

UNITED STATES V. SINGLETON: A WARNING SHOT HEARD 'ROUND THE CIRCUITS?

To none will we sell, to none deny or delay, right of justice.

—*Magna Carta*, Clause 40

INTRODUCTION

King John's reluctant concession to this principle led to the signing of the Magna Carta in 1215 and marked one of the earliest foundations of Anglo-American jurisprudence.¹ Although this concept has been significantly modified over the last seven centuries, the fundamental ideal that a government of laws exists to uphold justice, and not merely to sell it to the highest bidder, continues to guide our notions of fairness.² Skeptics suggest that the modern application of this ideal, however, has much more strength as a rhetorical flourish than as a judicially enforced principle. Pointing to such noteworthy examples as the O.J. Simpson case and the JonBenet Ramsey investigation, many modern skeptics question whether individuals with vast financial resources can indeed buy justice.³ Some scholars go so far as to argue that prosecutors' reliance on the plea bargaining system, where a defendant can "purchase" his freedom by testifying against a co-defendant, has effectively resulted in the governmental business of selling justice to the highest bidder.⁴

In 1998, in *United States v. Singleton*, the Tenth Circuit Court of Appeals addressed the issue of purchased testimony.⁵ In excluding testimony from a witness who had agreed to testify against his co-defendant in exchange for a prosecutorial promise of leniency, a three judge panel concluded that this plea bargain violated a federal statute governing bribery of witnesses.⁶ Although the panel's decision was

¹ See generally DANIEL R. COQUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE* 60, 80-88 (1999).

² See *id.*

³ See, e.g., Sherry Keene-Osborn & Daniel Glick, *Who Really Killed JonBenet?*, *TIMES OF LONDON*, July 9, 1998; Diana Trilling, *Notes on the Trial of the Century; How the O.J. Trial will be Remembered*, 18 *NEW REPUBLIC*, Oct. 10, 1995.

⁴ See Richard J. Johnston, *Paying the Witness: Why is it OK for the Prosecution, but Not the Defense?*, 12 *CRIM. JUST.* 21 (1997).

⁵ See 144 F.3d 1343 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999).

⁶ See 144 F.3d at 1360-61 (interpreting 18 U.S.C. § 201(c)(2), the federal bribery statute).

overturned when reheard en banc in January of 1999, many scholars were intrigued that a respected federal court challenged the validity of witness-bargained agreements.⁷ Because plea bargaining has become such an ingrained practice in our modern criminal justice system, these scholars have closely examined the panel's rationale for excluding witness-bargained testimony.⁸

The panel in *Singleton* reasoned that the prosecutor's agreement with the witness was essentially a payment for testimony.⁹ Even though attorneys for the government argued that the federal bribery statute was not applicable to the U.S. Attorney, the panel maintained that basic democratic principles as articulated in the Magna Carta mandated the statute's application to the government.¹⁰ Although the *Singleton* decision was overturned and the panel's rationale was expressly rejected when it was reheard en banc, the case is by no means final because defense attorneys have petitioned the United States Supreme Court for certiorari.¹¹

The prospect of the Supreme Court possibly re-examining the rationales for plea bargaining has sent shock waves throughout the legal community.¹² Criminal defense lawyers herald the original three judge panel's logic in *Singleton* as landmark, with implications as far reaching as the *Miranda* decision, because it seemed to signal the beginning of the end of plea bargaining for testimony.¹³ Larry Pozner, president-elect of the National Association of Criminal Defense Law-

⁷ See, e.g., Marcia Coyle & David E. Rovella, *Stunning Rulings Curtail Prosecutors' Power*, NAT'L L. J., July 20, 1998, at A1; David Dinell, *Appeals Panel Rejects Witness Deals*, WICHITA BUS. J., July 13, 1998; Paul Elias, *Criminal Deals Are Placed in Limbo*, THE RECORDER, July 9, 1998; Debra Saunders, *Singleton Motions*, S. F. L. J., July 12, 1998, at 9.

⁸ See, e.g., *id.*

⁹ See 114 F.3d at 1348.

¹⁰ See *id.* at 1346-47. In fact, the panel quoted Justice Brandeis' dissent in *Olstead v. United States* noting,

Our Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . [T]o declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.

Id. at 1346 (quoting 277 U.S. 438, 455 (1928)).

¹¹ See 165 F.3d 1297, 1298 (10th Cir. 1999), *petition for cert. filed*, 165 U.S.L.W. 3772 (U.S. June 21, 1999) (No. 98-8758).

¹² See *supra* note 7 and accompanying text.

¹³ See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (holding police must inform suspects of their constitutional right to remain silent and right to an attorney before an interrogation may proceed). Many scholars have noted that the *Miranda* decision fundamentally changed the way in which law enforcement officials can proceed in both the investigation and prosecution of criminal cases. See generally PHILLIP E. JOHNSON, CRIMINAL PROCEDURE 458-62 (2d ed. 1995). In equating *Singleton* to *Miranda*, some members of the legal community maintain that by excluding

yers, commented on the panel's holding and said, "[t]he court has ended decades of government-sanctioned bribery. A system in which the government [can] exchange freedom for a story they wanted to hear is a system rampant with injustice."¹⁴ Also commenting on the panel's ruling, Singleton's attorney stated, "When the government wraps the American flag around a . . . [witness], juries believe them, because that witness is cloaked with the power and majesty of the United States."¹⁵ Singleton's attorney further added that the decision could "completely change the plea bargaining system," and force prosecutors to work, "harder and cleaner."¹⁶

While criminal defense attorneys praise the panel's rationale in *Singleton*, prosecutors contend that this decision runs contrary to years of precedent and are relieved that it was reversed en banc.¹⁷ San Diego Assistant United States Attorney and Criminal Division Head Bruce Castetter noted, "the [panel] ruling [was] really, really, stupid. Have you read it? Dumb."¹⁸ Other prosecutors have argued, "It's a horrible ruling. It [would] hamstring us and . . . become a nightmare."¹⁹ Judge Smalkin of the United States District Court for the District of Maryland even stated that, "[t]he chances of . . . the Supreme Court reaching the same conclusion as the *Singleton* panel are . . . about the same as discovering that the entire roster of the Baltimore Orioles consists of cleverly disguised leprechauns."²⁰

While plea bargaining was a major subject of debate in the academic literature of the 1970s and 1980s, the *Singleton* case has caused many to examine the issue from a different perspective: namely, does the system effectively amount to bribery?²¹ In analyzing this question, Sections I and II of this Note examine the early development of plea bargaining in Anglo-American history as well as how the practice operates in the modern criminal justice system.²² Section III focuses on the United States constitutional justifications for plea bargaining and Section IV will address the academic debate surrounding the practice.²³

witness-bargained testimony, the court has forced law enforcement to use other investigative tools in order to convict a defendant. See Dinell, *supra* note 7.

¹⁴ Coyle & Rovella, *supra* note 7, at A1.

¹⁵ Saunders, *supra* note 7, at 9.

¹⁶ Dinell, *supra* note 7.

¹⁷ See Coyle & Rovella, *supra* note 7, at A1.

¹⁸ David Rovella & Gail Cox, *Fallout from Singleton Bribe Ruling*, NAT'L L. J., Aug. 24, 1998, at A1.

¹⁹ Elias, *supra* note 7.

²⁰ *United States v. Eisenhardt*, 10 F. Supp. 2d 521, 521-22 (D. Md. 1998).

²¹ See *Singleton*, 144 F.3d at 1343; see also Johnston, *supra* note 4, at 24.

²² See *infra* notes 27-69 and accompanying text.

²³ See *infra* notes 70-141 and accompanying text.

Sections V and VI provide a detailed analysis of both the three judge panel's rationale in *Singleton* and the en banc decision that reversed that opinion.²⁴ Section VII assesses the legislative history of the federal bribery statute on which the *Singleton* court based its decision and concludes that this statute is inapplicable to federal prosecutors negotiating plea bargains.²⁵ Finally, Section VIII argues that the policy justifications for plea bargaining are weak in the context of witness-bargained agreements and the *Singleton* case could, therefore, be viewed as a "warning shot" to prosecutors who over-rely on plea bargaining as a tool for gaining testimony.²⁶

I. PLEA BARGAIN TERMINOLOGY AND PRACTICAL IMPLEMENTATION

Plea bargaining is defined as "[t]he process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval."²⁷ In general, there are several methods by which plea bargaining operates in modern practice.²⁸ The first is implicit plea bargaining, where the defendant, without the impetus of negotiations with the prosecutor, pleads guilty to a certain, usually lesser, offense.²⁹ Scholars suggest that many defendants enter guilty pleas because they implicitly believe that this will result in a lesser sentence.³⁰ The second, and most common plea bargaining method operates through formal discussions with a prosecutor and can be divided into two sub-categories.³¹ The first occurs when a defendant enters negotiations to plead guilty to a certain lesser offense in exchange for a reduced sentence.³² The second type involves a prosecutor promising something, usually leniency or a promise not to bring the accused up on any charges, in exchange for the person's valuable testimony implicating a defendant in another case.³³ The focus of this Note is on the latter type of plea bargaining—promises made by a prosecutor in exchange for testimony.

²⁴ See *infra* notes 142-258 and accompanying text.

²⁵ See *infra* notes 265-353 and accompanying text.

²⁶ See *infra* notes 265-353 and accompanying text.

²⁷ BLACK'S LAW DICTIONARY 1152 (6th ed. 1990).

²⁸ See generally WAYNE LA FAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 766 (1985) (discussing the mechanics of modern day plea bargaining).

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.*

³² See *id.*

³³ See WAYNE LA FAVE ET AL., MODERN CRIMINAL PROCEDURE 1083 (4th ed. 1974).

The plea bargaining process is regulated by the Federal Rules of Criminal Procedure, the Federal Sentencing Guidelines and the federal immunity statutes.³⁴ Federal Rule of Criminal Procedure 11(e) allows attorneys for the government and for the defendant to enter into negotiations in which the prosecutor can offer the following: (1) a move for dismissal of charges; (2) a recommendation, or agreement not to oppose the defendant's request for a particular sentence; or (3) an agreement that a specific sentence is the appropriate disposition of the case.³⁵ Rule 11(e), however, explicitly precludes the court from being involved in these negotiations, thus leaving the process solely in the hands of the prosecution and the defense.³⁶

In addition, the Federal Sentencing Guidelines, enacted in 1984, include provisions that impact plea bargaining.³⁷ Section 3E1.1 allows for a reduction in sentence if the defendant "clearly demonstrates acceptance or responsibility for his offense."³⁸ The commentary to the rule lists several alternatives by which a defendant can manifest this acceptance, including truthfully admitting to conduct (pleading guilty).³⁹ Section 5K1.1 of the Federal Sentencing Guidelines allows for a reduction in sentence if the defendant offers substantial assistance to the authorities.⁴⁰ The Sentencing Commission has noted that a defendant's assistance in the resolution of other criminal investigations should mitigate the severity of the sentence imposed because this kind of assistance helps resolve criminal cases.⁴¹

The federal immunity statutes also regulate the plea bargaining process.⁴² Under these series of statutes enacted as a part of the Organized Crime Control Act of 1970, courts are authorized to confer immunity (freedom from criminal prosecution) upon government witnesses in criminal trials.⁴³ In upholding the validity of these immunity

³⁴ See FED. R. CRIM. P. 11(e); Sentencing Reform Act of 1984, 18 U.S.C. § 3553(e) (1994); 28 U.S.C. § 994(n) (1994); 18 U.S.C. § 6003(a) (1994). The Federal Rules of Evidence also govern aspects of the plea bargaining process. Rule 410 prohibits evidence concerning a defendant's willingness or actual participation in plea negotiations to be admitted to prove a defendant's guilt. See FED. R. EVID. 410. The advisory committee noted that exclusion of this evidence permits "unrestrained candor" and allows for prompt disposition of cases. See FED. R. EVID. 410 advisory committee's note.

³⁵ See FED. R. CRIM. P. 11(e)(1)(a)-(c).

³⁶ See *id.*

³⁷ See 18 U.S.C. § 3553(e).

³⁸ U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (1997).

³⁹ See *id.*

⁴⁰ See *id.* § 5K1.1.

⁴¹ See *id.* § 5K1.1 sentencing commission's comments.

⁴² See 18 U.S.C. §§ 6001-6005 (1994).

⁴³ See 18 U.S.C. § 6003.

statutes, the Supreme Court has concluded that granting immunity for witnesses "reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime."⁴⁴ The Supreme Court also determined that these immunity statutes are essential to the effective enforcement of various criminal statutes, and are "so familiar that they have become part of our 'constitutional fabric.'"⁴⁵

II. HISTORICAL DEVELOPMENT OF PLEA BARGAINING

Although the debate surrounding plea bargaining has intensified within the last thirty years, it is certainly not a new controversy. Even its historical origins are the subject of much debate.⁴⁶ Some scholars trace its development to tribal society where individuals exacted revenge, however they saw fit, against those who had wronged them.⁴⁷ The plea bargaining concept developed from this human instinct for revenge.⁴⁸ Over time, wronged parties began to accept some sort of payment, usually money, instead of seeking physical revenge.⁴⁹ As Anglo-Saxon society developed even further, local communities drafted lists of compromises.⁵⁰ Private parties could look at these lists to determine the adequate compensation for their injury.⁵¹ With the ascension of William the Conqueror in 1066, the state became involved in this previously private bargaining system through a concept known as the "King's Peace."⁵² Using this rationale to expand his power over local feudal territories, the King began to legislate on matters that previously had been enforced privately, including the prosecution of "breaches of the peace," and the imposition of penalties.⁵³ As more and more cases were brought as "breaches of the King's peace," the practice of bargaining for punishment became a popular tool for courts.⁵⁴

⁴⁴ *Kastigar v. United States*, 406 U.S. 441, 446 (1976) (upholding validity of federal immunity statutes).

⁴⁵ *United States v. Mandujano*, 425 U.S. 564, 575-76 (1976) (upholding validity of federal immunity statutes).

⁴⁶ See, e.g., Albert Alschuler, *Plea Bargaining and Its History*, 13 L. & SOC'Y REV. 211, 212 (1979) [hereinafter Alschuler, *Plea Bargaining History*]; Jay Wishingrad, Note, *Plea Bargaining in Historical Perspective*, 23 BUFF. L. REV. 499, 500 (1973-74).

⁴⁷ See Wishingrad, *supra* note 46, at 500. For an excellent description of this historical period see COQUILLETTE, *supra* note 1, at 37-42, 55-62.

⁴⁸ See Wishingrad, *supra* note 46, at 501.

⁴⁹ See *id.*

⁵⁰ See *id.* at 504.

⁵¹ See *id.*

⁵² See *id.* at 505-06.

⁵³ See Wishingrad, *supra* note 46, at 505-06.

⁵⁴ See *id.* at 509, 511.

This historical interpretation of the plea bargaining system has been criticized.⁵⁵ Most of its opponents contend that plea bargaining is essentially a modern invention that became a popular method of case management during the 1920s.⁵⁶ In dismissing the idea that plea bargaining dates back to the eleventh century, critics point to such credible evidence as Sir Matthew Hale's treatise, *Pleas of the Crown*, to show that as late as 1670 "it [was] usual for the judge to discourage an accused from pleading guilty, and to advise the party to plead [not guilty] and put himself upon his trial."⁵⁷ Most scholars contend that plea bargaining did not reach the United States until after the Civil War.⁵⁸ These scholars note that as late as 1874 the United States Supreme Court condemned plea bargaining, when the Court stated that "[a] man may not barter away his life or his freedom, or his substantial rights."⁵⁹

Despite this judicial rebuke of plea bargaining, many urban jurisdictions employed the practice at the turn of the century.⁶⁰ In an era when corruption dominated urban politics and law enforcement, it was a common practice for prosecutors to sell lesser sentences for a fee.⁶¹ It was not until the 1920s, when cities began to officially survey their criminal justice systems, that these corrupt bargaining practices were exposed.⁶² At this time, it was not uncommon for city prosecutors to resolve over seventy percent of their cases by defendants entering guilty pleas (a strong indication that prosecutors were bargaining for guilty pleas).⁶³

The reliance on plea bargaining remained steady throughout the early part of the twentieth century and then increased dramatically

⁵⁵ See, e.g., Alschuler, *Plea Bargaining History*, *supra* note 46, at 212; John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 L. & Soc'y REV. 261 (1979) [hereinafter Langbein, *Short History*].

⁵⁶ See Alschuler, *Plea Bargaining History*, *supra* note 46, at 228-29.

⁵⁷ Langbein, *Short History*, *supra* note 55, at 264-65.

⁵⁸ See Alschuler, *Plea Bargaining History*, *supra* note 46, at 221-23.

⁵⁹ *Id.* at 227 (quoting *Insurance Co. v. Morse*, 87 U.S. 445, 451 (1874)). The Supreme Court also explicitly rejected agreements where co-defendants agreed to testify in order to be charged with lesser crimes. See generally *Whiskey Cases*, 99 U.S. 594 (1878). In the *Whiskey Cases*, the Court held that although agreements which resulted in full pardons were permissible, bargains that "led to a reduction in punishment and an abandonment of the government's claims w[ere] invalid." See Alschuler, *Plea Bargaining History*, *supra* note 46, at 226 (interpreting the *Whiskey Cases*).

⁶⁰ See Alschuler, *Plea Bargaining History*, *supra* note 46, at 229.

⁶¹ See *id.* at 229, 233.

⁶² See *id.* at 229.

⁶³ See *id.*

again in the 1960s.⁶⁴ Today, it is estimated that ninety percent of all criminal cases are disposed of by plea bargaining.⁶⁵ Most scholars attribute the increase in plea bargaining to the "due process" revolution of the 1960s.⁶⁶ As the Warren Court afforded defendants more constitutional rights in state courts, prosecutors found it more difficult to convict.⁶⁷ This difficulty in attaining convictions, combined with an overall caseload increase due to the criminalization of more activities, resulted in crowded dockets.⁶⁸ Thus, in the latter half of this century, prosecutors have relied on plea bargaining simply to manage the overwhelming number of cases on their dockets.⁶⁹

III. CONSTITUTIONAL APPROVAL OF THE PLEA BARGAINING SYSTEM

The United States Supreme Court addressed the constitutionality of plea bargaining in several landmark cases during the 1970s.⁷⁰ There have been two general categories of constitutional arguments surrounding plea bargaining. The first revolve around the Sixth Amendment to the United States Constitution, which states, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"⁷¹ Advocates who rely on this language maintain that plea discussions deny the accused the opportunity to be judged by a jury of his peers. This argument has been largely unsuccessful, however, because the Supreme Court has maintained that as long as the defendant enters his plea knowingly, voluntarily and intelligently, his Sixth Amendment rights have not been violated.⁷²

The second set of constitutional criticisms of plea bargaining revolve around the Fifth Amendment which provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law"⁷³ Proponents of this argument maintain that entering a

⁶⁴ See Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context* 13 L. & Soc'y REV. 273, 273 (1979).

⁶⁵ See Warren Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970).

⁶⁶ See, e.g., Alschuler, *Plea Bargaining History*, *supra* note 46, at 238–39; Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 L. & Soc'y REV. 247, 256–58 (1979).

⁶⁷ See, e.g., Alschuler, *Plea Bargaining History*, *supra* note 46, at 238–39.

⁶⁸ See *id.*

⁶⁹ See *id.* at 239; see also Friedman, *supra* note 66, at 248.

⁷⁰ See, e.g., Bordenkircher v. Hayes, 434 U.S. 357 (1978); Santobello v. New York, 404 U.S. 257 (1971); Alford v. United States, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970).

⁷¹ U.S. CONST. amend. VI.

⁷² See, e.g., Santobello, 404 U.S. at 261–62; Boykin v. Alabama, 396 U.S. 238, 242 (1969); Machibroda v. United States, 368 U.S. 487, 493 (1962).

⁷³ U.S. CONST. amend. V.

guilty plea to receive some benefit from the state (namely leniency, a reduced charge or sentence reduction) amounts to coercion. It, therefore, violates the protection against self-incrimination.⁷⁴ The Court addressed this Fifth Amendment argument in 1970, in *Brady v. United States*.⁷⁵

In *Brady*, the Supreme Court of the United States upheld the validity of a defendant's guilty plea even though the defendant's desire to avoid the death penalty motivated the plea.⁷⁶ Brady, the defendant, was charged with kidnapping in violation of the Federal Lindbergh Act and faced a possible death sentence.⁷⁷ When Brady learned that his co-defendant had entered into an agreement with the government to testify against him, he changed his plea to guilty.⁷⁸ Brady subsequently appealed, arguing that his guilty plea was not voluntary because it was motivated by both his fear that he would be sentenced to death and his desire for a reduced sentence.⁷⁹ In upholding the validity of his guilty plea, the Court reasoned that a guilty plea is not necessarily invalid under the Fifth Amendment whenever it is motivated by a desire to accept a lesser penalty rather than risk the chances of a higher penalty at trial.⁸⁰

The Court discussed the mutual benefits of the plea bargaining system, stating that

for a defendant . . . the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is a substantial doubt that the State can sustain its burden of proof.⁸¹

⁷⁴ See, e.g., *Bordenkircher*, 434 U.S. at 357, 360; *Alford*, 400 U.S. at 37–39; *Brady*, 397 U.S. at 758.

⁷⁵ See 397 U.S. at 758.

⁷⁶ See *id.*

⁷⁷ The Lindbergh Act allowed for a defendant to be punished by death if the victim of the kidnapping was not "liberated without harm." See *id.* at 743.

⁷⁸ See *id.*

⁷⁹ See *id.* at 744.

⁸⁰ See 397 U.S. at 751.

⁸¹ *Id.* at 752.

In light of these mutual benefits, the Court held that plea bargaining was constitutional under the Fifth Amendment, as long as the defendant entered his guilty plea knowingly, intelligently and voluntarily.⁸² Recognizing that defendants receive numerous advantages by pleading guilty, the Court held that a defendant's desire to get a lesser penalty or sentence does not, in and of itself, make his guilty plea involuntary.⁸³

One year after *Brady*, in *Santobello v. New York*, the Supreme Court again addressed the validity of plea bargaining.⁸⁴ In *Santobello*, the Court held that a defendant who completes a plea agreement with the prosecution can claim specific performance of that agreement if it is not honored.⁸⁵ The defendant in *Santobello* was indicted on two counts of felony gambling and initially entered a plea agreement where he would plead guilty to a lesser offense in exchange for the prosecutor's promise not to make a sentence recommendation.⁸⁶ When Santobello changed his counsel and learned that the evidence against him was possibly the product of an illegal search, he motioned to withdraw his plea.⁸⁷ The court denied this motion and proceeded to the sentencing phase where a new prosecutor, apparently unaware of the previous plea agreement, made a sentence recommendation of one year—the statutory maximum.⁸⁸ Despite the defense's objection, Santobello was sentenced to one year in prison.⁸⁹ The case was remanded to the lower court to determine whether the prosecutor's violation of the prior agreement influenced the judge's decision.⁹⁰

The Supreme Court upheld the initial agreement, reasoning that plea bargaining was both an essential and desirable part of the criminal process.⁹¹ The Court listed the benefits of plea bargaining, noting that

it leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those accused persons who are denied release pending trial; it protects the

⁸² See *id.* at 758.

⁸³ See *id.*

⁸⁴ See 404 U.S. 257.

⁸⁵ See *id.* at 263.

⁸⁶ See *id.* at 258.

⁸⁷ See *id.* at 258–59.

⁸⁸ See *id.* at 259.

⁸⁹ *Santobello*, 404 U.S. at 259. The judge noted that the prosecution's recommendation did not influence his decision. See *id.* at 259–60.

⁹⁰ See *id.* at 262–63.

⁹¹ See *id.* at 261.

public from those who are prone to continue criminal conduct even while on pre-trial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.⁹²

Thus, since the Court in *Santobello* thought that plea bargaining was such an essential component of the American criminal justice system, it held that defendants can claim specific performance of plea agreements offered by prosecutors.⁹³

The Court examined the constitutionality of plea bargaining again in 1978, in *Bordenkircher v. Hayes*.⁹⁴ In *Bordenkircher*, the Court held that a prosecutor could charge a defendant with additional crimes once plea negotiations broke down, because the power to negotiate bargains is solely within the prosecutor's discretion.⁹⁵ In *Bordenkircher*, the prosecutor offered the defendant a reduced sentence if he pleaded guilty on a charge of uttering a forged instrument (writing false checks).⁹⁶ The prosecutor said, however, that if the defendant did not plead guilty, he would seek an indictment under the Kentucky Habitual Criminal Act that had a mandatory life sentence.⁹⁷ The defendant refused to accept the prosecutor's offer, was found guilty, and was sentenced to life imprisonment.⁹⁸

On appeal, the defendant contended that the prosecutor's charge based on the Kentucky Habitual Offender Act was a vindictive action that violated his Fifth Amendment due process rights.⁹⁹ The Supreme Court upheld the conviction and reasoned that the defendant had the same bargaining power as the state.¹⁰⁰ The Court stated that there was no element of punishment or retaliation on the part of the prosecution because in the "give and take" of plea bargaining the accused is free to accept or reject the prosecution's offer.¹⁰¹ The Court further added,

⁹² *Id.*

⁹³ See *Santobello*, 404 U.S. at 262-63.

⁹⁴ See 434 U.S. 357.

⁹⁵ See *id.* at 363-65.

⁹⁶ See *id.* at 358.

⁹⁷ See *id.*

⁹⁸ See *id.* at 358-59.

⁹⁹ See *Bordenkircher*, 434 U.S. at 359-60.

¹⁰⁰ See *id.* at 363-65.

¹⁰¹ See *id.* at 363.

a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged.¹⁰²

Thus, the *Bordenkircher* Court held that it was not a due process violation for the prosecution to file additional charges against the defendant once plea negotiations broke down.¹⁰³ Commentators maintain that the *Bordenkircher* decision provides the prosecution with broad discretion in plea bargaining.¹⁰⁴ Specifically, the commentators note that although the Court could have required lower courts to be more intimately involved in the plea negotiation system, "[t]he *Bordenkircher* Court made it clear that the role of the prosecutor was preeminent in the criminal justice system."¹⁰⁵

IV. THE ACADEMIC DEBATE¹⁰⁶

The most frequently cited reason for maintaining the plea bargaining system is judicial efficiency.¹⁰⁷ Without this method of case disposal, it is widely believed that courts could never address all the cases before them.¹⁰⁸ Scholars contend that if plea bargaining were to be prohibited, courts throughout the nation would be forced to significantly enhance their infrastructure (both in terms of staffing and physical plant) resulting in astronomical costs to taxpayers.¹⁰⁹ Proponents of plea bargaining also contend that it allows both prosecutors

¹⁰² *Id.* at 365.

¹⁰³ *See id.* at 363-65.

¹⁰⁴ *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, J. CRIM. L. & CRIMINOLOGY 717, 754 (1996).

¹⁰⁵ *Id.*

¹⁰⁶ Most of the debate concerning plea bargaining has centered around bargains where the defendant directly pleads guilty to a lesser sentence. Little if any of the literature has discussed plea bargaining within the context of inducing witness testimony. In theory, however, the two practices operate in a very similar manner. In both instances the prosecution attempts to reduce its case load through the use of bargaining and the defendant/witness gives away the right to trial in lieu of a reduced sentence or charge. Therefore, the literature is applicable to the type of plea bargaining discussed in this Note.

¹⁰⁷ Numerous scholars have advanced this argument. For an interesting study of this judicial efficiency rationale, see MILTON HEUMANN, PLEA BARGAINING 114 (1978); *see also* Peter Arenella, *Reforming the Federal Grand Jury and State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 524 (1980); Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 440 (1971).

¹⁰⁸ *See, e.g.*, Arenella, *supra* note 107, at 524; HEUMANN, *supra* note 107, at 114-17; White, *supra* note 107, at 440.

¹⁰⁹ Former Chief Justice Burger has argued that "a reduction from 90 per cent to 80 per cent

and defendants to save their judicial resources for more serious disputes.¹¹⁰ These proponents argue that by weeding out cases early on, courts can spend more time on those cases that require more extensive debate.¹¹¹

Many advocates also contend that defendants receive significant benefits and protections from the plea bargaining system.¹¹² First, defendants are able to avoid the cumbersome burden and public spotlight that modern trials entail.¹¹³ Defendants, by entering a plea, avoid the uncertainties and rigors associated with cross examination and leaving their fate to twelve unknown jurors.¹¹⁴ Secondly, plea bargaining enables defendants to avoid the excessive punishments that legislatures have assigned to crimes through the Sentencing Guidelines.¹¹⁵ This practice of plea bargaining allows prosecutors to charge defendants with lesser crimes and thus tailor the sentence to the offender by manipulating the charges brought.¹¹⁶

Plea bargaining advocates also contend that there are substantial safety mechanisms in plea bargaining that ensure that the defendant does not receive unfair deals.¹¹⁷ Among the most powerful of these mechanisms is the "market for bargains."¹¹⁸ If the prosecution offers an unfair bargain, the defendant always has the option of going to trial to get a "better deal."¹¹⁹ If, however, the prosecutor offers a "good deal," the defendant need not go to trial.¹²⁰

Proponents of plea bargaining also maintain that the system is inevitable.¹²¹ These scholars point to the concept of implicit plea bar-

in guilty pleas requires the assignment of twice the judicial manpower and facilities—judges, court reporters, bailiffs, clerks, jurors and courtrooms." Burger, *supra* note 65, at 931.

¹¹⁰ For a general discussion, see Arenella, *supra* note 107, at 524; HEUMANN, *supra* note 107, at 114–17; White, *supra* note 107, at 440.

¹¹¹ See *id.*

¹¹² See *Brady*, 397 U.S. at 752; see also *Bordenkircher*, 434 U.S. at 363; *Santobello*, 404 U.S. at 261.

¹¹³ See *Brady*, 397 U.S. at 752; see also *Bordenkircher*, 434 U.S. at 363; *Santobello*, 404 U.S. at 261.

¹¹⁴ See *Brady*, 397 U.S. at 752; see also *Bordenkircher*, 434 U.S. at 363; *Santobello*, 404 U.S. at 261.

¹¹⁵ See HEUMANN, *supra* note 107, at 161.

¹¹⁶ See *id.*

¹¹⁷ See generally Frank Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983); DOUGLAS W. MAYNARD, *INSIDE PLEA BARGAINING: THE LANGUAGE OF NEGOTIATION* 203–05 (1984).

¹¹⁸ See Easterbrook, *supra* note 117, at 297–98.

¹¹⁹ See *id.*; see generally RICHARD P. ADELSTEIN, *THE NEGOTIATED GUILTY PLEA: AN ECONOMIC AND EMPIRICAL ANALYSIS* (1984).

¹²⁰ See Easterbrook, *supra* note 117, at 297–98; see generally ADELSTEIN, *supra* note 119.

¹²¹ For a general discussion, see HEUMANN, *supra* note 107, at 157–62.

gaining where a defendant enters a guilty plea without participating in formal negotiations with the prosecution. Recognizing that many defendants enter guilty pleas implicitly believing they will receive a reduced sentence, proponents maintain that even if formal plea negotiations are abolished, bargaining would still occur.¹²²

Despite all of the positive attributes of plea bargaining, the vast majority of academics criticize the practice as it currently operates.¹²³ Perhaps the most cited criticism is that plea bargaining coerces defendants and denies them their Fifth Amendment rights.¹²⁴ Much of this criticism centers around the belief that innocent defendants will be forced to enter guilty pleas out of fear that they will be punished if they pursue their right to trial.¹²⁵ These critics also maintain that guilty defendants benefit from the plea bargaining system.¹²⁶ Rather than face trial, these defendants plead guilty to lesser charges than they would otherwise have been charged with and thus receive excessive and undeserved leniency.¹²⁷

Opponents also maintain that plea bargaining hinders respect for the justice system.¹²⁸ When legal defenses are turned into bargaining chips and guilty defendants are encouraged to accept lesser charges,

¹²² See *id.*; see generally Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984) [hereinafter Schulhofer, *Inevitable*]. In addition to these arguments, advocates also maintain that the United States is not the only country that employs a plea bargaining system. These proponents point to several European nations that employ a very similar practice. See generally John Baldwin & Michael McConville, *Plea Bargaining and Plea Negotiations in England*, 13 L. & Soc'y REV. 287 (1979); William F. Felsüner, *Plea Contracts in West Germany*, 13 L. & Soc'y REV. 309 (1979).

¹²³ The scholars criticizing plea bargaining are numerous. For a sampling of some of the more notable critics, see Albert Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981) [hereinafter Alschuler, *Changing Debate*]; Albert Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975) [hereinafter Alschuler, *Defense Attorney's Role*]; Albert Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983) [hereinafter Alschuler, *Alternatives*]; Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968) [hereinafter Alschuler, *Prosecutor's Role*]; Douglas G. Gilford, *Meaningful Reform in Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37 (1983); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978) [hereinafter Langbein, *Torture*]; Stephen Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992) [hereinafter Schulhofer, *Disaster*]; Schulhofer, *Inevitable*, *supra* note 122.

¹²⁴ See, e.g., Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 L. & Soc'y REV. 527 (1979).

¹²⁵ See *id.*

¹²⁶ See, e.g., Alschuler, *Changing Debate*, *supra* note 123, at 652-80; Gilford, *supra* note 123, at 65-68.

¹²⁷ See, e.g., Alschuler, *Changing Debate*, *supra* note 123, at 652-80; Gilford, *supra* note 123, at 65-68.

¹²⁸ See, e.g., ARTHUR ROSETTE & DONALD R. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE 175-80 (1976).

it is inevitable that there will be a loss of respect for the judicial system.¹²⁹ In the sense that the court is an "omnipresent teacher" of American democracy, critics argue that plea bargaining teaches defendants to lie early on to receive lesser punishment.¹³⁰ As a result, both innocent defendants and victims of crimes feel as if the system has failed them.¹³¹

Another criticism of current plea bargaining practices is that too much discretion is placed in the hands of the prosecutor in deciding the fate of individual defendants.¹³² In plea bargaining, two distinct procedural processes are combined into one decision.¹³³ Prosecutors decide not only what the defendant will be found guilty of, but also what sentence will be imposed, without judicial involvement.¹³⁴ When all of this power is placed within the hands of one individual, critics maintain that the potential for prejudice and unequal treatment increases exponentially.¹³⁵ In this sense, the trial process is good, in and of itself, as it allows two distinct procedures with judicial, and perhaps jury, involvement to ensure that a defendant's rights have not been violated.¹³⁶ Opponents of plea bargaining also argue that the privacy of plea negotiations allows for collusion and corruption by prosecutors with improper motives.¹³⁷ Unlike most judges, prosecutors are not motivated by finding what is a just outcome in a given case, but rather in most instances by attaining a winning record and appearing tough on crime.¹³⁸

The ad hoc nature of plea bargaining has also been the subject of criticisms.¹³⁹ Because there are no official guidelines governing how

¹²⁹ See *id.*

¹³⁰ *Olmstead v. United States*, 277 U.S. 438, 458 (1928); see also ROSETTE & CRESSEY, *supra* note 128, at 175-80.

¹³¹ See ROSETTE & CRESSEY, *supra* note 128, at 175-80.

¹³² See generally ALSCHULER, *Prosecutor's Role*, *supra* note 123; Gilford, *supra* note 123, at 65-68; Misner, *supra* note 104, at 717.

¹³³ See generally ALSCHULER, *Prosecutor's Role*, *supra* note 123; Gilford, *supra* note 123, at 65-68; Misner, *supra* note 104, at 717.

¹³⁴ See generally ALSCHULER, *Prosecutor's Role*, *supra* note 123; Gilford, *supra* note 123, at 65-68; Misner, *supra* note 104, at 717.

¹³⁵ See generally ALSCHULER, *Prosecutor's Role*, *supra* note 123; Gilford, *supra* note 123, at 65-68; Misner, *supra* note 104, at 717.

¹³⁶ See generally ALSCHULER, *Prosecutor's Role*, *supra* note 123; Gilford, *supra* note 123, at 65-68; Misner, *supra* note 104, at 717.

¹³⁷ See, e.g., ALSCHULER, *Prosecutor's Role*, *supra* note 123, at 50; Gilford, *supra* note 123, at 65-68; Misner, *supra* note 104, at 717.

¹³⁸ See generally ALSCHULER, *Prosecutor's Role*, *supra* note 123; Gilford, *supra* note 123, at 65-68; Misner, *supra* note 104, at 717.

¹³⁹ See, e.g., Misner, *supra* note 104, at 718.

and what prosecutors offer in their plea agreements, the predictability and regularity of knowing the punishment a defendant will receive for a specific crime is eliminated.¹⁴⁰ Recognizing these and many other inherent defects in the modern practice of plea bargaining, scholars have advocated a variety of alternatives, ranging from the complete abolishment of plea bargaining to simple additions including more judicial involvement in the process.¹⁴¹

V. *UNITED STATES V. SINGLETON*

In the shadow of the Supreme Court's constitutional approval of plea bargaining and the intensive academic debate surrounding the topic, in June of 1998, the United States Court of Appeals for the Tenth Circuit decided *United States v. Singleton*.¹⁴² In *Singleton*, a three judge panel held that a prosecutor's plea bargain with a witness that provided leniency in exchange for his testimony against a co-defendant violated a federal statute governing bribery of witnesses.¹⁴³ Sonya Singleton, a pregnant twenty-four year-old African American woman, was one of several defendants convicted of money laundering and conspiracy to distribute cocaine.¹⁴⁴ The charges arose out of an investigation by the Wichita Police who were suspicious of a number of Western Union wire transfers.¹⁴⁵ The police soon discovered that these transfers were linked to men who were suspected of drug trafficking.¹⁴⁶

Singleton was identified as one of several women who had either sent or received wire transfers on behalf of the drug business.¹⁴⁷ This case centered on Singleton's motion to suppress the testimony of a witness, Napoleon Douglas, during trial.¹⁴⁸ Douglas was a fellow defendant, with an extensive criminal record, who had entered a plea agreement with the Assistant United States Attorney.¹⁴⁹ This agreement contained three promises from the government.¹⁵⁰ The prosecution first promised not to indict Douglas for any violations of the Drug Abuse

¹⁴⁰ See, e.g., *id.*

¹⁴¹ See generally Alschuler, *Alternatives*, *supra* note 123; Alschuler, *Prosecutor's Role*, *supra* note 123, at 50; Gilford, *supra* note 123; Misner, *supra* note 104.

¹⁴² 144 F.3d 1343, 1343 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297, 1298 (10th Cir. 1999).

¹⁴³ See *id.* at 1360-61.

¹⁴⁴ *Id.* at 1343; see also Saunders, *supra* note 7, at 9.

¹⁴⁵ See 144 F.3d at 1343.

¹⁴⁶ See *id.*

¹⁴⁷ See *Singleton*, 144 F.3d at 1343-44.

¹⁴⁸ See *id.* at 1344.

¹⁴⁹ See *id.*

¹⁵⁰ See *id.*

Prevention and Control Act.¹⁵¹ The prosecution next promised "to advise the sentencing court, prior to sentencing, of the nature and extent of the cooperation provided" by Douglas in accordance with U.S. Sentencing Guideline § 5K1.1.¹⁵² The court noted that Douglas believed this would result in a lesser sentence than one he might otherwise receive at trial.¹⁵³ Finally, the prosecution promised to advise the Mississippi parole board of the assistance Douglas provided.¹⁵⁴ In exchange for these promises, Douglas agreed to "testify truthfully in federal and/or state court" against the other defendants including Singleton.¹⁵⁵

The trial court denied Singleton's motion to suppress Douglas' testimony.¹⁵⁶ She was subsequently convicted and sentenced to forty-six months in prison followed by three years of probation.¹⁵⁷ Singleton appealed this conviction alleging that the trial court erred in not granting her motion to suppress Douglas' testimony.¹⁵⁸

A. Statutory Basis for the Exclusion of Testimony

Contrary to previous defendants who had attempted to suppress co-conspirator plea bargained testimony based on the Fifth Amendment, Singleton's argument was that the government's agreement with Douglas was a violation of 18 U.S.C. § 201(c)(2), a federal bribery statute.¹⁵⁹ Thus, the *Singleton* panel first assessed the statutory plain language of 18 U.S.C. § 201 (c), which states that

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 . . . shall be fined under this title or imprisoned for not more than two years, or both.¹⁶⁰

¹⁵¹ See *id.*

¹⁵² *Singleton*, 144 F.3d at 1344.

¹⁵³ See *id.* at 1350-51.

¹⁵⁴ See *id.* at 1344.

¹⁵⁵ *Id.*

¹⁵⁶ See *id.* at 1343.

¹⁵⁷ See *Singleton*, 144 F.3d at 1343.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.* Ms. Singleton's argument seems to be based in large part on an article by a former government prosecutor. See Johnston, *supra* note 4, at 21.

¹⁶⁰ 18 U.S.C. § 201(c)(2) (1994).

The court analyzed each portion of the statute recognizing that Congress specifically intended that "§ 201 is to be broadly construed to further its legislative purpose of deterring corruption."¹⁶¹

The court first examined the class of persons to whom the statute applies.¹⁶² Noting the use of the word "whoever," the court analyzed whether the U.S. Attorney, who was acting for the government, fit within this definition.¹⁶³ The U.S. Attorney cited *Nardone v. United States*, where the United States Supreme Court decided that the government is presumptively exempted from complying with a statute in two instances.¹⁶⁴ These two instances are: (1) when the statute would deny the sovereign an established prerogative title or interest (i.e. the right to prosecute criminals), and (2) when the statute, as applied, would create an absurdity for government actors (i.e. applying speed limit laws to a police officer pursuing a suspect.)¹⁶⁵

The *Singleton* court determined that the first exemption, inherent government prerogative, did not apply because in *Singleton* "the operation of law is upon agents or servants of the government rather than on the sovereign itself."¹⁶⁶ The *Singleton* court reasoned that 18 U.S.C. 201(c)(2) was enacted to prevent bribery and fraud and was applied

¹⁶¹ *Singleton*, 144 F.3d at 1345.

¹⁶² *See id.*

¹⁶³ *See id.* at 1345-48.

¹⁶⁴ *See id.* at 1345. In 1937, in *Nardone v. United States*, the Supreme Court of the United States held that a federal statute governing the interception of wire communications was applicable to federal agents who used wire taps to listen to the phone conversations of suspected bootleggers. *See* 302 U.S. 379, 384 (1937). In *Nardone*, the defendants were charged with the smuggling and concealment of alcohol in violation of the Volstead Act. *See id.* at 380. At trial, federal agents testified to conversations they had overheard through tapping of the defendants' telephones. *See id.* In appealing their subsequent conviction, the defendants argued that the agents' testimony should have been excluded because it was obtained illegally in violation of Section 605 of the Federal Communications Act. *See id.* at 380-81. This statute stated: "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person." *Id.* at 381. In deciding whether this statute was applicable to the government, the Court determined that there are two instances when a statute does not apply to government: (1) when the statute would deny the government a recognized or established title or interest; and (2) where the application to the government would be an obvious absurdity. *See id.* at 383-84. The Court held that in deciding whether applying a statute to the government denies an established right or acts as an absurdity is a question "of policy." *See id.* at 383. The Court went to great lengths to discuss the "moral" debate surrounding the general application of legislation, specifically prohibition of wiretapping, to government actors and noted that it is the "view of many that the practice [wiretapping] involves a grave wrong." *Id.* at 384. In applying these policy arguments, the *Nardone* Court determined the wiretapping statute to be applicable to the government, stating that "the sovereign is embraced by general words of a statute intended to prevent injury and wrong." *Id.*

¹⁶⁵ *See Singleton*, 144 F.3d at 1345-46.

¹⁶⁶ *Id.* at 1346.

not to the government as an entity but rather to a government agent, namely the U.S. Attorney.¹⁶⁷ Since the statute applied merely to a government agent, and not the government itself, the first *Nardone* exemption was inapplicable.¹⁶⁸

The court further reasoned that under the first *Nardone* exemption (government prerogative), there are two requirements.¹⁶⁹ The first requirement is that the statute is being applied to the government.¹⁷⁰ Once it is established that the statute is applied to the government, the second requirement is that the statute would deny the government an established right or prerogative.¹⁷¹ In this case, since the U.S. Attorney was merely an agent and not the government, the initial requirement of the first *Nardone* exemption was not met.¹⁷²

The judges in the panel, in a dissent to the en banc appeal, also stated that the second requirement of the *Nardone* government prerogative exemption was not met. The judges stated that since the statute applied merely to an agent of the United States, the government retained its power to prosecute criminals (its governmental prerogative).¹⁷³ The judges reasoned that applying § 201(c)(2) would merely limit the manner by which the U.S. government's agent, the U.S. Attorney, could exercise the established governmental prerogative to prosecute criminals.¹⁷⁴

The *Singleton* panel also held that *Nardone's* second category of government exemption, the absurdity exemption, was inapplicable.¹⁷⁵ In reviewing the concept of a limited sovereign from the Magna Carta to present day, the court determined that § 201(c)(2)'s anti-corruption policy has long been enforced by the common law.¹⁷⁶ In articulating the policy of judicial integrity, the court stated,

[t]he judicial process is tainted and justice is cheapened when factual testimony is purchased, whether with leniency or money. Because prosecutors bear a weighty responsibility to

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See *Singleton*, 144 F.3d at 1346.

¹⁷¹ See *id.*

¹⁷² See *id.*

¹⁷³ The *Singleton* three-judge panel did not specifically address this requirement. The dissent in the *Singleton* en banc appeal, however, which consisted of the same three judges that were on the original panel, did make this point. See *United States v. Singleton*, 165 F.3d 1297, 1310-12 (10th Cir. 1999) (rehearing en banc).

¹⁷⁴ See *id.*

¹⁷⁵ See *Singleton*, 144 F.3d at 1346-48.

¹⁷⁶ See *id.* at 1346-47; see also *supra* note 10 and accompanying text.

do justice and observe the law in the course of a prosecution, it is particularly appropriate to apply the strictures of § 201(c)(2) to their activities.¹⁷⁷

The *Singleton* panel thus concluded that applying § 201(c)(2) to government officials is far from absurd—rather, it is an essential component of the Anglo-American legal tradition.¹⁷⁸

After the court held that the statute applied to the U.S. Attorney, it next determined whether the promises made to Douglas were, as the statute requires, “for or because of” his testimony.¹⁷⁹ The court noted that this requirement does not mandate a quid pro quo relationship, but rather that the promises motivate the testimony.¹⁸⁰ The three judge panel found that, because the promises and testimony mutually induced each other in this case, the statute’s requirement was met.¹⁸¹

Finally, the panel examined the statutory requirement that the gift or promise be “something of value.”¹⁸² It noted that objects of value are not restricted to things of monetary, commercial, objective or tangible value.¹⁸³ The court further articulated that the test of value is whether the person receiving the object subjectively attaches value to it.¹⁸⁴ In determining that Douglas valued the U.S. Attorney’s promises, the court said that the promise not to prosecute was of great value to him: “besides guaranteed physical freedom, he was guaranteed freedom from the burden of defending himself and from the stigma of prosecution and conviction.”¹⁸⁵ Thus, the statutory requirement that the witness subjectively value the promise was met.

B. *The Legislative History of 18 U.S.C. § 201(c)(2)*

In quoting the House Report on § 201, the *Singleton* panel maintained that the “legislative history confirms Congress’s purpose that giving or receiving anything of value by witnesses ‘for’ or ‘because of’ . . . testimony . . . should be prohibited.”¹⁸⁶ The panel noted that the majority of the debate concerning the bill was centered around new conflicts of interest provisions regulating government employees, in-

¹⁷⁷ *Singleton*, 144 F.3d at 1347–48.

¹⁷⁸ *See id.*

¹⁷⁹ *Id.* at 1348.

¹⁸⁰ *See id.*

¹⁸¹ *See id.*

¹⁸² *Singleton*, 144 F.3d at 1348–49.

¹⁸³ *See id.* at 1349.

¹⁸⁴ *See id.*

¹⁸⁵ *Id.* at 1350.

¹⁸⁶ *Id.* at 1352 (citing H.R. REP. NO. 87-748, at 16 (1961)).

cluding attorneys, and their private non-official actions.¹⁸⁷ The *Singleton* panel also noted that most statements concerning the bill related to the general topic of government corruption and not specifically to the inducement of testimony in criminal trials.¹⁸⁸

Despite the general nature of the debate surrounding the statute, the panel stated that the legislative history also confirms the Senate's intent to hold the government to high ethical standards in its increasingly complicated realm of activities.¹⁸⁹ In specifically addressing § 201(h) [now (c)(2)], the panel pointed to the Congressional Record which states that the amendments were not intended to "restrict the broad scope of the present bribery statutes as construed by the courts."¹⁹⁰ Furthermore, the panel acknowledged that the House recognized that the exchange of testimony for something of value has "the appearance of evil and the capacity of serving as a cover for evil."¹⁹¹ Relying on both the policy of the general anti-corruption bill, as well as the specific language concerning the broad scope of the bribery provisions, the *Singleton* panel determined that its holding was consistent with Congress's express legislative intent.¹⁹²

The panel also examined the manner in which Congress structured § 201.¹⁹³ It noted that Congress specifically divided the legislation into two provisions: bribery prohibitions and gratuity prohibitions.¹⁹⁴ In examining this structure, the panel concluded that § 201(c)(2) is included under gratuity prohibitions and therefore does not require a corrupt intent to influence.¹⁹⁵ Thus, the *Singleton* panel stated that the promise of leniency to Douglas did not have to be based upon any corrupt intent of the prosecutor to influence testimony.¹⁹⁶ Rather, it was enough that the prosecutor made the promise of leniency and that Douglas subjectively valued it.¹⁹⁷

¹⁸⁷ See S. REP. NO. 2213, at 1 (1962), reprinted in 1962 U.S.C.C.A.N. 3852, 3852.

¹⁸⁸ See *id.* at 3853.

¹⁸⁹ See *id.*

¹⁹⁰ *Id.* The federal bribery statute was significantly altered to its present statutory language in 1962 as part of a Congressional attempt to root out graft within the government. See *id.* at 3852-68. This provision was originally codified as 18 U.S.C. § 201(h) but a 1986 amendment, which did not change any of the statutory language, re-codified the provision as 18 U.S.C. § 210(c)(2).

¹⁹¹ *Singleton*, 144 F.3d at 1352.

¹⁹² See *id.*

¹⁹³ See *id.* at 1351-52.

¹⁹⁴ See *id.* at 1351.

¹⁹⁵ See *id.*

¹⁹⁶ See *Singleton*, 144 F.3d at 1351.

¹⁹⁷ See *id.*

The panel also examined the language of the other § 201 provisions.¹⁹⁸ It stated that in sharp contrast to § 201(c)(2), § 201(c)(1) expressly exempts the Executive Branch from its operation.¹⁹⁹ In reviewing the language of "whoever" in (c)(2), the panel noted that the government exemption language is conspicuously absent, therefore pointing to Congress's intent to apply the provision to government actors.²⁰⁰

C. Law Enforcement Justifications for Exclusion

In addition to the previously discussed reasons, the panel also raised an issue *sua sponte*: namely whether some overriding policy should prevent application of this statute to the U.S. Attorney. For example, criminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law.²⁰¹ The court, however, rejected this argument because the promise of leniency was not made by a police officer acting in exigent circumstances to prevent a crime.²⁰² In reaching this conclusion, the court stated that "[o]nce the exigencies of field enforcement are satisfied, we can find no policy by which prosecutors may be excused from statutes regulating testimony presented to the federal courts."²⁰³

D. Sentencing Guidelines

The court also discussed whether holding § 201(c)(2) applicable to the government runs contrary to the Federal Sentencing Guidelines.²⁰⁴ Section 5K1.1 of these guidelines provides reduced sentences to defendants who offer "substantial assistance in the investigation or prosecution of another person who has committed an offense."²⁰⁵ In holding that § 201(c)(2) and the Federal Sentencing Guidelines are not contradictory, the panel determined that substantial assistance does not include testimony and that Congress enacted the sentencing provisions recognizing the illegality of giving anything of value for testimony.²⁰⁶ In maintaining that its decision would not impede federal

¹⁹⁸ See *id.* at 1350-51.

¹⁹⁹ See *id.* at 1350.

²⁰⁰ See *id.*

²⁰¹ See *Singleton*, 144 F.3d at 1352.

²⁰² See *id.* at 1353.

²⁰³ *Id.*

²⁰⁴ See *id.* at 1354-55; see also 18 U.S.C. § 3553(e); 28 U.S.C. § 994(n).

²⁰⁵ *Singleton*, 144 F.3d at 1354 (quoting 18 U.S.C. § 3553(e)).

²⁰⁶ See *id.* at 1355.

prosecutions and defeat the purpose of § 5K1.1, the court stated that "a defendant can substantially assist an investigation or prosecution in myriad ways other than by testifying."²⁰⁷ Although the panel maintained that substantial assistance could include a variety of other actions beyond merely testifying, it did not enumerate any other methods of assistance.²⁰⁸

After establishing these points, the *Singleton* panel held that the federal bribery statute was applicable to the U.S. Attorney.²⁰⁹ The court reasoned that in promising the witness prosecutorial leniency in exchange for his testimony, the U.S. Attorney essentially bribed the witness and violated 18 U.S.C. § 201(c)(2).²¹⁰ Recognizing the impact that this decision might have upon other criminal prosecutions, the panel ordered that the appeal be reheard en banc, and that the opinion be vacated until the full panel decision.²¹¹

VI. SINGLETON EN BANC DECISION

In January of 1999, with Judge Porfillo speaking for the majority, the U.S. Court of Appeals for the Tenth Circuit overturned the *Singleton* three judge panel's decision.²¹² The en banc majority held that the federal prosecutor's plea agreement with Douglas was not subject to 18 U.S.C. § 201(c)(2).²¹³ Thus, the trial court properly denied Singleton's motion to suppress the testimony.²¹⁴

The majority first reasoned that under the first *Nardone* exemption, § 201(c)(2) denied the government an established prerogative.²¹⁵ The government, therefore, was presumptively exempt from adhering to the statute.²¹⁶ The majority held that plea agreements between defendants and the United States Attorney were really agreements between the defendant and the United States government (not an agent of the government as the *Singleton* panel maintained) and thus met

²⁰⁷ *Id.*

²⁰⁸ *See id.*

²⁰⁹ *See id.* at 1351.

²¹⁰ *See Singleton*, 144 F.3d at 1351. After reaching this conclusion, the court also determined the witness agreement to be in violation of Kansas Rule of Professional Conduct 3.4(b). *See id.* at 1358-59. This rule provides that "[a] lawyer shall not . . . offer an inducement to a witness that is prohibited by law." KANSAS RULES OF PROFESSIONAL CONDUCT Rule 3.4(b).

²¹¹ *See Singleton*, 144 F.3d at 1361-62.

²¹² *See United States v. Singleton*, 165 F.3d 1297, 1302 (10th Cir. 1999) (rehearing en banc).

²¹³ *See id.*

²¹⁴ *See id.*

²¹⁵ *See id.* at 1301-02.

²¹⁶ *See id.*

the first requirement of the initial *Nardone* exemption.²¹⁷ After establishing that the statute operated on the government, the court moved to the second requirement and held that 18 U.S.C. § 201(c)(2) denied the government of an established and long-standing right, namely the ability to prosecute criminal cases.²¹⁸ Thus, because § 201(c)(2) both applied to the government and denied an established right, U.S. Attorneys were presumptively exempt from adhering to it when entering plea agreements under the first *Nardone* exemption.²¹⁹

Additionally, the majority held that under the second *Nardone* exemption, applying § 201(c)(2) to plea agreements would operate as an absurdity.²²⁰ The court reasoned that providing leniency for testimony is an established practice in American jurisprudence.²²¹ It stated that "we must presume if Congress had intended that section 201(c)(2) overturn this ingrained aspect of American legal culture, it would have done so in clear, unmistakable, and unarguable language."²²² Thus, the majority held that it would be absurd to apply this statute to the U.S. Attorney because the statute did not specifically mandate application to prosecutors entering plea agreements.²²³ It would be counter-intuitive to apply such a general statute as § 201(c)(2) to these plea agreements.²²⁴ The majority reasoned that if Congress had really intended to overturn this long standing practice, it would have said so using much clearer and specific language.²²⁵

Furthermore, the majority stated that when § 201(c)(2) was enacted, Congress did not intend to limit prosecutors' ability to plea

²¹⁷ See *Singleton*, 165 F.3d at 1301. Reasoning that the government's sovereign authority to prosecute is vested solely in the United States Attorney, the court concluded that a criminal case can not even be heard unless a U.S. Attorney files a motion and begins prosecution. See *id.* The majority opined that the U.S. Attorney is the alter ego of the government and therefore "when an assistant U.S. Attorney enters into a plea agreement with a defendant, that plea agreement is between the United States government and the defendant." *Id.*

²¹⁸ See *id.* at 1300-01.

²¹⁹ See *id.*

²²⁰ See *Singleton*, 165 F.3d at 1301.

²²¹ See *id.* at 1301-02.

²²² *Id.* at 1302.

²²³ See *id.* at 1301-02.

²²⁴ See *id.*

²²⁵ See *Singleton*, 165 F.3d at 1301-02. The court also cited several cases that held that applying 18 U.S.C. § 201(c)(2) would operate as an absurdity. See *id.* at 1301 (citing *United States v. Reid*, 19 F. Supp. 2d 534, 535-38 (E.D. Va. 1998); *United States v. Guillaume*, 13 F. Supp. 2d at 1332-34 (S.D. Fla. 1998); *United States v. Eisenhardt*, 10 F. Supp. 2d 521, 521-22 (D. Md. 1998)). The court also noted that at least one district court has followed the *Singleton* panel's reasoning in applying 18 U.S.C. § 201(c)(2) to plea agreements. See *id.* at 1301 (citing *United States v. Fraguela*, 1998 WL 560352 No. CRIM. A. 96-0339 (E.D. La. Aug. 27, 1998)).

bargain.²²⁶ The majority noted that the plain meaning of the term "whoever" in the statute does not logically mean the U.S. government.²²⁷ Quoting the Webster's Third New International Dictionary, the majority held that the term "whoever" means "whatever person" or "any person."²²⁸ Because the U.S. government is an inanimate object, the majority reasoned that Congress purposefully excluded the government from adherence to the statute.²²⁹ The majority stated that if Congress had intended the statute to apply to the government, the term "whatever" would have been used.²³⁰ Thus, applying § 201(c)(2) to prosecutors entering plea agreements would run contrary to Congress's intent.²³¹

Finally, the majority held that it was unnecessary to address the conflicts between § 201(c)(2) and other congressional enactments such as the Federal Sentencing Guidelines.²³² The court stated, "we simply believe this particular statute [§ 201(c)(2)] does not exist for the government."²³³ Thus, by virtue of the *Nardone* test for government exemption as well as Congress's intent to exempt prosecutors from § 201(c)(2), the court held that the practice of bargaining for testimony was not subject to the federal bribery statute.²³⁴

In a concurring opinion, Chief Judge Henry and Judge Lucero criticized the majority's reasoning.²³⁵ Concurring in the judgement that § 201(c)(2) did not apply to prosecutors entering plea agreements, Lucero and Henry maintained that the conflicts between § 201(c)(2) and other statutes are "dispositive" in allowing prosecutors to enter plea agreements.²³⁶ The concurring judges reasoned that subsequent statutes, including the Federal Sentencing Guidelines and the federal immunity statutes, reveal a legislative intent to override § 201(c)(2) and permit the practice of bargaining for testimony.²³⁷

These concurring judges maintained, however, that the majority misapplied the two *Nardone* exemptions in the *Singleton* case.²³⁸ Apply-

²²⁶ See *Singleton*, 165 F.3d at 1300-01.

²²⁷ See *id.* at 1300 (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY 2611 (1993)).

²²⁸ *Id.*

²²⁹ See *id.* at 1300-01.

²³⁰ See *id.* at 1300.

²³¹ See *Singleton*, 165 F.3d at 1300-01.

²³² See *id.* at 1302.

²³³ *Id.*

²³⁴ See *id.*

²³⁵ See *id.* at 1303-08.

²³⁶ See *Singleton*, 165 F.3d at 1303.

²³⁷ See *id.*

²³⁸ See *id.* at 1304-05.

ing the first *Nardone* exemption (government prerogative), the concurrence maintained that this exemption only applied where "the operation of the law is upon the sovereign itself rather than the agents or servants of the government."²³⁹ The concurring judges thus disagreed with the majority's holding that the U.S. Attorney was the government and that § 201(c)(2) would deny the government a prerogative. These judges reasoned that because § 201(c)(2) operated merely on government agents and not the sovereign itself, the government prerogative exemption was inapplicable.²⁴⁰ Furthermore, the concurring judges determined that the second *Nardone* exemption (obvious absurdity) did not apply in *Singleton*.²⁴¹ They held that "the majority's holding itself worked an obvious absurdity by implying that a federal prosecutor who bribes a witness to supply false testimony is not subject to the criminal prohibitions of § 201."²⁴²

Although the concurring judges stated that the majority misapplied the two *Nardone* exemptions, they maintained that prosecutors entering plea agreements are nonetheless exempt from adhering to § 201(c)(2).²⁴³ In coming to this conclusion, these judges noted that it is an elementary tenant of statutory construction that "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one."²⁴⁴ Thus, they reasoned that subsequent congressional provisions overruled the general prohibitions of § 201(c)(2).²⁴⁵ The concurrence pointed to specific statutes including the federal immunity statutes and the Federal Sentencing Guidelines and noted,

these various statutes create both a substantive and procedural framework for bargaining between government agents and potential witnesses. . . . The result is a coherent, narrowly defined set of laws that operate in the same field as the more general prohibitions of § 201(c)(2) . . . [and therefore these

²³⁹ *Id.* at 1304.

²⁴⁰ *See id.* at 1304-05.

²⁴¹ *See Singleton*, 165 F.3d 1304-05.

²⁴² *Id.* at 1304. In a separate concurring opinion, Chief Judge Henry said that the application of state codes of professional ethics, an issue not addressed by either the majority nor this Note, is an issue of extreme importance. *See id.* at 1302-03. Noting recent federal legislation holding federal prosecutors to state standards of professional conduct, Judge Henry opined that the issue raised in this case is "a problem that may arise again." *Id.*

²⁴³ *See id.* at 1305-08.

²⁴⁴ *Singleton*, 165 F.3d at 1305.

²⁴⁵ *See id.* at 1305-08.

general prohibitions] must give way, insofar as it would prohibit that which the narrow statutes would allow.²⁴⁶

The dissent in the *Singleton* en banc decision, the same three judges who sat on the original panel, continued to maintain that plea agreements offering leniency for testimony are prohibited under § 201.²⁴⁷ The dissent reasoned that these agreements violated § 201's policy of preventing inducements to provide false and misleading testimony.²⁴⁸ The dissent stated that § 201 is applicable to federal prosecutors, and that the statute does not contradict subsequent congressional statutes such as the Sentencing Guidelines.²⁴⁹

The dissent maintained that the statutory plain meaning of the word "whoever" as well as the statute's construction indicated the legislature's intent to apply § 201 to the government.²⁵⁰ The dissent argued that the statute did not restrict any government prerogative. It reasoned that § 201 did not affect the government's core prerogative to prosecute or to withhold prosecution. "It le[ft] unfettered the sovereign's established prerogative to charge; it merely place[d] a restriction on one method of gathering admissible evidence."²⁵¹

In addressing whether the application of § 201 to plea agreements contradicts subsequent statutes, the dissent examined the substantial assistance language of Federal Rule of Criminal Procedure 35(b) and the Federal Sentencing Guidelines.²⁵² It noted that neither source uses the word "testimony" to define manners of providing substantial assistance.²⁵³ The dissent conceded that the Federal Sentencing Guidelines do provide a sentence reduction for truthful testimony.²⁵⁴ The dissent noted, however, that this rule contemplates rewarding a defendant only after the testimony is given and not offering or extending leniency in advance of testimony as an inducement.²⁵⁵

The dissent also maintained that "much of this case has been about policy."²⁵⁶ They noted that their constitutional duty was to apply the statute's plain meaning.²⁵⁷ Thus, the dissenting judges said that "if

²⁴⁶ *Id.* at 1307.

²⁴⁷ *See id.* at 1308.

²⁴⁸ *See id.* at 1308-09.

²⁴⁹ *See Singleton*, 165 F.3d at 1312-13.

²⁵⁰ *See id.* at 1310-11.

²⁵¹ *Id.* at 1311.

²⁵² *See id.* at 1311-13.

²⁵³ *See id.* at 1312.

²⁵⁴ *See Singleton*, 165 F.3d at 1312.

²⁵⁵ *See id.* at 1312-13.

²⁵⁶ *Id.* at 1309.

²⁵⁷ *See id.* at 1309-10.

the balance struck by § 201 is to be re-weighed, that re-weighing should be done by the policymaking branch of the government—the Congress, and not the courts.”²⁵⁸

VII. LEGISLATIVE ACTION

While the *Singleton* panel decision was still awaiting an en banc hearing before the Tenth Circuit Court of Appeals, Senator Kohl of Vermont introduced a bill in Congress to limit the impact of its potential as precedent.²⁵⁹ Introduced before the Senate Committee on the Judiciary on July 15, 1998, the Effective Prosecution and Public Safety Act was aimed at preventing defendants from using § 201(c)(2) to suppress the testimony of “government turned witnesses.”²⁶⁰ The bill sought to amend 18 U.S.C § 201 by inserting the following clause:

(a) IN GENERAL—Notwithstanding any other provision of law, nothing in section 201 of title 18, United States Code, or any other provision of law, shall be construed to prohibit any otherwise lawful giving, promising, or offering by a prosecutor of leniency, witness protection, or any other thing of value

²⁵⁸ *Id.* at 1310.

²⁵⁹ S. 2311, 105th Cong., 2d Sess. (1998). In fact, prior to the Congressional hearings on the bill, two federal district courts in 1998 cited the *Singleton* three judge panel decision as authority to exclude witness bargained testimony. *See* *United States v. Fraguela*, 1998 WL 560352 (E.D. La. Aug. 27, 1998); *United States v. Lowery*, 15 F. Supp. 2d 1348 (S.D. Fla. 1998). In *Lowery*, Judge Zloch of the Southern District of Florida excluded the testimony of three co-conspirators in a drug case because of their plea agreement with the prosecution. *See* 15 F. Supp. 2d at 1360. Citing the exact rationale of the *Singleton* court, Judge Zloch maintained that the federal prosecutor purchased the testimony of a co-defendant through his promise of leniency. *See id.* at 1359–60. He reasoned that the witness, therefore, had good reason to falsify his testimony in order to please the prosecutor. *See id.* at 1359. Judge Zloch, commenting on judicial activism, stated that “if any changes are to be made to § 201(c)(2) . . . it is solely for Congress, and not for the courts or the Executive Branch to make them.” *Id.* at 1360.

In *Fraguela*, Justice Berrigan of the Eastern District of Louisiana also followed the holding of *Singleton*. *See* 1998 WL 560352 at *1–2. In that case, Justice Berrigan granted a new trial for a defendant who argued that several witnesses that testified against him because of the prosecution’s plea agreement, violated 18 U.S.C. § 201(c)(2). *See id.* Justice Berrigan noted “[t]o find § 201(c)(2) inapplicable to the prosecution, just gives the prosecution yet another powerful weapon that is not shared by the defense for no, frankly, logical reason.” *Id.* at *2. Despite these two courts adopting the *Singleton* panel rationale, federal district courts throughout the nation have expressly rejected the *Singleton* panel’s reasoning. *See, e.g.,* *United States v. Guillaume*, 13 F. Supp. 2d 1331, 1335 (S.D. Fla. 1998); *United States v. Reid*, 19 F. Supp. 2d 534, 538 (E.D. Va. 1998); *United States v. Eisenhardt*, 10 F. Supp. 2d 521, 521 (D. Md. 1998). Most of these courts focused on the *Nardone* precedent and maintained that the government is presumptively exempt from adherence to U.S.C. § 201(c)(2). *See, e.g., id.*

²⁶⁰ Klenda, Mitchell, Austermann & Zuercher LLP, *Statements on S. 2311* (visited Oct. 5, 1998) <<http://www.kmazlaw.com/Publications/statements.html>> [hereinafter *Statements on S. 2311*].

within the reasonable exercise of prosecutorial discretion, in exchange for the testimony of any person, including any—

- (1) offer or grant of immunity for prosecution;
- (2) offer to advise a court or parole board of the extent of the cooperation by the person with the prosecutor, or any advice so given; or
- (3) plea bargain agreement.²⁶¹

In introducing this bill, Senator Kohl stated that the *Singleton* three judge panel ruling is “simply a case of Scalia-ism taken to the extreme, beyond the bounds of common sense and in the face of established practices. I cannot believe that even Justice Scalia, the high priest of literalism, would agree with this result.”²⁶² Kohl maintained that the potential for courts to follow the *Singleton* panel decision is too great for the legislature to wait for the Supreme Court to make a decision, as “jailhouse lawyers are probably foaming at the mouth anticipating making this argument in courts all over the nation.”²⁶³ At the close of the 105th Congress, however, the bill remained in the Senate Judiciary Committee and there had been no floor action taken on the proposal.²⁶⁴

VIII. THE FUTURE OF WITNESS-BARGAINED AGREEMENTS

In analyzing the impact of *Singleton*, it is significant to note that the Tenth Circuit’s decision was based purely upon a federal bribery statute and not on any constitutional provision.²⁶⁵ Thus, the central issues in this case center around: (1) whether the application of § 201 (c)(2) would either deny the U.S. government of an established prerogative or operate as an obvious absurdity, and (2) whether Congress ever intended § 201 (c)(2) to apply to witness bargained agreements.²⁶⁶ When closely examined, it seems clear that § 201(c)(2) does not operate as an absurdity nor does it deprive the U.S. government of an established prerogative.²⁶⁷ It does, however, appear that Congress, through various enactments including the Federal Sentencing Guidelines, intended to exclude prosecutors entering plea agreements from

²⁶¹ S. 2311, 105th Cong., 2d Sess. (1998).

²⁶² See *Statements on S. 2311*, *supra* note 260.

²⁶³ *Id.*

²⁶⁴ See Thomas, *Bill Summary and Status for the 105th Congress* (visited Nov. 14, 1998) <<http://thomas.loc.gov/bss/d105query.html>>.

²⁶⁵ See 144 F.3d 1346, 1359 (10th Cir. 1998), *rev’d en banc*, 165 F.3d 1297 (10th Cir. 1999).

²⁶⁶ See *id.* at 1345–48; see also *Singleton*, 165 F.3d 1297, 1301–02 (10th Cir. 1999).

²⁶⁷ See 144 F.3d at 1345–48; see also 165 F.3d at 1304–05 (Lucero, J., concurring).

adherence to § 201(c)(2).²⁶⁸ Based on this reasoning, it is likely that the United States Supreme Court will determine that § 201(c)(2) does not bar witness bargained plea agreements.

The *Singleton* case does, however, offer both Congress and the Supreme Court the opportunity to readdress the policy issues surrounding plea bargaining.²⁶⁹ Recognizing the differences between the policies the Supreme Court addressed in cases such as *Brady*, *Santobello* and *Bordenkircher*, the *Singleton* case provides an excellent opportunity for Congress to address several defects in the modern plea bargaining system. Paramount among these defects are the problems associated with broad prosecutorial discretion.

A. Government Prerogative

Under the first *Nardone* exemption, the U.S. government is presumptively exempt from adhering to any statute when its application would deny the government of an established right or prerogative.²⁷⁰ As the *Singleton* panel noted, the government must satisfy two requirements in order to qualify for this initial exemption.²⁷¹ The first requirement mandates the court to determine whether the U.S. Attorney, when acting in an official capacity, is acting as the government or merely as the government's agent.²⁷² If the U.S. Attorney is found to be an agent of the government and not the sovereign itself, then the statute will be treated as applying to the U.S. Attorney himself.²⁷³ As such, the statute will not deny the *government* an established right and the second requirement need not be addressed.²⁷⁴

If, however, the U.S. Attorney is deemed to be the sovereign itself, the court must move to the second requirement and determine whether the statute denies the government of a long established prerogative or right.²⁷⁵ While the *Singleton* majority maintains that the U.S. Attorney is for all intents and purposes the government while prosecuting criminal cases,²⁷⁶ the dissent's opinion that the prosecution is merely an agent or servant of the sovereign seems more logical.²⁷⁷

²⁶⁸ The *Singleton* concurrence made this argument. See 165 F.3d at 1306-07.

²⁶⁹ See *Brady v. United States*, 397 U.S. 742 (1970); see also *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Santobello v. New York*, 404 U.S. 257 (1971).

²⁷⁰ See 302 U.S. 379, 383-84 (1937).

²⁷¹ See *Singleton*, 144 F.3d at 1346.

²⁷² See *id.*

²⁷³ See *id.*; see also *Singleton*, 165 F.3d at 1304 (Lucero, J., concurring).

²⁷⁴ See *Singleton*, 144 F.3d at 1346.

²⁷⁵ See *Singleton*, 165 F.3d at 1300-02.

²⁷⁶ See *id.* at 1300-01; *supra* note 217 and accompanying text.

²⁷⁷ See 165 F.3d at 1311 (Kelly, J., dissenting).

As the dissent argued, if federal prosecutors are held to be the government itself rather than agents, than all other government employees representing the sovereign should also be deemed the government itself.²⁷⁸ The majority maintains that it is logical to deem prosecutors the government since criminal prosecutions (an established government right) can not commence unless a prosecutor is involved.²⁷⁹ Following this same logic, all law enforcement officers, including the local beat cop, should be considered the government, since the criminal law can not be enforced without their direct involvement.²⁸⁰ If all of these officers are considered "alter egos" of the government, however, then where is the line of government authority to be drawn?²⁸¹ It would simply be too unwieldy to consider so many of these individuals the government.²⁸²

Furthermore, if all of these employees are deemed the sovereign and are therefore presumptively exempt from adhering to a statute, the government prerogative exemption would be extremely broad, encompassing millions of individuals across a broad spectrum of activities.²⁸³ This broad government exemption, however, is contrary to our constitutional notions of limited government and the idea that those who enforce the law are also subject to its rigors.²⁸⁴ In order to prevent broadening the scope of the government exemption to all these individuals, therefore, it seems unlikely that the U.S. Supreme Court will determine that federal prosecutors are the government itself. Thus, the government prerogative exemption does not exempt federal prosecutors from adhering to § 201(c)(2).²⁸⁵

Even if the Supreme Court were to decide that the U.S. Attorney was the sovereign itself and not merely its agent, it seems logical that applying § 201(c)(2) to plea negotiations would not deny any established prerogative under the second requirement of the *Nardone* government prerogative exemption.²⁸⁶ As the dissenting and concurring justices in the *Singleton* appeal persuasively argue, plea bargaining is not a long-standing government right.²⁸⁷ Although the ability to prose-

²⁷⁸ See *id.*

²⁷⁹ See *id.* at 1299-1300.

²⁸⁰ The judges in the *Singleton* concurrence also made this point. See *id.* at 1304 (Lucero, J., concurring).

²⁸¹ See *id.* at 1311 (Kelly, J., dissenting); see also *Singleton*, 144 F.3d at 1346.

²⁸² See 165 F.3d at 1311 (Kelly, J., dissenting); see also *Singleton*, 144 F.3d at 1346.

²⁸³ See 165 F.3d at 1311 (Kelly, J., dissenting); see also *Singleton*, 144 F.3d at 1346.

²⁸⁴ See 165 F.3d at 1311 (Kelly, J., dissenting); see also *Singleton*, 144 F.3d at 1346-47.

²⁸⁵ See 165 F.3d at 1311 (Kelly, J., dissenting); see also *Singleton*, 144 F.3d at 1346-47.

²⁸⁶ See 165 F.3d at 1311 (Kelly, J., dissenting); see also *Singleton*, 144 F.3d at 1346-47.

²⁸⁷ See 165 F.3d at 1311 (Kelly, J., dissenting); see also *Singleton*, 144 F.3d at 1346-47.

cute, or conversely not to prosecute, is an established government practice dating back to the earliest developments of the common law, the practice of plea bargaining was not constitutionally sanctioned until the late 1970s.²⁸⁸ The fact that the Supreme Court officially condemned the practice as late as the Civil War proves that, at best, plea bargaining is a century-old concept.²⁸⁹ To argue otherwise would be a distortion of constitutional history. Thus, because plea bargaining is essentially a modern practice, it can not be an established government right.²⁹⁰

Although it is undeniable that entering plea negotiations is a legitimate exercise of state authority, it is by no means a vested prerogative to which there are no limitations.²⁹¹ While the Supreme Court in *Bordenkircher* sanctioned broad prosecutorial discretion in plea negotiations, the Court has not left the practice completely unregulated.²⁹² The Court has enforced some limitations on plea bargaining including the requirement of final judicial approval on all pleas entered, as well as on any sentence imposed.²⁹³ Thus, the dissenting opinion in *Singleton* that argues that the government right to prosecute is conceptually different from the power to enter plea bargains seems persuasive.²⁹⁴ The former is a government prerogative, while the latter is merely a means of achieving that end.²⁹⁵ The U.S. Attorney, therefore, is not exempt from adhering to § 210(c)(2).²⁹⁶ To hold otherwise and allow prosecutors to use any method, however dubious, in achieving the legitimate end of prosecuting criminals seems disjointed from modern constitutional practice.²⁹⁷

²⁸⁸ See generally *Brady*, 397 U.S. 751; see also *Alschuler, Plea Bargaining History*, *supra* note 46, at 239-40; *Langbein, Plea Bargaining History*, *supra* note 55, at 262.

²⁸⁹ See *Insurance Co. v. Morris*, 397 U.S. 445, 451 (1874).

²⁹⁰ See 165 F.3d at 1311-12 (Kelly, J., dissenting); see also *Singleton*, 144 F.3d at 1346-47.

²⁹¹ See FED. R. CRIM. P. 35(b); *Misner*, *supra* note 104, at 754-55.

²⁹² See *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978); see also FED. R. CRIM. P. 35(b); *Misner*, *supra* note 104, at 754-55.

²⁹³ See FED. R. CRIM. P. 35(b).

²⁹⁴ See 165 F.3d at 1311 (Kelly, J., dissenting).

²⁹⁵ See *id.*

²⁹⁶ See *id.*

²⁹⁷ In fact, if one closely studies late twentieth century jurisprudence in criminal procedure, the Supreme Court has severely limited the government's ability to interrogate, induce confessions and search an individual's person and property. See generally *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding police must inform suspects of right to silence and counsel before an interrogation may proceed); *Edwards v. Arizona*, 451 U.S. 477 (1981) (holding custodial interrogation must cease once right to counsel has been invoked); *Escobedo v. Illinois*, 378 U.S. 478 (1968) (holding suspect must be advised of right to counsel before an interrogation may proceed). The Court has found these activities to be dubious means in achieving the legitimate end of enforcing the criminal law. See *id.* Although the current court has made significant cutbacks

B. Obvious Absurdity

Under the second *Nardone* exemption, the U.S. Attorney would be exempt from adhering to § 201(c)(2) if the application of the statute would operate as an obvious absurdity.²⁹⁸ As the concurring justices in the *Singleton* en banc decision persuasively argued, applying this statute to federal prosecutors entering plea agreements is far from being absurd.²⁹⁹ While the majority infers that the historic use of plea bargaining in criminal prosecutions makes the application of § 201(c)(2) absurd, they fail to develop a detailed analysis of this statement.³⁰⁰ Although they point to a series of cases interpreting the *Singleton* panel's decision,³⁰¹ the majority does not provide any other specific reason why applying § 201 would be absurd and merely opines that "if Congress had intended that § 201(c)(2) overturn this ingrained aspect of American legal culture [plea bargaining], it would have done so in clear, unmistakable, and unarguable language."³⁰²

The majority's reasoning on this point is problematic. First, § 201(c)(2) was enacted decades before the Supreme Court addressed the constitutionality of plea bargaining.³⁰³ Thus, Congress was not considering, nor did it ever envision, the implications § 201(c)(2) would have on plea bargaining when the statute was drafted.³⁰⁴ More convincing, however, is the concurring opinion which maintains that by exempting prosecutors from adherence to the statute, the court "impl[ies] that a federal prosecutor who bribes [with monetary inducements] a witness to supply false testimony is not subject to the criminal prohibitions of § 201."³⁰⁵ To argue that federal prosecutors who bribe witnesses with money are exempt from adhering to § 201(c)(2) is problematic because Congress's very intent in enacting the statute was to root out bribery and corruption within government.³⁰⁶ Furthermore, it is preposterous to contend that, "in the administration of the criminal law the end justifies the means."³⁰⁷ Thus, the fundamental concept

to these Warren Court innovations, it seems unlikely that they will completely overturn these established limits of government and law enforcement authority. *See id.*

²⁹⁸ *See Nardone*, 302 U.S. at 384.

²⁹⁹ *See Singleton*, 165 F.3d 1304-05 (Lucero, J., concurring).

³⁰⁰ *See id.* at 1301.

³⁰¹ *See id.*

³⁰² *Id.* at 1302.

³⁰³ *See generally Brady*, 397 U.S. 758; *see also* 18 U.S.C. § 201 (c)(2).

³⁰⁴ *See generally* S. REP. NO. 2213, at 1 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3853.

³⁰⁵ *Singleton*, 165 F.3d at 1304 (Lucero, J., concurring).

³⁰⁶ *See generally* S. REP. NO. 2213, at 1 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3852-53.

³⁰⁷ *See Singleton*, 144 F.3d at 1347.

of limited government, dating back to the Magna Carta, holds that even those charged with upholding the law are subject to its rigors.³⁰⁸ Federal prosecutors entering plea agreements are therefore subject to the provisions of § 201(c)(2) and prohibited from providing inducements for testimony.³⁰⁹ To hold otherwise is an absurdity that defies centuries of Anglo-American jurisprudential thought.³¹⁰

C. Congressional Intent in the Federal Sentencing Guidelines

Although the two *Nardone* exemptions do not provide a government exemption from adherence to § 201(c)(2), subsequent congressional enactments such as the Federal Rules of Criminal Procedure, the Federal Sentencing Guidelines and the federal immunity statutes provide a limited exception.³¹¹ These laws point to a specific congressional intent to override the application of § 201(c)(2) to prosecutors entering plea agreements for testimony.³¹² Simply stated, prosecutors are no longer governed by § 201(c)(2), but rather by the Federal Rules of Criminal Procedure, the Federal Sentencing Guidelines and the federal immunity statutes.³¹³

It is significant to note that the general provisions of § 201(c)(2) were written decades before the Court specifically condoned the practice of plea bargaining.³¹⁴ Thus, the concurring justices' statement that "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one," is applicable.³¹⁵ An example of a specific statutory scheme overriding § 201(c)(2) is the Federal Sentencing Guidelines.³¹⁶ Section 5K1.1 of these guidelines provides for a reduction in sentence if a defendant offers "substantial assistance" in the investigation or prosecution of another person who has committed an offense.³¹⁷ Although the dissenting *Singleton* justices contend the Federal Sentencing Guidelines do not override § 201(c)(2) and that

³⁰⁸ See generally COQUILLETTE, *supra* note 1, at 37-42; see also *Singleton*, 144 F.3d at 1346-47.

³⁰⁹ See *Singleton*, 144 F.3d at 1346-47.

³¹⁰ See generally COQUILLETTE, *supra* note 1, at 37-42; see also *Singleton*, 144 F.3d at 1346-47.

³¹¹ See FED. R. CRIM. P. 11(c); Sentencing Reform Act of 1984, 18 U.S.C. § 3553 (e)(3) (1994); 18 U.S.C. § 994 (n) (1994); 18 U.S.C. § 6003 (a) (1994); see *supra* notes 34-35 and accompanying text.

³¹² See FED. R. CRIM. P. 11(c); 18 U.S.C. § 994 (n) (1994); 18 U.S.C. § 6003 (a) (1994); see *supra* notes 34-35 and accompanying text.

³¹³ See FED. R. CRIM. P. 11(c); 18 U.S.C. § 3553 (e)(3); 18 U.S.C. § 994 (n); 18 U.S.C. § 6003 (a); see also *Singleton*, 165 F.3d at 1305-07 (Lucero, J., concurring).

³¹⁴ See generally *Brady*, 397 U.S. 742; see also 18 U.S.C. § 201 (c)(2) (1994).

³¹⁵ *Singleton*, 165 F.3d at 1305 (Lucero, J., concurring).

³¹⁶ See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1994).

³¹⁷ See *id.*

substantial assistance can be provided in various other ways, including only providing testimony after the entering of their own guilty plea and not before, this argument is problematic.³¹⁸ First, to maintain that the Federal Sentencing Guidelines only purport to provide leniency after a witness has entered his own guilty plea, and not before hand, falsely assumes that agreeing to testify will not be motivated by a desire for a decreased sentence.³¹⁹ As the facts in the *Singleton* case illustrate, when a criminal defendant, particularly a habitual criminal, is confronted with the prospect of significant jail time, it is naive to assume that a potential offer for a reduced sentence will not motivate his willingness to testify, regardless of its timing.³²⁰

Secondly, with the enactment of the Federal Sentencing Guidelines that provide a specific framework on how defendants can receive reduced sentences in exchange for their testimony, it is unrealistic to believe that Congress was still applying the general provisions of § 201(c)(2).³²¹ Congress was obviously envisioning the practice of providing leniency for testimony when it enacted the Guidelines. Section 201(c)(2), therefore, does not prevent U.S. Attorneys from entering these plea agreements.³²²

D. Plea Bargaining Policy

Despite the improbability that the Supreme Court will overturn the Tenth Circuit en banc decision and apply § 201(c)(2) to federal prosecutors, the *Singleton* case presents an excellent opportunity for both the Supreme Court and Congress to readdress the policy issues surrounding plea bargaining. Based on Congressional reaction to the *Singleton* three judge panel decision, the issue of bargaining for testimony is obviously a topic of concern for politicians and the law enforcement community.³²³ Thus, even if the Supreme Court is unwilling to readdress this issue, Congress should act upon Senator Kohl's Effective Prosecution and Public Safety Act and seriously consider whether plea bargaining policies justify the granting of leniency to conspirators willing to testify.³²⁴

³¹⁸ *Singleton*, 165 F.3d at 1312-13 (Kelly, J., dissenting).

³¹⁹ See *id.*

³²⁰ See *Singleton*, 144 F.3d at 1343-44.

³²¹ See *Singleton*, 165 F.3d at 1305-07 (Lucero, J., concurring); see also 18 U.S.C. § 3553 (e)(3) (1994).

³²² See *id.*

³²³ See *supra* notes 259-64 and accompanying text.

³²⁴ See *supra* notes 259-64 and accompanying text.

In the United States Supreme Court decisions upholding the validity of plea bargaining, the central issue was whether the practice of plea bargaining unconstitutionally coerced defendants into pleading guilty in violation of the Fifth Amendment.³²⁵ Although in several landmark decisions (including *Miranda* and *Escobedo*) the Court has held that coerced confessions are constitutionally impermissible because they are inherently unreliable, the Court has refused to find guilty pleas unreliable in the realm of plea bargaining.³²⁶ As *Brady* and its progeny illustrate, the Court has found mutual advantages in the plea bargaining system.³²⁷ While the judicial system benefits from prompt case disposition, defendants are able to avoid the rigors and uncertainties of trial and receive punishments more tailored to their crimes.³²⁸ As a result of these mutual advantages, the Court has held that plea bargaining does not unconstitutionally coerce defendants into pleading guilty.³²⁹

In contrast, the *Singleton* three judge panel and dissent recognized that witness-bargained testimony is unreliable.³³⁰ Similar to coerced confessions, providing leniency for testimony has the potential for encouraging false testimony.³³¹ Motivated by a desire to avoid punishment, co-conspirators have incentive to embellish stories about other defendants in order to gain favorable prosecutorial treatment.³³² Although the Court has found the unreliability argument opposing plea bargaining unpersuasive,³³³ witness-bargained agreements present a different policy issue than those previously addressed by the Court. When a defendant is convicted because of testimony from a witness who has entered a plea agreement, the mutual benefits of the plea bargaining system cease to exist for that defendant. Although the witness who has received leniency receives a benefit from the bargain, the defendant does not. In fact, the defendant is confronted with the obstacle of proving his or her own innocence as well as undermining the credibility of a witness against him or her.³³⁴ The mutual benefits

³²⁵ See generally *Brady*, 397 U.S. 742; see also *Bordenkircher*, 434 U.S. 357; *Santobello*, 404 U.S. 257.

³²⁶ See generally *Brady*, 397 U.S. 742; see also *Miranda*, 384 U.S. 436; *Escobedo*, 378 U.S. 478.

³²⁷ See *Brady*, 397 U.S. at 752; see also *Bordenkircher*, 434 U.S. at 363.

³²⁸ See *Brady*, 397 U.S. at 752.

³²⁹ See *id.*

³³⁰ See *Singleton*, 165 F.3d at 1313-14 (Kelly, J., dissenting); see also *Singleton*, 144 F.3d at 1350.

³³¹ See *Singleton*, 165 F.3d at 1313-14 (Kelly, J., dissenting); see also *Singleton*, 144 F.3d at 1350.

³³² See *Singleton*, 165 F.3d at 1313-14 (Kelly, J., dissenting); see also *Singleton*, 144 F.3d at 1350.

³³³ See generally *Brady*, 397 U.S. 742; see also *Bordenkircher*, 434 U.S. 357; *Santobello*, 404 U.S. 257.

³³⁴ See *Singleton*, 165 F.3d at 1313-14 (Kelly, J., dissenting).

argument that the Court has used to justify the reliability of plea bargaining, therefore, does not apply in this context since the mutual benefits are lost.³³⁵

Although the judicial economy rationale for plea bargaining remains valid in the leniency for testimony context,³³⁶ the negative aspects of plea bargaining take on increased significance. Paramount among these is a loss of judicial integrity.³³⁷ First, a defendant is potentially exposed to false testimony that is cloaked with the power and majesty of the U.S. government leading many jurors to presumptively believe its validity.³³⁸ In addition, a guilty conspirator receives favorable treatment merely because the prosecutor was able to strike a better bargain with him or her than with the defendant.³³⁹ In this sense, the judicial system is reduced to a bartering system wherein whoever is willing to confess earlier and tell the better story can purchase favorable treatment.³⁴⁰ Although critics maintain that providing leniency for testimony has deep historical roots dating back at least to the post-Civil War period, it is difficult to deny that the ability to purchase favorable prosecutorial treatment runs contrary to our notions of American justice as articulated in the Magna Carta.³⁴¹

It is equally difficult to ignore, however, that many in the law enforcement community find the ability to offer leniency for testimony an essential tool for solving crimes.³⁴² As the Supreme Court said in *Mandujano*, providing leniency for testimony is essential to the effective enforcement of various criminal statutes.³⁴³ Presented with this practical reality, it seems clear that the practice of bargaining for testimony is a necessary evil in modern criminal practice.³⁴⁴

Confronted with this, perhaps the best course of action Congress can pursue in attempting to balance the realities of modern criminal practice with the due process and fairness concerns of criminal defendants is to limit prosecutorial discretion in witness-bargained agree-

³³⁵ See *id.*

³³⁶ See *Kastigar v. United States*, 406 U.S. 441, 446 (1972); see also *United States v. Mandujano*, 425 U.S. 564, 575-76 (1976).

³³⁷ See *supra* notes 128-31 and accompanying text.

³³⁸ See *supra* notes 128-31 and accompanying text.

³³⁹ See *supra* notes 128-31 and accompanying text.

³⁴⁰ See generally Easterbrook, *supra* note 117; Adelstein, *supra* note 119.

³⁴¹ See *Singleton*, 165 F.3d at 1313-14 (Kelly, J., dissenting); see generally Alschuler, *Plea Bargaining History*, *supra* note 46; Langbein, *Plea Bargaining History*, *supra* note 55; Wishingrad, *supra* note 46.

³⁴² See *Kastigar*, 406 U.S. at 446; *Mandujano*, 425 U.S. at 576.

³⁴³ See *Mandujano*, 425 U.S. at 575-76.

³⁴⁴ See *Kastigar*, 406 U.S. at 446; *Mandujano*, 425 U.S. at 576.

ments.³⁴⁵ Although the Supreme Court has advocated broad prosecutorial discretion in cases like *Bordenkircher*, the *Singleton* case provides an excellent example of a fact situation that challenges the wisdom of broad discretion.³⁴⁶ Why did the U.S. Attorney choose to strike a bargain with Douglas, a man with an extensive criminal background, rather than Singleton, a woman without any previous criminal record? In fact, Douglas had the most incentive to enter an agreement because he was faced with the potential of significant jail time under the habitual criminal statute.³⁴⁷ Because of this, Douglas also had the incentive to embellish his story or lie about Singleton's involvement. Although Singleton retained the right to cross-examine Douglas, once he was cloaked with the power of the United States government, Singleton faced an uphill battle in order to discredit Douglas' potentially embellished story.³⁴⁸

By limiting prosecutorial discretion in plea bargaining, the potential corruption and collusion from backroom deals as well as excessive and undeserved leniency can be avoided.³⁴⁹ By simply limiting the persons with whom prosecutors can deal and limiting the offers that can be made, it is less likely that an innocent defendant will be convicted based on false testimony from a witness seeking favor with the prosecutor.³⁵⁰ With clearer guidelines governing the persons with whom prosecutors can deal, individuals such as Singleton could avoid being unjustly convicted merely because a co-defendant wanted to avoid extensive jail time and was, therefore, willing to give potentially untruthful information to the prosecutor. By prohibiting prosecutors from making deals with habitual criminals like Douglas, defendants will have protection from those individuals who have proven their untrustworthiness through consistent criminal behavior.³⁵¹

In addition, by limiting what prosecutors can offer for testimony, courts can prevent undeserved offers of grossly lenient sentences to witnesses.³⁵² As noted earlier, these offers for extremely lenient sen-

³⁴⁵ See generally Alschuler, *Changing Debate*, *supra* note 123; Gilford, *supra* note 123; Misner, *supra* note 104.

³⁴⁶ See 434 U.S. at 357; see also Saunders, *supra* note 7, at 9.

³⁴⁷ See *Singleton*, 144 F.3d at 1344.

³⁴⁸ See generally Dinelli, *supra* note 7; Saunders, *supra* note 7, at 9.

³⁴⁹ See generally Alschuler, *Changing Debate*, *supra* note 123; Gilford, *supra* note 123; Misner, *supra* note 104.

³⁵⁰ See generally Alschuler, *Changing Debate*, *supra* note 123; Gilford, *supra* note 123; Misner, *supra* note 104.

³⁵¹ See generally Alschuler, *Changing Debate*, *supra* note 123; Gilford, *supra* note 123; Misner, *supra* note 104.

³⁵² See generally Alschuler, *Changing Debate*, *supra* note 123; Gilford, *supra* note 123; Misner, *supra* note 104.

tences provide a tremendous incentive to provide false and damaging testimony.³⁵³ If prosecutors were given guidelines, similar to the current Sentencing Guidelines, detailing the lowest sentence that can be offered for a given crime, courts could insure that witnesses do not receive excessive and undeserved leniency as a result of striking a bargain with the prosecutor.³⁵⁴ At the same time, defendants would have increased protection from potentially false or misleading testimony.

CONCLUSION

Although the initial *Singleton* three judge panel decision sent shock waves throughout the legal community, the Tenth Circuit's en banc reversal has calmed many critics' fears. While it is questionable whether the Supreme Court will grant certiorari, the policy questions which the case has brought to the surface have shed a different light on the academic debate surrounding plea bargaining. The *Singleton* three judge panel has forced many attorneys to examine whether, in fact, the practice of providing leniency for testimony is bribery in violation of § 201(c)(2).³⁵⁵

The *Singleton* en banc majority's ruling that prosecutors entering plea agreements are presumptively exempt from adhering to § 201(c)(2) because the statute denies the government an established right, however, evidences the Tenth Circuit's opinion that the practice is not government sanctioned bribery.³⁵⁶ Although the majority's application of the government prerogative exemption and its holding that prosecutors are exempt from adhering to § 201(c)(2) may be incorrect, the concurring judges' opinion that the Federal Rules of Criminal Procedure and the Federal Sentencing Guidelines clearly and specifically sanction the practice of providing leniency for testimony seems accurate.³⁵⁷ As the concurring judges recognize, Congress has expressed a specific intent to permit witness bargained agreements and, therefore, U.S. Attorneys are exempted from adhering to § 201(c)(2).³⁵⁸

³⁵³ See generally Alschuler, *Changing Debate*, *supra* note 123; Gilford, *supra* note 123; Misner, *supra* note 104; see also *supra* notes 32-35 and accompanying text.

³⁵⁴ See generally Alschuler, *Changing Debate*, *supra* note 123; Gilford, *supra* note 123; Misner, *supra* note 104.

³⁵⁵ See *Singleton*, 144 F.3d at 1361.

³⁵⁶ See *Singleton*, 165 F.3d at 1301-02.

³⁵⁷ See *id.* at 1305-07 (Lucero, J., concurring).

³⁵⁸ See *id.*

Despite these specific congressional enactments that seem to trump the general provisions of § 201(c)(2), one cannot deny that the practice of witness plea bargaining presents distinct policy issues from those the Court has discussed in *Brady* and its progeny.³⁵⁹ Although the judicial efficiency arguments and the realities of criminal practice suggest a legitimate practical need for witness-bargained testimony, the mutuality of benefits rationale for plea bargaining lacks merit for defendants convicted because of witness-bargained testimony.³⁶⁰ As discussed earlier, a defendant convicted as a result of witness-bargained testimony does not receive a benefit, but rather is confronted with potentially false and damaging testimony.³⁶¹

Recognizing this, the Court must confront a new dilemma—to the merits of judicial efficiency and economy outweigh the fairness arguments of those who are convicted through the use of bargained testimony? For now, the Tenth Circuit has answered this question in the affirmative.³⁶² Perhaps the time has come to reassess both the scholarly debate concerning the benefits of plea bargaining in the realm of witness-bargained agreements and the alternatives that have been suggested including the limitation of prosecutorial discretion in plea bargaining.³⁶³ Unless the Supreme Court or Congress takes further action on this issue, however, the *Singleton* panel's "warning shot" that was originally heralded as the beginning of the end of plea bargaining remains nothing more than a false alarm.

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³⁵⁹ See *supra* notes 323–51 and accompanying text.

³⁶⁰ See *supra* notes 336–41 and accompanying text.

³⁶¹ See *supra* notes 325–48 and accompanying text.

³⁶² See *Singleton*, 165 F.3d at 1302.

³⁶³ Numerous scholars have proposed alternatives to plea bargaining. For some interesting viewpoints, see Alschuler, *Alternatives*, *supra* note 123; Alschuler, *Prosecutor's Role*, *supra* note 123 at 50; Arenella, *supra* note 107; Gilford, *supra* note 123, at 37; White, *supra* note 107.