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## Plea Agreements: Progressing the Fight against Crime or Bribing Witnesses

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# PLEA AGREEMENTS: PROGRESSING THE FIGHT AGAINST CRIME OR BRIBING WITNESSES?

## I. INTRODUCTION

Plea bargaining, the method of being lenient with a witness in order to convict his accomplice, is a significant weapon in a prosecutor's arsenal and standard practice in the modern American criminal justice system.<sup>1</sup> Opponents of plea-bargaining argue it is unfair to allow the prosecution to trade leniency for testimony when courts forbid opposing attorneys from granting anything to a witness in exchange for testimony with the exception of basic expenses.<sup>2</sup> According to opponents, this disparity gives prosecutors an unfair advantage that can only be corrected by suppressing testimony gained through plea agreements.<sup>3</sup>

The controversy over the validity of plea agreements increased in 1998 when the Tenth Circuit Court of Appeals ruled in *United States v. Singleton*<sup>4</sup> that plea agreements constituted bribes under 18 U.S.C. § 201(c)(2) (the Bribery Statute).<sup>5</sup> This resulted in the suppression of testimony that resulted from the plea agreement.<sup>6</sup> Shortly thereafter, attor-

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<sup>1</sup> See *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (characterizing plea agreements as most "ingrained" practice in American criminal justice system).

<sup>2</sup> See *United States v. Fraguera*, 1998 WL 560352, \*2 (E.D. La. Aug. 27, 1998) (outlining tools available to defense teams in comparison to those available to prosecution).

<sup>3</sup> See *id.* (describing prosecutorial tools).

<sup>4</sup> 144 F.3d 1343 (10th Cir. 1998)

<sup>5</sup> See *id.* (holding plea-bargains violate Bribery Statute). The court applied the plain meaning of 18 U.S.C. § 201(c)(2), which provides, in pertinent part:

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

*Id.*

<sup>6</sup> See *Singleton*, 144 F.3d at 1361 (allowing defense motion to suppress accomplice testimony).

neys across the United States rushed to file motions to vacate convictions based on testimony attained as the result of plea agreements.<sup>7</sup> The majority of decisions following *Singleton* rejected the bribery theory and refused to hold the government bound under 18 U.S.C. §201(c)(2).<sup>8</sup> At the same time, the United States Senate came to the defense of prosecutors and drafted a bill specifically providing that plea agreements are not a violation of the Bribery Statute.<sup>9</sup> This scrutiny of plea-bargaining shows the vulnerability of a practice believed to have an unshakable foundation.<sup>10</sup>

This note begins by providing a chronology of the use of plea bargains and the manner in which they gained acceptance as a regular practice in the American criminal justice system.<sup>11</sup> This note then discusses the plain meaning rule and the debate over its use.<sup>12</sup> Furthermore, this note will investigate the application of the plain meaning rule to the Bribery Statute and the effect that *Singleton* and subsequent decisions had on this debate.<sup>13</sup> Finally, this note will discuss how plea bargaining has become an indispensable tool in fighting crime, specifically in combating and controlling crimes involving complicity.<sup>14</sup>

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<sup>7</sup> See e.g. Patricia Nealon, *Massachusetts Lawyers Await Effects of Colorado Ruling*, BOSTON GLOBE, July 29, 1998, at B1 (documenting at least three motions to suppress in Massachusetts based on *Singleton* decision).

<sup>8</sup> See e.g. *United States v. Barbaro*, 1998 WL 556152, \*3 (S.D.N.Y. Sept. 1, 1998) (explaining long history of plea bargaining in United States); *United States v. Reid*, 19 F. Supp.2d 534, 535 (E.D. Va. 1998) (stating courts have continually supported exchange of leniency for testimony); *United States v. Eisenhardt*, 10 F. Supp. 2d 521 (D. Md. 1998) (refusing to follow *Singleton*). The *Eisenhardt* court opined that the chances of the Supreme Court agreeing with the *Singleton* decision was "about the same as discovering that the entire roster of the Baltimore Orioles consists of cleverly disguised leprechauns." *Id.*

<sup>9</sup> See S. 2311, 105<sup>th</sup> Cong. (1998). The bill also states that the exclusion of prosecutors from the Bribery Statute would be retroactive. *Id.*

<sup>10</sup> See *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (stating that plea agreements are "ingrained" practice in America).

<sup>11</sup> See *infra* notes 15-45 and accompanying text.

<sup>12</sup> See *infra* notes 46-58 and accompanying text.

<sup>13</sup> See *infra* notes 59-127 and accompanying text.

<sup>14</sup> See *infra* notes 128-141 and accompanying text.

## II. HISTORY

### A. Plea Agreements

The practice of plea-bargaining dates back to old English law.<sup>15</sup> As early as 1892, the United States Supreme Court recognized the admissibility of a co-defendant's testimony for the prosecution.<sup>16</sup> The Court reasoned that just as the defendant has a right to testify, so should his accomplice.<sup>17</sup> For some time, plea agreements remained a hidden component of trial practice.<sup>18</sup> Plea agreements gained recognition and validation when the Supreme Court found that plea-bargaining is a key element in fighting crime and encouraged the practice.<sup>19</sup> It was widely acknowledged that the witness who has the most detailed knowledge of a crime is often a co-conspirator.<sup>20</sup> Courts, however, noted some potential problems regarding plea agreements.<sup>21</sup> One court supported the procedure of plea bargaining while at the same time calling it an "inducement to lie."<sup>22</sup>

In recent years, courts have made an effort to better define the elements of a valid plea agreement.<sup>23</sup> Judges tempered the strength of

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<sup>15</sup> See *Rex v. Rudd*, 99 Eng. Rep. 1114 (1775) (allowing exchange of leniency for witness' testimony).

<sup>16</sup> See *Benson v. United States*, 146 U.S. 325, 337 (1892) (holding that accomplice not prevented from testifying solely because they are interested party).

<sup>17</sup> See *id.* at 64 (equating rights of conspirators). See also *Rosen v. United States*, 245 U.S. 467, 472 (1917) (discussing how *Benson* case sparked acceptance of accomplice testimony on state level).

<sup>18</sup> See *Blackledge v. Allison*, 431 U.S. 63, 76 (1977) (asserting that plea bargains "shrouded in secrecy and deliberately concealed").

<sup>19</sup> See *United States v. Santabello*, 404 U.S. 257, 260 (1971) (stating that plea-bargaining were "essential component of the administration of justice"). See also *United States v. Reid*, 19 F. Supp. 2d 534, 537 (E.D. Va, July 28, 1998) (noting long history of accepting plea agreements).

<sup>20</sup> See *United States v. Dailey*, 759 F.2d 192,196 (1st Cir. 1985) (explaining need for plea agreements).

<sup>21</sup> See *United States v. Cervantes-Pacheo*, 826 F.2d 310, 315 (5th Cir. 1987) (requiring attorneys disclose plea agreements in court).

<sup>22</sup> See *id.* In *Cervantes*, the court held that plea agreements are acceptable so long as the agreement is disclosed at trial and the jury has an opportunity to evaluate the witness' credibility. *Id.*

<sup>23</sup> See *infra* notes 58-68 (discussing elements of valid plea agreements).

plea-bargains by requiring prosecutors to disclose the terms and details of the bargain at trial.<sup>24</sup> Opponents of plea-bargaining counter that when a witness is promised leniency that witness is induced to offer testimony that will aid the prosecution, thereby increasing the possibility that the witness will feel compelled to commit perjury.<sup>25</sup> In an effort to mitigate the possibility of perjury in plea-bargained testimony, one court ruled that plea agreements that are contingent upon the issuing of an indictment or the success of a prosecution is unconstitutional.<sup>26</sup> Similarly, courts forbid prosecutors from withholding the benefits of a plea bargain until after they achieve the desired result.<sup>27</sup> When the government waits to fulfill the terms of a plea bargain, the threat of prosecution continues to plague the witness, therefore making him or her feel a sense of obligation to please the government and results in a violation of the defendant's due process.<sup>28</sup> If a prosecutor uses this carrot and stick approach, he violates his duty to search out the truth rather than merely follow a pre-determined theory of guilt.<sup>29</sup>

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<sup>24</sup> See *Giglio v. United States*, 405 U.S. 150, 153-54 (1972) (ordering new trial because plea agreement not disclosed). In *Giglio*, the court ordered a new trial because the prosecutor had no knowledge of, and therefore did not disclose during the trial, the existence of a plea agreement between the government and witness. *Id.*

<sup>25</sup> See *United States v. Waterman*, 732 F.2d. 1527, 1531 (8th Cir. 1984) (describing contingent plea agreements as "invitation to perjury"). The defense in *Waterman* argued that the testimony gained as a result of a plea agreement is so likely to be tainted that it cannot be trusted. *Id.* See also *Franklin v. Nevada*, 577 P.2d. 860, 861-62 (1978) (*overruled by Sheriff, Humbolt County v. Acuna*, 819 P.2d 197 (Nev. 1991) (approving use of plea agreements so long as plea agreements not contingent on outcome of trial). The *Franklin* court held that to make a plea agreement contingent would violate due process by inducing the witness to testify in a certain manner. *Id.* See also *United States v. Fraguera*, 1998 WL 560352,\*1 (E.D. La. Aug. 27) (arguing that despite good faith of prosecutors, plea agreements may tempt witnesses to lie).

<sup>26</sup> See *Waterman*, 732 F.2d. at 1531 (holding that contingent plea agreements violate due process); *Franklin*, 577 P.2d at 863 (discussing witness' perception of plea agreement). The court in *Franklin* found that if the terms of a plea agreement would make a reasonable witness feel that he/she is required to lie in order to fulfill the conditions of the bargain, the agreement violates the defendant's right to due process. *Id.*

<sup>27</sup> See *Franklin*, 577 P.2d at 866. (holding it violated due process for government to withhold "fruits" of bargain for three years).

<sup>28</sup> See *id.* at 221 (stating that witness' sense of obligation to prosecutor can violate due process).

<sup>29</sup> See *id.* at 225 (stating when prosecutors merely follow theory of guilt disrespects idea of presumed innocence).

Historically, the possible rewards involved in plea agreements have not been limited to leniency.<sup>30</sup> In addition to promises of reduced sentences, courts have approved cash payments of over one million dollars to witnesses.<sup>31</sup> One court approved a reward of a liquor license in return for cooperation with a government investigation.<sup>32</sup>

The plea agreement process has a strong procedural and historical foundation.<sup>33</sup> Theorists reason that the prosecutors who reach plea agreements with witnesses do not hold the power over that witness' final sentence, but rather act only in an advisory capacity during the witness' sentencing.<sup>34</sup> It is the sentencing judge and not the prosecutor who makes the final determination on how to reward the cooperation of the witness, leaving prosecutors only able to offer advice thereon.<sup>35</sup> Often when drafting plea agreements, prosecutors limit their promise to merely informing the court of the plea agreement and advising the court to reduce the witness' sentence.<sup>36</sup> Procedural guidelines determine that prosecutors can agree to three actions in return for cooperation: (1) a motion to dismiss other charges; (2) a recommendation for a specific sentence; and (3) an agreement that a specific sentences is appropriate.<sup>37</sup>

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<sup>30</sup> See *United States v. Issacs*, 347 F. Supp. 763, 767 (N.D. Ill., 1972) (exchanging liquor license for cooperation).

<sup>31</sup> See Richard A. Serrano, *Ruling Against Testimony Deals Hits Prosecutors*, LOS ANGELES TIMES, July 10, 1998, at A1 (criticizing *Singleton* court for jeopardizing other prosecutions). Emad Ali Salem received a cash payment after agreeing to be a witness in the trial of Sheik Omar Abdel Rahman. *Id.* Rahman faced charges of plotting to blow up the United Nations building in New York City. *Id.* See also *Hoffa v. United States* 385 U.S. 293, 311-12 (1966) (reasoning ability to cross-examine paid witnesses regarding agreement as safeguard against unfair advantage).

<sup>32</sup> See *Issacs*, 347 F. Supp. at 767 (N.D. Ill., 1972) (equating value of liquor license with value of leniency offered in other plea agreements).

<sup>33</sup> See *United States v. Santabello*, 404 U.S. 257, 260 (1971) (stating that plea-bargaining is "essential component of the administration of justice"). See also *United States v. Reid*, 19 F. Supp. 2d 534, 537 (E.D. Va, July 28, 1998) (noting long history of accepting plea agreements).

<sup>34</sup> See 5 CHARLES ALAN WRIGHT, *FEDERAL PRACTICE AND PROCEDURE*, Section 175.1 (2d Ed. 1987) (finding that prosecutor simply gives court his/her opinion as to appropriate sentence).

<sup>35</sup> See *id.* (stating that prosecutor's role in determining sentence in advisory).

<sup>36</sup> See, e.g. *United States v. Arana*, 18 F. Supp. 2d 715, 722 (E.D. Mich., 1998) (noting sentencing judge makes final decision as to level of leniency witness is afforded); U.S.S.G. Section 5K1.1(a)(2) (allowing judge to take witness' helpfulness into consideration when reaching sentence).

<sup>37</sup> See FED. R. CRIM. P. 11(e) (West 1999).

Despite the pervasiveness of plea agreements, prosecutors do not have free reign when it comes to bargaining.<sup>38</sup> There are sufficient safeguards in place to prevent an unfair prosecutorial advantage such as: (1) full disclosure of the agreement to the jury; (2) allowing defense counsel to cross-examine the witness with regard to the plea agreement; and (3) giving the jury specific instructions to weigh the witness' testimony with caution.<sup>39</sup> In an effort to further safeguard agreements against misinterpretation, prosecutors are advised to make each agreement as explicit and specific as possible.<sup>40</sup>

The reasoning behind the need for plea agreements is simple: the high number of cases resolved through plea agreements takes the burden and the expense of trials off the judicial system.<sup>41</sup> In addition to the financial benefits of plea bargaining, the process reduces the possibility that there may be an error made in guilt determination and provides a certainty not available with an unpredictable trial.<sup>42</sup> If a state had an aversion to the practice of plea-bargaining, however, that state could decide to ban the practice on the state level.<sup>43</sup> The Supreme Court has ruled that while plea bargains are not constitutionally forbidden, they are also not protected from abolition.<sup>44</sup> No state has imposed such a ban. In

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<sup>38</sup> See *id.* (vesting power in sentencing judge).

<sup>39</sup> See *United States v. Dailey*, 759 F.2d 192, 196 (1st Cir. 1985) (revising lower court decision regarding risk or perjury). Although the district court in *Dailey* felt the danger of perjury made plea agreements unconstitutional, the appeals court felt that while there was a possibility of perjury it was not enough to violate due process. *Id.* The appeals court pointed out that even uncorroborated testimony from a witness who had committed perjury before was admissible as long as it was not "incredible on its face." *Id.* at 198 (quoting *Lyda v. United States* 321 F.2d 788, 794-95 (9th Cir. 1963)). See also *Lisenba v. California*, 314 U.S. 219, 227 (1941) (stating that taking accomplice's cooperation into consideration not violation of due process).

<sup>40</sup> See *Dailey*, 759 F.2d at 201 (explaining importance of plea agreements); see also *United States v. Santabello*, 404 U.S. 257, 262 (1971) (stating prosecutors must explain their intentions to sentencing judge).

<sup>41</sup> See *Santobello*, 404 U.S. at 260 (encouraging plea agreements as means of reducing backlogs in courts).

<sup>42</sup> See Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 573-76 (1977) (explaining that plea agreements remove questions of guilt).

<sup>43</sup> See *Corbitt v. New Jersey*, 439 U.S. 212, 223 (1978) (placing decision on whether or not to continue practice on states).

<sup>44</sup> See *id.* (stating that states can restrict use of plea agreements).

fact, plea bargains continue to increase in usage, accounting for an overwhelming percentage of guilty pleas in criminal cases.<sup>45</sup>

*B. 18 U.S.C. §201(c)(2) and the Plain Meaning Rule*

*Whoever directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom; shall be fined under this title or imprisoned for not more than two years, or both.*<sup>46</sup>

The debate over the meaning of 18 U.S.C. Section 201 provision begins with the struggle to define the term "whoever."<sup>47</sup> Traditionally, when Congress uses ambiguous language, the plain meaning of that word can be used.<sup>48</sup> As a result, one can imply the term "whoever" includes all people in the United States, including the government and government officials.<sup>49</sup> In the absence of express exclusion, there is a limited exception that allows the exclusion of the government from the plain meaning rule.<sup>50</sup> Courts may hold that a statute does not apply to the government and its agents if: (1) the application of the law would prevent the government from executing an established right or; (2) the application of the law would "work an obvious absurdity."<sup>51</sup> By allowing only

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<sup>45</sup> See Yvette A. Beema, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800, 801 (1987) (explaining ninety percent of criminal defendants plead guilty, in large part from plea agreements).

<sup>46</sup> 18 U.S.C. § 201(c)(2).

<sup>47</sup> See *Nardone v. United States*, 302 U.S. 379, 384 (1937) (explaining plain meaning rule's application when language has commonly accepted definition).

<sup>48</sup> See *id.* (detailing application of plain meaning rule).

<sup>49</sup> See *id.* (applying term "anyone" to government officials in federal wiretapping case).

<sup>50</sup> See *id.* at 383-84 (outlining possible exclusions of government and government officials).

<sup>51</sup> *Id.* The court exemplified requiring a police officer involved in a chase to follow the speed limit as an example of an "obvious absurdity." *Id.*



limited scope in interpreting statutory language, courts avoid the perception that the judicial branch of the government is acting as a legislator.<sup>52</sup>

Courts have also grappled with the definition of a "thing of value." There is no requirement that the item exchanged for testimony have a discernable cash value.<sup>53</sup> Therefore, a "thing of value" can be intangible, such as special prison visitation rights.<sup>54</sup>

Prosecutors argue, and some courts agree, that to hold government officials bound to Section 201(c)(2) restrains the government's ability to enforce the law.<sup>55</sup> To include the government under the statute would hinder prosecutors' ability to convict those involved in the types of crimes that thrive on complicity, such as organized crime and drug trafficking.<sup>56</sup> In these areas, the government often depends on plea agreements to build their cases.<sup>57</sup>

### III. JUDICIAL DECISIONS AND REASONING

#### *A. Singleton Decision and the Application of the Plain Meaning Rule to the Bribery Statute*

The defendant and witness involved in *Singleton* were part of a drug trafficking ring; the kind of accomplice-rich crime group that is often brought to justice through plea-bargaining.<sup>58</sup> In order to convict the defendant, prosecutors used plea-bargaining to obtain an accom-

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<sup>52</sup> See *United States v. Lowery*, 15 F. Supp. 2d 1348, 1357 (S.D. Fla., 1998) (employing plain meaning rule to 18 U.S.C. §201 (c)(2)); *United States v. Fraguera*, 1998 WL 560352, \*1 (E.D. La Aug. 27, 1998) (stating that when language of statute unambiguous plain meaning applies).

<sup>53</sup> See *Salinas v. United States*, 522 U.S. 52, 55 (1997) (including "contact visits" to prisoner as item of value).

<sup>54</sup> *Id.*

<sup>55</sup> See *United States v. White*, 27 F. Supp. 2d 646, 649 (E.D.N.C. 1998) (classifying prosecutors as law enforcement agents).

<sup>56</sup> See *id.* (explaining importance of plea agreement in prosecuting complicity crimes).

<sup>57</sup> See *id.* (illustrating prosecution dependence on plea agreements).

<sup>58</sup> See *United States v. Singleton*, 144 F.3d 1343, 1344 (10th Cir. 1998) (noting defendant was part of operation that transferred drug money via Western Union).

plice's testimony.<sup>59</sup> On appeal, the defense argued that prosecutors violated Section 201(c)(2) by bribing the witness with the promise of a reduced sentence.<sup>60</sup>

The *Singleton* Court broke Section 201(c)(2) into three components: (1) an offer or promise, either direct or indirect; (2) of value; (3) given for or because of sworn testimony.<sup>61</sup> The court ruled that the agreement does not need to affect the witness' testimony in any way.<sup>62</sup> Applying the plain meaning rule, the court held prosecutors bound under Section 201(c)(2) and suppressed testimony gained through a plea agreement.<sup>63</sup>

The court rejected the government's arguments that disallowing the plea bargain conflicts with the immunity statute.<sup>64</sup> The court reasoned that the prosecution merely asks the court to grant immunity with the court ultimately deciding whether to grant immunity.<sup>65</sup> The court further ruled that immunity does not provide a benefit to the witness but rather it only lifts the witness' Fifth Amendment privilege.<sup>66</sup> Therefore, the immunity statute operates independently of Section 201(c)(2).<sup>67</sup> One judge in the *Singleton* decision advised the government that they would

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<sup>59</sup> See *id.* (describing sentences of witness and defendant). As a result of the testimony of a witness who had been persuaded to testify by a plea agreement, the defendant received a jail sentence while the individual who ran the crime ring was not confronted with any witnesses who entered plea bargains and was not sentenced to any jail time. *Id.*

<sup>60</sup> See *id.* The prosecution did not actually promise the witness a sentence reduction. *Id.* Rather, they promised to refrain from prosecuting the witness on related offenses and to advise the sentencing court and a parole board of the witness' cooperation. *Id.*

<sup>61</sup> See *id.* at 1358 (interpreting Section 201(c)(2) using plain meaning rule).

<sup>62</sup> See *Singleton*, 144 F.3d at 1359 (explaining statutory requirements).

<sup>63</sup> See *id.* at 1344-45 (describing difference between sovereign and government officials). The court held that while the government as an entity may be excluded from the statute, government agents and officials are required to carry out their duties in a manner consistent with Section 201(c)(2). *Id.* The court stated its power to suppress evidence gives the court a vehicle to "deter official misconduct" and destroy tainted testimony. *Id.* at 1360.

<sup>64</sup> See *id.* at 1348 (stating that judge retains ability to grant immunity).

<sup>65</sup> See *id.* at 1358 (reasoning that immunity serves to lift Fifth Amendment privilege). The court further ruled that immunity is not a gift in the same way that a reduced sentence is because all immunity, in effect, only lifts the Fifth Amendment privilege during testimony. *Id.*

<sup>66</sup> See *id.* (explaining that under immunity witness can testify without incriminating him/herself).

<sup>67</sup> See *Singleton*, 144 F.3d at 1355 (providing immunity to lift Fifth Amendment privilege).

be better served by requesting immunity for witnesses rather than entering a plea agreement that would induce the witness to “embellish” his testimony.<sup>68</sup>

The *Singleton* court also rejected the government’s argument that limiting plea agreements inhibits a prosecutor’s ability to enforce the law. The court reasoned that its decision merely banned plea bargains made in exchange for testimony.<sup>69</sup> The court ruled that witnesses are still free to assist the government’s investigations and prosecution without actually testifying.<sup>70</sup> Prosecutors can still make agreements with accomplices for other forms of assistance, such as helping locate a suspect or a witness.<sup>71</sup>

The government also argued that the plea agreement involved did not amount to a “thing of value” under Section 201(c)(2).<sup>72</sup> The court, however, ruled that it is established that a “thing of value” does not need to be an item with a cash or commercial value.<sup>73</sup> Furthermore, the court reasoned that personal freedom is an item to which people attach a great deal of value.<sup>74</sup> The court went so far as to compare the plea bargain to an offer of money in return for perjured testimony.<sup>75</sup> The court reminded the prosecution that all citizens have a duty to testify truthfully.<sup>76</sup> Through the submission of the accomplice’s testimony, the court believed it leveled the playing field and removed what had been an unfair advantage to the prosecution.<sup>77</sup>

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<sup>68</sup> See David. E. Rovella, *Pleas: Justice of Bribery? 10th Circuit Hears Arguments on Whether to Outlaw Federal Plea Bargains that Require Testimony*, NAT’L L.J. A1 (Nov. 30, 1998) (describing exchange between judge and prosecutor during hearing).

<sup>69</sup> See *Singleton*, 144 F.3d at 1355 (outlining possible alternative means to use witnesses who reach plea bargains).

<sup>70</sup> See *id.* (explaining “myriad” of ways witnesses can aid prosecution without taking witness stand).

<sup>71</sup> See *id.* (describing areas where witnesses can aid prosecutors).

<sup>72</sup> See *id.* at 1248-49 (arguing that plea agreements have no monetary value).

<sup>73</sup> See *id.* at 1349 (citing to history assigning value to material objects as well as money).

<sup>74</sup> See *Singleton*, 144 F.3d at 1357 (valuing liberty above monetary gain).

<sup>75</sup> See *id.* at 1358 (explaining that excluding prosecutors from statute would allow exchange of money for favorable testimony).

<sup>76</sup> See *id.* (referring to oath taken by witnesses).

<sup>77</sup> See *id.* at 1347 (proclaiming that “decency, security and liberty” called for court to treat government and citizens alike).

The court used another provision, 18 U.S.C. Section 201(c)(1), to support their reasoning.<sup>78</sup> Section 201(c)(1) begins with the following exemption: "otherwise than as provided by law for the proper discharge of official duty."<sup>79</sup> If Congress intended to exclude government officials from Section 201(c)(2), the court explained, the same term would have been included within the statute.<sup>80</sup>

The government argued that it is excluded from Section 201(c)(2) under the law enforcement justification.<sup>81</sup> The *Singleton* court rejected this argument by ruling that there is no law enforcement justification for prosecutors because they are not acting in the capacity of peace officers.<sup>82</sup> The court reasoned that prosecutors do not fall under the exclusion because they do not actively participate in enforcement actions, such as arrest or chase.<sup>83</sup> The court rejected the government's argument that because they could not find a case that included prosecutors after the commencement of criminal proceedings.<sup>84</sup> Once the government's actions moved from investigation to trial, the court reasoned, the prosecutors lost any chance of exclusion under the law enforcement justification.<sup>85</sup>

In summary, the court illustrated a number of means to reward cooperation and that Congress allowed for such rewards leaving the quantity of relief to the discretion of judges.<sup>86</sup> The *Singleton* court cited United States Sentencing Guidelines, which allows a judge to grant a downward departure in return for substantial assistance.<sup>87</sup> The court established that by giving these rewards after the witness cooperates (as

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<sup>78</sup> See *id.* at 1350 (detailing statutory provisions).

<sup>79</sup> See *Singleton*, 144 F.3d at 1350 (quoting 18 U.S.C. Section 201 (c)(1)).

<sup>80</sup> See *id.* (showing proximity as evidence that express exclusion in first implies inclusion in second).

<sup>81</sup> See *Nardone v. United States*, 302 U.S. 379, 384 (1937) (explaining exclusionary rule for government and its officials).

<sup>82</sup> See *Singleton*, 144 F.3d at 1353 (applying law enforcement justification to "enforcement actions").

<sup>83</sup> See *id.* (reasoning that prosecutors are not active law enforcers).

<sup>84</sup> See *id.* (citing *United States v. Ryans*, 903 F.2d 731 (10th Cir. 1990) (excluding prosecutors once proceedings begin)).

<sup>85</sup> See *id.* at 1354 (stating that law enforcement exception does not extend to court proceedings).

<sup>86</sup> See *id.* (citing 18 U.S.C. Section 3553(e) which allows court to impose sentence below minimum).

<sup>87</sup> See *Singleton*, 144 F.3d at 1355 (citing U.S.S.G. Section 5K1.1) (allowing downward departure for cooperation).

opposed to signing plea agreements in advance of testimony) there is no inducement towards perjury.<sup>88</sup> Through this manner, the court preserved the process of rewarding witnesses without violating Section 201(c)(2).

### *B. The Debate on Plea Agreements and the Bribery Statute*

Commentators immediately termed the *Singleton* decision both "stunning" and "revolutionary."<sup>89</sup> The decision gave defendants convicted on the testimony of their accomplices hope that their convictions may be overturned or they may be granted a new trial.<sup>90</sup> Courts across the country weighed in with their opinions of the *Singleton* decision and almost exclusively rejected the bribery theory for the ban of plea-bargains.<sup>91</sup> Subsequently, the Tenth Circuit Court of Appeals reversed the *Singleton* decision, thus continuing the debate about plea-bargains and the Bribery Statute.<sup>92</sup>

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<sup>88</sup> See *id.* (explaining that when witness testifies prior to leniency his/her testimony is not tainted).

<sup>89</sup> See Marcia Coyle, *Stunning Rulings Curtail Prosecutor's Power. Testimony Can't Be Bought; Immunity's Scope Widened*, NAT'L L. J. (July 20, 1998) at A1 (outlining *Singleton* decision); see also Harvey Silvergate, *Immunity Is Not For Sale, Says the Tenth Circuit*, NAT'L L.J. (Aug. 17, 1998) at A19 (finding that court's decision to equate plea bargains with bought testimony shocked federal prosecutors).

<sup>90</sup> See Nealon *supra* note 7 at B1 (describing motions for new trial filed in Massachusetts).

<sup>91</sup> See *United States v. Lowery*, 15 F. Supp. 2d 1348, 1352 (S.D. Fla., 1998) (suppressing testimony based on "clear and unambiguous meaning of Section 201(c)(2)"); *United States v. Fraguella*, 1998 WL 560352,\*1 (E.D. La., Aug. 27, 1998) (adopting both *Singleton* and *Lowery* decisions). See *United States v. Arana*, 18 F. Supp. 2d 715, 722 (E.D. Mich., 1998) (upholding governments ability to reach plea agreements); *United States v. Reid*, 19 F. Supp.2d 534, 538 (E.D. Va., 1998); *United States v. Eisenhardt*, 10 F. Supp. 2d 521 (D.Md., 1998). But see *United States v. Guillaume*, 13 F. Supp. 2d 705, 712 (S.D. Fla., 1998) (acknowledging plea bargains as necessity); *United States v. Pungitore*, 15 F. Supp. 2d 705, 710 (E.D. Pa., 1998); *United States v. Gabrouel*, 1998 WL 515947 (D.Colo., Aug. 17, 1998); *United States v. McGuire*, 21 F. Supp. 2d 1264, 1270 (D. Kan., 1998); *United States v. Barbaro*, 1998 WL 556152 (S.D.N.Y., Sept. 1, 1998); *United States v. Szur*, 1998 WL 661484 (S.D.N.Y., Sept. 24, 1998); *United States v. White*, 27 F. Supp. 2d 646, 650 (E.D.N.C., 1998); *United States v. McClelland*, 1998 WL 773171 (D. Kan., Nov. 15, 1998); *United States v. Haese*, 162 F.3d. 359, 363 (5th Cir. 1998).

<sup>92</sup> See *Singleton* 165 F.3d at 1297 (rejecting *Singleton's* three judge panel's decision).

Some theorists argue that it is a mistake to dismiss the bribery theory simply because the plea-bargaining process is ingrained in our judicial system and changing the process would cause a flood of similar motions to suppress.<sup>93</sup> Courts exist to protect the citizens, it is reasoned, and such a limited line of reasoning does not serve the interest of the citizens.<sup>94</sup> If judges gave such heavy weight to preserving the status quo, courts may not have reached landmark decisions such as those that led to the end of segregation.<sup>95</sup>

Plea bargain supporters also argue that an abolition of plea-bargains could pose a serious threat to law enforcement.<sup>96</sup> If prior convictions that relied on accomplice testimony were overruled, the release of dangerous criminals, such as those convicted of the Oklahoma City Federal Building bombing and the World Trade Center bombing, would follow.<sup>97</sup> In this age of highly publicized trials and pervasive crime stories, the public wants to see those most responsible for crimes go to jail, even if that means letting their accomplices receive leniency.<sup>98</sup> Cases aimed at dissolving notorious organized crime rings hinged on the validity of plea-bargains signed by accomplices.<sup>99</sup> Rejecting this practice

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<sup>93</sup> See *Lowery*, 15 F. Supp. 2d at 1355 (reasoning potential burden on judicial system warranted rejection of *Singleton* holding). The court in *Lowery* explained that the threat of an overwhelming number of motions to dismiss is not a good enough reason to reject the *Singleton* decision. But see *White*, 27 F. Supp. 2d at 649 (attesting to long-standing approval of plea bargains). See also *Gabrourel*, 1998 WL 515947 (refraining from ruling against history of plea bargains); *Barbaro* 1998 WL 556152 (validating plea bargains); *Guillaume*, 13 F. Supp. 2d 705 (finding plea bargains necessary to law enforcement).

<sup>94</sup> See *Coyle*, *supra* note 89 (outlining *Singleton* decision); *Silvergate*, *supra* note 89 (explaining *Singleton* decision's effect on federal prosecutors).

<sup>95</sup> See *Rovella*, *supra* note 68 at A1 (outlining defense's argument in *Singleton*).

<sup>96</sup> See *White*, 27 F. Supp. 2d at 649 (holding that to reject plea agreements would obstruct justice and prevent convictions); see also *Haese*, 162 F.3d. at 364 (describing negative effect of *Singleton* decision). The court in *Haese* compared following the *Singleton* decision to putting "shackles" on or "crippling" the government's ability to fight crime. *Id.* See also *Appellate Court Reconsiders Plea-Bargain Testimony Ban; Attorneys Debate Favors*, SAN DIEGO UNION TRIBUNE (Nov. 18, 1998) at A7 (quoting prosecutor referring to ruling in *Singleton* as paralyzing).

<sup>97</sup> See *Serrano*, *supra* note 31 (outlining threat to other cases). The convictions of those people involved in both the New York World Trade Center bombing and the Oklahoma City bombing involved the testimony of accomplices who made plea bargains with prosecutors. *Id.* Lawyers for Oklahoma City bomber Timothy McVeigh were reported to be carefully following the *Singleton* decision. *Id.*

<sup>98</sup> See *id.* (describing merit of plea agreements).

<sup>99</sup> See *Nealon*, *supra* note 7 (detailing reaction to *Singleton* decision). The murder and drug trafficking trial of two members of the Intervale Posse gang, a well established

threatens to eradicate any possibility of conviction and allows reputed criminals to go unpunished.<sup>100</sup> Prosecutors have alternative methods, including the use of the government's agents, surveillance, and resources, to aid in the investigation and prosecution of criminals.<sup>101</sup> Plea bargains, however, help connect evidence gathered in the field investigation to courtroom testimony.<sup>102</sup>

Some theorists argue the existence of plea agreements are validated by the sentencing guidelines allowing judges to give downward departure in return for cooperation.<sup>103</sup> The final decision of leniency rests with the judge; the prosecutors have only the power of persuasion when requesting a reduction in an accomplice's sentence.<sup>104</sup> In fact, sentencing guidelines that allow for downward departures and the recognition of plea agreements existed before Section 201(c)(2), therefore implying the inclusion of prosecutors in Section 201(c)(2).<sup>105</sup> This rationale could also apply to the Bribery Statute because Congress included an exclusion for government officials in Section 201(c)(1), but refrained from doing so in Section 201(c)(2).<sup>106</sup>

In addition to the differing opinions on congressional intent, other questions remain about the interpretation of the Section 201(c)(1). One possible reading finds the exceptions for government officials set out in an all-inclusive list, while another interpretation provides those exceptions as merely examples or ways that the government can be excluded from statutory language.<sup>107</sup> Therefore, it is unclear whether the language

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criminal element in New England, included testimony from three gang members who reached plea agreements with federal prosecutors. *Id.*

<sup>100</sup> See *id.* (explaining need for plea agreements to enforce crimes involving complicity).

<sup>101</sup> See *United States v. Lowery*, 15 F. Supp. 2d 1348, 1352 (S.D. Fla. 1998) (outlining tools that prosecutor's have).

<sup>102</sup> See *id.* (describing ban on defense exchanging anything for testimony).

<sup>103</sup> See *United States v. Arana*, 18 F. Supp. 2d 715, 722 (E.D. Mich 1998) (outlining ability of judge to reduce sentence).

<sup>104</sup> See *United States v. White*, 27 F. Supp. 2d 646, 649 (E.D. N.C. 1998) (minimizing prosecutor's effect on sentencing).

<sup>105</sup> See *Arana*, 18 F. Supp. 2d at 718-19 (explaining lack of express exclusion of government). The *Arana* court held that the lack of an express inclusion of the government in Section 201(c)(2), coupled with the previously enacted sentencing guidelines, implies the exclusion of government officials. *Id.*

<sup>106</sup> See *Lowery*, 15 F. Supp. 2d at 1352 (adopting *Singleton* decision and disallowing use of plea agreement).

<sup>107</sup> See *White*, 27 F. Supp. 2d at 650 (explaining that *Nardone* provided only partial list of exceptions to plain meaning rule); *United States v. Szur*, 1998 WL 661484, \*1

of the statute requires an explicit exclusion of the government barring express inclusion.<sup>108</sup>

Courts can allow a prosecutor's request for leniency even after applying Section 201(c)(1). The Federal Rules of Criminal Procedure allow the court to grant the motion for a reduction in sentence in response to cooperation with prosecutors.<sup>109</sup> To apply the plain meaning rule to include the government in Section 201(c)(2) would work a kind of "obvious absurdity" by preventing the government from taking an allowed action.<sup>110</sup> Similarly, the application of the statute to prosecutors would seem to contrast with their ability to request immunity for a witness.<sup>111</sup> This absurdity could extend to forcing the government to abandon entire cases due to the loss of plea bargains.<sup>112</sup> The number of cases at risk could amount to several thousand.<sup>113</sup>

One could also argue an absurdity exists if prosecutors are not included in the "officer of the law" exception.<sup>114</sup> There is an inconsistency at work when prosecutors are separated from the government as a sovereign.<sup>115</sup> The *Singleton* court excluded the government from Section 201(c)(2) because the government is a sovereign.<sup>116</sup> The court, however,

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(S.D.N.Y., Sept. 24, 1998) (holding that any inclusion of government must be expressed); *United States v. Reid*, 19 F. Supp. 2d 534, 540 (E.D. Va., 1998) (citing *Nardone v. United States*, 302 U.S. 379, 383 (1937)) (allowing plea agreements); *Arana*, 18 F. Supp. 2d at 720 (explaining that *Singleton* court read *Nardone* case "too narrowly").

<sup>108</sup> See *United States v. Guillaume*, 13 F. Supp. 2d 705, 707 (S.D.Fla., 1998) (outlining debate over need for explicit exclusion of government). But see *Lowery*, 15 F. Supp. 2d at 1352-53 (holding that government agents should be treated same as citizens). The court in *Lowery* illustrated the importance of holding the government responsible to the same laws that apply to citizens, calling it the cornerstone of democracy. *Id.*

<sup>109</sup> See FED. R. CRIM. P. 35(b) (West 1999).

<sup>110</sup> See *Guillaume*, 13 F. Supp. 2d at 707-08 (finding reasoning in *Singleton* unconvincing); c.f. *United States v. Fraguera*, 1998 WL 560352, \*1 (E.D. La., Aug. 27, 1998) (holding application of plain meaning rule does not cause obvious absurdity).

<sup>111</sup> See *United States v. Arana*, 18 F. Supp. 2d 715, 719 (E.D. Mich. 1998) (finding no difference between request for immunity, request for downward departure, and plea agreement).

<sup>112</sup> See *Reid*, 19 F. Supp. 2d at 537 (illustrating importance of testimony of accomplices in order to resolve cases).

<sup>113</sup> See *United States v. White*, 27 F. Supp. 2d 646, 649 (E.D.N.C. 1998) (holding that prosecutors need plea bargains in order to do their job).

<sup>114</sup> See *Arana*, 18 F. Supp. 2d at 717 (citing federal immunity statute as evidence that prosecutors not meant to be covered by § 201(c)(2)).

<sup>115</sup> See *White*, 27 F. Supp. 2d at 649 (rejecting *Singleton* decision).

<sup>116</sup> See *Singleton*, 144 F.3d 1343, 1346 (10th Cir. 1998) (explaining government sovereignty). The court in *Singleton* explained Section 201(c)(2) did not apply to the



refrained from extending that coverage to government employees.<sup>117</sup> The result is absurd because prosecutors do not bring cases in their individual capacity, but rather as an instrument of the United States government.<sup>118</sup> Therefore, by not including prosecutors under the exclusion allowed to officers of the law, the *Singleton* court deprived the government of its fundamental right to bring people who break the laws to justice.<sup>119</sup>

In an effort to prevent the interpretation of Section 201(c)(2) from weighing on courts, the United States Senate proposed a bill aimed at finalizing congressional intent with regard to the Bribery Statute.<sup>120</sup> The Senate responded to the debate with a retroactive correction to Section 201(c)(2).<sup>121</sup> The impetus for the proposed bill may have originated from a suggestion that Congress could single-handedly end the procedural arguments revolving around plea-bargains and the Bribery Statute.<sup>122</sup> The Senate measure would reword Section 201(c)(2) to include an exception for prosecutors and specifically exclude "plea bargain agreements" from the statute.<sup>123</sup> The measure clarifies the congressional intent in the original statute by stating:

There is no evidence in legislative history or otherwise that Congress intended for Section 201 of Title 18, United States Code, to make illegal the traditional prosecutorial practice of recommending leniency or other favorable action towards a defendant in exchange for truthful testimony or other cooperation with the prosecution of another defendant.<sup>124</sup>

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government as an entity, but only to the means employed by government officials, including prosecutors, while carrying out government business. *Id.*

<sup>117</sup> *See id.*

<sup>118</sup> *See id.* (describing prosecutor as extension of government).

<sup>119</sup> *See id.* (reasoning that prosecutors are part of government).

<sup>120</sup> *See* S. 2311, 105<sup>th</sup> Cong. (1998). Senator Patrick Leahy (D-Vt.) proposed the measure. *Id.*

<sup>121</sup> *See id.* at § 2(1).

<sup>122</sup> *See* Joan Biskupic, *Justice Dept. to Appeal Court Ban on 'Deals' with Witnesses*, WASHINGTON POST (July 10, 1998) at A3 (describing outcry for legislative resolution to government exclusion from Bribery Statute). The Washington Post reported that Justice Department officials went public with their belief that Congress could solve the disputes arising from the *Singleton* decision by rewriting the Bribery Statute. *Id.*

<sup>123</sup> *See* S.2311, 105<sup>th</sup> Cong., § 3(a), (1998) (allowing plea agreements, immunity deals, protection and other items of value).

<sup>124</sup> *Id.* at § 2 (1).

This proposed language recognizes that the statute must allow prosecutors to use reasonable discretion in enforcing the law.<sup>125</sup> The measure also avoids the foreseeable onslaught of appeals and motions to suppress by making the amendments to Section 201(c)(2) retroactive.<sup>126</sup>

#### IV. ANALYSIS

Prosecutors cannot simply advocate conviction, but rather have a duty to employ fair procedure in an effort to find the truth.<sup>127</sup> It is well accepted that a plea agreement affects the weight of testimony, not the admissibility.<sup>128</sup> Courts found that stern cross-examination justifies the admissibility of accomplice testimony.<sup>129</sup> The admissibility of these plea arrangements shifts the responsibility over to the jury in order to determine how the witness' plea agreement may have colored his testimony.<sup>130</sup> In addition, it does not behoove the witness to perjure himself since perjury could be viewed as a failure to cooperate and therefore invalidate the plea agreement.<sup>131</sup>

There are a number of ways in which plea agreements are safeguarded against an excess of power.<sup>132</sup> Plea-bargains, however, should not be immune from scrutiny nor should they be viewed as an easy solution.<sup>133</sup> Witnesses have a duty to tell the truth under oath and if prose-

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<sup>125</sup> See *id.* at § 2(6) (rejecting ruling in *Singleton* and any concurring decisions).

<sup>126</sup> See *id.*

<sup>127</sup> See *United States v. Santobello*, 404 U.S. 257, 262-63 (1971) (explaining prosecutors must work together and share information about plea agreements).

<sup>128</sup> See *United States v. Kimble*, 719 F. 1253, 1257 (5th Cir. 1983) (reasoning that weight of testimony is question for jury). The *Kimble* court felt that allowing the cross examination of the accomplice and the disclosure of the plea agreement were acceptable if the court allowed the jury to decide what weight to give the testimony. *Id.*

<sup>129</sup> See *id.* at 1255 (suggesting defense attorney can use cross-examination to expose bias of accomplice witness).

<sup>130</sup> See *U.S. v. Jones*, 575 F.2d 81, 85-6 (6th Cir. 1978) (holding no policy reason exists to exclude informant testimony even if informant was paid). The *Jones* court felt it was better to leave the determination of witness credibility to the jury. *Id.*

<sup>131</sup> See *United States v. Dailey*, 759 F.2d 192, 196 (1985) (suggesting all plea agreements should stipulate that lying under oath violates agreement).

<sup>132</sup> See *Wright*, *supra* note 34 (stating that judge retains final word and prosecutor's role in determining sentence in advisory).

<sup>133</sup> See *Dailey*, 759 F.2d at 201 (explaining importance that plea agreements be tempered by disclosure in court).

cutors are too quick to offer a plea agreement, witnesses may begin to expect something in exchange for testimony rather than viewing their truthfulness as an obligation.<sup>134</sup>

Prosecutors may want to step back and look to other ways apart from testimony where they can use plea agreements, such as in gaining assistance in an investigation.<sup>135</sup> If an accomplice aids in an investigation, it may lead to the discovery of a witness who would not need a plea-bargain in order to take the stand.<sup>136</sup> A plea agreement, however, provides the witness with some protection.<sup>137</sup> Just as one can see perjury as a form of acting in an uncooperative manner, so can the accomplice see a prosecutor going back on a plea agreement by rescinding his plea.<sup>138</sup> These situations cannot be frequent, for to allow either the prosecutor or the witness to back in and out of plea agreements sets a dangerous precedent which threatens the very value of plea agreements.<sup>139</sup> This kind of system would not decrease the number of court cases, as plea bargains have done in the past, but would rather increase the number of hearings and motions of those witnesses trying to back-pedal on plea agreements.<sup>140</sup>

## V. CONCLUSION

There can be little doubt that the plea-bargaining process is volatile and not always desirable.<sup>141</sup> It is not the longstanding acceptance of the practice that lends it credibility. It is hard to imagine a judicial system in which prosecutors have no device other than an appeal to ethics with which to encourage an accomplice to testify. Without a bargaining

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<sup>134</sup> See *United States v. Waterman*, 732 F.2d 1527, 1531 (8th Cir. 1984) (describing certain plea agreements as "invitation to perjury").

<sup>135</sup> See *United States v. Singleton*, 144 F.3d 1343, 1355 (10th Cir. 1998) (explaining "myriad" of ways witnesses can aid prosecution without taking witness stand).

<sup>136</sup> See *id.* (explaining that when an accomplice cooperates he/she often leads prosecutors to other witnesses).

<sup>137</sup> See *United States v. Santobello*, 404 U.S. 257, 267 (1971) (stating that unkept plea agreements are grounds for relief).

<sup>138</sup> See *id.* (explaining importance of keeping plea agreements).

<sup>139</sup> See *Blackledge v. Allison*, 431 U.S. 63, 76 (1977) (suggesting that unkept plea agreement could cause accomplice's testimony to be involuntary).

<sup>140</sup> See *id.* (stating that plea agreements must have some measure of finality).

<sup>141</sup> See *id.* at 1627 (admitting that plea bargains may not be ideal system, but are beneficial).

device, however, the number of convictions would drop significantly. Plea-bargains serve a purpose and like most useful methods they can be refined over time. As is their duty to their clients, defense attorneys will continue to look for ways in which they can invalidate plea agreements. At the same time, prosecutors will continue, often with the help of plea agreements, to attain the highest number of convictions possible. This is the government's duty to its client: the citizen.

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