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**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

No. 97-3178

SONYA EVETTE SINGLETON

Defendant - Appellant

On Appeal from the United States District Court
for the District of Kansas

The Honorable Frank G. Theis
Senior District Judge

D.C. No. 96-10054-05

APPELLANT'S SUPPLEMENTAL BRIEF

Oral Argument Requested:

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Through The Looking-Glass, Ch. VI, p.2303

The United States Supreme Court has warned:

There are those who say . . . that under our constitutional exclusionary doctrine ‘(t)he criminal is to go free because the constable blundered.’

In some cases this will undoubtedly be the result. But . . . ‘there is another consideration - - the imperative of judicial integrity.’ The criminal goes free if he must, but it is the law that sets him free. **Nothing can destroy a government more quickly than its failure to observe its own laws**, or worse, its disregard of the character of its own existence.

Mapp v. Ohio, 367 U.S. 643, 659 (1961). (Citations omitted.) (emphasis added.)

PREFACE

On January 27, 1997, Sonya Evette Singleton was convicted of one count of conspiracy to distribute cocaine, *see* 21 U.S.C. §§ 841(a)(1), 846 and seven counts of money laundering, *see* 18 U.S.C. § 1956(a)(1)(B)(I), and in May she was sentenced to forty-six months in prison. The principal witness against Ms. Singleton was Napoleon Douglas, her former co-defendant, and, according to the government, one of the principal drug dealers in Kansas at that time.¹

Douglas entered into a plea agreement in which he agreed to testify in exchange for lenient treatment. Through an assistant United States attorney, Douglas was promised that if he testified, the government, in its sole discretion, would (1) not prosecute him for any other crimes arising out of his activities as a drug dealer in Wichita; (2) file a USSG § 5K1.1 motion and advise the court of the nature and extent of his cooperation; and (3) advise the Mississippi parole board of the extend of his

¹During the trail the government introduced evidence that at the time Eric Johnson was the leading drug dealer in Wichita. Johnson and Ms. Singleton lived together, and Johnson was the father of Ms. Singleton’s child. When this case was initially filed, Johnson was one of the co-defendants. Prior to trial the government dismissed all charges against Mr. Johnson, and he was spirited out of Wichita, leaving Ms. Singleton to face the government’s charges.

cooperation. *See* Vol. I. Doc. 109 at 1-3. In return Douglas agreed to testify truthfully in any state or federal court. *Id.* At 2-2.

Ms. Singleton filed a motion to suppress Douglas’s testimony because the government’s offer violated 18 U.S.C. § 201(c)(2) and Kansas Rule of Professional Conduct 3.4(b). *See* Vol. I, Doc. 135. The motion was denied. Ms. Singleton was convicted of conspiracy to distribute cocaine and money laundering. She appealed, raising, *inter alia*, the issue that the court erred in denying her motion to suppress.

In this memorandum Ms. Singleton re-addresses arguments she raised in her initial submission.

As ordered by this Court, Ms Singleton also addresses whether the reversal of the District Court will have retroactive or prospective impact.

ISSUES ADDRESSED IN THE SUPPLEMENTAL BRIEF

- I. The District Court Erred in Failing to Grant The Motion to Suppress the Testimony of Napoleon Ransom Douglas.
- II. Retroactive and/or Prospective Consequences of a Decision Overturing the District Court.

ARGUMENT AND AUTHORITIES

I. The District Court Erred in Failing to Grant The Motion to Suppress the Testimony of Napoleon Ransom Douglas

A. The Plain Meaning of 18 U.S.C. § 201(c)(2)

Douglas testified at trial, and his testimony and plea agreement demonstrated that the government had promised him something of value - lenient treatment - in exchange for his testimony. The evidence demonstrated that Mr. Douglas was, in essence, a “paid” occurrence witness. There exists an inherent danger of untruthfulness in the paid “occurrence” witness. In criminal cases payment takes many forms. The courts have found it obvious that “promises of immunity or leniency premised on cooperation in a particular case may provide a strong inducement to testify falsely in that case.” *United*

States v. Meinster, 619 F.2d 1041, 1045 (4th Cir. 1980). “It is difficult to imagine a greater motivation to lie than the inducement of a lesser sentence.” *United States v. Cervantes-Pacheo*, 827 F.2d 310, 315 (5th Cir. 1987).

The language of 18 U.S.C. § 201(c)(2) is clear. It is a crime for **anyone** to give, offer or promise “anything of value” to a fact witness for his testimony. The statute provides in pertinent part that:

(c) Whoever -

(2) directly or indirectly, gives, offers or promises **anything of value to any person, for** or because of the **testimony** under oath or affirmation given or to be given by such person **as a witness upon a trial**, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such persons absence therefrom;

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

18 U.S.C. 201(c)(2) (emphasis added). To further its legislative purpose of deterring corruption, § 201 is broadly construed. See *United States v. Hernandez*, 731 F.2d 1147,1149 (5th Cir. 1984); and *United States v. Evans*, 572 F.2d 455, 480 (5th Cir.) *cert denied* 439 U.S. 870 (1978).

“The starting point in statutory interpretation is ‘the language [of the statute] itself.’” *United States v. James*, 478 U.S. 597, 604 (1986), quoting *Blue Chip Stamps v. Manor Drug Stores*, 412 U.S. 723, 756 (1975). Statutory construction is guided by “‘(t)he strong presumption’ that the plain language of the statute expresses congressional intent is rebutted only in ‘rare and exceptional circumstances,’ when a contrary legislative intent is clearly expressed.” *Ardestani v. INS*, 502 U.S. 129, 135-136 (1991).

The meaning of words - plain language - is important to an ordered society. If, as Humpty Dumpty said to Alice, “When I use a word ... it means just what I choose it to mean,” - then observance of the law would be all but impossible. Through The Looking-Glass, Ch. VI, p.230, International

Collectors Library, Garden City, New York. The importance of plain language has been stressed by the Supreme Court, reminding that “no rule of construction, however requires that a penal statute be strained and distorted in order to exclude conduct ...” a statute need only be “plain to anyone reading (it)’ that the statute encompasses the conduct at issue.” *See Salinas v. United States*, ___ U.S. ___, 118 S.Ct. 469, 472-475, (citations omitted) (1997). Section 201(c)(2) begins with the word “whoever.” “(W)hoever *pron.* 1. No matter who . . .” The American Heritage Dictionary, Second College Edition, Houghton Mifflin Company, 1985, p.1389. The plain meaning of the word “whoever” includes within its scope the assistant United States attorney who offered Douglas something of value in exchange for his testimony. Thus the plain meaning of 18 U.S.C. 201(c)(2) is clear. It prohibits **anyone** from offering things of value in exchange for testimony.

B. 18 U.S.C. § 201(c)(2) Applies to the Government

Nardone v. United States 302 U.S. 379, 383 (1937) addresses a canon of construction regarding the applicability of statutes to the government. At issue was “whether, in view of section 605 of the Federal Communications Act of 1934, evidence procured by a federal officer’s tapping telephone wires and intercepting messages (was) admissible in a criminal trial.” *Nardone*, 302 U.S. 380-381. The Act provided that “no person” who, as an employee, has to do with the sending or receiving of any interstate communication “shall divulge or publish its substance to anyone other than the addressee.” *Id.* Notwithstanding, federal agents tapped Nardone’s phone, and testified about what they overheard. *Id.* In reversing, the Supreme Court noted that, “(t)aken at face value the phrase ‘no person’ comprehends federal agents, and the ban on communication to ‘any person’ bars testimony to the content of an intercepted message.” *Id.*

On appeal the government argued that the statute be construed to exclude federal agents since “it (was) improbable (that) Congress intended to hamper and impede the government in the detection

and punishment of crime.” *Id.* at 383. The Supreme Court reasoned:

The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty.

Id. The Court continued:

The canon that the general words of a statute do not include the government or affect its rights unless the construction be clear and indisputable upon the text of the act does not aid the respondent. The cases in which it has been applied fall into two classes. The first is where an act, if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest. A classical instance is the exemption of the state from statutes of limitation. The rule of exclusion of the sovereign is less stringently applied where the operation of the law is upon the agents or servants of the government rather than on the sovereign itself. The second class -- that where public officers are impliedly excluded from language embracing all persons -- is where a reading which would include such officers would work obviously absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire truck responding to an alarm.

Id. at 383-384. The Court concluded that federal agents were covered by the term “anyone,” as used by the Act, and the illegally obtained evidence was suppressed.

Section 201(c)(2) does not operate to divest the United States of an established prerogative, title or interest. Thus the first exclusion defined under *Nardone* is inapplicable.

In America, neither the government nor its agents are above the law. Mr. Justice Brandies reminded all Americans of this principle when he wrote:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. **In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously.** Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . To 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. Against that pernicious doctrine this court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting) (footnote omitted)

(emphasis added).

Including the assistant United States attorney within the ambit of the statute does not work an absurdity. In fact to do otherwise is absurd, for it would permit attorneys, agents of the government, to bribe witnesses for testimony. And note, in *United States v. Gorman* an assistant United States attorney was convicted for taking an illegal gratuity under a parallel subsection. *United States v. Gorman*, 807 F.2d 1299, 1304-06 (6th Cir.) cert. denied 484 U.S. 815 (1987).

C. Anything of Value

What then is the meaning of “anything of value.” In statutory construction, courts “start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words.” *Richards v. United States*, 396 U.S. 1, 9 (1962). See *Russello v. United States* 464 U.S. 16, 21 (1983) (words should be interpreted according to their everyday meaning). Clearly “value” embodies anything of worth or utility, and not just tangible things. Monetary worth is not the sole measure of value. See *United States v. Williams*, 705 F.2d 603, 622-623 (2nd. Cir. 1983). “Value” included intangibles. *United States v. Nielsen*, 967 F.2d 539, 542-543 (11th Cir. 1992) cert. denied 479 U.S. 890 (1986) (construing 18 U.S.C. § 876).

The plain language of the phrase “anything of value” indicates a broad scope of coverage. Courts have construed the language to include intangibles. See *United States v. Nielsen*, 967 F.2d at 542-543. The purpose of the statute is to keep testimony free of influence and protect its truthfulness. In *United States v. Cervantes-Pacheo*, 827 F.2d 310, 315 (5th Cir. 1987) the court stated, “(i)t is difficult to imagine a greater motivation to lie than the inducement of a lesser sentence.” There is no basis in public policy, law or (perish the thought) common sense, which requires that the term “anything of value” be limited to money or other tangibles.

Section 201(c)(2) is the “gratuity” section. It does not require that an offer be made with the

intention of the offeror to influence the testimony. *See United States v. Irwin*, 354 F.2d 192, 197 (2nd Cir. 1965) (construing 18 U.S.C. § 201(h) the predecessor to 201(c)(2) which uses the exact language of the current statute.) (By way of contrast it is of note that the separate bribery provision under § 201(b)(3) specifically requires corrupt giving as an element of the crime.) This conclusion has additional support. In *Golden Door Jewelry v. Lloyds*, the trial court, contrasting the requirement of corrupt influence contained within §201(b)(3) with the language of §201(c)(2), found that:

The plain language of §201(c)(2) does not distinguish between truthful or untruthful testimony. Moreover, the legislative history of §201(c)(2) is silent on whether Congress intended to make such a distinction. *See* S. Rep. No. 2213, 87th Cong., 2nd Sess. (1962), reprinted in 1962 U.S. Code Cong. & Admin. News 3852.

Golden Door Jewelry v. Lloyds, 865 F.Supp. 1516, 1523 (S.D. Fla. 1994), *aff'd in part, rev'd in part and remanded*, 117 F.3d 1428 (11th Cir. 1997). The *Golden Door* court also stated that: “Section **201(c)(2)**, on the other hand, **does not require a corrupt mind**. It makes it a crime for anyone to: ‘(d)irectly or indirectly, gives offers or promises anything of value to a person, for or because of the testimony under oath or affirmation given by such person as a witness upon a trial, hearing or other proceeding, before any court . . .’” *Id.* at 1523, (emphasis added). Accordingly; anyone, even one without a corrupt motive, who offers anything of value in exchange for testimony commits a felony.

There are a limited number of cases which discuss §201(c)(2), and they are addressed in Appellants Brief. Cases dealing with § 201(h), the predecessor gratuity section, are also quite limited. The panel decision cited three, *United States v. Issacs* 347 F.Supp. 763 (N.D. Ill. 1972), *United States v. Barrett*, 505 F.2d 1091 (6th Cir. 1974), *cert denied* 421 U.S. 964 (1975) and *United States v. Blanton*, 700 F.2d 298 (6th Cir.), *reheard in part*, 719 F. 2d 815 (6th Cir.), *cert denied*, 465 U.S. 1099 (1984).

In *Blanton*, the defendant argued that testimony should have been suppressed because the

witness was given value for his testimony. The argument was rejected, and the court found that the “thing,” a liquor store license, was not offered by the government. 700 F.2d at 311. The court, incorrectly, held that the government does not “give” a thing when it simply preserves the status quo - the witness was allowed to keep his license. In truth, friendly persuasion by the government on one’s behalf is a valuable thing. Setting that aside, there is no precedent in *Blanton* upon which to conclude that the government’s conduct in Ms. Singleton’s case was not offering value in exchange for testimony.

Barrett too can be distinguished. In *Barrett* the primary witness against the defendant was offered the recommendation of a lenient sentence, transactional immunity and civil tax immunity in exchange for his testimony. The defendant moved to suppress under §201(h). The court denied the motion, but it allowed the plea bargain agreement to be given to the jury. *Barrett*, 505 F.2d at 1100-1102. The Seventh Circuit upheld the finding that the thrust of the defendant’s argument was that the government had no authority to grant civil tax immunity in exchange for testimony. In other words it had offered “unauthorized” things of value for testimony. *Id.* Section 201(h) did not prohibit the giving of unauthorized things in exchange for testimony, it prohibited the offering of **anything** of value in exchange for testimony. To read it in any other fashion perverts the plain meaning of the statutory language. Both 201(h) and 201(c)(2) define criminal conduct based upon whether or not a thing of value is given or offered in exchange for or because of testimony.

In *Issacs* the defendant argued that the government gave a witness value in exchange for testimony. The court overruled a motion to suppress, finding that the motion was based upon conjectural allegations from newspaper reports and that *Giglio v. United States* 405 U.S. 150 (1972), indicated suppression was an inappropriate remedy. 247 F.Supp. at 767. *Giglio* requires that considerable information, including promises made by the government, be provided to the defendant in a criminal case. The criminality of the offering of value for testimony is not inconsistent with *Giglio*’s

requirement that the terms of the offer be disclosed. The *Giglio* analysis is not applicable here.

Section 201(c)(2) has found limited attention from a civil law perspective. The Eleventh Circuit, in *dicta*, discussing the section, seems to be the only court to have made a distinction between truthful and untruthful testimony. *United States v. Moody*, 977 F.2d 1420, 1425 (11th Cir. 1992). Other courts have not seen the need to read the requirement of untruthfulness into the statute. In *Hamilton v General Motors Corp.*, 490 F.2d 223 (7th Cir. 1973), the court discussed generally the prohibition against contracting to pay fact witnesses anything above what is allowed by statute. The *Hamilton* court, citing prior cases and referencing both 18 U.S.C. 201(h), the predecessor to §201(c)(2), and the common law, wrote that contracts to pay fact witnesses more than what is allowed by statute are “against public policy,” and are “against the spirit of the constitution.” The court went on to note that the “tendency to evil consequences is apparent.” *Id.* at 227-29.

Despite its clear applicability, the government argues that there is, somehow, a law enforcement justification for flouting the statute. It posits that criminal prohibitions do not generally apply to reasonable enforcement action by an officer of the law. *Borgan v. United States* ___ U.S. ___, 118 S.Ct. 805, 811 (1998). The conduct of the assistant United States attorney does not fall into this exception because it was not undertaken by a law enforcement officer, or one acting in that capacity, and further because it was not required by exigent circumstances to make an arrest or prevent a crime.

Undercover officers may from time to time break the law as a means of investigation. *United States v. Russell*, 411 U.S. 423 (1973). Government officers may employ artifice and deception to undercover criminal activity. *United States v. Szycher*, 595 F.2d 443, 449 (10th Cir. 1978). When complained of, such conduct is evaluated against a “reasonable and necessary” law enforcement standard. *United States v. Mosley* 956 F.2d 906, 908-915 (10th Cir. 1992). No cases have been found in which prosecuting attorneys, acting as such after criminal proceedings have begun, have been

accorded the privilege of violating the law.

The law enforcement justification is for street cops engaged in uncovering crime. The assistant United States attorney was not in the field; rather, she was in the federal courts prosecuting crimes which had been discovered. The violation of 201(c)(2) was unrelated to detecting crime. Law enforcement action must not be expanded beyond its scope of detection, prevention and apprehension.

D. Section 201(c)(2) in the Context of Other Statutes

The government argues that various statutes authorized it to make a deal with Douglas , and that the panel's decision cannot be reconciled with the "regulatory scheme." As support the government principally cites Fed. R. Crim. P. 11, Fed. R. Crim. P. 35(b), Fed. R. Evid. 410, 18 U.S.C. § 3553(e), 18 U.S.C. § 994(n), 18 U.S.C. §§ 6001-6005, 18 U.S.C. § 3521(b)(1) and (d)(1)(A), 18 U.S.C. § 3071 *et seq.* However, with the possible exception of 18 U.S.C. § 3521 *et seq.*, none of these statutes or rules specifically authorize the government to offer anything of value in exchange for testimony. A review of the various statutes and rules demonstrates that it is § 3521 which is out of step with the regulatory scheme

Rewards: The authorization of the payment of rewards for information is covered at 18 U.S.C. § 3071 *et seq.* Section 3701 provides that, "(w)ith respect to acts of terrorism . . . the Attorney General may reward any individual who **furnishes information** -" 18 U.S.C. § 3071. (Emphasis added.) Testimony is not mentioned at any place in this act. It is only the furnishing of information that is required for a reward, and the government's reliance upon it is misplaced.

Sentencing: 18 U.S.C. § 3553(e) and Fed. R. Crim. P. 35(b) make up the canvas upon which the government paints its arguments that the sentencing statutes authorize offering lenient treatment in exchange for testimony. Section 3553(e) authorizes the court to impose a lesser sentence upon one who has provided "**substantial assistance** in the investigation or prosecution of another," and § 994(n)

instructs the Sentencing Commission to ensure that the guideline provide for the imposition of a lower sentence to “take into account a defendant’s **substantial assistance** in the investigation or prosecution of another.” (emphasis added.) Fed. R. Crim. P. 25(d) also speaks to the court’s ability to reduce a sentence to “reflect a defendant’s subsequent **substantial assistance** in the investigation or prosecution of another...” (emphasis added.) Testimony is not mentioned in either statute or in the rule. The panel’s correct reading the statutes and the rule “will not impair the substantial assistance provisions” because there are countless ways in which one may provide substantial assistance to the investigation or prosecution of a person. *See Op.* at page 35.

Substantial assistance can still be provided by an accused. The sentencing statutes and 201(c)(2) are not in conflict, and the sentencing statutes have not impliedly repealed 201(c)(2). *See United States v. Romani*, ___ U.S. ___, 118 S.Ct. 1478, 1486 (1998) (holding that repeal by implication are not favored, and will not be found by the courts in doubtful cases.)

Plea Bargaining: The government relies upon Fed. R. Crim. P. 11 and Fed. R. Evid. 410 as additional support for its argument that the regulatory scheme encourages the offer of leniency in exchange for testimony. Fed. R. Crim. P. 11(e) provides, in pertinent part, that the attorneys for the parties “may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government may . . .” move for dismissal of the charges, recommend or not oppose a particular sentence or agree that a specific sentence is appropriate. Rule 11 is silent with respect to testimony.

More specifically, Rule 11(e) recognizes the propriety of plea bargains. Rule 11(e), *Comment*, and the rule is more concerned with “general deterrence” and the rehabilitation of the individual, than with securing testimony.

Where the defendant by his plea aids in insuring prompt and certain application of

correctional measures, the proper ends of the criminal justice system are furthered because swift and certain punishment serves the ends of both general deterrence and the rehabilitation of the individual defendant.

Id (citations omitted). See *Brady v. United States*, 397 U.S. 742, 753-53 (1970), in which the Supreme Court recognized that it was not unconstitutional for the government to extend a benefit to an individual who had demonstrated by his plea of guilty that he was both ready and willing to admit his crime and enter into the “correction system” of such a disposition that there was a hope of success in a shorter period of rehabilitation. Testimony is not required by the plea bargaining statute as a component of rehabilitation. The government’s reliance on Rule 11 and Fed. R. Evid. 410 are misplaced.

Immunity: The federal immunity statutes are found at 18 U.S.C. § 6001-6005. Whenever a witness, on the basis of self-incrimination, refuses to testify, and “the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of the privilege.” 18 U.S.C. 6002. Should that person refuse, under the self-incrimination privilege, to testify to a court or grand jury the government may request an order requiring that the person give testimony. 18 U.S.C. 6003. Nothing in these section is inconsistent with the panel’s interpretation of 18 U.S.C. 201(c)(2).

Immunity may be, and has been, forced upon witnesses. See *United States v. Kates* 419 F.Supp. 846, 858 (E.D. Pa. 1976), finding witnesses have no choice whether to accept immunity, and *United States v. Fitzgerald*, 225 F.2d 453 (2nd. Cir. 1956), holding that the rejection of immunity does not relieve the witness of the compulsion to testify. Immunity is a device used to coerce testimony. Immunity need not be part of a bargained for exchange. That prosecutors have fallen into the habit of offering immunity in exchange for testimony does nothing to alter the statutory language and the case law. If granted immunity, one may not refuse to testify. The immunity statutes do not conflict with 201(c)(2).

Protection of Witnesses: The federal laws regarding the protection of witnesses are found at 18 U.S.C. § 3521 *et seq.* Section 3521(b)(1) appears to allow the government to extend protection to protect a witness and to insure the witnesses safety. The witness protection statute appears to be the only statute which specifically addresses testimony given in exchange for a benefit. Based upon the language of the statutes and rules discussed, and the decisions interpreting them, it is evident that the witness protection statutes are outside the “regulatory scheme.” Indeed § 3521, by appearing to require testimony in exchange for a benefit conflicts on its face with the authorities relied upon by the government to support its argument in opposition to the panel’s decision. Because § 3521 is not before this court, its deviation from the “regulatory scheme” established by Congress need not be addressed.

E. Suppression is the Appropriate and Only Remedy

There are those who say . . . that under our constitutional exclusionary doctrine ‘(t)he criminal is to go free because the constable blundered.’ In some cases this will undoubtedly be the result. But . . . ‘there is another consideration - - the imperative of judicial integrity.’ The criminal goes free if he must, but it is the law that sets him free.

Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence.

Mapp v. Ohio, 367 U.S. at 659. (Citations omitted.) (emphasis added.) Suppression of testimony is a rule fashioned by the courts for the purpose of ending official misconduct. *United State v. Peltier*, 442 U.S. 531, 542 (1975). Exclusion of the Douglas testimony will accomplish that end.

Violations of 201(c)(2) occur almost daily. The practice of assistant United States attorneys offering things of value - lenient treatment - in exchange for testimony is omnipresent. *See Cervantes-Pacheo* 826 F.2d at 315. Exclusion is appropriate, and necessary, to stop these widespread and repeated violations. *United States v. Roberts* 779 F.2d 565, 568 (9th Cir. 1986). Exclusion serves as an incentive to compel respect for the laws established by Congress. The benefits of deterrence far outweigh any evil of excluding some relevant evidence. Exclusion benefits the courts by preserving the imperative of

judicial integrity. *United States v. Elkins* 364 U.S. 206, 222 (1960).

Courts must not be made party to lawlessness by permitting the unfettered use of the fruits of illegality. *Terry v. Ohio*, 392 U.S. 1, 12-13 (1968). In 1928 Justice Brandeis recognized this danger of a loss of faith in judicial integrity loss of respect for the government and foreshadowed it in 1928, when he wrote:

The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination . . .

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously.

Olmstead v. United States, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting) (footnote omitted). If the government breaks the law to secure a conviction, as it does when it violates § 201(c)(2), it is the duty of the courts to say, "No." Exclusion may allow a criminal to "go unwhipped," but the practice it is in keeping with Congress's wish to insure that high ethical standards are preserved and that officers and prosecutors not resort to methods which are inconsistent with, and destructive of, personal liberty. *Nardone* 302 U.S. at 383.

In Ms. Singleton's case, the violation of §201(c)(2) directly tainted the evidence. The government cannot be allowed to profit from its lawlessness. The testimony of Douglas, offered in violation of the statute, must be suppressed.

II. Retroactive and/or Prospective Consequences of a Decision Overturning the District Court

The case law on retroactive application of new criminal law decisions has evolved over the years. In *Linkletter v. Walker*, 381 U.S. 618 (1965) the Court denied retroactive application of *Mapp v. Ohio*,

367 U.S. 643 (1961) (extending Fourth Amendment exclusionary rule to the states) holding that “the Constitution neither prohibits nor requires retrospective effect” of a new constitutional rule. Rather, retroactivity depends on “weigh[ing] the merits and demerits in each case.” 381 U.S. at 629. The criteria for retroactivity was said to include: “(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.” See *Stovall v. Denno*, 388 U.S. 293, 297 (1967)²

² The *Linkletter-Stovall* criteria were applied to rulings both of a constitutional and a non-constitutional nature. See *Halliday v. U.S.*, 394 U.S. 831 (1969); *Harris v. Day*, 649 F.2d 755 (10th Cir. 1981) (“the criteria which are set forth in *Stovall* ... for determining whether new legal precedents should be applied retroactively apply to non-constitutional decisions concerning statutory interpretation, as well as to constitutional questions.” 649 F.2d at 757).

The Linkletter-Stovall criteria were extensively criticized, particularly as to the need to distinguish between applying a new decision on direct review and collateral review. In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Court “shifted course” and held that “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final.” 479 U.S. at 328. In *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), the Court held that such new rules are not to be applied retroactively to cases which become final before the new rule is announced unless the new rule places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe” or if it implicates “watershed rules of criminal procedure”.³ 489 U.S. at 311.

Thus after *Teague*, new rules of criminal procedure apply to all cases not yet final (those pending at trial or on direct review). However, such rules do not apply to cases which have become final (those

³ The first exception is concerned with decisions which define the elements of a crime, determining that certain conduct is not “covered”. See e.g. *Bousley v. United States*, *infra*. The second exception is concerned with decisions which “alter our understanding of the bedrock procedural elements” essential to the fairness of the proceeding, such as the right to counsel. *Teague*, 489 U.S. at 311. See also *Sawyer v. Smith*, 497 U.S. 227, 241-42 (1990) (“It is thus not enough ... to say that a new rule is aimed at improving the accuracy of trial. More is required.”); *Graham v. Collins*, 506 U.S. ___, 113 S.Ct. 892 (1993) (“we believe it unlikely that many such components of basic due process have yet to emerge”).

raising the issue on collateral attack) unless the ruling decriminalizes a class of conduct or announces a watershed rule of fairness and accuracy.⁴

In addition, a threshold issue which must be determined when considering retroactivity is whether *Teague* applies at all. This is because *Teague*, by its terms, applies only to “new” rules of criminal “procedure”.

Thus, if the new case for which retroactive effect is sought announces a substantive, as opposed to procedural rule, *Teague* does not apply and the case will be applied even on collateral attack. The assumption appears to be that such cases are retroactive for all purposes. See *Bousley v. United States*, ____ U.S. ____, 118 S.Ct. 1604 (1998). In *Bousley*, the defendant pled guilty to “using” a firearm in violation of 18 U.S.C. §924(c)(1). Subsequently, the Court in *Bailey v. United States*, 516 U.S. 137, held that “use” of a firearm for purposes of the statute requires “active employment of the firearm”. Bousley then filed a habeas action contending that his guilty plea was not valid because he did not receive real notice of the nature of the charge against him. The Court held:

“[W]e do not believe that *Teague* governs this case. The only constitutional claim made here is that petitioner’s guilty plea was not knowing and intelligent. There is surely nothing new about this principle, enumerated as long ago as *Smith v. O’Grady* And because *Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.

⁴ *Teague* has been applied to both constitutional and non-constitutional decisions concerning statutory construction. See *Sanabria v. U.S.* 916 F.Supp. 106 (D. Puerto Rico 1996) cited with approval in *U.S. v. Barnhardt*, 93 F.3rd 706, 709 fn. 6 (10th Cir. 1996).

This distinction between substance and procedure is an important one in the habeas context. ... [D]ecisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct ‘beyond the power of the criminal law-making authority to proscribe,’ [citations omitted] necessarily carry a significant risk that a defendant stands convicted of “an act that the law does not make criminal.” [citations omitted]⁵

118 S.Ct. at 1610.

Thus, in cases where the Court decides that “a substantive federal criminal statute does not reach certain conduct,” the question of whether *Teague* applies at all, or whether its first exception applies, appears to be blurred. However, the result - that the case applies retroactively - is the same.

⁵ See also e.g. *U.S. v. Dashney*, 52 F.3rd 298 (10th Cir. 1995) (retroactive application of *Ratzlaff v. United States*, 510 U.S. 135, defining substantive elements of crime of structuring cash transactions in order to evade currency reporting requirements); *U.S. v. Barnhardt*, 93 F.3rd 706 (10th Cir. 1996) (*Bailey* decision applies retroactively); *U.S. v. Holland*, 116 F.3rd 1353 (10th Cir. 1997) (same).

A related threshold issue for application of *Teague* is whether the rule sought to be applied is actually “new”. Again the assumption appears to be that if the rule is not “new”, it applies to all cases and is fully retroactive.⁶ *Saffle v. Parks*, 494 U.S. 484 (1990) addresses this issue:

In *Teague*, we defined a new rule as a rule that “breaks new ground,” “imposes a new obligation on the States or the Federal Government,” or was not “dictated by precedent existing at the time the defendant’s conviction became final.” *Teague, supra*, 489 U.S., at 301, (emphasis in original). The explicit overruling of an earlier holding no doubt creates a new rule; it is more difficult, however, to determine whether we announce a new rule when a decision extends the reasoning of our prior cases. ... [T]he question must be answered by reference to the underlying purposes of the habeas writ. ... Under this functional view of what constitutes a new rule, our task is to determine whether a ... court considering [petitioner’s] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.

494 U.S. at 488.

See also *Sawyer v. Smith*, 497 U.S. 227, 234, (1990) (rule is “new” if the decision is a “development in the law over which reasonable jurists [could] disagree”); *Lambrix v. Singletary*, 520 U.S. ____, 117 S.Ct. ____, 137 L.Ed.2d 771 (1997); *Earnest v. Dorsey*, 87 F.3rd 1123, 1133 (10th Cir. 1996); *U.S. v. Emmons*, 107 F.3rd 762 (10th Cir. 1997).

⁶ “One general rule that has emerged under *Teague* is that application of existing precedent in a new factual setting will not amount to announcing a new rule. See *Wright v. West*, 505 U.S. ____, 112 S.Ct. 2482 (1992) (O’Conner, J. concurring).” *Graham v. Collins*, 506 U.S. ____, 113 S.Ct. 892 (1993) (Souter, J. dissenting).

In the present case, the panel decision rested on its reading of the “plain meaning” of 18 U.S.C. §201(c)(2). That reading was that the statute applies equally to the United States Attorney as to any other party. Since 18 U.S.C. §201(c)(2) is a substantive statute defining a crime, the panel decision arguably does nothing more than declare “what the law meant from the date of its enactment”⁷ (i.e. a substantive rather than procedural rule) thus making Teague inapplicable. This might be true if the issue for retroactivity purposes was the substantive application of the statute. However, appellant is unaware of any case seeking to charge a United States attorney with violation of 18 U.S.C. §201(c)(2).

What is of importance in the panel decision for retroactivity purposes is the exclusionary rule announced in the decision as a remedy for the government’s violation of 18 U.S.C. §201(c)(2). So viewed, appellant believes the panel decision announced a “new” rule of criminal “procedure” to which *Teague* applies. The exclusionary rule aspect of the decision appears procedural rather than substantive. It clearly “breaks new ground” and “imposes a new obligation on the government”. Arguably it was not dictated by prior existing precedent, since there was no precedent, or was a development “over which reasonable jurists could disagree.”

As required by *Teague*, the exclusionary rule announced by the panel decision should be applied to all cases which had not become final as of the date of the decision (or of the en banc decision if the Court as a whole agrees with the panel). The rule should not be applied to cases on collateral attack unless a *Teague* exception applies. It does not appear that either of the exceptions is implicated.

CONCLUSION

Payment of value can take many forms, and the value need not money. *United States v. Nielsen*, 967 F.2d at 542-543. For more than ninety-five years the courts of this country have recognized that

⁷ *U.S. v. Dashney*, 52 F.3rd 298, 299 (10th Cir. 1995).

payment for testimony is simply wrong. “The payment of a sum of money to a witness to ‘tell the truth’ is as clearly subversive to the proper administration of justice as to pay him to testify to what is not true.” *In re. Robinson*, 151 A.D. 589, 600, 136 N.Y.S. 548 (1st Dept. 1912) *aff’d* 209 N.Y. 254, 103 N.W. 160 (1913). *See also State of N.Y. v. Solvent Chemical Co., Inc.*, 166 F.R.D. 284,289 (W.D.N.Y. 1996). To protect the integrity of the judicial system, the practice must be stopped, and the decision of the trial court must be reversed.

Respectfully submitted,

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