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# Leniency Bribes: Justifying the Federal Practice of Offering Leniency for Testimony

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## I. INTRODUCTION

A three-judge panel of the Tenth Circuit Court of Appeals recently caused an uproar in the federal criminal justice system when it decided that a federal bribery statute,[1] enacted in 1962, prohibited prosecutors from offering leniency to suspected criminals in exchange for testimony against fellow accomplices.[2] The unanimous opinion in *Singleton v. United States* (hereinafter *Singleton I*) shocked law enforcement officials and gave criminal defendants (and their attorneys) a substantial, albeit short-lived, victory.[3] Shortly after the decision, numerous prisoners and defendants petitioned courts, arguing that *Singleton I* invalidated their convictions.[4] The federal judiciary, however, was quick to condemn *Singleton I*.[5] Just nine days after the publication of decision, the Tenth Circuit, on its own motion, granted a rehearing *en banc* and subsequently reversed the panel's decision (hereinafter *Singleton II*).[6] At the time of this writing, at least eight other circuit courts of appeals and numerous district courts have rejected *Singleton I*'s holding.[7]

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1. *See* Pub. L. No. 87-849, § 1(a), 76 Stat. 1119, 1120 (codified at 18 U.S.C. § 201(h) (effective Oct. 23, 1962) (current version at 18 U.S.C. § 201(c)(2) (1986)).

2. Singleton v. United States, 144 F.3d 1343, 1348 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), *cert. denied*, 119 S.Ct. 2371 (1999). Professor Albert Aschuler of the University of Chicago characterized the *Singleton I* opinion by stating, "[I]t's a bombshell, it's nuclear, it's really a big deal." *Justice System Thrown Off Balance by Ruling*, Omaha World-Herald, July 17, 1998, *available in* 1998 WL 5512734. Another writer stated that *Singleton I* "caused earthquake-size shivers through law enforcement." Gerald Walpin, *The Tenth Circuit's "Singleton" Decision Wrong and Uniformly Rejected*, 220 N.Y. L.J. 2 (Oct. 29, 1998). The Justice Department stated that *Singleton I* had "caused chaos in district courts and U.S. Attorney's Offices in [the Tenth Circuit] . . . and significant disruption throughout the rest of the country." William Glaberson, *Leniency Ruling Jolts U.S. Legal Procedures*, The Journal Record (Oklahoma City), Nov. 4, 1998, *available in* 1998 WL 11961432.

3. *See, e.g.*, Mike Fimea, *Plea Bargain in Air in 10th*, Arizona Business Gazette, Nov. 5, 1998, *available in* 1998 WL 7738146; Patricia Nealon, *Mass. Lawyers Await Effects of Colo. Ruling*, The Boston Globe, July 29, 1998, *available in* 1998 WL 9145598.

4. *See, e.g.*, United States v. Condon, 170 F.3d 687, 688 (7th Cir.), *cert. denied*, 119 S. Ct. 1784 (1999) (noting that "defendants throughout the nation" had argued for other courts to adopt *Singleton I*); United States v. Lowery, 166 F.3d 1119, 1122-23 (11th Cir. 1999), *petition for cert. filed*, (July 6, 1999) (No. 99-5172) (citing numerous cases in which defendants had argued for *Singleton I*); Nealon, *supra* note 3. The most notorious prisoner to invoke *Singleton I* was Timothy McVeigh, the Oklahoma City bomber. *See* Julie Delcour, *McVeigh Appeal Won't Be Delayed, Court Rules*, Tulsa World, July 18, 1998, *available in* 1998 WL 11145386.

5. Some of the criticism of the *Singleton I* panel has been quite sharp. *See, e.g.*, United States v. Haese, 162 F.3d 359, 368 n.2 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1795 (1999) (stating that "the likelihood of our knowledgeable colleagues on the Supreme Court finding as the *Singleton* panel's absurd holding is nonexistent"); United States v. Eisenhardt, 10 F. Supp. 2d 521, 521-22 (D. Md. 1998) (finding that the "chances of either or both the Fourth Circuit and [sic] the Supreme Court reaching the same conclusion as the *Singleton* panel are . . . about the same as discovering the entire roster of the Baltimore Orioles consists of cleverly disguised leprechauns").

6. *See* United States v. Singleton, 165 F.3d 1297, 1302 (10th Cir.), *cert. denied*, 119 S. Ct. 2371 (1999).

7. The Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, and District of Columbia Circuits have all refused to adopt *Singleton I*. *See* United States v. Carroll, 166 F.3d 334, 1998 WL 801880,

The facts underlying *Singleton I* were rather ordinary. The defendant was charged with distribution of cocaine and money laundering.[8] During the trial, Mr. Douglas, the defendant's accomplice, testified for the prosecution and against the defendant.[9] Prior to the trial, Mr. Douglas had entered into a plea agreement with the prosecutor, under the terms of which the prosecutor promised leniency in exchange for Mr. Douglas's testimony.[10] Such "leniency for testimony" deals are quite common in federal courts today.[11] *Singleton I*'s holding, though, was far from common. The Tenth Circuit panel reversed the defendant's conviction and ordered a new trial on the grounds that Mr. Douglas's bargained for testimony should have been excluded, because its procurement by the government violated 18 U.S.C. § 201(c)(2), the federal bribery statute, which states that "whoever . . . promises anything of value . . . for . . . testimony" commits a felony punishable by two years of prison.[12]

This Article will not quarrel with the *Singleton I* characterization that promises of leniency are equivalent to bribes[13]—although such a characterization is not necessarily correct.[14] An offer of leniency undoubtedly encourages an accomplice to testify rather than plead his Fifth Amendment right against self-incrimination. To a suspect facing a jail sentence, an offer of leniency is probably more valuable than any monetary bribe.[15] Indeed, in recognition of this fact, this Article will refer to such offers as "leniency bribes."

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at *3 n. 4 (4th Cir. 1998) (unpublished disposition), *cert. denied*, 119 S. Ct. 1089 (1999); *Haese*, 162 F.3d at 366-68; United States v. Ware, 161 F.3d 414, 418-25 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1348 (1999); *Condon*, 170 F.3d at 688-91; United States v. Johnson, 169 F.3d 1092, 1097-98 (8th Cir. 1999), *petition for cert. filed*, (June 15, 1999) (No. 98-9870); United States v. Flores, 172 F.3d 695, 699-700 (9th Cir. 1999), *petition for cert. filed*, (June 28, 1999) (No. 99-5111); *Lowery*, 166 F.3d at 1122-24; United States v. Ramsey, 165 F.3d 980, 986-91 (D.C. Cir. 1999), *petition for cert. filed*, (July 13, 1999) (No. 99-5255). For a collection of district court opinions rejecting and upholding *Singleton I*, *see Lowery*, 166 F.3d at 1123.

8. *See Singleton I*, 144 F.3d at 1343.

9. *See id.* at 1344.

10. *See id.*

11. *See id.* at 1360. The Tenth Circuit panel 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." *See id.* (quoting United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987)); *see also Lowery*, 166 F.3d at 1123-24; Glaberson, *supra* note 2.

12. *See Singleton I*, 144 F.3d at 1343.

13. *See Singleton I*, 144 F.3d at 1352, 1358 (noting that § 201(c)(2) was a "bribery" statute and concluding that the leniency for testimony deal violated the statute).

14. One dictionary defines bribe as "[s]omething, such as money, offered to or given to induce or influence a person to act dishonestly." American Heritage Dictionary 86 (2d college ed. 1983) (emphasis added). A prosecutor's offer of leniency is in exchange for *truthful* testimony. *See, e.g.*, *Singleton II*, 165 F.3d at 1298. If every offer of a thing of value was characterized as a "bribe," then everyday transactions, such as an offer of twenty-five cents for the daily newspaper, would be considered bribes.

15. *But see Condon*, 170 F.3d at 689 (Easterbrook, J.) (disputing the notion that an offer of leniency is a "thing of value").

The acknowledgment that an element of bribery characterizes a prosecutor's offer of leniency does not mean *Singleton I* was correctly decided, however. The purpose of this Article is to explore whether leniency bribes are a desirable part of the criminal justice system. Part II of the Article explains the reasoning behind *Singleton I* and summarizes the widespread rejection of its holding. Part III of the Article details the current practice in the federal system of offering leniency bribes to accomplices.[16] Part IV addresses the two primary reasons—inherent unreliability and judicial integrity—that have been advanced as justification for exclusion of leniency-induced testimony and concludes that these reasons are insufficient to justify exclusion. Part IV also examines the benefits and risks of leniency bribes and proposes solutions to minimize those risks.

Although this Article concludes that *Singleton I* was incorrect from both a legal and policy perspective, the practice of leniency bribes raises troubling questions. The public expects that the criminal justice system will imprison only those who are factually guilty; nothing is perhaps more disturbing than the notion of an innocent person serving time for a crime he did not commit. By inducing suspect testimony through leniency bribes, prosecutors run a small risk of imprisoning the innocent and violating the public's legitimate expectations. Nevertheless, the risks caused by leniency bribes are outweighed by their benefits. Rather than prohibiting leniency bribes, prosecutors and judges should install safeguards that will lessen their dangers.

## II. THE *SINGLETON* DECISION AND ITS REJECTION

Few would dispute that the law prohibits prosecutors from paying fact witnesses monetary bribes in exchange for testimony.[17] The act of bribing witnesses, on its face, is repulsive to the concept of the Anglo-American trial, for bribed testimony seems to taint the truth-finding process.[18] If monetary bribes of witnesses are legally wrong, then how can a prosecutor argue that a leniency bribe is legally justified? The panel that decided *Singleton I* could discern no difference.

### A. *Singleton I*

The text of 18 U.S.C. § 201(c)(2) prohibits bribery of witnesses by providing:

> (c) Whoever —
> (2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation

16. As used in this Article, the term "accomplice" refers to the defendant's accomplice, who cooperates with the prosecution, informs the prosecution about the crime, and testifies for the prosecution against the defendant.

17. *See Singleton I*, 144 F.3d at 1348 (noting that the government in its brief conceded that the § 201(c)(2) prohibited prosecutors from offering monetary bribes to fact witnesses).

18. *See id.* at 1347 (stating that "[t]he judicial process is tainted and justice cheapened when factual testimony is purchased, whether with leniency or money").

> given or to be given by such person as a witness upon trial, hearing, or other proceeding, before any court . . . shall be fined under this title or imprisoned for not more than two years, or both.

To the *Singleton I* panel, the wording of the statute also prohibited federal prosecutors from offering leniency in exchange for testimony.[19] Judge Kelly's opinion addressed two issues in construing § 201(c)(2): (1) whether the word "whoever" included government officials and prosecutors,[20] and (2) whether an offer of leniency was "anything of value."[21]

On the first issue, the panel stated that it was required to follow the statute's plain language, and the word "whoever" includes federal prosecutors.[22] However, the panel did acknowledge that certain classes of statutes do not apply to the government.[23] The first class are those laws that, if applied to the government, "would deprive the sovereign of a 'recognized or established prerogative title or interest.'"[24] The second class consists of laws whose application to the government would create an absurdity.[25]

In determining that § 201(c)(2) did not fall under the first class, the panel recognized two exceptions to the rule that statutes should not be interpreted to undermine an established prerogative of the government.[26] First, if a statute was meant to merely restrict the government's agent, rather than the government itself, then a court was required to enforce the statute against the agent.[27] The panel then stated, without citation to authority, that "§ 201(c)(2) does not restrict any interest of the sovereign itself; it operates only upon [the U.S. Attorney,] an agent of the sovereign."[28] The second exception occurs when the purpose of a statute "is to prevent fraud, injury, or wrong."[29] According to *Singleton I*, § 201(c)(2) also satisfied the second exception because "[it] operates to prevent fraud upon the federal courts in the form of inherently unreliable testimony."[30] The panel reasoned that applying § 201(c)(2) to prosecutors actually advanced, rather than hindered, the interests of the sovereign by aiding in the "enforcement of its laws and the just administration of [the] judicial system."[31]

*Singleton I* also found that applying § 201(c)(2) to the government did not create an absurdity.[32] The panel explained that the classic example of an

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19. *See Singleton I*, 144 F.3d at 1343.
20. *See id.* at 1345.
21. *See id.* at 1348.
22. *See id.*
23. *See id.* at 1345-46.
24. *See id.* at 1346 (quoting Norton v. United States, 302 U.S. 379, 383, 58 S. Ct. 275, 277 (1937)).
25. *See id.*
26. *See id.*
27. *See id.*
28. *Id.*
29. *See Singleton I*, 144 F.3d at 1346.
30. *Id.*
31. *Id.*
32. *See id.* at 1346-47.

"absurdity" would be applying a speed limit regulation to a police officer who was trying to catch a speeding motorist.[33] In justifying why leniency bribes are not similarly exempt, the panel invoked the Magna Carta and Justice Brandeis's famed dissent in *Olmstead v. United States*[34] in pointing out that "[d]ecency, security and liberty alike demand that government officials" obey the law.[35] *Singleton I* also noted that contract law voided contracts to pay fact witnesses as a violation of public policy.[36] Lastly, the panel engaged in lofty rhetoric to the effect that bribes taint the judicial process, cheapen justice, and conflict with the weighty responsibility of prosecutors. *Singleton I* concluded that the application of § 201(c)(2) to prosecutors—rather than being absurd—was at the center of the American legal tradition.[37]

After declaring that the word "whoever" in § 201(c)(2) included U.S. attorneys, the panel proceeded to the second issue of whether an offer of leniency was "anything of value."[38] The panel stated that the test should be "whether the recipient subjectively attaches value to the thing received";[39] moreover, *Singleton I* noted that many other courts had held intangible things to be "things of value," including, *inter alia*, information regarding the location of a witness, information in a DEA report, assistance in arranging a merger, and conjugal visits.[40] Furthermore, the panel reasoned that the congressional purpose behind § 201(c)(2) was to "to keep testimony free of all influence so that truthfulness is protected."[41] The panel ruled an offer of leniency to be "anything of value" by concluding that there was "no basis in law, policy, or common sense" to hold otherwise.[42]

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33. *See id.* at 1346.

34. 277 U.S. 438, 48 S. Ct. 564 (1928).

35. *Singleton I*, 144 F.3d at 1347 (quoting *Olmstead*, 277 U.S. at 485, 48 S. Ct. at 575 (Brandeis, J. dissenting)). This reasoning begged the question, since the issue before the court was whether prosecutors did, indeed, need to obey the law—that is, specifically § 201(c)(2).

36. *See Singleton I*, 144 F.3d at 1346.

37. *See id.* at 1348.

38. *See id.*

39. *Id.* at 1349.

40. *See id.*

41. *Id.* at 1350. The panel listed three other reasons for its holding based upon statutory construction. First, the panel reasoned that much of the precedent cited had construed statutes with the phrase "thing of value," but § 201(c)(2) contained the words "anything of value," which indicated an even broader construction. Second, much of precedent cited interpreted statutes in which "thing of value" was at the end of a series, indicating that courts had construed the term constrained by the doctrine of *ejusdem generis*. In contrast, § 201(c)(2) contained no such enumeration, leaving it to be more broadly interpreted. Third, § 201(c)(1), which criminalizes bribery of public officials, includes the language, "otherwise than as provided by law for the proper discharge of official duty," while § 201(c)(2) is free of any such language, indicating that if Congress wanted to exempt official acts from bribery of witnesses, it would have included language similar to that found in § 201(c)(1). *See id.* at 1349-50.

42. *Id.*

After holding that a prosecutor's leniency bribe was illegal under § 201(c)(2),[43] the panel addressed the issue of whether exclusion of the illegally-obtained testimony was the appropriate remedy. The panel cited two public policies to justify suppression of leniency-induced testimony. First, it would deter official misconduct. The panel reasoned that since the practice of offering leniency for testimony was so widespread in the criminal justice system, exclusion of the testimony was the only effective means of stopping future violations of § 201(c)(2).[44] Second, the panel stated that exclusion was necessary to protect "judicial integrity."[45] The panel noted that an accomplice who is offered a leniency bribe is tempted "to color or falsify" his testimony.[46] In the panel's opinion, this temptation to fabricate taints an accomplice's testimony, and to present such tainted testimony in a court would directly impugn the judiciary's integrity.[47]

In summary, the *Singleton I* panel found that § 201(c)(2), the witness bribery statute, barred testimony by accomplices who had been offered leniency bribes.[48] The term "whoever" in § 201(c)(2) included federal prosecutors, and the language "anything of value" encompassed offers of leniency.[49] Finally, a violation of § 201(c)(2) warranted exclusion of any leniency-induced accomplice testimony.[50]

### *B. Justifications for Leniency Bribes*

*Singleton I* was a startling opinion because it challenged the well-established—and many believe essential—prosecutorial practice of offering leniency in exchange for testimony.[51] Additionally, the Tenth Circuit panel mounted its challenge by relying on the plain meaning of a statute that had been on the books since 1962.[52] An Eleventh Circuit case probably best summarizes the legal community's disbelief as to the logic of *Singleton I*:

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43. Besides the statutory construction arguments discussed, *see supra* notes 19-41 and accompanying text, the panel also based its holding on the structure of § 201(c)(2), the relation of § 201(c)(2) to other statutes, and public policy justifications for its holding. *See Singleton I*, 144 F.3d at 1351-56. Additionally, the panel noted that the prosecutor had violated Rule 3.4(b) of the Kansas Rules of Professional Conduct (adopted from the Model Rules), which provides that "[a] lawyer shall not . . . offer an inducement to a witness prohibited by law." *See Singleton I*, at 1358-59; *see also* United States v. Lowery, 15 F. Supp. 2d 1348, 1358 (S.D. Fla. 1998), *rev'd by*, 166 F.3d 1119 (11th Cir. 1999), *petition for cert. filed*, (July 6, 1999) (No. 99-5172) (finding that the prosecutor had violated a similar Florida rule).

44. *See Singleton I*, 144 F.3d at 1359-60.

45. *See id.* at 1360. The issue of judicial integrity is discussed more fully below. *See infra* Part IV.A.2.

46. *See id.*

47. *See id.*

48. *See supra* note 19 and accompanying text.

49. *See supra* notes 22-47 and accompanying text.

50. *See supra* notes 44-47 and accompanying text.

51. *See infra* notes 241-245 and accompanying text.

52. *See supra* note 1.

> During the three and half decades of [the bribery statute's] existence, what defendants now claim is the plain meaning of that language has not been plain to thousands of prosecutors, judges, and defense lawyers who have been involved with testimony for leniency agreements over the decades. If the language of the statute did plainly provide that it is a crime for the government to trade leniency for testimony, the issue would have been raised early and often. It was not.[53]

Nonetheless, a mere argument that "we've always done it this way" would be insufficient to refute *Singleton I*'s contention that § 201(c)(2) outlawed leniency bribes. In response to *Singleton I*, courts have advanced two primary legal justifications for leniency bribes. The first justification is grounded in the common law and the history of American jurisprudence,[54] while the second is rooted in principles of statutory construction.[55]

*1. Prerogative of the Sovereign*

To justify exempting prosecutors from § 201(c)(2), some courts have argued that leniency bribes have long been a prerogative of the sovereign.[56] At early common law, an accomplice might try to bargain for leniency through a process known as "approvement."[57] The accomplice would confess and then offer to bring a private prosecution against his confederate involved with the crime.[58] The accomplice would receive a pardon only if the jury convicted his confederate; otherwise, the accomplice faced execution.[59] Approvement fell into disfavor by 1500, because it seemed to elicit perjury.[60] A related practice soon developed, in which accomplices who provided information were entitled to an equitable title to a pardon, so long as they testified "fully and fairly," regardless of the jury's verdict for the defendant.[61] Under this later system, an accomplice could only testify if he was less culpable than the defendant.[62]

Until the mid-nineteenth century, the power to bargain for leniency in exchange for testimony rested with the court, not the prosecutor.[63] Eventually the law allowed prosecutors to bargain for testimony by offering pardons, immunity,

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53. United States v. Lowery, 166 F.3d 1119, 1123 (11th Cir. 1999), *petition for cert. filed*, (July 6, 1999) (No. 99-5172).

54. *See infra* Part II.B.1.

55. *See infra* Part II.B.2.

56. *See infra* note 68 and accompanying text.

57. *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 Colum. L. Rev. 1, 14 (1979); *see also* Note, *Accomplice Testimony Under Conditional Promise of Immunity*, 52 Colum. L. Rev. 138, 139 (1952).

58. *See id.*

59. *See id.*

60. *See* Note, *supra* note 57, at 139.

61. *See id.*

62. *See* Alschuler, *supra* note 57, at 14-15.

63. *See id.* at 15.

and other forms of leniency.[64] By 1878, the Supreme Court in *The Whiskey Cases*[65] acknowledged that many American jurisdictions permitted the prosecutor to bargain for testimony with leniency bribes.[66] As Professor Alschuler has noted, *The Whiskey Cases* revealed that "the common law did permit a sacrifice of the public interest in punishing a single offender in order to gain his assistance in convicting other criminals, and it devised an open and regularized form of bargaining to accomplish this result."[67] Relying upon the history of the common law, the *Singleton II* majority and other courts have held that the "granting of lenience in exchange for testimony has created a vested sovereign prerogative in the government," which has become an "ingrained" part of Anglo-American jurisprudence.[68] Statutes of general applicability, such as 18 U.S.C. § 201(c), do not apply to the sovereign, unless the legislature had made application to the sovereign "clear and undisputable"; the language of section 201(c)(2), "whoever," is not sufficiently clear so as to include the sovereign.[69] The defendant in *Singleton II* argued that the "whoever" of section 201(c)(2) did include the sovereign's agent—the individual U.S. Attorney—even if it did not encompass the sovereign entity of the United States.[70] The *Singleton II* majority countered that when prosecuting, a U.S. Attorney was exercising the sovereign powers of the United States, thereby making the U.S. Attorney the alter ego of the government and inseparable from the sovereign.[71] As the alter ego, the U.S. Attorney is exempt from statutes of general applicability.

The "alter ego" argument advanced by the majority has at least two problems. First, as Judge Lucero opined in his *Singleton II* concurrence, the majority opinion might be read to permit monetary bribes by prosecutors.[72] For example, would a

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64. *See* Note, *supra* note 57, at 139-40 & nn.8-10. Professor Alschuler contends that plea bargaining, though, was not a means for a prosecutor to induce an accomplice's testimony. Rather, courts only permitted prosecutors to bargain for testimony by offering something equivalent to transactional immunity. *See* Alschuler, *supra* note 57, at 15-16.

65. 99 U.S. (9 Otto) 594 (1878).

66. *See id.* at 604. The Supreme Court stated:

> Prosecutors . . . [should] inform [the accomplice] just what he may reasonably expect in case he acts in good faith, and testifies fully and fairly as to his own acts in the case, and those of associates. When he fulfills those conditions he is equitably entitled to a pardon, and the prosecutor, and the court if need be, when fully informed of the facts, will join in such a recommendation.

*Id.*

67. Alschuler, *supra* note 57, at 15. Professor Alschuler, a critic of plea bargaining in general, has acknowledged that leniency bribes are an "unusually strong case for permitting some form of plea bargaining." *Id.*

68. *Singleton II*, 165 F.3d at 1301; *see also* United States v. Ramsey, 165 F.3d 980, 988 (D.C. Cir. 1999), *petition for cert. filed*, (July 13, 1999) (No. 99-5255); United States v. Haese, 162 F.3d 359, 367 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1795 (1999); United States v. Ware, 161 F.3d 414, 419 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1348 (1999).

69. *See Singleton II*, 165 F.3d at 1300.

70. *See id.* at 1299.

71. *See id.* at 1300 & n.1.

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

U.S. Attorney who offers a monetary bribe to a witness in furtherance of the prosecution be exempt from prosecution under the alter ego theory? The majority contended otherwise, because the bribe would be neither a "government function" nor a "prosecutorial act[] . . . recognized in common law or authorized by statute."[73] Second, even if the *Singleton II* majority is correct about its interpretation of the common law,[74] its reliance upon the common law to determine when the prosecutor is an alter ego is problematic.[75] In order to determine whether a U.S. Attorney must abide by a criminal statute, a court must analyze whether the U.S. Attorney is performing a "prerogative of the sovereign," as defined by the common law. Gleaning through Anglo-American history and the common law to determine which prosecutorial acts are "prerogatives of the sovereign" will only muddle the law, since the common law is rarely crystal clear.[76] Rather than making an alter ego argument, a better method for determining the appropriateness of prosecutorial actions may be to rely upon statutes and examine what powers Congress has specifically bestowed on U.S. Attorneys.

*2. Statutory Power to Offer Leniency Bribes*

In his concurrence in *Singleton II*, Judge Lucero set forth a statutory argument to justify the existence of leniency bribes.[77] The statutory argument acknowledges that the language of § 201(c)(2), when read by itself, does prohibit U.S. Attorneys from offering leniency bribes. But when read "in conjunction with other statutes" which do permit the U.S. Attorney "to trade certain items of value for testimony," a different result is mandated.[78] At least three sets of statutes—all of which provide "things of value" to testifying accomplices—are so specific that they must overrule the general prohibition contained in § 201(c)(2).[79]

First, the immunity statutes specifically authorize U.S. Attorneys to request immunity for witnesses who will provide "testimony or other information . . . [that]

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73. *See id.* at 1302 n.2.

74. On the other hand, one could argue that since judges, and not prosecutors, controlled leniency offers for a long duration of the common law that it is not entirely clear whether leniency bribes are a "prerogative of the sovereign." *See supra* note 63 and accompanying text.

75. *See Singleton II*, 165 F.3d at 1308 (Lucero, J. concurring) (stating that the majority opinion had "create[d] a conceptually messy legal regime for handling the case of the errant United States Attorney").

76. Another example of the potential problems created by the majority opinion is 18 U.S.C. § 1622, which prohibits "whoever" from suborning perjury. The majority contended that § 1622 would apply to U.S. Attorneys—despite the identical "whoever" language as § 201(c)(2)—because suborning perjury was plainly not an exercise of sovereign power. *See id.* at 1302 n.2. The majority's brief resolution, in dicta, about the applicability of § 1622 seems to be based really on intuition, rather than a common law analysis.

77. *See id.* at 1303-08 (Lucero, J. concurring).

78. *Id.* at 1303 (Lucero, J. concurring).

79. Judge Lucero also mentioned that a "bar to pre-testimony negotiation would contradict the intent of Fed. R. Crim. P. 11." *See Singleton II*, 165 F.3d at 1307. The rule provides that the "attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement." Fed. R. Crim. P. 11.

may be necessary to the public interest."[80] Second, the Witness Relocation and Protection Act authorizes the Attorney General to offer a whole range of "things of value" to cooperating witnesses, including, *inter alia*, housing, moving expenses, living expenses, and a job.[81] Third, and perhaps most critical, the Sentencing Reform Act of 1984 specifies that the government may offer the possibility of a lower sentence to an accomplice for his "substantial assistance in the investigation or prosecution of another person."[82]

The members of the *Singleton I* panel, as dissenters in *Singleton II*, countered that their construction of § 201(c)(2) had been consistent with these other statutes.[83] First, the dissenters agreed that the immunity statutes did overrule § 201(c)(2), but only in cases of formal court-ordered immunity; all other forms of leniency are subject to § 201(c)(2).[84] Second, they argued that the Witness Relocation and Protection Act was "concerned with the welfare of witnesses, not with obtaining testimony."[85] Finally, the dissenters interpreted "substantial assistance," to mean only assistance that fell short of actual testimony.[86] In response to dissenters' last point, Judge Lucero stated that although some "substantial assistance" could be non-testimonial, there could "be little doubt that Congress intended to include . . . cooperative testimony under the rubric of 'substantial assistance,'" and "it stretche[d] credulity to suppose that Congress intended to exclude cooperative testimony from 'substantial assistance' as used in these statutes."[87]

### *C. Summary*

Of all the opinions, Judge Lucero's concurrence in *Singleton II* is most convincing, because unlike the narrow focus of the *Singleton I* panel, Judge Lucero examined all congressional legislation, not just the language of § 201(c)(2), when attempting to glean congressional intent and policy.[88] By focusing on the words "whoever" and "thing of value," the *Singleton I* panel failed to see the true congressional purpose. The federal statutes permitting prosecutors to offer things of value for testimony makes it exceedingly clear that Congress did not intend to prohibit leniency bribes and also makes resort to the ambiguous common law unnecessary. Although Judge Lucero's reliance upon federal statutes is the best method for validating the practice of leniency bribes, it does not settle the issue of whether leniency bribes are sound public policy. In order to address this issue, one

80. 18 U.S.C. § 6003(b) (1994).

81. 18 U.S.C. § 3521(b)(1)(B)-(E) (1994).

82. 2 U.S.C. § 994(n) (1994). Based on this authority, the Sentencing Commission created the § 5K1.1 "substantial assistance" departure. *See infra* notes 114-15 and accompanying text. Another statute, 18 U.S.C. § 3553(e), permits prosecutors to move for a sentence below the statutory mandatory minimum if the defendant provides "substantial assistance." *See infra* note 117 and accompanying text.

83. *See Singleton II*, 165 F.3d at 1309-10 (Kelly, J. dissenting).

84. *See id.* at 1313 (Kelly, J. dissenting).

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

86. *See id.* at 1312-13 (Kelly, J. dissenting).

87. *Id.* at 1306-07 (Lucero, J. concurring)

88. *See supra* notes 77-82, 87 and accompanying text.

must fully comprehend the mechanics of the federal practice of offering leniency bribes.

## III. FEDERAL PRACTICE OF OFFERING LENIENCY BRIBES

A bribe is "something that serves to induce or influence."[89] For any bribe to take place, a mutually agreed upon currency must be used for the transaction, and the briber must have the power to influence or induce the bribee. With a monetary bribe, the currency is usually dollars, and the power of the briber over the bribee depends upon the amount of dollars in the briber's pocket. For a leniency bribe, the currency is leniency, and the prosecutor's power over an accomplice depends upon the potential sentence and the prosecutor's ability to impose and to reduce that sentence.

To find how much currency she has and how valuable it might be to an accomplice, a prosecutor must make three fundamental calculations. First, she must master the labyrinth of the Federal Sentencing Guidelines and determine the possible sentence that an accomplice faces.[90] Second, the prosecutor must determine which type of leniency bribe is permitted under Department of Justice policy.[91] Third, the prosecutor must calculate how the court may alter or influence the leniency bribe.[92]

### *A. Sentencing Guidelines*

#### *1. Basics of Federal Sentencing*

The Sentencing Guidelines originated with the Comprehensive Crime Control Act of 1984,[93] which created the United States Sentencing Commission and directed it to establish uniform sentencing standards for all federal courts.[94] To achieve this goal, the Commission instituted a detailed procedure for calculating a convicted defendant's sentence. Under this procedure, a prosecutor must examine a number of factors to determine an accomplice's possible sentencing range.[95] The two most important factors are the "offense-level" and "criminal history" of an accomplice.[96] Every sentence is determined by a matrix with a

89. Webster's Ninth New Collegiate Dictionary 178 (1987).

90. *See infra* part III.A.

91. *See infra* part III.B.

92. *See infra* part III.C.

93. Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017-34 (1984) (codified as amended at 28 U.S.C. §§ 991-998 (1994)).

94. *See* William L. Gardner & David S. Rifkind, *A Basic Guide to Plea Bargaining*, 7 Crim. Just. 14, 14-15 (1992).

95. *See id.* at 15.

96. *See* Eric R. Komitee, Note, *Bargains Without Benefits: Do the Sentencing Guidelines Permit Upward Departures to Redress the Dismissal of Charges Pursuant to Plea Bargains?*, 70 N.Y.U. L. Rev. 166, 169 (1995).

horizontal "offense-level" axis and a vertical "criminal history" axis;[97] the sentencing range for a particular accomplice is the intersection of the two axes.[98] Arriving at the appropriate "offense level" involves a series of steps. First, and probably most importantly, the prosecutor must choose the charge to bring against an accomplice and then determine the "base offense level" for that charge.[99] For example, robbery has a base offense level of twenty.[100] Second, the prosecutor must examine whether the defendant's crime involves any of the "specific offense characteristics" which may alter the offense level.[101] Continuing with the robbery example, if a firearm was discharged during the robbery; the offense level increases upward by seven levels.[102] Third, the Guidelines may mandate an "adjustment."[103] For example, an adjustment that is frequently important is an accomplice's role in the offense.[104] If the accomplice was an organizer or leader of criminal activity, then the accomplice's offense level is adjusted upward by four levels.[105] Other adjustments take into account the harm caused to a victim,[106] the accomplice's motivation for targeting the victim,[107] any obstruction of justice by the accomplice,[108] and whether the accomplice has accepted responsibility.[109]

After finding the appropriate offense level, the prosecutor must determine the accomplice's criminal history category.[110] The rules for calculating criminal history appear simple, but they involve a host of interpretative problems. For example, the Guidelines state that convictions that have been "set aside" are to be counted in the criminal history, but convictions that have been "expunged" are not counted.[111] Making the distinction between "set aside" and "expunged" is not always easy, especially when dealing with laws of different jurisdictions.

After determining the accomplice's offense level and criminal history category, the prosecutor looks to the matrix to find an accomplice's sentencing range under the Guidelines. The prosecutor's calculation, however, is not yet finished, as she also must examine whether the accomplice can receive a "departure." Departures permit the sentencing judge to disregard the Guidelines altogether and to give a defendant a lower (or possibly higher) sentence than the one prescribed by the Guidelines.[112] The most routinely-used departure is the "substantial assistance"

97. *See* U.S. Sentencing Guidelines Manual § 5A (1998).
98. *See id.*
99. *See id.* § 1B1.1(b).
100. *See id.* § 2B3.1(a).
101. *See id.* § 1B1.1(b).
102. *See id.* § 2B3.1(b)(2).
103. *See id.* § 1B1.1(c).
104. *See id.* § 3B1.1.
105. *See id.* § 3B1.1(a).
106. *See id.* § 3A1.3.
107. *See id.* § 3A1.1.
108. *See id.* § 3C1.1.
109. *See id.* § 3E1.1.
110. *See id.* § 1B1.1(f).
111. *See id.* § 4A1.2(j) & cmt. 10.
112. *See id.* § 1B1.1(i); Gardner & Rifkind, *supra* note 94, at 17.

departure, which was the leniency bribe at issue in *Singleton I*.[113] The "substantial assistance departure" is more commonly known as a § 5K1 departure (or a Rule 35(b) motion).[114] The prosecutor has the sole discretion to move for a § 5K1 departure if she determines that the accomplice "has provided substantial assistance in the investigation or prosecution of another person who has committed an offense."[115]

Two other points are worth noting about the Guidelines. First, some statutes specify mandatory minimum sentences for certain offenses.[116] An accomplice's sentence cannot be lower than the mandatory minimum irrespective of the sentencing range dictated by the Guidelines. However, just as a § 5K1 departure permits a judge to disregard the Guidelines, 18 U.S.C. § 3553(e) allows a judge to depart below the mandatory minimum when the prosecutor, in her sole discretion, certifies that the accomplice has provided "substantial assistance in the investigation or prosecution of another person."[117] The "substantial assistance" required to receive a § 3553(e) departure is indistinguishable from that required for a § 5K1 departure. Thus, all discussion hereinafter relating to § 5K1 departures is equally germane to § 3553(e) departures.

Second, an accomplice charged with multiple counts can incur a sentence for each count,[118] thereby giving more power to a prosecutor who is able to bring multiple charges.[119] The Guidelines direct that "closely related counts" be placed into a single group for purposes of determining the offense level;[120] however, like

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113. *See* U.S. Sentencing Guidelines Manual § 5K1.1 (1998). In fiscal year 1998, courts granted substantial assistance departures in 9,224 sentences, constituting 19.3% of all federal sentences. By comparison, courts granted all other types of downward departures in 6,509 sentences, constituting 13.6% of all federal sentences. *See* U.S. Sentencing Commission, 1998 Sourcebook of Federal Sentencing Statistics 53, Table 26 (visited Feb. 11, 2000) <http://www.ussc.gov/ANNRPT/1998/sbtoc.98.htm>.

114. The difference between a § 5K1 motion and a Rule 35(b) motion is one of timing. A § 5K1 motion is filed *at* an accomplice's sentencing, while a Rule 35(b) motion is filed *after* sentencing. *See* U.S. Attorney's Manual 9-27.400 (1997). Rule 35(b) permits the judge to re-sentence the accomplice in lieu of his post-sentence cooperation. *See* Fed. R. Crim. P. 35(b). However, the difference in timing is immaterial, because prosecutors will not file either motion until after the accomplice has provided his substantial assistance, i.e. has testified against his coconspirator. The U.S. Attorney's Manual treats the two motions identically, and so will this Article.

115. *See* U.S. Sentencing Guidelines Manual § 5K1.1 (1998).

116. *See, e.g.*, 21 U.S.C. § 841(b) (1994).

117. 18 U.S.C. § 3553(e) (1994); *see* Melendez v. United States, 518 U.S. 120, 116 S. Ct. 2057 (1996); U.S. Attorney's Manual 9-27.730 (1997). The sentencing statutes do provide a possible means for a defendant to escape the mandatory minimum requirements, despite the lack of a government motion, and to be sentenced under the Guidelines, so long as several criteria are satisfied. *See* 18 U.S.C. § 3553(f) (1994).

118. *See* U.S. Sentencing Guidelines Manual § 1B1.1 (1998).

119. *See* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Cal. L. Rev. 1471, 1475, 1505-17 (1993) (noting that "[b]ecause the sentencing guidelines are largely 'charge-offense based,' the eventual sentencing outcome is determined primarily by the crime with which the prosecutor charges the defendant").

120. *See* U.S. Sentencing Guidelines Manual § 3D1.2 (1998).

other parts of the Guidelines, determining what counts as "closely related" is not always simple.

*2. Factors Controlled by the Prosecutor*

As noted earlier, leniency is the currency used in the prosecutor's bribe of an accomplice, and the amount of currency available to the prosecutor depends upon her power to threaten and to reduce a sentence. To calculate the currency and power available to her under the Guidelines, the prosecutor must identify sentencing factors that she controls or influences. Generally, there are three such factors.

The first factor controlled by the prosecutor is the accomplice's offense level. For example, first degree murder has a base offense level of forty-three, which translates into a life sentence regardless of past criminal history,[121] but voluntary manslaughter has a base offense level of twenty-five, which could result in a sentence as low as fifty-seven months.[122] Because the only difference between murder and manslaughter is state of mind, which is an amorphous concept, a prosecutor acting in good-faith could probably charge either crime. Therefore, a prosecutor can effectively bribe an accomplice by threatening a murder charge but offering to reduce the charge to manslaughter if the accomplice cooperates.

The second key factor controlled by the prosecutor is the § 5K1 or "substantial assistance" departure. Favorable testimony for the prosecution undoubtedly falls under the definition of "substantial assistance." For a defendant to obtain a § 5K1 departure, the prosecutor must initiate a motion. Without prosecutorial consent, a defendant cannot argue for a "substantial assistance" departure, nor can the sentencing judge consider the departure *sua sponte*.[123] Commentators have emphasized the enormous power that a prosecutor wields over a defendant through the § 5K1 departure.[124] Statistical evidence also supports the proposition that the § 5K1 departure is the most valuable bribe a prosecutor can offer an accomplice. In fiscal year 1998, the median decrease for "substantial assistance" departures was twenty-six months below the minimum guideline sentences, resulting in a median

121. U.S. Sentencing Guidelines Manual §§ 2A1.1, 5A (1998).

122. *See id.* §§ 2A1.3, 5A.

123. *See id.*

124. *See, e.g.*, Ronald S. Safer & Matthew C. Crowl, *Substantial Assistance Departures: Valuable Tool or Dangerous Weapon*, 12 Fed. Sent. R. 41 (1999) (describing how the §5K1 departure, coupled with long mandatory sentences, lured previously uncooperative members of a Chicago gang to testify against gang leaders); Cynthia Lee & Brian Derdowski, Jr., *The Future of Substantial Assistance: Recommendations for Reform*, 11 Fed. Sent. R. 78 (1998) ("Many in the criminal defense community . . . would be happy if the substantial assistance departure were eliminated. The provision fosters distrust amongst defendants by encouraging defendants to testify against one another. Some defense attorneys feel so strongly that they refuse to represent clients who desire to cooperate with the government."); Gardner & Rifkind, *supra* note 94, at 17 ("[The substantial assistance] departure provides the prosecutor with the greatest flexibility . . . . [M]ost prosecutors are unwilling to commit to a downward departure until they . . . have determined the information is important enough to warrant a lesser sentence.").

sentence reduction of 50.4%; in contrast, the median decrease for all other types of downward departures was ten months below the minimum guideline sentence, resulting in a median sentence reduction of 35.1%.[125] In another survey, 83.3% of drug-trafficking defendants who provided testimony in return for a § 5K1 departure received a sentence reduction of four years or more; by comparison, only 45.0% of those drug-trafficking defendants who provided only verbal information—but did not testify—received a sentence reduction of four years or more.[126]

The third factor is, in reality, a range of factors that the prosecutor can influence, though not control, through his presentation of facts to the court. These factors include specific offense characteristics, general offense level adjustments, and criminal history.[127] For example, suppose an accomplice has robbed a bank, but the police are uncertain whether the accomplice was the leader and cannot positively establish that a firearm was "brandished, displayed, or possessed" during the robbery. Also suppose that the accomplice has been convicted in state court of a D.U.I., but the state records are unclear as to whether the D.U.I. was "set aside" or "expunged." The sentencing judge must resolve each of these factual issues to find the accomplice's appropriate sentence. In a plea bargain scenario, the judge will not have had the benefit of a full trial to hear evidence. Therefore, the judge depends, in part, on the representations of the prosecutor at the sentencing hearing. In order to elicit the accomplice's cooperation, the prosecutor may offer to inform the court that the accomplice was not a leader, did not possess a firearm, and that his D.U.I. conviction has been expunged.

### *B. Department of Justice Policy*

The Sentencing Guidelines define the maximum currency that a prosecutor has available to offer to an accomplice. However, Department of Justice ("DOJ") policy regulates a prosecutor's power to spend that currency. The DOJ permits prosecutors to offer leniency bribes through four general types of agreements: (1) immunity agreements,[128] (2) charge agreements,[129] (3) sentence agreements,[130] and (4) fact stipulation agreements.[131] Frequently, prosecutors will use a combination of these types of agreements when structuring a leniency offer.[132]

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125. *See* U.S. Sentencing Commission, 1998 Annual Report 39.

126. *See* Linda Drazga Maxfield & John H. Kramer, Substantial Assistance: An Empirical Yardstick: Gauging Equity in Current Federal Policy and Mostice 32 (Jan. 1998), located at <http//www.ussc.gov/pdf/5kreport.pdf>.

127. *See supra* notes 96-111 and accompanying text.

128. *See infra* Part III.B.1.

129. *See infra* Part III.B.2.

130. *See infra* Part III.B.3. Prosecutors can also enter into "mixed agreements," which contain both a charge agreement and a sentence agreement. *See* U.S. Attorney's Manual 9-27.400 (1997).

131. *See infra* Part III.B.4.

132. *Cf.* Safer & Crowl, *supra* note 124, at 42-43 (noting the "plethora of options open to the parties in structuring plea agreements").

Before exploring the specific components of these agreements, it is important to emphasize that DOJ policy requires that all agreements be recorded in writing.[133] Furthermore, with the exception of an informal immunity agreement, the prosecutor must file papers with the court, and any plea agreement with the accomplice must be revealed in open court.[134] Leniency bribes are not secretive affairs: counsel for the accused can ascertain the exact nature of a leniency bribe in order to impeach the accomplice at trial.[135]

*1. Immunity Agreements*

Every accomplice would probably prefer an immunity agreement, as it entails no conviction and no sentence.[136] Formal immunity agreements are statutory-based and require the approval of an Assistant or Deputy Assistant Attorney General. They must also be cleared by the Criminal Division.[137] Prosecutors are directed to seek authorization for a formal immunity agreement only if it is "necessary to the public" interest and the accomplice will likely "refuse to testify . . . on the basis of his privilege against self-incrimination."[138] Once a prosecutor receives authorization from DOJ officials, she must file a motion with the court to compel the testimony of the immunized accomplice.[139] The only type of formal immunity is use immunity (sometime called derivative-use immunity), which prohibits the government from using the accomplice's immunized testimony, or any evidence derived thereof, in a subsequent prosecution.[140] If the government does choose to prosecute an accomplice who has been granted use immunity, the government has the burden of proving that the evidence presented at trial is "derived from a legitimate source, wholly independent of the compelled testimony."[141]

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133. *See* U.S. Attorney's Manual 9-27.400, 9-27.450, 9-27.650 (1997).

134. *See* Fed. R. Crim. P. 11.

135. *See, e.g.*, Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 766 (1972) (reversing conviction for nondisclosure of promise made to witness); and Hoffa v. United States, 385 U.S. 293, 311-12, 87 S. Ct. 408, 418 (1966) (noting that "[a]t the trial, . . . [the accomplice-witness] was subjected to rigorous cross-examination, and the extent and nature of his dealings with federal and state authorities were insistently explored").

136. *Cf.* Timothy D. Scandurro, *Immunity*, 24 Am. Crim. L. Rev. 839, 839 (1987) (noting that white-collar "defendants are often receptive to immunity offers to avoid the continued threat of criminal prosecution").

137. *See* 18 U.S.C. §§ 6001-6005 (1994); U.S. Attorney's Manual 9-23.130 (1997).

138. 18 U.S.C. § 6003(b) (1994); *see* U.S. Attorney's Manual 9-23.210 (1997).

139. *See* 18 U.S.C. § 6003(a) (1994); *see* U.S. Attorney's Manual 9-23.110 (1997). The court's role in granting an immunity order is minor, as it is merely required to find the facts upon which the order is predicated. *See* U.S. v. Singleton (Singleton II), 165 F.3d 1297, 1306 (10th Cir. 1999) (Lucero, J. concurring).

140. *See* Kastigar v. United States, 406 U.S. 441, 449, 92 S. Ct. 1653, 1659 (1972); Roger C. Spaeder, *The Challenge of Negotiating Immunity: What You Must Know Before You Seek Immunity for Your Client*, 7 Crim. Just. 8, 9 (1992).

141. *Kastigar*, 406 U.S. at 460, 92 S. Ct. at 1665; *see also* U.S. Department of Justice Criminal Resource Manual 718, located at <http://www.usdoj.gov/usao/eousa/foia_reading-room/usam/>.

A close cousin of formal immunity is informal immunity, which is not statutory-based and is often referred to as a non-prosecution agreement.[142] The validity of informal immunity agreements are judged by contract law.[143] A prosecutor need only receive authorization for such contracts from the local U.S. Attorney or a supervisory assistant U.S. attorney, but such agreements still must be in "the public interest" and should only be pursued when "other means," including a formal agreement, "are unavailable."[144] In most respects, informal agreements are less valuable because they are not binding upon state prosecutors and may not even be binding upon U.S. Attorneys in other judicial districts.[145] Furthermore, prosecutors who are dissatisfied with an accomplice's testimony have more leeway to argue that the accomplice has breached the informal immunity agreement by not providing full cooperation.[146] In other aspects, however, an informal immunity agreement can be more valuable to an accomplice, because a prosecutor is able to grant protection—such as transactional immunity—that goes beyond the use immunity provided by statute.[147]

*2. Charge Agreements*

If the cooperation that an accomplice offers is not valuable enough to merit an immunity deal, the prosecutor may still be willing to offer a leniency bribe in the form of a charge agreement. As mentioned before, a prosecutor can exert significant control over an accomplice's possible sentence through the selection of charges.[148] With a charge agreement, the prosecutor promises not to pursue certain charges or to drop current charges, thereby reducing the accomplice's offense level and sentence under the Guidelines.[149] Of course, the prosecutor does not have free reign to pick and choose charges. The U.S. Attorney's Manual directs that a prosecutor must file a charge if she "believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction."[150] Prior to the filing of charges, an individual prosecutor has considerable discretion in declining to pursue a case, but once

142. *See* U.S. Department of Justice Criminal Resource Manual, *supra* note 141, at 719. Informal immunity is also called "pocket immunity" or "letter immunity." *See id.*

143. *See id.*; Spaeder, *supra* note 140, at 10.

144. *See* U.S. Attorney's Manual 9-27.600 (1997).

145. *See* U.S. Department of Justice Criminal Resource Manual, *supra* note 141, at 719; U.S. Attorney's Manual 9-27.630 (1997); Spaeder, *supra* note 140, at 10.

146. *See* Spaeder, *supra* note 140, at 10.

147. *See id.*; Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 8.11(d), at 427 (2d ed. 1992). Transactional immunity protects an accomplice from being prosecuted for the offenses about which he testifies, with the exception of prosecution for perjurious testimony. *See* U.S. Department of Justice Criminal Resource Manual, *supra* note 141, at 719.

148. *See supra* notes 121-22 and accompanying text.

149. *See* Gardner & Rifkind, *supra* note 94, at 15.

150. U.S. Attorney's Manual 9-27.220 (1997).

charges are filed, the prosecutor may only drop a charge with the approval of the U.S. Attorney or a "designated supervisory level official."[151]

Since prosecutorial resources are scarce, DOJ policy permits a U.S. Attorney to decline filing charges when "[n]o substantial Federal interest would be served";[152] furthermore, an accomplice's "willingness to cooperate in the . . . prosecution of others" is one factor among many to be weighed in determining a "substantial Federal interest."[153] The nature and seriousness of the offense, the deterrent effect of prosecution, criminal history and culpability are some other factors that a prosecutor must consider when deciding whether to drop charges against an accomplice.[154]

*3. Sentence Agreements*

A sentence agreement occurs when the prosecutor agrees to take "a certain position regarding the sentence to be imposed."[155] A prosecutor may offer to take no position regarding the accomplice's sentence, to refrain from opposing the accomplice's sentence request, or to recommend a specific fine or term of imprisonment.[156] However, the prosecutor cannot guarantee a particular sentence, because sentencing, unlike charging, is within the province of the judge.[157] This judicial limitation on prosecutorial power makes a sentence agreement less attractive to an accomplice than a charge agreement.

For any sentencing agreement, DOJ policy permits a prosecutor to negotiate one of three options. Under the first option, a prosecutor agrees to recommend or not oppose a specific sentence within a sentencing range but refuses to seek from the judge any departures or adjustments.[158] For example, if the accomplice is facing a thirty-three to forty-one month sentencing range under the Guidelines, the prosecutor may choose to recommend or not oppose a thirty-three month sentence. Under this first option, the prosecution and accomplice sometimes reach a "specific sentence agreement," which permits an accomplice to withdraw his plea if the judge does not accept the prosecutor's recommended sentence.[159] The U.S. Attorney's Manual does not specifically require any supervisory approval for these agreements.[160]

A second option permits the prosecutor to agree to recommend a downward adjustment.[161] This option will be greatly dependent on the facts that the prosecutor

151. *Id.* at 9-27.400; *see* Gardner & Rifkind, *supra* note 94, at 16-17.
152. U.S. Attorney's Manual 9-27.220 (1997).
153. *See id.* at 9-27.230.
154. *See id.*
155. *See id.*
156. *See id.*
157. *See id.* at 9-27.710 (stating that "[s]entencing in Federal criminal cases is primarily the function and responsibility of the court"); *see also* Gardner & Rifkind, *supra* note 94, at 16.
158. *See* U.S. Attorney's Manual 9-27.400 (1997).
159. *See* Gardner & Rifkind, *supra* note 94, at 16.
160. *See* U.S. Attorney's Manual 9-27.400 (1997).
161. *See id.*

presents to the court. As an example, the prosecutor may argue to the court that the accomplice has accepted responsibility for his wrongdoing, thereby lowering the accomplice's offense level by two levels. Like the first option, the U.S. Attorney's Manual does not dictate supervisory approval for these agreements.[162]

The third and most lucrative option for the accomplice is a prosecutorial agreement to file a § 5K1 motion. As noted earlier, the § 5K1 motion permits the judge to impose a sentence outside of the range mandated by the Guidelines.[163] Under this option, a prosecutor may also recommend or not oppose a specific sentence outside of the Guidelines.[164] DOJ policy mandates that a prosecutor receive authorization from superiors prior to filing a § 5K1 motion, but local U.S. Attorneys are given flexibility in formulating an authorization process.[165] However, a recent study indicates that many U.S. Attorney offices are ignoring their own local procedures, while nearly twenty percent of the offices do not even have procedures in writing.[166]

Prosecutorial discretion for any sentence agreement is limited by a DOJ policy, which mandates that sentencing bargaining "must honestly reflect the totality and seriousness of the defendant's conduct."[167] Any recommendation for a downward adjustment must be done in "good faith."[168] With respect to departures from the Guidelines, DOJ policy states that prosecutors should not determine on their own that a departure is appropriate and then attempt to conceal the departure via a charge agreement.[169] Rather, prosecutors are expected to identify departures to the court, so that the court can independently review its appropriateness.[170]

*4. Fact Stipulation Agreements*

Lastly, as previously noted, an accomplice's sentence is heavily dependent upon how the facts are presented to the court.[171] Accomplices sometimes seek fact stipulation agreements, so that their conduct is presented as favorably as possible to the sentencing judge.[172] However, both DOJ policy and the Guidelines limit the extent to which a prosecutor may "fudge" facts in order to induce cooperation from an accomplice. The U.S. Attorney's Manual states that prosecutors should "ensure that the relevant facts are brought to the court's attention fully and accurately,"[173]

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162. *See id.*

163. *See supra* notes 112-115, 123-24 and accompanying text.

164. *See* U.S. Attorney's Manual 9-27.730 (1997).

165. *See id.* at 9-27.400. Authorization may be sought from the U.S. Attorney, the Chief Assistant U.S. Attorney, a supervisory criminal Assistant U.S. Attorney, or a committee composing at least one of the aforementioned individuals.

166. *See* Maxfield & Kramer, *supra* note 126, at 7-8, 24-25.

167. *See* U.S. Attorney's Manual 9-27.400 (1997).

168. *See id.*

169. *See id.*

170. *See id.*

171. *See supra* note 121 and accompanying text.

172. *See* Gardner & Rifkind, *supra* note 94, at 16.

173. *See* U.S. Attorney's Manual 9-27.710 (1997).

and the Guidelines specify that a fact stipulation agreement "shall . . . not contain misleading facts."[174] Nevertheless, prosecutors and accomplices probably have some flexibility when presenting unclear or unascertainable facts.[175]

### C. *Role of the Judiciary*

Some might justifiably express skepticism that executive branch policy can effectively regulate the leniency bribe practice. However, a prosecutor's power to spend leniency currency is not solely governed by DOJ policy. Before offering a leniency bribe, the prosecutor must also consider the judiciary's role. The judicial branch has two important functions in the leniency bribe process.[176] First, the judge, not the prosecutor, imposes an accomplice's sentence.[177] Second, the judge may caution the jury about the reliability of accomplice testimony induced by a leniency bribe.[178]

#### *1. Sentencing*

A judge has considerable discretion in a number of areas when sentencing an accomplice. Doubt as to how a judge will exercise this discretion creates uncertainty in the terms of a leniency bribe contract. Such uncertainty diminishes the prosecutor's power to deal, since the prosecutor is unable to guarantee a sentence for the accomplice. Moreover, a judge does not make sentencing decisions based solely upon facts and recommendations presented by the prosecutor, for an accomplice is free to present his own evidence and to argue how the Guidelines should be applied.[179] Furthermore, the probation officer, who is independent from the U.S. Attorney and works for the judiciary, prepares a pre-sentencing investigation report that details the facts underlying the accomplice's crime.[180]

The first area of judicial discretion is interpretation and application of the Guidelines. A prosecutor may estimate a sentencing range, but the judge ultimately decides an accomplice's offense-level, criminal history category, and adjustments.[181] Second, the judge has discretion in choosing the particular sentence within the sentencing range.[182] The difference between the upper and lower sentences can be as little as six months or as great as six plus years.[183] Third, in some limited circumstances, the judge may depart *sua sponte* from the

174. *See* U.S. Sentencing Guidelines Manual § 6B1.4 (1998).

175. *See* Gardner & Rifkind, *supra* note 94, at 16.

176. In addition to the two roles listed, the court also plays a minor, insignificant role in grants of formal immunity. *See supra* note 139.

177. *See supra* Part III.C.1.

178. *See supra* Part III.C.2.

179. *See* U.S. Sentencing Guidelines Manual § 6A1.3 (1998).

180. *See id.* § 6A1.1.

181. *See id.* § 6A1.3(b) (stating that "[t]he court shall resolve disputed sentencing factors").

182. *See id.* § 5A.

183. *See id.*

Guidelines.[184] While some of these departures call for increases above the Guideline range,[185] the downward departures are more frequently used by judges.[186]

As noted before, the most common departure is the § 5K1 "substantial assistance" departure, but the § 5K1 motion cannot be entertained by a judge absent a government motion, thereby making it the most valuable currency available to a prosecutor.[187] However, the § 5K1 motion, if made, is subject to the broadest judicial discretion. The Guidelines state that a judge *may* depart from the sentencing range; judges have occasionally declined to decrease an accomplice's sentence.[188] Furthermore, the Guidelines say nothing about *how much* a judge should reduce a sentence, making the terms of the leniency bribe contract even more uncertain.[189]

Notwithstanding these areas of judicial discretion, one should not overemphasize the judge's power to regulate leniency bribes through sentencing. The prosecutor, through his charging power, possesses considerable control over the judge's sentencing decision.[190] In a recent survey, nearly seventy-five percent of federal judges polled believed that the prosecutor had the "greatest influence on the final guideline sentence."[191]

*2. Jury Instructions*

When an accomplice testifies against his coconspirator, a federal trial judge frequently cautions jurors about the unreliability of accomplice testimony.[192] Although jury instructions do not diminish the value of a leniency bribe to the testifying accomplice, they do provide a judicial means for regulating the prosecutorial practice of offering leniency for testimony. A prosecutor must

184. *See id.* § 5K2.0 (permitting judge to depart from the Guidelines when "there exists an aggravating or mitigating circumstance . . . not adequately taken into consideration by the sentencing commission"); *see also* 18 U.S.C. § 3553(b).

185. *See* U.S. Sentencing Guidelines Manual § 5K2.0.

186. *See* United States Sentencing Commission Federal Sentencing Statistics, *Federal Sentencing Statistics by State, 1997 Fiscal Year,* Table 8, at 11 (visited Feb. 11, 2000) located at <http//www.ussc.gov.judpack/jp1997.htm>.

187. *See supra* notes 112-15, 123-24 and accompanying text.

188. *See* U.S. Sentencing Guidelines Manual § 5K1.1 (1998); *see, e.g.,* United States v. Luis, 102 F.3d 466, 468 (11th Cir. 1996) (noting that a defendant was denied a "substantial assistance" departure—despite the government's § 5K1 motion—because the district court found the defendant had received adequate leniency in a charge-bargain).

189. *See* U.S. Sentencing Guidelines Manual § 5K1.1 (1998); *see, e.g.,* United States v. Manella, 86 F.3d 201, 202 (11th Cir. 1996) (noting that the district court granted a seven-month departure after government had requested a sixty-month departure); *cf.* Maxfield & Kramer, *supra* note 126, at 20. (discussing whether judges should be given more concrete guidance for sentencing outside the Guidelines).

190. *See* Standen, *supra* note 119, at 1501-17.

191. *See* Maxfield & Kramer, *supra* note 126, at 15.

192. *See* 1 Edward J. Devitt et. al., Federal Jury Instructions: Civil and Criminal § 15.04, at 495-502 (4th ed. 1992).

consider the likelihood and the content of any instructions before deciding to offer a leniency bribe.

Courts have long recognized the danger of accomplice testimony.[193] In the late 1700's, judges began to caution jurors about the dangers of uncorroborated accomplice testimony. Originally, such a caution was not a rule of law but merely sound judicial practice.[194] Today, over twenty American jurisdictions have codified the judicial practice into a nondiscretionary rule of law, whereby judges *must* give the instruction and juries are *required* to acquit if they find the accomplice's testimony to be uncorroborated.[195]

The federal system has never adopted a similar rule of law. In *Caminetti v. United States*,[196] the Supreme Court commented that "it [is] the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to such evidence."[197] Nevertheless, when the defendant argued that the trial judge should have instructed the jury to disregard uncorroborated accomplice testimony, the Supreme Court disagreed and held "there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them."[198]

Most of the courts of appeal have pattern instructions for cautioning jurors about the dangers of accomplice testimony.[199] The following from the Eleventh Circuit is fairly typical:

> The testimony of some witnesses must be considered with more caution than the testimony of other witnesses.
>
> For example, . . . a witness who has been promised that he or she will not be charged or prosecuted, or a witness who hopes to gain more favorable treatment in his or her own case, may have a reason to make a false statement because he wants to strike a good bargain with the Government.
>
> So, while a witness of that kind may be entirely truthful when testifying, you should consider his testimony with more caution than the testimony of other witnesses.[200]

Despite these standardized instructions, rarely does a failure to instruct result in reversible error.[201] Generally, the trial judge commits reversible error only if he fails to caution a jury about uncorroborated accomplice testimony.[202]

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193. *See* 7 John H. Wigmore, Wigmore on Evidence § 2056, at 404-05 (Chadbourn rev. 1978).
194. *See id.*
195. *See id.* § 2056, at 414 & n.10.
196. 242 U.S. 470, 37 S. Ct. 192 (1917).
197. *Id.* at 495, 37 S. Ct. at 198.
198. *Id.*
199. 1 Devitt et al., *supra* note 192, § 15.04, at 495-502.
200. *Id.* at § 15.04, at 502.
201. *See id.* § 15.04, at 495-502.
202. *See, e.g.*, United States v. Roberts, 848 F.2d 906, 908 (8th Cir. 1988); United States v. McGinnis, 783 F.2d 755, 758 (8th Cir. 1986); United States v. Hill, 627 F.2d 1052, 1054-55 (10th Cir.

### D. Summary

Calculating the amount of currency available to a prosecutor involves a number of steps. At a minimum, the prosecutor must figure the possible sentencing range under the Guidelines, consult the limits of DOJ policy, and consider judicial intervention.[203] All three—the Guidelines, DOJ policy, and the courts—regulate a prosecutor's ability to offer leniency bribes. Nonetheless, critics contend that the regulations are insufficient and that any testimony induced by a leniency bribe should be excluded.[204]

## IV. PUBLIC POLICY

Opponents of leniency bribes have raised essentially two arguments in support of a *per se* exclusion of leniency-induced testimony: (1) such testimony is inherently unreliable and (2) it impairs judicial integrity.[205] Neither of these arguments merits exclusion, especially in light of the crime-fighting benefits derived from leniency bribes. Leniency bribes do carry a small risk of erroneous convictions, but this risk can be reduced through prosecutorial and judicial safeguards without sacrificing the benefits of leniency bribes.

### A. Policy Arguments for a Per Se Exclusion

#### 1. Inherent Unreliability

The *Singleton I* panel justified its holding by stating that "the purpose of . . . § 201[(c)(2)] is to keep testimony free of all influence so that its truthfulness is protected."[206] One commentator has noted that "[a]ccomplice plea agreements tend to produce unreliable testimony because they create an incentive for the accomplice to shift blame to the defendant or other co-conspirators,"[207] while another commentator has asserted that "[a] promise of favorable treatment in exchange for

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1980); Tillery v. United States, 411 F.2d 644, 646-47 (5th Cir. 1969). *But see* United States v. Bernard, 625 F.2d 854, 857 (9th Cir. 1980) (where the Ninth Circuit found reversible error when the accomplice testimony was merely "important" and weakly supported by other evidence).

203. *See supra* Part III.A,B, & C.

204. *See infra* Part IV.A.

205. *See id.* The *Singleton I* panel also argued that "deterrence of official misconduct" was a policy justification for exclusion of leniency-induced testimony. *See supra* note 44 and accompanying text. However, this argument presumes that offering a leniency bribe is "official misconduct." If one concludes, as *Singleton II* did, that offering a leniency bribe is *not* official misconduct, then this policy argument becomes moot.

206. *See Singleton I*, 144 F.3d at 1350.

207. Yvette Beeman, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 Cornell L. Rev. 800, 802 (1987).

'cooperative' testimony creates an incentive for perjury."[208] These critics contend that testimony induced by leniency bribes is so inherently unreliable that it should be excluded *per se*.[209]

American jurisprudence, however, does not mandate exclusion of evidence just because it is unreliable. Unless a specific rule forbids it, all relevant evidence is admissible.[210] The jury, not the judge, has the responsibility of evaluating the weight of the evidence.[211] Nonetheless, courts have recognized that some evidence has "special dangers" of unreliability, and in recognition of these dangers, courts have developed policies, called "probative policies" by Dean Wigmore, that lay down "extra safeguard[s]."[212] Perhaps opponents of leniency bribes could justify their *per se* exclusionary rule as a necessary "safeguard" because leniency-induced testimony poses a "special danger."

The most obvious such danger is that the leniency bribe makes the accomplice a biased, interested witness. That danger can be combated without resorting to an exclusionary rule. The early common law did prohibit interested parties from testifying, but that policy has long been obsolete.[213] Today, when a witness is interested, counsel on cross-examination is given broad scope to expose the witness's biases, including the nature of any leniency bribe.[214] Excluding biased witnesses would be an extreme step backwards in the development of evidence law.

Critics of leniency bribes also often compare the unreliability of accomplice testimony to the unreliability of hearsay and then argue that the similarities between the two justify the exclusion of accomplice testimony.[215] This reasoning is wholly without merit. Hearsay is considered a "special danger" because the declarant is not subject to cross-examination, the declarant is not under oath, and the declarant's credibility cannot be assessed and observed by jurors.[216] None of these dangers exist with accomplice testimony.[217]

Commentators have also argued that since the Supreme Court has decided that unreliable eyewitness identifications are excludable, *ergo* unreliable accomplice testimony should be excluded.[218] The analogy is unpersuasive. Pretrial identification has "special dangers" because a witness may mistakenly become convinced that the defendant was the perpetrator, due to overly-suggestive and

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208. Samuel A. Perroni & Mona J. McNutt, *Criminal Contingency Fee Agreements: How Fair are They?*, 16 U. Ark. Little Rock L.J. 211, 222 (1994).

209. *See Singleton I*, 144 F.3d at 1359-61; Perroni & McNutt, *supra* note 208, at 230-31; Beeman, Note, *supra* note 207, at 806, 816.

210. 1 John H. Wigmore, Wigmore on Evidence § 10, at 152 (2d ed. 1923).

211. *See id.* § 12, at 157.

212. *See* 2 Wigmore, *supra* note 210, § 1171, at 711.

213. *See* 1 Wigmore, *supra* note 210, § 575, at 985.

214. *See* Edward J. Imwinkelried & Daniel D. Blinka, Criminal Evidentiary Foundations 184-85 (1997); 3A John H. Wigmore, Wigmore on Evidence § 944, at 778 n.1 (Chadbourn rev. 1970).

215. *See* Perroni & McNutt, *supra* note 208, at 230.

216. *See* 5 Wigmore, *supra* note 193, § 1362, at 3-12.

217. *See supra* note 135 and accompanying text.

218. *See, e.g.*, Beeman, *supra* note 207, at 805.

untrustworthy police procedures that take place outside the courtroom.[219] By the time of trial, the eyewitness has become so persuaded of her previously faulty identification that defense counsel cannot correct the mistake through a courtroom cross- examination.[220] To safeguard against such unreliable results, the Court has mandated certain procedures—such as the presence of defense counsel at pre-trial line-ups and regulation of suggestive techniques—to eliminate, in advance, the untrustworthy elements of line-ups.[221] In contrast, accomplice testimony is unreliable due to witness bias, and as noted earlier, defense counsel can disclose the biases to the jury on cross-examination.[222] So long as leniency bribes are fully documented and made available to defense counsel, the out-of-court dangers of leniency bribes can be corrected in the courtroom.

Another plausible rationale for exclusion might be what Dean Wigmore deemed a "preferential rule."[223] Sometimes, evidence is excluded, either absolutely or conditionally, because other evidence is more reliable.[224] For example, the best evidence rule is a conditional preference because original writings are preferred, unless they are unavailable.[225] One could argue that other forms of evidence (i.e. circumstantial evidence or non-accomplice testimony) are preferred, either absolutely or conditionally, over accomplice testimony. However, prosecutors are often forced to use accomplice testimony because no other strong evidence is available. Furthermore, prosecutors probably already do use non-accomplice evidence whenever possible in order to maximize the chances of convicting a defendant and to minimize the amount of a leniency bribe they must pay an accomplice.[226] In summary, leniency-induced testimony has no special dangers that would merit its exclusion.

### 2. *Judicial Integrity*

The *Singleton I* panel and commentators have claimed that preservation of judicial integrity merits *per se* exclusion of accomplice testimony induced by a leniency bribe.[227] Defining "judicial integrity" is no easy feat. The Supreme Court has proclaimed that "[t]he primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution."[228] Judicial integrity could also be extended to discourage statutory

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219. *See* United States v. Wade, 388 U.S. 218, 235, 87 S. Ct. 1926, 1936-37 (1967).

220. *See id.* 235-36, 87 S. Ct. at 1936-37.

221. *See id.* 236, 87 S. Ct. 1937.

222. *See supra* note 135 and accompanying text.

223. *See* 2 Wigmore, *supra* note 210, § 1172, at 712.

224. *See id.*

225. *See id.*

226. *See generally supra* Part III. As the amount of non-accomplice evidence increases, the bargaining power of the prosecutor over the accomplice also rises, enabling the prosecutor to offer a less lucrative leniency bribe.

227. *See Singleton I*, 144 F.3d at 1360; Perroni & McNutt, *supra* note 208, at 211; Beeman, *supra* note 207, at 823-24.

228. United States v. Janis, 428 U.S. 433, 458 n.35, 96 S. Ct. 3021, 3034 n.35 (1976).

violations; as *Singleton I* noted, courts should "not be made party to lawlessness by permitting unhindered use of the fruits of illegality." However, these definitions require that a law be broken, and if one accepts the notion that leniency bribes do not violate § 201(c)(2) or any other law, then the "judicial integrity" argument becomes moot.

Perhaps the "judicial integrity" argument is grounded in a belief that leniency bribes are just not fair.[229] Opponents of leniency bribes have noted that if a defense attorney bribed a witness, he would be subject to disciplinary sanctions and criminal penalties; meanwhile, his prosecutor-opponent can bribe with impunity.[230] One court has commented that when a private attorney pays a fact witness, the attorney "violates the very essence of the integrity of the judicial system";[231] therefore, critics contend a prosecutor's leniency bribe must be equally ominous for judicial integrity.[232] Mr. J. Richard Johnston, the attorney who devised the § 201(c)(2) argument made in *Singleton I*, best summarizes this view of "judicial integrity":

> Regardless of the difference in the duties of a prosecutor and defense counsel, compensating a witness for testifying involves an identical threat to the integrity of the judicial system whether the witness testifies for the prosecution or the defense. There is no apparent reason why the rules should be different for the two sides in a criminal case. . . .[233]

The reasoning of Mr. Johnston and other critics is flawed because it fails to acknowledge a key distinction between illicit bribes and leniency bribes. When a criminal defendant bribes a witness, it is done covertly and without the judge, the prosecutor, and, most importantly, the jury ever knowing anything about the nature of the bribe. An illicit bribe is often totally obscured from the finder of fact, depriving the jury of valuable evidence that could assist it in evaluating the credibility of the bribed witness.

In contrast, a leniency bribe is heavily regulated, well documented, and made known to the court, to defense counsel, and, again most importantly, to the jury.[234] As noted before, a defendant has an opportunity to cross-examine the accomplice. Just like any other witness, the credibility of an accomplice testimony is subject to attack and impeachment. Defense counsel is free to admit into evidence the

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229. *See* Perroni & McNutt, *supra* note 208, at 220-22; Beeman, *supra* note 207, at 826.

230. *See* Mark Hansen, *Shotdown in Mid-Theory*, A.B.A. J. May 1999, at 46; J. Richard Johnston, *Paying the Witness: Why is it OK for the Prosecution, but not the Defense?*, 11 Crim. Just. 21, 23 (Winter 1997).

231. The Florida Bar v. Jackson, 490 So. 2d 935, 936 (Fla. 1986).

232. *See* Johnston *supra* note 230, at 24; Perroni & McNutt, *supra* note 208, at 222.

233. Johnston, *supra* note 230, at 24; *see generally* Hansen, *supra* note 230, at 46. Rather than arguing that *neither* prosecutors nor defense counsel should be permitted to make any type of bribe, *Singleton I* supporters might want to argue that *both* prosecutors and defense counsel should be permitted to make leniency bribes. *See generally* Rita W. Gordon, Comment, *Right to Immunity for Defense Witnesses*, 20 Conn. L. Rev. 153 (1987). Such a proposal is beyond the scope of this Article, but it could achieve the fairness desired by defense attorneys.

234. *See supra* Part III; *supra* notes 135, 217 and accompanying text.

accomplice's plea agreement or immunity deal; furthermore, counsel may argue to the jury that the accomplice is lying to save his skin. In the leniency bribe scenario, the jury is presented with all the evidence so it can determine the credibility of the accomplice-witness. None of these procedures occur with an illicit bribe. A leniency bribe does not corrode the judicial process like an illicit bribe does, because the procedures that accompany a leniency bribe ensure that judicial factfinding is not impaired.

### *B. Benefits and Costs of Leniency Bribes*

The primary benefits of leniency bribes are obvious: they elicit testimony that assists in the prosecution and conviction of factually guilty defendants. Unfortunately, there are no firm statistics showing how many persons are convicted based upon accomplice testimony. One survey loosely supports the argument that leniency-induced testimony is helpful in obtaining convictions. The U.S. Sentencing Commission examined 130 drug defendants who had provided the government some type of substantial assistance (e.g. testimony, undercover work, nontestimonial information, etc.).[235] Of these 130, twenty-nine testified for prosecutors.[236] The study does not indicate how many convictions directly resulted from the testimony provided by the twenty-nine accomplices, but the study did show that the assistance provided by all 130 accomplices resulted in twenty-one trial convictions and fifty-eight guilty pleas.[237]

Other evidence indicates that leniency bribes are most critical in the war on drugs. In 1997, over thirty-four percent of all § 5K1 "substantial assistance" departures were granted to defendants convicted of drug trafficking or possession—more than any other crime category.[238] Furthermore, studies show that prosecutors use the § 5K1 departure to lure "small fish" drug operators to catch "big fish" drug leaders and organizers.[239] Judge Trott of the Ninth Circuit, an ex-prosecutor, has explained why accomplice testimony is so necessary to catch the "big fish":

> [H]uman nature is such that if you go to somebody who's been trapped, a small fish, and say, "We'd like you to testify against your boss," and he says, "Well, what do I get out of it," and you tell him, "Nothing," then

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235. *See* Maxfield & Kramer, *supra* note 126, at 28. The types of assistance categorized in the survey were: (1) undercover, (2) testimony, (3) agreement to testify, (4) information on new co-defendants, (5) information on known defendants, and (6) information on own criminal conduct.

236. *See id.* Seventeen performed undercover work, thirty-two agreed to testify, twenty-five gave information on new co-defendants, seventy-eight provided information on known defendants, and seven provided information on their own criminal conduct.

237. *See id.* at 29. Some of the other results were thirty-one new prosecutions and five sentencing enhancements.

238. *See* United States Sentencing Commission Federal Sentencing Information, *Federal Sentencing Statistics by State, 1997 Fiscal Year,* Table 9, at 14 located at <http//www.ussc.gov.judpack/jp1997.htm>. Many of these departures may have been granted for non-testimonial assistance.

239. *See* Maxfield & Kramer, *supra* note 126, at 12-13.

> why is he going to cooperate? So I think it's important to be able to give something in return.[240]

Additionally, since *Singleton I*, law enforcement officials have stressed the significance of leniency bribes to crime-fighting. The DOJ announced that "[t]he department relies on [accomplice] witness testimony in thousands of cases each year," and if *Singleton I* had been upheld, it "would [have] cripple[d] enforcement of federal criminal and civil law."[241] One former prosecutor commented that "[t]he prosecutions where the government does not use informants are few and far between."[242] Furthermore, current prosecutors believe accomplice testimony is beneficial. In a recent survey of eighty-eight U.S. Attorney's offices, testimony at trial was the only type of assistance for which all eighty-eight offices would grant a § 5K1 departure to an accomplice.[243] One writer claims that in the last five years, the U.S. Attorney's Office in the Southern District of New York has solved 250 gang-related murders and convicted 300 persons on almost exclusively accomplice testimony.[244] Other writers have described how the § 5K1 departure was critical to law enforcement's efforts in toppling a notoriously violent Chicago street gang.[245] Although much of the foregoing evidence is anecdotal and inconclusive, it generally indicates that leniency bribes benefit prosecutors and police in their crime-fighting efforts.

Nevertheless, leniency bribes are not cost-free. One cost is that factually guilty accomplices receive lower sentences, thereby causing great sentencing disparities amongst defendants who have committed similar crimes.[246] Victims and society are often morally outraged that a criminal is getting a "break." While such outrage may be understandable, a number of factors should dampen this outrage. First, a prosecutor may often be unsure of whether she has sufficient admissible evidence to convict an accomplice at trial; the leniency bribe entices the accomplice to plead guilty, thereby avoiding the risk of the accomplice receiving a "not guilty" verdict and no punishment at all. Second, an accomplice who does cooperate with the government should probably be considered less morally culpable and more deserving of a lower sentence than a non-cooperating defendant. Third, an accomplice who testifies against a defendant possibly runs the risks of reprisal

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240. *Morning Edition* (National Public Radio broadcast, Nov. 17, 1998), *available in* 1998 WL 3309399.

241. *See id.*

242. Fimea, *supra* note 3 (comments of Mr. Tom Crowe of Crowe & Scott, Phoenix, Arizona).

243. *See* Maxfield & Kramer, *supra* note 126, at 26.

244. *See* Steven M. Cohen, *"Singleton" Turns the Tables Too Far*, 21 Nat'l L.J. Nov. 16, 1998, at A27.

245. *See* Safer & Crowl, *supra* note 124, at 41-42.

246. *See* Frank O. Bowman, III, *Defending Substantial Assistance: An Old Prosecutor's Meditation on Singleton, Sealed Cases, and the Mayfield-Kramer Report*, 12 Fed. Sent. R. 45, 46-47 (1999); Ian Weinstein, *Regulating the Market for Snitches*, 47 Buff. L. Rev. 563, 564 (1999). The problem of sentencing disparity should not be underestimated, and this Article, admittedly, does not sufficiently address the problem. Professors Bowman and Weinstein have offered some interesting suggestions to correct sentencing disparity.

from the defendant or his confederates;[247] a leniency bribe compensates the accomplice for the risk he takes.

Another cost to society of leniency bribes is the risk that an accomplice will fabricate testimony, thereby misleading a jury and causing a wrongful conviction of an innocent defendant. Calculating this risk is exceedingly difficult if not impossible. A recent example of the costs incurred by this risk occurred in Illinois, where state prosecutors allegedly used a leniency bribe to coerce a witness to falsely implicate defendants in a double murder case, resulting in four innocent persons spending eighteen years in prison.[248] One can certainly imagine situations where a leniency bribe might encourage an accomplice to implicate innocent confederates for self-serving purposes.[249] Professors Bedau and Radelet claimed in one study, which has been discredited by some scholars,[250] that out of 360 erroneous capital convictions this century, twenty-two were caused by prosecutors and police who unduly influenced key witnesses, some of whom received leniency bribes.[251]

Nonetheless, even if one accepts the figures from the Bedau and Radelet study, the vast majority of wrongful convictions are *not* the result of leniency-induced testimony.[252] While the newspapers recently have been filled with stories of wrongful convictions, leniency bribes have not been the primary cause of these convictions.[253] Rather, other factors, such as mistaken eyewitness testimony, seem to be largely responsible for wrongful convictions.[254] Even though there may be

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247. *See* Safer & Crowl, *supra* note 124, at 42.

248. *See, e.g.*, Abdon M. Pallasch, *'Ford Heights Four' Case Now Turns on Prosecutors, Police*, Chicago Daily L. Bull., Apr. 24, 1999, at 3 (alleging that a key eyewitness changed her testimony and placed the defendants at the scene of the crime only after prosecutors agreed to reduce the eyewitness's sentence for a perjury conviction to probation); *see also* Ken Armstrong, *Now Ford Heights 4 Seek Special Prosecutor*, Chicago Tribune, Apr. 1, 1999, at 1 (Metro), *available in* 1999 WL 2859249.

249. *Cf., e.g.*, Christopher Slobogin, Criminal Procedure: Regulation of Police Investigation 133-34 (2d ed. 1998) (detailing U.S. Postal Service sting operation where police informants—who were paid for their services—wrongly implicated innocent persons with apparent motive of "scamming" money from the federal government).

250. *See* Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 Stan. L. Rev. 121 (1988).

251. *See* Hugo A. Bedau & Michael L. Radelet, *Miscarriages in Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 56-57, 58-59 (1987).

252. *See supra* note 251 and accompanying text.

253. *See, e.g.*, Sharen Cohen, *Last-Minute Exonerations Fuel Death-Penalty Debate Justice*, Los Angeles Times, Aug. 15, 1999, at A1; Shirley E. Perlman, *Exoneration by DNA Raises Unsettling Questions*, Indianapolis Star, Aug. 1, 1999, at A7; David Protess & Rob Warden, *Nine Lives: The Justice System Sentenced These Men to Death*, Chicago Tribune, Aug. 10, 1997 (Magazine), *available at* 1997 WL 3576969.

254. *See* Perlman, *supra* note 253 (noting Department of Justice study that found eyewitness testimony was incriminating factor in 28 cases of wrongfully-convicted persons); Michael Higgins, *Tough Luck for the Innocent Man*, 85 A.B.A. J. 46, 48 (Mar. 1999) (quoting Professor C. Ronald Huff, co-author of a book about wrongful convictions as saying "[t]here are just a lot of problems with overreliance on eyewitness testimony"). The homepage of the Innocence Project, a group at Cardozo School of Law that attempts to exonerate innocent death row inmates, claims that "[c]onventional serology, mistaken eyewitness identification, and unmonitored laboratory practices have contributed

some legitimate reasons to believe that leniency bribes cause innocent persons to be convicted, the evidence for this proposition is too light to justify an outright ban on leniency bribes; a more appropriate step would be greater regulation of leniency bribes through safeguards.

### C. *Some Proposed Safeguards*

The *Singleton I* panel and leniency bribe opponents urged exclusion of leniency-induced testimony in order to safeguard against the risk of perjury.[255] This safeguard, however, is too costly to society. As explained above, leniency bribes benefit society by enabling prosecutors to more effectively combat crime.[256] Furthermore, the art of cross-examination permits a defendant, just like any other litigant, to expose an accomplice's bias and lack of credibility. Nonetheless, three aspects of leniency-induced testimony suggest that extra safeguards are warranted. First, society has higher expectations of government litigants than private litigants; therefore, government prosecutors should be expected to be more careful than private litigants in ensuring that their witnesses are reliable. Second, while an illicit bribe is probably within the common understanding of jurors, a leniency bribe is unique to the criminal law world and may be difficult for jurors to comprehend; hence, jurors may need extra assistance in understanding the leniency bribe. Third, unlike civil litigation, a criminal trial involves a person's liberty interest; thus, the law should require extra safeguards in criminal litigation. I propose two safeguards. First, DOJ should develop more thorough procedures for confirming the reliability of accomplice witnesses.[257] Second, judges should be required as matter of law to give a cautionary instruction to the jury about the dangers of leniency-induced testimony.[258] All of these safeguards can reduce the risk of erroneous convictions while not depriving society of the benefits of leniency bribes.

#### 1. *Formal Prosecutorial Procedures*

As previously noted, the U.S. Attorney's Manual and other DOJ resources provide extensive guidance to prosecutors on the procedures for offering leniency bribes.[259] However, the U.S. Attorney's Manual lacks an expressed procedure for determining the reliability of accomplice testimony. The proposed procedure is simple: Before a prosecutor puts an accomplice witness on the stand, one or more disinterested officials should review the case file and verify that the accomplice's testimony has indicia of reliability.

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largely to the population of thousands to be unjustly incarcerated." *Innocence Project at Cardozo School of Law* (visited Feb. 12, 2000) <http://www.cardozo.yu.edu/innocence_project/index.html>.

255. *See supra* Part IV.A.

256. *See supra* Part IV.B.

257. *See infra* Part IV.C.1.

258. *See infra* Part IV.C.2.

259. *See supra* Part III.B.

Prosecutors who have been intimately involved with a case may be incapable of adequately assessing the reliability of an accomplice-witness, because prosecutors, like all litigating attorneys, often become passionate advocates for their position. A disinterested official could ensure that the prosecutor's reliability assessment is correct. The disinterested official should be an experienced attorney with no stake in the outcome of the case. Small U.S. Attorney's offices may need to consult other offices or hire outside counsel for large cases. If the disinterested official opined that the accomplice was unreliable, her opinion would not necessarily halt the prosecution, but it should provoke further review of the case by more senior officials.

In her review, the disinterested official should look for evidence, either direct or circumstantial, that corroborates the accomplice's testimony. Corroborating evidence normally will provide sufficient indicia of reliability. In the absence of corroborating evidence, the disinterested official should scrutinize the case for any special reasons that would make the accomplice particularly reliable; for example, perhaps the accomplice has clearly demonstrated great remorse for past crimes. When an accomplice has a high motive to lie (e.g. avoidance of a lengthy sentence), the disinterested official should be particularly suspicious of the accomplice's reliability.

Although many U.S. Attorney's offices may already have local formal or informal procedures for verifying accomplice testimony,[260] one study has indicated that many U.S. Attorney offices do not comply with their local § 5K1 procedures,[261] and obviously, an unenforced policy will not reduce the risk of wrongful convictions. DOJ should formulate a general policy for all U.S. Attorneys and include it as part of the U.S. Attorney's Manual. Formal written procedures promulgated by DOJ will make all U.S. Attorneys and their prosecutors accountable for adhering to the policy.

*2. Cautionary Jury Instructions*

As noted before, giving cautionary jury instructions for leniency-induced testimony has always been considered sound judicial practice, but appellate courts refuse to find reversible error for a failure to instruct, unless there is a lack of corroborating evidence.[262] This deference to the trial court's discretion is unnecessary, for it is difficult to imagine a case where an instruction would not be beneficial. Appellate courts should find that failure to give a cautionary instruction is plain error, even if corroborating evidence exists.[263]

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260. *Cf.* Daniel C. Richman, *The Challenges of Investigating Section 5K1.1 in Practice*, 11 Fed. Sent. R. 75 (1998) (noting different procedures among different districts).

261. *See supra* note 166 and accompanying text.

262. *See supra* notes 196, 201-02 and accompanying text.

263. Overwhelming corroborating evidence may mean that the lack of an instruction is merely "harmless error."

The present pattern instructions used in the various circuits are adequate.[264] The instruction should expressly say what a witness is receiving or may receive in the future for his testimony. The Ninth Circuit's instruction is exemplary: "You have heard the testimony from . . . a witness who has received immunity. The testimony was given in exchange for a promise by the government. . . ."[265]

Some may argue that an additional jury instruction is unwarranted, because an instruction discussing general witness biases is sufficient.[266] However, jurors may have difficulty understanding exactly what the accomplice-witness is receiving in exchange for his testimony. Expert witnesses often testify when something is beyond the jury's normal understanding,[267] but calling expert witnesses to explain leniency bribes would be time-consuming and costly. In contrast, a jury instruction costs society almost nothing, and it may reduce the risk of wrongful conviction by educating jurors about the accomplice's leniency bribe. Furthermore, a judicial instruction comports with a judge's role of giving "reasonable guidance to the jury on the facts of the case."[268]

Cautionary instructions are subject to valid criticisms. Whether jurors pay attention to jury instructions is a debatable issue, and lengthening an instruction might only lessen jurors' attention to the instruction. Nevertheless, a concise and express statement by the judge can avert these problems and still assist the jury in understanding the nature of the accomplice's leniency bribe.

## V. CONCLUSION

*Singleton I*, although wrongly decided, has sparked a healthy debate about prosecutorial offers of leniency in exchange for accomplice testimony.[269] Such offers can be characterized as bribes, and the currency used in these bribes is leniency.[270] The amount of currency available to a prosecutor is regulated by the Sentencing Guidelines, DOJ policy, and the courts.[271] These regulations, coupled with the art of cross-examination, expose the unreliable elements of accomplice testimony and ensure that judicial integrity is not impaired; therefore, exclusion of leniency-induced testimony is unwarranted.[272] Leniency bribes benefit society by aiding in crime-fighting, but they cause a small risk of wrongful convictions.[273] To reduce this risk at little cost, the Justice Department should adopt formal procedures to verify the reliability of accomplice testimony, and trial judges should give cautionary instructions to juries about the nature of leniency bribes.[274]

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264. *See, e.g., supra* note 199-200 and accompanying text.
265. *See* 1 Devitt et al., *supra* note 192, § 15.03, at 493.
266. *See, e.g.*, 7 Wigmore, *supra* note 193, § 2057, at 417-20.
267. *See, e.g.*, Fed. R. Evid. 702.
268. *See* 1 Devitt et al., *supra* note 192, § 7.01, at 200.
269. *See supra* Part II.
270. *See supra* Part III.
271. *See id.*
272. *See supra* Part IV.A.
273. *See supra* Part IV.B.
274. *See supra* Part IV.C.