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I. INTRODUCTION

Since the late 1980's, with the advent of the Federal Sentencing Guidelines, plea agreements have become commonplace in American criminal jurisprudence, particularly in multiple defendant or conspiracy cases. For example, in 1999, out of the 21,840 arrests for drug trafficking, 20,481, almost ninety-four percent, of those cases were disposed of through a plea agreement, as opposed to trial.[1] The use of plea bargains in trials from the 1970's to today has been an example of the common law at work. Plea bargains have evolved from an added twist in criminal trials to an expected tool in the prosecutor's toolbox. Early tensions between improper bolstering of beneficiary witnesses and anticipatory disclosure of evidence by the prosecution have largely yielded to almost blanket admission of all facets of a plea agreement. Provided the "ritual" of admitting the agreement in conjunction with a testifying witness is adhered to, defense lawyers have nary a prayer to preclude its admission against their clients.

Plea agreements are a contract between a defendant and the prosecuting attorney in which a defendant will plead "guilty" or "no contest" to a charge in exchange for something in return from the prosecutor.[2] Typically, consideration from a prosecutor in these agreements would consist of charging the accused with a lesser included offense or fewer number of charges, or recommending, or not opposing, a certain range within the Federal Sentencing Guidelines. Additionally, other matters may be dealt with in a plea bargain, such as the defendant agreeing to testify in another trial, perhaps against a co-conspirator, or provide information in an ongoing investigation.

This Comment examines plea agreements, and by analogy immunity agreements, in federal appellate jurisprudence since the late 1970's,

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1. United States Sentencing Commission, *Statistics for the Eleventh Circuit, Fiscal Year 1999, Table 3, available at* http://www.ussc.gov/judpack/1999/11c99.pdf. (last visited Oct. 22, 2001).

2. Department of Justice, UNITED STATES ATTORNEY'S MANUAL, ¶ 9-16.000 *et seq., available at* http://www.doj.gov/usao/eousa/foia_reading_room/usam/title9/ [hereinafter "USAM"]; *see also* UNITED STATES ATTORNEY'S MANUAL, TITLE 9, UNITED STATES ATTORNEY'S CRIMINAL RESOURCE MANUAL, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9 [hereinafter "USACRM"].

the current understanding of their uses and limits, and offers thoughts about their future applications. The Comment focuses on the major cases in the federal circuit courts of appeals defining the state of the law with regard to plea and immunity agreements. Some state cases are also noted to highlight the use of plea agreements in other jurisdictions.[3] To contribute to the theme of this Symposium, issues United States Attorneys consider in determining whether to enter into a plea agreement are briefly described in Part II. Part III expands upon the purposes served by plea agreements, both proper and improper, to include discussion of potential pitfalls prosecutors should avoid (and for which defense attorneys should be aware) when using or impeaching witness testimony pursuant to a plea agreement. Admissibility issues will be discussed in Part IV.

The Comment concludes that it is all but automatic that a plea agreement,[4] or a substantive portion thereof desired by a prosecutor, will be admitted against an accused. Also, it argues that the limits imposed by the federal courts of appeals are ones of form, not function. Despite the limits, chances are that the jury is going to hear at least the details of the plea agreement, while they may not physically read the agreement in the jury deliberation room. Also, a hypothetical is provided to demonstrate "how to do a plea agreement in court."

II. GUIDANCE TO ASSISTANT UNITED STATES ATTORNEYS REGARDING PLEA AGREEMENTS

Besides the law in their respective jurisdictions, the Federal Rules of Criminal Procedure, *United States Attorney's Manual*, and Federal Sentencing Guidelines provide guidance to the federal prosecutor in determining whether to enter into a plea or immunity agreement and what type to use. Federal Rule of Criminal Procedure 11(e)(1) governs the acceptance or rejection of plea agreements.[5] It provides:

> The attorney for the government and the attorney for the defendant—or the defendant when acting pro se—may agree that, upon the defendant's entering a plea of guilty or nolo contendere to a charged

3. *See, e.g.*, Commonwealth v. Ciampa, 547 N.E.2d 314 (Mass. 1989).

4. There are two types of agreements addressable in this Comment. The first is the cooperation plea agreement, which has become somewhat standardized whereby the government provides consideration in exchange for actions by a beneficiary witness. A second type of instrument is apparent in the case law and is addressable herein, namely a grant of immunity and order compelling the witness to testify. *See* United States v. McNeill, 728 F.2d 5 (1st Cir. 1984); United States v. Winter, 663 F.2d 1120 (1st Cir. 1981). These cases are cited for same propositions asserted by cases using the cooperation type agreement. *See* United States v. Lord, 907 F.2d 1028, 1029 (10th Cir. 1990).

5. USAM, *supra* note 2, ¶ 9-16.300; *see also* USACRM, *supra* note 2, § 625.

> offense or to a lesser or related offense, the attorney for the government will:
> (A) move to dismiss other charges; or
> (B) recommend, or agree not to oppose the defendant's request, for a particular sentence, or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court; or
> (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court.
> The court shall not participate in any discussions between the parties concerning any such plea agreement.[6]

These are not the only subjects that may be included in a plea agreement. For example, the prosecutor could agree to not bring charges against another individual or the defendant. The plea agreement may bind the defendant to cooperate in the prosecution of another case or investigation.[7] Such cooperation may include testifying against another participant in the underlying criminal transaction, or working in an undercover capacity.

If the parties reach a plea agreement, the court shall require the disclosure of the agreement in open court or in camera if good cause is shown.[8] The Federal Rules of Criminal Procedure do not specify whether the show of good cause must be done in camera or in open court. In accordance with Federal Rules of Criminal Procedure 11(c) and (d), the court may not accept a plea of guilty or nolo contendere until the court has determined that the defendant has the required understanding and that the plea is voluntary.[9]

Considerations often taken into account when deciding whether to enter into a plea agreement include the: (1) defendant's willingness to provide useful, timely information as part of an agreement; (2) defendant's past criminal history; (3) nature and seriousness of the charged offense; (4) defendant's attitude; (5) current stage of the trial process, likelihood of conviction if the case was disposed of at trial; (6) effect of testimony on witnesses at trial; (7) probable sentence accused may receive if it went to trial; (8) whether public interest would be better served by disposing the case at trial; (9) expense of a trial and appeal;

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6. FED. R. CRIM. P. 11(e)(1).
7. USAM, *supra* note 2, ¶ 9-16.300; *see also* USACRM, *supra* note 2, § 625.
8. FED. R. CRIM. P. 11(e)(2).
9. *Id.*

and (10) the effect on the prompt disposition of other pending cases.[10]

In a multiple defendant case, prosecutors must take care to ensure that the disposition of the charges against one defendant does not adversely affect the investigation or prosecution of co-defendants. Some adverse consequences also to be avoided are the potential negative jury inference that may result when a relatively less culpable defendant is tried in the absence of a more culpable defendant, or when the prosecution witness appears to be equally as culpable as the defendants, but has been allowed to plead to a significantly less serious offense.[11]

There are various types of agreements a federal prosecutor may pursue depending on the information a defendant is able to provide. Benefits may be given to a defendant for many reasons, to include early acknowledgement of criminal responsibility, essential information in an ongoing investigation, and in-court testimony. Benefits are also varied, from requiring the government to offer a non-binding recommendation to impose a sentence at the lower end of the sentencing guideline range, to a government commitment to file a motion under the Federal Sentencing Guidelines for a downward departure in sentencing. Some of the "buzz" provisions in the agreements include the downward departure, acknowledgment of responsibility, and safety valve provisions. Downward departure is the statutory allowance for courts to depart from the guideline-specified sentence only where it finds "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . that should result in a sentence different from that described."[12] Substantial assistance and acceptance of responsibility provisions are separate. Substantial assistance is considered to be assistance rendered towards the investigation and prosecution of criminal activities by persons other than the defendant. Acceptance of responsibility is acknowledgment of the defendant's affirmative recognition of his own conduct.[13] Plea agreements may also offer a minor benefit, the so-called "safety valve," for first time offenders by allowing a court to sentence at the low end of the sentencing range.

Due to the flood of appeals resulting from use of the Federal Sentencing Guidelines, many United States Attorney's offices in routine cases have begun requiring waivers of appeal, including appeals of sentences.[14] The Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have all held that plea bargained waivers of right

10. USAM, *supra* note 2, ¶ 9-27.420.

11. *Id.* at ¶ 9-27.430.B.4.

12. ROGER W. HAINES, JR. ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK 7 (1999) (quoting 18 U.S.C. 3553(b) (1999)).

13. *Id.* at 1018.

14. HAINES, *supra* note 12, at 27.

to appeal do not violate public policy or due process.[15] In fact, the Ninth Circuit has enforced an appeal waiver provision where the district court imposed an *upward* departure,[16] and the Fifth Circuit sanctioned an attorney who filed an appeal after his client waived that right in a plea bargain.[17] Conversely, the Ninth Circuit has also allowed an appeal where the defendant was informed he had a right to appeal, despite a waiver of appeal provision in the plea bargain, and the prosecution failed to object.[18]

The Supreme Court in *United States v. Mezzanatto* held that a criminal defendant may elect to waive many important constitutional and statutory rights during the plea bargaining.[19] In *Mezzanatto*, the defendant was arrested for drug distribution. He sought to plea bargain with the government. As a condition to starting negotiations, the prosecutor had Mezzanatto agree that he would have to be completely truthful and that any statements he made during negotiations may be used to impeach any possible trial testimony he may give. After discussions with his attorney, Mezzanatto agreed. Negotiations subsquently failed and information from the failed negotiations was used to impeach Mezzanatto when he took the stand in his own defense at trial.

In construing the provisions of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) making statements obtained in plea negotiations inadmissible against the declarant, the Ninth Circuit held that Congress must have meant to preclude waiver agreements.[20] The Supreme Court reversed, validating the waiver.[21] Thus, by entering plea agreements, defendants' statements could easily come back to haunt them should they take the stand in any trial, including when testifying for the government in a case other than their own.

The waivers of using statements from plea discussions for impeachment, appeal, and the various types of other agreements provide the prosecutor much leeway in determining what to offer a cooperative defendant, or in choosing which defendant to strike a deal with in a multi-defendant case. Depending on the form of agreement, it is within the prosecutor's discretion whether to even make the motion for a downward departure under the Federal Sentencing Guidelines. Additionally,

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15. *Id.*

16. United States v. Bolinger, 940 F.2d 478 (9th Cir. 1991).

17. United States v. Gitan, 171 F.3d 222 (5th Cir. 1999).

18. United States v. Buchanan, 59 F.3d 914 (9th Cir. 1995) (holding that the district court's oral pronouncement controls and therefore the written waiver is unenforceable) (cited in HAINES, *supra* note 12, at 29).

19. United States v. Mezzanatto, 513 U.S. 196 (1995); *see also* Tollett v. Henderson, 411 U.S. 258, 267 (1973).

20. *See Mezzanatto*, 513 U.S. at 200.

21. *Id.* at 211.

the judge is under no obligation to grant a motion for downward departure. In spite of these facts, downward departures do happen quite often. From 1994 through 1998, twenty-nine to thirty-three percent of all federal offenders were granted downward departures from the sentencing range applicable to their case.[22]

III. PURPOSES SERVED BY INTRODUCING THE PLEA AGREEMENT IN A TRIAL

A. *Proper Use in General by Prosecutors*

Introducing evidence of a plea agreement or some component thereof during direct examination may serve one or more purposes. Its admissibility "turns on the purpose for which it is offered."[23] The "most frequent purpose" is to allow the jury to accurately assess the credibility of the witness.[24]

Prosecutors may elicit some information to lay out a witness's background and to give the jury a fuller understanding of the witness's testimony,[25] perhaps to explain how the witness has first-hand knowledge concerning the events about which he is testifying.[26] The impor-

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22. HAINES, *supra* note 12, at 1019 n.2, n.3, and accompanying text.

23. United States v. Halbert, 640 F.2d 1000, 1004 (9th Cir. 1981).

24. United States v. Werme, 939 F.2d 108, 114 (3d Cir. 1991) (citing United States v. Gambino, 926 F.2d 1355, 1363 (3d Cir. 1991)); *see* United States v. King, 505 F.2d 602 (5th Cir. 1974); Isaac v. United States, 431 F.2d 11 (9th Cir. 1970).

25. *See generally* Raysor v. Port Auth. of New York & New Jersey, 768 F.2d 34, 40 (2d Cir. 1985); *cf.* Gov't of the Virgin Islands v. Grant, 775 F.2d 508, 513 (3d Cir. 1985). Background evidence is not a well-defined concept:

> The jurisprudence of "background evidence" is essentially undeveloped. "Background" or "preliminary" evidence is not mentioned in the evidence codes, nor has it received attention in the treatises. One justification for its admission, at least in terms of the background of a witness *qua* witness, is that it may establish absence of bias or motive by showing the witness' relationship (or non-relationship) to the parties or to the case. It may also be said to bear on the credibility of the witness by showing the witness to be a stable person. The routine admission of evidence that an accused has never ben arrested would thus seem to be a function of years of practice and of the common sense notion that it is helpful for the trier of fact to know something about a defendant's background when evaluating his culpability. . . In determining whether to admit background evidence, however, wide discretion should remain with the trial court. . . . . We also note that in view of the relatively low probative value of such evidence, particularly when coming from the defendant, refusal to admit such evidence, even if error, would be harmless.

Grant, 775 F.2d at 513. The difference between background and character evidence may be blurred. "[A]t some point a defendant who goes too far with evidence indicating good character, despite attempts to characterize it as background evidence, might find that the door to rebuttal evidence has been opened." *Id.* at 513 n.7.

26. United States v. Universal Rehab. Serv. (PA), Inc. 205 F.3d 657, 667 n.4 (3d Cir. 2000) (*en banc*). As the *Universal* court explained:

> although one might view this as a corollary to the credibility rationale, members of the jury may still question whether the witness's testimony is worthy of belief. The

tance of background information may be envisioned if one thinks about a prosecution witness/co-conspirator providing testimony on a complex drug smuggling ring without being able to explain how he obtained this information. Jurors would be missing an integral piece of information as they sat bewildered as to how this witness is testifying on such a matter with no apparent means to gain access to such information.

Other purposes are to show that the prosecution has nothing to hide,[27] and for the jury to better assess the witness's potential conflicting motivations behind her testimony.[28] Inherent in all these purposes is a constant tension. These conflicting motivations include the government's desire to elicit what happened in a particular criminal transaction and to ensure justice is served, with a criminal's desire to lessen his punishment by whatever means possible. To this end, prosecutors need to respond to juror concern over the likelihood of false testimony tending to lessen the witness's involvement and to increase the defendant's involvement in the transaction.

Other valid purposes for providing the jury with background information include anticipating an attack by the other side, regardless of whether the defense intends to use the agreement to impeach the witness's testimony.[29] In effect, the prosecution would be impeaching his own witness, thus stealing the defense's thunder on cross-examination and eliminating any concern that the jury may harbor over whether the government has selectively prosecuted the defendant.[30] This should also counter potential jury apprehension concerning inequitable results between two equally culpable criminals and explain why the prosecution's witness is getting more lenient treatment for his participation in the same criminal transaction as the other defendant(s). To illustrate, consider a case where a prosecution witness is equally culpable with the defendant for the underlying crime. If the facts of a plea or immunity agreement were not made apparent to the jury, the jurors may feel com-

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> fact that the witness has pled guilty to an offense concerning the very events that required his or her testimony makes it that much more likely that the testimony is truthful and reliable, as an individual typically does not plead guilty to an offense in the absence of culpability.

Id. at 667. As such, the prosecution in the *Universal* trial court was entitled to introduce the uncharged co-conspirators' pleas in order to answer any question the jury might have concerning how they possessed knowledge of the events and actions described in their testimony. *Id.*; *see also* United States v. Halbert, 640 F.2d 1000, 1005 (9th Cir. 1981).

27. United States v. Hilton, 772 F.2d 783, 787 (11th Cir. 1985); *Halbert*, 640 F.2d at 1005.

28. United States v. Townsend, 796 F.2d 158, 163 (6th Cir. 1986).

29. *See, e.g.*, United States v. Mealy, 851 F.2d 890, 899 (7th Cir. 1998).

30. *See Universal*, 205 F.3d at 667; United States v. Gaev, 24 F.3d 473, 479 (3d Cir. 1994); United States v. Inadi, 790 F.2d 383, 384 n.2 (3d Cir. 1986).

pelled to find the defendant not guilty of crimes besides those that the witness admitted to committing in his testimony.

The 1997 Supreme Court case *Old Chief v. United States* describes the necessity for the prosecution, with its burden of persuasion, to have "evidentiary depth to tell a continuous story."[31] A component of this evidentiary depth may be to appease juror expectations concerning what proper proof in a criminal trial should be by providing the presumed requisite evidence, lest the prosecutor run the risk of incurring a juror's wrath and negative inference about the prosecution.[32] Another component may be the need to provide the jurors with the moral underpinning to decide against the accused, "the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to discrete elements of a defendant's legal fault."[33]

This line of discussion in *Old Chief* is highly supportive of the admissibility of plea agreements. In this context, it stands for prosecutor flexibility to "weave her tale" to create a coherent narrative of an accused's thoughts and actions in perpetrating the offense for which he is tried. When considered with the incremental easing of limits on plea agreements used in the federal circuit courts of appeal, *Old Chief* provides an imposing tool against an accused in a case that contains witnesses who have signed immunity or plea agreements.

B. *Improper Use of Plea Agreements by Prosecutors*

Before examining this topic, a discussion about the importance of the defense attorney quickly objecting when an error is made by prosecutors on direct examination is merited. Charged error will be more difficult to challenge if no objection is raised at the trial level. If no objection is raised, the appellate court will review for plain error under Federal Rule of Criminal Procedure 52(b).[34] Under the plain error doctrine, courts will recognize only "those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings,' and . . . will reverse solely in those circumstances in which a miscarriage of justice would otherwise result."[35] The importance of objecting will become

31. Old Chief v. United States, 519 U.S. 172, 190 (1997).

32. *Id.* at 188 (citing Stephen A. Saltzberg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CAL. L. REV. 1011, 1019 (1978)).

33. *See id.* at 188 (citing United States v. Gilliam, 994 F.2d 97, 100-02 (2d Cir. 1993)).

34. United States v. Gwaltney, 790 F.2d 1378, 1386 (9th Cir. 1986).

35. United States v. Wallace, 848 F.2d 1464, 1473 (9th Cir. 1988) (quoting United States v. Young, 470 U.S. 1, 15 (1985) (citation omitted)).

apparent in the cases that are discussed in this Comment, as many of those cited will be evaluated under this standard due to the defense counsel's failure to object.

1. Improper Bolstering[36]

Plea or immunity agreements may not be offered to bolster the immunized or beneficiary witness's credibility. The Federal Rules of Evidence forbid bolstering a witness's credibility absent an attack under Federal Rule of Evidence 608(a).[37] Rule 608(a) limits evidence supporting or attacking a witness's character for truthfulness or untruthfulness to opinion or reputation evidence. Furthermore, this evidence is admissible only after the witness's character for truthfulness has been attacked, again, by "opinion or reputation *or otherwise*."[38] The "or otherwise" attack includes a "Perry Mason rapier-like" cross-examination that utterly destroys a witness's truthful character.[39] Admitting, as most circuits have done, plea agreements (or provisions of plea agreements) on direct examination prior to any attack *in evidence* by the defense, for purposes of allowing the prosecutor to "weave his tale" during a case or "allowing the jurors to get a full background of the witness," opens a tension between the item's admissibility and Rule 608(a)(2). This tension will be explored later in this Comment.

2. Inferring Guilt to Defendant

In addition to the tension described above, plea agreements may not

36. Improper bolstering may be distinguished from improper vouching, although many courts appear to merge the two concepts. *See* United States v. Bowie, 892 F.2d 1494, 1499 n.1 (10th Cir. 1990). For precision's sake, vouching, as opposed to bolstering as described in this Part, may be described as in *infra* Part III.B.3. as the government's impermissible placing of its prestige behind a client, a prosecutor or government acting as a guarantor of the witness's truthfulness, or a prosecutor relying on evidence not within the jury's purview. *Compare Bowie*, 892 F.2d at 1498-99 (analyzing concepts of "credibility-vouching" and "credibility bolstering" separately) *with* United States v. Hendersen, 717 F.2d 135, 137-38 (4th Cir. 1983) (defining the concept of bolstering similar to *Bowie,* then declaring the facts of that case to not be a form of bolstering or vouching) *and* Commonwealth v. Rivera, 712 N.E.2d 1127, 1132 (Mass. 1999) (defining "vouching" in terms of bolstering). *Bowie* also cites *United States v. Townsend*, 796 F.2d 158, 162-63 (6th Cir. 1986), as an example of a court merging the concepts. This is not the case, as *Townsend* mentions only bolstering, and defines the concept similarly to *Bowie*.

37. This is the "legal irrelevance doctrine." At the point a prosecutor bolsters a witness, before the witness's cross-examination, the court does not know whether the witness would be attacked by the opponent. The witness's testimony may be so innocuous that the opponent may not cross-examine her. In that event, the time spent bolstering the witness is wasted. Therefore, the proponent must wait until the witness is attacked on cross-examination. Then the proponent may rehabilitate the witness on redirect. Ronald L. Carlson et al., Evidence: Teaching Materials for an Age of Science and Statutes 360 (4th ed. 1997).

38. Fed. R. Evid. 608(a).

39. The author acknowledges and thanks Professor Lee B. Schinasi of the University of Miami School of Law for this example.

be introduced to show a co-conspirator's guilt as substantive evidence of another defendant's guilt.[40] "The foundation of [this] policy is the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else. . . . The defendant ha[s] a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else."[41]

A manifestation of this policy may be seen in the Fifth Circuit Court of Appeals case *United States v. Casto*,[42] which addressed the question of the prosecution's use of a co-conspirator's guilty plea for a presumed impermissible purpose. In *Casto,* the prosecutor asked the witness, who had pled guilty for a drug transaction in which the defendant was being tried, whether she had been charged in the same case with possession with intent to distribute and whether she pled guilty to that offense.[43] At this point, the defense counsel objected, and the judge allowed it with a curative instruction pursuant to Federal Rule of Evidence 105.[44] The question, however, was never answered, and the prosecutor moved on with other questions.[45] At the close of the witness's testimony, the judge again gave a curative instruction on the witness's testimony and a third instruction was given when he charged the jury.[46]

On appeal, the defendant argued that the prosecutor's introduction of the co-conspirator's guilty plea constituted reversible error because the prosecutor did not have a legitimate purpose in introducing the plea, and it was only done to create the inference of the defendant's guilt.[47] The government countered by arguing that the defendant's counsel opened the door when he called into question the co-conspirator witness's credibility during the opening statement.[48] The court ruled that although the defense counsel did not openly refer to the witness's guilty plea, he had invited the jury to consider any of the witness testimony with suspicion, thus providing a "legitimate reason" for the prosecutor's

40. United States v. Gambino, 926 F.2d 1355, 1363 (3d Cir. 1991); United States v. Hutchings, 751 F.2d 230, 237 (8th Cir. 1984); Baker v. United States, 393 F.2d 604, 614 (9th Cir. 1968).

41. Bisaccia v. Attorney Gen. of New Jersey, 623 F.2d 307, 312 (3d Cir. 1980) (quoting United States v. Toner, 173 F.2d 140, 142 (3d Cir. 1949)). *Bisaccia* was a habeas corpus proceeding which held that a prosecutor's use of a co-conspirator's guilty plea to establish another defendant's guilt was error, and was remanded for a determination of whether the error was harmless.

42. 889 F.2d 562 (5th Cir. 1989).

43. *Id.* at 566.

44. *Id.*

45. *Id.*

46. *Id.* at 566-67.

47. *Id.* at 567.

48. *Id.*

question.[49] Therefore, the prosecutor was permitted to defuse the potential attack on direct examination of her witness.[50] The court remarked that, "[c]ounsel presenting witnesses of blemished reputation routinely bring out such adverse facts as they will know be developed on cross-examination in order to avoid even the appearance of an intent to conceal."[51]

Additionally, the curative instructions issued by the court eliminated the prejudice of the co-conspirator's guilty plea.[52] Regarding curative instructions, the court said, "circumstances of . . . [a] case overcome the curative effect of the instruction when the guilty plea of one co-defendant implicates another or others," but that did not occur in the instant case.[53] Lastly, because the co-defendant's guilty plea did not establish any facts that the defendant attempted to deny, there was no reversible error.[54]

3. Improper Vouching

The government may be vouching by "placing the prestige of the government behind the witness,"[55] by implying information not heard by the jury[56] that supports the witness's veracity,[57] by implying that the government has independently verified the witness's veracity,[58] or by expressing a personal opinion as to a witness's credibility.[59] Conversely, where a prosecutor states in his closing argument, "[w]e brought

49. *Id.*

50. *Id.*

51. *Id* (citations and internal quotations omitted).

52. *Id.* at 567-68. The court classified labeled the instruction as a "clear and strong cautionary instruction . . . that [the jury] might use the accomplice's guilty plea only to assess her credibility as a witness and not to create an inference of guilt against the accused." *Id.*

53. *Id.* (citations and internal quotations omitted).

54. *Id.*

55. *See* United States v. Winter, 663 F.2d 1120, 1133-35 (1st Cir. 1981); United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980); *see also* Oregon v. Charbonneau, 913 P.2d 308, 311 (Or. 1996) (where the state drafted into an actual agreement that the primary reason for the agreement is that, based on the witness's statements and its investigation, the state believes the charge actually reflects the role the defendant played in the victim's death). *Commonwealth v. Lam*, 684 A.2d 153, 157 (Pa. Super. Ct. 1996), defined "bolstering" as whenever a state places its prestige of the government behind the witness through personal assurances of his or her veracity or indicates that information not before the jury supports the witness's testimony. This would more accurately be described as improper vouching. Bolstering is better described as the improper evidentiary practice of increasing the witness's standing in front of the jury before an attack on her truthful character. *See supra* note 36, and accompanying text.

56. *See, e.g.*, United States v. Mealy, 851 F.2d 890, 900 (7th Cir. 1988); United States v. Hedman, 630 F.2d 1184, 1198-99 (7th Cir. 1980); United States v. Garza, 608 F.2d 659, 664 (5th Cir. 1979).

57. Orebo v. United States, 293 F.2d 747, 749 (9th Cir. 1961).

58. United States v. Beasley, 102 F.3d 1440, 1450 (8th Cir. 1996).

59. *Id.* at 1449; *see also* Berger v. United States, 295 U.S. 78, 88 (1934).

you those people to testify," and "I'm confident that you'll agree that these individuals are all involved in the same conspiracy. . . ," the Seventh Circuit found that the latter statement was merely a summary of the government's theory of the case, while the former was "equally equivocal."[60] Even if the former statement could cause a jury to infer that a prosecutor personally believed that the government witnesses were telling the truth, the court's limiting instruction was "sufficient to dispel any possible inference that the government could vouch for the witness's veracity."[61]

i. A Prosecutor May Not Imply She Possesses Information Not Heard by the Jury

A wonderful example of how not to do a closing argument may be seen in *United States v. Garza*.[62] The court reversed because of persistent and repeated references to matters not before the jury regarding the dedication and professionalism of the testifying agents of the Drug Enforcement Agency. The comments included, "He's a professional man . . . . And if he wasn't good at it . . . when he was doing it with the San Antonio Police Department, if he wasn't doing a good job over there, do you think he would ever have gotten on with the [Drug Enforcement Agency]?"[63] This information was not in the record. This all preceded another line of argument, to the effect that the prosecutor would not be participating in the case if the defendant's guilt had already not been determined. These two lines of argument, first articulated on the closing, and later on rebuttal, comprised reversible plain error.[64]

In *United States v. Roberts*, the Ninth Circuit reversed a district court because of the prosecutor's remarks that referred to matters outside the record.[65] The prosecutor erred in exploiting a state trooper's presence at the trial who was monitoring the witness who signed a plea

60. *Mealy*, 851 F.2d at 900.

61. *Id.* The court's limiting instruction was:

> The witnesses, [*M, R, J, I,* and *B*], have agreed to plead guilty to a crime arising out of the same occurrence for which the defendants are now on trial. These witnesses have received immunity from prosecution for other crimes; that is a promise by the government that any testimony or other information they provided would not be used against them in a criminal case. You may give their testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care. Moreover, their guilty plea is not to be considered as evidence against the defendants.

Id. at 900 n.9. *See also Hedman*, 630 F.2d at 1199.

62. 608 F.2d 659 (5th Cir. 1979). The Fifth Circuit refers to the examples cited in its opinion as "virtually textbook examples of what a closing argument should not be." *Id.* at 664 n.3.

63. *Id.* at 661.

64. *Id.* at 666.

65. 618 F.2d 530, 545 (9th Cir. 1980).

agreement. In this case, in his closing argument, the prosecutor made much of the wide divergence between the defendant's and witness's testimony. One of the witnesses had to be lying, he argued. To buttress the government witness, the prosecutor pointed out a state trooper present in the courtroom, and stated that the trooper was there to monitor the government witness's testimony to ensure the witness told the truth. The prosecutor's remarks were fatal. The Ninth Circuit found "the remarks, fairly construed, were based on the District Attorney's personal knowledge apart from the evidence in the case and that the jury might have so understood them."[66] The prosecutor referred to evidence outside the record by stating that the trooper was monitoring the witness's testimony.[67] The jury could infer that the trooper had personal knowledge of the relevant facts and was satisfied that those facts were accurately stated by the government witness.[68] In effect, the prosecutor told the jury that another witness could be called to corroborate the witness's testimony.[69]

The defense attorney objected to the prosecutor's remarks at trial, but was overruled.[70] The Ninth Circuit stated it would have been helpful if the defense counsel had asked for a curative instruction, but this was not necessary where the error is brought to the court's attention and curative action is clearly warranted.[71] Absent a curative instruction, in analyzing error, the court will apply the "plain error" standard under Federal Rule of Criminal Procedure 52. Here, the error rose to that level, so the lack of a curative instruction was not fatal to the defendant on appeal.

Roberts stands for the proposition that a prosecutor may not tell the jury that the government has confirmed a witness's credibility before using that witness.[72] This is improper vouching because it invites the jury to rely on the government's assessment of the witness.[73] The prosecutor may not portray itself as a guarantor of truthfulness.[74]

Lastly, another Ninth Circuit case is illustrative of impermissible

66. *Id.* 533-34 (citing Orebo v. United States, 293 F.2d 747, 749 (9th Cir. 1961)).

67. *Id.* at 534.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*; *see also* Berger v. United States, 295 U.S. 78, 84-85 (1934) (discussing the prosecutor's overstepping the bounds of propriety and fairness which called for stern rebuke).

72. *Roberts*, 618 F.2d at 536. *Roberts* is very informative for the level of analysis and guidance to a prosecutor in making use of a government witness's promise to testify truthfully. This guidance is incorporated in the hypothetical application in the Conclusion *infra*.

73. *Id.*

74. *Id.* at 537; *see also* United States v. Bess, 593 F.2d 749, 756-57 (6th Cir. 1979); United States v, Ellis, 547 F.2d 863, 869 (5th Cir. 1977).

reference to matters outside the purview of the jury. In *United States v. Brown*, the prosecutor made numerous references to polygraph provisions within a plea agreement, in which the witnesses would submit to verification of their stories through a polygraph test.[75] The prosecutor attempted to offer the entire agreement into evidence at the end of the direct examination of one of the witnesses. The court withheld ruling until after defense cross-examination and then admitted the agreement. The Ninth Circuit found that the polygraph test references within the plea agreement were "particularly invidious,"[76] and constituted reversible error.[77]

ii. A Prosecutor May Not Imply His Personal Opinion Regarding Witness Credibility

A statement made by the prosecutor in closing argument regarding a witness's arrangement made with the government to testify "truthfully" was at issue in *United States v. Miceli*.[78] The court examined the prosecutor's remark to determine if it was intended as an expression of his personal opinion about the veracity of a witness.[79] The court found, however, that the defense did not object to the remark.[80] Thus, the First Circuit analyzed the error under the plain error standard and found the prosecutor may have been referring to other evidence to suggest the witness, an admitted perjurer, was telling the truth.[81] The court stated that a defense objection would have enabled the trial court to give a clarifying instruction.[82]

Ten years later, in the Second Circuit case *United States v. Modica*,[83] the witness ("*A*"), who entered into a plea agreement, performed poorly on the stand. The prosecutor thus felt compelled to argue in favor of *A*'s credibility in his summation. Initially, the prosecutor kept his rehabilitative efforts at arms length by using the rhetorical phrase, "I suggest that." The prosecutor then shifted to outright endorsement. "I'm not here telling you that Mr. [*A*] is your A-1, class-1 citizen. I'm here to tell you that Mr. [*A*]'s testimony when it relates to this case is truthful." The court stated that the "I'm here to tell you" phrase was improper, and quoted American Bar Association Standard for Criminal Justice 3-

75. United States v. Brown, 720 F.2d 1059, 1070 (9th Cir. 1983).
76. *Id.* at 1072.
77. *Id.* at 1075.
78. 446 F.2d 256 (1st Cir. 1971).
79. *Id.* at 260.
80. *Id.*
81. *Id.*
82. *Id.*
83. 663 F.2d 1173 (2d Cir. 1981).

5.8(b), which states, "[i]t 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."[84] Although the court did not reverse the trial below, it did discuss available methods of sanctioning[85] for prosecutors who engage in this sort of behavior.[86]

Ten years after *Modica*, the Eighth Circuit, in *United States v. Freisinger*, dealt with a defendant who appealed in part because of his contention that the prosecutor overused the pronoun "I," thus injecting his personal beliefs as to the credibility of the witness and personalizing his arguments.[87] In addressing the issue, the court discussed the diffi-

84. The current version of Standard 3-5.8(b) eliminated the phrase "it is unprofessional conduct." The standard now states, "The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." American Bar Association, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION & DEFENSE FUNCTION, 3RD (1993), *available at* http://www.abanet.org/crimjust/standards/pfunc_toc.html.

85. *Modica*, 663 F.2d at 1182-86.

86. The *Modica* court at least acknowledged the intent of the American Bar Association Professional Standard. In the 1961 Supreme Court case *United States v. Lawn*, 355 U.S. 357 (1958), the Court addressed a prosecutor's comment stating, "We vouch for [the testifying witnesses] because we think they are telling the truth," in a footnote. *Id.* at 360 n.15. The Court stated that the prosecutor's comment was not improper, since it was not based, implicitly or explicitly, on personal knowledge, or anything other than the witness's testimony before the jury. *Id.* The Court noted that the prosecutor's comment was made in response to defense attacking statements made closing summation, and that the district court issued a curative instruction in its charge to the jury. *Id.* Also, as noted by the circuit court on the first direct appeal, there was an overwhelming amount of evidence against the defendants. *Id.* After instructing the jury that they were the sole judges of witness credibility, the judge instructed them regarding the accomplice-witness, "You have got to be particularly careful in scrutinizing his testimony to see whether to save his own skin he lied to hurt somebody else or whether he had some other motive for lying to hurt somebody else." *Id.* As to the other witness, the judge instructed, "I am going to tell you to be just as careful with his testimony as you would with an accomplice, and look and scrutinize it carefully." *Id.*

The *Lawn* Court buried the error; the prosecution did exactly what it was not supposed to do, namely, base his argument on his personal opinion. The Court then disposed of the entire assignment for error in a footnote, and did not even address the improper prosecutorial conduct. The three circuit court cases cited for support in *Lawn* all address the alleged prosecutorial misconduct. Two of those three cited cases dealt with statements made by the prosecutor directed towards the accused as opposed to statement made in support of a testifying witness. *See* Henderson v. United States, 218 F. 14, 19 (6th Cir. 1955) (". . .it is not misconduct to *express* [the prosecutor's] individual belief in the guilt of the accused, if such belief is based solely on the evidence introduced and the jury is not led to believe that there is other evidence, known to the prosecutor but not introduced, justifying that belief.") (emphasis in original); United States v. Holt, 108 F. 365, 370 (7th Cir. 1939). The last one, *Tuckerman v. United States*, 291 F. 958, 969 (6th Cir. 1923), dealt with the prosecutor's patriotic plea to the jurors to find the defendant guilty. The reasoning in *Lawn* would have been consistent with reasoning seen in other cases had the Court noted that it was improper for the prosecution to make the statemet, but then find the error harmless due to the reasons cited. At issue, however, was only one "slip of the toungue." This was not a case of repeated instances of prosecutorial misconduct. Compare the singular instance in *Lawn* with the recurring misconduct in *Berger v. United States*, 295 U.S. 78, 84-89 (1934).

87. United States v. Freisinger, 937 F.2d 383, 385 (8th Cir. 1991).

culty in excluding the word "I" from one's speech. As an example, it pointed out that while the defendant complained about the prosecutor's use of the word "I" thirty-five times during his closing argument, the defendant's counsel used it fifty-one times. The circuit court cited *Modica*, and expanded on the reason for the rule against improperly expressing a prosecutor's personal opinion:

> 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.[88]

In *Freisinger*, the prosecutor used devices such as, "I submit to you that the testimony you heard from the officers was the truth."[89] Additionally, he argued, "[t]hey came here and told the truth."[90] The court reasoned that these argument devices were not only improper, but 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 that the jury does not. Government must eschew that kind of argumentation, even when couching the argument in less brazen language."[91] Because there was no defense objection, the error was examined for plain error under Rule 52. The court determined that while the prosecutor's remarks were unquestionably improper, they did not deprive the defendant of a fair trial, and thus did not rise to the level of plain error.[92]

In *United States v. Keskey*, the Seventh Circuit found that a letter from an Assistant United States Attorney regarding a government witness's credibility appeared to express the personal opinion that the witness was telling the truth, and amounted to improper vouching.[93] The letter was sent to the witness's lawyer, and admitted into evidence.[94] The appellant argued notwithstanding that the government may elicit testimony on direct examination regarding a witness's plea or immunity agreement, "in introducing evidence of plea agreements, the prosecutor

88. *Id.* at 386 (citing United States v. Modica, 663 F.2d 1173 (2d Cir. 1981)).
89. *Id.*
90. *Id.*
91. *Id.* at 386-87.
92. *Id.*
93. United States v. Keskey, 863 F.2d 474, 479 (7th Cir. 1988).
94. *Id.*

may not . . . imply his personal opinion that a witness is telling the truth."[95] The court found that the letter did appear to express the personal opinion of the Assistant United States Attorney that the witness was telling the truth. The portion of the letter that the appellant found objectionable read:

> In her statement your client admitted to facts which establish some criminal culpability on her part; however, her statement was consistent with other evidence already acquired which indicates that her culpability was relatively minimal. The information she provided appeared to be truthful, and she is apparently willing to cooperate with the investigation and possible prosecution in this matter.[96]

Because the defendant's attorney did not object to the letter's admission during the trial, however, the court again evaluated it under the standard of plain error.[97] Like the Eighth Circuit in *Freisinger,* the Seventh Circuit found the letter's admission did not rise to the level of reversible error.[98] First, while the prosecutor did read the letter into evidence before the jury, the Assistant United States Attorney did not elaborate on it during direct examination, nor did it come up in the cross examination.[99] Secondly, neither attorney mentioned it during closing argument.[100] This reduced the emphasis placed on the letter.[101] Next, the testimony for whose veracity the letter vouched was not as damaging as other witnesses' testimony.[102] Lastly, at the end of the trial, the court provided a limiting instruction on that witness's testimony.[103] The court found that while there was a slight risk that the defendant's "substantial rights" were affected, the error was harmless.[104]

In *United States v. Ludwig,* the Tenth Circuit found reversible error where the district attorney personally vouched for the integrity of the New Mexico state police, one of whose members was a prosecution witness.[105] The prosecutor said in part:

> I know one thing you can be proud of, it's the New Mexico State Police . . . . the finest . . . I've personally seen . . . I know personally

95. *Id.* (citing United States v. Mealy, 851 F.2d 890, 900 (7th Cir. 1988)).
96. *Id.*
97. *Id. See infra* note 109 and accompanying text.
98. *Id.* at 480.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. 508 F.2d 140, 142-43 (10th Cir. 1974). The prosecutor said in part: "I know one thing you can be proud of, it's the New Mexico State Police . . . . the finest . . . I've personally seen . . . I know personally that can't be said of a lot of police forces . . . . [they] are people you can be proud of and they do their job, no matter what the consequences to them. . ." *Id.* at 143.

> that can't be said of a lot of police forces . . . . [they] are people you can be proud of and they do their job, no matter what the consequences to them. . . .[106]

The court reasoned, "prosecuting attorneys . . . in their closing argument . . . should not, [note here that the court merges the concepts of bolstering and vouching] in an effort to bolster the credibility of the government witness, place their own integrity, directly or indirectly, on the scales. Such is improper, and . . . may well end in a reversal which could have easily been avoided."[107]

If the importance of objections and requests for proper limiting instructions are not yet apparent, consider the Seventh Circuit's reasoning in *United States v. Mealy* where the trial court's use of a timely limiting instruction to use caution when evaluating the government witness's testimony possibly saved the case from reversal.[108]

IV. ADMISSIBILITY ISSUES[109]

Federal Rule of Evidence 402 provides that all relevant evidence is admissible, except as provided by Congress, the Constitution, the Federal Rules of Evidence, or other rules as promulgated by the Supreme Court. Rule 402 also provides that irrelevant evidence is inadmissible. Relevant evidence is defined by Federal Rule of Evidence 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[110]

Witnesses provide evidence in the form of testimony. Under Federal Rule of Evidence 607, any party may impeach a witness's credibility, including the party calling the witness.[111] Recall, however, that a witness's credibility may not be bolstered absent an attack on her credi-

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106. *Id.* at 143.

107. *Id.*

108. United States v. Mealy, 851 F.2d 890, 900 (7th Cir. 1988).

109. Admissibility issues are labeled as evidentiary issues in appellate courts. Evidentiary rulings by a federal district court judge will be overturned in the federal district courts of appeals only for abuse of discretion. *See, e.g.*, United States v. Orlando-Figuroa, No. 99-6820, 2000 U.S. App. LEXIS 231 (1st Cir. Jan. 10, 2000); United States v. Casamento, 887 F.2d 1141, 1188 (2d Cir. 1989); United States v. Johnson, 199 F.3d 123, 125 (3d Cir. 1999); United States v. Rebrook, 58 F.3d 961, 967 (4th Cir. 1998); United States v. Wallace, 32 F.3d 921, 927 (5th Cir. 1994); United States v. Taplin, 954 F.2d 1256, 1258 (6th Cir. 1992); United States v. Dominguez, 992 F.2d 678, 680 (7th Cir. 1993); *cf.* United States v. Tucker, 137 F.3d 1016, 1035 (8th Cir. 1998); United States v. Patterson, 678 F.2d 774, 778 (9th Cir. 1982); United States v. Toledo, 985 F.2d 1462, 1469-70 (10th Cir. 1993); United States v.Williford, 764 F.2d 1493, 1497 (11th Cir. 1985). Even if errors were found, non-constitutional errors would not require reversal unless it was alleged it was "more probable than not" that the error affected the verdict.

110. FED. R. EVID. 401.

111. FED. R. EVID. 607.

bility.[112] A witness testifying pursuant to a plea or immunity agreement would typically have her credibility tested by an attack on cross-examination, followed by rehabilitation on redirect examination.[113]

Components of a plea or immunity agreement which may be brought out in testimony appear from the case law and templates viewed by the author to include:

1. the very fact that a plea or immunity agreement exists, to include that the witness is pleading, or has pled, guilty for involvement in some crime;
2. that the witness is testifying under an agreement that requires him to provide truthful testimony;
3. that the witness understands that he will be sentenced in accordance with some sort of sentencing guidance, whether it be federal[114] or state,[115] depending on the jurisdiction;
4. that the defendant must provide assistance in other investigations in exchange for the consideration as listed in paragraph 5 below;
5. that in exchange for truthful testimony, the defendant is to receive some sort of consideration by the prosecution to lessen his punishment; this may be in the form of:
   the prosecution not objecting to defendant's argument for lower sentence;
   the prosecution recommending that the court impose a sentence at the lower end of the sentencing guideline range;
   the prosecution either agreeing to merely consider, or actually obligating itself, to move the court to depart from the sentencing guideline range;
   the prosecution agreeing to not file certain charges or dismiss certain counts or charges against the defendant;
6. that the defendant agrees to voluntarily forfeit his right, title, and interest in certain assets due to their deriving from proceeds of, for example, an illegal drug activity;
7. a more generic understanding of the plea agreement, for purposes of testifying to that understanding.

Issues of admissibility regarding plea or immunity agreements depend on the content of that to be admitted, along with the timing of the admission. The law is technically varied along these lines between the federal circuit courts of appeal and between the states. Some circuits have addressed: whether the *terms* of the plea agreement are admissible; whether only impeaching terms are admissible, as opposed to bolstering

112. *See* 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 608.11 (2d ed. 2000); 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 607.1 (5th ed. 2001).

113. United States v. Cosentino, 844 F.2d 30, 32-33 (2d Cir. 1988).

114. *See generally* HAINES, *supra* note 12.

115. *See, e.g.*, FLA. R. CRIM. P. 3.703 and forms located at FLA. R. CRIM. P. 3.991.

terms; whether the "*truthfulness term*" is admissible; whether the witness's *understanding* of the plea agreement is admissible; and whether the *entire physical agreement* itself is admissible.

These components appear to be artificial headings. For instance, if a witness describes his "understanding," potentially this testimony may also allow in the "terms" of the agreement. Examining the bulleted list above, for instance, items two through six appear on their face to be terms to which a witness could testify to express his *understanding* of the plea or immunity agreement. The case law is not clear as to what constitutes "the terms" of the agreement, as opposed to "the witness's understanding" of the agreement, or the vaguely termed "evidence of the plea agreement." Which terms impeach? Which terms bolster? And lastly, if a circuit court allows an entire plea agreement to be admitted, would that not allow the terms to be admitted? The case law does not elaborate on the meaning of these terms, except for those addressing whether the plea agreement itself maybe admitted. Notwithstanding this vagueness, this Comment forges ahead to define the current trends among the circuits regarding these components of plea agreements, and demonstrates why they really do not matter.

As concluded later in this Part, case law has evolved to the point where all the circuit courts of appeal do not even require defense attack, but only an adequate representation as to the purposes for introducing information on the plea agreement in the prosecution's case-in-chief. This is because the various courts of appeal provide a low threshold for prosecutors to get substantive information regarding practically any plea agreement admitted into evidence, in keeping with the supporting *Old Chief* opinion.

A. *Admissibility of the Existence and Truthful Testimony Requirement of a Plea Agreement*

As case law developed in the 1970's and 1980's on various aspects of plea agreements, the grounds of many appellate cases regarding plea or immunity agreement is the elicitation of the mere fact that there is an agreement or perhaps only where the existence of the truth-telling provisions of a plea agreement have been elicited.[116] These grounds of the

116. The consideration given by the United States to the witness taking a plea deal is typically based on the United States making a recommendation at sentencing that the court reduce by two or three levels the sentencing guideline level applicable to the defendant's offense, pursuant to section 3E1.1 of the Federal Sentencing Guidelines. The United States may often make this agreement contingent on cooperation so that they would not be required to make this recommendation if the defendant: (1) fails or refuses to make a full, accurate, and complete disclosure of the circumstances surrounding the relevant offense conduct; (2) is found to have misrepresented the facts to the government prior to entering the plea agreement; or (3) commits

appeals were based upon a theory that the elicitation or introduction of these provisions are unlawful bolstering or vouching by the government for its witnesses. This line of argument has been largely ineffective. The beneficiary-witness's credibility is often called into question during an opponent's closing argument, particularly when an attack on the witness's credibility on cross-examination opens the door for a witness's credibility rehabilitation.

1. Admissibility of the Existence of the Plea Agreement

All of the circuit courts of appeal, except the Sixth and Eleventh which have not directly addressed the issue, are in agreement that the equities are balanced between the prosecution and defense if a plea agreement's existence is introduced into evidence.[117] Thus, elicitation of that fact is admissible.[118]

> The practice is justified by the same considerations that underlie the "completeness" rule codified in Fed. R. Evid. 106. A party ought to be able to extract the complete testimony of his witness, including the essential circumstances bearing on its believability, rather than forced to leave gaping holes to be poked at by his opponent. This is particularly true in the matter of a plea or immunity agreement, since the jury is bound to wonder from the outset why someone should be testifying to all these things that damn him along with the defendant, and having wondered may be shocked or puzzled to discover the reason for the first time on cross-examination. A trial is not just combat; it is also truth-seeking; and each party is entitled to place its case before the jury at one time in an orderly, measured, and balanced fashion, and thus spare the jury from having to deal with bombshells later on. It is on this theory that defense counsel, in beginning their examination of a defendant, will often ask him about his criminal record, knowing that if they do not ask, the prosecutor will do so on cross-examination. . . . What is sauce for the goose is sauce for the gander.[119]

The question was still open in the Third Circuit until the case of *Univer-*

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any misconduct after entering into the plea agreement. These three listed items may be cumulatively thought of as the "truthfulness" provisions. Examples of cases will be discussed *infra*.

117. United States v. McNeill, 728 F.2d 5, 14 (1st Cir. 1984); United States v. Henderson, 717 F.2d 135, 137 (4th Cir. 1983); United States v. Townsend 796 F.2d 158, 163 (6th Cir. 1986); United States v. Mealy, 851 F.2d 890, 899 (7th Cir. 1988); United States v. Drews, 877 F.2d 10, 12 (8th Cir. 1989); United States v. Bowie, 892 F.2d 1494, 1499 (10th Cir. 1990).

118. See the synoptic chart in Part VI, *infra*. The author could not find cases supporting this assertion from the Sixth or Eleventh Circuits. Where those circuits do have cases allowing testimony on direct examination of the truthfulness terms of a plea agreement, however, an agreement's existence is necessarily admitted.

119. United States v. LeFevour, 798 F.2d 977, 983-84 (7th Cir. 1979) (citations omitted).

sal Rehabilitative Services (PA) v. United States[120] resolved the conflict between two earlier cases decided a year apart, *United States v. Thomas*,[121] and *United States v. Gaev*.[122] *Thomas*, in a split 2-1 panel, reversed the conviction of the defendant because the trial court admitted, over defense objection, evidence of co-defendant's guilty pleas. The defense represented that it would not attack the witness's credibility based on their plea agreements. The court held the admission of the evidence was not needed to show the witnesses's credibility because the defense represented that it would not attack on cross-examination the witness's credibility based on the plea agreements.[123]

The government argued that the evidence was necessary to ensure the jury did not impermissibly conclude that the defendant alone was being prosecuted. The circuit court reasoned that the district court could have given an instruction that the jury need only concern themselves with the guilt or innocence of the defendant, and that information regarding disposition of others involved in the scheme was not the jury's concern.[124] Lastly, the government argued that the evidence was necessary to establish the witnesses' roles in the unlawful scheme.[125] The circuit court reasoned, however, that the witnesses themselves testified as to their involvement.[126] Based on these reasons, the Third Circuit found the district court erred because the evidence of the plea agreement was admitted for no permissible purpose for which evidence of a guilty plea of a witness involved in the same underlying criminal activity may be admitted.[127]

The court also could not find the error to be harmless. Despite the district court giving limiting instructions to the jury to not consider the witnesses' guilty pleas as evidence of the defendant's guilt, it could not determine to a high probability that the error did not affect substantial rights.[128] "[I]t seems plain . . . that the lack of proper purpose for admitting the guilty pleas to conspiracy charges is not cured by limiting instructions."[129] The *Thomas* court drew a distinction between a guilty plea being admitted for a substantive crime, which would likely be admissible with a curative instruction, and a guilty plea for a conspiracy,

120. 205 F.3d 657 (3d Cir. 2000).
121. 998 F.2d 1202 (3d Cir. 1993).
122. 24 F.3d 473 (3d Cir. 1994).
123. *Thomas*, 998 F.3d at 1205.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 1206.
128. *Id.* at 1206-07.
129. *Id.* at 1206.

when not admitted for any permissible purpose.[130]

The next year, a different Third Circuit panel, while not explicitly overruling *Thomas*, seemingly limited its effects in *United States v. Gaev*.[131] In *Gaev*, an analogous situation to *Thomas*, the district court admitted "evidence" of three co-conspirators' plea agreements over defense objection. Contrary to *Thomas*, the *Gaev* panel reasoned that whenever a co-conspirator testifies he took part in the criminal scheme in which the defendant is charged:

> [h]is credibility will automatically be implicated. Questions will arise in the minds of jurors whether the co-conspirator is being prosecuted, why he is testifying, and what he may be getting in return. If jurors know the terms of the plea agreement, these questions will be set to rest and they will be able to evaluate the declarant's motives and credibility.[132]

Note the difference between these two conspiracy cases. In *Thomas*, the Third Circuit found that the agreement was admissible for no permissible purpose. Instructions could be issued to dispel jurors' notions of selective prosecution. The defense in *Thomas* was allowed to stipulate its way out of the admissibility of the plea agreement by not attacking credibility based on the agreement, whereas in *Gaev*, credibility was "automatically" at issue. The *Gaev* court further distinguished *Thomas* on the basis that in *Thomas*, there was no direct evidence of Thomas's criminal intent. On the other hand, in *Gaev*, co-conspirators gave direct testimony as to the defendant's criminal activity and intent.

The cases are distinguishable only on the facts. Decided by different Third Circuit panels, the assertions the *Thomas* court made that it could have dispelled jury concerns with a cautionary instruction over a guilty plea to conspiracy, directly conflicted with the *Gaev* court's opinion. It did not take long for the Third Circuit to ease its restrictions against admitting evidence of plea agreements on direct examination, prior to any attack on witness credibility. In 2000, during an en banc rehearing, the Third Circuit in *United States v. Universal Rehabilitative Services (PA)*, agreed and overruled *Thomas*. The court adopted, inter alia, the dissenting opinion in *Thomas*, along with the *Gaev* opinion, as accurately reflecting the law within the Third Circuit.[133]

130. *Id.*
131. 24 F.3d 473 (3d Cir. 1994).
132. *Id.* at 477.
133. 205 F.3d 657, 669-70 (3d Cir. 2000).

2. Admissibility of the Truthfulness Provision of a Plea Agreement

The Eighth Circuit, in *United States v. Magee*, and the Tenth Circuit, in *United States v. Lord*,[134] held not only that the existence of the agreement should be admitted on direct examination, but also that the truthfulness terms of the agreement should also be admitted.[135] In *Magee*, during its opening statement, the government described the requirement for its intended witnesses to testify truthfully under their respective plea agreements.[136] Part of the assigned error assailed by the defendant concerned two government witnesses' testimony. During the witnesses' testimony, the prosecutor had one witness read the provisions requiring truthful testimony, and asked them both clarifying questions to demonstrate their knowledge of those provisions:[137]

> Prosecutor: What occurs in the event that you do not tell the truth here today?
> Witness #1: I would be in violation of the agreement. The agreement wouldn't be any good, I guess.
> Prosecutor: Do you understand, in accordance with the plea agreement, that if the government catches you lying, the plea agreement is off?
> Witness #1: Yes.
>
> * * * *
>
> Prosecutor: [I]f you are found to be telling a lie to this jury, what do you expect is going to happen to your plea agreement?
> Witness #2: It would probably be revoked.[138]

The court evaluated the reading and associated questions with an eye towards: (1) whether it would lead a jury to believe that the government knew something about the witness's veracity outside of the information available to the jury;[139] (2) whether the prosecution implied that it independently verified the witness's testimony; and (3) whether the questions and reading gave the prosecutor's implied personal opinion on the witness's veracity. In all three contexts, the court concluded the prosecution did not and rejected the appeal.[140]

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134. 907 F.2d 1028, 1030-31 (10th Cir. 1990).
135. 19 F.3d 417, 412 (8th Cir. 1994).
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*; *see* United States v. Freisinger, 937 F.2d 383, 386-87 (8th Cir. 1991). Leading the jury to believe that the government had information regarding a witness's veracity outside the information available to the jury is discussed in Part III.B.3.ii. *infra*.
140. *Magee*, 19 F.3d at 421. These contexts considered by the court are the most prominent reasons that agreements or witness testimony are appealed. The Eight Circuit has also ruled that eliciting evidence showing the lack of a plea or immunity agreement is not impermissible

The Second, Ninth, and Eleventh Circuits will not allow eliciting the truth-telling provisions of a plea agreement until the witness's credibility is attacked.[141] In *United States v. Maniego*, decided by the Second Circuit, the defendant appealed because, among other grounds, the testifying government witnesses stated on direct examination that they would receive immunity if they told the truth.[142] Citing Federal Rule of Evidence 608(a)(2), the court stated that co-defendant's counsel had attacked the witness's credibility in her opening statement, thus opening the door to the rehabilitating testimony.[143] The Eleventh Circuit, in *United States v. Cruz*,[144] adopted this same rule, citing the 1985 Second Circuit case, *United States v. Smith*,[145] which relied on *Maniego*.

In 1991, an analysis by the Ninth Circuit questioned the basis for these two circuit courts' reliance on Rule 608(a)(2).[146] The purpose of Rule 608(a)(2) is to encourage direct attacks on a witness's veracity and to discourage indirect attacks on a witness, for example, through attacks on her general character for truthfulness.[147] Thus, Rule 608(a)(2) would not allow rehabilitation by character evidence of truthfulness after a *direct* attack on a witness's veracity for bias.[148] "For example, it would

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vouching for the witness when the defendant implies an agreement exists. United States v. Beasley, 102 F.3d 1440, 1450 (8th Cir. 1996); Jenner v. Class, 79 F.3d 736, 739 (8th Cir. 1996). Here, the introduction of a letter from the Department of Justice indicating a witness was not receiving any benefit in return for her truthful testimony did not constitute impermissible vouching on the witness's despite placing the prestige of the government behind the witness. *Jenner*, 79 F.3d at 739. In fact, the government did not even comment on the witness's veracity.

141. *See* synoptic chart in Part VI *infra*; *accord* United States v. Rohrer, 708 F.2d 429, 433 (9th Cir. 1983); Smith v. United States, 687 A.2d 1356, 1367 (D.C. 1996); People v. Lukity, 596 N.W.2d 607, 610 (Mich. 1999).

142. 710 F.2d 24, 27 (2d Cir. 1983).

143. *Id.* (emphasis in original); *see* United States v. Jones, 763 F.2d 518, 522 (2d Cir. 1985) (stating that despite rule against eliciting truth-telling provisions as expressed in *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1146 (2d Cir. 1978), defense counsel attacked the credibility of witness in opening statement, and thus could not be heard to complain at the witness's rehabilitation on direct examination).

144. 805 F.2d 1464, 1480 (11th Cir. 1986).

145. 778 F.2d 925, 928 (2d Cir. 1985).

146. *See* United States v. Dring, 930 F.2d 687, 691 (9th Cir. 1991).

147. The *Dring* court stated:

> Character evidence in support of credibility is admissible under the rule only after the witness' character has first been attacked, as has been the case at common law. The enormous needless consumption of time which a contrary practice would entail justifies the limitation. Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence or misconduct, including conviction of crime, and of corruption also fall within this category. *Evidence of bias or interest does not.*

Id. at 690-91 n.2 (citing FED. R. EVID. 608(a) advisory committee notes) (other citations omitted) (emphasis added). If credibility were attacked based on a plea agreement, a sound argument may be raised that the defendant's entering into such an agreement is evincing of his interest, and thus may not be rehabilitated under Rule 608(a).

148. *Id.* at 691.

be permissible to imply that, because of bias due to a family relationship, a father is lying to protect his son."[149] "Such evidence directly undermines the veracity and credibility of the witness in the instant case, without implicating the witness as a liar in general."[150] Rule 608(a)(2) does, however, allow rehabilitation after *indirect* attacks on a witness's general character for truthfulness by permitting opinion or reputation evidence which would allow a jury to infer that a witness was lying at present because he or she lied in the past.[151] Additionally, the rule requires an attack "by evidence in the form of opinion or reputation."[152] A statement made in opening statement is not *in evidence.*

The Second Circuit's reasoning in *Maniego* notes simply that credibility testimony may not be elicited until an attack. *Maniego* does not explain how the government's witnesses were attacked, noting merely that the co-defendant's counsel joined the credibility issue in opening argument.[153] If the nature of the attack was direct, as to the instant case, then the court's reliance on Rule 608(a)(2) is misplaced, and the witness may not be rehabilitated. If the attack was indirect and more generalized, then rehabilitation under Rule 608(a)(2) would be allowed, but only by opinion or reputation evidence.

What happened in *Maniego* may be reasoned more appropriately by analogy to Rule 608(b). Rule 608(b) states in relevant part: "[s]pecific instances of the conduct of a witness, for the purpose of . . . supporting the witness' credibility . . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning the witness' character for truthfulness or untruthfulness."[154] By questioning the witness about the terms of the agreement, the prosecution was eliciting a specific instance of conduct regarding *why* the witness would be more likely to tell the truth in the instant case, i.e., because there is a grant of immunity (or in other cases, a plea agreement). Admission of this evidence on direct examination would be necessary to counter the attack made on the defense's opening statement. Where there is no guarantee that the defense would cross-examine the witness, the prosecution would otherwise be left in a position where she could not otherwise have an opportunity to rehabilitate the witness.

149. *Id.*
150. *Id.*
151. *Id.*
152. FED. R. EVID. 608(a).
153. United States v. Mangiego, 710 F.2d 24, 27 (2d Cir. 1983).
154. FED. R. EVID. 608(b).

3. DON'T KICK A DEAD HORSE

While the requirement of the truthful testimony in a plea agreement is admissible, too many utterances may be a problem on appeal. By allowing disproportionate emphasis, a prosecutor may cross the fine line between introducing the agreement as evidence of the witness's credibility and introducing it for some prohibited use.[155] This issue came up recently in the Seventh Circuit case *United States v. Collins*.[156] In *Collins*, the government introduced into evidence, over defense objection, evidence regarding cooperation and plea agreements for ten government witnesses.[157] The court noted that the district court should not permit the government to make "unnecessarily repetitive references to truthfulness."[158]

The Seventh Circuit also noted that in a case that came on appeal after the Collins's trial, *United States v. Thornton*,[159] there were even more numerous references to truthfulness than the plea agreements in the instant case, and the court in that case held it was not an abuse of discretion to enter the agreements into evidence.[160] In *Thornton*, nine witnesses' plea agreements were entered into evidence, along with proffer letters.[161] Each agreement contained five references to requirements for truthful testimony, and the proffer letters each contained three references to those requirements.[162] As in *Thornton*, the district court in *Collins* gave cautionary jury instructions that directed the jury to consider the government witness with "caution and great care."[163] The *Thornton* court, however, chastised prosecutors "for coming perilously close to being unnecessarily repetitive" and that they should "think twice before risking reversal."[164] The court stated that the proffer letters were overkill, and that they added no value beyond the plea agreements.[165]

B. *Admissibility of Witness's Understanding of the Plea Agreement*

All but the District of Columbia, Ninth, Tenth, and Eleventh Circuits (the latter two not yet having the opportunity to address the issue), are in agreement that the witness's "understanding" of his plea agree-

155. United States v. Mealy, 851 F.2d 890, 899 (7th Cir. 1988); United States v. Henderson, 717 F.2d 135, 138 (4th Cir. 1983); United States v. Halbert, 640 F.2d 1000, 1005 (9th Cir. 1981).
156. 223 F.3d 502 (7th Cir. 2000).
157. *Id.* at 510.
158. *Id.* (quoting United States v. Lewis, 110 F.3d 417, 421 (7th Cir. 1997)).
159. 197 F.3d 241, 252 (7th Cir. 1999).
160. *Collins*, 223 F.3d at 510.
161. *Thornton*, 197 F.3d at 251.
162. *Id.* at 251-52.
163. *Id.* at 252 n.4.
164. *Id.* at 252-53.
165. *Id.* at 252.

ment is admissible on direct examination.[166] The Ninth, Tenth, and District of Columbia Circuits have not directly addressed the issue of admissibility of a witness's understanding of a plea agreement on direct examination, but have ruled that the "terms" of an agreement are admissible.[167] If received from a beneficiary-witness, this could be couched in terms of the witness's "understanding." Thus, these circuits would likely allow a witness's "understanding" to be admitted on direct examination.

In *United States v. Winter*, the First Circuit allowed testimony on a witness's understanding of an oral immunity agreement.[168] Additionally, because the government revealed the arrangements of the immunity deal to the defendant before trial,[169] and the witness reiterated the terms while on the stand, the court ruled that the defendant's assigned errors regarding the infringement of his rights to confrontation and due process were groundless.[170]

In the Seventh Circuit case *United States v. Mealy*, the defendants claimed error by the trial court because the prosecutor improperly vouched for the witnesses by: (1) implying he possessed information not heard by the jury on the immunized witness's veracity; or (2) expressing or implying that the witness is telling the truth. The court ruled that the prosecutor did neither, but rather merely asked the witness questions on his understanding of the plea agreement.[171]

In *United States v. Craig*,[172] another Seventh Circuit case, the defendants argued that questions and answers concerning the immunized

166. *See* synoptic table *infra* Part VI.

167. *See* synoptic table *infra* Part VI. The Ninth Circuit has addressed the question of elicitation of a witness's understanding of his obligations under a plea agreement in an unreported opinion and ruled that this did not constitute vouching. United States v. Coronel, No. 92-50317, 1994 U.S. App. LEXIS 6111, at *3 (9th Cir. Mar. 7, 1994).

168. 663 F.2d 1120 (1st Cir. 1981).

169. The case does not specify the mechanism by which this was done.

170. *Winter*, 663 F.2d at 1133-34.

171. United States v. Mealy, 851 F.2d 890, 900 (7th Cir. 1988). There was also an assigned error that the prosecutor improperly bolstered the witnesses by needless references to truthful testimony in the agreements themselves. Each agreement, and here the trial court dealt with five of them, contained four or five references each to a requirement to give truthful testimony. The court said the "government should avoid unnecessarily repetitive references to truthfulness if it wished to introduce the agreements into evidence." *Id.* at 899. Nevertheless, the court did not believe that the promise of truthful testimony was disproportionately emphasized or repeated. *Id.* at 899-900. Not much information was apparent as to how little (or how much) emphasis was given. All that was mentioned as far as highlighting any facet of the agreements, and incidentally this was in the portion of the opinion analyzing alleged improper vouching, as opposed to bolstering, was the prosecutor's asking the witnesses to state their understanding of the plea agreements they entered into with the government and two other statements that the court dismissed as not errors. *Id.* at 900.

172. 573 F.2d 513 (7th Cir. 1978).

witness's understanding of the immunization agreement conveyed to the jury the impression that the prosecutor was in a position to personally know whether or not a witness was truthful. Therefore, the jury was given the appearance of a witness whose veracity is vouched for by the government. The witness explained her understanding of her immunity agreement to be "my testimony that I will give will not be held against me as long as I tell the truth."[173] The court found nothing improper about the question of the witness's understanding of the terms in the immunity order. In *Craig*, the Seventh Circuit found no insinuation by the prosecutor, direct or otherwise, that the government possessed knowledge unknown to the jury on the issue of the immunized witness's veracity.[174] Further, the court stated that the jury's function of assessing credibility and weighing testimony was "aided by evidence of an immunized witness's understanding of the terms under which he or she is testifying."[175] As stated by the Seventh Circuit in *United States v. Creamer*, relied on in *Craig*, by questioning a witness over his or her understanding of a plea agreement, the government is presenting the pressures the witness was testifying under and what would happen if he breached the agreement.[176] Further, the government is neither presenting information not available to the jury nor is the government giving a personal opinion regarding the witness's veracity.[177]

At this point, one should see that prosecutors may establish the existence, terms, and understanding (but keeping in mind that the Eleventh Circuit has yet to specifically consider admissibility of either the "terms" or "understanding") of a plea agreement on direct examination without having it considered inadmissibly bolstering or vouching.[178] This makes sense if one considers that the plea agreement is a double-edged sword, making apparent the witness's bias and interest in presenting testimony in a believable fashion, regardless of the truth.[179] The

173. *Id.* at 519.

174. *See* United States v. Creamer, 555 F.2d 612 (7th Cir. 1977).

175. *Craig*, 573 F.2d at 519.

176. *Creamer*, 555 F.2d at 617.

177. *See id.* at 617-18.

178. *See* United States v. Beasley, 102 F.3d 1440, 1449-50 (8th Cir. 1996). *But see* State v. Eby, 673 P.2d 522 (Or. 1993) (evidence concerning the terms of a plea agreement held not relevant because it does not tend to prove or disprove credibility).

179. United States v. Mealy, 851 F.2d 890, 899 (7th Cir. 1988); *see* United States v. Werme, 939 F.2d 108 (3d Cir. 1990). *Werme* explained that rationale behind admitting agreements:

> The most frequent purpose for introducing such evidence is to bring to the jury's attention facts bearing upon a witness's credibility. Proof that a witness has pleaded guilty or has agreed to plead guilty is highly relevant to show bias, a recognized mode of impeachment. The term "bias" is used "to describe the relationship between a party [in this case the prosecution] and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a

other edge of the sword aids the government by showing to the jury a witness's interest in providing truthful testimony[180] or how the witness has knowledge of the crime.[181]

C. *Admissibility of the Entire Plea Agreement*

The circuits are split as to when a plea agreement may properly be admitted. Six circuits, namely, the First,[182] Third[183], Fourth,[184] Sixth,[185] and Seventh,[186] and Eighth[187] have admitted them in direct examination. The Second Circuit allows the entire plea agreement to be admitted if credibility is attacked in opening argument, but with the caveat that Rule 403 may require some redaction to eliminate prejudicial, confusing, or misleading information.[188] The Fifth Circuit has endorsed the use of "plea agreement letters" that memorializes the respective promises of the government and witness.[189] The Ninth Circuit has not addressed admitting the entire agreement on direct examination. The Tenth Circuit has not addressed the question. Lastly, the District of Columbia Circuit has ruled that allowing a witness to provide testimony on direct examination about "the terms" of his cooperation agreement with the government is not error, let alone plain error.[190]

This seems to fly in the face of the rule against improper bolstering of a witness. Again, evidence of a plea agreement cuts both ways. Its introduction shows the witness's interest in the case—he is getting something in return for the testimony he is giving. Additionally, a curative instruction should be given as to the limited admissibility of the

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> party." A witness who has pleaded guilty may have a tendency to favor the prosecution because of concern about the prosecution's position regarding sentence or for other reasons. "Proof of bias is almost always relevant" and, unlike "less favored forms of impeachment," may be shown by "extrinsic evidence." Moreover, under Fed. R. Evid. 607, a witness may be impeached by any party, "including the party calling the witness." . . . In any criminal trial, the credibility of the prosecution's witnesses is central. By eliciting the witness' guilty plea on direct examination, the government dampens attacks on credibility, and forecloses any suggestion that it was concealing evidence. Such disclosure is appropriate.

Werme, 939 F.2d at 114 (citations omitted).

180. *Mealy*, 851 F.2d at 899.

181. United States v. Henderson, 717 F.2d 135, 137 (4th Cir. 1983).

182. United States v. McNeill, 728 F.2d 5, 14 (1st Cir. 1984).

183. United States v. Universal Rehab. Serv. (PA), Inc., 205 F.3d 657 (3d Cir. 2000) (*en banc*).

184. *Henderson*, 717 F.2d at 138.

185. United States v. Townsend, 796 F.2d 158, 163 (6th Cir. 1986).

186. United States v. Mealy, 851 F.2d 890 (7th Cir. 1988). In fact, the Seventh Circuit has ruled that any error in admitting plea agreements into evidence is harmless in the face of overwhelming evidence. United States v. LeFevour, 798 F.2d 977, 984 (7th Cir. 1986).

187. United States v. Drews, 877 F.2d 10, 12 (8th Cir. 1989).

188. United States v. Cosentino, 844 F.2d 30 (2d Cir. 1988).

189. United States v. Leslie, 759 F.2d 366, 376 (5th Cir. 1985).

190. United States v. Spriggs, 996 F.2d 320, 324 (D.C. Cir. 1993).

witness's guilty plea, i.e., it may not be used to show the guilt of the accused. Recall the curative instruction was missing in the Third Circuit *Thomas* case discussed supra. Also in *Thomas*, there was no defense objection. In the Eight Circuit, however, a missing curative instruction, with no defense objection, is not dispositive in the face of overwhelming evidence.[191]

In the Third Circuit case *United States v. Universal Rehabilitation Services (PA)*, the co-defendants raised an issue in error regarding the admissibility of uncharged co-conspirators' plea agreements.[192] The charged co-defendants stated in a motion-in-limine that they would not attack the uncharged co-conspirators' credibility. They argued that the district court erred in admitting evidence regarding the uncharged co-conspirators' plea agreements. The circuit court used it as an opportunity to resolve the conflict in that court's jurisprudence between *United States v. Gaev* and *United States v. Thomas*, discussed in this Comment.[193] In resolving the case, the Third Circuit stated in a footnote that for the purposes of their analysis, which was based on Rule 403, admission of the co-defendants' guilty pleas and plea agreements into evidence are treated equally.[194]

The appellants in *Universal* relied on *Old Chief v. United States*.[195] In *Old Chief*, the defendant was charged, inter alia, with possession of a firearm as a previously convicted felon. One of the elements for that crime is that the accused was previously found guilty of a felony. Defendant Old Chief argued that allowing the prosecution to introduce into evidence the actual name of his previous felony conviction would be unfairly prejudicial to him.[196] The jury may use that name of the charge for a purpose other than that for which it was intended, i.e., the simple fact that Old Chief had been previously found guilty of one of the felonies.

Old Chief offered to stipulate that he had, in fact, been previously found guilty of a felony. The prosecution turned down that stipulation, and the trial court allowed this, arguing that the prosecution should have the opportunity to prove its case the way it deems appropriate.[197] The Supreme Court found that the Ninth Circuit erred when they reversed the case because of the state's introduction of the record which included

191. Gerberding v. United States, 471 F.2d 55 (8th Cir. 1973).
192. 205 F.3d 657 (3d Cir. 2000).
193. *See infra* Part IV.A.1.
194. *Universal*, 205 F.3d at 665 n.10.
195. 519 U.S. 172 (1997).
196. *Id.* at 175.
197. *Id.* at 177.

the name of the previously charged felony.[198] One may be tempted to broaden the meaning of *Old Chief* to be when two items of evidence, equally probative, are available to the trial court, the court should use the least prejudicial. According to *Old Chief*, the holding is narrower. "Given these peculiarities of the element of felony-convict status and of admissions and the like when used to prove it, there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence."[199]

Turning back to *Universal*, the co-defendants argued that they, similar to the defendant in *Old Chief*, presented the district court, "with an alternative that lacked the prejudicial effect of the government's proffered evidence—a representation that they would refrain from any affirmative challenge to the credibility of either [of the uncharged co-conspirators]."[200] In its seven to five decision, the Third Circuit reasoned that this alternative, however, presented the district court with a different situation than the one in *Old Chief* because the stipulation in *Old Chief* went to an element of the crime.[201]

First, the *Universal* co-defendants simply offered not to render any affirmative challenge to the uncharged co-conspirators' credibility.[202] Second, and more importantly, the Supreme Court's holding in *Old Chief* was expressly premised on the Court's belief that the defense offer to stipulate to the prior conviction and the government's offer to introduce evidence of the same were equally probative.[203] In the *Universal* appeal, however, the co-defendant's offer to refrain from affirmatively challenging the uncharged co-conspirators' credibility did not, and could not, carry the same probative value on the issue of witness credibility as the introduction of the latter's guilty pleas.[204] The Third Circuit declared that its reasoning behind this applies equally to plea agreements.[205]

Admitting the entire plea agreement has bolstering and impeaching aspects; recall the two edged sword analogy as discussed in Part IV.B. The existence of a plea agreement on one hand supports a witness's credibility by showing his or her interest in testifying truthfully. On the other hand, the plea agreement may also impeach the witness's credibil-

198. *Id.* at 179.
199. 519 U.S. at 191.
200. *Universal*, 205 F.3d at 667.
201. *Id.* at 666-67.
202. *Id.* at 667.
203. *Id.*
204. *Id.*
205. *Id.*

ity by showing his or her interest in testifying as the government wishes regardless of the truth. Introduction of the entire plea agreement permits the jury to consider fully the possible conflicting motivations underlying the witness's testimony and, thus, enables the jury to more accurately assess the witness's credibility.[206]

V. A HYPOTHETICAL APPLICATION[207]

Consider the following hypothetical. John, Bob, Stewart, Harry, and Sam are members of a drug distribution conspiracy. Sam is arrested in possession of a large amount of heroin. He desires to enter into a plea agreement with the United States Attorney's Office. Sam's lawyer approaches the prosecutor to express his desire to enter into plea negotiations, offering information that the government may be interested to use against John, Bob, Stewart, and Harry. Negotiations at this point would come under the purview of Federal Rule of Criminal Procedure 11(6) in that discussions and statements made in the course of the negotiations would not be admissible against the prospective witness if the negotiations broke down. So how should the other defendants counter Sam's turning state's evidence?

First, the defense lawyer should not mention the credibility of Sam in her opening. To do so would allow the government to get the maximum amount of information regarding Sam's plea agreement admitted in its case-in-chief. Assuming the defense counsel does not mention the agreement, in the government's case-in-chief, the prosecution may elicit information that Sam is testifying pursuant to a signed (or oral) plea agreement. The prosecution may have Sam identify the agreement and testify as to his understanding of the plea agreement. Consider the following colloquy regarding Sam's understanding of the plea agreement:

> PROSECUTOR: Sam, tell the court your understanding of the terms of the agreement.
> SAM: I would receive favorable treatment if I testified for the government.
> PROSECUTOR: Favorable treatment in what way?
> SAM: The government would (consider) asking the court for a lower sentence in my case.
> PROSECUTOR: Anything else?
> SAM: I had to provide information about what I knew about the (conspiracy) (scheme) to investigators.

So long as the prosecutor does not elicit that Sam's agreement is

206. United States v. Drews, 877 F.2d 10, 12 (8th Cir. 1989).

207. *See generally* William B. Johnson, Annotation, *Use of Plea Bargain or Grant of Immunity as Improper Vouching for Credibility of Witness in Federal Cases*, 76 A.L.R. FED. 409 (2000).

revocable if he should perjure himself and that he would be liable for all crimes committed and information used to impeach him at a later trial, the above colloquy would be acceptable.[208] Addressing these issues have been considered as bolstering to the prosecution case. Thus, to properly adhere to the "regime" of plea agreement admissibility, this information should not be elicited until attacked. Unless, of course, one is in one of the more permissive circuits.

While the government is conducting its direct examination, defense counsel should be alert for instances of improper vouching, raise an objection, and request a curative instruction pursuant to Federal Rule of Evidence 105. If on cross-examination, the defense counsel raises the plea agreement as a credibility issue, then the government may introduce the plea agreement itself on redirect. Defense counsel may consider not making the plea agreement a character issue, and instead directly impeach the witness as towards bias.[209]

Prosecutors may want the direct attack for bias because the argument would be stronger to admit the plea agreement into evidence. Defense counsel not wanting to have a plea agreement admitted may want to impeach the witness indirectly by opinion or reputation evidence. This argument is based on the idea that the witness may be rehabilitated with specific instances of conduct, which may not be proved by extrinsic evidence. Thus, the plea agreement may not be admitted. Defense counsel will want to request a limiting instruction upon the witness's testimony to highlight the fact that the testifying witness pled guilty should not be used by the jury as substantive evidence of the defendant's guilt. If there arises an occasion to admit the plea agreement, prosecutors should be wary of needless repetition of the requirements for truthful testimony.

On closing argument, prosecutors should not argue their personal opinion as to witness veracity, evidence not in front of the jury, or act as a personal guarantor of the witness's veracity. Defense counsel should be attentive for such instances and object and request a limiting instruction if they should arise. If the reference is " brief and non-recurring," it is likely any error will be deemed harmless on appeal.[210] Defense counsel should be aware that failure to object will make any error analyzed on appeal for plain error, an appreciably higher standard than the abuse of discretion standard, usually employed for evidentiary rulings. Defense attorneys may consider moving to strike the prosecutor's remarks. If striking the remarks will not adequately cure the effect of

208. *See* United States v. Edwards, 631 F.2d 1049, 1052 (2d Cir. 1980).
209. United States v. Dring, 930 F.2d 687 (9th Cir. 1991).
210. United States v. Monroe, 943 F.2d 1007, 1017 n.7 (9th Cir. 1991).

the statements, the defense attorney should request an instruction to the effect that the plea agreement promise to tell the truth adds little to the obligation of a witness to tell the truth under oath, that the prosecutor often has no way to ascertain whether or not the witness is telling the truth, that acquittal would not mean that the government would not still make its promise of leniency for the testifying witness, nor that acquittal would cause the government to seek an indictment of the witness for perjury.[211]

VI. THE LOOMING OMNIPRESENCE OF A PLEA OR IMMUNITY AGREEMENT AGAINST THE ACCUSED

Consider Chart (1), highlighting the law on plea agreements among the circuit courts of appeal:

211. United States v. Roberts, 618 F.2d 530, 536 (9th Cir. 1980).

Circuit	Consider Plea Agreement Equally Bolstering and Impeaching?	Allow introduction of Existence of a Plea Agreement on Direct Examination?	Allow introduction of Truthfulness Terms of an Agreement on Direct Examination?[212]	Allow the Witness's Understanding of a Plea Agreement on Direct Examination?	Allow Admission of the Entire Plea Agreement on Direct Examination?[213]
First	Likely; United States v. McNeill, 728 F.2d 5 (1st Cir. 1984) (although the court does not expressly answer the question, opinion notes that immunity agreement disclosure both impeaches and bolsters). *Id.* at 14.	Yes; *McNeill*, 728 F.2d at 14.	Yes; United States v. Winter, 663 F.2d 1120 (1st Cir. 1981), *citing* U.S. v. Craig, 573 F.2d 513 (7th Cir. 1978).	Yes; *Winter*, 663 F.2d at 1134.[214]	Likely; *Winter*, 663 F.2d 1120 (1st Cir. 1981); United States v. McNeill, 728 F.2d 5 (1st Cir. 1984) (addressing immunity and compulsion agreements).
Second	No; United States v. Barnes, 604 F.2d 121, 151 (2d Cir. 1979) (a cooperation agreement, when introduced by the government, is used primarily to bolster a witness's credibility).	Yes; United States v. Edwards, 631 F.2d 1049, 1052 (2d Cir. 1980) (in order to anticipate defendant's cross-examination, to preclude giving jury an unjustified impression that the government was concealing this relevant fact).	Okay if attacked; *see* United States. v. Maniego, 710 F.2d 24, 27 (2d Cir. 1983) (truthfulness terms of plea agreement allowed where one of the three co-defendants' lawyers questioned witness's credibility in opening statement); *Edwards*, 631 F.2d at 1052 (prosecutor may not elicit bolstering aspects of	Conditional; United States v. Arroyo-Angulo, 580 F.2d 1137, 1146-47 (2d Cir. 1978); *Edwards*, 631 F.2d at 1051-52 (as motivation for the witness testimony, but may not elicit bolstering terms, i.e. requirement to testify truthfully and penalties for failure, until attacked, which may include	Conditional; *Edwards*, 631 F.2d at 1052 (bolstering aspects may not be admitted absent an attack); United States v. Borello, 766 F.2d 46, 56 (2d Cir. 1985) (reversible error for trial court to allow entire plea agreement to be read into evidence on direct examination absent an attack on wit-

212. *See also* People v. Garcia, 596 N.E.2d 1308, 1317-18 (Ill. App. 2d Dist. 1992); People v. Buschard, 311 N.W.2d 759, 762-66 (Mich. App. 1981), *vacated and aff'd on remand*, 341 N.W.2d 260 (Mich App. 1983) (allowing truthful testimony provisions, in addition to prosecutor's use of that testimony during closing argument).

213. Allowing the entire agreement in on direct would necessarily allow admitting the various components.

214. This case was decided in the context of immunity and compulsion orders. The court, however, uses rationale from cooperation agreements as persuasive reasoning to do so.

Circuit	Consider Plea Agreement Equally Bolstering and Impeaching?	Allow introduction of Existence of a Plea Agreement on Direct Examination?	Allow introduction of Truthfulness Terms of an Agreement on Direct Examination?	Allow the Witness's Understanding of a Plea Agreement on Direct Examination?	Allow Admission of the Entire Plea Agreement on Direct Examination?
Second (cont'd)			plea agreement, including revocability of agreement for perjury, liability for all crimes for perjury, and statements may be used against witness for perjury).	attacks in opponent's opening statement).	ness credibility); U.S. v. Cosentino, 844 F.2d 30, 34 (2d Cir. 1988) (written text of plea agreement may be admitted after defense attacks witness credibility; when admitting plea agreement after an attack, judge should be wary of substantial prejudice under Rule 403, and redact bolstering terms if necessary).
Third	Not yet addressed.	Yes; United States v. Gaev, 24 F.3d 473, 476-77 (3d Cir. 1994) (provided curative instruction given).	Conditional; United States v. Oxman, 740 F.2d 1298, 1303-04 (1984), *vacated on other grounds sub. nom.* United States v. Pflaumer, 473 U.S. 992 (1985), (if government could reasonably anticipate impeachment during cross-examination)	Yes, United States v. Universal Rehabilitation Services (PA), Inc., 205 F.3d 657, 665 n.9 (2000).	Yes; *Universal Rehabilitation*, 205 F.3d at 666.
Fourth	No; Hoover v. Maryland, 714 F.2d 301 (4th Cir. 1983) (undermines witness credibility by showing witness's interest in personal gains). *But see* United States v.	Yes; *Henderson*, 717 F.2d at 137.	Yes; *Henderson*, 717 F.2d at 138.	Likely; *Henderson*, 717 F.2d at 138 (concluding that "the terms" of the plea agreement may be admitted during direct examination, but in fact addressing	Uncertain; *see Henderson*, 717 F.2d at 138 (concluding that "the terms" of the plea agreement may be admitted during direct examination, but in fact addressing

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Fourth (cont'd)	Henderson, 717 F.2d 135, 137 (4th Cir. 1983) (stating that testimony concerning the existence of a plea agreement concerning a government witness can cut both ways).			throughout the opinion the issue of admissibility of the truthfulness provisions of the agreement).	throughout the opinion the issue of admissibility of the truthfulness provisions of the agreement).[215]
Fifth	Not yet addressed.	Yes; United States v. Leslie, 759 F.2d 366, 376 (5th Cir. 1985), *rev'd on reh'g en banc on other grounds*, 783 F.2d 541 (5th Cir. 1986).	Yes; *Leslie*, 759 F.2d at 376-78; United States v. Edelman, 873 F.2d at 795.	Yes, *Leslie*, 759 F.2d 366.	Yes; United States v. Edelman, 873 F.2d 791, 795 (5th Cir.1989) (admitting the plea agreement on direct is not impermissible bolstering). Full disclosure of all terms either through testimony or plea agreement letters is required. *Leslie*, 759 F.2d 366.
Sixth	Yes; United States v. Townsend, 796 F.2d 158, 163 (6th Cir. 1986).	Not yet addressed.	Yes; *Townsend*, 796 F.2d 158.	Yes;. *Townsend*, 796 F.2d 158.	Yes; *Townsend*, 796 F.2d 158.

215. Provided government's questioning does not imply special knowledge of witness's veracity, curative instruction given to use caution in evaluating witness testimony, and prosecutor's close includes no improper use of witness's promise of truthful cooperation. United States v. Romer, 148 F.3d 359, 369 (4th Cir. 1998) (citing United States v. Henderson, 717 F.2d 135, 138 (4th Cir. 1983). *But see* State v. Eby, 673 P.2d 522, 528-29 (Or. 1993) (evidence concerning terms of a plea agreement held to be not irrelevant as they tend to neither prove nor disprove credibility).

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Seventh	Yes; United States v. Mealy, 851 F.2d 890, 899 (7th Cir. 1988).	Yes; United States v. Montani, 204 F.3d 761 (7th Cir. 2000).	Yes; United States v. Hedman, 630 F.2d 1184, 1198-99 (7th Cir. 1980) (unless there is some additional implication that the government possessed special knowledge of the witness's veracity); *Mealy*, 851 F.2d at 898-900.	*Mealy*, 851 F.2d 890 (1988); United States v. Craig, 573 F.2d 513 (7th Cir. 1978).	Yes; *Mealy*, 851 F.2d 890.
Eighth	Yes; United States. v. Drews, 877 F.2d 10, 12 (8th Cir. 1989).	Yes; United States v. Magee, 19 F.3d 417 (8th Cir. 1994).	Yes; *Drews*, 877 F.2d 10; United States v. Tate, 915 F.2d 400 (8th Cir. 1990).	Yes; *Tate*, 915 F.2d 400.	Yes; *Drews*, 877 F.2d at 12.
Ninth	No; United States v. Roberts, 618 F.2d 530, 536 (9th Cir. 1980) (agreements aid the government's case) .[216]	Yes; *Roberts*, 618 F.2d at 535 (provided judge consider jury instructions to dispel improper suggestions of government vouching for truthfulness).	Likely; United States v. Kats, 871 F.2d 105, 107 (9th Cir. 1989) (referring to truthful testimony not vouching when made in response to an attack on the witness's credibility due to plea bargain). However, there is no	Allows the "terms" to be admitted in order for jury to assess witness credibility. United States v. Portac, 869 F.2d 1288, 1296 (9th Cir. 1989); *see also Wallace*, 848 F.2d at 1474 (references to plea agreement on direct	Yes, provided judge consider jury instructions to dispel improper suggestions of government vouching for truthfulness; *Roberts*, 618 F.2d at 535.[217]

216. The agreement aids government by indicating the witness's knowledge of the crime or by improperly suggesting "that the prosecutor is forcing the truth from his witness and [thereby conveying] the unspoken message that the prosecutor knows the truth and is assuring its revelation." United States v. Roberts, 618 F.2d 530, 536 (9th Cir. 1980).

217. *Roberts* contains a caveat. "Evidence is not admissible . . . simply because it is contained in a plea agreement. References to irrelevant or prejudicial matters . . . are often excluded." *Roberts,* 618 F.2d at 535.

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Ninth (cont'd)			bright line rule. United States v. Monroe, 943 F.2d 1007, 1014 (9th Cir. 1991). It is not plain error in light of additional evidence against accused. United States v. Lew, 875 F.2d 219, 223 (9th Cir. 1989) (vouching may have occurred where beneficiary witness's credibility not attacked).	examination before attack suggest witness is compelled by prosecutor threats to reveal the truth does not rise to reversible error; cumulative effect with other errors may however warrant reversal; remanded to district court for determination).	
Tenth	Yes; United States v. Bowie, 892 F.2d 1494, 1499 (10th Cir. 1990); United States v. Lord, 907 F.2d 1028, 1029 (10th Cir. 1990).	Yes; *Lord*, 907 F.2d at 1031.	Yes; *Lord*, 907 F.2d at 1031.	Yes. In *Lord*, the issue of whether plea agreement evidence was admissible on direct examination arose from testimonial evidence from the three witnesses who entered into plea agreements with the government. *Lord*, 907 F.2d at 1029. The evidence was held to be admissible. *Id.* at 1031.	Not yet addressed. The *Lord* opinion, however, reasons that a majority of circuits allow the government to admit "evidence" of plea agreements prior to any challenge to a witness's credibility.
Eleventh	Not yet addressed.	Not yet addressed.	Conditional; United States v. Cruz, 805 F.2d 1464, 1480 (10th Cir. 1986) (if witness's credibility is attacked during defendant opening statement).	Not yet addressed. However, *text* of plea agreement is admissible, minus truthfulness provisions absent an attack (see panel to right).	Yes, but truthfulness provision must be redacted if credibility is not attacked; United States v. Hilton, 772 F.2d 783, 787 (10th Cir.

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Eleventh (cont'd)				Thus, testimonial evidence of witness's understanding likely is admissible. By analogy to the rule pertaining to written agreements, the truthfulness provisions should be excluded from a witness's understanding, unless credibility is attacked.	1985);.[218] Attack may be on defendant's opening statement, *Cruz*, 805 F.2d at 1480.
D.C.	Yes; United States v. Spriggs, 996 F.2d 320, 324 (D.C. Cir. 1993).	Not yet addressed, but likely; *Spriggs*, 996 F.2d at 324.	Yes; *Spriggs*, 996 F.2d at 324.	Yes. In *Spriggs*, the issue of whether plea agreement evidence was admissible on direct examination arose from testimonial evidence from the government witness who entered into a plea agreement with the government. *Spriggs*, 996 F.2d at 323. There was no error in admitting testimony, let alone plain error. *Id.* at 324	Not yet addressed, but likely. *See Spriggs*, 996 F.2d at 324.

Chart (1)[219]

218. *But see* United States v. Williford, 764 F.2d 1493, 1502 (11th Cir. 1985) (admitting a plea agreement does not constitute bolstering by a prosecutor) (citing United States v. Martino, 648 F.2d 367, 389 (5th Cir. 1981)). *Williford* and *Martino* are distinguishable, however, because the issue in both cases is set in the context of rehabilitation of the witnesses' credibility after a thorough cross-examination. *Williford*, 764 F.2d at 1501-02; *Martino*, 648 F.2d at 389.

219. To conserve space, citations in the chart do not include whether *certiori* was denied, nor do they include the Court, provided in the axis, unless another circuit court is cited.

As evidenced by the chart, a defendant hoping to exclude evidence from a witness testifying pursuant to a plea agreement faces a steep uphill climb. Few cases have been reversed due to a prosecutor improperly vouching.[220]

The Second, Ninth, Tenth, and Eleventh Circuits may be the last hold outs to total open admissibility of any facet of a plea agreement, leaving only a cautionary instruction as a barrier between the defendant and the damage a beneficiary-witness's plea agreement can do. The most stringent, the Second Circuit, lamented in 1988 that, were it writing on a blank slate, it may have followed the majority of circuits and not caused parties in the heat of trial to discern between niceties of what information was bolstering and what was impeaching.[221]

The Ninth Circuit's guidance starting in 1980 with *United States v. Roberts*,[222] and extending through four other cases decided in 1988 and 1989, provide sound guidance in handling plea agreements.[223] Consider the Ninth Circuit decision in *United States v. Wallace*. In *Wallace*, the court reasoned that a witness who signed a plea agreement and referred to the agreement on direct examination may be an error, either individually or cumulatively with two other possible errors cited by the Ninth Circuit.[224] The case was remanded to determine whether any of the three errors constituted reversible error on one of the two defendants' convictions.[225] *Wallace* is reconcilable with *Roberts*, decided eight years prior, because *Roberts* requires a determination by the judge to issue a cautionary instruction before admitting a plea agreement. No such instruction was given in *Wallace*.[226]

The Seventh Circuit's decision in *United States v. Hedman* may offer protection of an unjustly accused against a witness who had signed a plea agreement.[227] Under *Hedman*, truthfulness terms of an agreement will be admitted unless there is some additional implication that the government possessed special knowledge of the witness's veracity.[228] But what does this really mean? It sounds like the plea agreement terms will not be admitted if the government is vouching for the witness. The

220. *See supra* Part III.B.2.i.

221. United States v. Cosentino, 844 F.2d 30, 33 n.1 (2d Cir. 1988).

222. *Roberts*, 618 F.2d 530.

223. United States v. Lew, 875 F.2d 219 (9th Cir. 1989); United States v. Kats, 871 F.2d 105 (9th Cir. 1989); United States v. Portac, 869 F.2d 1288 (9th Cir. 1989); United States v. Wallace, 848 F.2d 1464 (9th Cir. 1988).

224. 848 F.2d 1464 (9th Cir. 1988).

225. *See id.* at 1473-74.

226. *Id.* at 1476.

227. 630 F.2d 1184, 1198-99 (7th Cir. 1980).

228. *See id.* at 1198.

prohibitions against vouching already exist, and by now prosecutors are surely aware of the limitation. *Hedman* is protection without function.

Substantive information regarding a plea agreement is going to be admitted. Consider the Eight Circuit's opinion in *United States v. Drews*,[229] which expanded earlier Eighth Circuit decisions *United States v. Hutchings*[230] and *United States v. Braidlow*[231] as reasoning to admit the written text of the plea agreements. *Drews* used those cases for the proposition that a confederate's plea or plea agreement is admissible on direct examination of the government's witness as evidence of his credibility and acknowledgment of his participation in the offense.[232] *Hutchings*, however, addressed the admissibility of a confederate's plea, while *Braidlow* addressed admissibility of confederates' "pleas and plea arrangements" on direct examination. Yet, in neither of those two cases was the physical plea agreement at issue. This extension is demonstrative of the lack of real substance between, on one hand a confederate's oral testimony of the "arrangements" or the "terms" to show the witness's "understanding" of a play agreement and the admission of the written plea agreement.

VII. CONCLUSION

Put the issue with plea agreements in terms of what a jury is hearing. Can there be that much of a difference if a jury hears the terms of a plea agreement, (or the witness's "understanding" of the agreement), and if the jury does not get a chance to actually see the agreement in the jury room? The damage to the defendant is done. It will likely be lasting, despite any appropriate cautionary instruction.

Even in the more stringent circuits, such as the Second, Ninth, and Eleventh, the only way information surrounding a plea agreement could possibly not be admitted is when the defense chooses not to attack the witness's credibility, an unlikely tactic given the damaging testimony from the government's witnesses. The march towards admissibility of just about all facets of a plea agreement began with the defense arguing that eliciting plea agreements constituted impermissible vouching or bolstering. It evolved to the point where to get the best deal, an accused better turn state's evidence early if involved in a criminal transaction with others. If there is a lone criminal, he best admit responsibility early in order to save himself from the harsher sentences allowed under the Federal Sentencing Guidelines.

229. 877 F.2d 10 (8th Cir. 1989).
230. 751 F.2d 230 (8th Cir. 1984).
231. 806 F.2d 781 (8th Cir. 1986).
232. United States v. Drews, 877 F.2d 10, 12 (8th Cir. 1989).

Despite the restriction against using a witness's guilt in a criminal transaction as evidenced in a plea agreement as propensity evidence that the accused is also guilty, one cannot help but wonder how effective that restriction will be. Consider a typical witness's testimony. It would likely consist of his presence at the scene, information on the planning of the crime, and testimony on the accused's role. Indeed, one of the only tactics available to a defense attorney is to attack with both barrels at the witness's credibility and highlight the quid pro quo for the witness's testimony and other assistance in the case.

Indeed, the devastating effect of a witness testifying against an accused pursuant to a plea agreement, combined with the *Old Chief* verbiage allowing the prosecutor to "weave his tale" to effectuate his case, allows the prosecutor much leeway, with little room for prosecutorial accountability.[233] Criminal trials have become criminal processes when a plea agreement is involved. On the surface this may not necessarily be a bad thing, but it goes far in effecting judicial efficiency. A defendant signing a plea agreement in return for a recommendation from the prosecutor for sentencing at the low end of an offense level is not necessarily getting much. For example, for an offense level of twenty-two, the range is forty-one to fifty-one months; the difference in this case may at most be a difference of ten months jail time.[234] Regardless, this misses the point: a defendant who enters into the plea agreement relatively early into an investigation may be able to plead to a lesser number or type of crime in exchange for his testimony, thus lessening his culpability. Considering the motivation one has to tell the court what the government wants to hear, this would result in gross injustice towards the unjustly accused, as this testimony will be truly insurmountable by any defendant.

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233. *See generally* Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939 (1997).

234. HAINES, *supra* note 12, at inside front cover. Other example ranges: offense level twenty-six ranges from sixty-three to seventy-eight months, while offense level nineteen is thirty to thirty-seven months.

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