved); *United States v. Roberts, supra* at 533 (closing argument that a detective had monitored the witness's testimony, impermissible vouching). On the other hand, a prosecutor may properly point out that an agreement seeking only the truthful cooperation of the witness does not give the witness any special incentive to lie. *United States v. Arroyo-Angulo,* 580 F.2d 1137, 1147 (2d Cir.1978).

***266** As we have noted, the plea agreement by itself could be viewed as an implied representation by the government that the witness's testimony will be truthful. The implied representation of credibility far exceeds any implication of credibility arising from simply calling a witness to testify for the Commonwealth under oath. Because of the possible improper influences on a jury that could develop from hearing testimony given pursuant to a written plea agreement that offers substantial benefits to a witness but only if the witness tells the truth, courts have generally determined that, although a jury may hear such a witness and receive as an exhibit a copy of the agreement, the judge must specifically and forcefully tell the jury to study the witness's credibility with particular care. See *United States v. Mealy,* 851 F.2d 890, 900 (7th Cir.1988) (witnesses' testimony "must be considered with caution and great care. Moreover, their guilty plea is not to be considered as evidence against the defendants"); *United States v. Shaw,* 829 F.2d 714, 718 (9th Cir.1987), cert. denied, 485 U.S. 1022, 108 S.Ct. 1577, 99 L.Ed.2d 892 (1988) (in the circumstances, "[i]t would have been better if the trial court had given an instruction that the reference to truthfulness in the plea agreement does not mean that the government has a way of knowing that the testimony is truthful," but the judge did tell the jury that they should examine the benefited witness's testimony "with greater caution than that of ordinary witnesses"); *United States v. Dailey,* 759 F.2d 192, 196, 200 n. 8 (1st Cir.1985) (the jury should "be specifically instructed to weigh the accomplice's testimony with care"); *United States v. Sims,* 719 F.2d 375, 378 (11th Cir.1983), cert. denied, 465 U.S. 1034, 104 S.Ct. 1304, 79 L.Ed.2d 703 (1984) (trial judge dispelled any ****321** suggestion of vouching by instructing the jury to keep in mind that testimony given pursuant to an immunity agreement "is always to be received with caution and weighed with great care").

We do not prescribe particular words that a judge should use. We do expect, however, that a judge will focus the jury's attention on the particular care they must give in evaluating testimony given pursuant to a plea agreement that is contingent on the witness's telling the truth.

***267** Because there must be a new trial, we consider issues argued on appeal that are likely to reappear. (a) If evidence of threats made by third parties to certain witnesses is offered to show Orlandella's consciousness of guilt, that evidence should not be admitted for that purpose unless the Commonwealth presents evidence that the threats were made with Orlandella's knowledge, consent, or authorization. See *Commonwealth v. Min Sing,* 202 Mass. 121, 127, 88 N.E. 918 (1909); *Commonwealth v. Robbins,* 3 Pick. 63, 63 (1825). Even then, the judge should consider whether the probative value of evidence of threats by third persons on the consciousness of guilt question is outweighed by its prejudicial effect. See *Commonwealth v. Leo,* 379 Mass. 34, 41, 393 N.E.2d 410 (1979). (b) We see no impropriety in trying the defendants jointly. (c) The murder indictments were properly given to the jury on the theory of extreme atrocity or cruelty where the victim was hit with a blast from a shotgun from a distance of several feet and did not die immediately. See *Commonwealth v. Glass,* 401 Mass. 799, 803, 519 N.E.2d 1311 (1988). (d) Our failure to address other issues does not mean that the defendants' undiscussed appellate arguments are without merit but simply that the issues will not arise again or are not likely to arise in the same form. Asserted problems in the judge's charge not discussed in this opinion will presumably be avoided by jury instructions crafted by the judge who retries the case. For example, at retrial the jury should not be told that they may infer a defendant's consciousness of guilt if they disbelieve the defendant's alibi witnesses. Also, at retrial the language of *Commonwealth v. Rodriguez,* 378 Mass. 296, 302, 391 N.E.2d 889 (1979), should not be used when discussing how the jury should assess the testimony of any defense witness who testifies that the men in the vehicle leaving the scene of the crime were not the defendants. The *Rodriguez* opinion concerns the appropriate instruction to be given concerning the possibility of mistaken identification of a defendant by prosecution witnesses.

In discussing the grounds on which we determine that admission of the plea agreement and certain testimony concerning ***268** it constitute reversible error, the dissent states its view that, in certain instances, appellate rights were not preserved at trial or an issue was not specifically argued on appeal. Our function under G.L. c. 278, § 33E (1988 ed.), in reviewing a conviction of murder in the first degree is to consider, not only issues clearly preserved for appellate review, but also issues apparent on the record (see *Commonwealth v. Brown,* 376 Mass. 156, 166-168, 380 N.E.2d 113 [1978]; *Commonwealth v. Corcione,* 364 Mass.

611, 618, 307 N.E.2d 321 [1974]), to determine whether there is a substantial likelihood of miscarriage of justice. For example, in *Commonwealth v. Callahan,* 380 Mass. 821, 822, 406 N.E.2d 385 (1980), this court rejected all the arguments advanced on appeal by a defendant convicted of murder in the first degree, and then, based on its independent review of the record, identified an error, not argued below (*id.* at 826, 406 N.E.2d 385), that required the court to order a new trial.

In the course of that portion of the trial that concerned the admission of the plea agreement and testimony concerning it, one or more defense counsel objected to the witness testifying to the content of the agreement; to the self-serving quality of the agreement's references to truthfulness; to the boot-strapping quality of the statement that the benefits to DeVincenzi of the agreement depended on the fact DeVincenzi did not shoot the victim; to reading the agreement to the witness; and to the hearsay representations inherent in testimony ****322** concerning the involvement of DeVincenzi's counsel in the execution of the plea agreement. At another point counsel sought, perhaps belatedly, to raise a different but unidentified objection but was barred from doing so.

Surely trial counsel could have done a better job. They could have moved for the redaction of specific portions of the agreement after the judge ruled that the agreement in general was admissible. Indeed a pretrial motion along the same lines would have been appropriate. Perhaps appellate counsel should have focused on the inappropriateness of specific portions of the agreement other than those they thought inappropriate. In any event, we regard as fully before us the question whether there should be a new trial because of the ***269** errors that we have identified and viewed collectively as prejudicial.

As to a crime that once carried the penalty of death and that now alone calls for the imposition of a sentence of life imprisonment without the possibility of parole, a special duty has been assigned to us under G.L. c. 278, § 33E. We must disregard omissions of counsel if justice requires us to order a new trial. Such an appellate process can rightly be troublesome to the trial judge because it does not mean in all instances in which we order a new trial that the trial judge has erred in any traditional (or even nontraditional) sense. That problem is, however, inherent in the process required of us under § 33E.

The judgments are reversed, the verdicts set aside, and the cases are remanded to the Superior Court for retrial.

So ordered.

ABRAMS, Justice (concurring, with whom LIACOS, C.J., joins).

I agree with the opinion of the court, but I add the following comments concerning the instructions in answer to the dissent's contention that the judgments should be affirmed.

1. *Identification.*[1] The defendants challenge the trial judge's instruction on identification as inappropriate and prejudicial. They also claim that the judge's instruction on this point impermissibly shifted the burden of proof from prosecution to defense in violation of the defendants' right to due process of law. The defendants' contentions are based on the inappropriateness of any identification instruction at all ***270** in the circumstances of the case. They are correct. Positive identification of the defendants was never at issue. The defendants were linked to the crime by the testimony of an accomplice, William DeVincenzi, who had known them for some time before the murder.

The judge's instructions on identification applied to the testimony of Joseph Rugnetta and Christine Lennon, two defense witnesses. Both witnesses observed the getaway car and testified that neither defendant was among the men they saw in the car. Because these witnesses were not "identification" witnesses for the prosecution, an instruction of the sort normally given when a prosecution witness identifies a defendant was wholly inappropriate.

The instruction was not only incorrect but also gravely prejudicial to the defendants. The judge repeatedly referred to factors that might give rise to reasonable doubt if the identification witnesses were testifying for the prosecution; she urged the jury to consider the credibility of Rugnetta and Lennon and whether they might be mistaken or lying when they claimed that the defendants were not the men they had seen in the getaway car. These admonitions, which normally serve the function of requiring a jury to be convinced beyond a reasonable doubt that the defendant *was* the perpetrator of a crime, in this case ****323** were applied in a way that encouraged the jury to regard defense witnesses with suspicion. Because of the truthtelling aspect of DeVincenzi's agreement (see the opinion of the court, *ante* at ----), combined with the skepticism with which the jurors were

instructed to weigh the testimony of the defense witnesses, the error was prejudicial.

After timely objection by defense counsel, the judge attempted to fashion a curative instruction.[2] In the "curative" instruction, the judge stated, "[T]he burden is on the Commonwealth to prove identity of any defendant beyond a reasonable doubt. In mentioning the witnesses Christine Lennon and Joseph Rugnetta, I did not mean to imply that they had ***271** any burden to prove anything." The judge then lapsed into her previous error by adding: "The purpose of my giving you the identification charge, as far as [Rugnetta and Lennon] are concerned, was so that you could *evaluate their credibility as identification witnesses* " (emphasis added). This reference to credibility had the effect of reemphasizing the skepticism with which these defense witnesses should be viewed. The attempted correction therefore did not eliminate the legal error.

Both the original and the "curative" instruction impermissibly shifted the burden of proof from the Commonwealth to the defense in violation of the defendants' right to due process of law. See *Francis v. Franklin,* 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). These instructions plainly were errors of law. Assuming the failure to object to the attempted curative instruction requires analysis under G.L. c. 278, § 33E, the lowering of the Commonwealth's burden of proof resulted in a "substantial likelihood that a miscarriage of justice [had] occurred." *Commonwealth v. Cole,* 380 Mass. 30, 38, 402 N.E.2d 55 (1980). See G.L. c. 278, § 33E.

2. *Consciousness of guilt.*[3] The defendants challenge the instruction on consciousness of guilt on the grounds that it deprived them of their constitutional right to present a defense to the charges against them and impermissibly reduced the Commonwealth's burden of proof.

Both defendants offered alibi witnesses. The Commonwealth then offered a witness, Anthony Pezzella, to rebut the alibi of the defendant Ciampa. Pezzella testified that, shortly ***272** after the murder, he questioned Ciampa about his whereabouts at the time of the crime, and Ciampa said that he had been at home that night. Because these two exculpatory accounts offered by Ciampa-his alibi at trial and his statement to Pezzella-were in conflict, the prosecutor requested, and the judge gave, an instruction concerning conflicting accounts as evidence of consciousness of guilt.[4]

The judge's charge improperly broadened the scope of evidence that can be taken as indicating a guilty conscience. Generally, only a defendant's *own* statements or actions can indicate consciousness of guilt. Testimony by alibi witnesses, therefore, is an inappropriate basis for an instruction on consciousness of guilt. See *Commonwealth v. Basch,* 386 Mass. 620, 624, 437 N.E.2d 200 (1982).

With respect to Orlandella, there is no evidence of any statement by him as to his ****324** whereabouts on April 11. The jurors were permitted to infer *his* consciousness of guilt if they disbelieved his alibi witnesses. This was an unconstitutional burden on his right to present evidence. "[E]very subject [in a criminal prosecution] shall have a right to produce all proofs, that may be favorable to him." Art. 12 of the Massachusetts Declaration of Rights. Cf. *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *Commonwealth v. Mahdi,* 388 Mass. 679, 695, 448 N.E.2d 704 (1983).

As to both defendants, the instruction impermissibly shifted the burden of proof from the Commonwealth. In *People v. Leasure,* 34 A.D.2d 688, 312 N.Y.S.2d 563 (1970), the court reversed a conviction on these same grounds, with the admonition that "[t]he burden of proof of guilt never shifts from the People." *Id.* at 689, 312 N.Y.S.2d 563. Cf. *Commonwealth v. Berth,* 385 Mass. 784, 787, 434 N.E.2d 192 (1982) (burden of proof shifts when a judge instructs, "You either believe one side or you believe the other side"); *Commonwealth v. Trefethen,* 157 Mass. 180, 200, 31 N.E. 961 (1892) (prosecution may not contend that a denial of guilt is itself evidence against the defendant). This lowering of the ***273** Commonwealth's burden of proof also resulted in a "substantial likelihood that a miscarriage of justice [had] occurred." *Commonwealth v. Cole, supra* 380 Mass. at 38, 402 N.E.2d 55. See G.L. c. 278, § 33E. I would grant a new trial on the erroneous instructions as well as the manner in which the written plea agreement was handled.

O'CONNOR, Justice (dissenting, with whom NOLAN and LYNCH, JJ., join).

Much of the court's opinion consists of "observations intended to aid trial judges ... in the future," *ante* at 319, and of commentary concerning anticipated issues on retrial. *Ante* at 321. I direct my attention solely to that part of the court's

opinion that sets forth the court's rationale for reversing the convictions.

The court is correct when it says that the admission in evidence of DeVincenzi's plea agreement did not constitute impermissible "vouching," and that, "if appropriately handled," "testimony pursuant to a plea agreement, founded on a promise of truthful cooperation, and the plea agreement itself are admissible." *Ante* at 318. The court concludes, however, that the judge committed reversible error in the manner in which she handled the plea agreement. *Ante* at 316. I do not agree with that conclusion.

The court identifies four perceived errors in the judge's handling of the plea agreement. *Ante* at 318. The first perceived error is that the judge failed to redact from the plea agreement the statement that the agreement was "contingent upon the truthfulness of [DeVincenzi's] representation to the Commonwealth that he, personally, did not shoot [the victim]." "That statement," according to the court, "can be read as asserting the Commonwealth's reasoned conclusion that DeVincenzi's representation was correct." Neither defendant argues the point on appeal. The defendants' failure to argue the point is understandable. The provision that the agreement is contingent on the truthfulness of DeVincenzi's representation that he did not shoot the victim cannot fairly be construed as the Commonwealth's asserted conclusion, ***274** reasoned or otherwise, that the representation was truthful. The statement says no more than that, if DeVincenzi's representation indeed should turn out to have been false, the Commonwealth will have no obligation with respect to a sentencing recommendation. Redaction was neither required nor appropriate.

The second "error" identified by the court as a reason to reverse the convictions is that "[t]he judge should also have deleted references in the agreement that DeVincenzi would be placed in a program to protect his life and safety." *Ante* at 318. Neither defendant requested the judge to redact those references nor objected to them nor argues that issue on appeal. Nevertheless, I agree that redaction of that language would have been appropriate. I discuss below the effect of the judge's failure to do so.

****325** Next, the court states that "[r]epeated references to the witness's obligation to tell the truth should have been deleted" from the plea agreement. *Ante* at 318. I submit there was no error, and certainly no prejudicial error, in this regard. The court concedes that the agreement providing DeVincenzi's obligation to tell the truth was properly in evidence. Nothing in *United States v. Mealy,* 851 F.2d 890, 898-899 (7th Cir.1988), relied on by the court, supports the court's assertion that it was reversible error for the judge not to redact repeated references to the witness's obligation to tell the truth. In *Mealy,* five witnesses testified pursuant to plea agreements. The agreements were five pages in length, and each contained four or five references to that witness's promise to testify truthfully. The *Mealy* court said that, "[i]n drafting plea agreements, the government should avoid unnecessarily repetitive references to truthfulness if it wishes to introduce the agreements into evidence. Nevertheless, we do not believe that the plea agreements in this case disproportionately emphasized or repeated the promise of truthful testimony." *Id.* at 899-900. The repetitions in the present case do not come close to the twenty to twenty-five repetitions that the court found acceptable (and certainly not reversible error) in *Mealy.*

***275** The last asserted error on which the reversal of these convictions turns is that the judge "permitted the Commonwealth to obtain testimony from DeVincenzi that his attorney had signed a statement representing that DeVincenzi understood the agreement and that his attorney believed that DeVincenzi's decision to make the agreement was an informed and voluntary one." *Ante* at 318. This evidence was hearsay and was inadmissible. The proper consequence of that error is discussed below.

The court reasons that the prejudice from the judge's erroneous failure to redact the aforementioned provisions, and her erroneous admission in evidence of DeVincenzi's attorney's out-of-court statement, was not alleviated by the judge's jury instructions, and that the errors therefore require reversal. *Ante* at 319. In my view, the court has correctly identified only two errors. One is the judge's failure to redact from the plea agreement the witness protection references, and the other is the admission of the attorney's out-of-court statement.

At trial, the defendants did not preserve the witness protection issue for appellate review. Furthermore, they have not argued the point on appeal. Even so, of course, we are required by G.L. c. 278, § 33E, to consider whether the failure to redact the witness protection references, viewed in the context of the entire case, poses a substantial likelihood of a miscarriage of justice with respect to the convictions of murder in the first degree. Also, with respect to the other convictions, pursuant to our decision in *Commonwealth v. Freeman,* 352 Mass. 556,

563-564, 227 N.E.2d 3 (1967), we conduct a similar test; one, as we have previously said, that may be harder than the test under c. 278, § 33E, for the defendant to satisfy. *Commonwealth v. Lennon,* 399 Mass. 443, 448-449 n. 6, 504 N.E.2d 1051 (1987). *Commonwealth v. Richmond,* 379 Mass. 557, 562-563 n. 4, 399 N.E.2d 1069 (1980).

The court, unaided by argument by the defendants, does not discuss the significance of the plea agreement's references to the witness protection program except to say that the references "implied that the Commonwealth agreed that ***276** DeVincenzi reasonably believed his life and safety would be in jeopardy, if he testified against the defendants." *Ante* at 318. Even if DeVincenzi's belief about the defendants' dangerousness were more than marginally significant in the total context of these cases, a very doubtful proposition, the inclusion in the agreement of the witness protection references does not demonstrate, despite the court's contrary suggestion, that DeVincenzi considered those references to be necessary or even advisable. For all that appears in the record, those references were routinely included in such agreements, DeVincenzi did not insist on them, and indeed was indifferent about their inclusion here. Surely, the jury's exposure to that kind of evidence did not ****326** create a substantial risk of a miscarriage of justice.

I turn to the erroneous admission of DeVincenzi's testimony that his attorney had signed a statement to the effect that DeVincenzi's decision to enter into the plea agreement was an informed and voluntary one. "The attorney's hearsay statement," the court says, "in effect indicated that he believed DeVincenzi was telling him the truth, thus justifying his advice to DeVincenzi to plead guilty and to testify against the defendants." *Ante* at 318-319. The court indulges in a non sequitur. Yes, the attorney's statement was inadmissible hearsay, but it was absolutely harmless. The attorney's statement implies nothing whatsoever about whether the attorney believed DeVincenzi's account of the robbery and murder.

In reversing the defendants' convictions, the court relies on four perceived errors. Two of these, in my view, were not errors, and the other two, considered individually or cumulatively, were not reversible. Therefore, I cannot join the court's opinion or subscribe to its result.

Further discussion is appropriate. Despite the court's expressed limitation of its holding to the four asserted evidentiary errors and the judge's failure in her instructions to cure the perceived prejudice therefrom, the court's opinion seems also to suggest that, although the issues may not have been properly preserved for the purpose of review, there were ***277** other defects in the instructions which may have inclined the court toward reversing the convictions. The court states as follows: "The charge failed adequately to direct the jury's attention to the potential influences of the plea agreement on DeVincenzi's credibility and failed as well to dispel any implication inherent in the plea agreement, and in the presentation of DeVincenzi as a government witness, that the government knew or was warranting that DeVincenzi was telling the truth.... [The] language [of the charge] insufficiently conveys a need for caution as to DeVincenzi's testimony. The charge did not tell the jury to weigh DeVincenzi's testimony with care and not to consider DeVincenzi's guilty plea as evidence against the defendants. It did not adequately focus the jury's attention on the incentives that could have influenced DeVincenzi's testimony. It did not warn the jury that, in entering into the agreement and presenting him as a witness, the government did not know whether DeVincenzi was telling the truth and did not emphasize that DeVincenzi's truthfulness was solely a question for the jury to decide. Only by a cautionary instruction covering these points could the jury have been in a position to evaluate the impact of the plea agreement and testimony presented pursuant to it." *Ante* at 319.

I do not agree that the jury instructions bearing on the plea agreement were defective. Furthermore, even if they were somehow defective in that regard, such defects, if not properly preserved for appellate review, would not be cause for reversal in the absence of a demonstration, not attempted by the court, that the defects created a substantial risk of a miscarriage of justice. In my view, there clearly was no error creating such a risk.

Early in its opinion, *ante* at 317, the court expresses its disagreement with the defendants' "claim that admission of the agreement in evidence was in effect a representation by the prosecutor that DeVincenzi's testimony was credible, a form of vouching by the prosecutor who was not subject to cross-examination." The court was right. Vouching occurs when "the prosecution portrays itself 'as a guarantor of ***278** truthfulness' by making personal assurances that the witness is telling the truth or by ... indicating that information not heard as evidence supports the testimony." *United States v. Munson,* 819 F.2d 337, 344-345 (1st Cir.1987), quoting *United States v. Martin,* 815 F.2d 818, 821 (1st Cir.), cert. denied, 484 U.S. 825, 108 S.Ct. 89, 98 L.Ed.2d 51 (1987).

United States v. Leslie, 759 F.2d 366, 378 (5th Cir.1985), rev'd on other grounds, 783 F.2d 541, 542 n. 1 (1986) (en banc), vacated on other grounds, 479 U.S. 1074, 107 S.Ct. 1267, 94 L.Ed.2d 128 (1987). *United States v. Sims,* 719 F.2d 375, 377 (11th Cir.1983), cert. denied, ****327** 465 U.S. 1034, 104 S.Ct. 1304, 79 L.Ed.2d 703 (1984). There was no vouching in this case. The plea agreement's requirement that DeVincenzi testify truthfully as a condition precedent to the Commonwealth's obligation to make a favorable sentencing recommendation neither implies the prosecutor's assurance of DeVincenzi's credibility nor suggests that the Commonwealth has information not known to the jury that supports DeVincenzi's testimony. See *United States v. Mealy, supra* at 899-900. *United States v. Munson, supra* at 344-345; *United States v. Martin, supra* at 821-822; *United States v. Townsend,* 796 F.2d 158, 162-163 (6th Cir.1986); *United States v. Leslie, supra* at 378; *United States v. Sims, supra* at 377-378. Furthermore, despite the contrary view expressed in *United States v. Wallace,* 848 F.2d 1464, 1474 (9th Cir.1988), such a plea agreement simply does not imply that the Commonwealth knows or can discover whether the witness is telling the truth. That is especially the case where, as here, the plea agreement provides that the truthfulness of the witness's testimony is for the sentencing judge, not the prosecutor, to decide. Therefore, there was no need for the judge in this case to give an instruction designed to neutralize such a nonexistent implication. Rather, an instruction in that regard would have been inappropriate.

Did the jury instructions fail adequately to direct the jury's attention to the potential influences of the plea agreement on DeVincenzi's credibility, as the court charges? I think not. The court states that "[t]he charge did not tell the jury to weigh DeVincenzi's testimony with care and not to ***279** consider DeVincenzi's guilty plea as evidence against the defendants." *Ante* at 319. In this Commonwealth, as in other States, but unlike in the Federal courts, judges instructing juries in civil or criminal cases ordinarily are not permitted to comment on the evidence. See *Commonwealth v. Kane,* 19 Mass.App.Ct. 129, 138, 138 n. 9, 472 N.E.2d 1343 (1984). See also 9 J. Wigmore, Evidence § 2551 (Chadbourn ed. 1981). Thus, Federal cases are of doubtful assistance to a determination whether the judge in these cases should have commented to the jury that DeVincenzi's testimony should be weighed "with care." Furthermore, I am aware of no case that requires the judge in the circumstances of these cases to instruct the jury that a witness's guilty plea is not to be considered as evidence against the defendants.

Even if this court were to adopt a rule requiring trial judges to make sure that the jury are aware of the special circumstances that may impair the credibility of an accomplice testifying pursuant to a written plea agreement, no rule should be adopted that would require a more focused or stronger instruction than the one given in this case. The judge instructed the jury in part as follows: "An accomplice is one, and I am referring now to William DeVincenzi, one who knowingly, voluntarily, and with common intent, unites with a principal offender in the commission of a crime. A person who is an accomplice to a crime is a criminal himself and that in itself raises a question of credibility.... The testimony of an accomplice ... need not be corroborated, although you may consider whether such is the case in weighing an accomplice's credibility. Whether you should believe the testimony of an accomplice rests in your good judgment based upon all the evidence before you. You should not convict a defendant unless you believe beyond a reasonable doubt that the accomplice is telling the truth.

"Now, in this case there is also evidence that William DeVincenzi, who has admitted his participation in the Tello's murder, made a plea agreement with the Government ... under which certain promises were made to him in return for his truthful cooperation and testimony. You may consider ***280** this agreement and any hopes the witness may have as to future advantages in judging his credibility, as well as the credibility of any witness who came before you to whom promises had been made." The judge should not be required to place his or her thumb on the scale to benefit a defendant. If, indeed, there should be any requirement that the judge remind the jury that the testimony of an accomplice pursuant to a plea agreement may be suspect, that requirement was met in this case.

****328** The instructions were adequate, but, even if they were not, it cannot reasonably be said that the jury may have been unaware that DeVincenzi's situation presented to the jury a unique and critical issue of his credibility. From the openings and the evidence the jury were informed that DeVincenzi was an accomplice, that he was a criminal, that his testimony had in a sense been "bought" by the Commonwealth, and that his motivation was highly suspect. Surely in the course of this seven-week trial, even if there had been no comment by the judge, the jury would have been acutely aware of the necessity that they weigh DeVincenzi's testimony with care. Thus, in my view, if the judge did fail to state the obvious with as much vigor as the court would require, there is no risk-and certainly

not a substantial one-that, had the instructions met the court's requirements, the result would have been different.

I am aware that the defendants have argued numerous issues not relied on by the court in reversing these convictions and barely mentioned by the court or not mentioned at all. I, too, will refrain from what would be an unproductive discussion of those issues since the court has remanded the cases for retrial.

All Citations

406 Mass. 257, 547 N.E.2d 314

Footnotes

1 Five against Carmen G. Ciampa and five against Mark D. Orlandella.

2 Ciampa was also convicted of unlawfully carrying a shotgun on his person.

3 The Commonwealth also agreed (a) to recommend concurrent sentences on other charges pending against DeVincenzi, (b) to endeavor to have DeVincenzi serve his sentence in an appropriate Federal institution, (c) to acknowledge DeVincenzi's truthful cooperation to other governmental agencies and courts, (d) to try to have charges pending in New Hampshire against DeVincenzi disposed of on a concurrent basis, and (e) to use available programs within lawful limits to protect DeVincenzi's life and safety during confinement.

4 The agreement as it went to the jury did not contain the attorney's signed statement, and a reference to the results of a polygraph examination was deleted.

5 Some Federal courts have accepted the admissibility of plea agreements that were not only contingent on the witness's truthful testimony but also were contingent on the government's general satisfaction with the witness's testimony. See *United States v. Spector,* 793 F.2d 932, 934, 936-937 (8th Cir.1986), cert. denied, 479 U.S. 1031, 107 S.Ct. 876, 93 L.Ed.2d 830 (1987) (the agreement provided "[t]he more important we deem that information and cooperation [in solving and prosecuting crimes], the more likely the reduction of charges and [the informant's] sentencing risk"); *United States v. Dailey,* 759 F.2d 192, 197, 200-201 (1st Cir.1985) (government's recommendation for sentencing will be influenced by "the value to the government" of the witness's cooperation; such a contingent plea agreement "should be reserved for exceptional cases, such as this one, where the value and extent of the accomplice's knowledge is uncertain but very likely to be great"); *United States v. Waterman,* 732 F.2d 1527, 1531 (8th Cir.), vacated en banc, *id.* at 1533 (1984) (four-to-four decision) (affirming a conviction based on testimony of witness whose subsequent treatment by the government was contingent on the success of the prosecution), cert. denied, 471 U.S. 1065, 105 S.Ct. 2138, 85 L.Ed.2d 496 (1985). We need not go so far in deciding this case because the plea agreement here did not depend on the results of the prosecution or on the Commonwealth's satisfaction with the witness's testimony.

Testimony pursuant to a plea agreement made contingent on obtaining an indictment or a conviction, as a result of the witness's testimony, would presumably present too great an inducement to lie, would not meet the test of fundamental fairness, and would not be admitted. See *United States v. Dailey, supra* at 201; *United States v. Waterman, supra* at 1531.

6 The better course would be also to delete any signature of the prosecutor or other representative of the Commonwealth from the agreement as admitted in evidence.

7 The defendants objected to aspects of the charge concerning DeVincenzi sufficiently to put the judge on notice of the need for a special instruction concerning DeVincenzi. We need not consider whether the objections were sufficiently focused to preserve as appellate issues various challenges to the jury instructions. Our holding is that the prejudicial admission of portions of the plea agreement was not cured in the judge's charge.

8 "You should give the testimony of each witness such weight as in your good judgment it is fairly entitled to receive." The fact that a person was an accomplice "in itself raises a question of credibility.... The testimony of an accomplice need not be corroborated. In other words, you need not have other evidence, if you find beyond a reasonable doubt that you believe the testimony of William DeVincenzi.... Whether you should believe the testimony of an accomplice rests in your good judgment based upon all the evidence before you.... You may consider the [plea] agreement and any hopes the witness may have as to future advantages in judging his credibility."

1 The judge stated to the jury: "Are you *convinced* that the witness had the capacity and an adequate opportunity to observe the individual ..."; "Are you *satisfied* that the witness had the eyesight and the time necessary under the circumstances to see the individual ..."; "[A]re you *convinced* that the witness did not make a good faith mistake in the identification of an individual ..."; "You may consider whether or not a witness may have a motive for lying. You have to be *convinced*

that the identification made by a witness subsequent, in other words, after the offense, was the product of his own recollection....” (Emphasis added.)

2 At side bar, the assistant district attorney also expressed concern as to the appropriateness of the instructions as applied to defense witnesses.

3 The instructions were as follows: “It is your memory that controls ... you have heard ... testimony from various witnesses, which if you believe it, concerns where Ciampa and Orlandella were at various times on April 11, 1983, the date of this incident. Based upon your determinations of the facts and reasonable inferences based upon credible evidence, it is for you to say whether a defendant has given conflicting stories, or whether in fact you find that there has been presented to you a false alibi. I don't mean to suggest that that is the situation. I am only indicating to you that these are matters you may consider as consciousness of guilt if you first find that they are present in [the] evidence.”

4 Although this instruction apparently was meant to apply only to Ciampa, the judge did not so limit it.

763 F.2d 518
United States Court of Appeals,
Second Circuit.

UNITED STATES of America,
Appellant-Cross-Appellee,
v.
Charles JONES, a/k/a "Coffee",
Marshall J. Muhammad, a/k/a
"Marshall Jones", Raymond Piacente,
Defendants-Appellees Cross-Appellants.

Nos. 605, 454, 515 and 516, Dockets
84–1230 and 84–1258 to 84–1260.
|
Argued Dec. 18, 1984.
|
Decided May 28, 1985.

Synopsis

Defendants were convicted in the United States District Court for the Southern District of New York, Mary Johnson Lowe, J., of various narcotics offenses primarily through the sale of drugs by way of forged prescriptions, and they appealed. The United States cross-appealed from order setting aside a defendant's conviction on charge of operating a continuing criminal enterprise. The Court of Appeals, Cardamone, Circuit Judge, held that: (1) once defense counsel questioned motives of government witnesses, Government was properly permitted to elicit testimony on direct examination about portions of the witnesses' cooperation agreements requiring them to testify truthfully; (2) presence of alternate jurors during deliberations, acquiesced in by defense counsel, violated rule but did not mandate new trial; and (3) finding of continuing criminal enterprise under the Comprehensive Drug Abuse Prevention and Control Act section 848 could be predicated upon section 846 conspiracy violations, based themselves on section 841 substantive narcotics violations that defendant himself did not commit, and it was error to instruct otherwise and to enter acquittal judgment on the continuing criminal enterprise count; however, jury's answers to special interrogatories reflected positive findings as to all necessary elements of section 848 violation and, hence, guilty verdict would be reinstated.

Affirmed in part, reversed in part, and remanded.

Kearse, Circuit Judge, dissented in part and filed opinion.

Attorneys and Law Firms

***519** Michael P. Stokamer, New York City, for defendant-appellee-cross-appellant Charles Jones.

Edward S. Panzer, New York City, for defendant-cross-appellant Raymond Piacente.

Ralph Naden, New York City (Donald E. Nawi, New York City, of counsel), for defendant-cross-appellant Marshall J. Muhammad.

David S. Hammer, Asst. U.S. Atty., S.D.N.Y., New York City (Rudolph W. Giuliani, ***520** U.S. Atty., S.D.N.Y., Stuart Abrams, Stacey J. Moritz, Asst. U.S. Attys., New York City, of counsel), for appellant-cross-appellee United States of America.

Before MESKILL, KEARSE and CARDAMONE, Circuit Judges.

Opinion

CARDAMONE, Circuit Judge:

Three appellants are before us as a result of their convictions arising from their involvement over several years in the illegal distribution of a huge amount of drugs by forged prescriptions. After the jury returned a guilty verdict on a multi-count indictment against one of the appellants, the trial court set aside the verdict as to one count, which prompted the government's appeal. The resolution of the appeals from the judgments of convictions against appellants is relatively straightforward. What sets this case apart are the problems raised by the government's appeal.

The confusion began when the district court charged the jury that conspiracy violations and substantive violations attributed to a defendant because of his membership in a conspiracy could not be considered as predicate offenses to support a conviction for operating a continuing criminal enterprise in violation of 21 U.S.C. § 848 (1982). As our recent decision in *United States v. Young,* 745 F.2d 733 (2d Cir.1984), makes clear, this charge was erroneous. Further, the jury was also directed to return with its verdict answers to certain written interrogatories. With this cautionary stroke, the district judge enabled us to know on what factual basis the jury reached its verdict. Such knowledge is crucial on

Evelyn Dorval, a licensed pharmacist who worked at the Liotta Pharmacy, testified that Jones and Piacente sold controlled substances in the back room. Juanita Solas, who also worked at the Liotta Pharmacy, testified to her own and Jones' and Piacente's involvement in the sale of controlled substances. Frederick Ibitoye stated that he had written prescriptions at Liotta Pharmacy at Jones' and Piacente's request. Herman Fleming, a clerk and stockboy at Harlem Pharmacy, asserted that Muhammad and Jones sold drugs illegally there. Fleming also testified that he picked up packages of controlled substances from the Liotta and Brownsville Pharmacies and brought them to the Harlem Pharmacy. Cathy Jo Wilton, administrator of the Greenleaf Clinic and an indicted co-conspirator, testified that she ordered prescription narcotics for the clinic and delivered them to Muhammad at the Harlem Pharmacy. Wilton also testified that she forged prescriptions at Muhammad's request and that he supplied her with a model prescription form and blank prescription pads.

All of the above witnesses, except the DEA agent and the stockboy at Harlem Pharmacy, testified pursuant to cooperation agreements with the government. At trial these witnesses testified on direct examination regarding the portion of the cooperation agreement that required them to testify truthfully.

Shortly before the district judge charged the jury, defense counsel requested that the alternate jurors not be discharged. One of the regular jurors had indicated that she might have to leave early, and defense counsel indicated that they wanted to facilitate her substitution in that event. Appellants' counsel urged the trial court to allow two or three alternate jurors to be present during deliberations. Upon being assured that this was the choice of all the appellants, the trial judge granted this request. ***522** At the end of her charge, Judge Lowe instructed two of the alternate jurors to sit and listen to the jury's deliberations. She emphasized that although the alternates could be present, they were not to participate.

Less than two hours after the jury had retired, the government's attorney informed the court that research had revealed that alternates should not be present in a jury room during deliberations. Judge Lowe promptly recalled the jury and discharged the two alternates. At that time the court asked them whether they had participated in the deliberations. One alternate said they had not; the other was ambivalent. The trial judge then instructed the regular jurors to begin their deliberations anew and to disregard all discussions that had been held up to that point. The jury deliberated for another 14 hours before reaching its verdicts.

The district court had directed the jury to return a special verdict on Charles Jones' continuing criminal enterprise charge, 21 U.S.C. § 848. The jury was requested, among other things, to identify the three predicate narcotics violations necessary to support a § 848 conviction. When the jury returned a guilty verdict on the continuing criminal enterprise charge against Jones, the district court set that verdict aside and entered a judgment of acquittal because it concluded that the jury had improperly relied on § 846 narcotics conspiracy violations as predicate offenses for the § 848 conviction.

III

Defendant's Arguments

A. *The Truth-Telling Provisions of the Cooperation Agreements*

The defendants complain that by eliciting testimony about the truth-telling portions of the witnesses' cooperation agreements the government improperly bolstered the witnesses' credibility and prejudiced defendants. Absent an attack on a witness' veracity, no evidence is admissible to bolster his credibility. *See* Fed.R.Evid. 608(a)(2); C. McCormick, *Law of Evidence* § 49 (2d ed. 1972). Ordinarily the government may not elicit evidence of truth-telling portions of cooperation agreements on direct examination. *United States v. Arroyo-Angulo,* 580 F.2d 1137, 1146 (2d Cir.), *cert. denied,* 439 U.S. 913, 1005, 99 S.Ct. 285, 618, 58 L.Ed.2d 260, 681 (1978) and 439 U.S. 1131, 99 S.Ct. 1052, 59 L.Ed.2d 93 (1979). We held in *United States v. Maniego,* 710 F.2d 24, 27 (2d Cir.1983) (per curiam), that as Fed.R.Evid. 608(a)(2) allows admission of credibility testimony "only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise," such evidence is admissible on direct only if the witness' credibility was attacked in the opening argument. Here defense counsel attacked the credibility of the government's witnesses in their opening arguments.

Defense counsel questioned the motives of the government witnesses and commented on their immunity status by stating that it meant they have committed "many crimes, and they are not going to be prosecuted." Reference was further made in the opening to the fact that one of the government witnesses had previously committed perjury. The jury had to ask

itself, another defense counsel said, whether the government witnesses they heard had "made a deal to save their own hide." Since these opening statements by defense counsel attacked the credibility of the government witnesses, appellants may not be heard to complain at their rehabilitation on direct examination.

B. *Presence of Alternate Jurors During Deliberations*

Jones and Piacente assert that the presence of the two alternate jurors in the jury room for about an hour and a half deprived them of a fair trial. Federal Rules of Criminal Procedure 24(c) states: "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." Unquestionably, by not discharging the two ***523** alternate jurors and allowing them to sit at the beginning of the jury's deliberations, the district court violated this rule. This mandatory rule is one that trial courts should carefully observe because of the potential for an unfair trial. When alternate jurors are present during deliberations, the possible prejudice is that the defendants are being tried not by a jury of 12, as is their right, but by a larger group. *See United States v. Hayutin,* 398 F.2d 944, 951 (2d Cir.), *cert. denied,* 393 U.S. 961, 89 S.Ct. 400, 21 L.Ed.2d 374 (1968); *United States v. Allison,* 481 F.2d 468, 470 (5th Cir.), *aff'd after remand,* 487 F.2d 339 (5th Cir.1973), *cert. denied,* 416 U.S. 982, 94 S.Ct. 2383, 40 L.Ed.2d 759 (1974).

Recently, in *United States v. Hillard,* 701 F.2d 1052 (2d Cir.), *cert. denied,* 461 U.S. 958, 103 S.Ct. 2431, 77 L.Ed.2d 1318 (1983), we held that "a violation of Rule 24(c) does not require reversal per se, absent a showing of prejudice." 701 F.2d at 1058. In *Hillard* we refused to reverse a conviction when the trial judge substituted an alternate juror for a regular juror who became ill after deliberations had begun. The alternate juror had reaffirmed his ability to consider evidence and to deliberate fully and fairly and indicated that his discussions with the other alternate had not changed in any way his view of the case. Further, the trial judge there instructed the jurors to begin their deliberations over again after the alternate joined them. Because of the district court's painstaking efforts to minimize potential prejudice to defendants and its determination that there had in fact been no such prejudice, we found that the violation of Rule 24(c) did not constitute reversible error. 701 F.2d at 1061; *see also United States v. Mahler,* 579 F.2d 730, 737 (2d Cir.), *cert. denied,* 439 U.S. 872, 991, 99 S.Ct. 205, 592, 58 L.Ed.2d 184, 666 (1978).

Although *Hillard* was decided on somewhat different facts, its holding that a Rule 24(c) violation does not require reversal absent a showing of prejudice applies here. Hence, in order to determine whether a Rule 24(c) violation mandates a new trial, there must be an analysis of the facts and circumstances at trial. Some factors that should be considered are: (1) whether defendants requested or consented to the alternates' presence in the jury room; (2) how long the alternates were present; (3) whether the alternates participated in the deliberations; (4) what instruction the trial judge gave before the alternates retired with the regular jurors; (5) what the alternates' statements subsequently revealed; (6) what curative instructions were given by the trial court to the "reconstituted" jury, i.e., the body without the alternates. An evidentiary hearing should be held where necessary for an evaluation of these factors. *See Allison,* 481 F.2d at 472.

Here, when the trial court sent the regular jurors out to deliberate and allowed the alternates to accompany them, it specifically instructed the alternates not to participate. The alternates were with the jury for less than two hours. When the alternates were withdrawn and questioned as to whether they had participated and one answered somewhat ambiguously, the trial court called all of the regular jurors before it and instructed that their deliberations must start again from the beginning and they were to disregard any possible participation by the alternates. The jury thereafter deliberated for 14 hours before reaching a verdict. These factors demonstrate the lack of prejudice present in this case. The brief presence of the alternates was at defendants' request. The trial court instructed the alternates not to participate, but only to sit and listen, and there was a lack of evidence that they had participated. The trial judge gave the reconstituted jury a curative instruction to start its work over again, and the ensuing 14 hours of deliberations before a verdict was reached indicates that whatever possible taint might have crept into the deliberations was effectively removed. Moreover, defendants' counsel, hoping to avoid a mistrial, argued below that inclusion of the alternates would not be reversible error because defendants had requested that course. The fact that defendants themselves ***524** believed that no harm resulted from the alternates' presence is further proof of a lack of prejudice. Defense counsel requests, which are granted by a trial court, are frequently raised as a claim of error on appeal. We look with disfavor on this trial tactic. *United States v. Ferguson,* 758 F.2d 843, 851–52 (2d Cir.1985) (conviction affirmed when defendants over government objection expressly requested trial court to charge a lesser crime, one for which defendants had not

805 F.2d 1464
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee, v. Carlos Bienuenido CRUZ, Roberto Cruz, Stephen Cruz, Teresa Irwin, Phillip Warren Jones, Dave Thomas, and Arthur Liggins Strong, Defendants-Appellants.

No. 85–8808.
|
Dec. 16, 1986.
|
As Amended Dec. 29, 1986.

Synopsis
Defendants were convicted by jury in the United States District Court for the Northern District of Georgia, No. CR 85–108, Orinda D. Evans, J., of various narcotic and gun offenses associated with conspiracy to distribute cocaine, and they appealed. The Court of Appeals, Anderson, Circuit Judge, held that: (1) whether Congress intended for drug trafficking to be included within statutory definition of "crime of violence" was ambiguous, and ambiguity precluded conviction of defendants convicted of underlying narcotics offenses for use of firearms during commission of crime of violence; (2) District Court had jurisdiction over defendant charged with conspiracy in which he was initially involved as minor, and Federal Juvenile Delinquency Act did not prohibit conspiracy conviction on basis of evidence of defendant's acts of conspiracy while he was minor once jury could conclude that defendant's activities had continued when he was adult; (3) testimony of Georgia Bureau of Investigation agent regarding request to be introduced to cocaine supplier was not inadmissible hearsay; (4) conspiracy sentence of defendant also sentenced for engaging in continuing criminal enterprise would be vacated, but sentence for possession offenses would stand; (5) defendant had failed to establish bona fide doubt as to his competency; and (6) prosecutor could present evidence of witness' plea agreements on direct examination after witness' credibility had been attacked by defense counsel during opening statement.

Affirmed in part, vacated in part and reversed in part.

Attorneys and Law Firms

***1466** Wilmer Parker III, Asst. U.S. Atty., Allen H. Moye, Sp. Asst. U.S. Atty., Atlanta, Ga., for plaintiff-appellee.

Jay L. Strongwater, court-appointed, Atlanta, Ga., for Carlos Cruz.

Eugene A. Medori, Jr., court-appointed, Decatur, Ga., for Roberto Cruz.

Gil Howard, court-appointed, Atlanta, Ga., for Stephen Cruz.

R.C. Cougill, court-appointed, Lilburn, Ga., for Teresa Irwin.

Thomas R. Moran, court-appointed, Atlanta, Ga., for Phillip Warren Jones.

Michael R. Hauptman, court-appointed, Atlanta, Ga., for Dave Thomas.

Daniel Kane, Atlanta, Ga., for Arthur Liggins Strong.

Appeals from the United States District Court for the Northern District of Georgia.

Before JOHNSON and ANDERSON, Circuit Judges, and GARZA[*], Senior Circuit Judge.

Opinion

***1467** ANDERSON, Circuit Judge:

This case involves a large conspiracy to distribute cocaine in the Southeastern United States. A grand jury indictment returned on April 15, 1985 charged seventeen defendants with eighteen counts of various narcotic and gun offenses.

Following a jury trial appellant Carlos Cruz, the alleged ringleader of the conspiracy, was found guilty of twelve counts of possessing cocaine with the intent to distribute it in violation of 21 U.S.C. § 841(a)(1), one count of conspiring with others to possess cocaine with the intent to distribute it in violation of 21 U.S.C. § 846, one count of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848, and one count of carrying or using a firearm during the commission of a crime of violence in violation of 18 U.S.C. § 924(c).[1] Appellant Roberto Cruz, Carlos' cousin, was found guilty of conspiring to possess cocaine with intent to distribute, using a firearm during the commission of a

1325 (11th Cir.1982), *cert. denied,* 459 U.S. 1220, 103 S.Ct. 1225, 75 L.Ed.2d 460 (1983). The legal test for competency is whether the defendant had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and whether he had "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States,* 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). Carlos offered the testimony of Dr. Brendi, a psychiatrist from the Veterans Administration, who testified that Carlos was suffering from a post-Viet Nam stress syndrome. The effect of this was to cause him to have memory lapses which, Carlos contends, rendered him incompetent to stand trial. After hearing Dr. Brendi's testimony in full, the trial court concluded that Carlos had not established a bona fide doubt as to his competency, noting that Dr. Brendi's testimony was speculative, that his opinion was reached without the benefit of defendant's previous medical or psychiatric records, and that his opinion was based upon a single interview with the defendant in which Dr. Brendi relied for his conclusions on Carlos' presumed veracity. The trial court of course also had the benefit of its observations of defendant's demeanor.[19] We have carefully reviewed Dr. Brendi's testimony; the deficiencies noted by the district court are well taken. In addition, we note that the only impediment cited by Dr. Brendi as being detrimental to defendant's ability to understand the proceedings and assist in his defense was an asserted deficiency in defendant's capacity to recall. In *Adams v. Wainwright,* 764 F.2d 1356, 1361 (11th Cir.1985), we noted that the ability to recall was not determinative of a defendant's ability to "fully understand the proceedings against him and cooperate meaningfully with his attorney in his defense." Based upon the particular circumstances of this case, we conclude that the district court did not err in finding that Carlos had failed to establish a bona fide doubt as to his competency.

Appellants also challenge the prosecutor's use of the cooperating witness' plea agreements to bolster their testimony ***1480** on direct examination. We have previously held that the general statements contained in a plea agreement requiring a witness to testify truthfully should not be used during direct examination and should be introduced on re-direct only if the credibility of the witness is attacked on cross-examination. *See United States v. Hilton,* 772 F.2d 783, 787 (11th Cir.1985). Other circuits have recognized an exception to this general rule which allows a prosecutor to elicit testimony regarding the truth-telling portion of a cooperation agreement during direct examination if the witness' credibility has been attacked by the defense counsel in his opening argument. *See United States v. Smith,* 778 F.2d 925, 928 (2d Cir.1985). We adopt this sensible and prudent measure. In this case, the entire thrust of several defendants' arguments was that the testimony of the government's cooperating witnesses could not be trusted. The attack on these witnesses' credibility began from almost the first words of the defendants' opening statements. *See, e.g.,* Record on Appeal, vol. 6 at 39–42, 76–77, 81–82, 96–97, 100, 101. Consequently, there was no error in the prosecutor's presenting evidence concerning the plea agreements during direct examination under the facts and circumstances of this case.

Appellants also contend that it was error for the district court to receive partial jury verdicts. Such a procedure is, however, expressly authorized by the Federal Rules of Criminal Procedure. Fed.R.Crim.P. 31(b) ("If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if a jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again."). Upon a review of the record, we determine that there was no error in the manner in which the trial court received the jury verdicts. *See United States v. DiLapi,* 651 F.2d 140, 146–47 (2d Cir.1981), *cert. denied,* 455 U.S. 938, 102 S.Ct. 1427, 71 L.Ed.2d 648 (1982); *United States v. Ross,* 626 F.2d 77, 80–81 (9th Cir.1980).

We have closely examined the remaining various allegations of error made by appellants. They are all without merit and warrant no discussion.

V. CONCLUSION

For the foregoing reasons, the order of the district court is affirmed in all respects but two. Carlos Cruz' conviction for violating 21 U.S.C. § 846 merges with his continuing criminal enterprise conviction and his sentence on § 846 is vacated. Because drug trafficking offenses are not crimes of violence within the definition of 18 U.S.C. § 16(b), Carlos', Roberto's and Irwin's convictions on the § 924(c) firearms count must be reversed.

AFFIRMED in part, VACATED in part, and REVERSED in part.

All Citations

805 F.2d 1464, 22 Fed. R. Evid. Serv. 283

986 F.2d 1273
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of
America, Plaintiff-Appellee,
v.
David Dominic NECOECHEA,
Defendant-Appellant.

No. 92-10275.
|
Argued and Submitted Dec. 17, 1992.
|
Decided Feb. 18, 1993.
|
As Amended on Denial of Rehearing April 15, 1993.

Synopsis

Defendant was convicted by jury in the United States District Court for the District of Arizona, William D. Browning, Chief Judge, of conspiracy to possess marijuana with intent to distribute, and he appealed. The Court of Appeals, Rymer, Circuit Judge, held that: (1) prosecutor's opening statement bringing up truthfulness provision of witness' plea agreement was "vouching," but elicitation of testimony regarding that provision on direct examination was not; (2) prosecutor's closing statement explaining why witness did not testify against her other codefendants and referring to facts not in the record was "vouching," but "I submit" statements were not; and (3) neither instance of vouching was plain error considered separately, nor did both together rise to the level of plain error requiring reversal.

Affirmed.

Attorneys and Law Firms

***1275** William G. Walker, Hirsh, Davis, Walker & Piccarreta, Tucson, AZ, for defendant-appellant.

Jesse Figueroa, Asst. U.S. Atty., Tucson, AZ, for plaintiff-appellee.

Appeal from the United States District Court for the District of Arizona.

Before: GOODWIN, O'SCANNLAIN, and RYMER, Circuit Judges.

Opinion

RYMER, Circuit Judge:

David Dominic Necoechea appeals his conviction for conspiracy to possess marijuana ***1276** with the intent to distribute in violation of 21 U.S.C. §§ 846 & 841(a)(1). Necoechea argues that the prosecution improperly vouched for its witnesses and knowingly presented false testimony, that he was denied effective assistance of counsel, that there was insufficient evidence to support his conviction, and that there was cumulative error. We have jurisdiction, 28 U.S.C. § 1291, and we affirm.

I

Agent Richard Salazar, acting undercover, posed as a large-scale marijuana dealer looking for buyers. He planned a 120 pound transaction with Lupita Gibson, John Blomquist, Charles Jackson, and Manny Romero, though his primary contact was Gibson. After several discussions, a transaction was finally planned at a particular house. Everyone met at the house, after which Salazar left to go get the marijuana. While Salazar was gone, Gibson heard Jackson say that he was going to get his "moneyman."[1] Jackson returned with Necoechea. Gibson saw Necoechea at the door of the residence with a cooler, and heard Necoechea ask Jackson if he should bring the cooler into the house. This appears to be the only contact Gibson had with Necoechea.

At Salazar's request, Gibson and Jackson met him at a parking lot to inspect the marijuana. Salazar noticed that Gibson "looked like she knew what she was doing" when she inspected the marijuana. A short time later, Salazar came to the house, without the marijuana, to inspect the money. Jackson showed Salazar into the house, and led him to a room, but made him wait in the hall. Jackson went into the room, and came out with a cooler filled with cash, which Salazar said "looked good." Salazar then told Jackson that he would call to bring the marijuana to the house, and shortly thereafter a police team arrived. Jackson, Romero, and Necoechea were arrested in the house, and Gibson, who had left, was later pulled over by police when she returned to the house. Necoechea was found, with the cooler full of cash, in the room to which Jackson had led Salazar.

Gibson entered into a plea agreement and testified that she saw Necoechea outside of the house with a cooler. Necoechea was convicted, and now appeals.

II

Necoechea first argues that the prosecutor repeatedly vouched for the credibility of Salazar and Gibson. Since Necoechea failed to raise this objection at trial, we review for plain error. *United States v. Molina,* 934 F.2d 1440, 1444 (9th Cir.1991); Fed.R.Crim.P. 52(b). We reverse only if, viewing the error in the context of the entire record, the impropriety "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings, or where failing to reverse a conviction would amount to a miscarriage of justice." *Id.* at 1446 (internal quotations omitted).

A

"As a general rule, a prosecutor may not express his opinion of the defendant's guilt or his belief in the credibility of government witnesses." *Id.* at 1444. Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony. *Id.* at 1445; *United States v. Roberts,* 618 F.2d 530, 533 (9th Cir.1980). "Vouching is especially problematic in cases where the credibility of the witnesses is crucial, and in several cases applying the more lenient harmless error standard of review, [courts] have held that such prosecutorial vouching requires reversal." *Molina,* 934 F.2d at 1445. At the same time, we have recognized that prosecutors must have reasonable latitude to fashion closing arguments, and thus can argue reasonable inferences based on the evidence, including that one of the two sides is lying. *Id.; see also United States v. Prantil,* 764 F.2d 548, 555 (9th Cir.1985).

***1277** We have recently decided a number of vouching cases, which we believe will be helpful to review and put in context.

In *United States v. Shaw,* 829 F.2d 714, 716-18 (9th Cir.1987), *cert. denied,* 485 U.S. 1022, 108 S.Ct. 1577, 99 L.Ed.2d 892 (1988), the prosecutor told the jury in opening statement that the defendant's accomplice and an important government witness had agreed to testify and that "we ... have agreed that as long as he is truthful we will present his truthful cooperation to the local prosecutor." *Id.* at 717. The court instructed the jury that the witness was the beneficiary of a plea bargain and that the jury should examine his testimony with greater caution than that of ordinary witnesses. Even though the prosecutor's words imply that the prosecution had some method of determining whether the witness's testimony was truthful, and communicated a clearer message coming at the outset of trial before credibility had been challenged, we concluded that the vouching was harmless error. *Id.* at 717-18.

In *United States v. Wallace,* 848 F.2d 1464, 1473-74 (9th Cir.1988), the government elicited on direct examination that a witness had entered into a plea agreement which required her to testify truthfully, submitted in closing that the witness told the truth, and commented in rebuttal that the witness "didn't say that because that would not have been the truth ... [S]he could have gilded the lily, she could have really buried Janice Wallace ... but she didn't do that, she told the truth ... [S]he could have given a lot more details ... But she didn't." *Id.* at 1474 n. 16. Defense counsel repeatedly argued that the government's key witness was lying. The trial judge instructed that the witness's testimony should be examined with greater caution as she was immunized and an accomplice, but gave no other curative instructions. We declined to decide whether the improper vouching was plain error, because the record was incomplete. *Id.* at 1474.

In *United States v. Lew,* 875 F.2d 219, 223-24 (9th Cir.1989), the prosecution brought out on the direct examination of two witnesses that their plea agreements required each to testify truthfully. We recognized that it was improper to allow the prosecution to elicit testimony on direct about the truthfulness requirement in a plea agreement. However, the vouching did not rise to the level of plain error because there was substantial independent evidence against the defendant, and because the judge instructed the jury to consider the extent to which the testimony of the witnesses may have been influenced by the government's promises and to look for corroborating circumstances before giving full credibility to those witnesses. *Id.* at 223-24.

In *United States v. Simtob,* 901 F.2d 799, 805 (9th Cir.1990), the prosecutor offered in front of the jury to immunize a witness for possible false statements to government officials. He then repeatedly exhorted the witness to tell the truth, and suggested during an exchange with the witness that he did not think the witness was lying. In response to defense counsel's

objection, the court agreed that the prosecutor's remarks were "inappropriate" and said, "the jury will disregard." *Id.* at 806. The court also later instructed, "that the prosecutor cannot vouch for the truthfulness of a witness." *Id.* Because the case was close, we reversed applying harmless error analysis. *Id.*

In *United States v. Monroe,* 943 F.2d 1007, 1013-14 (9th Cir.1991), *cert. denied,* 503 U.S. 971, 112 S.Ct. 1585, 118 L.Ed.2d 304 (1992), the government introduced the truthful testimony requirement of the witness's plea agreement on direct. We held that this was not vouching as it was offered in response to defense counsel's attack on the witness's credibility in his opening statement. *Id.* at 1014.

In *United States v. Smith,* 962 F.2d 923, 933-34 (9th Cir.1992), the prosecutor assured the jury in closing argument that his job was to turn over favorable evidence to the defense and to lead them to the truth, and that "[i]f I did anything wrong in this trial I wouldn't be here. The court wouldn't allow that to happen." Defense counsel had attacked a witness's credibility, ***1278** and the prosecutor told the jury the witness could not just say anything he wanted to because he would be prosecuted for perjury. The witness's testimony was crucial, the prosecutor's comments as a whole were not invited, and the prosecutor placed the prestige of both law enforcement and the court behind the witness's testimony. Accordingly, we reversed for plain error. *Id.* at 934-36.

Most recently, in *United States v. Kerr,* 981 F.2d 1050 (9th Cir.1992), the Assistant United States Attorney in closing argument referred to interviews he had with four witnesses and asked whether they were hoodwinking him and the court, and also said "I think ..." one witness was "very candid," and another was "candid" and "honest." The trial court gave a general instruction which did not mention the specific statements of the prosecutor and was not given immediately after the vouching occurred. We examined the closeness of the case, and thought the testimony of the four witnesses for whom the government vouched was crucial to the case and to the prosecutor's argument. We reversed for plain error. *Id.* at 1054.

These cases indicate that we have no bright-line rule about when vouching will result in reversal. Rather, we consider a number of factors including: the form of vouching; how much the vouching implies that the prosecutor has extra-record knowledge of or the capacity to monitor the witness's truthfulness; any inference that the court is monitoring the witness's veracity; the degree of personal opinion asserted; the timing of the vouching; the extent to which the witness's credibility was attacked; the specificity and timing of a curative instruction; the importance of the witness's testimony and the vouching to the case overall. When reviewing for plain error, we then balance the seriousness of the vouching against the strength of the curative instruction and closeness of the case.

B

Necoechea argues that the prosecutor impermissibly vouched by bringing up the truthfulness provision of Gibson's plea agreement, by mentioning facts outside the record, and by expressing his personal opinion of credibility.

First, Necoechea points to the prosecutor's opening statement that, "in exchange for a reduced exposure on this charge and a recommendation of probation from my office, [Gibson] has agreed to cooperate with the government, and to testify truthfully." This is vouching. Although the particular statement, "to testify truthfully," is nothing more than what the plea agreement says, it does mildly imply, as do all statements regarding truthfulness provisions, that the government can guarantee Gibson's truthfulness. It does not, however, connote that the government will be monitoring the witness's truthspeaking. *Cf. Shaw,* 829 F.2d at 717 (prosecutor stated that "as long as" the witness testified truthfully, the prosecutor would help the witness obtain a lighter sentence, thereby implying somewhat more directly that the government knew what the truth was and could monitor the witness's truthfulness.) The statement in this case does not refer to any facts outside the record, or express any personal opinion. Although it was not invited, Gibson's credibility would almost certainly be challenged in any event.[2]

Necoechea next argues that the prosecutor improperly vouched by eliciting testimony regarding the truthfulness provision on direct examination by asking Gibson if it were part of her agreement that she "testif[y] truthfully and cooperat[e]," to which she responded yes. This is not vouching. The prosecutor's question does not imply a guaranty of Gibson's truthfulness, ***1279** refer to extra-record facts, or reflect a personal opinion. Nor was it inopportune since Necoechea challenged Gibson's credibility during opening statement. *See Monroe,* 943 F.2d at 1013-14 (reference to a truthfulness provision may be made on direct examination if the witness's credibility is attacked during opening statement).

763 F.2d 518
United States Court of Appeals,
Second Circuit.

UNITED STATES of America,
Appellant-Cross-Appellee,
v.
Charles JONES, a/k/a "Coffee",
Marshall J. Muhammad, a/k/a
"Marshall Jones", Raymond Piacente,
Defendants-Appellees Cross-Appellants.

Nos. 605, 454, 515 and 516, Dockets
84–1230 and 84–1258 to 84–1260.
|
Argued Dec. 18, 1984.
|
Decided May 28, 1985.

Synopsis

Defendants were convicted in the United States District Court for the Southern District of New York, Mary Johnson Lowe, J., of various narcotics offenses primarily through the sale of drugs by way of forged prescriptions, and they appealed. The United States cross-appealed from order setting aside a defendant's conviction on charge of operating a continuing criminal enterprise. The Court of Appeals, Cardamone, Circuit Judge, held that: (1) once defense counsel questioned motives of government witnesses, Government was properly permitted to elicit testimony on direct examination about portions of the witnesses' cooperation agreements requiring them to testify truthfully; (2) presence of alternate jurors during deliberations, acquiesced in by defense counsel, violated rule but did not mandate new trial; and (3) finding of continuing criminal enterprise under the Comprehensive Drug Abuse Prevention and Control Act section 848 could be predicated upon section 846 conspiracy violations, based themselves on section 841 substantive narcotics violations that defendant himself did not commit, and it was error to instruct otherwise and to enter acquittal judgment on the continuing criminal enterprise count; however, jury's answers to special interrogatories reflected positive findings as to all necessary elements of section 848 violation and, hence, guilty verdict would be reinstated.

Affirmed in part, reversed in part, and remanded.

Kearse, Circuit Judge, dissented in part and filed opinion.

Attorneys and Law Firms

***519** Michael P. Stokamer, New York City, for defendant-appellee-cross-appellant Charles Jones.

Edward S. Panzer, New York City, for defendant-cross-appellant Raymond Piacente.

Ralph Naden, New York City (Donald E. Nawi, New York City, of counsel), for defendant-cross-appellant Marshall J. Muhammad.

David S. Hammer, Asst. U.S. Atty., S.D.N.Y., New York City (Rudolph W. Giuliani, ***520** U.S. Atty., S.D.N.Y., Stuart Abrams, Stacey J. Moritz, Asst. U.S. Attys., New York City, of counsel), for appellant-cross-appellee United States of America.

Before MESKILL, KEARSE and CARDAMONE, Circuit Judges.

Opinion

CARDAMONE, Circuit Judge:

Three appellants are before us as a result of their convictions arising from their involvement over several years in the illegal distribution of a huge amount of drugs by forged prescriptions. After the jury returned a guilty verdict on a multi-count indictment against one of the appellants, the trial court set aside the verdict as to one count, which prompted the government's appeal. The resolution of the appeals from the judgments of convictions against appellants is relatively straightforward. What sets this case apart are the problems raised by the government's appeal.

The confusion began when the district court charged the jury that conspiracy violations and substantive violations attributed to a defendant because of his membership in a conspiracy could not be considered as predicate offenses to support a conviction for operating a continuing criminal enterprise in violation of 21 U.S.C. § 848 (1982). As our recent decision in *United States v. Young,* 745 F.2d 733 (2d Cir.1984), makes clear, this charge was erroneous. Further, the jury was also directed to return with its verdict answers to certain written interrogatories. With this cautionary stroke, the district judge enabled us to know on what factual basis the jury reached its verdict. Such knowledge is crucial on

Evelyn Dorval, a licensed pharmacist who worked at the Liotta Pharmacy, testified that Jones and Piacente sold controlled substances in the back room. Juanita Solas, who also worked at the Liotta Pharmacy, testified to her own and Jones' and Piacente's involvement in the sale of controlled substances. Frederick Ibitoye stated that he had written prescriptions at Liotta Pharmacy at Jones' and Piacente's request. Herman Fleming, a clerk and stockboy at Harlem Pharmacy, asserted that Muhammad and Jones sold drugs illegally there. Fleming also testified that he picked up packages of controlled substances from the Liotta and Brownsville Pharmacies and brought them to the Harlem Pharmacy. Cathy Jo Wilton, administrator of the Greenleaf Clinic and an indicted co-conspirator, testified that she ordered prescription narcotics for the clinic and delivered them to Muhammad at the Harlem Pharmacy. Wilton also testified that she forged prescriptions at Muhammad's request and that he supplied her with a model prescription form and blank prescription pads.

All of the above witnesses, except the DEA agent and the stockboy at Harlem Pharmacy, testified pursuant to cooperation agreements with the government. At trial these witnesses testified on direct examination regarding the portion of the cooperation agreement that required them to testify truthfully.

Shortly before the district judge charged the jury, defense counsel requested that the alternate jurors not be discharged. One of the regular jurors had indicated that she might have to leave early, and defense counsel indicated that they wanted to facilitate her substitution in that event. Appellants' counsel urged the trial court to allow two or three alternate jurors to be present during deliberations. Upon being assured that this was the choice of all the appellants, the trial judge granted this request. ***522** At the end of her charge, Judge Lowe instructed two of the alternate jurors to sit and listen to the jury's deliberations. She emphasized that although the alternates could be present, they were not to participate.

Less than two hours after the jury had retired, the government's attorney informed the court that research had revealed that alternates should not be present in a jury room during deliberations. Judge Lowe promptly recalled the jury and discharged the two alternates. At that time the court asked them whether they had participated in the deliberations. One alternate said they had not; the other was ambivalent. The trial judge then instructed the regular jurors to begin their deliberations anew and to disregard all discussions that had been held up to that point. The jury deliberated for another 14 hours before reaching its verdicts.

The district court had directed the jury to return a special verdict on Charles Jones' continuing criminal enterprise charge, 21 U.S.C. § 848. The jury was requested, among other things, to identify the three predicate narcotics violations necessary to support a § 848 conviction. When the jury returned a guilty verdict on the continuing criminal enterprise charge against Jones, the district court set that verdict aside and entered a judgment of acquittal because it concluded that the jury had improperly relied on § 846 narcotics conspiracy violations as predicate offenses for the § 848 conviction.

III

Defendant's Arguments

A. *The Truth-Telling Provisions of the Cooperation Agreements*

The defendants complain that by eliciting testimony about the truth-telling portions of the witnesses' cooperation agreements the government improperly bolstered the witnesses' credibility and prejudiced defendants. Absent an attack on a witness' veracity, no evidence is admissible to bolster his credibility. *See* Fed.R.Evid. 608(a)(2); C. McCormick, *Law of Evidence* § 49 (2d ed. 1972). Ordinarily the government may not elicit evidence of truth-telling portions of cooperation agreements on direct examination. *United States v. Arroyo-Angulo,* 580 F.2d 1137, 1146 (2d Cir.), *cert. denied,* 439 U.S. 913, 1005, 99 S.Ct. 285, 618, 58 L.Ed.2d 260, 681 (1978) and 439 U.S. 1131, 99 S.Ct. 1052, 59 L.Ed.2d 93 (1979). We held in *United States v. Maniego,* 710 F.2d 24, 27 (2d Cir.1983) (per curiam), that as Fed.R.Evid. 608(a)(2) allows admission of credibility testimony "only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise," such evidence is admissible on direct only if the witness' credibility was attacked in the opening argument. Here defense counsel attacked the credibility of the government's witnesses in their opening arguments.

Defense counsel questioned the motives of the government witnesses and commented on their immunity status by stating that it meant they have committed "many crimes, and they are not going to be prosecuted." Reference was further made in the opening to the fact that one of the government witnesses had previously committed perjury. The jury had to ask

itself, another defense counsel said, whether the government witnesses they heard had "made a deal to save their own hide." Since these opening statements by defense counsel attacked the credibility of the government witnesses, appellants may not be heard to complain at their rehabilitation on direct examination.

B. *Presence of Alternate Jurors During Deliberations*

Jones and Piacente assert that the presence of the two alternate jurors in the jury room for about an hour and a half deprived them of a fair trial. Federal Rules of Criminal Procedure 24(c) states: "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." Unquestionably, by not discharging the two ***523** alternate jurors and allowing them to sit at the beginning of the jury's deliberations, the district court violated this rule. This mandatory rule is one that trial courts should carefully observe because of the potential for an unfair trial. When alternate jurors are present during deliberations, the possible prejudice is that the defendants are being tried not by a jury of 12, as is their right, but by a larger group. *See United States v. Hayutin,* 398 F.2d 944, 951 (2d Cir.), *cert. denied,* 393 U.S. 961, 89 S.Ct. 400, 21 L.Ed.2d 374 (1968); *United States v. Allison,* 481 F.2d 468, 470 (5th Cir.), *aff'd after remand,* 487 F.2d 339 (5th Cir.1973), *cert. denied,* 416 U.S. 982, 94 S.Ct. 2383, 40 L.Ed.2d 759 (1974).

Recently, in *United States v. Hillard,* 701 F.2d 1052 (2d Cir.), *cert. denied,* 461 U.S. 958, 103 S.Ct. 2431, 77 L.Ed.2d 1318 (1983), we held that "a violation of Rule 24(c) does not require reversal per se, absent a showing of prejudice." 701 F.2d at 1058. In *Hillard* we refused to reverse a conviction when the trial judge substituted an alternate juror for a regular juror who became ill after deliberations had begun. The alternate juror had reaffirmed his ability to consider evidence and to deliberate fully and fairly and indicated that his discussions with the other alternate had not changed in any way his view of the case. Further, the trial judge there instructed the jurors to begin their deliberations over again after the alternate joined them. Because of the district court's painstaking efforts to minimize potential prejudice to defendants and its determination that there had in fact been no such prejudice, we found that the violation of Rule 24(c) did not constitute reversible error. 701 F.2d at 1061; *see also United States v. Mahler,* 579 F.2d 730, 737 (2d Cir.), *cert. denied,* 439 U.S. 872, 991, 99 S.Ct. 205, 592, 58 L.Ed.2d 184, 666 (1978).

Although *Hillard* was decided on somewhat different facts, its holding that a Rule 24(c) violation does not require reversal absent a showing of prejudice applies here. Hence, in order to determine whether a Rule 24(c) violation mandates a new trial, there must be an analysis of the facts and circumstances at trial. Some factors that should be considered are: (1) whether defendants requested or consented to the alternates' presence in the jury room; (2) how long the alternates were present; (3) whether the alternates participated in the deliberations; (4) what instruction the trial judge gave before the alternates retired with the regular jurors; (5) what the alternates' statements subsequently revealed; (6) what curative instructions were given by the trial court to the "reconstituted" jury, i.e., the body without the alternates. An evidentiary hearing should be held where necessary for an evaluation of these factors. *See Allison,* 481 F.2d at 472.

Here, when the trial court sent the regular jurors out to deliberate and allowed the alternates to accompany them, it specifically instructed the alternates not to participate. The alternates were with the jury for less than two hours. When the alternates were withdrawn and questioned as to whether they had participated and one answered somewhat ambiguously, the trial court called all of the regular jurors before it and instructed that their deliberations must start again from the beginning and they were to disregard any possible participation by the alternates. The jury thereafter deliberated for 14 hours before reaching a verdict. These factors demonstrate the lack of prejudice present in this case. The brief presence of the alternates was at defendants' request. The trial court instructed the alternates not to participate, but only to sit and listen, and there was a lack of evidence that they had participated. The trial judge gave the reconstituted jury a curative instruction to start its work over again, and the ensuing 14 hours of deliberations before a verdict was reached indicates that whatever possible taint might have crept into the deliberations was effectively removed. Moreover, defendants' counsel, hoping to avoid a mistrial, argued below that inclusion of the alternates would not be reversible error because defendants had requested that course. The fact that defendants themselves ***524** believed that no harm resulted from the alternates' presence is further proof of a lack of prejudice. Defense counsel requests, which are granted by a trial court, are frequently raised as a claim of error on appeal. We look with disfavor on this trial tactic. *United States v. Ferguson,* 758 F.2d 843, 851–52 (2d Cir.1985) (conviction affirmed when defendants over government objection expressly requested trial court to charge a lesser crime, one for which defendants had not

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Agreements for Cooperation in Criminal Cases

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I. INTRODUCTION

In criminal prosecutions, both state and federal, closely negotiated agreements for immunity and lenient plea bargaining in return for cooperation have acquired considerable importance. These agreements are an ancient practice now wearing sophisticated modern dress. They may arise in complex white-collar crime cases, organized crime cases, narcotics prosecutions, and, from time to time, in other prominent major felony cases. They constitute a phenomenon that differs in important ways from the run-of-the-mill guilty pleas that characterize our metropolitan courts and recently have preoccupied students of the criminal system. Unlike the ordinary guilty plea, the suspect or defendant in cooperation agreements offers more than just a quick result that saves public resources; in this kind of case that limited consideration often would not be attractive enough to induce leniency since the government may be quite willing to spend time and money in prosecuting. In cooperation agreements the defendant trades information[1] and testimony, with the promise of enabling the State[2] to make a case against other defendants who, for one reason or another, are regarded as most deserving of the severest form of prosecution.[3]

Again, unlike the great run of guilty pleas, the deal made in more complex criminal cases cannot be sealed with a chat in the hall just before entering the courtroom. Compacts for cooperation may involve contested issues that must be negotiated, sometimes for months, and that eventually are embodied in letter agreements that range from the fairly straightforward to the extremely complicated.[4] Most important, in these cases the State cannot speedily conclude the deal with a plea

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1. See the discussion in KENNETH MANN, DEFENDING WHITE COLLAR CRIME 14-18 (1985), in which the author represents the struggle to obtain and control information as the principal issue in defense trial preparation or plea negotiation in complex white-collar crime cases.

2. The terms "state" and "government" in this Article refer to the prosecution in a general sense and are not meant to imply a distinction between state and federal prosecutions.

3. As the Seventh Circuit Court of Appeals has suggested, "Promises of immunity are important weapons in the fight against large-scale criminal enterprises; the government often snares hig fish with information gained from little fish. In return, the little fish are granted immunity from prosecution based upon the information they provide to the goverument." United States v. Palumbo, 897 F.2d 245, 246 (7th Cir. 1990). Sometimes the fish are all one size and the one who receives immunity may be sunply the one who first shows a convincing readiness to cooperate. A defendant who elects to go to trial may be found especially deserving of rigorous prosecution as compared with one who early shows a desire to plead and cooperate.

4. The complexity may arise from the need to define in detail and with precision: (1) the nature of the cooperation promised by the cooperator, and (2) the scope of the immunity or nature of the plea bargain that is extended. In Ricketts v. Adamson, 483 U.S. 1 (1987), discussed *infra* notes 29-45 and accompanying text, the plea agreement comprised 17 paragraphs. The full text of the agreement, taking up two pages of the Law Reports, is contained in Appendix A to the *en banc* decision of the court of appeals. Adamson v. Ricketts, 789 F.2d 722, 731 (9th Cir. 1986), *rev'd*, 483 U.S. 1 (1987).

and a sentence and still protect its interests. The cooperator makes a set of promises and assumes potentially onerous and protracted obligations. These will at least include interviews and debriefings and may involve undercover action or observation and reporting back. The cooperator's obligations will probably continue into more formal stages with grand jury and trial testimony and, perhaps, testimony at retrials years later. The State must find a way, therefore, to keep the immunity grant or plea bargain contingent on the cooperator's substantial performance of the promised obligations. The usual sequence of plea and sentencing, with the consequent engagement of the double jeopardy clause, would render these long-term cooperation agreements worthless unless the State carefully drafts the agreements to avoid this hazard.

For these reasons, deals involving promises to cooperate are sharply different from the general phenomenon of plea bargaining. They are exotic plants that can survive only in an environment from which some of the familiar features of the criminal procedure landscape have been expunged. A way must be found to prop open the double jeopardy lid; sentencing (if it is a plea agreement rather than an immunity grant) must be postponed, perhaps for years; immunity (if it is an immunity deal) must be contingent and not irrevocable. The prosecutor must retain the power to enforce the cooperation agreement for as long as necessary. In the end the disposition will be dictated by the terms that were negotiated and by the prosecutor's ability to hold the defendant to those terms.

Many years ago Sir Henry Maine, in the context of the civil law, made the famous observation that a conspicuous feature of modern society and modern law was a "movement from Status to Contract."[5] That movement has now reached the criminal justice system both with mass plea bargaining and with cooperation agreements. If a regular practice of sentence discounts for guilty pleas represents the bureaucratization of criminal justice, then the cooperation agreement marks its privatization.[6] In cooperation agreements the prosecutor and defendant resolve suspicion or charges by contract. Any subsequent litigation between the defendant and the prosecutor thus turns largely to concepts

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5. HENRY S. MAINE, ANCIENT LAW 170 (1st Am. ed. 1864) (emphasis omitted).

6. As one scholar has noted, "Plea bargaining undercuts [the] distinctive moral aspects of the criminal law. First, negotiated dispute resolution 'privatizes' the dispute by empowering the parties themselves to resolve it without any significant involvement hy either the public or the courts." Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L. J. 185, 219 (1983) (footnote omitted). It may seem odd to refer to "privatization" when the state remains a party, but the characterization is apt in the sense that public standards of guilt and procedures for fact-finding yield to negotiated dispositions that are later reviewable for the most part only under the concepts and standards of contract law.

taken from contract law. In mass plea bargaining the defendant subscribes to a contract of adhesion.[7] With cooperation agreements, by contrast, the terms are fashioned individually and the contract is executory on both sides.

These developments invite attention for several reasons. First, they redirect us to perennial questions about the free-ranging discretion of the American prosecutor. Second, they raise again the old question of whether it is fair to convict defendants on purchased testimony. Third, they invite reflection on the fairness of both the process and the result of the bargaining for immunity or for a plea for concessions. Fourth, they invite some appraisal of the changing face of the criminal process.

This Article examines these questions in the context of an overall survey of cooperation agreements. It identifies cooperation agreements as a subject worthy of detailed scrutiny in the future.

Part II traces the history of informal immunity grants and discusses their nature. Part III examines the prosecutor's discretion in choosing whom to immunize or treat leniently in return for cooperation, and discusses ways of monitoring the exercise of that discretion. Part IV raises the question of whether testimony admitted under cooperation agreements sometimes infringes on a defendant's right to a fair trial while Part V discusses whether the enforcement of these agreements by the government sometimes imposes an unfair burden on the cooperating witness. Part VI comments on how the existence of a cooperation agreement produces changes in the conventional forms and practices of the criminal process.

II. THE NATURE AND FUNCTION OF INFORMAL IMMUNITY GRANTS

Cooperation agreements may take the form of plea bargains or of informal immunity agreements. The general contours of the plea bargain are familiar enough, but at the outset we need to say something about the special features of informal grants of immunity. Nearly all jurisdictions have formal statutory provisions under which a court, upon application of a prosecutor, may grant immunity. The federal statute[8] requires that a senior Justice Department officer[9] approve a

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7. The term "contract of adhesion" refers to a standardized form of offer about which one party, usually a consumer, has no liberty to negotiate and simply must take or leave the offered terms. *See* Freidrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631-32 (1943).

8. 18 U.S.C. § 6003 (1988).

9. The request must be approved by "the Attorney General, the Deputy Attorney General, Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General." *Id.* § 6003(b). In practice the request almost invariably is referred to the Assistant Attorney General in charge of the Criminal Division.

federal prosecutor's application. It further states that the United States Attorney who makes the application must declare that the witness's testimony "may be necessary to the public interest" and that the witness "has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."[10]

Formal applications for immunity give the prosecutor certain advantages. A court has little or no discretion to refuse a formal application.[11] Also, after the court grants immunity, it may sanction the witness for contempt if he refuses to testify. The formal grant is thus well suited to compelling the recalcitrant witness. There are, however, features that make formal immunity grants less suitable for cooperation agreements.

First, if the formal grant is made in a public proceeding, the potentially important element of secrecy will be shattered. For example, once a court grants a subject formal immunity in a public proceeding, it becomes difficult to use her in an undercover capacity to report on activities of her associates. In some jurisdictions, including the federal, courts may seal the immunity grant to avoid this problem.[12]

Second, the grant's only direct impact is to immunize as to the use of testimony and its fruits, thereby compelling the subject to testify. The grant cannot, for example, expressly compel the subject to submit to debriefing and interviewing by agents of the prosecution or to work in an undercover capacity, though the prosecutor might apply for the grant on the basis of the cooperator's agreement to perform these tasks.[13] Even the testimony is not guaranteed since the subject may be

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10. 18 U.S.C. § 6003(b).

11. The federal statute affords no discretion, providing that the United States district court "*shall* issue" an order directing the witness to testify upon request by the government attorney. 18 U.S.C. § 6003(a) (emphasis added). In Ryan v. Commissioner, 568 F.2d 531, 541 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978), the Seventh Circuit noted that a court bas no power to review a United States Attorney's conclusion that conferring immunity is in the public interest. According to the court, because "that judgment is entirely a matter for the executive branch, unreviewable by a court, there is no need for the record to contain any facts supporting the decision of the United States Attorney." *Id.*

12. Federal formal immunity usually is granted in the context of grand jury proceedings. The immunity grant thus typically is covered by the secrecy provisions that apply to the grand jury. *See* FED. R. CRIM. P. 6(e)(2) and (3) (imposing a general rule of secrecy on "matters occurring before the grand jury"). Formal immunity occasionally is granted in open court to a witness about to testify at a trial.

13. *See* Marc L. Sherman, *Informal Immunity: Don't You Let That Deal Go Down*, 21 LOY. L.A. L. REV. 1, 48-49 (1987). This point is somewhat academic since, while the courts in the setting of formal immunity cannot apply sanctions for failing to undergo interviews or work undercover, the prosecutor actually loses nothing, because the formal immunity, while irrevocable, has no impact except to prohibit tbe use of any testimony the cooperator provides as a witness. The cooperator can be prosecuted if he does not testify or even if he testifies, provided no direct or derivative use is made of his testimony. *See* note 14 *infra*.

willing to undergo the sanction of punishment for contempt rather than testify. In that case the prosecution can do nothing more to procure the testimony though it may be able to prosecute the subject without the testimony.

Third, because the formal grant of immunity is restricted to "use and fruits immunity,"[14] the subject remains vulnerable to the possibility of a prosecution based on evidence not derived from the testimony compelled by the grant.[15] So narrow a protection may be an insufficient inducement to secure full cooperation. The greater security of transactional immunity may be necessary to convince the subject to cooperate.[16] Conversely, in some cases transactional immunity has the added attraction for prosecutors of allowing them to define precisely the area of immunization by the terms of the agreement. The prosecutor thus may exclude certain crimes from the reach of the bargain if she does not wish to release the subject completely from liability. In this way transactional immunity may be narrower than use and fruits immunity since both crimes related to the testimony and other crimes may be excluded from the scope of immunity.[17]

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14. Section 6002 provides that when an immunity order is issued "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. § 6002 (1988). Known as use and derivative use immunity (informally "use and fruits"), this is the degree of immunity required by the United States Constitution to erase the privilege against self-incrimination. *See* Kastigar v. United States, 406 U.S. 441 (1972). This was the type of immunity conferred on Lieutenant Colonel Oliver North when he testified before the congressional committees investigating the Iran-contra matter in the summer of 1987. United States v. North, 910 F.2d 843, 851, *later proceeding* 1990 U.S. App. LEXIS 16490 (D.C. Cir. 1990).

15. The government, however, carries the heavy burden in such a case of proving "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U.S. at 460. This *Kastigar* requirement has been enforced with a degree of rigor. *See North*, 910 F.2d at 861 (holding that testimony was tainted when witnesses may have refreshed their memory or focused their thoughts by adverting to the earlier, immunized testimony of the defendant). If informal immunity is stipulated to be of the use and derivative use kind, or if the agreement is silent as to its exact scope, then the *Kastigar* standards are applicable. *See* United States v. Palumbo, 897 F.2d 245, 248-49 (7th Cir. 1990) (applying the *Kastigar* tests to statements made by a defendant while negotiating for an immunity deal that was never finalized).

16. Transactional immunity means that the government cannot charge the witness with any offense about which he provided evidence. He may, however, be charged with perjury or contempt. Some jurisdictions, including New York, require transactional immunity to be conferred to meet the constitutional privilege against self-incrimination. Indeed, New York confers automatic transactional immunity on every witness who is summoned to testify before the grand jury. N.Y. CRIM. PROC. LAW §§ 50.10, 190.40(2) (McKinney 1981-82). In order to avoid the sweep of transactional immunity, New York prosecutors sometimes will bargain with a grand jury witness to waive his statutory immunity and accept instead an informal immunity agreement limited to use and derivative use immunity.

17. *See, e.g.*, United States v. Quatermain, 613 F.2d 38 (3d Cir.), *cert. denied*, 446 U.S. 954 (1980), discussed *infra* in notes 163-72 and accompanying text. Conversely, transactional immunity can reach crimes that will not form the subject of any part of the witness's testimony and as to

Sometimes, to offer the amplest measure of protection, the cooperator may seek and the government may wish to extend a combination of transactional and use and fruits immunity. The witness thus may gain immunity from use or derivative use of any testimony he gives and simultaneously obtain total immunity from prosecution for categories of offenses denominated in the agreement, whether or not the testimony given relates to them. In most jurisdictions the simple use and fruits immunity is all that flows from a formal grant. Prosecutors and subjects, therefore, often cannot achieve these desirable combinations and permutations through a formal grant. To escape these confinements, prosecutors have long been in the habit of offering to potential cooperators informal grants of immunity, sometimes called "letter immunity" or "pocket (or hip-pocket) immunity." These informal grants can be flexibly shaped to fit the contours of the deal that is negotiated.

A. History of the Practice

The old common law recognized a practice of "approvement" under which a person arraigned for a felony might accuse another as his accomplice and become entitled to a pardon if the accused accomplice were convicted.[18] Apart from approvement, which fell into disuse by the eighteenth century,[19] there also existed an informal practice by which an accused, though not legally entitled to a pardon, could obtain one by confessing to the crime and revealing his accomplices.[20] This practice was rife in the nineteenth century when the lack of an organized police force often made it essential to procure accomplice testimony in order to track down or build a case against a major criminal. It was customary to advertise prominently the offer of pardons to accomplices who would come forward and testify leading to a conviction of the principal and to

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which use and fruits immunity thus would offer no protection.

18. 4 WILLIAM BLACKSTONE, COMMENTARIES *330, *cited in* The Whiskey Cases (United States v. Ford), 99 U.S. 594, 599 (1878).

19. *The Whiskey Cases*, 99 U.S. at 599 (describing approvement as an "obsolete practice"). Approvement had earlier come under severe criticism. Chief Justice Hale wrote, "The truth is that more mischief hath come to good men, by these kinds of approvements by false accusations of desperate villains, than benefit to the public by the discovery and convicting of real offenders." MATTHEW HALE, PLEAS OF THE CROWN 226 (1678).

20. Lord Mansfield described this informal practice as follows:

> Where the accomplice has made a full and fair confession of the whole truth and is admitted as a witness for the crown, the practice is, if he act fairly and openly and discover the whole truth, though he is not entitled *of right* to a pardon, yet the usage, the lenity and the practice of the court is to stop the prosecution against the accomplice, the understanding being that he has an equitable title to a recommendation for the king's mercy.

The Whiskey Cases, 99 U.S. at 600 (paraphrasing Lord Mansfield in Rex v. Rudd, 98 Eng. Rep. 1114, 1116 (1775)).

offer cash payments to witnesses who might come forward.[21]

In *The Whiskey Cases*[22] the Supreme Court discussed the practice in surprisingly modern terms. After recognizing the importance of prosecutorial discretion in deciding when immunization is necessary to apprehend other criminals, the Court described what evidently was regarded as a familiar procedure under which the prosecutor would interview the accomplice in an attempt to estimate the need for his testimony. In such a setting, the Court recommended:

> Prosecutors . . . should explain to the accomplice that he is not obliged to criminate himself, and inform him just what he may reasonably expect in case he acts in good faith, and testifies fully and fairly as to his own acts in the case, and those of his associates. When he fulfils those conditions he is equitably entitled to a pardon, and the prosecutor, and the court if need be, when fully informed of the facts, will join in such a recommendation.[23]

The Court was careful to explain that the existence of such an agreement and the defendant's full performance under it could not operate as a plea in bar to quash an indictment.[24] The practical consequences, however, appeared little different from a successful motion to dismiss, since the Court recognized that the defendant had an equitable right to a pardon and to a delay in the trial pending application for one.[25] The Court also recognized the essentially contingent features of the practice, commenting that if the defendant later refused to comply with the conditions of the agreement, he might be tried and convicted since his bad faith would forfeit his "equitable title to protection."[26]

B. The Modern Practice

Modern practice thus has ancient roots. Significantly, the Court's discussion in 1878 involved no requirement of judicial approval for the immunity offer but acknowledged the prosecutor's unrestricted discretion to purchase testimony through immunity agreements. There al-

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21. The tremendous inducement sometimes offered under this practice is described in the Welsh-language account of a murder in rural Wales in 1840 in G. PHILLIPS, LLOFRUDDIAITH SHADRACH LEWIS [The Murder of Shadrach Lewis] (1986), where the reward notice read:

> A reward of 200 pounds . . . will be given to any person who will afford such information and evidence as shall lead to the discovery and conviction of the murderers and Lord Normanby [the Secretary of State] will advise the grant of Her Majesty's most precious pardon to any accomplice, not being the actual murderer, who will give such evidence as shall lead to the same result.

Id. at 40 (translated from the Welsh). The author noted the huge dimensions of the reward, stating that "[t]o a farm laborer earning six shillings a week [15 pounds a year] 200 pounds was a fortune." *Id.* at 40-41.

22. 99 U.S. 594 (1878).

23. *Id.* at 604.

24. *Id.* at 601.

25. *Id.* at 606.

26. *Id.* at 605.

ways has been, however, a tension arising out of the difficulty of harmonizing informal prosecutorial practices with the formal statutory procedures for granting immunity by way of judicial order.

Questions about the validity of the informal practice may arise in two ways. First, a reluctant witness may claim that the prosecutor has no power outside existing statutes to override his privilege against self-incrimination and compel his testimony by offering an informal immunity. Courts have upheld this contention, applying a jealous scrutiny to the destruction of a constitutional privilege against the will of the party involved.[27] When a witness's constitutional rights are at stake, courts properly hold that the prosecution must comply strictly with a legislative declaration of the formal procedure necessary to extinguish the privilege.[28]

Second, questions about the validity of the informal practice arise when a defendant claims that he should not be prosecuted because he was informally immunized under a cooperation agreement and has performed his side of the bargain. The prosecutor may allege that the defendant did not perfectly carry out the terms of the bargain, or a subsequent prosecutor may not feel bound by the actions of a predecessor,[29] or there may be a dispute as to whether the prosecutor and defendant ever arrived at an immunity for cooperation deal. When the defendant negotiates for immunity in exchange for testimony, the considerations are sharply different than when a reluctant witness challenges a prosecutor's power to offer informal immunity. For a court to refuse to validate an agreement that a suspect bargained for would disable that suspect from advantageously waiving the constitutional right against self-incrimination. This judicial intransigence would be difficult to reconcile with the affirmative attitude that courts now display toward plea bargaining[30] and would be a strong brake on prosecutorial

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27. Commonwealth v. Brown, 619 S.W.2d 699 (Ky. 1981), *overruled on other grounds by* Murphy v. Commonwealth, 652 S.W.2d 69 (Ky. 1983); Grand Jurors for Middlesex County v. Wallace, 343 N.E.2d 844 (Mass. 1976); State v. Saliterman, 150 N.W.2d 699 (Minn. 1967); Campus v. State, 580 P.2d 966 (N.M. 1978); Apodaca v. Viramontes, 212 P.2d 425 (N.M. 1949); Commonwealth v. Carrera, 227 A.2d 627 (Pa. 1967); Commonwealth v. Brady, 323 A.2d 866 (Pa. Super. 1974). *Contra In re* Kelly, 350 F. Supp. 1198 (E.D. Ark. 1978); Surina v. Buckalew, 629 P.2d 969 (Alaska 1981). *See generally* Robert M. Schoenhaus, Annotation, *Prosecutor's Power to Grant Prosecution Witness Immunity from Prosecution*, 4 A.L.R. 4TH 1221 (1981). In Higdon v. State, 367 So.2d 991 (Ala. Crim. App. 1979), the court, without any discussion of fairness issues, reversed a conviction on the ground, inter alia, that the testimony of a witness had been received over his claim of the Fifth Amendment privilege solely because the trial court had relied on the prosecutor's purporting to immunize the witness in court. *Id.* at 992, 993.

28. See cases cited *supra* note 27.

29. *See infra* note 152.

30. In Santobello v. New York, 404 U.S. 257 (1971), the Court said that plea bargaining "is an essential component of the administration of justice [and] . . . is to be encouraged." *Id.* at 260.

discretion. Furthermore, if a bargain was struck and the defendant performed his part, it seems intolerably unfair to allow the prosecutor to renege and subject the cooperator to the penalties that he paid to avoid.

While this context presents compelling considerations for honoring informal bargains, dangers still are discernable in the immunity for cooperation deal that are not present in the run-of-the-mill plea bargain in which the prosecutor simply trades immunity for a quick disposition. With the cooperation agreement, the prosecutor buys a witness's testimony against another defendant. This raises sensitive questions about the credibility of the testimony and the propriety of absolute prosecutorial discretion over whom to pursue rigorously and whom to allow to buy out of the criminal process. An immunity deal is also a more absolute benefit than a plea bargain, for the subject is escaping scot free by not submitting to any conviction or sanction.[31] Finally, while a court must hold a plea hearing and approve a plea bargain, the informal immunity deal is not subject to any judicial scrutiny.

Some courts, therefore, have displayed reluctance to concede unfettered prosecutorial discretion to enter into informal immunity for cooperation agreements.[32] These courts may insist that only the court has discretion to dismiss a prosecution and that even a faithfully performed agreement to testify is no absolute bar to a future prosecution.[33] More

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Plea bargaining, the Court observed, is "highly desirable" and "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 261, 262.

31. This is not always the case. Some immunity agreements may require the cooperator to disgorge profits from illegal transactions.

32. This discussion is confined to agreements entered into between cooperators and prosecutors. A separate topic not pursued in this Article is the validity of agreements entered into between cooperators and investigative agents. Here some courts are more willing to ignore the agreement on the ground that the agent was not authorized to make an agreement not to prosecute. In such a case the position of the cooperator may be protected to an extent by suppressing any statements he made or any evidence derived from them. This was the course taken by the Supreme Court of Michigan in People v. Gallego, 424 N.W.2d 470, 476 (Micb. 1988). For a discussion of this case, see Recent Case, 102 HARV. L. REV. 539 (1988). Federal courts are more willing to enforce such agreements with investigative agents. *See generally* United States v. Carrillo, 709 F.2d 35 (9th Cir. 1983) (involving DEA agents); United States v. Rodman, 519 F.2d 1058 (1st Cir. 1975) (involving the SEC). This may be due to the close working relationship between federal agents and United States Attorneys, both of whom operate under the ultimate control of tbe Department of Justice.

33. State v. Johnson, 594 P.2d 514 (Ariz. 1979); Commonwealth v. Brown, 619 S.W.2d 699 (Ky. 1981), *overruled on other grounds by* Murphy v. Commissioner, 652 S.W.2d 69 (Ky. 1983). Compare the earlier decision, *In re* Parham, 431 P.2d 86 (Ariz. Ct. App. 1967), in which the court distinguished between an agreement to testify, which it viewed as generally enforceable, citing Restatement (Second) of Contracts § 549, and an agreement to give information, which it declared was enforceable only at the court's discretion. *Id.* at 88-89. The policy bebind tbe distinction is that when a defendant agrees only to provide information, he has not waived any constitutional rights as he does wben he agrees to give self-incriminating testimony. People v. Marquez, 644 P.2d 59 (Colo. App. 1981); *see also* State v. Borrego, 445 So.2d 666 (Fla. Dist. Ct. App. 1984). In Gipson v. State, 375 So.2d 514 (Ala. 1979), the court held tbat the prosecutor could not confer informal

frequently, courts deny that the prosecutor has the power to grant immunity, but simultaneously recognize good reasons for rejecting the prosecution of a defendant who performed his side of the bargain in an immunity-cooperation deal.[34] Sometimes this takes the weak form, derived from the ancient doctrine of approvement and *The Whiskey Cases*,[35] of acknowledging the defendant's equitable right to a pardon.[36]

Most courts, however, now take a more expansive approach.[37] While usually refusing to accord the prosecutor a power to immunize,[38] they often are willing to devise an approach that effectively bars the prosecution of a defendant who has kept his part of the cooperation agreement. These courts have relied on notions of the honor and dignity of the State,[39] the fair administration of justice,[40] and contractual theories of consideration[41] or equitable

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transactional immunity.

34. *See infra* notes 36-37 and accompanying text.

35. *See supra* part II.A.

36. In Bowie v. State, 287 A.2d 782 (Md. App. 1972), the court stated in dicta that while the defendant after performance under a cooperation agreement had only an equitable right to clemency, the court usually would grant a continuance so that the defendant could apply for clemency. *Id.* at 788-89. By contrast, in King v. United States, 203 F.2d 525 (8th Cir. 1953), the court stated that the right to clemency arising out of the ancient doctrine of approvement and set forth in *The Whiskey Cases* was no longer a part of federal law. *Id.* at 526.

37. For a review of justifications in this area, see Note, *Judicial Supervision of Non-Statutory Immunity*, 65 J. CRIM. L. & CRIMINOLOGY 334 (1974). In United States v. Palumbo, 897 F.2d 245 (7th Cir. 1990), the court, referring to informal grants of use and derivative use immunity, said that "[s]uch grants of immunity are fully enforceable." *Id.* at 248 (citing United States v. Williams, 809 F.2d 1072, 1081-82 (5th Cir.), *cert. denied*, 484 U.S. 896 (1987)); United States v. Society of Indep. Gasoline Marketers, 624 F.2d 461, 469-74 (4th Cir. 1979), *cert. denied*, 449 U.S. 1078 (1981); United States v. Kurzer, 534 F.2d 511, 513 (2d Cir. 1976)).

38. This is no doubt because of fears of too loosely permitting prosecutors to compel reluctant witnesses to testify.

39. United States v. Paiva, 294 F. Supp. 742, 747 (D.D.C. 1969). In United States v. Carter, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1974), the court observed: "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.* at 428.

40. *See, e.g.*, State v. Hingle, 139 So.2d 205 (La. 1962); State v. Ashby, 195 A.2d 635 (N.J. 1963), *rev'd*, 204 A.2d 1 (1964). In Workman v. Commonwealth, 580 S.W.2d 206 (Ky. 1979), a case in which the prosecution promised to drop charges if the defendant passed a polygraph test, the court, in finding the promise enforceable, said:

> The standards of the market place do not and should not govern the relationship between the government and a citizen. . . . If the government breaks its word, it breeds contempt for integrity and good faith. It destroys the confidence of citizens in the operation of their government and invites them to disregard their obligations.

Id. at 207, *quoted in* 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 13.5, at 207 (1984).

41. People v. Brunner, 108 Cal. Rptr. 501 (Cal. Ct. App. 1973). In *Brunner* the prosecutor was dissatisfied with the performance of the defendant as a cooperating witness and sought to prosecute on the ground that his purported immunity grant was inoperative because it did not conform with the statutory procedures. The court held that it would be inequitable to allow the

estoppel.[42] One can now find recognition of the enforceability of these agreements not only in cases in which the defendant has performed an agreement to testify[43] but also in cases in which the defendant agreed only to cooperate in bringing other offenders to justice without testifying.

This willingness to recognize that informal agreements not to prosecute are binding seems an inevitable outcome of deep tendencies in the American criminal justice system. It emerges from the confluence of two important phenomena—our hardly questioned tradition of wide prosecutorial discretion and the benedictions bestowed by the Supreme Court on plea bargaining.[44] Because there is no effective doctrine under which courts can compel a prosecutor to proceed against a suspect when no charges have been filed, an agreement not to prosecute remains largely inaccessible to judicial intervention.[45] This is the source of the power. For the prosecutor to treat one defendant leniently in order to procure that individual's testimony against others has long been a familiar practice in plea bargaining. If a reduced sentence or charge is appropriate for the cooperating defendant, why should it be wrong to take one more step and immunize the cooperator altogether when, in the prosecutor's judgment, that is the only way of proceeding successfully against more culpable or more dangerous offenders? This is the justification for the exercise of the power. But neither the tradition of prosecutorial discretion nor the utility of dealing for cooperation as a way of building a case altogether dispels the concerns to which this Ar-

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prosecution to go forward since the prosecutor had received substantially the performance for which he had bargained. The consideration issue presents difficulties when the cooperator stands ready to perform but performance becomes unnecessary. This situation may arise, for example, when the defendant pleads guilty. *See infra* text accompanying notes 213-15.

42. Rowe v. Griffin, 676 F.2d 524 (11th Cir. 1982).

43. *See* United States v. Carrillo, 709 F.2d 35 (9th Cir. 1983).

44. *See* Santobello v. New York, 404 U.S. 257 (1971).

45. The Supreme Court has stated that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ." United States v. Nixon, 418 U.S. 683, 693 (1974). An application can be made by mandamus, or a local equivalent, to force a prosecutor to bring charges. A leading federal case in which such an attempt was made is Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973). The court dismissed the application on the grounds that there is no duty to prosecute and that the principle of separation of powers, the impracticality of judicial review, and the dangers of allowing private parties to open up the prosecutor's files all contribute to the inappropriateness of acceding to mandamus. *Id.* For a full discussion, see 2 LAFAVE & ISRAEL, *supra* note 40, at §§ 13.2, 13.3. Once charges have been filed, a prosecutor's power to withdraw them (to *nol pros*) in most jurisdictions is subject to some degree of judicial review. Rule 48(a) of the Federal Rules of Criminal Procedure provides that a United States Attorney may file for dismissal "by leave of [the] court." The purpose of this provision is primarily to protect the defendant from harassment, *see* Rinaldi v. United States, 434 U.S. 22 (1977), but it also confers some power on the court to inquire whether the proposed dismissal is "contrary to manifest public interest," United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). *See also* 2 LAFAVE & ISRAEL, *supra* note 40, at § 13.3(c).

ticle now turns.

III. The Perils of Prosecutorial Discretion in Choosing Cooperators

Questions of ethics and policy arise when prosecutors confer immunity or make lenient bargains for cooperation in cases where the witness almost certainly could be convicted of a serious offense or would, absent the bargain, be sentenced more severely on a straightforward guilty plea.[46] May lesser imps justifiably be liberated if this will snare the grand Satan, or can no good come from bargains with the devil? One possible view is that the prosecutor should never reduce a charge or release an offender unless some aspect of the commission of the crime substantially diminishes culpability. This would not cover later repentance or rehabilitation even if evidenced by restitution or cooperation. Such postcrime actions indeed may support a finding that the offender is not as bad as the crime alone might indicate. One could argue, however, that in the division of responsibilities this is a matter for a sentencing judge, and that prosecutors should confine themselves to assessing the gravity of crimes already committed.

Indeed, even if the prosecutor acted properly in judging the moral character of the defendant or suspect, most cooperation agreements would be difficult to fit into any concept of repentance or rehabilitation.[47] These are agreements to sell a commodity—knowledge. The witness usually gains that knowledge through participation in criminal conduct, and the offer of testimony is a calculated attempt to gain immunity or leniency. Freeing such a person can powerfully excite the public's sense of injustice.

While this narrow view of the prosecutor's proper role sharply contradicts our actual practice in many cases, it has an almost irresistible appeal in cases involving the most serious crimes of personal violence, such as rape and murder. In those cases a cooperation deal would leave the crime inadequately punished. Suppose, for example, that murderer *X*, against whom the prosecutor has a strong case with respect to the averagely evil murder *A*, offers strong testimony against murderer *Y*,

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46. This is not always so. The case against a cooperator may contain flaws which will strengthen the prosecutorial disposition to confer immunity or a favorable bargain. There may, indeed, be no real case against a cooperator, but he may seek immunity to guard against a chance that what he relays by way of cooperation might incriminato him.

47. This might be disputed by prosecutors who likely would assert that the cooperator, by his conduct, will strike a blow at crime and, in some cases, will effectively terminate the activities of a criminal organization to which he once belonged. This potential is undeniable, and this form of "restitution" may make the bargain a good one for society, but the cooperator's actions are not the same as an unsolicited demonstration of a change of heart by a criminal.

who is suspected of the peculiarly horrifying serial murders *B*, *C*, and *D*, and, against whom the prosecutor has no case without *X*'s testimony. While the prosecutor might offer *X* some degree of leniency, it is extremely unlikely that she would immunize *X* as to murder *A*, even if she believed that *Y* was conspicuously more evil and dangerous than *X*. This is because immunity would leave the score quite unsettled as to murder *A* with no retribution and no requital to the family of the victim. By contrast, prosecutors often are ready to make full immunity deals with respect to serious "victimless" crimes, such as controlled substance offenses, in which the public does not so clearly hear the voices of an individual victim and his family crying for retribution.

Prosecutors sometimes enter into cooperation agreements with suspects of even the most violent offenses when there are joint perpetrators. In those cases, if prosecutors sometimes offer immunity or a favorable plea to an accomplice even in a spectacularly horrible murder, they do so with the aim that the worst offenders *in that murder* shall not escape retribution. Immunization in such cases is a painful accommodation to produce the most retribution for the crime at the price of permitting some participants to escape their deserts altogether. Although the public's sense of injustice may be excited by such a bargain, it might be equally aroused if the planner or ringleader of the crime went untouched because no deal was cut.

The *Principles of Federal Prosecution* set out by the United States Department of Justice recognize in very general terms the propriety of permitting the prosecutor to make a utilitarian calculation.[48] Under these principles a prosecutor has a duty to neutralize the largest number of units possible of culpability and dangerousness expressed in behavior that the criminal code prohibits. As to each potential defendant,

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48. The Department of Justice's PRINCIPLES OF FEDERAL PROSECUTION, Part F (1980), provides, in part:

1. Except as hereafter provided, the attorney for the government may, with supervisory approval, enter into a non-prosecution agreement in exchange for a person's cooperation when, in his judgment, the person's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.

2. In determining whether a person's cooperation may be necessary to the public interest, the attorney for the government, and those whose approval is necessary, should weigh all relevant considerations, including: (a) the importance of the investigation or prosecution to an effective program of law enforcement; (b) the value of the person's cooperation to the investigation or prosecution; and (c) the person's relative culpability in connection with the offense or offenses being investigated or prosecuted and his history with respect to criminal activity.

Also noteworthy are the ABA STANDARDS RELATING TO PLEAS OF GUILTY § 1.8(a)-(v) (Approved Draft, 1968), which acknowledge as a justification for a plea bargain that "the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct."

the prosecutor must make a difficult calculation to measure the moral weight of the culpability, including the harm done, and the future danger to the public. When she can gather no more evidence without inducements, the prosecutor then decides whether to proceed and prosecute those suspects against whom the already produced evidence makes a case or whether to extend leniency or full immunity to some suspects in order to procure testimony against other, more dangerous suspects against whom existing evidence is flimsy or nonexistent.

This utilitarian approach is surely the correct one. A prosecutor has multiple public interests to protect and her concept of justice should be a synthetic one that blends considerations of public safety with judgments of moral culpability.[49] Fortunately, the two standards will not clash often since the morally worst offender is often the most dangerous. If the prosecutor makes the agreements properly, she achieves the maximum possible degree of retribution for moral wrongdoing and the maximum future protection of the public with respect to that crime. Naturally, prosecutors always should perceive immunization as a last resort. The thrifty prosecutor will buy cooperation at the lowest price,[50] and immunization should only rarely be necessary. In the worst cases, however, or in cases in which the suspect's crime is not so serious and his cooperation may be very fruitful, the skillfully represented suspect sometimes will be able to extract a high price.

A prosecutor's decisions in this area are painfully delicate. She is often not in a position to explain or defend her decisions. At an early stage in the case public statements may reveal too much to other defendants. Courts, in any case, may prohibit comment by the prosecutor;[51] even if they do not, comment may appear unseemly.

While we may sympathize with the prosecutor's difficult position,

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49. Judgments about public safety involve predictions of future dangerousness that are very difficult to make with precision. *See* Graham Hughes, *Legal Aspects of Predicting Dangerousness*, *in* 2 CRITICAL ISSUES IN AMERICAN PSYCHIATRY AND THE LAW 57 (Richard Rosner ed., 1985); THE PREDICTION OF CRIMINAL VIOLENCE (Fernand N. Dutile & Cleon H. Foust eds., 1987); Franklin E. Zimring & Gordon Hawkins, *Dangerousness and Criminal Justice*, 85 MICH. L. REV. 481 (1986).

50. The *Principles of Federal Prosecution* stipulate:

> In entering into a non-prosecution agreement, the attorney for the government should, if practicable, explicitly limit the scope of the government's commitment to: (a) non-prosecution based directly or indirectly on the testimony or other information provided; or (b) non-prosecution within his district with respect to a pending charge or to a specific offense then known to have been committed by the person.

PRINCIPLES OF FEDERAL PROSECUTION, *supra* note 48, Part F.3.

51. In Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991), the Supreme Court, while finding the particular Nevada Supreme Court Rule void for vagueness, held that generally a rule prohibiting an attorney in a criminal case from making an extrajudicial statement to the press does not violate the First Amendment when the lawyer knows or reasonably should know that the statement will have a substantial likelihood of materially prejudicing an adjudicative proceeding. *Id.* at 2725.

we must also recognize that the present system has weaknesses. These weaknesses transcend the mere need to defend the prosecutor's public image; they pose threats to the public interest as well. A prosecutor may immunize the wrong people as a result of misjudgment or even corrupt motives. He may "pick people that he thinks he should get, rather than pick cases that need to be prosecuted."[52] By ignoring repeated offenses of a long-term informer, prosecutors may establish unhealthy relationships and create the appearance that the offender has a license to commit crimes. The intensity of the dilemmas, the lonely position of the prosecutor, and the possibility of bad decisions are good reasons for seeking some mechanism for review.

Three possibilities exist. First, we might wish to require that local prosecutors obtain the consent of a high prosecuting official before entering into a cooperation agreement. Federally, the government could assimilate the procedure for cooperation agreements to the current formal immunity grants procedure under which the prosecutor must obtain the consent of an Assistant Attorney General.[53] Since informal agreements often have much the same aim and impact as formal agreements, one could make a strong principled case for this extension of the practice.[54] But there would be practical difficulties. The number of requests by federal district offices for approval of informal immunity grants or plea bargains in cooperation situations probably would run into the thousands each year, and a requirement that a high-level official clear every request would demand additional staffing of a special office or some change in the present practice through devolution to regional committees. In most states, on the other hand, where there is no central prosecuting authority, the request would go no higher than the office of the chief local prosecuting attorney.[55] Another practical difficulty would be that prosecutors often would need a speedy green light

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52. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 5 (1940).

53. *See supra* notes 8-10 and accompanying text.

54. The policy behind this proposal is that the higher the official, the broader the outlook should be. With respect to formal immunity, the National Commission on Reform of the Federal Criminal Law recognized this justification for requiring high-rank approval. The Commission stated:

> Is the public need for the particular testimony or documentary information in question so great as to override the social cost of granting immunity and thereby possibly pardoning a person who has violated the criminal law? Such a calculation can be made only by a person familiar with the total range of law enforcement policies which would be affected by an immunity grant, and not by one familiar only with the asserted public need in the particular case.

2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS: WORKING PAPERS 1433-34 (1970), *discussed in* Sherman, *supra* note 13, at 61.

55. A district attorney may be the head of an office containing a staff of hundreds, covering a district with a population of millions, or of an office containing fewer than ten attorneys in a district with a population of thousands.

in order to seize an opportunity and move quickly with a cooperator. In the federal system, with so many cooperation negotiations, this might create a substantial problem. A similar practice functions smoothly and effectively with applications for electronic surveillance warrants,[56] but these occur much less frequently than would requests with respect to cooperation agreements.

A second possibility would be to require judicial approval of cooperation agreements. We must be careful to define exactly what judicial approval might mean. Under present practice, if there is a dispute over whether either side has breached an agreement, a court may decide the dispute, especially if one side, usually the government, seeks to avoid fulfilling its promises.[57] Judicial review in this limited sense already exists. A stronger concept of judicial review would require the government to submit any agreement to a court for approval before it goes forward with eliciting information from a cooperating witness or having him testify. A court at this stage could consider the public interest by balancing the importance of the potential information and testimony against the indulgence being granted to the cooperator. The court also could scrutinize the agreement for any unconscionable clauses.[58] It might include a colloquy with the cooperator, similar to the colloquy conducted when a guilty plea is accepted,[59] to ascertain whether the cooperator's surrender of his Fifth Amendment rights was voluntary and intelligent. No such judicial review is required for a grant of formal immunity,[60] but one could argue that it is not necessary there because, with formal immunity, the government irrevocably confers a precisely defined protection that is logically an exact equivalent of the constitutional guarantee the immunized witness surrenders. Thus, by its very nature, the transaction is fair and balanced. Informal immunity, by contrast, is flexible enough to accommodate different shades of immunity and simultaneously is open-ended with respect to the kinds of obligations that the cooperator may assume. It is also contingent on the cooperator's keeping his promises. Its flexible shape contains the possibilities of unconscionable clauses or agreements that are contrary to good public

56. The federal statute, 18 U.S.C. § 2516 (1988), provides that an application for an electronic surveillance warrant must be authorized by a Department of Justice officer of at least the rank of Deputy Assistant Attorney General of the Criminal Division, specially designated by the Attorney General. The parallel New York statute confers the power to apply for an eavesdropping warrant on any district attorney. N.Y. CRIM. PROC. LAW §§ 700.05(5), 700.20(1) (McKinney 1984). Federally, approval to apply for these warrants can be obtained very swiftly, once the initial paper work is done, with the aid of facsimile machines and the telephone.

57. *See infra* notes part V.

58. *See infra* note 153 and accompanying text.

59. *See* FED. R. CRIM. P. 11(c) and (d).

60. *See* discussion *supra* note 11.

policy. Thus, there is a need for threshold review, especially with respect to the voluntariness and intelligence of the cooperator's assumption of obligations and waiver of rights.

While some courts have stated that an informal immunity deal will not be binding without consent of the court,[61] there are difficulties with judicial regulation of cooperation agreements. The nature of the difficulty depends in part on whether the agreement is for immunity or whether it involves a guilty plea. In the case of the guilty plea, the agreement must come before the court when the plea is tendered and accepted.[62] But, under present practice, by the time the plea is tendered to the court, the defendant likely has at least partly executed the cooperation agreement by debriefing, or has executed it fully by testimony before a grand jury or at a trial. A strong brand of judicial review, thus, would require that the prosecutor submit the agreement to the court before obtaining testimony or information from the defendant. Even if this proceeding were sealed, it would be awkward and might considerably disrupt existing prosecutorial techniques.

Current federal practice illustrates the kind of difficulty that might arise from this stronger judicial review of cooperation agreements. Because the federal Sentencing Guidelines tie the range of sentences that courts may impose rather tightly to the degree and nature of the charges,[63] it is now a frequent practice for the government to enter into a plea agreement with a cooperator before the grand jury returns any indictment. An important part of that agreement concerns the nature of the charges that the government will seek from the grand jury and the statement of facts that the government will present to the court.[64] To

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61. *See* cases collected in Jay M. Zitter, Annotation, *Enforceability of Agreement by Law Enforcement Officials Not to Prosecute if Accused Would Help in Criminal Investigation or Would Become Witness Against Others*, 32 A.L.R. 4TH 990, 995-97 (1984).

62. Rule 11(e)(2) of the Federal Rules of Criminal Procedure provides that "[i]f a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered." Under this Rule, if a cooperation agreement has been reduced to writing, it must be submitted to the court when the plea is taken. There will he cases, however, in which there is ongoing cooperation and the agreement has not been reduced to writing. If the defendant accepts a plea under these circumstances, the prosecutor likely will tell the court only that the defendant is cooperating and that the prosecutor may have later recommendations in the light of the cooperation.

63. The Guidelines are not written in terms of specific statutory offenses but in broader terms descriptive of generic conduct. The starting point of an inquiry into the appropriate sentence range is, nevertheless, an identification of which guideline covers the charged offense or offenses.

64. In addition to offering a generic statement of the conduct that invokes a particular sentence range, the Guidelines also contain listings of real offense elements such as the amount of money taken, whether a gun was used, and so forth. These elements will have a mitigating or aggravating impact on the sentence range. Courts can make further adjustments depending on factors such as the defendant's role in the offense and whether the defendant accepted responsibil-

assure judicial review before the cooperator incriminates himself, therefore, a court sometimes would have to review an agreement before the grand jury returns any indictment. The procedure thus would be rather different from the court's present inquiry when a plea is tendered. While this procedure is not impossible to contemplate, it would be cumbersome and interrupt the flow and rhythm of the investigation unless it could be completed very swiftly. At the same time, it would have no great impact unless the court possessed strong discretion to refuse to countenance the agreement on grounds of public policy and fairness.[65]

Judicial review of immunity agreements also would be an almost complete innovation since these compacts presently are insulated from scrutiny except in two limited situations. First, courts currently exercise review over immunity agreements when litigation arises over the alleged breach of a term in the agreement. At this point the court, while probably not examining the agreement's overall acceptability, will determine the fair meaning of the term and whether there was a material breach.[66] Second, courts review immunity grants when the cooperator testifies at a trial and discovery or cross-examination reveal the agreement. Here the defense may allege that terms in the agreement taint the testimony and make it inadmissible.[67] This may trigger a narrow scrutiny, confined to certain terms in the agreement and their impact on the cooperator, only to determine the admissibility of his testimony.

Submission of immunity agreements for judicial approval before execution thus would constitute a substantial change of practice, subjecting the agreement, before implementation, to broad review based on public interest and fairness. This practice would not be easy to enforce.

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ity. Federal Sentencing Guideline § 6B1.4, reprinted in 18 U.S.C.S. app. (Law. Co-op. 1990), provides that a plea flowing from a plea agreement "may be accompanied by a written stipulation of facts relevant to sentencing." Although the stipulation shall "not contain misleading facts," *id.* § 6B1.4(a)(2), the way in which it presents the facts may have a considerable impact on the final calculation of the appropriate sentencing range under the Guidelines.

65. The federal system presently confers a power on the courts to review plea bargains. Rule 11(e)(2) of the Federal Rules of Criminal Procedure provides that the court may accept or reject an agreement that involves the dismissal of charges or the imposition of a specific sentence. In Santobello v. New York, 404 U.S. 257, 262 (1971), the Court said that a defendant has "no absolute right to have a guilty plea accepted" and that a court "may reject a plea in exercise of sound judicial discretion." No specific standards have been declared for the exercise of this discretion. A few courts have asserted a broad discretion to disapprove pleas that appear too lenient. *See* United States v. Carrigan, 778 F.2d 1454, 1461-62 (10th Cir. 1985); United States v. Bean, 564 F.2d 700, 703-704 (5th Cir. 1977). Compare United States v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973), in which the court concluded that a court's power to reject a guilty plea involving a reduction of the initial charge is confined to cases where the "action of the prosecuting attorney is such a departure from sound prosecutorial principle as to mark it an abuse of prosecutorial discretion." *Id.* at 622. The court should only interfere in a "hlatant and extreme case." *Id.*

66. *See infra* part V.

67. *See infra* part IV.

Absent testimony by the cooperator or subsequent litigation between the cooperator and the government, the agreement would not inevitably come to light. Judicial review, therefore, might depend on self-policing by the prosecutor. The prosecutor would have to come to the court every time she did not proceed against a suspect in return for cooperation. The prosecutor would have little incentive to do this, at least in cases where the cooperator will not testify, if she could secure the cooperation without the court's seal of approval. The cooperating suspect, who would have the real interest in the court's validation of the arrangement, often would not be in a strong position to insist on an agreement's presentation to a court and, thus, would have to rely on the prosecutor's good faith.

Since American law never has accepted the proposition that a prosecutor has a general duty to prosecute every known offense, there are currently no concepts or procedures by which a court can challenge or investigate a prosecutor's decision not to prosecute suspects against whom probable cause exists.[68] Courts would have difficulty gathering information to review a prosecutor's decision not to proceed when the evidence might sustain a prosecution unless prosecutors had to keep files with formal notations of their decision.[69] Cases involving testimony are a large and important segment of immunity agreements and, in those cases, the sanction of excluding the witness's testimony at trial for failure to seek the court's prior approval of the agreement could defend and enforce the requirement of judicial review before implementation of a cooperation agreement. However, this would likely be an unacceptably strong sanction and would not reach the intractable difficulty of undoing any advantages the prosecutor gained through information provided by the cooperator.

Another possibility, very novel to American tradition but with attractive potential, would be to require the prosecutor to file the details of immunity agreements and plea agreements in major felony cases and create a standing commission that would include lay persons not engaged in prosecution to examine and report upon the agreements at regular intervals. The prosecutor's filings would include any written agreement with the cooperator and also would contain information on

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68. *See supra* note 45. *See generally* 2 LAFAVE & ISRAEL, *supra* note 40, at 160-207. Some states have statutes that seem to require the prosecutor to proceed whenever she has cause. The court in State *ex rel.* Ginsberg v. Naum, 318 S.E.2d 454 (W. Va. 1984), relied upon such a statute to force a prosecution by mandamus. The conventional position is put tersely in United States v. Librach, 536 F.2d 1228, 1230 (8th Cir.), *cert. denied*, 429 U.S. 939 (1976), in which the court stated that "failure to seek court approval does not render the agreement unlawful," and concluded that "[t]he decision of whether to prosecute rests in the Executive Branch."

69. *See* 2 LAFAVE & ISRAEL, *supra* note 40, at 174.

any understandings, whether recorded or not, as to whether the cooperator would participate in any future criminal activity as part of the agreement. Standards and manuals for prosecutors' offices should contain provisions on the policies and considerations a prosecutor should weigh in drafting cooperation agreements[70] and should develop standard cooperation agreement forms. The reporting commission's comments should contribute helpfully to the development of these standards and agreement forms in greater detail than now provided by the *Principles of Federal Prosecution.*

The strongest model of this innovation would require prosecutors to submit cooperation agreements to the commission and receive its advice in all major cases. The commission's advice need not be binding but would be part of what the prosecutor must consider before arriving at an agreement. A weaker version of this innovation would require the commission retrospectively to examine cooperation agreements in all major cases and issue regular reports on the discharge of this prosecutorial function.

A question that arises at this point is why cooperation agreements deserve special scrutiny as opposed to plea bargains in general. One could certainly make an argument for review by a public commission of all plea bargains in major cases, but plea bargains involving cooperation agreements constitute a good starting point. Cooperation agreements are special because the extended leniency or immunity often does not rest, even in part, on any reduced culpability in the commission of a crime. Also, they sometimes carry a special danger of licensing continuing criminal acts. Simultaneously, no doubt because of the absence of any approval or review process, cooperation agreements are not standardized or governed by a detailed set of rules, but instead tend to be individually composed and may vary in important ways even from district to district in the federal system. The proper protection of the public interest and fairness in the administration of justice thus are implicated with a special sharpness. Ventilation and examination of these agreements by a public body outside the prosecutorial bureaucracy might have a healthy impact that later could be extended to a wider range of plea bargains.

The commission might review and comment on the following issues: (1) the development of standards for identifying situations in which granting full immunity appears inappropriate; (2) framing criteria for what should be permissible and impermissible conditions of

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70. The *Principles of Federal Prosecution* do so now in a very general way. *See supra* notes 48, 50.

achievement attaching to the cooperation;[71] (3) suggesting standards for when it is proper to immunize the cooperator with respect to the commission of future crimes;[72] and (4) developing criteria for what should constitute a substantial breach of an agreement by a cooperator and when prosecutors should consider completing cooperation despite a breach.[73]

Any proposal for review or monitoring of a prosecutor's decision to enter into a cooperation agreement with a witness suffers from the risk of imposing unhelpful rigidity on what is often a very flexible process. Currently prosecutors (and investigating agents) sometimes prefer to avoid or hold off on immunity agreements because the continuing suspense might strengthen their influence over the witness. Prosecutors, thus, often will not reduce an agreement to writing and will provide only vague assurances to the witness or informer that he will benefit from continued cooperation.

Under present practice no fixed time exists at which the prosecutor must reduce the agreement to writing. In some cases the discussion may proceed swiftly and neatly so that there is an early, precise understanding of what will be exchanged and, consequently, an early framing of a written compact. In many cases, however, the process is less tidy and much more protracted. A potential cooperator may go through numerous interviews, first with agents and then with prosecutors, during which the cooperator, the agents, and the prosecutors may slowly clarify the dimensions and value of his cooperation. The extent of the immunity or leniency offered similarly may remain undefined during these early stages. Indeed, agents and prosecutors often will prefer to keep the degree of leniency imprecise until the end or close to the end of the cooperator's expected contribution.[74] A new rule requiring that coopera-

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71. *See infra* notes 131-44 and accompanying text.

72. Prosecutors sometimes use cooperators most productively by allowing them to continue to operate in a criminal organization while relaying information and perhaps setting up certain situations favorable to government investigation. It may be impossible for cooperators to do this kind of work without committing certain offenses. A very sensitive question is where to draw lines with respect to what criminal acts public policy can condone for these ends. All presumably would agree that the government should never allow crimes of violence or the irreversible infliction of loss on an individual under cooperation agreements. Some situations are more controversial. For example, should the government immunize a cooperator for contemplated participation in narcotics felonies if this appears to be the only way to build a case against persistent, major offenders?

73. *See infra* notes 196-216 and accompanying text.

74. A prosecutor may prefer not to have a written agreement that makes precise promises because its absence may strengthen the position of the witness before a jury. The witness will be able to say truthfully that, while he has a general assurance of leniency if he cooperates, the government has made no promises to him with respect to the exact extent of the leniency. If the prosecutor has a trustworthy and generous track record in this area, a cooperating witness's counsel may advise him that it is safe and even advantageous to proceed without a written agreement, since, if he does his best for the government, the prosecutor ultimately may give him a greater

tion agreements be submitted for approval or scrutiny, if faithfully complied with, would have an inevitable tendency to direct the present varying and fluid process into harder channels and would considerably formalize the proceedings, compelling the reduction of the agreement to writing at an early stage. A fundamental question, therefore, is whether the gains from innovation would be outweighed by the loss in prosecutorial flexibility and freedom of maneuver. There is also a risk that a review requirement simply would drive cooperation understandings underground and thus increase the occurrence of agreements that are contrary to public policy.[75]

IV. Fairness to the Defendant

Conventionally our judicial system has relied primarily on the defense's adversarial capacity to reveal a cooperation agreement and expose its significance in cross-examination and in summation. Some courts may also supplement the defense's actions with a corroboration requirement for accomplice testimony or a charge to the jury on the importance of weighing the cooperator's testimony carefully.[76] In modern times these protections have been strengthened by the prosecutor's duty, in response to a properly framed request, to disclose to the defense the promises made to the witness. Breach of this duty may amount to a due process violation requiring the reversal of a conviction.[77]

Beyond disclosure and confrontation, there is the possibility that some kinds of cooperation agreements will render testimony tainted and its use a violation of a defendant's due process rights. This possibil-

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reward than the prosecutor would have promised in a written agreement at an early stage.

75. Prosecutors are unlikely to be pleased with the establishment of a commission to which they would have a duty to report cooperation agreements. They may feel that there are security risks in reporting certain information to the commission while simultaneously recognizing that they cannot properly defend the agreement as in the public interest without forwarding that information. They thus would be afraid of unfair criticism.

76. "The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." Hoffa v. United States, 385 U.S. 293, 311 (1966). In *Hoffa* the trial court admitted the testimony of an informer who, among other rewards for his information and testimony, had federal and state charges against him dropped. The Court observed: "The petitioner is quite correct in the contention that Partin, perhaps even more than most informers, may have bad motives to lie. But it does not follow that his testimony was untrue, nor does it follow that his testimony was constitutionally inadmissible." *Id.* at 311. The Court held in Lisenba v. California, 314 U.S. 219, 227 (1941), that an agreement whereby an accomplice received a reduced sentence in return for testifying was not a violation of the due process clause.

77. *See* Brady v. Maryland, 373 U.S. 83 (1963). In Giglio v. United States, 405 U.S. 150 (1972), the Court held that nondisclosure of an immunity grant to a witness who testified against the defendant violated due process because there was an issue of the witness's credibility. This followed the earlier decision, Napue v. Illinois, 360 U.S. 264 (1959), to the same effect.

ity probably flows from the old common-law principle that confessions are involuntary when procured by promises or threats from a person in authority.[78] By analogy, one could argue that testimony is inadmissible when a witness who is in the position of a virtual defendant testifies in hopes of receiving leniency. Some courts have held that agreements for leniency or immunity that require a witness to testify in a particular fashion or are contingent on results (procuring indictments or convictions) are a violation of the due process rights of the defendant against whom the testimony is offered.

In 1884 the Texas Court of Appeals roundly condemned an arrangement by which the State promised to drop charges against one or another of six suspects depending on which of them gave the most productive testimony before the grand jury.[79] As the court moderately observed, this arrangement for immunity by public competition could induce a witness to swear to "any and all things" and was worse than a bribe.[80] Much more recently a California appellate court reversed a conviction on the ground that a witness against the defendant had been promised immunity on condition that his testimony at the trial did "not materially or substantially change" from prior recorded statements that he had made to the police.[81] "[A] defendant," the court observed, "is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion."[82]

A few courts have tried to curb the dangers of perjured testimony by requiring that the State execute its promises to the witness before he testifies. This essentially means that a court must sentence the witness under a plea agreement before he testifies or treat a promise of immunity as irrevocable.[83] Otherwise, the testifying witness still expects his

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78. *See Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 954-59 (1966).

79. Harris v. State, 15 Tex. App. 629 (1884).

80. *Id.* at 634.

81. People v. Medina, 116 Cal. Rptr. 133, 141 (Cal. Ct. App. 1974).

82. *Id.* at 145. In People v. Green, 228 P.2d 867 (Cal. Dist. Ct. App. 1951), an accomplice gave testimony at the preliminary hearing with a promise of leniency if the testimony resulted in the defendant's being bound over for trial. At the trial the witness recanted and his preliminary hearing testimony was admitted over objection. The appellate court described the agreement as an "astonishing bargain," *id.* at 867, and went on to reverse the conviction, saying that such testimony was "tainted beyond redemption." *Id.* at 871 (quoting Rex v. Robinson, 30 B.C.R. 369, 375 (British Columbia, 1921)).

83. In Franklin v. State, 577 P.2d 860 (Nev. 1978), an accomplice witness in a murder prosecution bargained to escape the risk of a death sentence by pleading to second degree murder. The witness was not allowed to plead until after he had testified at the defendant's preliminary hearing, and sentence was not imposed on the witness until after the defendant had been convicted. The Nevada court reversed on the ground that this practice created such a risk of perjury that it

"fee" and the prosecution is tainted by the appearance of purchasing or coercing testimony.[84] From the State's perspective, the obvious danger is that the witness may not give the testimony expected once he has irrevocably procured the benefit of the bargain.[85] In that situation, however, the State may still be able to revoke the plea[86] and perhaps prosecute for perjury, so that the prosecutor may still "keep a hammer" over the witness.[87]

In any case, the great weight of modern authority, particularly in the federal courts, is that, in guilty-plea cases, the postponement of plea and sentence is unobjectionable. Federal courts consistently have refused to find a due process violation in this practice and have viewed the traditional safeguards of cross-examination, summation, and the court's charge to the jury as adequate for exposing the possibilities of perjury.[88] At the same time, the suggestion of some older cases that an agreement with a witness should only demand full and truthful testimony and should in no way be contingent on the success of the prosecution[89] seems to have crumbled. In the analogous situation of testimony by informants, federal courts have held that the informant's anticipated receipt of money if his testimony resulted in a conviction did not render

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violated the defendant's right to due process.

84. *See id.* at 862, 863.

85. In LaPena v State, 643 P.2d 244 (Nev. 1982), the witness was allowed to plead to second degree murder with a promised sentence of five years to life. He testified against the defendant at the preliminary hearing and then was sentenced under the hargain. At the defendant's trial the witness recanted and his preliminary hearing testimony was admitted. The appellate court reversed on the ground that his preliminary hearing testimony was suspect because of the pending inducement.

86. The witness would have promised to testify fully and truthfully. If his trial testimony contradicted his testimony at the preliminary hearing, he broke his promise at one or the other of these proceedings and so, presumably, the State would be entitled to have the plea vacated. This seems at the least to be constitutionally permissible. See the discussion of Ricketts v. Adamson, 483 U.S. 1 (1987), *infra* notes 229-45 and accompanying text.

87. This was how the prosecutor expressed his intentions at a hearing held in *Franklin*, 577 P.2d at 863 n.5.

88. United States v. Dailey, 759 F.2d 192, 198-99 (1st Cir. 1985); United States v. Kimble, 719 F.2d 1253, 1255-57 (5th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); United States v. Borman, 437 F.2d 44, 45-46 (2d Cir.), *cert. denied*, 402 U.S. 913 (1971); United States v. Insana, 423 F.2d 1165, 1168-69 (2d Cir.), *cert. denied*, 400 U.S. 871 (1970); United States v. Vida, 370 F.2d 759, 767 (6th Cir.), *cert. denied*, 387 U.S. 910 (1966).

89. The First Circuit in United States v. Winter, 663 F.2d 1120, 1133 (1st Cir. 1981), suggested tbat testimony might be tainted if leniency is dependent on its evaluation by the government. The Eighth Circuit made the same suggestion in United States v. Librach, 536 F.2d 1228, 1230 (8th Cir.), *cert. denied*, 429 U.S. 939 (1976). A rare federal case in which a court found testimony tainted and inadmissible on contingency grounds is United States v. Baresh, 595 F. Supp. 1132, 1134-37 (S.D. Texas 1984), in which the government promised the witness immunity and permission to keep assets derived from narcotics dealing if he would give information and testimony leading to the conviction of two specified defendants. After his testimony had been admitted, and in the absence of any corroboration, the court declared a mistrial.

him incompetent to testify;[90] that it was proper to admit the testimony of an informant who was a convicted felon and who had been paid for results rather than simply for information;[91] and that it was proper to allow the testimony of undercover agents who worked under an agreement providing that their compensation was to be fixed after trial "on the basis of an appraisal of the extent and quality of [their] work."[92]

A contrary tendency briefly appeared in *Williamson v. United States*.[93] In that case the government agreed to pay an informer, who became a witness,[94] if he could detect a pretargeted individual committing a crime. The former Fifth Circuit reversed the conviction because of the enhanced risk of entrapment.[95] The *Williamson* decision, however, was repudiated elsewhere, interpreted restrictively in the former Fifth Circuit, and ultimately reversed.[96] Courts rejected *Williamson* for several reasons. First, they noted the alleged importance to law enforcement of specific contracts with informers, even if they became witnesses. Second, courts have expressed confidence that the adversarial process adequately enables the jury to weigh the witness's credibility. Indeed, the Supreme Court decision in *United States v. Bagley*,[97] while not confronting this issue squarely, suggests that there is no impropriety in designating targets in agreements for information and testimony made with paid informers.[98]

The cases noted above, however, did not involve cooperation agreements but rather dealt with paid informants who became witnesses. A question remains as to whether a witness's testimony is more deeply tainted when the contingency involves not simply a cash payment but

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90. United States v. Valle-Ferrer, 739 F.2d 545, 546-47 (11th Cir. 1984).

91. Heard v. United States, 414 F.2d 884, 886 (5th Cir. 1969).

92. United States v. Crim, 340 F.2d 989, 990 (4th Cir. 1965) (per curiam).

93. 311 F.2d 441 (5th Cir. 1962).

94. Although this is not made clear in the opinion, a deposition by the informer in *Williamson* was admitted into evidence at the trial. *See* United States v. Rey, 811 F.2d 1453, 1457 (11th Cir. 1987) (court's analysis of the *Williamson* transcript).

95. *Williamson*, 311 F.2d at 444.

96. *Williamson* was interpreted narrowly in United States v. McClure, 577 F.2d 1021, 1022-23 (5th Cir. 1978), and was rejected in United States v. Dailey, 759 F.2d 192, 199-200 (1st Cir. 1985), United States v. Grimes, 438 F.2d 391, 394 (6th Cir.), *cert. denied*, 402 U.S. 989 (1971), United States v. Reynoso-Ulloa, 548 F.2d 1329, 1338 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978), and in United States v. Hodge, 594 F.2d 1163, 1167 (7th Cir. 1979). It was overruled by the Fifth Circuit in United States v. Cervantes-Pacheco, 826 F.2d 310 (5th Cir. 1987).

97. 473 U.S. 667 (1985).

98. In *Bagley* the government had agreed to pay informers (state law enforcement officers and private security guards) lump sums for the provision of information regarding violations committed by Bagley and for testifying against Bagley in federal court. Although the issue presented in *Bagley* was whether there should be reversal for failure by the prosecutor to disclose the agreements in full to the defense, there is no suggestion in the opinion that the agreements themselves necessarily tainted the witness's testimony to the point of rendering it inadmissible. The Court appeared to take it for granted that the testimony was properly admitted.

immunity or leniency in some criminal matter. In one notable piece of litigation in this area, *United States v. Waterman*,[99] the government agreed to give a witness a twelve-year sentence if he cooperated. The district court found that the agreement entailed a promise that the government would make a further motion for the reduction of the witness's sentence if he gave truthful testimony before the grand jury that led to further indictments.[100] The government in fact did move to reduce the sentence after the witness testified before the grand jury, the defendant was indicted, and the witness again testified at the defendant's trial.

A panel of the Eighth Circuit Court of Appeals concluded that this agreement amounted to an offer of favorable treatment contingent on the success of the prosecution and, thus, reversed the conviction. The court noted that, while the agreement went only to grand jury testimony, the pressure for the defendant to stick to the same story at the trial was very strong.[101] The court suggested that this was an "invitation to perjury."[102] Although the jury was aware of the terms of the agreement, the court declared that there is "no place in due process law for positioning the jury to weed out the seeds of untruth planted by the government."[103] This check on the scope of such agreements was overturned, however, when, on a rehearing, the en banc court divided equally without any opinion, thus restoring the conviction. Although this outcome deprives the decision of any precedential value, it exemplifies a trend in the federal courts toward greater freedom for the prosecution to tie inducements more closely to performance in cooperation agreements.[104]

Subsequent to *Waterman* the First Circuit considered the impact of a set of plea agreements in which the government offered cooperating witnesses sentence concessions the dimensions of which were to be fixed at a later date, "depending principally upon the value to the Government of the defendant's cooperation."[105] While suggesting that the government in the future include in plea agreements a clause stating that giving false information or testimony would be considered a failure to

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99. 732 F.2d 1527 (8th Cir. 1984) (panel and en banc decisions), *cert. denied*, 471 U.S. 1065 (1985).

100. *Id.* at 1530.

101. *Id.* at 1531.

102. *Id.*

103. *Id.* at 1532.

104. This is now reinforced by changes in sentencing laws that restrict the motion for reduction of sentence under Rule 35 of the Federal Rules of Criminal Procedure to one made by the government on the ground of the defendant's cooperation. Formerly, defendants routinely made motions for reduction, and the Rules did not restrict the motion to any specific ground. Giving the government a monopoly over the motion puts even greater pressure on cooperating witnesses to perform up to expectations and to secure results. *See infra* note 162 and accompanying text.

105. United States v. Dailey, 759 F.2d 192, 194 (1st Cir. 1985).

cooperate fully,[106] the court found that the nature of the agreement did not taint the testimony.[107] The court stated that it was in agreement with the essential policy contained in a Sixth Circuit opinion where that court had said:

> [There is no overriding policy to exclude the testimony of an informant if he is paid under] a contingent fee agreement for the conviction of specified persons for crimes not yet committed. Although it is true that the informant working under this type of arrangement *may* be prone to lie and manufacture crimes, he is no more likely to commit these wrongs than witnesses acting for other, more common reasons. . . . Rather than adopting an exclusionary rule for a particular factual situation, . . . we prefer the rule that would leave the entire matter to the jury to consider in weighing the credibility of the witness-informant. (Citation omitted). In our view this approach provides adequate safeguards for the criminal defendant against possible abuses since the witness must undergo the rigors of cross-examination.[108]

Recent cases have confirmed this trend. In *United States v. Risken*[109] the informant-witness, who was not an accomplice receiving immunity or leniency, reached an understanding with the government whereby the government might give the witness a post-trial payment depending on whether there was a conviction. The court found no constitutional objection to the testimony. In *United States v. Wilson*[110] the government promised the witnesses, who were cooperators, immunity and, in addition, notified them that they were eligible to receive millions of dollars from the United States for aiding in the detection and punishment of tax offenders depending on testimony they gave at the trial.[111] The court of appeals held that, since there had been full disclosure and a cautionary instruction had been given, the testimony was unobjectionable.[112] These decisions invite an appraisal of the present

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106. *Id.* at 200.

107. Other cases in which courts found testimony to be properly admitted under agreements that promised leniency according to the government's evaluation of the worth of the testimony are United States v. Spector, 793 F.2d 932, 936-37 (8th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987), and United States v. Fallon, 776 F.2d 727, 733 (7th Cir. 1985).

108. United States v. Dailey, 759 F.2d 192, 199-200 (1st Cir. 1985) (alterations in original) (quoting United States v. Grimes, 438 F.2d 391, 395-96 (6th Cir.), *cert. denied*, 402 U.S. 989 (1971)). The Sixth Circuit was dealing in this passage, however, with informant testimony and not with testimony in return for leniency.

109. 788 F.2d 1361 (8th Cir.), *cert. denied*, 479 U.S. 923 (1986).

110. 904 F.2d 656 (11th Cir. 1990), *cert. denied*, 60 U.S.L.W. 3264 (1991).

111. The Secretary of the Treasury is authorized by statute "to pay such sums . . . as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws . . . ." 26 U.S.C. § 7623 (1988).

112. The instruction given was in the usual terms and ran:

> The testimony of an alleged accomplice, and the testimony of one who provides evidence against a defendant as an informer for pay or for immunity from punishment or for personal advantage or vindication, must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses . . . .

Wilson, 904 F.2d at 659-60. In this case the argument might be made that the inducement is in no way objectionable since the prospect of financial reward comes from a general statute and not from

state of the law with respect to the testimony of cooperators.

A. *Safeguards Against Perjured Testimony*

While it may not be necessary for courts to apply a general exclusionary rule to testimony and fruits resulting from cooperation agreements, these agreements present specially sensitive situations because it is the government that extends inducements for a witness to lie. When the government either creates or sharply enhances its own witness's motivation to lie, adversarial equipoise calls for special safeguards to protect defendants. These safeguards might take a variety of forms.

First, there is a need to clarify and strengthen the defendant's rights to discovery and the prospect of postconviction relief in the absence of proper discovery.[113] In practice, the discovery of a cooperation agreement is often not difficult for the defense. Not infrequently it will be evident well before the trial that the witness, who initially may have been or who may remain a codefendant, is cooperating with the government. The defense typically will prepare to meet the witness's testimony. Part of the preparation will include a request to the government for the details of any cooperation agreement with the witness and for the witness's criminal record. The prosecution generally will provide this information and might, of course, be compelled to do so, on application by the defense, under the *Brady* principle which, as a matter of due process, requires the government to disclose any material exculpatory information to the defense.[114] The federal practice is to make *sua sponte* disclosure of cooperation agreements.[115]

There will, however, be some cases in which the government either through reluctance or mistake fails adequately to disclose a cooperation or a reward agreement. If this failure becomes an assignment of error on appeal, it will be imperative to know the exact scope of the defendant's discovery rights. The matter is not free from difficulty since the Supreme Court seriously eroded the *Brady* principle in *United States*

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a specific promise made by the government to induce cooperation in a particular case. The statute evinces a general congressional policy to induce information and testimony by the prospect of financial reward in tax cases. But it seems inappropriate that the prosecution may tell witnesses that whether they will receive the bounty depends to an extent on the nature of their testimony. Further, in *Wilson* the prosecutor made an additional promise of immunity. *Id.* at 658.

113. *See* Note, *A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 HARV. L. REV. 887 (1981).

114. *See* Brady v. Maryland, 373 U.S. 83 (1963).

115. Where an accomplice who has made a plea bargain testifies, the federal rule is that the court should inform the jury of the exact nature of the agreement and instruct the jury to weigh the accomplice's testimony carefully. United States v. Insana, 423 F.2d 1165, 1169 (2d Cir. 1970), *cert. denied*, 400 U.S. 841 (1971). Federal prosecutors make a practice, even in the absence of a specific request under *Brady*, of disclosing such agreements to the defense.

v. Bagley.[116] In *Bagley* the Court effectively indicated that a prosecutor's suppression of information about inducements held out to government witnesses will not be a ground for reversal absent a reasonable probability that the outcome would have been different had the suppressed information been available.[117] *Bagley* is a formidable obstacle to postconviction relief. It also may fortify any trial court tendencies to restrict discovery and may encourage the prosecution to make less than full disclosure.[118]

Bagley was not a case of failure to disclose a promise of leniency to a cooperating witness, but, insofar as it may apply to such cases, state courts should revise or reject the *Bagley* principle under their state constitutions. The principle is indefensible in light of the specific requirements of the Sixth Amendment's confrontation clause. Confrontation, the right to the effective assistance of counsel in pursuing confrontation, and independent general due process considerations demand that in all cases of cooperation the government make full pretrial disclosure to the defense.[119] Courts should not permit the government to induce its witnesses to lie, fail to disclose the inducements, and then escape

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116. 473 U.S. 667 (1985).

117. In *Bagley* the defendant made a pretrial request to the prosecutor for information on "any deals, promises or inducements made to witnesses in exchange for their testimony." *Id.* at 669-70. The response did not disclose any inducements. After conviction the defendant discovered that two principal witnesses against him had entered into agreements under which the government had promised to "pay to said vendor a sum commensurate with services and information rendered." *Id.* at 671. The agreement specified that the witness would provide information on the defendant. As a result, the Ninth Circuit granted the defendant's motion to vacate his sentence under 28 U.S.C. § 2255. The Supreme Court, however, upheld the government's appeal of the decision to vacate. Although the defendant had made a specific request for the suppressed information, the Court found that he was not entitled to reversal of his conviction unless there was "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. Other cases holding that incomplete disclosure of fee arrangements with government witnesses are not material are United States v. Janis, 831 F.2d 773 (8th Cir. 1987), *cert. denied*, 484 U.S. 1073 (1988), and United States v. Risken, 788 F.2d 1361 (8th Cir.), *cert. denied*, 479 U.S. 923 (1986).

118. *Bagley* is a serviceable test for appellate courts reviewing a conviction, but it is awkward for trial courts to apply. If a trial court is confronted before trial with the propriety of a defense demand for discovery, the judge presumably still must apply the *Brady* standard of "materiality" but with the gloss given by *Bagley*. The question of whether the result of the proceeding would be different (that is, would any guilty verdict probably not have been returned), however, is difficult to answer when no evidence has yet been presented. The knowledge of the appellate court's reviewing standard nonetheless will likely cause trial courts to make rulings unfavorable to the defense.

119. The Supreme Court's holding in Pennsylvania v. Richie, 480 U.S. 39, 52 (1987), to the effect that confrontation is primarily an in-trial doctrine going to the scope of cross-examination is distinguishable. *Richie* was a case of a defense subpoena addressed to a state agency to obtain records protected under a confidentiality statute. This reasoning may not apply when the very subject matter as to which a need for confrontation arises is created entirely by the government for the sole purpose of gaining a stronger position at the trial.

reversal on the grounds that disclosure would not have produced a different result. When the government is exclusively responsible for creating a need-to-know situation as to confrontation, the proper standard should be harmless error, with the usual burden of proof beyond a reasonable doubt on the government. The potential for grave prejudice through nondisclosure in any particular case and the systemic need to monitor cooperation agreements necessitates placing that burden on the government.[120]

If clear rules for automatic full disclosure are the first necessary safeguard, the next question is whether special evidentiary rules also are needed. The cooperating witness, whether immunized or the recipient of a favorable bargain, is often an accomplice of the defendant against whom he testifies. Although some jurisdictions require accomplice testimony to be corroborated,[121] the federal system and many states have no such rule.[122] Federal courts generally agree, however,

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120. In addition to discovery under a due process or confrontation requirement, any prior statements by the cooperating witness that relate to his testimony at the trial will be discoverable after he testifies under the Jencks Act, 18 U.S.C. § 3500 (1985); *see also* FED. R. CRIM. P. 26.2, or under a comparable state provision. These provisions extend to grand jury testimony by the witness but may not cover statements that the witness made in interviews with agents unless these were memorialized in a way that qualifies them as recorded statements for the purposes of the statute. Agents and the prosecutor often may refrain from verbatim recording of statements in order to take them outside the provisions of the statute.

121. A recent survey shows that 16 states have accomplice corroboration statutes. Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 791 n.40 (1990). For example, § 60.22(1) of the New York Criminal Procedure Law (1981) provides: "A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense." This corroborative evidence must be "truly independent," People v. Hudson, 414 N.E.2d 385, 387 (N.Y. 1980), and "[i]t may not depend for its weight and probative value upon the testimony of the accomplice." People v. Kress, 31 N.E.2d 898, 902 (N.Y. 1940). The New York court stated in *Hudson*:

> The objective of the statute is not to require bolstering of the testimony of the accomplice as a witness or to lend credibility to the details of his testimony; rather the purpose of the statute is to protect the defendant against the risk of a motivated fabrication, to insist on proof other than that alone which originates from a possibly unreliable or self-interested accomplice.

Hudson, 414 N.E.2d at 388.

122. Federal courts have declared that neither the United States Constitution nor the Federal Rules of Criminal Procedure require corroboration of accomplice testimony. United States v. Gardea, 830 F.2d 41, 44 (5th Cir. 1987) (noting that "[a] conviction may rest solely on the uncorroborated testimony of one accomplice if the testimony is not insubstantial on its face"); Jacobs v. Redman, 616 F.2d 1251, 1255 (3d Cir.), *cert. denied*, 446 U.S. 944 (1980) (stating that "uncorroborated accomplice testimony may constitutionally provide the exclusive basis for a criminal conviction" (quoting United States v. De Larosa, 450 F.2d 1057, 1060 (3d Cir.), *cert. denied*, 405 U.S. 927 (1971)). Early this century, the Supreme Court apparently viewed accomplice testimony negatively, saying that it "ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses." Crawford v. United States, 212 U.S. 183, 204 (1909). But soon thereafter the Court came to accept accomplice testimony, even in the absence of a cautionary

that a cautionary instruction is desirable and should be given when requested.[123]

While a corroboration requirement has a superficial common-sense appeal, it likely would not significantly protect the defendant when cooperating witnesses give key testimony. If courts understand corroboration as *some* independent evidence of the defendant's participation in the crime, this evidence usually will be forthcoming. In cases of cooperating witnesses, however, the absence of *any* other evidence is usually not as disturbing as the overwhelming, scale-tilting weight of the cooperating witness's testimony. The mere production of a second witness or second piece of evidence does not cure the suspect testimony at the heart of the prosecution's case. If courts understand corroboration in a weaker sense as evidence that strengthens the credibility of the witness without independently implicating the accused as to the offense, this evidence too will usually be readily available since the prosecutor easily can implicate the witness in the criminal activity. This implication will qualify the witness as having access to special knowledge and thus corroborate his credibility.[124] Thus, while a corroboration requirement would add a small measure of assurance,[125] it would not go to the heart of the problem of how best to guard against the suspect quality of informer or cooperating witness testimony.

A familiar safeguard is the special charge to the jury. The Supreme Court has not spoken decisively on the need for a special charge, either constitutionally or in the context of the federal criminal system. In *On Lee v. United States*[126] the Court acknowledged the need for "careful

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instruction, with equanimity. *See, e.g.*, Caminetti v. United States, 242 U.S. 470, 495 (1917); Holmgren v. United States, 217 U.S. 509, 524 (1910). *See also* Note, *supra* note 121, at 792-95.

123. The Supreme Court has never announced a requirement of corroboration but has made several comments on the need to treat accomplice testimony with caution. The Court has stated:

> The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are "dirty business" may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions.

On Lee v. United States, 343 U.S. 747, 757 (1952). The Court also has noted that when the prosecution calls an accused accomplice to testify against the defendant, "[c]ommon sense would suggest that [the witness] 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." Washington v. Texas, 388 U.S. 14, 22 (1967). *See also* Cool v. United States, 409 U.S. 100, 103 (1972) (recognizing that "[a]ccomplice instructions have long been in use and have been repeatedly approved," and suggesting that "[i]n most instances, they represent no more than a commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity").

124. *See* R. v. Farler, 173 Eng. Rep. 418, 419 (1837) (stating that an accomplice "will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all").

125. Corroboration requirements thus would be a welcome requirement in all cases of bought testimony whether or not the witness was an accomplice of the defendant.

126. 343 U.S. 747 (1952).

instructions" when there are questions as to the credibility of accomplice testimony. The Court expanded on this remark in *Cool v. United States*[127] by noting that cautionary instructions as to accomplice testimony represented a common sense and traditional practice. The Court has not indicated, however, when the omission of such instructions might constitute reversible error.

Federal courts typically instruct juries to weigh and scrutinize accomplice testimony with great care.[128] Some courts have held that the omission of this instruction constitutes reversible error when there was no corroborating evidence and the evidence of guilt was not overwhelming.[129] The adequacy of the caution's present form is doubtful when, as is usually the case, the benefits expected by the cooperating witness are as yet unrealized and depend upon his continued cooperation. Courts should instruct juries to consider how easily suspects with inside knowledge can fabricate testimony and the strong incentive for suspects to do so when their liberty may depend on it. A defense summation likely will make these points vigorously, but that is not a substitute for a charge by the court.

B. The Case for Exclusion

If full disclosure, adversarial cross-examination and summation, and a strong charge to the jury cannot guard adequately against the dangers of perjury by cooperating witnesses, then the only alternative would be an exclusionary rule barring such testimony. Nonetheless, general application of the radical remedy of automatic exclusion is not justifiable. Testimony is frequently not disinterested. Victims and their families and friends may seek revenge by embellishing their testimony. A victim may shape testimony out of a desire for restitution, and with recent developments in the law, a victim's testimony at a criminal trial may secure a conviction that will fortify a subsequent civil claim by the victim for treble damages.[130]

Courts generally do not bar witnesses simply because they are enemies of the defendant or stand to gain from his conviction. The expectation of some gain or pleasure from an outcome hardly makes it sure

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127. 409 U.S. 100 (1972).

128. *See* Sheldon R. Shapiro, Annotation, *Necessity of, and Prejudicial Effect of Omitting, Cautionary Instructions to Jury as to Accomplice's Testimony Against Defendant in Federal Criminal Trial*, 17 ALR FED. 249, 263 (1973).

129. *See id.*

130. This is a common result under the RICO statute, 18 U.S.C. § 1962 (1984), and always has been possible under the antitrust laws. *See* Howard P. Marvel, Jeffry M. Netter & Anthony M. Robinson, *Price Fixing and Civil Damages: An Economic Analysis*, 40 STAN. L. REV. 561, 572 (1988).

or even probable that a person is lying. The paths of truth and advantage do not always diverge. If these motives did bar testimony there often would be no competent witnesses. Furthermore, the defense has the opportunity to educate the jury thoroughly on all the possible motives to commit perjury. Law enforcement's success always has depended heavily on criminals' willingness to cut each other's throats. The offer of inducements traditionally has enhanced this willingness. Courts should not deny juries the opportunity to hear testimony that is very often decisive and true, nor should they deny society this most useful tool for convicting the guilty. A substantial number of valid convictions would be lost if these practices were forbidden.

Even if courts generally allow a cooperator to testify, they must still face the question of what might constitute a "worst case" situation in which the danger of concoction is so strong that courts should exclude the testimony.[131] As noted above, some courts earlier concluded that testimony should be excluded when leniency or immunity for the witness was conditioned on a raw result (conviction or indictment of the defendant), or when the government attached a condition that testimony replicate earlier testimony or information given to the police or prosecutor in an interview.[132] As also noted above, however, there is a movement in the federal cases away from this position toward an easier admission of testimony.[133]

There are attractive arguments to the effect that the tendency toward easier admission of testimony is misconceived and should be reversed, at least in the strongest cases in which the government conditions immunity or leniency on testimony leading to the indictment or conviction of a pretargeted individual. It may be unobjectionable to condition the payment of a reward for information on some affirmative result. The notion that a reward will be paid only if the information leads to an arrest or conviction is familiar. Even when the contract for information designates a particular target, as to whom there must be a successful outcome, the risk to the innocent does not become unacceptable.[134] The practice is arguably a necessary tool of law enforcement,

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131. *See* Yvette A. Beaman, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800 (1987).

132. *See supra* notes 79-82 and accompanying text.

133. *See supra* notes 99-112 and accompanying text.

134. Information contracts contingent on results are now a common practice and courts have had no problems with them. Appellants sometimes attack these contracts on the ground that the government is guilty of "outrageous" conduct, United States v. Russell, 411 U.S. 423, 431-32 (1973), but courts have not been receptive. *See* United States v. Valona, 834 F.2d 1334, 1343 (7th Cir. 1987) (stating that "[i]t is clear that situations, as in the present case, which involve pretargeting of a defendant . . . and a contingent fee arrangement, do not call for the activation and application of the outrageous conduct concept").

and the government has to transform the information into testimony by competent witnesses or relevant evidence subject to the adversarial process.

When the information giver is also to be a witness, however, the designation of targets and the demand for results before payment are much more suspect because the quality of testimony before a jury or grand jury is at issue. Due process considerations control with respect to the conduct of the trial. Courts should permit the government to offer inducements only within the compass of its generally proper exercise of prosecutorial discretion. To bargain for the truth is traditionally within this range; to bargain for results is not. Telling the truth is a normal obligation for all witnesses. Getting results is clearly not a normal or proper witness obligation. It is inconceivable that a witness who was not a suspect or defendant should be punished for not getting a result. Punishing a witness who tells the truth but does not get the prosecutor's desired result is analogous to punishing juries who acquit.

In due process terms, it is crucial to emphasize that the temptation to lie in cooperation agreement cases is not just a natural feature of the landscape but specifically is introduced or inflated by the government when it offers immunity or leniency in return for cooperation. Accomplices, if they give information or testify, may have a natural tendency to lie in order to minimize their part in the crime. A promise of leniency in exchange for cooperation surely enhances that tendency. The question then becomes whether we should tolerate yet a further increment of pressure by allowing the government to impose a specific contingency requirement. A requirement of procuring an indictment or conviction strongly indicates the nature and quality of the testimony that the government expects. The witness is being crudely told that he will get no reward unless his testimony is of a certain nature. This imposes a very high degree of pressure and infiuence and, thus, should render the testimony tainted. These practices weaken the concept of the trial as a truth-finding process and disturb the adversarial equipoise since the defendant has no similar weapons with which to cajole testimony.[135] Even if the outcome condition is coupled with a condition that the witness always tell the truth, the former is likely to loom larger. Courts should hold, therefore, that contingency requirements taint the testimony irretrievably.[136] As Sir Matthew Hale reminded us, we often are dealing

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135. *See* Note, *supra* note 131.

136. A sample of a plea agreement in return for cooperation, embodying some of the conditions under discussion, is provided in 5 Crim. Prac. Man. (BNA) 11 (1991). The agreement, drafted by a Maryland prosecutor, binds the defendant to give truthful cooperation and to testify truthfully before the grand jury, but also contains the following clause:

That the defendant agrees that he will cooperate with the police in a manner that leads to the

here with "desperate villains"[137] whose disposition to tell the truth may be weak enough without demanding that their testimony produce results and subjecting them to severe penalties in the event of failure.

Additionally, contingency requirements violate ethical rules. The Model Code of Professional Responsibility forbids the "payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case."[138] As one federal judge observed in a decision that upheld the admission of contingent fee testimony for the government:

> The prosecuting attorney is therefore permitted to adduce evidence in a criminal case despite the fact that it is gained by a breach of ethical standards. . . . If the government may do so, the defendant presumably may also employ experts and other witnesses to testify for a fee contingent on his acquittal. While this balances opportunity equally, it patently permits perversion of the trial process . . . .[139]

In sum, the dangers of perjured testimony are already so great that they should not be underscored by unethical promises contingent on securing an indictment or a conviction, especially when the reward to the witness is immunity or leniency. This type of specific contingency in the agreement either should lead courts to exclude the testimony or should become a ground for reversal if a court allowed the testimony

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> indictment of the following four (4) individuals [individuals are then named]. . . . Any indictment of [A] must be for a minimum of one (1) kilo of cocaine. If for whatever reason insufficient evidence is available to indict [B], [C] or [D], a person may be substituted for them for the purpose of this agreement. Any substitution must have the approval of the State's Attorney and must come from the organization that is being investigated . . . .

Id. at 12.

137. *See* note 19, *supra*. The damage that can he wrought by such "desperate villains" is shown by the recent California allegations of wide spread concoction hy jailhouse informers of "confessions" by other inmates, arguably leading to numerous false convictions. *See* 3 Crim. Prac. Man. (BNA) 181-82, 265-66, 453-54, 501-02 (1989).

138. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(C) (1980). The Preliminary Statement to the Model Code states that the Disciplinary Rules (which contain the prohibition cited here) are "mandatory in character" and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." The Model Code has now been followed by the MODEL RULES OF PROFESSIONAL CONDUCT (1983), which were intended to take the place of the Code. Many states, however, still adhere to the Model Code. The Model Rules merely prohibit offering "an inducement to a witness that is prohibited by law." *Id.* Rule 3.4(b). The ABA's STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 3.2(a) (1974), declare that "[i]t is unprofessional conduct to compensate a witness, other than an expert, for giving testimony . . . ." The AMERICAN LAWYER'S CODE OF CONDUCT (ATLA) (1980) Rule 3.10 provides that "[a] lawyer shall not give a witness money or anything of substantial value, or threaten a witness with harm, in order to induce the witness to testify . . . ." It is also likely that a defendant's promise to a potential witness for a reward contingent on the value of his testimony to the defense would be a criminal offense. For example, federal law makes it an offense to "corruptly . . . endeavor[] to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. § 1503 (1988). Courts have held that this applies to nonviolent or nonintimidating efforts to interfere with testimony. United States v. Lester, 749 F.2d 1288, 1292-94 (9th Cir. 1984).

139. United States v. Cervantes-Pacheco, 826 F.2d 310, 316 (5th Cir. 1987) (en banc) (Rubin, J., concurring), *cert. denied*, 484 U.S. 1026 (1988).

and the error is not harmless. Thus, the State should only use contingent agreements for the provision of information from an informant who will not be a witness. Prosecutors may object that it is often difficult at the outset to foresee whether they will have to call the informer as a witness. But whenever this possibility exists, the safer practice is to eschew any contingency arrangement.[140]

Terms in a cooperation agreement to the effect that the degree of leniency depends on a government appraisal of the value of the cooperation are just as bad as raw contingency clauses. In *United States v. Dailey*[141] the government promised the cooperators, who already had been convicted, that if they cooperated fully, the government would recommend a sentence of twenty years or less, and that, depending on the value of the cooperation, the government "in its sole discretion" might recommend a term of no more than ten years. The First Circuit Court of Appeals held that this agreement did not taint the testimony of the cooperators. The court's holding is unconvincing. A sliding scale of benefits is eminently likely to egg the cooperators on to greater efforts. They know that even if they cooperate fully they still might not win the big prize. To receive the lightest possible sentence they must do something more, which is not precisely defined but which consists of impressing the government very much with the value of their testimony. These types of conditions dangle almost irresistible temptations before witnesses to lie or enhance testimony and invest the government with an unfailing capacity to apply coercion.[142] The lack of measurable standards for fulfillment of the promise confers on the government a tyrannical power to profess a continuing lack of satisfaction so that the cooperator feels goaded to ever greater efforts to please. Courts should

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140. At least in federal practice, it will be very unlikely that a cooperation agreement with an accomplice or someone receiving immunity or leniency in return for testimony will include an express contingency in terms of the return of an indictment or a conviction. These express contingencies are more likely to occur when the arrangement is with an informer rather than a cooperator. One court has suggested that, while contingency agreements generally do not taint testimony, there would be a due process violation if the government promised the witness a reward for information and testimony against a specific individual against whom no reasonable suspicion existed. *See* United States v. Risken, 788 F.2d 1361, 1374 (8th Cir.), *cert. denied*, 479 U.S. 923 (1986). This is "pretargeting" in the strongest sense and the suggestion of a constitutional violation is connected with the idea that certain government practices impermissibly lead to entrapment. *See id.*; *see also* United States v. Terrill, 835 F.2d 716 (8th Cir. 1987).

141. 759 F.2d 192 (1st Cir. 1985). For a discussion of *Dailey*, see *infra* notes 142-43 and accompanying text.

142. For a good analysis of *Dailey*, concluding that such agreements should render the testimony inadmissible, see Neil B. Eisenstadt, Note, *Let's Make A Deal: A Look at* United States v. Dailey *and Prosecutor-Witness Cooperation Agreements*, 67 B.U. L. REV. 749 (1987). The danger here is not confined to tainting testimony. The imprecise government promise is given in exchange for the value of cooperation. This may tempt the cooperator to improprieties other than false testimony—such as entrapment, threatening others into cooperation, or supporting false stories.

not permit the prosecution to pressure the cooperator in this way, with a wink and a shake of the head, but should restrict the prosecution to obtaining simple promises to testify fully and truthfully.[143]

But the prohibition of naked contingency clauses or vague standards for appraising the value of the cooperation, even though desirable, ultimately will not achieve very much. Realistically, there also must be protection for the government's interest in cooperation agreements. If a cooperator simply promises to tell the truth and fulfills his promise and wins immunity by testimony that exonerates the defendant, the government naturally will have satisfied no interest. How then may the necessary quid pro quo be assured while avoiding unacceptable doubts as to the truth of the cooperator's testimony? The answer lies in conformity between the proffer and later testimony. At the outset, the government will make no offer unless the proffer indicates that the cooperator's testimony will at least substantially strengthen the prosecution's case. It seems, therefore, that an appropriate, indeed a necessary, condition to impose is that future testimony not depart substantially from the proffer. Agreements can satisfy this condition indirectly, and in a seemingly bland and innocuous fashion, by requiring that the cooperator always tell the full truth, for if the testimony differs from the proffer then the cooperator has violated the truth-telling condition somewhere, and the prosecution may call off the deal.[144]

This formula superficially will sanitize the agreement by eschewing any express promise to give testimony of a particular content, but the truth-telling requirement implicitly carries with it the same fundamen-

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143. These pressures remain present in some form in many federal cooperation agreements. It is typical that a cooperator will receive specific transactional immunity for certain offenses but will be required to plead guilty to others. With respect to his sentence on the offenses to which he is pleading, a standard agreement in use in the Eastern District of New York (provided by the Federal Defenders Service of the New York Legal Aid Society) contains the following provision:

> If the Office determines that [the cooperator] has cooperated fully, provided substantial assistance to law enforcement authorities and otherwise complied with the terms of this agreement, the Office will file a motion with the sentencing court setting forth the nature and extent of [his] cooperation. . . . In this connection it is understood that the Office's determination of whether [the cooperator] has cooperated fully and provided substantial assistance, and the Office's assessment of the value, truthfulness, completeness and accuracy of the cooperation, shall be binding upon [him].

The extent of the benefit here is loosely governed by the Sentencing Guidelines, but the government seeks to empower itself to act in an unfettered way in deciding whether the cooperator will receive any benefit.

144. A standard form of cooperation agreement in use in the Eastern District of New York (supplied by the Federal Defenders' Service of the New York Legal Aid Society) provides:

> Should it be judged by the Office that [the cooperator] has failed to cooperate fully, or has intentionally given false, misleading or incomplete information or testimony . . . [he] shall thereafter be subject to prosecution for any federal criminal violation of which the Office has knowledge, including, but not limited to, perjury and obstruction of justice.

tal demands. In the first place, the witness will know that he has no chance to gain immunity or leniency unless the information that he initially furnishes appears weighty enough to aid in convicting a target. At an early stage he almost certainly will testify before a grand jury. If this testimony differs in any significant way from the information he gave the police and the prosecutor, he may lose immediately any expectation of leniency or immunity, since it logically follows that either the information tendered to the police or the grand jury testimony was false. Similarly, if his testimony at trial differs either from the information tendered or from his grand jury testimony, he risks losing the benefits of the bargain and also risks prosecution for perjury. The prosecution thus may bring the strongest pressures to bear without, in the cooperation agreement, explicitly trading leniency or immunity for trial results.

The initial condition that information and projected testimony be sufficiently weighty to aid in the conviction of a known individual, and the continuing de facto condition, imposed obliquely by the healthy sounding promise to tell the truth, that the testimony conforms to the proffer combine to produce a dilemma. Even if the government receives minimal protection for its interests, the agreement will be tantamount to a pretargeting contingency. The intractable problem is that a witness may lie or make mistakes at the proffer, and conditions as to truthfulness may serve as the strongest inducement for the witness to perpetuate the lie or not to retract the mistake. The prohibition of frank contingency agreements, therefore, may ultimately be little more than cosmetic. It seems impossible to give the government any protection at all without giving it so much that the government elicits the testimony from a cooperator under the strongest pressure. We are left with a stark choice between excluding this whole category of testimony and trusting the adversary system to weed out perjury.

Because of the lack of developed special rules to protect the defendant, juries and occasionally courts are sometimes uneasy about heavy reliance on bargained testimony. One federal judge, in dismissing an indictment on a variety of grounds, all having to do with governmental improprieties before the grand jury, relied in part on the government's extensive use of informal immunity, which he described as a "damnable practice."[145] Such judicial condemnation is extremely rare, but we may speculate that acquittals by juries are sometimes attributable, at least in part, either to skepticism about the credibility of cooperating witnesses who, in addition to their confessed participation in the instant crime, may also have extensive criminal records, or to revulsion

145. United States v. Anderson, 577 F. Supp. 223, 233 (D. Wyo. 1983), *rev'd*, 778 F.2d 602 (10th Cir. 1985).

at the sources of the prosecution's case. Some may see these jury responses as a sufficient vindication of the system's reliance on cross-examination and summation to protect the defendant's position; others may view them as an admonition and a signal that we need to develop further safeguards.[146]

V. FAIRNESS TO THE COOPERATING WITNESS

The cooperating witness is not a strong candidate for sympathy. He is likely getting much better than he deserves—either full immunity or a lenient outcome, unmerited in terms of the degree and nature of his criminal activity, and purchased by his often unrepentant and selfish willingness to assist in ensuring that others get what they deserve. But, whatever his moral worth, his fate under and after the cooperation agreement deserves attention because it is an important index of the fairness and integrity of the prosecutorial system. A bargain is, after all, a bargain. Double dealing by the State will create doubts about the rectitude of the criminal justice process.[147]

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146. As a postscript, it may be interesting to note recent British experience with a heavy reliance on cooperating witnesses. As with our federal system, Anglo-Welsh law does not require corroboration for accomplice testimony though cautionary instructions are required. The systematic use of cooperating informers in trials of violent or dangerous professional criminals apparently became prominent in London in the 1970s, TONY GIFFORD, SUPERGRASSES: THE USE OF ACCOMPLICE TESTIMONY IN NORTHERN IRELAND 6 (1984), giving rise to the British underworld term "supergrass" to denote an informer on a large scale. ("Grass" is a British underworld and law-enforcement term for an informer.) Sixteen convictions resulted from the evidence of Bertie Smalls who had received immunity and who was described in the Court of Appeal as "one of the most dangerous and craven villains who ha[s] ever given evidence for the Crown." R. v. Turner, 61 Crim. App. 67, 79 (C.A. 1975), *quoted in* GIFFORD, *supra*, at 7. Other prominent offenders were given short sentences and favorable treatment while in detention in return for their collaboration. GIFFORD, *supra*, at 6-7. But there was a high rate of acquittals in cases in which supergrasses testified, and the Director of Public Prosecutions later issued instructions that in the future no cases should be brought on uncorroborated supergrass evidence. *Id.* at 7-8.

In the early 1980s supergrass testimony became a frequent and initially very successful mode of prosecuting terrorists in nonjury trials in Northern Ireland. *See* Greer, *The Supergrass: A Coda*, FORTNIGHT, March 1984, at 7. Supergrasses were immunized and promised new lives in any English speaking country. In the first such prosecution, 38 people were charged and 35 convicted after an eight-month trial. A succession of these trials led to criticism that the supergrasses (or "converted terrorists" as the authorities preferred to style them) were being coached by police and, indeed, often simply were subscribing to statements written for them by the police. As the testimony given by some supergrasses became evidently and even ludicrously inaccurate, and as several of them recanted their initial testimony, acquittals and reversals on appeal ensued. The supergrass movement, therefore, waned and seemingly died out after a few years. *See* GIFFORD, *supra*, at 8.

147. In United States v. Pavia, 294 F. Supp. 742 (D.D.C. 1969), the government made what may have been its last attempt in a federal case to argue that it was not bound by an agreement not to prosecute even if the defendant had carried out his side of the bargain. It relied in part on *The Whiskey Cases*, *supra* notes 22-26 and accompanying text, to contend that the defendant's best remedy was to apply for executive clemency. It also argued that the doctrine of separation of powers should bar a court from interfering with prosecutorial discretion to pursue the case. The district court decisively rejected both arguments. Courts now generally recognize the importance of

The doctrines of the criminal process provide little help, however, in deciding whether bargains have been kept or whether a bargain was from the start unconscionable. Traditionally, courts look to the law of contracts to answer these questions. A prime task for the courts in this area is to adapt principles of contract in the light of the relevant issues of public policy and constitutional protection.[148]

Clearly a suspect or defendant who enters into a cooperation agreement without an attorney's assistance in drafting the agreement will be at considerable risk. First, there is the question of what degree of use immunity extends to communications made during the first contacts between the government and the potential cooperator. This stage is a delicate dance in which the witness must seek to persuade the government that what he has to offer is worth immunity or leniency while, at the same time, not irretrievably incriminating himself. These early negotiations may occur through use of a formal proffer or they may take place in a series of informal meetings between the witness and government agents or prosecutors.

The cooperator's attorney at an early stage may make an offer couched in hypothetical terms. If the potential cooperator is not present at the proffer, no problem of incrimination will arise.[149] The prosecutor early on, however, likely will insist on an interview with the cooperator. Here questions arise as to the degree of immunity that will apply.[150]

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holding the government to immunity agreements. *See* United States v. Palumbo, 897 F.2d 245, 246 (7th Cir. 1990) (stating that "[t]he system works . . . only if each side keeps its end of the bargain").

148. As the Supreme Court stated:

> A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution.

Mabry v. Johnson, 467 U.S. 504, 507-08 (1984) (footnote omitted). Since immunity agreements do not result in any court judgment, it would be even more difficult to view them as directly implicating constitutional guarantees.

149. In United States v. Catena, 500 F.2d 1319, 1326-27 (3d Cir.), *cert. denied*, 419 U.S. 1047 (1974), the Third Circuit held that an attorney's nonverbal answers to an investigator's questions in the presence of the defendant were admissible as an admission.

150. Rule 11(e)(6)(D) of the Federal Rules of Criminal Procedure provides that "any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn" shall not be admissible against the defendant in any civil or criminal proceeding. While this Rule does not expressly refer to immunity discussions, courts appear to treat it as applicable. *See, e.g.*, United States v. Boltz, 663 F. Supp. 956 (D. Alaska 1987). But this provision confers bare use immunity without derivative use protection and so is limited in its value. *See* United States v. Cusack, 827 F.2d 696 (11th Cir. 1987). Counsel for a cooperating witness should try to insist on use and derivative use immunity for the witness's first proffer. Such immunity was promised in United States v. Palumbo, 897 F.2d 245, 247 (7th Cir. 1990), where the parties ultimately failed to work out a cooperation agree-

Controversial questions also may arise early in negotiations about the ultimate scope of immunity or the concessions to be afforded on a plea.[151] Does informal immunity travel across jurisdictional frontiers, either between the federal government and a state or between federal districts? These issues may be crucial to the cooperator, and counsel's aid is thus virtually indispensable.[152] From the defendant's point of view it

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ment. Palumbo's conviction was reversed by the Court of Appeals on the ground that the government had not passed the *Kastigar* test, *see infra* note 166, of showing that their evidence was untainted. The federal prosecutor most likely will be unwilling, however, to accede to a full use and derivative use term in the agreement out of fear that the proffer may contain little of value and the witness may use it to take an "immunity bath." A standard form of proffer agreement used in the Eastern District of New York (provided by the Federal Defender's Office of the New York Legal Aid Society) provides that the government will give bare use immunity for the proffer and expressly states that "the Office may use information derived directly or indirectly from the meeting for the purpose of obtaining leads to other evidence, which evidence may be used in any prosecution and sentencing of [the one who makes the proffer] by the Office." The agreement form further requires the potential cooperator to waive any claim that his statements at the interview "are inadmissible for cross-examination should [he] testify." These provisions make proffers a risky business. If the information tendered is not what the government wants or is not consistent with the government's theory, the potential cooperator is likely to be prosecuted in the most disadvantageous circumstances.

151. *See infra* notes 152-62 and accompanying text.

152. With respect to the hazard of prosecution by a different sovereign, informal immunity gives less protection than a formal immunity grant. Federally granted formal immunity binds the states while the federal government and other states must recognize state-granted formal immunity under the Fifth Amendment and the due process clause. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964). Since informal immunity has a primarily equitable foundation, it is not constitutionally binding in other jurisdictions. The federal government, thus, is not bound by informal immunity extended by a state officer unless the state officer was acting as a federal agent. *See* United States v. Long, 511 F.2d 878 (7th Cir.), *cert. denied*, 423 U.S. 895 (1975). As between federal districts, the approach laid down in United States v. Harvey, 791 F.2d 294 (4th Cir. 1986), is that "the agreements reached are those of the Government" and "[i]t is the Government at large—not just specific United States Attorneys or United States '*Districts*'—that is bound by plea agreements. . . ." *Id.* at 303. In United States v. Carter, 454 F.2d 426 (4th Cir. 1972) (en banc), *cert. denied*, 417 U.S. 933 (1974), the United States Attorney in one district promised a cooperating defendant that he would not be prosecuted on charges pending in another district. The court held that the United States Attorney in the second district was bound by the promise. *Id.* at 428. And in Giglio v. United States, 405 U.S. 150 (1972), the Supreme Court noted that "[t]he prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government." *Id.* at 154. The court in United States v. Harvey, 791 F.2d 294 (4th Cir. 1986), however, made it clear that this approach is dispositive only when the agreement is ambiguous. The government may validly contract to limit the immunity or plea bargain to a particular district. In United States v. Alessi, 544 F.2d 1139 (2d Cir.), *cert. denied*, 429 U.S. 960 (1976), the court held that a promise not to prosecute for certain offenses made as part of a plea bargain by a federal strike force prosecutor in the Eastern District of New York did not bind the United States Attorney for the Southern District of New York. The Department of Justice in its *Principles of Federal Prosecution*, *supra* note 48, Part F(3)(b), now directs government attorneys, if practicable, to restrict an agreement to nonprosecution to the particular district. A provision in a standard cooperation agreement used in the Eastern District of New York (provided by the Federal Defender Service of the New York Legal Aid Society) reads: "This agreement is limited to the United States' Attorney's Office for the Eastern District of New York . . . and cannot bind other federal, state or local prosecuting authorities." If a state inter-

is important for the agreement to provide that the court, and not the government, determine questions as to breach,[153] and that only a material and substantial breach shall be a ground for rescission.

Even though the cooperator clearly may be prosecuted if he breaches the agreement, another important issue is whether the government can use the cooperator's statements after the breach. The federal statutory protection of statements made during plea or immunity negotiations[154] does not apply to statements made after an agreement is reached if there is a subsequent breach.[155] The application of this principle generally will render the cooperator's position hopeless if a breach is established. Counsel can attempt to secure a term in the agreement that rejects or limits the use or derivative use of defendant's statements if the government should assert a breach.[156] Assistance of counsel, therefore, is invaluable to a defendant-potential cooperator at these early stages. The presence of counsel during interviews is also important so that she may advise the cooperator on the dangers of offering a

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prets a state immunity agreement as not extending to another county or district in the state, a federal court in a habeas proceeding will not give relief if the restriction of the immunity was lawful under state law. *See* Staten v. Neal, 880 F.2d 962 (7th Cir. 1989). Courts sometimes approach this issue under agency principles and do not perceive it as having constitutional significance. *Id.*

153. The government typically will seek to insert a term that it shall be the sole judge of whether the agreement is breached. The standard form of cooperation agreement used in the Eastern District of New York (supplied by the Federal Defender's Service of the New York Legal Aid Society) provides that penalties for breach shall be imposed "[s]hould it be judged by the Office that [the cooperator] has failed to cooperate fully, or has intentionally given false, misleading or incomplete information or testimony . . . or has otherwise violated any provision of this agreement." Similarly, under the standard agreement form, the United States Attorney's Office shall decide whether there has been full cooperation. The form provides: "[I]t is understood that the Office's determination of whether [the cooperator] has cooperated fully and provided substantial assistance, and the Office's assessment of the value, truthfulness, completeness and accuracy of the cooperation, shall be binding upon [the cooperator]." Taken literally, this agreement is surely unconscionable and a court would not uphold perverse judgments on these matters.

154. *See* FED. R. CRIM. P. 11(e)(6), discussed *supra* note 150.

155. *See* United States v. Davis, 617 F.2d 677 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 967 (1980); United States v. Stirling, 571 F.2d 708 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978). In Hutto v. Ross, 429 U.S. 28 (1976), the Supreme Court held that a defendant's confession made prior to withdrawing from a plea bargain was not per se inadmissible as involuntary and was not covered by Rule 11(e)(6). *Id.* at 30 n.3.

156. The point is that even if the breaching cooperator cannot get immunity from prosecution, he still might get immunity from the use or derivative use of any statements he made pursuant to the agreement. A careless promise also can prejudice the government's interests. In United States v. Pelletier, 898 F.2d 297 (2d Cir. 1990), for example, the government orally agreed that it would use the defendant's grand jury testimony only in a perjury prosecution. The defendant breached by not testifying truthfully before the grand jury, and the government sought to use defendant's grand jury testimony in its prosecution of him. The court held that the government was bound by its oral promise and could not use the grand jury testimony against the defendant in a prosecution for a nonperjury offense. *Id.* at 302.

different version in later testimony.[157]

Agreement negotiations also afford the cooperating witness an opportunity to create sentencing benefits. Federally, in plea cases, the witness can seek to include acknowledgements in the agreement such as a recognition that the cooperator has accepted responsibility,[158] or that he played a minimal or minor role in the criminal activity.[159] Acknowledgements of this type may constitute grounds for favorable sentence adjustments under the Sentencing Guidelines. Even more important, a court may reduce a sentence below the Guidelines' lower limit if the government makes a motion stating that "the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense."[160] The court has discretion to determine the appropriate reduction in these cases, and the Guidelines provide that, in so doing, the court should give "substantial weight" to the government's evaluation.[161] The cooperator, therefore, will want a government promise to make a favorable sentencing motion included in the cooperation agreement. This promise also strengthens the prosecutor's hand since her assessment of the truthfulness and impact of the cooperator's testimony will determine both whether the government makes the sentencing reduction motion at all and how favorable that motion will be. Finally, the cooperator also will seek a promise that, if cooperation continues after sentence, the government will move within one year under Rule 35 of the Federal Rules of Criminal Procedure for a further reduction of sentence.[162] This possibility keeps pressure on

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157. Obviously counsel should not advise the witness to lie in order to preserve conformity, but interviews may be extensive and the witness, through faulty memory or confusion, might create discrepancies. Counsel can make notes during interviews and go over them with the witness prior to his testimony.

158. Section 3E1.1(a) of the Federal Sentencing Guidelines, reprinted in 18 U.S.C.S. app. (Law. Co-op. 1990), provides that the offense level for sentencing purposes should be reduced by two levels "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." A defendant does not have a right to this reduction, however, merely because he pleads guilty. *Id.* § 3E1.1(c). The government can help the defendant get his sentence reduced by telling the court that he has made full and truthful admissions.

159. Section 3B1.2(a) of the Federal Sentencing Guidelines provides that the sentencing level shall be decreased by four levels if the defendant was a "minimal participant in any criminal activity." Section 3B1.2(b) provides for a two level decrease if he was a "minor participant." Under the Sentencing Guidelines, the plea agreement may be accompanied by a stipulation of facts relevant to sentencing. *See* U.S. SENT. GUIDE. § 6B1.4(a). The stipulation must not contain misleading facts. *See id.* § 6B1.4(a)(2). Nevertheless, this provision gives the government some leeway to agree to a statement of facts that presents the defendant's participation in criminal activity in the best light possible.

160. U.S. SENT. GUIDE. § 5K1.1.

161. *See id.* application n.3.

162. The current version of Rule 35(b), FED. R. CRIM. P., provides that within a year after sentencing the court may, on motion of the government, lower a sentence:

the cooperator even after sentence has been imposed.

Complex questions with a vital bearing on the witness's fate often arise in interpreting immunity deals and plea bargains for cooperation. Consider the story of Drax Quatermain who, for some time, had been manufacturing amphetamines with a partner, Zelman Fairorth.[163] Quatermain testified against Fairorth in return for a promise of immunity. Quatermain's testimony covered, as the agreement recited, his "participation and involvement with Zelman A. Fairorth and others relating to the manufacture of methamphetamine."[164] Fairorth was duly convicted and sentenced to a term of imprisonment, but while on bail pending appeal, in a turn of the tables, he became an informant for the United States Attorney in an investigation of Quatermain relating to suspicions that Quatermain had diversified into manufacturing silencers for guns. With money supplied by the government, Fairorth bought materials for making silencers and delivered them to Quatermain.

Quatermain was indicted for a firearms offense,[165] and moved to dismiss on the ground that the government obtained the evidence sup-

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to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of Title 28, United States Code. The court's authority to lower a sentence under this subdivision includes the authority to lower such a sentence to a level below that established by statute as a minimum sentence.

See also 18 U.S.C. § 3553(e); 28 U.S.C. § 994(n) (1988). A court may not take favorable notice of cooperation in the absence of a government motion, *see* United States v. Reina, 905 F.2d 638, 640 (2d Cir. 1990); United States v. Ortez, 902 F.2d 61, 64 (D.C. Cir. 1990), unless the government's refusal to file the motion is shown to be arbitrary and capricious, *see Reina*, 905 U.S. at 641; United States v. LaGuardia, 902 F.2d 1010, 1017-18 (1st Cir. 1990); United States v. Smitherman, 889 F.2d 189, 191 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1493 (1990). *But see* United States v. Havener, 905 F.2d 3, 8 (1st Cir. 1990) (stating that the sentencing judge was free to consider information regarding the defendant's cooperation despite the absence of a government motion).

163. United States v. Quatermain, 613 F.2d 38 (3d Cir.), *cert. denied*, 446 U.S. 954 (1980).

164. *Id.* at 44 n.1. The full text of the pertinent part of the letter of agreement ran as follows:

> This letter is to confirm our understanding with respect to your cooperation with the Drug Enforcement Administration and the United States Attorney's Office in its investigation of Zelman A. Fairorth and others who are allegedly involved in the manufacture of methamphetamine. It has been agreed that in return for your cooperation and truthful testimony in any court proceeding related to these matters that the Government will provide you with immunity from prosecution for your participation and involvement with Zelman A. Fairorth and others relating to the manufacture of methamphetamine. It is further agreed that at the completion of our investigation the Government will provide you with a letter setting forth the extent of your cooperation and the results of that cooperation in terms of seizure of contraband and prosecution of suspected violators. Finally, it is understood that application has been made on your behalf to include you and your family under the Department of Justice witness protection plan. In the event that you are not accepted into the witness protection plan the Drug Enforcement Administration has agreed to provide you with the same services and protections afforded by the Department of Justice witness plan.

Id.

165. The government thus got two for the price of none.

porting the indictment in breach of Quatermain's immunity bargain. This ambitious and ingenious argument contended that, since Fairorth had a revenge motive that the government exploited, Fairorth's testimony to the grand jury was derived from Quatermain's earlier testimony against Fairorth. Treating the motion as one to suppress Fairorth's testimony, the district court, persuaded by Quatermain's argument, issued a suppression order. The government appealed.

Both sides agreed that the resolution of the appeal should depend on what kind of immunity the government had granted Quatermain. Quatermain argued that it must have been at least use and fruits immunity, the degree that is required constitutionally under a formal grant to compel testimony.[166] He thus posited that since Fairorth's testimony was a fruit of his own earlier testimony, it was properly suppressed. The government responded that a proper and natural reading of the agreement[167] suggested a limited transactional immunity only for offenses relating to amphetamines.[168] Avoiding a resolution of this question, the majority of the appellate court panel reversed on the ground that even derivative use immunity cannot extend to future crimes.[169] The dissent, calling the case an "odd mix of civil contract and estoppel law thrust into the context of a criminal prosecution,"[170] read the contract as providing a broader immunity with respect to Quatermain's involvement with Fairorth, especially in the light of other evidence indicating that the government, in contemplating future use of Quatermain as an informer, suspected that Quatermain might engage in

166. Kastigar v. United States, 406 U.S. 441 (1972).

167. The agreement used the term "immunity from prosecution for." *See supra* note 164.

168. The government argued that use and fruits immunity was not constitutionally required since Quatermain's testimony was voluntary. 613 F.2d at 40. This argument goes to the heart of the difference between formal and informal immunity. The case is also a good example of how use and fruits immunity can confer protection that is in one sense more extensive and in another narrower than transactional immunity. The use and fruits immunity was more extensive in that it barred use or derivative use of the testimony in any criminal prosecution, at least for crimes already committed, even if unrelated to amphetamines. On the other hand, use and fruits was narrower than transactional immunity since, even for the amphetamine crimes, prosecution remained a possibility if the government derived no independent evidence from Quatermain's testimony. Transactional immunity, by contrast, "accords full immunity from prosecution for the offense to which the compelled testimony relates." *Kastigar*, 406 U.S. at 453.

169. 613 F.2d at 40-42. In Marchetti v. United States, 390 U.S. 39 (1968), the Court held that the Fifth Amendment privilege may extend to future acts when there is a substantial hazard of incrimination. The Court's holding in United States v. Freed, 401 U.S. 601 (1971), however, apparently narrowed *Marchetti*. The *Quatermain* court read *Marchetti* as confined to cases where the future conduct involved "was part of a continuing course of similar criminal activity." 613 F.2d at 42. In Harvey v. United States, 869 F.2d 1439 (11th Cir. 1989), the court held that informal transactional immunity for certain narcotics offenses did not extend to future tax offenses related to money derived from the immunized drug offenses.

170. 613 F.2d at 44 (Aldisert, J., dissenting).

future illegal acts.[171]

In light of these facts, one could simply be thankful that it is in criminals' nature to cut each other's throats and that prosecutors are clever enough to turn them against each other. But the case also reveals causes for concern: (1) Quatermain was uncounselled when he entered into his immunity agreement; (2) the government perhaps to some extent contemplated his participating in future criminal conspiracies; and (3) the agreement's loose phrasing led naturally to adversarial positions on its extent and import. Certainly, this case underlines the disadvantage to witnesses or defendants who enter cooperation agreements without the aid of counsel.

There is also a hanging question mark about what reward, apart from the sweet taste of vengeance, Fairorth received for turning in Quatermain. Fairorth's conviction was still on appeal and the government, therefore, still could join in a motion for the reduction of his sentence based on his cooperation in the prosecution of Quatermain.[172] If this was the deal with Fairorth, then the government bought Fairorth's conviction with Quatermain's immunity, and subsequently, in a neat turnabout, bought Quatermain's conviction with Fairorth's sentence reduction. Practices like these, if left unregulated, can place the State in the suspect role of licensing and managing some crime and some criminals in order to hit the target of the day. Perhaps this is the only successful method of convicting for some categories of offenses and offenders, but there should be some attempt to introduce safeguards that could sanitize these strategies without seriously impeding them.

These concerns are highlighted and amplified by the fairly common cooperation agreement in *United States v. Brown*.[173] In *Brown* the government granted the defendant immunity for a narcotics offense in return for promises, incorporated in a letter agreement, that included the customary obligation to give "full cooperation."[174] In addition to giving information and testimony, "full cooperation" was defined to include "participation in ongoing investigations."[175] A further term stipulated that the government would not be bound by the agreement if the defendant committed any "future crimes punishable by a term of imprisonment exceeding one year."[176] The government later alleged that

171. *Id.* at 46 (asserting that "there was evidence that Quatermain was given some kind of license to participate in future illegal activities").

172. The defendant at that time could make a motion for reduction of sentence under FED. R. CRIM. P. 35(b).

173. 801 F.2d 352 (8th Cir. 1986).

174. *Id.* at 353.

175. *Id.*

176. *Id.* (emphasis omitted).

Brown had breached the agreement by committing subsequent narcotics offenses and, while conceding that he had given full cooperation, proceeded to indict Brown for the original offense.[177] A divided panel of the court of appeals held that the indictment was valid if the government could prove at a hearing that Brown had committed the subsequent offenses.

While the position that criminals must honor their bargains if they are to get leniency or immunity is generally impeccable, there are troubling aspects about its application in this case. The government received full performance of the agreement's main element of consideration for immunity—the cooperation of the defendant. The defendant was in a typically subservient negotiating position with the government. As a result, the agreement contained two elements that called for scrutiny. First, a natural reading of the agreement[178] bound the defendant to cooperation for an indefinite period that might run into years.[179] Second, in spite of his full cooperation, the commission of a later crime not only exposed the defendant to prosecution for that offense but also waived the immunity for his former offense. Cooperation should not give an offender a license to commit future crimes with impunity, but there is an appearance of overreaching when the government encourages "full cooperation," gets what it wants, and in the end, gives nothing in return. These considerations led the dissenting judge in *Brown* to conclude that the letter agreement was an unconscionable bargain and therefore void as against public policy.[180]

Brown also raises questions about the extent to which use and derivative use immunity are affected by the defendant's breach of the agreement. In *Brown* the court held that, while the defendant might be prosecuted for the original offense that was the subject of the agreement, the government could not use any statements he made while the

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177. *Id.* at 353-54. One should not view this kind of government action as purely vindictive. The witness has broken his agreement and the breach is not unrelated to the principal purpose of cooperation, since the defense can use the witness's crime to impeach him and thus undermine his testimony.

178. Generally speaking, a cooperation-immunity agreement is "contractual in nature and subject to contract law standards." United States v. Irvine, 756 F.2d 708, 710 (9th Cir. 1985) (per curiam). The agreement's language thus should be "read as a whole and given a reasonable interpretation." *Id.*

179. As the dissent suggested, "the government used its superior bargaining position to almost blackmail Brown into siguing a contract committing him to being an informant for life." 801 F.2d at 355 (Hanson, J., dissenting). It is worth noting that in this case, as in many similar situations, the government initiated and possibly set the stage for the deal. When a government undercover agent's investigation ended, the United States Attorney "invited Brown and his attorney to review the government's evidence against Brown." *Id.* at 353.

180. *Id.* at 355.

agreement was in operation.[181] The basis for the court's holding was that the agreement contained a promise that the government would not use the defendant's statements against him except on a prosecution for perjury. As a practical matter, however, this type of promise is tough to keep. Prosecutors cannot easily wash from their minds the massively inculpatory taint of the information obtained from debriefings and from testimony. Thus, at least in cross-examination and in anticipating defenses, the government, intentionally or not, may prosecute defendants with the aid of information derived from the statements it promised not to use.[182] The use immunity contained in the agreement thus appears of very little value when the government takes the position that the witness has breached the agreement.

Also of potential concern to cooperators are federal cases holding that Federal Rule of Criminal Procedure 11(e)(6) confers use immunity for statements made during plea negotiation but does not apply to statements made after the agreement is reached.[183] One could read these cases as suggesting that, if an agreement collapses, use immunity attaches only up to the conclusion of the agreement. In these cases, however, the cooperator voluntarily withdrew from the agreement and finally elected to go to trial.[184] The courts decided that Rule 11 immunity did not apply in light of the cooperator's withdrawal.[185] This is understandable because of the danger that a defendant could enter a cooperation agreement in bad faith, take an "immunity bath," and then change his mind and go to trial. As in *Brown*, however, often the cooperator is not expressly repudiating the arrangement, but rather seeks to cling to it, and the government, upon alleged breach, asserts that immunity does not apply to statements made while the agreement was in operation. To accept the government's position in that situation seems to work hardship where the cooperator already has supplied decisive information or testimony.

The government typically seeks to make clear in the agreement that a breach by the defendant will forfeit any use immunity as to statements otherwise protected.[186] The government thus uses its supe-

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181. *Id.*

182. Cooperating witnesses should try to avoid this hazard by clearly stipulating in the agreement that the government, upon breach, may not use any of the defendant's statements made pursuant to the agreement.

183. United States v. Davis, 617 F.2d 677 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 967 (1980); United States v. Stirling, 571 F.2d 708 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978). These decisions are concerned only with the applicability of Rule 11(e)(6). The policy of the Rule is to encourage negotiations by removing a chilling threat.

184. *Stirling*, 571 F.2d at 730; *Davis*, 617 F.2d at 681.

185. *Stirling*, 571 F.2d at 731-32; *Davis*, 617 F.2d at 686.

186. The standard form of agreement used by the United States Attorney's Office for the

rior bargaining position to ensure that the cooperator receives no benefit upon breach even if he already has secured the government's major goal of convicting other defendants. Courts should not focus, therefore, on whether Rule 11 applies, but rather should ask whether, on all the facts of the case, the application of concepts of breach and performance equitably can lead to the loss of use immunity.

What further safeguards might alleviate potential unfairness to the cooperator? The Sixth Amendment right to counsel does not attach constitutionally unless the defendant has been formally charged.[187] Even if not required constitutionally, however, it would be good practice for prosecutors not to enter into cooperation agreements with suspects or defendants who are without counsel. Cooperating witnesses in fact often are counselled before letter agreements are signed. The government knows that the immediate advantage to the witness of cooperating is so great that counsel scarcely will obstruct the deal and often counsel may explain the deal's advantages to her client and so expedite matters.[188]

Furnishing counsel for indigents presents some difficulty in informal immunity negotiations since counsel only can be appointed by the court and there is no occasion to come before the court if no charge is filed. Federally, this problem can be cured in most cases as an incident to the grand jury proceedings.[189] The witness almost certainly will have to appear before the grand jury and the court will appoint counsel to advise the witness if his appearance is connected with an immunity agreement. Courts will assign counsel from a list that, in most districts, includes several recent Assistant United States Attorneys familiar with

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Eastern District of New York, stipulates that:

> Any prosecution resulting from a breach of this agreement may be premised upon: (a) any statements made by [the cooperator] to the Office or to other law enforcement agents; (b) any testimony given by [him] before any grand jury or other tribunal, whether before or after the date this agreement is signed . . .; and (c) any leads derived from such statements or testimony.

187. *See* Massiah v. United States, 377 U.S. 201, 206 (1964); United States v. Gouveia, 467 U.S. 180, 187 (1984). Cooperation negotiations may start or continue after a formal charge. A defendant's counsel must be present at those negotiations unless there has been a waiver.

188. When cooperation is clearly in the witness's best interest, defense counsel can assist both sides greatly. Counsel can gauge the government's needs and willingness to offer leniency or immunity and make clear to the witness the type and extent of cooperation necessary to make the deal. The government, therefore, usually will be anxious to secure counsel for the witness once it is clear that he is going to cooperate. The government may wish, however, to interview the witness and secure incriminating statements before he obtains counsel.

189. If the potential cooperator is a target, the federal practice is that he will not be subpoenaed to appear before the grand jury. The formal need for appointment of counsel, however, easily can be created by serving a subpoena for exemplars (handwriting, fingerprints, and similar evidence) on the cooperator. The cooperator thus becomes eligible for the appointment of counsel by the court.

cooperation procedures. Federally, therefore, this process generally goes smoothly. Cooperation agreements nevertheless are reached in a significant number of cases without counsel representing the witness. In the absence of counsel, however, an agreement may not be reduced to writing, creating a situation obviously fraught with danger for the witness and for the defendant against whom his cooperation is directed.

While ensuring that cooperators have counsel during agreement negotiations is a step in the right direction, in light of the intense pressure on potential witnesses and the larger questions of public policy involved, we need to consider further possibilities of ventilating and scrutinizing cooperation agreements. As discussed earlier,[190] one possibility is requiring that a judge validate all cooperation agreements. The independent commission, proposed earlier,[191] similarly could help remedy the lack of vigilance in this area.

Additionally, courts could improve their role in reviewing the implementation of cooperation agreements. Courts should hold, of course, the government[192] and the defendant[193] to the bargain. Courts generally have no great difficulty in deciding what the government promised and whether it has discharged its promises, at least when the agreement is reduced to writing.[194] Whether the cooperator has performed under the agreement, however, is often more contestable. The cooperator's obligations—typically to cooperate and testify fully—are inherently vague. Prosecutors, having promised immunity or leniency before seeing the results, are naturally at times disappointed in the outcome and seek to avoid their contingent promise.[195]

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190. *See supra* notes 57-69 and accompanying text.

191. *See supra* notes 70-75 and accompanying text.

192. *See* Santobello v. New York, 404 U.S. 257 (1971); United States v. Martin, 788 F.2d 184, 187 (3d Cir. 1986); United States v. Miller, 565 F.2d 1273, 1274 (3d Cir. 1977) (stating that "[t]he Government must adhere strictly to the terms of the bargains it strikes with defendants"), *cert. denied*, 436 U.S. 959 (1978); Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973). *See generally* Peter Westen & David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CAL. L. REV. 471 (1978).

193. *See* United States v. Calabrese, 645 F.2d 1379, 1390 (10th Cir.) (stating that "[a] defendant's failure to fulfill the terms of a pretrial agreement relieves the government of its reciprocal obligations under the agreement"), *cert. denied*, 451 U.S. 1018 (1981); *see also* United States v. Simmons, 537 F.2d 1260, 1261 (4th Cir. 1976); United States v. Resnick, 483 F.2d 354, 358 (5th Cir.), *cert. denied*, 414 U.S. 1008 (1973); United States v. Nathan, 476 F.2d 456, 459 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973).

194. The government's promise is usually either not to prosecute at all or to prosecute only on specific charges. There may he supplementary promises, such as a promise to make a favorable sentencing statement, or to enroll the cooperator in the witness protection program. There may be an ambiguity, however, ahout the nature and scope of the immunity promised by the government. *See, e.g.*, United States v. Quatermain, 613 F.2d 38 (3d Cir. 1980), discussed *supra* notes 163-71 and accompanying text.

195. If the prosecutor thus chooses to go forward against the cooperating defendant, the defendant may move to dismiss the indictment. This is the proper procedure for the defendant to

In determining enforceability of a cooperation agreement, principles of contract law govern.[196] Courts accordingly have taken the position that before the defendant will lose the benefit of the bargain the government must show that he was guilty of a substantial breach.[197] Not surprisingly, outcomes under this standard may be controversial. An immunity or plea agreement may require the cooperator to do many things.[198] There may be reasonable disagreement as to whether neglect to fulfill one or more of the items constitutes a substantial breach. A court sometimes may find that a defendant's breach was inconsequential.[199]

An example is *United States v. Wood*.[200] In *Wood* the defendant had negotiated an immunity agreement under which he promised to "fully and truthfully disclose to law enforcement everything that he knows concerning offers to, or the actual bribery of any public official concerning any matter . . . including drug importation and drug distri-

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raise the claim that his prosecution is precluded by a prior agreement. *See* United States v. Brimberry, 744 F.2d 580, 586 (7th Cir. 1984). If the dispute then turns on whether the defendant has complied with the agreement, a hearing usually will be necessary. United States v. Calabrese, 645 F.2d 1379, 1390 (10th Cir), *cert. denied*, 451 U.S. 1018 (1981); *see also* United States v. Verrusio, 803 F.2d 885, 889 (7th Cir. 1986). These hearings are sometimes referred to as "pre-deprivation" hearings since they determine whether the cooperator is to be deprived of his benefits under the agreement. The government has the burden of establishing a breach by the defendant. *Calabrese*, 645 F.2d at 1390 (stating that "[t]he question of a defendant's breach is not an issue to be finally determined unilaterally by the government," and that "the government has the burden of establishing a breach by the defendant if the agreement is to be considered unenforceable"). A breach must be proved by a preponderance of the evidence. *Verrusio*, 803 F.2d at 890-91. One scholar who has examined the possible standards of proof for breach of cooperation agreements concluded that proof by a preponderance is both the majority view and the most suitable one. Julie A. Lumpkin, Note, *The Standard of Proof Necessary to Establish That a Defendant Has Materially Breached a Plea Agreement*, 55 FORDHAM L. REV. 1059, 1084-86 (1987). If terms in a plea agreement are ambiguous, courts should construe them in favor of the defendant. *See, e.g.*, United States v. Jeffries, 908 F.2d 1520, 1523 (11th Cir. 1990); United States v. Coleman, 895 F.2d 501, 505 (8th Cir. 1990). Undue delay by the government in acting on the breach may be construed as a waiver if the government continues to accept the benefits of the agreement. United States v. Vogt, 901 F.2d 100, 102 (8th Cir. 1990).

196. *See* United States v. Baldacchino, 762 F.2d 170, 179 (1st Cir. 1985) (stating that "[p]lea bargains are subject to contract law principles insofar as their application will insure the defendant what is reasonably due him"); *cf.* United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986) (stating that application of private contract law "may require . . . tempering in particular cases").

197. *See, e.g.*, United States v. Wood, 780 F.2d 929, 930-32 (11th Cir.), *cert. denied*, 479 U.S. 824 (1986); United States v. Simmons, 537 F.2d 1260, 1261 (4th Cir. 1976); United States v. Paiva, 294 F. Supp. 742, 748 (D.D.C. 1969).

198. For example in United States v. Boulier, 359 F. Supp. 165, 167-68 (E.D.N.Y. 1972), *aff'd sub nom.* United States v. Nathan 476 F.2d 456 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973), the agreement required Boulier to furnish numerous very specific pieces of information, including particular methods of smuggling, the addresses and location of certain individuals, and the location of drug processing laboratories. It also required him to introduce an undercover agent to two narcotics dealers. *Id.* at 168.

199. *See* United States v. Paiva, 294 F. Supp. 742 (D.D.C. 1969).

200. 780 F.2d 929 (11th Cir.), *cert. denied*, 479 U.S. 824 (1986).

bution conspiracies now under investigation."[201] Over eight months Wood had several interviews with the Federal Bureau of Investigation and made extensive disclosures. The government nevertheless alleged breach of the agreement on the following grounds: (1) Wood had initially denied selling cocaine to a certain individual and had only admitted to the sale when confronted with evidence; (2) Wood had lied about one act of bribery; (3) Wood later was arrested for arranging a drug deal on which he had given no information to the government. Wood argued that he had substantially performed and ultimately had cured some of his omissions by telling the truth. The district court found that Wood's new drug deal did not constitute a breach since it was not a matter "under investigation" at the time of the agreement and the government had never asked Wood questions specifically relating to this incident. The court of appeals reversed, concluding that failure to disclose the new drug deal was a substantial breach since a proper reading of the agreement required Wood to disclose all that he knew about any drug offenses.[202]

In *Wood* the defendant had provided very useful information and testimony which may have led to the successful convictions of other offenders. Yet, failure to "come clean" with every piece of information relevant to a general segment of criminal offenses deprived the defendant of any benefit from the bargain. This all-or-nothing outcome amounts to a harsh application of formal contractual principles to cooperation agreements.[203] In these agreements, the cooperator promises services that may be spread out over a period of time. He also may promise to abstain from certain conduct. If he actually performs a substantial segment of his promised acts of service, he should not lose the entire benefit of the bargain. Again, the cooperator usually trades away his Fifth Amendment rights against self incrimination. Once he has furnished information or given testimony, the constitutional deprivation is complete. The government retains substantial benefits from the executed portions of the contract.[204] For the government then to withdraw

201. *Id.* at 930.

202. *Id.* at 931-32.

203. An example of a less harsh and perhaps more rational result is found in United States v. Brimberry, 744 F.2d 580 (7th Cir. 1984). In *Brimberry* the defendant, a participant in a complex fraud scheme, entered a cooperation agreement that allowed him to plead guilty to one tax felony. In exchange the defendant gave the government extensive information on the fraud scheme and led the government to records that might otherwise have been destroyed. He also testified before the Securities and Exchange Commission and before a grand jury, leading to the indictment of several persons. Two of those indicted told the government that Brimberry had instructed them to destroy records. The government viewed this as a breach of the plea agreement and indicted Brimberry for obstruction of justice. As to the original charges involving the fraud scheme, however, the defendant apparently was allowed to stand on his plea to one felony tax count.

204. Cooperation agreements do not fit easily into contract law concepts, which, for the most

all of the promised immunity or leniency is a momentous act that courts should permit only when the defendant's breach destroys the government's capacity to make any substantial use of the information or testimony.[205]

Courts should expand the equitable contracts doctrine of part performance to include these cooperation agreements. The doctrine of part performance entitles a party who fell short of full execution of the terms of a contract to some compensation for his efforts under the agreement.[206] Courts have not yet applied this sophisticated doctrine to cooperation agreements, perhaps in part because the Supreme Court, in the seminal case of *Santobello v. New York*, listed specific performance and rescission as the only remedies available to a defendant who shows that the prosecutor breached the terms of a plea bargain.[207] This approach may be entirely correct when the breach is committed by the government, for the defendant's constitutional rights are implicated and the only sufficient vindication would be to give the defendant what was promised or allow the defendant the alternative of reverting to prebargain status. If we apply *Santobello* to breaches by the defendant, however, rescission becomes the government's sole remedy. Specific performance will not be an available remedy, either because it is no longer factually possible for the defendant to perform the bargain or because it would involve unconstitutionally compelling the defendant to incriminate himself.[208]

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part, have evolved with respect to commercial relationships in which a transfer of goods or services in return for money predominates and damages are the typical remedy. Several sections of the *Restatement (Second) of Contracts* are, however, relevant. Section 241(a) provides that, in determining whether a failure to perform is material, one relevant circumstance is "the extent to which the injured party will be deprived of the benefit which he reasonably expected." Another relevant circumstance is "the extent to which the party failing to perform . . . will suffer forfeiture." RESTATEMENT (SECOND) OF CONTRACTS § 241(c) (1979). The Comment to § 241 states:

> [A] failure is less likely to be regarded as material if it occurs late, after substantial preparation or performance . . . . For the same reason the failure is more likely to be regarded as material if such preparation or performance as has taken place can be returned to and salvaged by the party failing to perform . . . .

Id. § 241 cmt. d.

205. This is not to say that the breach is immaterial. If a cooperator lies to the government, the defense could use the lie to impeach his testimony and so could diminish his usefulness to the prosecution. The government no doubt wants to send a message to future cooperators that all terms in cooperation agreements are important and any breach will be regarded as serious.

206. The *Restatement (Second) of Contracts* confines part performance to contracts in which the obligations to be exchanged "can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents"; that is, to contracts that are divisible. RESTATEMENT (SECOND) OF CONTRACTS § 240. An illustration in the comment to § 240 indicates that substantial performance of personal services is a category to which courts should apply the doctrine of part performance. *Id.* § 240 cmt. d, illus. 4.

207. Santobello v. New York, 404 U.S. 257, 263 (1971).

208. *See* Note *supra* note 195, at 1068-69. The Court's recognition in *Santobello* that specific

Thus, this parallelism does not make good sense. Because of the usual complexity of the defendant's promises[209] and because the government may gain great value out of part performance, courts should invoke a flexible view of equitable remedies. Courts could limit the charges, reduce the sentence, or otherwise consider the defendant's part performance of his agreement. Courts can make these considerations informally in most jurisdictions, but we should formally recognize an obligation of courts to consider part performance of cooperation agreements.[210] Some charges might be eliminated by partial dismissal of the indictment; they also could be reduced to lesser included offenses. Since the remedy has an equitable provenance, the court would have discretion to reduce or eliminate the charges on the facts of each particular case. This would be a radical enlargement of orthodox grounds for dismissing all or part of an indictment, but the privatization of criminal justice entailed in the contractual model demands a radical departure. Modern contract law seeks to avoid allowing one party significant benefits under a bargain while the other party gets nothing. Since we now allow the disposition of an offender to be dictated by a negotiated contract with the State, largely independent of considerations of guilt and moral worth, we cannot shrink from modifying the charging and punishment processes in ways governed by the same modalities.

A different problem arises when a promise becomes impossible to execute while the agreement is still executory. Although the cooperator is in perfect good faith and has not breached the agreement, he may not yet have conferred any benefit on the government or acted to his own detriment. The guiding principle of modern law here is found in *Mabry v. Johnson*.[211] In *Mabry* the government offered the defendant a plea bargain with a recommendation for a sentence of twenty-one years to be served concurrently with another sentence. When the defendant sought to accept the offer, the government informed him that a mistake had been made and proposed a new offer under which the sentences would be consecutive. The Supreme Court held that the original offer was not rendered binding by the acceptance. The Court stressed the

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performance is an appropriate remedy for a defendant who shows that the government has breached a plea bargain is an acknowledgment that defendants have expectation rights in plea bargains and that these rights have due process implications since the defendant gains these rights by forfeiting constitutional protections. *Id.* at 1069-75.

209. One aspect of this complexity is that the defendant often will incur obligations that extend over a considerable period of time, perhaps years. Since these obligations may be difficult to perform (especially where they involve continuing undercover relations with criminals), the chance of some breach, in spite of very substantial compliance with the agreement, is great. Sherman, *supra* note 13, at 67.

210. In the federal system, an amendment to the Sentencing Guidelines would be necessary.

211. 467 U.S. 504 (1983).

nonconstitutional nature of a plea bargain that a court had not yet consummated by acceptance of the plea. Until the plea is consummated, the Court noted, it is merely an executory contract without the constitutional significance to compel judicial intervention.[212]

On its facts *Mabry* may be unobjectionable, but its application may cause difficulty with cooperation agreements. Mere discussion of the possibility of immunity or leniency on a plea clearly should not create any enforceable rights. Once the potential cooperator has made a proffer, however, the situation is more controversial. In *Hammers v. State*, for example, a cooperator had agreed with the prosecution to testify against her lover in a murder case in exchange for immunity.[213] She stood ready at all times to testify, but the defendant pleaded,[214] rendering her testimony unnecessary. The Arkansas Supreme Court reversed her subsequent conviction for murder on the ground that she had an equitable entitlement to immunity. This decision seems correct chiefly because of the high probability that her readiness to testify was an important contributing reason for her codefendant's plea. Although this was not literally an execution of her promise, it fully achieved the government's ultimate objective. The Arkansas court, therefore, correctly treated the cooperator's readiness to testify as furnishing substantial consideration.[215]

One could also justify *Hammers* in contractual terms by noting

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212. The Court's position in *Mabry* to the effect that offer and acceptance do not always make a contract shows that courts are willing to depart from some traditional contracts principles in the light of the context of these agreements. They should be equally willing, in the interests of fairness, to show some liberality in construing the concepts of part performance and breach.

213. 565 S.W.2d 406 (Ark. 1978).

214. It appears that the prosecutor became uneasy about the strength of Hammers' expected testimony and, therefore, used the threat of Hammers' testimony to obtain the other defendant's plea. A condition of the plea was that the other defendant would now testify against Hammers. By playing one defendant against the other, and breaking his agreement with Hammers, the prosecutor hoped to register convictions against both.

215. Some decisions, however, go the other way. In the plea-bargain case of People v. Boyt, 488 N.E.2d 264 (Ill. 1985), the cooperator agreed to testify against a codefendant in return for charge reduction. As in *Hammers*, the codefendant pleaded guilty, making the cooperator's testimony unnecessary. The court held that the cooperator could not hold the State to its promise since she had not yet surrendered any constitutional right. Even more perverse is the holding, again by the Illinois Supreme Court, in People v. Navarroli, 521 N.E.2d 891 (Ill. 1988). In *Navarroli* the prosecutor promised the defendant reduced charges if he acted as an informant. It was undisputed that the defendant carried out his side of the bargain. The court, however, upheld the prosecutor's failure to comply with the agreement on the ground that no plea actually had been entered. This is an indefensible formalism. Doctrines of due process should estop the State from reneging when the defendant has furnished consideration. The agreement was not purely executory, as in *Mabry v. Johnson*. The Illinois court's logic also would suggest that immunity promises would never be enforceable since they would never result in the acceptance of a plea. This reasoning would do great harm to prosecutors by making it difficult to assure potential cooperators that they can rely on agreements.

that the full performance of the cooperator's promise was frustrated by circumstances beyond her control. In circumstances of frustration, the government should be held to its promise when it benefits from the cooperation.[216] Counsel for the cooperator should try to address these potential difficulties during the negotiations of the agreement, but courts should not punish cooperators if their counsel fails or is unable to do so.

VI. Procedural Deformations

A. Appellate Review Problems

Several familiar features of the criminal process are hostile to the aims of cooperation agreements. This hostility sometimes stems from the special features of cooperation agreements and sometimes from their similarities with plea bargains generally. For example, plea bargaining often conflicts with the appellate process. From the State's perspective, the attraction of the plea bargain lies in the certain and settled quality of the conviction. If, after the prosecutor already has granted leniency, the ungrateful defendant seeks to upset the arrangement on appeal, the prosecutor is likely to feel aggrieved. The response has been the inclusion in plea agreements of clauses binding the defendant not to appeal.[217] Courts sometimes have had difficulty in resolving this natural antipathy between traditional features of criminal procedure and the very different logic of privatized criminal justice.

An interesting example is presented in *United States v. Shaw*[218]—a series of prosecutions for bid-rigging bribery and kickbacks. The government informed Shaw that he was a target and invited him to discuss a plea agreement. During negotiations the government raised four

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216. This conclusion is supported by the old equitable doctrine of quantum meruit.

217. Several courts have held that an agreement not to appeal, as long as it was voluntarily arrived at and does not prohibit a challenge to the voluntariness or intelligence of the plea, is binding and does not invalidato a plea when time to appeal has expired. See the cases collected in Kristine Karnezis, Annotation, *Validity and Effect of Criminal Defendant's Express Waiver of Right to Appeal as Part of Negotiated Plea Agreement*, 89 A.L.R. 3D 864 (1979). Some of these courts also hold that a defendant under such an agreement will not be barred from appealing while an appeal is still timely. *Id.* Filing an appeal in such circumstances, however, may cause the prosecution to move to vacate the plea. If such a motion is made, double jeopardy will not be an obstacle to fresh proceedings against the defendant. *Id.* A few courts have disapproved of covenants not to appeal. *See, e.g.*, Commonwealth v. March, 293 A.2d 57, 62 (Pa. 1972) (Roberts, J., concurring) (suggesting that "[t]o sanction [a no-appeal clause in a plea agreement] serves no proper interest of justice and would only invite attempts to insulate guilty pleas unlawfully obtained from appropriate appellate review"); *see also* People v. Stevenson, 231 N.W.2d 476 (Mich. 1975) (declaring that public policy will not permit the prosecutor to bar the review of a conviction). *See generally* Gregory M. Dyer & Brendan Judge, Note, *Criminal Defendants' Waiver of the Right to Appeal—An Unacceptable Condition of A Negotiated Sentence or Plea Bargain*, 65 Notre Dame L. Rev. 649 (1990).

218. 655 F.2d 168 (9th Cir. 1981).

counts that it intended to include in the indictment against Shaw. Shaw's counsel argued that two of the counts were bogus because they alleged bribery of a public official and the person allegedly bribed, an employee of the Federal Reserve Bank, was not a public official for purposes of the statute.[219] The government was not persuaded. Before indictment Shaw's lawyer and the United States Attorney finally reached an agreement by which Shaw would give information about and testify against other defendants in return for being allowed to plead guilty to any one of the four counts. The government consented to move to dismiss the other counts. As part of the agreement, Shaw also promised not to appeal his conviction.

Shaw testified as promised before the grand jury and then, under the terms of the bargain, chose to plead guilty to one of the charges of bribing a public official. After the plea, however, Shaw filed, under Rule 34 of the Federal Rules of Criminal Procedure, a motion in arrest of judgment, which can be based only on want of jurisdiction in the court or failure of the indictment to state an offense.[220] A professedly shocked government responded by moving to vacate Shaw's plea and try him on the four counts in the indictment. The government alleged that Shaw had committed a "fraud on the court and the government" by entering into the plea agreement with an undisclosed intention to violate his commitments.[221] The trial court granted the government's motion.

On appeal the circuit court reversed on the ground that, under a hallowed and well-founded tradition, subject-matter jurisdiction is always open to challenge. It cannot be conferred on the court by the consent of the parties and any agreement that prohibits a party from challenging jurisdiction is unenforceable. Since Shaw was exercising a statutory right in bringing his motion for arrest of judgment, the court suggested, the government's motion to dismiss his plea was an exercise in vindictive prosecution and, therefore, should have been denied.[222]

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219. The federal statute at issue was 18 U.S.C. § 201(a) (1988).

220. Rule 12(b)(2) of the Federal Rules of Criminal Procedure provides that an objection to an indictment on the ground that "it fails to show jurisdiction in the court or to charge an offense . . . shall be noticed by the court at any time during the pendency of the proceedings." Rule 12 is presumably a sufficient basis for a postverdict or postplea motion to dismiss the indictment. Rule 34, with its archaic formula of moving in arrest of judgment, is, therefore, probably superfluous.

221. 655 F.2d at 171. The government "freely admit[ted] that it moved to vacate Shaw's guilty plea in retaliation for Shaw's exercise of his right . . . to file a Motion in Arrest of Judgment after pleading guilty." *Id.*

222. In the Ninth Circuit at the time of the *Shaw* decision, the rule was that a district court's ruling against the defendant on a pretrial claim of vindictive prosecution constituted a "final decision" within the meaning of 28 U.S.C. § 1291 and, therefore, could be appealed before conviction. Subsequently, the Supreme Court held in United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982), that the right to relief from vindictive prosecution is fully protected by postconviction review. Today, therefore, in federal court Shaw would have to submit to trial or to a plea and

The *Shaw* decision is surely correct. Shaw was at all times willing to cooperate under the terms of the agreement. The government unwisely gave Shaw the choice of picking his charge for pleading, and Shaw turned that to his advantage. The government permitted him to plead exclusively to a charge the legality of which he had always contested.

The court of appeals' decision may seem disturbing since, assuming that Shaw's Rule 34 motion was well grounded, Shaw escaped conviction altogether. Public interest thus was not well served by the cooperation agreement. The government was properly held, however, to its unwise agreement. The government overreached by arguing that it could bind Shaw to abandon any challenge to the prosecution's interpretation of the public official bribery statute. It sought to fend off judicial review of its charges, even though the public interest and the demands of justice would seem to clamor for adjudication of an important question concerning the definition of a federal crime. If the government's position were accepted, the United States Attorney could insulate his office's interpretation of a statute from review by never trying a case involving a challenge to a statute. The prosecutor thus could continue to use the disputed statutory provision for plea agreements with a built-in barrier to judicial review. If the government wishes to make the most of cooperation agreements, perhaps it should brush up on its contract law, as well as its criminal procedure concepts.

The issues in *Shaw* serve as a microcosm of much that is troublesome about plea bargains in general and cooperation agreements in particular. It highlights the breadth of prosecutorial discretion and the great power of prosecutorial pressure to seal a bargain and suppress questions that may deserve public scrutiny. True, the attempt failed in *Shaw*, but it will succeed in many cases where the defendant is less bold or where the contested issue is not clearly a jurisdictional one.

B. Double Jeopardy Problems

While the cooperation agreement, like all plea bargains, avoids public inquiry into the cooperator's role and seeks to ban appeals as well as avoid trials, there still must be restraint and caution in executing the agreement lest the defendant enjoy an irrevocable benefit before

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sentence arrangement before he could appeal on this ground. This surely will discourage these challenges after plea agreements, especially since bail may be denied after sentence and pending appeal. To escape the vindictiveness, Shaw's better tactic now might be to wait until after sentence on the plea agreement and then raise the jurisdictional point for the first time by way of appeal. The jurisdictional challenge is still timely, United States v. Beard, 414 F.2d 1014 (3d Cir. 1969), and the defendant would avoid the risk that the trial court might force him to trial on more serious charges before he could appeal.

he has performed his part of the bargain. The prosecutor always must be vigilant to preserve the contingent nature of the agreement in order to be able to invoke sanctions if the cooperator fails to perform. With an immunity agreement this presents no difficulty since no formal judicial acts take place that arguably could terminate the cooperator's liability. Unless the statute of limitations has run, the State always can prosecute the cooperator if it can show that he has not performed substantially under the agreement. With plea-bargain agreements, however, the situation is more delicate because at some point the double jeopardy clause may intervene to bar the prosecutor from any further action. The State avoids this difficulty by inserting a routine provision in cooperation agreements that sentencing be postponed until the cooperator has discharged his obligations. Since plea agreements may be complex and may involve testifying in future trials, sentencing may be postponed for a matter of years. The court must consent to this delay, but consent usually is routinely forthcoming in cooperation cases. Delay risks offending the speedy trial guarantee, but this danger is averted by the cooperating defendant's consent to the delay.[223] Waiver thus becomes the commanding concept.[224]

The principal purpose of delay in sentencing contemplated by cooperation agreements is to avoid an entanglement with the double jeopardy clause. In this connection we are concerned with that aspect of double jeopardy that prohibits further proceedings for the same offense once jeopardy has attached.[225] Courts have worked out the concept of when jeopardy attaches quite precisely in trials[226] but not with respect

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223. The Sixth Amendment right to speedy trials applies to the sentencing phase. Pollard v. United States, 352 U.S. 354 (1957). Following the general speedy trial analysis in Barker v. Wingo, 407 U.S. 514 (1972), however, courts apply a balancing test in which the defendant's failure to claim or move for a speedy trial strongly suggests no violation of the right to speedy trial. The presence of a clause in a plea agreement waiving the right to be sentenced at the usual time, coupled with the absence of any later application for sentencing, therefore, will rule out any claim on this ground.

224. Postponing sentence is not just in the government's interest. The longer sentencing is delayed, the more time a cooperator has to please the government, and the happier the government, the more likely it will make a generous recommendation to the court.

225. If the defendant has been exposed to jeopardy in proceedings terminated prematurely without his consent, then any initiation of fresh proceedings against him generally will violate the double jeopardy clause. This principle often becomes significant when a trial ends in the declaration of a mistrial. Here double jeopardy bars a retrial unless the mistrial was dictated by a "manifest necessity." United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). If a guilty plea is vacated at the prosecutor's application and over the defendant's objection, the defendant may raise a double jeopardy argument. The question then becomes what analogues in the guilty plea context can serve the role of manifest necessity in the trial context in justifying the vacation of a plea over the defendant's protest.

226. The federal rule, applicable through the Fourteenth Amendment to the states, is that in a jury trial jeopardy attaches when the jury is empaneled and sworn. Crist v. Bretz, 437 U.S. 28 (1978). In a bench trial jeopardy attaches when the first witness is sworn. Serfass v. United States,

to guilty pleas.[227] The reason for this, no doubt, is that in typical guilty plea cases the double jeopardy question will not likely arise unless and until the State brings some subsequent prosecution after the defendant has been sentenced under the plea. At this point there is no doubt that jeopardy has attached,[228] and the usual question is simply whether the subsequent prosecution falls within some elaboration of the concept of "same offense." The unnatural delay of sentencing in many cooperation cases, however, opens up a window through which jeopardy attachment questions may enter. These questions, implicating contingent aspects of plea agreements for cooperation, were the core issues for consideration by the Supreme Court in *Ricketts v. Adamson*.[229]

Adamson was charged with the car bombing murder of an investigative reporter, Don Bolles, in Phoenix, Arizona, in 1976. Early in 1977 he entered a plea agreement in which he agreed to plead to second-degree murder for which he would receive a sentence that would lead to just over twenty years actual incarceration time. In return, he promised to testify against two others, Dunlap and Robison, who allegedly had instigated the murder. It was agreed that the usual time for sentencing was waived and that Adamson would be "sentenced at the conclusion of his testimony in all of the cases referred to in this agreement."[230] The trial judge accepted the agreement and Adamson's plea was entered.

For the next two years Adamson cooperated. He testified against Dunlap and Robison who were convicted of first-degree murder. While their convictions were pending on appeal, the State moved in December 1978, almost two years after his plea was entered, to have Adamson sentenced. The court sentenced Adamson in accordance with the plea agreement. But, in 1980 the Arizona Supreme Court reversed the convictions of Dunlap and Robison and remanded for new trials.[231] The State then informed Adamson that his testimony would be required in the retrials. In response, Adamson stated through his attorney that he

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420 U.S. 377 (1975).

227. One criminal procedure treatise suggests that "[a]s for those cases which are not tried at all, that is, where defendant is convicted by virtue of his plea, jeopardy attaches when the court accepts the defendant's plea unconditionally." LAFAVE & ISRAEL, *supra* note 40, § 24.1, at 64. The vital word, for present purposes, is "unconditionally." The authors cite United States v. Sanchez, 609 F.2d 761 (5th Cir. 1980), which held that jeopardy had not attached when a negotiated plea was accepted subject to the condition that information received later would support the defendant's assertions. A prosecutor thus could rather easily arrange to stave off the attachment of jeopardy for most guilty pleas in cooperation cases. Jeopardy would presumably attach only when the court expressed its satisfaction that the relevant condition had been satisfied. Sentencing the defendant arguably could constitute such an expression.

228. *See supra* note 227.

229. 483 U.S. 1 (1987).

230. *Id.* at 14.

231. State v. Dunlap, 608 P.2d 41 (Ariz. 1980); State v. Robison, 608 P.2d 44 (Ariz. 1980).

viewed his obligations under the agreement as fully performed and that the State must furnish further consideration if it wished him to testify again. He demanded as consideration his final release after the testimony, full transactional immunity for any and all of his past crimes, protection for his ex-wife and son, and funds and transportation for him to relocate. The prosecutor brusquely retorted that he viewed Adamson's response as a breach of his plea agreement. The State then successfully moved to vacate Adamson's plea and filed a new information charging him with first-degree murder. The Arizona courts rebuffed Adamson's pretrial challenge to the new charge. They concluded that Adamson had breached his plea agreement and that the State was, therefore, free to revert to the pre-plea position.[232] Adamson then offered to testify against Robison and Dunlap, but the offer was rejected by the prosecutor.[233] Adamson was convicted of first-degree murder and sentenced to death.[234] His state appeals were denied.[235]

Adamson's petition for federal habeas corpus was rejected by the district court and his appeal denied in a memorandum decision by a panel of the Ninth Circuit Court of Appeals.[236] On a petition for rehearing, however, a divided en banc court reversed the district court and granted habeas.[237] Under the majority view, jeopardy had attached at the latest upon sentencing.[238] The agreement contained no express waiver of protection against double jeopardy,[239] and the presumptions

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232. Adamson v. Superior Court, 611 P.2d 932, 937 (Ariz. 1980) (en banc).

233. 483 U.S. at 22.

234. State v. Adamson, 665 P.2d 972 (Ariz.), *cert. denied*, 464 U.S. 865 (1983).

235. *Id.*

236. Adamson v. Hill, 667 F.2d 1030 (9th Cir. 1981).

237. Adamson v. Ricketts, 789 F.2d 722 (9th Cir. 1986) (en banc). The court divided seven to four.

238. The majority, in noting that jeopardy attaches when tbe plea is accepted subject to any conditions annexed, cited United States v. Vaughan, 715 F.2d 1373, 1378 n.2 (9th Cir. 1983), and United States v. Bullock, 579 F.2d 1116, 1118 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978). *Adamson*, 789 F.2d at 726. Since conditions were arguably still outstanding, however, it is not clear why the formal imposition of sentence sbould make any difference to the outcome of the case, especially since the court already had indicated that it would impose the sentence fixed by the plea agreement. While federal cases hold that a court's acceptance of a plea binds all parties, this is usually coupled, in cooperation cases, by the requirement that tbe defendants have complied with all conditions annexed. *See* United States v. Blackwell, 694 F.2d 1325 (D.C. Cir. 1982) (noting tbat "Rule 11 appears to speak unequivocally; if the plea is accepted, the judge does not announce any deferral of that acceptance, *and the defendant adheres to the terms of the bargain*, all parties to it are bound") (emphasis added). This is only another way of saying that the defendant's duty to observe his side of the bargain necessarily makes the attachment of jeopardy contingent and defeasible.

239. While the words "double jeopardy" were never used in the agreement, Paragrapb 5 stated:

> Should the defendant refuse to testify or should he at any time testify untruthfully . . . then this entire agreement is null and void and the original charge will be automatically reinstated. The defendant will be subject to the charge of Open Murder, and if found guilty of First

against tacit waiver of constitutional rights made ordinary contract principles inapplicable.[240] There was a reasonable dispute under the contract as to Adamson's obligation to testify again.[241] Even if Adamson's interpretation of the contract was wrong, however, an unintentional breach could not constitute a waiver of a fundamental constitutional right. If the consequence for the State was the collapse of the bargain, then the State should have drafted the agreement better. They could have inserted a provision expressly waiving the double jeopardy right, or they might have waited until the appeals of Dunlap and Robison were disposed of before bringing Adamson up for sentencing.

The dissenters argued that Adamson had waived his double jeopardy rights. In their view the agreement as a whole was senseless unless Adamson agreed that he might be prosecuted again for first-degree murder if he committed a material breach. The only sensible interpretation of the agreement was that he undertook to testify in all proceedings against the other defendants. The dissenters further suggested that the reprosecution for first-degree murder and the death sentence could not be regarded as vindictive since they were not instituted or imposed to penalize the defendant's exercise of a constitutional or statutory right. His current disposition was always appropriate and legitimate but for the plea bargain, the protection of which he had now forfeited.

Degree Murder, to the penalty of death or life imprisonment . . . .

Adamson, 789 F.2d at 731 (appendix A). "Open murder" is a term used in some jurisdictions to describe the practice by which no degree of murder is specified in the indictment or information and the jury can return a guilty verdict for any degree. Paragraph 15 stated, "In the event this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement." *Id.* at 732. The appellate court dissenters read these clauses as establishing the defendant's implicit waiver of the double jeopardy guarantee. The full text of the agreement is given in Appendix A to the court of appeals' majority opinion. *See Adamson*, 789 F.2d at 731-33.

240. The majority relied largely on the principles declared in Johnson v. Zerbst, 304 U.S. 458 (1938), that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights," *id.* at 464 (quoting Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937)), and that to find waiver a court must be persuaded that there was "an intentional relinquishment or abandonment of a known right or privilege." *Id.* The Court has held that a defendant can implicitly waive double jeopardy by moving to have greater and lesser offenses tried separately, a procedure that otherwise would offend the double jeopardy clause. Jeffers v. United States, 432 U.S. 137, 152 (1977). Adamson made no comparable motion, but the appellate court dissenters relied on his general assent to the agreement as an implicit waiver.

241. Paragraph 8 of the agreement stated that "[a]ll parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement." 789 F.2d at 732. Paragraph 18 stated that "[t]he defendant is to remain in the custody of the Pima County Sheriff from the date of the entry of his plea until the conclusion of his testimony in all of the cases in which the defendant agrees to testify as a result of this agreement." *Id.* at 732-33. These events, sentencing and removal from the custody of the Pima County Sheriff, occurred at the prosecution's initiative long before Adamson was asked to give further testimony. Adamson contended that it was, therefore, a reasonable interpretation of the contract that he had done all the testifying that was contemplated under the agreement.

In a brief, colorless and unprobing opinion by Justice White, the Supreme Court, dividing five to four, reversed the Ninth Circuit Court of Appeals and reinstated Adamson's conviction for first-degree murder with the accompanying death sentence. The Court agreed that jeopardy attached at least at the date when Adamson was sentenced. The Court found, however, that waiver was amply indicated by Adamson's assent to the agreement's clauses contemplating reverting to the original charge if he did not comply with his obligations. If there was a dispute as to whether Adamson had breached the agreement, that dispute had been resolved by the Arizona courts.

Justice Brennan, writing for the four dissenters, concentrated on what he described as "the only important issue in this case"[242]—whether Adamson had breached the plea agreement. He conceded that the "law of commercial contract may . . . prove useful as an analogy or point of departure," but insisted that it could do no more than that "because plea agreements are constitutional contracts."[243] The State had failed to specify exactly how Adamson had broken the contract. His attorney's letter announcing that Adamson believed he already had fulfilled his contractual obligations hardly could be considered an anticipatory repudiation. Far from declaring an intention not to abide by the contract, the attorney's letter asserted reliance on an interpretation of the contract that had appeared reasonable to the majority of the court of appeals. As soon as an Arizona court decided that failure to testify further would amount to a breach, Adamson expressed his willingness to testify. At that point the State had suffered no serious harm since, while the informations against Dunlap and Robison had been dismissed, those dismissals were without prejudice to refiling. Under contractual principles the State had a duty to mitigate damages. By neglecting to reprosecute Dunlap and Robison, it had neglected that duty.

In Justice Brennan's view, therefore, the Arizona court's holding amounted to a finding that Adamson had breached the agreement and forfeited his constitutional right not to be prosecuted again simply by asserting a reasonable interpretation of the contract and bringing this interpretation to a court for resolution. By declaring that Adamson's disagreement with the prosecution was a breach, the Arizona courts in effect allowed the prosecution to dictate the interpretation of the contract. The question of what can amount to a waiver of a constitutional right, however, is always subject to federal review.

In the end Justice Brennan's dissent, in spite of its initial dis-

242. 483 U.S. at 12 (Brennan, J., dissenting).
243. *Id.* at 16.

claimer about the centrality of commercial contract law, itself relied chiefly on concepts drawn from contract law. This is hardly surprising. The privatization of criminal justice in cooperation agreements inexorably demands central reliance on contract principles and the consequent demotion of double jeopardy to the status of a mere gloss on contract law. A strong view of double jeopardy would prohibit altogether the reprosecution of a defendant who had pleaded and been sentenced.[244] Once the propriety of contingent plea agreements is upheld, we must find some way to neutralize the application of double jeopardy in order to preserve the threatened sanction against the defendant who still has promises to keep. This ultimately must mean that double jeopardy has no significance except as one conceptual way of expressing the impermissibility of reprosecuting a defendant who has kept his side of the bargain. The same result could be reached by purely contractual principles without any aid from the constitutional guarantee. Double jeopardy thus becomes a satellite concept and, indeed, a supererogatory one, performing no greater function than to echo the contractual logic of the plea agreement.

Justice Brennan's dissent in *Adamson* is more convincing than the majority opinion, but not because it demonstrates that the majority misconstrued the proper understanding of a constitutional doctrine. The persuasiveness of the dissent lies rather in its demonstration of the forced and unconvincing reading of a contract and the stunted understanding of concepts of breach and remedy revealed in the opinions of the Arizona courts and the Supreme Court majority. One can reduce the constitutional element in *Adamson*, first, to the (not unimportant) caution that the contract should be construed strictly since a constitutional right is involved, and second, to the legitimizing effect of federal review on the Arizona courts' findings which, but for the constitutional context, would be insulated from federal review.[245]

Generally, *Adamson* is a strong example of the transformation of conventional criminal process by the practice of plea bargaining for cooperation. The classical model views the criminal process as resulting either in an adversary trial or a plea. In either case the sentence is in the judge's hands, with actual incarceration time perhaps determined later by a parole board. Full appellate review is expected as a matter of

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244. This would not apply, of course, to defendants who appeal and obtain a reversal of their conviction. At common law reprosecution after an appellate reversal of a conviction was forbidden by the principle of double jeopardy. The Supreme Court, however, took a different view in United States v. Ball, 163 U.S. 662 (1896).

245. Ricketts v. Adamson was brought into the federal courts as a habeas corpus petition challenging the constitutionality of the conviction under the double jeopardy clause as applied to the states through the Fourteenth Amendment.

course for convictions after trial and is possible as to some questions after a plea. Reprosecution for the "same offense" is permitted only if the conviction was overturned at the initiative of the defendant.

Adamson turns each and every one of these traditional attributes upside down. The defendant and prosecutor negotiated and decided the terms of Adamson's sentence. They had to seek judicial approval, but this is fairly routine and cannot easily be withheld. To bind the defendant tightly, the *Adamson* agreement prohibited appeal and application to the parole board for early release. Formal sentencing, which has become a ministerial act, was postponed for two years and might have been postponed a good deal longer. Sentencing lost much of its conventional finality since, under the terms of the *Adamson* agreement, the prosecution could vacate the plea anytime Adamson breached. The prosecution, therefore, could vacate the plea years after sentencing if Adamson failed to testify as promised, appealed his conviction, or applied for early parole. The double jeopardy clause thus became little more than a surrogate vehicle for arguing about whether Adamson had breached. *Adamson* further seems to suggest that the prosecution's interpretation of the agreement is binding because, by simply advancing his interpretation, Adamson was found to have repudiated the contract. Even though Adamson performed perfectly up to the point of dispute and the prosecution suffered no obvious damage, by challenging the prosecution's interpretation Adamson lost all benefits of the bargain. To Adamson this meant the death penalty for the offense of lese majeste.

VII. Conclusion

Modern criminal cases terminate along one of several channels. A very small number go to trial, either because the defendant asserts his innocence, or because the defendant believes he can win, or because the prosecution will make no concessions for a plea. The assembly line guilty plea, by contrast, disposes of the great bulk of criminal cases. This mode is characterized by a rough tariff of charge and/or sentence discounts. The discounts depend on the record of the offender and the degree and circumstances of the crime and are executed by quickly struck deals. One may more accurately describe these cases as "discount pleading," rather than plea bargaining since there is little or no negotiation about the deal. For a small number of serious cases, cooperation is not an issue, but other considerations, such as possible weaknesses in the prosecution's case, may lead to some measure of close negotiation with the defense. These are truer instances of plea bargaining.

This Article has surveyed a small but significant number of cases that travel a different path. While these dispositions properly are de-

scribed as plea bargains or immunity deals, they have distinctive features. Their dominant purpose of securing cooperation coopts a suspect or defendant into the prosecution team and creates a curious relationship that is both adversarial and allied. Although the cooperator may badly need the offered concessions, the prosecution also will urgently require the cooperator's services. While he is faithfully discharging his promises, the State will protect the cooperator, perhaps pay him, and maybe even license his continued criminality.[246] If the cooperator fails to keep his promises, he may expect to feel the anger traditionally displayed by the jilted suitor.

The charged atmosphere of this relationship is heightened by the unique independence and sweeping powers of the American prosecutor. The prosecutor is often an elected official without clear accountability to any superior or any institution. The prosecutor's delicate and difficult obligation to enforce the criminal laws, thus, sometimes is in danger of being clouded by public and private pressures and by personal ambition. With the great range and complexity of American criminal laws, it sometimes seems as if all Americans commit crimes. The prosecutor must choose whom and whom not to prosecute. In this light, the prosecutor's power not to prosecute some suspects may become a weapon for prosecuting others.

Conspicuous criminal trials often succeed one another incessantly and are prime-time television news entertainment. They feature prominent local politicians and alleged members of organized crime families. Many of these prosecutions rely on the testimony of immunized or favorably treated accomplices. The prosecutor plays the double role of impresario and combatant in this gladiatorial show, setting some criminals against others and managing his own champions against the other side.

This performance demands scrutiny. The chief dangers of cooperation agreements are: (1) improper or imprudent selection of the beneficiaries of informal immunity or lenient bargains; (2) presentation of unacceptably tainted or suspect testimony of evidence against defendants; (3) agreements with cooperators that may impose unconscionable obligations on cooperators, confer unacceptable license to commit future crimes, or excessively forgive their past crimes; and (4) vindictive or excessively harsh retaliations against cooperators who, in a prosecutor's opinion, have not satisfied their obligations.

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246. If the agreement contemplates that the cooperator shall continue to be a member of a criminal organization and report back to the government, the cooperator likely will have to continue to collaborate in crimes committed by the organization. In the overall interests of law enforcement, this may be defensible, and in some cases, the cooperator might not commit crimes at all since his law-enforcement objectives deprive him of the necessary mens rea.

Courts are capable of sufficient invigilation with respect to some of these dangers. For example, courts or the legislature could fashion rules requiring corroboration of accomplice testimony or special jury charges. Courts also may prevent prosecutorial vindictiveness against cooperators and reject unduly severe interpretations of agreements. While courts may at times have failed to discharge these duties perfectly, they certainly have the capacity to do so.

Other dangers are not, under our present system, within the scope of judicial power. Courts can do nothing about the prosecutorial selection of subjects for informal immunity, and they can do little about a prosecutor's offering lenient plea bargains for cooperation. Courts also cannot control effectively the nature of the promises that a prosecutor extracts from a cooperating witness, unless the alleged breach of a promise becomes the subject of later litigation. When courts lack control, we should at least foster the continued development of published internal standards for prosecutors. We also should consider the potential contribution of novel practices such as establishing an independent commission to advise and monitor prosecutors' behavior.

We have noticed the impact of cooperation agreements on some customary steps of criminal process and constitutional doctrines—notably with respect to the imposition of sentence, the time for sentencing, and the double jeopardy clause. These departures must be viewed doctrinally as intelligent and voluntary waivers of some of the defendant's rights. A defendant always must waive certain rights when pleading guilty. Loss of these protections is thus unobjectionable from the cooperator's perspective, unless the prosecutor and courts unreasonably interpret the agreement, as was arguably the case in *Ricketts v. Adamson.*

From a systemic viewpoint, the phenomenon of cooperation agreements should by no means be condemned. It demonstrates the extent to which prosecutors can wield their discretion to invent new ways of settling criminal cases. In this sense, however, cooperation agreements are no more than a refined and complicated version of the well-accepted plea bargain. The volume of criminal cases, overflowing the banks of the traditional river, carved out the new channel of the discounted plea system. One consequence has been the relegation of the judiciary to the role of assembly-line overseers. The cooperation agreement springs from a unique impulse—the need that prosecutors perceive to fashion flexible instruments for securing accomplice testimony while retaining control over cooperators. The agreement's form grew out of and owes a great deal to devices, such as promises not to appeal, developed from ordinary plea bargain experiences. While, in the great scheme of things, cooperation agreements may be rare, they illuminate the spread of the

privatization of criminal justice. The cooperation agreement may be a necessary and even desirable method of prosecuting certain dangerous criminals. It is time, therefore, to confront its risks and dangers and to introduce guiding standards and supervision. The traditions and current trends of American criminal procedure make it unlikely that this supervision will come from the judiciary. Attention must be paid, therefore, to administrative possibilities.

AN "UNFORTUNATE BIT OF LEGAL JARGON": PROSECUTORIAL VOUCHING APPLIED TO COOPERATING WITNESSES

Vouching, which developed out of the Supreme Court's desire to protect the jury's right to evaluate credibility, traditionally forbids prosecutorial statements designed to enhance or attest to the credibility of a government witness. This Note examines a flavor of vouching unique to cases involving cooperating witnesses. Prior to testifying, cooperating witnesses sign an agreement setting out the terms of their deal with the government, including a requirement of truthful testimony. Three circuits, the Second, Ninth, and Eleventh, utilize vouching doctrine to restrict references during trial to such truthful-testimony provisions. The Second and Eleventh Circuits only permit references when the cooperator's credibility has been attacked by the defense, which is known as the "invited response" doctrine. The Ninth Circuit has displayed a willingness to completely foreclose references to such a provision. On the other side of the split, a majority of circuits allow a cooperator's plea agreement to be put before the jury in its entirety when the prosecution wishes. This Note concludes that this split should be resolved in favor of the majority approach, which will provide much needed clarity to lawyers on both sides of the criminal bar and return vouching doctrine to its principles.

Evidence - Rule 801(d)(1)(B) – Prior Consistent Statements

Favorable and Noteworthy Decisions in the Supreme Court and Federal Appellate Courts

Tome v. United States, 513 U.S. 150 (1995)

In order to introduce a prior consistent statement under Rule 801(d)(1)(B), the statement must have been made prior to the time that the alleged incentive to fabricate occurred. A consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive. Statements which were made after the motive to fabricate arose do not rebut the charge of recent fabrication. Thus, such statements are not admissible because they amount to hearsay. On remand, the Tenth Circuit concluded that the error in admitting the testimony was not harmless and required a new trial. 61 F.3d 1446 (10th Cir. 1995).

Jones v. Cain, 600 F.3d 527 (5th Cir. 2010)

A witness to a murder provided recorded statements to the police prior to his death from unrelated causes. He also testified at a suppression hearing prior to this death. His testimony at the suppression hearing was admissible, because it was prior sworn testimony. His statements to the police, however, were not admissible. The state argued that the statements to the police were not offered for the truth of the matter asserted, but this was clearly belied by the record. The statements were not merely used to "shore up the witness's credibility" or to "explain the investigators' conduct." The state also argued that the statements qualified as prior consistent statements (i.e., consistent with the suppression hearing testimony) and thus were admissible under a firmly-rooted hearsay

exception. However, these statements were not made prior to the time that the supposed motive to fabricate arose (i.e., a motive to shift responsibility for the murder from himself to the defendant).

United States v. Al-Moayad, 545 F.3d 139 (2d Cir. 2008)

The government improperly admitted an informant's hand-written notes that he authored after meeting with a government agent. The notes were not written prior to the time the motive to fabricate arose and, consequently, did not meet the prerequisite for admissibility.

United States v. Gonzalez, 533 F.3d 1057 (9th Cir. 2008)

Certain hearsay was admitted under the theory that it represented a prior consistent statement. The proper predicate for such evidence was not offered. Harmless error.

United States v. Bercier, 506 F.3d 625 (8th Cir. 2007)

The sexual abuse victim's prior statements implicating the defendant were not admissible as prior consistent statements, because the statements were not made prior to the alleged time of the fabrication. The statements were not admissible under the medical diagnosis exception, Rule 802(4), because statements that identify a perpetrator of a sexual assault are not made for purposes of medical diagnosis. *See also United States v. Kenyon*, 397 F.3d 1071 (8th Cir. 2005).

United States v. Kenyon, 397 F.3d 1071 (8th Cir. 2005)

Admitting prior consistent statements of the child abuse victim was reversible error, because the statements were not made prior to the time that the defendant claimed she fabricated the charges as required by *Tome v. United States*, 513 U.S. 150 (1995).

United States v. Awon, 135 F.3d 96 (1st Cir. 1998)

The witness's prior statement implicating the defendant was made after he had the motive to seek leniency for his participation in the crime. Therefore, the out-of-court statement was not admissible under Rule 801(d)(1)(B).

United States v. Forrester, 60 F.3d 52 (2d Cir. 1995)

A witness's hand-written statement which was prepared after her arrest (and after her motive to lie arose) was not admissible under Rule 801(d)(1)(B).

United States v. Acker, 52 F.3d 509 (4th Cir. 1995)

The trial court clearly erred in allowing an FBI agent to recite what a key government witness had said to him previously under the prior consistent statement rule, Fed.R.Evid. 801(d)(1)(B). The prior statement was made by the witness five months after he had been arrested for participation in a bank robbery for which the defendant was now being tried. The trial court simply held that the prior statement was "corroborative" of the testimony and was therefore admissible. Not only is this not a valid basis for introducing the out-of-court declaration, in this case, the other requirement of 801(d)(1)(B) was not satisfied – that is, the prior statement did not rebut a charge of recent fabrication, because the statement was not made prior to the time that a motive to lie arose.

United States v. Bolick, 917 F.2d 135 (4th Cir. 1990)

The use of prior consistent statements to rehabilitate a witness is only permissible if the witness has been impeached. In this case the government introduced a prior consistent statement without the defendant's having first impeached the witness. This was reversible error. The fact that the trial court gave a limiting instruction to the jury was not sufficient. The limiting instruction failed to advise the jury that they could consider the prior statements only if the declarant was subsequently impeached by the defense counsel.

United States v. Dotson, 821 F.2d 1034 (5th Cir. 1987)

The police report contained an officer's statement relating what he was told by a government witness to the effect that the witness had carried marijuana for the defendant. This was inadmissible to strengthen the witness' credibility even though the witness' statement would have qualified as a prior consistent statement. The officer's statement about what the witness stated was not admissible.

United States v. Collicott, 92 F.3d 973 (9th Cir. 1996)

The government's introduction of a witness's prior statements to a law enforcement officer was error. The government's justification – that the statement to the officer was admissible because the defense asked the officer about other statements made by the witness to the officer – was unavailing, because the defendant was properly seeking to impeach the witness on an unrelated matter.

United States v. Moreno, 94 F.3d 1453 (10th Cir. 1996)

After a co-defendant pled guilty, he testified against the defendant. To rehabilitate the witness's credibility, the government called that witness's lawyer who was asked whether the witness (his client) had implicated the defendant prior to the witness's decision to plead guilty. This was error. The witness's statements to his lawyer did not pre-date his motive to fabricated evidence against the defendant, and thus was not admissible as a prior consistent statement. The witness's motive to fabricate arose as soon as he was arrested. Harmless error.

United States v. Albers, 93 F.3d 1469 (10th Cir. 1996)

The trial court erred in permitting the introduction of out-of-court statements of witnesses on the theory that they were prior consistent statements. In both instances, the statements were made after the

motivation to falsify testimony arose. Thus, the statements did not satisfy the "pre-motive" prong of Rule 801(d)(1)(B) and *United States v. Tome*, 115 S.Ct. 696 (1995).

United States v. Pendas-Martinez, 845 F.2d 938 (11th Cir. 1988)

The defendant's conviction was reversed because the government introduced evidence of a Coast Guard officer's report under the erroneous theory that it was admissible to rehabilitate a witness as a prior consistent statement. However, the Eleventh Circuit held that the officer's credibility was not challenged and the report was not admissible under 801(d)(1)(B). The court holds that "It is an abuse of discretion to admit into evidence and send to the jury room government agent case summaries which constitute a written summary of the government's theory of the case."