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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,)	
)	
Plaintiff)	Criminal Action
)	
v.)	No. 96-10054-01, 02, 03, 04
)	05, 06 - FGT
RONALD O. MCCLELLAND,)	
a/k/a/ RONNELL GRIGSBY,)	
a/k/a RAYMOND CARTER,))	
a/k/a RONNELL WATSON,)	<u>Count 1</u>
a/k/a BoPETE,)	21 U.S.C. 846
NAPOLEON RANSOM DOUGLAS,)	18 U.S.C. 2
JONATHAN WENDELL SEARCY,))	
ERIC JOHNSON,)	
SONYA EVETTE SINGLETON, and))	<u>Counts 2 through 32</u>
STEPHANIE COATS,)	18 U.S.C. 1956 & 2
)	
Defendants.)	
_____)	

**MEMORANDUM IN SUPPORT OF DEFENDANT
SONYA EVETTE SINGLETON'S MOTION TO SUPPRESS TESTIMONY**

COMES NOW the defendant, Sonya Evette Singleton, by and through her attorney of record, John V. Wachtel of Klenda, Mitchell, Austerman & Zuercher, L.L.C., and hereby submits this memorandum in support of her motion to suppress the testimony of certain witnesses sponsored by the government..

ISSUE BEFORE THE COURT

This defendant has reason to believe that the United States intends to offer, during the trial against her, the testimony of witnesses, including among which is Napoleon Ransom Douglas, who have either received or have been promised something of value in exchange for their testimony. This prospective testimony is solicited, and is expected to be offered by, the United States in violation of 18 U.S.C. 201(c)(2) and Rule 3.4(b) of the Model Rules of Professional Responsibility, as adopted

by the State of Kansas effective March 1, 1988. It is in the best interest of justice to suppress testimony so acquired, and the failure to do so deprives this defendant of both fundamental fairness and due process of law. The defendant seeks an order of court prohibiting the government from offering the testimony of any such “paid” witnesses.

FACTUAL BACKGROUND

1. In Count 1 of a multiple count superseding indictment, the defendant, Ms. Singleton, along with five others, is accused of one count of conspiracy to traffic in cocaine base (i.e. powder cocaine), a Schedule II controlled substance, in violation of 21 U.S.C. 846 and 18 U.S.C. 2.

2. In Counts 19 and 21 through 27 of the superseding indictment, Ms. Singleton is charged, either as principals or as accessories, with conducting financial transactions designed in whole or in part to conceal and disguise the nature, location, source, ownership or control of the proceeds of unlawful activity, (i.e. money laundering), in violation of 18 U.S.C. 1956 & 2. These six counts all involve wire transfers of money, in varying amounts, from Wichita, Kansas by either Ms. Singleton or Mr. Johnson, or both of them, to other parties located outside Wichita, Kansas.

3. Ms. Singleton plead not guilty to all counts, and this matter is scheduled for jury trial.

4. On order of this court, and upon motions of the defendants to sever all trials. Ms. Singleton will be tried separately from the other named defendants.

5. At the hearing upon motions to sever, the United States indicated that it would present the testimony of an unidentified informant at the trial of Ms. Singleton.

6. The government has only in the last thirty-six (36) hours identified some of the witnesses which it will present at the trial of Ms. Singleton. Among the witnesses is Napoleon Ransom Douglas, who was charged in the original indictment and who has plead guilty.

7. Based upon the practice of the United States in prior drug trials, and based upon representations made by the government to counsel for this defendant, Ms. Singleton reasonably believes the United States will offer witnesses at her trial who have plead guiltily to the charges brought in this or other cases, and who, in exchange for a something of value not authorized by statute offered, promised, or delivered by the government, have agreed to testify on behalf of the government at the trial of Ms. Singleton.

ARGUMENT AND AUTHORITIES

The American judicial system has long recognized that there is an inherent danger of untruthfulness inherent in the paid “occurrence” witness. This danger exists in both civil and criminal cases. In criminal cases payment can take many forms, and range from outright cash payments to promises of leniency in the government’s treatment of the “paid” witness. In considering the dangers of using “paid” witnesses in criminal cases, the Fourth Circuit Court of Appeals has written: “Obviously 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).

Section 201 of Title 18 of the United States Code addresses providing something of value to a witness in exchange for his or her testimony. The section 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). It is important to note that §201(c)(2) does not require that the offer be made with an intention on the part of the offeror to influence the testimony of the witness.

This conclusion is supported by the implication implicit in §201(d) which provides:

(d) Paragraphs (3) and (4) of subsection (b) and **paragraphs (2) and (3) of subsection (c)** and (3) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or , in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

18 U.S.C. 201(d) (emphasis added). 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). That court further stated that: “Section 201(c)(2), on the other hand, does not require a corrupt mind. It makes it a crime for anyone who: ‘Directly 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. Accordingly; anyone, even one without a corrupt motive, who offers anything of value other than those considerations described in §201(d) to a potential witness in exchange for his testimony has committed a felony. This feloniously induced testimony must surely be suspect.

Despite this provision of the United States Code which clearly prohibits and criminalizes providing anything of value to a witness in exchange for his testimony, the United States, through the

Department of Justice and the various United States Attorney's Offices, has a well established and currently operated policy of providing witnesses with valuable consideration in exchange for their testimony in criminal cases. It is not at all unusual for the United States to promise leniency at sentencing, or to agree to accept a plea of guilty to a lesser charge, or to agree to file for a sentencing departure under §5K1 of the Sentencing Guidelines, if the offeree agrees to cooperate and testify at the trial of others who stand accused of crimes. In fact, the Department of Justice has on several occasions paid substantial sums of money to witnesses who testify. See J. Richard Johnston, *Paying the Witness*, Criminal Justice, Pages 21-22, Volume 11, Number 4, Winter 1977. So common is the United States' practice of offering value to witnesses for their testimony that the defendant, Ms. Singleton, reasonably believes such promises have been made to Napoleon Ransom Douglas and others as yet unidentified witnesses in the present case. In fact, similar offers of more favorable treatment have been made to Ms. Singleton, and it has been indicated to Ms. Singleton that others are cooperating and will testify against her.

Counsel for the defendant Ms. Singleton suggests that prosecution is appropriate for those who violate §201(c)(2). However; counsel realizes such prosecution is unlikely when the courts have, over the years, been liberal in allowing the testimony of witnesses who have been "paid." For example, in *United States v. Dailey*, 759 F.2d 192 (1st Cir. 1985) the court allowed the testimony of an accomplice of the accused who had entered into a plea agreement with the government which was contingent upon his cooperation as a witness. In *United States v. Grimes*, 438 F.2d 391 (6th Cir. 1971) the testimony of a government informer who had participated in the offence was admitted despite the fact that the informer was to be paid a fee for his testimony which was contingent upon a conviction. The accused in these cases challenged the admission of such testimony without success; however, none of these challenges arose out of §201(c)(2).

Counsel for Ms. Singleton has been unable to find any cases in which representatives of the Department of Justice, Assistant United States Attorneys, or attorneys engaged in private practice have been prosecuted for violations of §201(c)(2). Generally the prosecutions have been against witnesses who solicit bribes for their testimony in violation of §201(c)(3). Additionally, counsel can find no criminal cases in which the admissibility of the testimony of a witness was challenged under §201(c)(2) grounds.

However, violations of the law may not simply be ignored or swept under the carpet. The appropriate response to the government's willful violation of §201(c)(2) is the suppression of the testimony of all potential witnesses who have either been offered or who have received value for their expected testimony. Promises of leniency and ultimate reductions in sentences are surely things "of value."

Suppression of testimony is not without precedent in the civil law. There are civil cases in which sanctions have been imposed for violations of §201(c)(2) and corresponding violations of the various states' codes of ethical conduct.

The defendant has found few cases which discuss §201(c)(2) with respect to purchased "truthful" testimony. In *Golden Door Jewelry* the court wrote that the plain language of §201(c)(2) did not require either a corrupt mind or untruthful testimony. The *Golden Door Jewelry* court recognized that, in *dicta*, Eleventh Circuit had made a distinction between truthful and untruthful testimony and had further indicated, in *dicta*, that the section contemplated only false testimony. *Golden Door Jewelry*, 865 F.Supp. at 1253 -54, citing *United States v. Moody*, 977 F.2d 1420, 1425 (11th Cir. 1992). Additionally, *Hamilton v General Motors Corp.*, 490 F.2d 223 (7th Cir. 1973) discusses generally the prohibition on contracting to pay fact witnesses anything above what is allowed by statute. The *Hamilton* court, citing prior cases and referencing both the predecessor to

§201(c)(2) - 18 U.S.C. 201(i)- and the common law, wrote that contracts to pay fact witnesses more than what is allowed by statute are “against public policy,” and “against the spirit of the constitution,” and that the “tendency to evil consequences is apparent.” *Id.* at 227-29.

If purchased testimony is looked at askance by the civil courts, what measures then have been taken to protect against it. In *Golden Door Jewelry*, the court, while unable to determine that the purchased testimony was untruthful, resolved the issue by looking at the ethical standards placed upon attorneys. The court concluded that the payments to the witness for his fact testimony are clearly prohibited by Rule 4-3.4(b) of the Rules of Professional Conduct, and that this was the case without considering whether or not the testimony was either true or false. The court imposed the sanction of excluding all testimony which had been purchased. *Golden Door Jewelry*, 856 F. Supp. at 1524-27.

Both Kansas and American Bar Association have ethical rules which proscribe payments to witnesses when those payments are prohibited by law. The Model Rules of Professional Conduct, adopted by the State of Kansas on or about March 1, 1988, provide as follows: “A lawyer shall not: (b) falsify evidence, counsel or assist a witness to testify falsely, **or offer an inducement to a witness that is prohibited by law.**” MRPC Rule 3.4(b) (emphasis added). The Comment to MRPC 3.4(b) states:

With regard to paragraph (b), it is not improper to pay a witnesses’ expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying . . .

It has been further stated that the rule:

(The Rule) bars lawyers from offering inducements to a witness that are “prohibited by law,” which undoubtedly goes beyond bribery. Similar statutory and common law prohibitions exist in one form or another in every jurisdiction. It is well established, for example, that witnesses may not be paid a fee for telling the truth, for that is their duty in any event.

Hazard and Hodes, *The Law of Lawyering: A Handbook of the Model Rules of Professional Conduct* 2d, at 632. (Note also that §201(d) sets out those things of value which **may** be provided to a witness.)

It is clearly within the power of this court to impose sanctions against the United States for violations of the Kansas disciplinary rules as set out in Rule 3.4(b) of the MRPC. The appropriate sanction to be applied in the present case is to prohibit the United States from offering the testimony of any witnesses to whom it has promised or delivered, anything of value.

As stated at the commencement of this memorandum, promises of leniency are a strong inducement to testify falsely. *United States v. Meinster*, 619 F.2d at 1045. The use of purchased testimony is not only dangerous, it is unethical. While willing to admit the testimony of “paid” witnesses, the federal courts have also recognized that the practice of the government of paying witnesses and offering reduced sentences in exchange for testimony breaches established ethical standards and “patently permits perversion of the trial process.” *U.S. v Cervantes-Pacheco*, 826 F.2d 310, 315-15 (concurring opinion) (5th Cir. 1987.)

The Model Rules of Professional Conduct, as adopted by Kansas prohibit paying witnesses anything which is not allowed by law. Payment for non-expert testimony is not allowed by §201(c)(2). The sanction of suppressing the testimony of the “paid” witness is within the power of the court and should be applied. The testimony of the “paid” witnesses should not be submitted to the jury.

CONCLUSION

Over the passage of time the courts have become more and more willing to allow the admission of the paid testimony of occurrence witnesses. An interesting discussion of this process can be found in *United States v. Cervantes - Pacheco*, 826 F.2d 310 (5th Cir. 1987). It appears that

the courts, with the encouragement of the Department of Justice, have all too willingly accepted the testimony of paid occurrence witnesses as a method of fighting the war on drugs. The ends - convicting drug lords - have come to justify the means - the use of the paid testimony of criminals. This has resulted in a coarsening of the trial process which has come to match the coarsening which has gone on in the rest of society.

By presenting these “paid” witnesses the United States provides them with a mantle of credibility, reliability, and, almost, respectability. It is then assumed, almost prayerfully, by the courts that, through the process of vigorous cross examination, the reliability and veracity of the paid witness can be challenged and the jury will be able to divine the truth. This is whistling past the cemetery.

When the United States government offers the paid testimony of a admitted and convicted felon, it enters into a compact with evil. The result is the ultimate erosion of respect for government which all people must have in order to maintain a free society. The courts should not allow the law to be used to aid the government in this process.

Justice Brandeis recognized such a danger 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. 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 la 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, 48 S.Ct. 564, 574-75, 73 L.Ed. 944 (1928) (Brandeis, J., dissenting) (footnote omitted).

When the United States breaks the law in an attempt to secure a conviction, as it has in the present case by its violation of §201(c)(2), it is the province of this court to say, “No, this cannot be.” This court has the ability, and the duty, to protect the government from itself. As Justice Brandeis recognized, in a free democratic society, the end may never justify the means.

When the United States allies itself with criminals, is it then any wonder that the people no longer have respect for the government or the law? By granting the defendant Ms. Singleton’s motion for sanctions, this court strikes a blow which promotes confidence in the administration of justice. It is in that clear and fervent hope that this defendant prays that the court will rule favorably on her motion.

Respectfully submitted,

KLEND A, MITCHELL, AUSTERMAN
& ZUERCHER, L.L.C.

By:_____

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the ___ day of January, 1997, a true and correct copy of the above and foregoing Memorandum In Support of Defendant Sonya Evette Singleton's Motion to Suppress was served upon the United States, by depositing a copy of the same in the United States Post Office, postage pre-paid, and addressed to:

Debra L. Barnett, Assistant U.S. Attorney
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