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United States v. Singleton and the Witness Gratuity Statute: What Is the Best Approach for the Criminal Justice System?*

I. INTRODUCTION

The American Bar Association Canons of Professional Ethics provide that a lawyer cannot induce favorable testimony from a witness in exchange for something of value.¹ Most states have similar provisions.² The United States Code contains a similar provision which prohibits the exchange of something of value for testimony.³ Despite this provision (known as the witness gratuity statute), the Department of Justice has made a regular practice of paying prosecution witnesses for testimony, either with monetary payments or recommendations for lenient sentences.⁴ For example, the FBI paid Emad Salem \$1,056,200 for his testimony in the terrorism trial of Sheik Omar Abdel Rahman who was charged with plotting to bomb the United Nations.⁵ This statute has been applied to defense attorneys for awarding something of value to their witnesses but courts have refused to apply the statute to prosecutors when they give something of value to prosecution witnesses.⁶ The issue of the applicability of this statute to federal prosecutors came to the forefront in a case before the Tenth Circuit in 1998.⁷ The decision evoked a nationwide response⁸ and even inspired Hollywood.⁹

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1. See Alexander J. Menza, *Witness Immunity: Unconstitutional, Unfair, Unconscionable*, 9 SETON HALL CONST. L.J. 505, 534 (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(c) (1980)).

2. See, e.g., KANSAS RULE OF PROFESSIONAL CONDUCT 3.4b.

3. See 18 U.S.C. § 201(c)(2) (1994). It states:

Whoever directly or indirectly, gives, offers, or promises anything of value to any person, for or because of testimony under oath or affirmation given or to be given by such person as a witness upon a trial . . . before any court . . . shall be fined under this title or imprisoned for not more than two years, or both.

Id.

4. See J. Richard Johnston, *Why is it OK for the Prosecution, but not the Defense?*, 11 CRIM. JUST. 21 (1997).

5. See *id.*

6. See *United States v. Blanton*, 700 F.2d 298 (6th Cir. 1983); *United States v. Barrett*, 505 F.2d 1091 (7th Cir. 1974); *United States v. Isaacs*, 347 F. Supp. 763 (N.D. Ill 1972).

7. See *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998).

8. See, e.g., Marcia Coyle & David E. Rovella, *Stunning Rulings Curtail Prosecutors'*

On July 10, 1998, a three-judge panel issued an opinion for the United States Court of Appeals for the Tenth Circuit, unanimously overturning the conviction of Sonya Singleton for money laundering.¹⁰ The panel became the first to apply the witness gratuity statute to federal prosecutors.¹¹ Traditionally, courts had been reluctant to apply the statute, which prohibits the giving of anything of value for testimony, to federal prosecutors.¹² The panel first reasoned that the statute applied to assistant United States attorneys and then went on to hold that prosecutors' offers of nonprosecution or intervention at sentencing were things of value, as prohibited by the statute.¹³ Accordingly, because the government's chief witness against Ms. Singleton had been offered something for his testimony, the Tenth Circuit held that Ms. Singleton's conviction had been obtained in violation of 18 U.S.C. § 201(c)(2).¹⁴

In response to this decision, prosecutors from coast to coast portrayed it as the death knell of the present criminal justice system.¹⁵ Immediately following the decision, legislation to amend the statute was introduced in the Senate.¹⁶ Within seventy days, nineteen federal district courts had published opinions dealing with the issue.¹⁷ Criminal defendants all over the country moved to suppress the testimony of chief witnesses with the new ammunition provided by the Singleton decision.¹⁸ Most jurisdictions rejected the panel's interpretation, while only a couple adopted their reasoning.¹⁹

Almost immediately, the United States Court of Appeals for the Tenth Circuit vacated the panel's decision, *sua sponte*, and ordered a re-hearing before the Tenth Circuit *en banc*.²⁰ The Tenth Circuit issued a

Power, NAT'L L.J., July 20, 1998, at A1; Bruce Fein, *Fairer Trials . . . or Roadblocks?*, WASH. TIMES, July 14, 1998, at A18; *Plea Bargains as 'Bribery.'* DET. NEWS, July 31, 1998 at A10.

9. The issue inspired a Law and Order episode involving the FBI's payment to a witness.

10. See *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998).

11. See *id.*

12. See *United States v. Barrett*, 505 F.2d 1091 (7th Cir. 1974); *United States v. Isaacs*, 347 F. Supp. 763 (N.D. Ill. 1972).

13. See *Singleton*, 144 F.3d at 1350.

14. See *id.* at 1351.

15. See Justin M. Lungstrum, *United States v. Singleton: Bad Law Made in the Name of a Good Cause*, 47 U. KAN. L. REV. 749 (1999).

16. See *id.* at 749.

17. See *id.*

18. See *id.* at 750.

19. See *id.* (citing *United States v. Lowery*, 15 F. Supp. 2d 1348 (S.D. Fla. 1998), *rev'd*, 166 F.3d 1119 (11th Cir. 1999)); *United States v. Mays*, No. 97CR127 (E.D. Tenn. 1998), *cited in* *United States v. Ramsey*, 165 F.3d 980, 987 (D.C. Cir. 1999); *United States v. Fraguella*, No. Crim.A. 96-339, 1998 WL560352, at *1 (E.D. La. 1998), *vacated*, No. Crim.A. 96-339, 1998 WL 910219, at *2 (E.D. La. 1998).

20. See *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (*en banc*).

new opinion in January of 1999 with a completely different outcome.²¹ The majority found that the statute did not apply to assistant United States attorneys.²² As a result, the court did not have to address the issue of whether offerings of nonprosecution or intervention constituted something of value. The new decision rested on a strained interpretation of the term "whoever."²³ However, the decision saved the long-standing practice of obtaining key testimony in exchange for leniency. The concurring opinions offered a different rationale for maintaining the tradition—other statutes protected the practice.²⁴ The dissent in this opinion consisted of the judges who issued the original opinion that was vacated.²⁵

This casenote will address the issue of whether or not the first opinion had it right or whether the majority or concurring opinions in the en banc decision were right. It will also address the policy implications of both holdings. Section II of this casenote will provide a background into the practice of exchanging leniency for testimony and a background into the creation of the witness gratuity statute. Section III will outline the facts and reasoning behind *Singleton I*. Section IV will outline reasoning of *Singleton II*. Section V provides analysis into the ultimate issue of which panel had the right decision, based on both legal rationale and public policy reasons. Section V will also include a discussion of possible solutions to the issue.

II. BACKGROUND

A. Tradition of Exchanging Leniency for Testimony

The *Singleton I* court condemned a time-honored prosecutorial tool of offering leniency and intervention for testimony. The practice of exchanging leniency for testimony dates back centuries to England where English Justices of the Peace would agree to nonprosecution of defendants in return for their assistance in prosecuting their confederates.²⁶ Continuing the practice, early American prosecutors utilized the assistance of co-conspirators in prosecuting one another. "By 1878, this informal immunity arrangement—which allowed prosecutors to control whether a defendant could obtain leniency—but not the extent of that leniency, had become quite prevalent in the United States."²⁷ The Supreme

21. *See id.* at 1298.

22. *See id.* at 1301.

23. *See id.* at 1299.

24. *See id.* at 1302-08.

25. *See id.* at 1308.

26. *See* Lungstrum, *supra* note 15, at 751.

27. *Id.* at 752 (quoting Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 85

Court in the *Whiskey Cases*²⁸ considered the validity of a defendant's plea agreement. While evaluating the facts, the Court noted that it was well established that an accomplice may avoid prosecution for the same offense if willing to testify against his associates.²⁹ Prior to organized police forces, accomplice testimony was even more valuable than it is today and accomplices received greater benefits for their testimony.³⁰ Now, the traditional awards of clemency or immunity have largely been replaced by pleas to less serious charges.³¹ However, this change in rewards in no way diminishes the importance of the testimony. In a more recent case, the United States Court of Appeals for the Fifth Circuit noted that "[n]o practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence."³²

Offering leniency has an established place in the common law tradition of our criminal justice system. The court in *Singleton II* recognized such tradition and seemingly based a large majority of their analysis on the established tradition. The court found that the common law tradition had "created a vested sovereign prerogative in the government."³³

B. 18 U.S.C. § 201(c)(2)

Known as the witness gratuity statute, the statute expressly forbids giving anything of value for or because of testimony.³⁴ The decision in *Singleton I* stands for the proposition that a federal prosecutor violates this statute when they offer leniency or intervention in return for substantial assistance in the prosecution of their associates.³⁵ Prior to this decision, the statute had never been read this expansively.³⁶

After eight years of hearings and studies on the federal conflict of interest and bribery statutes, Congress enacted the federal prohibition against witness gratuities in 1962.³⁷ The hearings, spearheaded by the

(1995)).

28. 99 U.S. 594 (1878).

29. See *id.* at 599.

30. See Ian Weinstein, *Regulating the Market for Snitches*, 47 *BUFF. L. REV.* 563, 569 (1999).

31. See *id.*

32. *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987).

33. *United States v. Singleton*, 165 F.3d 1297, 1301 (10th Cir. 1999) (en Banc).

34. See 18 U.S.C. § 201(c)(2) (1994).

35. See *United States v. Singleton*, 144 F.3d 1343, 1343 (10th Cir 1998).

36. See *United States v. Blanton*, 700 F.2d 298 (6th Cir. 1983); *United States v. Barrett*, 505 F.2d 1091 (7th Cir. 1974); *United States v. Isaacs*, 347 F. Supp. 763 (N.D. Ill 1972); *supra* note 6 and accompanying text.

37. See Lungstrum, *supra* note 15, at 754.

House Judiciary Committee's Antitrust Subcommittee, also included input from a variety of other interested federal and non-governmental entities. Prior to 1962, the bribery statute relating to witnesses prohibited "payment to a witness or prospective witness before a court or before an officer authorized to take testimony upon an agreement or understanding that his testimony will be influenced thereby or that he will absent himself from the trial or hearing."³⁸ The staff report proposed broadening the scope of section 209 to include testimony before Congress and other federal agencies. In addition, witness gratuities—things of value given for or because of testimony regardless of the intent of the parties—were incorporated into the draft witness bribery statutes.³⁹

In 1960, the House Antitrust committee began the first round of hearings on the proposed legislation.⁴⁰ Twenty federal agencies submitted departmental reports during these hearings.⁴¹ In addition, these agencies sent representatives to testify about the effects of the proposed legislation.⁴² Additionally, eight other federal administrative bodies testified and the American Bar Association scrutinized the legislation.⁴³ The second round of hearings solicited reports from two more federal agencies including the Department of Justice.⁴⁴

The statute was created with the purpose of creating uniformity in the federal bribery statutes.⁴⁵ At the time of its creation, there were nine general federal bribery statutes containing a number of variations.⁴⁶ It is important to note here that neither the witnesses nor the report suggested that the legislation would criminalize the customary prosecutorial practice of offering leniency for testimony.⁴⁷ The legislative report, totaling nearly 1350 pages, made no mention of such a purpose.⁴⁸ The legislation was adopted and codified in 18 U.S.C. § 201(h), the direct predecessor of section 201(c)(2).⁴⁹

38. 18 U.S.C. § 209 (1962).

39. See Lungstrum, *supra* note 15, at 754.

40. See *id.* at 754-55.

41. See *id.* at 755.

42. See *id.*

43. See *id.*

44. See *id.*

45. See *id.* at 754.

46. See *id.*

47. See *id.* at 756.

48. See *id.* at 754.

49. See *id.*

III. SINGLETON I

A. *Facts*

In April 1992, a Wichita police detective conducted an investigation to determine if drug dealers were using Western Union services to transfer drug money.⁵⁰ His investigation uncovered a large number of wire transfers over \$1000 which bore similar identifiers, including similar names, addresses, and phone numbers of senders.⁵¹ The names led authorities to a group of suspected drug dealers.⁵² Further investigation indicated that a group of men who had moved from California to Wichita had started the drug business.⁵³ The dealers recruited local women to wire money back to California to pay for more cocaine.⁵⁴ Some of the women even transported drugs from California back to Wichita.⁵⁵ Police identified defendant Sonya Singleton as one of the women who received and transferred money for the drug dealers.⁵⁶ Her name was listed as either the sender or recipient on eight wire transfers alleged to have been sent on behalf of the dealers.⁵⁷ Handwriting experts confirmed the fact that her handwriting was present on the paperwork accompanying the transfers.⁵⁸ Ms. Singleton was charged with multiple counts of money laundering and conspiracy to distribute cocaine.⁵⁹

Before trial, Ms. Singleton filed a motion to suppress the testimony of one of her co-conspirators, Napoleon Douglas, who had entered into a plea agreement with the government. Ms. Singleton based her motion on the grounds that the government illegally promised Mr. Douglas “something of value”—leniency—for his testimony, in violation of 18 U.S.C. § 201(c)(2) and Kansas Rule of Professional Conduct 3.4(b), which prohibits offering unlawful inducements to a witness.⁶⁰ The district court denied the motion on the basis that section 201(c)(2) did not apply to the government.⁶¹ As a result, Mr. Douglas testified at the trial that an assistant United States attorney had promised to file a motion for a downward

50. *See* United States v. Singleton, 144 F.3d 1343, 1343 (10th Cir. 1998).

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.* at 1344.

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.*

departure if he testified truthfully.⁶² However, in Mr. Douglas's written plea agreement, there was no firm promise to file such a motion, only an agreement that the government may file one if Mr. Douglas's cooperation amounted to substantial assistance.⁶³

The plea agreement did state three specific promises made by the government to Mr. Douglas in return for his truthful testimony in federal or state court.⁶⁴ First, the government promised not to prosecute Mr. Douglas for any other violations under the Drug Abuse Prevention and Control Act stemming from the current investigation, with the exception of perjury or related offenses.⁶⁵ Second, the government promised to notify the sentencing court of the extent of the cooperation provided by Mr. Douglas.⁶⁶ Finally, the government promised "to advise the Mississippi parole board of the nature and extent of the cooperation provided" by Mr. Douglas.⁶⁷

Ms. Singleton was convicted of one count of conspiracy to distribute cocaine and seven counts of money laundering for which the district court sentenced her to forty-six months of imprisonment for each count.⁶⁸ Ms. Singleton appealed her conviction to the United States Court of Appeals for the Tenth Circuit, which found, *inter alia*, that the district court erred in denying Ms. Singleton's motion to suppress testimony obtained in violation of 18 U.S.C. § 201(c)(2).⁶⁹

B. The Court's Reasoning

1. Plain language

First, the court looked to the plain meaning of the statute to determine if there was an exemption for the government. The court began with the plain language because plain language "must ordinarily be regarded as conclusive."⁷⁰ The court also pointed to a recent Supreme Court decision relying on the plain language of the federal bribery statute. In *Salinas v. United States*,⁷¹ the Court refused to expand the reading

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

67. *See id.*

68. *See id.* at 1343.

69. *See id.*

70. *Id.* at 1344 (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

71. 522 U.S. 52 (1997).

of the federal bribery statute because of the plain language of the statute. In a later decision, *Brogan v. United States*,⁷² the Supreme Court rejected a proposition that criminal statutes “do not have to be read as broadly as they are written,” and stated:

[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself . . . Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so.⁷³

The court in this case found that the language of section 201(c)(2) could not be clearer—there is no exception for the government. In response to the government’s argument that the term ‘whoever’ does not include assistant United States attorneys, the court engaged in a discussion of *Nardone v. United States*.⁷⁴ In *Nardone*, the Court recognized a limited canon of construction, which provided that statutes do not apply to the government or affect governmental rights unless the text expressly includes the government.⁷⁵ However, the limited canon only applies to two classes of cases: (1) cases which involve statutes that deprive the sovereign of a “recognized or established prerogative title or interest” and (2) cases in which “public officers are impliedly excluded from language embracing person” because such a reading would “work obvious absurdity.”⁷⁶ The court reasoned that neither of the two classes were similar to this case.⁷⁷

An example of the first class of cases is the exemption of the sovereign from statutes of limitation. Two additional exceptions remove section 201(c)(2) from this class of statutes. First, the presumption that the sovereign is excluded unless named does not apply “where the operation of the law is upon the agents or servants of the government rather than on the sovereign itself.”⁷⁸ In this case, the statute operates only on the agents, the assistant United States attorneys themselves, in that it limits what they may offer in exchange for testimony. The second additional exception provides that the government is subject to a statute, even if it infringes upon a recognized government’s prerogative, if the statute’s purpose is to prevent fraud, injury, or wrong. *Nardone* relied on this ex-

72. 522 U.S. 398 (1998).

73. *Id.* at 403, 408.

74. 302 U.S. 379 (1937).

75. *See id.* at 383.

76. *Id.* at 383-84.

77. *See id.*

78. *Id.* (quoting *United States v. Arizona*, 295 U.S. 174, 184 (1935)).

ception to find that federal agents were covered by the word “anyone” in the 1934 federal wiretap statute.⁷⁹ Section 201(c)(2) addresses a wrong that Congress intended to remedy.⁸⁰ The court reasoned that if justice is perverted when a criminal defendant seeks to buy testimony, it is just as perverted when a government official attempts to do the same.⁸¹ The statute operates to prevent fraud upon the federal courts and, as a result, fits under this exception as well.

An example of the second class of cases, where applying the statute to public officers would work obvious absurdity, is a speed limit applied to a policeman pursuing a suspect. After a discussion of common law tradition and legal principle, the court concluded that the application of section 201, rather than being an absurdity, was at the center of legal tradition. The importance of preserving truthful testimony is paramount. The opinion stated, “[t]he judicial process is tainted and justice cheapened when factual testimony is purchased, whether with leniency or money.”⁸²

The court then considered whether applying section 201(c)(2) to federal prosecutors worked an obvious absurdity in view of the federal immunity statutes.⁸³ Finding that the statutes operated in separate spheres, the court concluded that the statutes can operate fully and independently.⁸⁴ The court noted here that if the assistant United States attorneys were not covered by the statutory term ‘whoever’ then the statute would not prohibit bribing a witness for testimony, which the government does concede is prohibited.⁸⁵ The court seemed to imply that this interpretation would work an obvious absurdity. Therefore, the court concluded that the section does apply to federal prosecutors.⁸⁶ The language makes no exception for the action of assistant United States attorneys.⁸⁷

The only issue left to address with regard to plain meaning was whether the promises made to Mr. Douglas constituted “anything of value” as prohibited by the statute.⁸⁸ Based on the plain language, the court assumed the everyday meaning of the phrase. “Value” embodies

79. *See id.* at 384.

80. *See United States v. Singleton*, 144 F.3d 1343, 1346 (10th Cir. 1998).

81. *See id.*

82. *Id.* at 1347.

83. *See id.* at 1348 (The federal immunity statutes are codified at 18 U.S.C. §§ 6001-6005 (1994)).

84. *See id.*

85. *See id.* at 1348.

86. *See id.*

87. *See id.*

88. *See id.*

notions of worth, utility, and importance generally.⁸⁹ Courts have recognized that the phrase must be broadly construed.⁹⁰ Other circuits have noted that the phrase is a term of art and includes tangible as well as intangible items.⁹¹ The court agreed with the interpretation that the phrase is not limited to tangible items, specifically monetary payments, and cited other court rulings, precedent, and statutory purpose to support its interpretation.⁹² Based on the plain language of the statute, the court found that the section was violated.⁹³ The court then moved to an analysis of the structure of section 201.

2. Structure of section 201

The court found it persuasive that other subsections within section 201 contain requirements of corruption and subsection (c)(2) did not.⁹⁴ For example section 201(b)(3) deliberately includes a corruptness and intent-to-influence requirement.⁹⁵ More importantly, the predecessor to section 201(c)(2) also had a requirement that the thing of value influence the testimony.⁹⁶ The court refused to re-insert this requirement where Congress had left it out of the current version.⁹⁷ In addition, the court found no clearly expressed legislative intention that contradicted the statute's language.⁹⁸

3. Law enforcement justification

The court next addressed the government's vague argument that overriding policy justifications warranted a finding that section 201(c)(2) did not apply to government officials.⁹⁹ "Criminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law."¹⁰⁰ If the justification applied, conduct that violates the terms of a

89. See *id.* at 1348-49.

90. See *id.* at 1349 (discussing *United States v. Williams*, 705 F.2d 603, 622-23 (2nd Cir. 1983)).

91. See *United States v. Nilsen*, 967 F. 2d 539, 542-43 (11th Cir. 1992) (construing 18 U.S.C. § 876); *United States v. Schwartz*, 785 F.2d 673, 679-81 (9th Cir. 1986) (construing 18 U.S.C. § 1954).

92. See *Singleton*, 144 F.3d at 1349-50.

93. See *id.* at 1351.

94. See *id.*

95. See *id.* (citing 18 U.S.C. § 201(b)(3) (1994)).

96. See *id.*

97. See *id.*

98. See *id.* at 1351-52.

99. See *id.* at 1352.

100. *Id.* (quoting *Brogan v. United States*, 522 U.S. 398, 406 (1998)).

criminal statute is nevertheless allowed. The law enforcement justification is generally described as follows:

[A] peace officer, prison guard, or private citizen authorized to act as a peace officer may, to the extent necessary to make an arrest, prevent an escape, or prevent the commission of a crime, violate a criminal statute if the conduct which constitutes the violation is reasonably in relation to the gravity of the evil threatened and the importance of the interest to be furthered.¹⁰¹

The justification does not apply to this case because the action was not undertaken by a peace officer or one acting in that capacity and it was not required to make an arrest or prevent an escape or other crime. The justification is limited to enforcement actions, which are not at issue here.

4. Precedent

Prior to the Tenth Circuit's decision in *Singleton I* and *II*, only three other courts had been faced with the issue of whether section 201(c)(2), or its immediate predecessor, applied to federal prosecutors. At this point in the opinion, the Tenth Circuit engaged in a thorough discussion of those three cases, explaining why the previous courts had failed in their attempts to properly construe the statute.¹⁰²

In the 1972 case of *United States v. Isaacs*,¹⁰³ the United States District Court for the Northern District of Illinois faced this issue. In *Isaacs*, the defendant, facing prosecution for conspiracy and various substantive offenses, moved for an evidentiary hearing concerning allegations that the United States attorney illegally obtained a business license for Ms. Marjorie L. Everett, a prospective witness, in violation of 18 U.S.C. § 201(h), the direct predecessor of section 201(c)(2).¹⁰⁴ The defendant based his motion on the idea that such a license was an attempt to influence Ms. Everett's testimony.¹⁰⁵ The court's analysis at this point misconstrues the requirements of the section—there does not need to be an intent to influence in order to constitute a violation of the gratuity statute.¹⁰⁶ The statute does not include that language. Moreover, the court in *Isaacs* does not really address the issue of whether or not this statute applies to federal prosecutors.

101. *Id.* (citing PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 142(a) (1984)).

102. *See* *United States v. Blanton*, 700 F.2d 298 (6th Cir. 1983); *United States v. Barrett*, 505 F.2d 1091 (7th Cir. 1974); *United States v. Isaacs*, 347 F. Supp. 763 (N.D. Ill. 1972).

103. 347 F. Supp. 763 (N.D. Ill. 1972).

104. *See id.* at 767.

105. *See id.*

106. *See* *United States v. Singleton*, 144 F.3d 1343, 1356 (10th Cir. 1998).

In 1974, the issue was presented before the United States Court of Appeals for the Seventh Circuit in *United States v. Barrett*.¹⁰⁷ In *Barrett*, the United States District Court for the Northern District of Illinois found defendant Edward Barrett guilty of mail fraud, interstate travel in aid of racketeering enterprises, and attempting to evade income taxes.¹⁰⁸ The defendant appealed his conviction arguing, *inter alia*, that the government violated the witness gratuity statute by offering exemptions from paying tax penalties to the prosecution's primary witness.¹⁰⁹ The court found that there was no violation because the U.S. Code authorizes the granting of civil immunity.¹¹⁰

The *Singleton I* panel disagrees with this conclusion pointing out that the Seventh Circuit reasoned from the faulty premise that the section only prohibited the giving of unauthorized items for testimony.¹¹¹ However, the statute clearly proscribed giving anything of value for testimony. The Seventh Circuit ignored the plain language of the statute. Section 201(c)(2) does not discriminate on the basis of what things of value are authorized; rather, it discriminates on the basis of whether the thing of value is given "for" or "because of" testimony.¹¹²

Finally, in 1983, the Sixth Circuit faced the issue of whether a prosecutor's grant of immunity violated section 201(h) in *United States v. Blanton*.¹¹³ In *Blanton*, defendants were convicted of crimes relating to issuance of retail liquor licenses during the time that one of the defendants, Blanton, was governor of Tennessee.¹¹⁴ The most important evidence at trial was the videotaped deposition of Jack Ham, an immunized witness who received a liquor license during Blanton's tenure as governor.¹¹⁵ In exchange for his testimony, the government offered him immunity from federal prosecution and civil tax liability. The defendants argued that the testimony should have been suppressed because the government gave him something of value for the testimony in violation of 18 U.S.C. § 201(h).¹¹⁶ The court rejected the defendants' argument, holding that the "thing of value"—a liquor license—was not given by the government.¹¹⁷ The court reasoned that the government used only per-

107. 505 F.2d 1091 (7th Cir. 1974).

108. *See id.*

109. *See id.* at 1100.

110. *See id.* at 1103.

111. *See Singleton*, 144 F.3d at 1357.

112. *See id.*

113. 700 F.2d 298 (6th Cir. 1983).

114. *See id.* at 300.

115. *See id.*

116. *See id.* at 310.

117. *See id.* at 311.

suasion and exercised no coercive power when it convinced the Alcohol Beverage Commission (ABC) not to revoke Ham's license.¹¹⁸ In addition, the court held that it did not "give" a thing of value because it merely allowed the witness to hold onto what he already had.¹¹⁹

The Sixth Circuit's reasoning did not persuade the *Singleton I* court.¹²⁰ It was not the actual liquor license that was the thing of value in this case.¹²¹ Clearly, the government persuading ABC to allow Mr. Ham to retain his license was the thing of value.¹²² Accordingly, the government agents did violate the statute by persuading ABC to allow Mr. Ham to retain the license in exchange for his testimony.¹²³ The persuasion may have been of great value to Mr. Ham since his liquor license was such a lucrative part of his business.

5. *Criticism of Singleton I*

The practical ramifications of this decision were a serious threat to the ability of prosecutors to effectively do their jobs. Any offer of leniency, intervention, or similar promises would result in criminal prosecution or suppression of relevant and necessary testimony. The panel offers no alternatives to the time-honored practice and does not seem to consider the necessity of the practice to secure convictions of criminals.

IV. SINGLETON II

On July 10, 1998, the United States Court of Appeals for the Tenth Circuit vacated the panel's decision, *sua sponte*, and ordered a rehearing before the Tenth Circuit *en banc*.¹²⁴ In addition to the majority opinion, there were two concurring opinions and a dissent.¹²⁵ Although the majority's decision was necessary to retain the federal prosecutor's ability to exchange leniency for testimony, the majority's statutory interpretation was not convincing.

A. *Majority Opinion*

Ms. Singleton argued that the plain language of the statute left the court no other alternative than to find that the statute applies to federal

118. *See id.*

119. *See id.*

120. *See United States v. Singleton*, 144 F.3d 1343, 1357 (10th Cir. 1998).

121. *See id.* at 1358.

122. *See id.*

123. *See id.*

124. *See United States v. Singleton*, 165 F. 3d 1297 (10th Cir. 1999) (*en Banc*).

125. *See id.*

prosecutors.¹²⁶ She argued that the payment of something of value gives incentive to lie and thus undermines the importance of truthful testimony in our criminal justice system.¹²⁷ The government responded that to allow section 201(c)(2) to apply in this case would result in a radical departure from the ingrained legal culture and would result in criminalizing the historic practice of offering leniency.¹²⁸ Moreover, the government argued, Congress could not have intended to hinder the sovereign's authority to prosecute violations.¹²⁹

The majority agreed with the government's argument, finding that the statute fit into the two classes of statutes that *Nardone* held did not apply to the government.¹³⁰ First, applying section 201(c)(2) in this case would work an obvious absurdity.¹³¹ The majority based its reasoning on the argument that the assistant United States attorney is acting as the alter ego of the United States; therefore, the two cannot be separated.¹³² As a result, the defendant is arguing that the statute applies to the United States and thus, like any other violator of the statute, the United States would be subject to criminal prosecution.¹³³ The majority finds this argument absurd.¹³⁴ Further, the majority reasons, "whoever" connotes a being and the United States is an inanimate entity.¹³⁵

Second, the majority finds that an application of the statute in this case would deprive the sovereign of a recognized and established prerogative—the ability to exchange leniency for testimony.¹³⁶ The sovereign's prerogative to exchange testimony for leniency is ingrained in common law tradition. In light of this tradition, the majority presumed that if Congress had intended to overturn such a tradition, it would have done so in clear language.¹³⁷

The majority then dismisses the argument that their decision could result in prosecutorial misconduct.¹³⁸ Once a prosecutor steps out of line, he or she is no longer working as an alter ego of the sovereign.¹³⁹ Therefore, they become subject to the criminal prohibitions of section

126. *See id.* at 1299.

127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.* at 1300-01.

131. *See id.*

132. *See id.* at 1299-1300.

133. *See id.* at 1300.

134. *See id.*

135. *See id.*

136. *See id.* at 1301.

137. *See id.* at 1302.

138. *See id.*

139. *See id.*

201(c)(2).¹⁴⁰ Although there is the shibboleth that “the government is not above the law,” it does not apply in this case because the statute does not exist for the government.¹⁴¹

B. Concurring Opinions

1. Judge Lucero's concurrence

Judge Lucero concurs in the judgment that the assistant United States attorney did not violate the statute but he disagrees with how the majority came to that conclusion.¹⁴² The term “whoever” can and does include the government and its agents.¹⁴³ The majority's interpretation of the term cannot be reconciled with the *Nardone* decision where the Supreme Court found that the wiretapping statute applied to federal agents.¹⁴⁴ The Court found that the statutory language in *Nardone*—“no person”—connoted a being and not an entity, yet it was applied to government agents.¹⁴⁵ Moreover, the majority ignores that the term ‘whoever’ as used in other provisions of section 201 applies to government agents.¹⁴⁶ The government concedes that “whoever” in other parts of the statute apply to government agents. To argue that the term has a different meaning in one part of the statute than in another, when used in the same way, is nonsensical.¹⁴⁷

In addition, the *Nardone* exceptions do not apply to the gratuity statute. The sovereign is not deprived of an interest.¹⁴⁸ *Nardone* states that exclusion is less stringently applied where operation of law is upon its agents rather than the government itself.¹⁴⁹ Here the operation of law is upon agents. Judge Lucero does not agree with the majority's classification of Assistant United States Attorneys as the alter ego of the government.¹⁵⁰

With respect to the majority's holding that application of the statute would work an obvious absurdity, Judge Lucero argues that the majority's interpretation is the one that works an absurdity.¹⁵¹ The majority's

140. *See id.*

141. *See id.*

142. *See id.* at 1303 (Lucero, J., concurring).

143. *See id.*

144. *See id.* at 1304.

145. *See id.*

146. *See id.* at 1305.

147. *See id.*

148. *See id.* at 1304.

149. *See id.*

150. *See id.*

151. *See id.* at 1307-08.

holding works an absurdity by implying that a federal prosecutor who bribes a witness to supply false testimony is not subject to criminal prohibitions of section 201(c)(2).¹⁵² Taking this analysis even further, a prosecutor would not be subject to prosecution for violation of this statute no matter what the bribe.

Judge Lucero cannot join the dissent, though, because other statutes in the United States Code, as well as Federal Rule of Criminal Procedure 11, allow the government to trade certain items of value for testimony.¹⁵³ These statutes are specific statutes, while section 201(c)(2) is a general one.¹⁵⁴ It is an elementary tenet of statutory construction that specific statutes will not be nullified or controlled by a general one.¹⁵⁵ Rather, a specific statute controls a general one.¹⁵⁶ Therefore, the specific statutes at issue here control section 201(c)(2).¹⁵⁷ All of these statutes allow the giving of something of value for testimony. This shows congressional intent to allow the long-standing practice of exchanging something for testimony. These statutes do not allow for prosecutorial misconduct because they clearly limit the something of value that can be given for testimony.¹⁵⁸

2. Judge Henry

Judge Henry finds that the concurring opinion of Judge Lucero is the most persuasive.¹⁵⁹ However, he feels it is important to note that Congress has recently passed legislation requiring that government attorneys be subject to state ethical rules.¹⁶⁰ As a result, it may be helpful and relevant to scrutinize the dissent's suggestions as to other tactics for effectively obtaining testimony in exchange for leniency.¹⁶¹ Judge Henry agrees with the majority opinion in that the dissent's statutory construction could work a legal absurdity. Congress could not have intended to criminalize the common practice of offering leniency for testimony.¹⁶²

152. *See id.* at 1306.

153. *See id.* at 1305-07. These statutes include 18 U.S.C. § 3553(e) (Imposition of a sentence); 28 U.S.C. § 994(n) (Duties of sentencing commission); 18 U.S.C. §§ 6001-6005 (Immunity of witnesses).

154. *See id.* at 1305.

155. *See id.* (quoting *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375 (1990)).

156. *See id.* at 1305.

157. *See id.* at 1307.

158. *See id.* at 1306-07.

159. *See id.* at 1302 (Henry, J., concurring).

160. *See id.*

161. *See id.* at 1302-03.

162. *See id.*

C. Dissenting Opinion

The dissenters in this case are the three judges who issued the *Singleton I* opinion.¹⁶³ The judges remain resolute in their statutory construction and their dissenting opinion outlines the issues that they addressed in the first opinion. Once again they disagree with the majority based on the unambiguous language contained in the statute and argue that courts must apply the unambiguous statutes as they are written.¹⁶⁴ The dissent argues that the majority has ignored the values that section 201(c) was created to protect.¹⁶⁵ Specifically, the court has ignored the maintaining of integrity, fairness, and credibility of the criminal justice system.¹⁶⁶ Accomplice plea agreements tend to produce unreliable testimony and create an incentive for the accomplice to shift the blame onto the defendant.¹⁶⁷ The dissent argues that there are other ways to obtain this testimony without violating the statute.¹⁶⁸

In response to the majority's opinion that the statute, if applied, deprives the sovereign of a protected interest, the dissent argues that section 201(c) does not interfere with the right to prosecute.¹⁶⁹ Instead, it interferes with "how" to prosecute, which is not a protected interest.¹⁷⁰ There are numerous limits placed on how the government may prosecute, such as the rules of individual courts and the rules of evidence.¹⁷¹ Section 201(c) is not limiting the right to prosecute, only the way the government may do so.

The dissent disagrees with Judge Lucero's opinion that section 201(c) cannot be reconciled with other statutes.¹⁷² As far as the majority's reliance on the importance of the ability of prosecutors to exchange testimony for leniency, the dissent counters with reliance on the constitu-

163. See *id.* at 1308 (Kelly, J., dissenting).

164. See *id.*

165. See *id.*

166. See *id.* at 1309.

167. See *id.* at 1309 (quoting Yvette A. Beeman, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800, 802 (1987)).

168. For example, the dissenting judges suggest that prosecutors could enter into a plea agreement with a defendant under Fed.R.Crim.P. 11(e), which is not prohibited by section 201(c). Section 201(c) does not prohibit plea agreements if the plea agreement is not conditioned on the defendant testifying. The prosecutor could record the plea discussions to preserve the information provided by the defendant. Once the defendant has entered his guilty plea and been sentenced, the prosecutor could subpoena the defendant as a witness in a trial of the other participants in the crime. The defendant's trial testimony is not given in exchange for something of value; rather it is compelled through subpoena. See *id.* at 1309 n. 3.

169. See *id.* at 1311.

170. See *id.*

171. See *id.*

172. See *id.* at 1312.

tional principle of creating an even playing field for the defendant and the government.¹⁷³ The dissent argues that the majority's position undercuts that basic principle. The only way to remain faithful to the importance of providing a level playing field is to interpret section 201(c)(2) as applying to government agents.¹⁷⁴

The importance of preserving the prosecutor's ability to exchange leniency for testimony may have motivated the court to come up with a means of protection. Although the majority did not clearly state that their decision was a practical interpretation determined to save the long standing practice of witness gratuity, there were hints that it was. The majority's references to the long-standing tradition suggests that the majority recognized the importance of protecting the tradition and made their decision conform.

V. WHO GOT IT RIGHT?

As mentioned above, the *Singleton I* opinion was greeted with enormous criticism and skepticism, both from other courts and the legislature. For example, the court in *United States v. Eisenhardt*¹⁷⁵ called the panel's decision "amazingly unsound, not to mention nonsensical," and found the odds that the Supreme Court would reach a similar result "about the same as discovering that the entire roster of the Baltimore Orioles consists of cleverly disguised leprechauns."¹⁷⁶ Since this case, over 200 other courts have been faced with this issue. The majority of them disagreed with *Singleton I*. The refusal of other courts to adopt the reasoning in *Singleton I* suggests that the opinion in *Singleton II* had the right answer. The quick response to the original panel's decisions suggests that the court understood the possible ramifications of the first decision.

The majority opinion seemed very result-oriented and they seemed to have ignored the possibility of prosecutorial misconduct. The court absolved prosecutors of any responsibility to abide by the rules as set forth by the statute. The decision expands the rights of the federal prosecutor to offer anything in exchange for testimony. Criticism of the holding is not a blanket condemnation of the integrity of federal prosecutors. However, it seems to create a series of inconsistencies. Federal prosecutors are not limited in their ability to award something of value for testimony. An expansion of this idea, taken from the dissent in *Singleton II*, is that

173. *See id.* at 1313-14.

174. *See id.* at 1314.

175. 10 F. Supp. 2d 521, 521-22 (D. Md. 1998).

176. *Id.*

the waiving of applicability to federal prosecutors creates an uneven playing field in the courtroom. As Judge Lucero noted, the majority's reading of subsection (c)(2) "creates a conceptually messy legal regime for handling the case of the errant U.S. attorney."¹⁷⁷

The original decision, although problematic for public policy reasons, seems to be based in sound legal reasoning. The judges, participating in the vacated decision and in the dissent, base their reasoning on the plain language of the statute. There is no uniform rule of statutory interpretation in this country. Two courts can take a different approach to the same statute and come out with opposite interpretations. *Singleton* provides evidence of such a problem. The most helpful approach seems to be to look at the plain language of the statute, along with congressional intent. However, the three-judge panel used that form. The plain language of the statute makes no exception for prosecutors. The three-judge panel argued that if Congress had intended to create such an exception, they should have included the language in the statute.

Congressional intent did not assist the court in this case, either. The legislative history was lengthy and thorough.¹⁷⁸ However, there was no mention of this specific exception.¹⁷⁹ The critical determination could come down to how one interprets congressional silence. In this case, silence could have easily been construed to indicate that the exception, based on such a long-standing tradition, was understood to be included. However, it could also be construed to mean that there was no intent to include the exception in the statute. This seemingly helpful form of statutory interpretation seems to give support to the conclusion reached in *Singleton I*. Perhaps the court in *Singleton I* should have included practical implications of their interpretation in their reasoning.

Although the panel's decision was based on sound legal reasoning, the public policy ramifications could possibly be catastrophic. The opinion seriously limited the federal prosecutor's ability to gain conviction using a practice that is engrained in the common law tradition of our criminal justice system. The panel's broad literal reading of the ban on witness gratuities created too many problems, and not only for prosecutors. The panel's reasoning made a criminal of any judge who ever lightened a defendant's sentence because of the defendant's truthful testimony. It also made an aider and abettor out of any defense attorney who ever negotiated a cooperation agreement rewarding a client for truthful testimony.¹⁸⁰ Further, critics of this decision argue that without the coop-

177. See *Singleton*, 165 F.3d at 1308.

178. See Lungstrum, *supra* note 15, at 755.

179. See *id.*

180. See David A. Sklansky, *Starr, Singleton and the Prosecutor's Role*, 26 *FORDHAM URB.*

eration agreements of the kind invalidated in *Singleton*, the government could not "enforce the drug laws, could not prosecute organized crime figures under RICO," and might not have obtained valuable testimony in the Oklahoma City bombing cases.¹⁸¹ The judges do offer alternatives to obtaining testimony, which may be good alternatives.¹⁸² However, in the meantime, the application of the witness gratuity statute to federal prosecutors would limit their ability to deal effectively with accomplices.

One might argue that this would be a positive policy ramification. For example, some have argued that the cooperation of criminals in exchange for leniency creates serious problems in the federal justice system, such as inconsistency and moral ambivalence.¹⁸³ Cooperation is unevenly distributed and subject to variations based on locale. One defendant may receive greater benefits for a crime while another receives almost nothing. In addition, widespread cooperation is ethically problematic. Disloyalty is the center of cooperation, therefore, snitching engenders moral ambivalence.¹⁸⁴ Moreover, the reliability of accomplice witness testimony is sketchy, at best, because the incentives to lie are overwhelming.¹⁸⁵ It is much safer to shift the blame onto the other party and avoid prosecution altogether. In addition, the practice seems to undermine the integrity of the judicial process by encouraging unreliable testimony. When a witness seeks leniency in exchange for testimony against the defendant, the prosecutor is tempted to leave credibility assessments up to the jury. Many prosecutors may feel it is not their job to judge the truth of testimony, only if it will help their case. Justice Department policies seem to encourage this approach. The Department's Principles of Federal Prosecution lists a range of "relevant considerations" for determining whether to enter a plea agreement with a defendant. These considerations include the defendant's willingness to cooperate, but do not include the prosecutor's degree of confidence that the witness will testify honestly.¹⁸⁶

Another argument for the application of the statute is that the defendant's right to have an even playing field may be just as important for the criminal justice system as the prosecutor's ability to exchange leniency

L.J. 509, 515 (1999).

181. *Id.* at 516 (quoting Supplemental Brief of the United States at 15-16, *Singleton*, 144 F.3d 1343 (No. 97-3178)).

182. *See Singleton*, 165 F.3d at 1309.

183. *See Weinstein*, *supra* note 30, at 563-64.

184. *See id.* at 564.

185. *See id.* at 565.

186. *See* David A. Sklanksy, *Starr, Singleton and the Prosecutors' Role*, 26 *FORDHAM URB. L.J.* 509, 528-29 (1999) (quoting U.S. Dep't of Justice, *United States Attorneys' Manual* § 9-27.420 (Prentice Hall 1987)).

for testimony. The defendant is at a severe disadvantage when he/she is up against testimony given in exchange for leniency. As the dissent in *Singleton II* noted, "ours is an adversarial legal system, and implicit in this system, which pits the government against the defendant in a court of law, is the notion of fair play."¹⁸⁷ One might counter this idea with the fact that courts allow evidence of the exchange for the purpose of impeaching the witness. However, at this point, the damage might have already been done. The witnesses' testimony is still available for the jury to hear.

However, on the other hand, the ability of the prosecutors to gain necessary testimony for convictions is tantamount to the inherent inconsistencies and the different standards for prosecutors and defense attorneys. Prosecutors have different roles than defense attorneys. Prosecutors are not ordinary parties to a controversy. Rather, they are agents of a sovereignty whose interest is in achieving justice.¹⁸⁸

The most persuasive opinion is Judge Lucero's concurrence, perhaps because it can be seen as a middle ground that criticizes both the dissent and the majority. Judge Lucero's opinion takes into consideration the idea that the majority's opinion may lead to prosecutorial misconduct. It also impliedly criticizes the dissent's dismissal of other statutes that allow the exchange of something of value for testimony. His statutory construction provides for limits on the something of value that prosecutors may offer to prospective cooperating witnesses. Although the more specific statutes override the witness gratuity statute, prosecutors are not absolved of responsibility. However, a major problem of Judge Lucero's concurrence is that the specific statutes do not expressly address dealing prior to sentencing. His concurrence addresses the idea that one can infer intent from the various other statutes. For plain language judges and scholars, this idea is problematic. If the statutes do not expressly address the issue of exchanging leniency for testimony prior to sentencing, prosecutors can find a way to get around them. Although Judge Lucero's opinion does not address the bigger issue of encouraging unreliable testimony, the opinion does dispense with the problem of applying the statute to federal prosecutors.

VI. CONCLUSION

This will not be the last time this issue is brought before the courts. With the gravity of the implications of a negative outcome for federal

187. See *Singleton*, 165 F.3d at 1314.

188. See *United States v. Singleton*, 144 F.3d 1343, 1347 (10th Cir. 1998) (citing *United States v. Burger*, 295 U.S. 78, 88 (1935)).

prosecutors, the better solution would be for the legislature to address this problem. The courts struggle with congressional intent. They attempt to read meaning into congressional inaction and ambiguities. Allowing the legislature to re-word the statute may be the best approach to this problem. Even if the statute is not reworded, at some point Congress should address the practice of exchanging something of value for testimony. There are a number of problems in relying on such testimony. The administration of justice must be fair and free from tainted testimony. Either way, the best answer is for the legislature to protect the prosecutor's ability to obtain necessary testimony and eliminate the problem by re-wording the statute.

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