

# Accomplice Testimony Under Contingent Plea Agreements

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# NOTES

## ACCOMPLICE TESTIMONY UNDER CONTINGENT PLEA AGREEMENTS

In a criminal case the prosecutor will often make a plea agreement with an accomplice of the defendant. Under these traditionally sanctioned agreements the accomplice receives a reduced sentence in return for full and truthful testimony during the defendant's trial. In recent years, some prosecutors have further conditioned the accomplice's reduction in sentence upon the defendant's indictment or conviction or the prosecutor's satisfaction with the accomplice's testimony.

This Note addresses whether testimony made pursuant to such contingent plea agreements is so unreliable that courts should exclude the testimony from evidence. This Note begins with a historical background of accomplice plea agreements and discusses the due process doctrine used to analyze the constitutionality of such agreements. It then examines recent developments involving contingent accomplice plea agreements. Finally, it concludes that courts should prohibit contingent accomplice plea agreements based upon defendants' due process rights and courts' supervisory powers to reject unreliable evidence.

### I

#### BACKGROUND

##### A. The History of Accomplice Plea Agreements

The long history of prosecutorial leniency in return for accomplice testimony has led to its widespread acceptance. Although courts recognize that accomplice plea agreements may encourage perjury, they deem that the value of the information obtained through such agreements outweighs the danger of unreliability.

###### 1. *At Common Law*

Common law courts have sanctioned the practice of plea bargaining for centuries. At early common law, English courts considered accomplices competent accusers in felony cases and either pardoned the accomplice upon the defendant's conviction or executed the accomplice upon the defendant's acquittal.<sup>1</sup> This practice

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<sup>1</sup> 2 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN \*235.

fell into disuse because the likelihood of perjury by the accomplice was thought to outweigh the probative value of his testimony.<sup>2</sup> To encourage accomplice testimony, however, the practice of granting pardons for "turning king's evidence" later evolved.<sup>3</sup> The American criminal justice system expanded the English tradition by allowing bargains for leniency as well as for immunity from prosecution.<sup>4</sup>

## 2. *In Current American Jurisprudence*

Currently, about ninety percent of all criminal defendants plead guilty,<sup>5</sup> and an unknown but substantial percentage of these defendants agree to testify against their co-defendants or co-conspirators in return for prosecutorial leniency.<sup>6</sup> If the accomplice does not testify fully and truthfully, the prosecutor may refuse the leniency promised in the bargain. Courts sanction these "traditional" accomplice plea agreements<sup>7</sup> and recognize them as a proper exercise of prosecutorial authority.<sup>8</sup>

<sup>2</sup> *Id.* at \*226.

<sup>3</sup> *Id.* at \*304; *see, e.g.*, *Rex v. Brunton*, 168 Eng. Rep. 894 (K.B. 1821) (sheep stealer turns king's evidence on burglary indictment); *The King v. Rudd*, 168 Eng. Rep. 160 (K.B. 1775) (bond forger testifies for crown).

<sup>4</sup> *E.g.*, *State v. Riney*, 137 Mo. 102, 104-05, 38 S.W. 718, 718-19 (1897) (accomplice's belief that his testimony would result in lighter sentence did not make him incompetent witness); *State v. Geddes*, 22 Mont. 68, 89, 55 P. 919, 926 (1899) (accomplice witness "is not rendered incompetent by reason of any immunity offered").

<sup>5</sup> J. BOND, PLEA BARGAINING AND GUILTY PLEAS § 1.02, at 2 (1975); H. MILLER, W. McDONALD & J. CRAMER, PLEA BARGAINING IN THE UNITED STATES 19 (1978); *see also* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1985, at 479 (T. Flanagan & E. McGarrell eds. 1986) (table 5.20) (69.8% of criminal defendants brought before United States district courts in year ending June 30, 1984, pleaded guilty).

<sup>6</sup> J. BOND, *supra* note 5, § 1.08; 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 829 (S. Kadish ed. 1983); *see, e.g.*, *Commonwealth v. Todd*, 186 Pa. Super. 272, 142 A.2d 174 (1958) (defendant testified as prosecution witness in other cases with expectation of recommendation of concurrent sentences).

<sup>7</sup> *See, e.g.*, *United States v. Boley*, 730 F.2d 1326, 1333-34 (10th Cir. 1984); *United States v. Tiche*, 424 F. Supp. 996, 1000-01 (W.D. Pa.), *aff'd*, 564 F.2d 90 (3d Cir. 1977).

<sup>8</sup> *See, e.g.*, *United States v. Librach*, 536 F.2d 1228 (8th Cir.), *cert. denied*, 429 U.S. 939 (1976); *see also* A.B.A., STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE PROSECUTION FUNCTION § 3.9(b)(vi) (1974) (prosecutor may decline to prosecute accused based on accused's cooperation in apprehension and conviction of others).

The Constitution places some limits upon a prosecutor's discretion regarding plea agreements. *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978). Generally, prosecutors must uphold the proper standards of fairness and justice. *Santobello v. New York*, 404 U.S. 257, 262-63 (1971). In the context of plea agreements, this standard requires that prosecutors disclose all agreements to the defendant, *Giglio v. United States*, 405 U.S. 150, 153-55 (1972), and uphold the terms of the agreement if the accomplice testifies truthfully under the agreement. *Santobello*, 404 U.S. at 261. Prosecutors must use fair procedures rather than merely advocate conviction. *Berger v. United States*, 295 U.S. 78, 88 (1935).

Accomplice plea agreements tend to produce unreliable testimony because they create an incentive for the accomplice to shift blame to the defendant or other co-conspirators. Further, an accomplice may wish to please the prosecutor to ensure lenient prosecution in his own case. Nevertheless, courts have held that the testimony of accomplices who receive lenient treatment is not per se unreliable.<sup>9</sup> Federal courts have allowed convictions based on uncorroborated testimony of accomplices to stand where the testimony is not "incredible or unsubstantial on its face."<sup>10</sup> Convictions have been sustained even when the accomplice is an admitted perjurer.<sup>11</sup>

Courts may deem accomplice testimony incompetent if the plea agreement departs from the traditional agreement to testify truthfully.<sup>12</sup> A number of state courts have censured bargains conditioned upon a witness's agreement to testify in a particular manner and have overturned the resulting convictions on both due process and policy grounds.<sup>13</sup> Courts prohibit these agreements because they provide a virtually irresistible temptation for the witness to say whatever will satisfy the prosecution.

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<sup>9</sup> *Caminetti v. United States*, 242 U.S. 470, 495 (1917); *Benson v. United States*, 146 U.S. 325, 334 (1892); *United States v. Peters*, 791 F.2d 1270, 1300 (7th Cir.), *cert. denied*, 107 S. Ct. 168 (1986); *United States v. Evans*, 697 F.2d 240, 245 (8th Cir.), *cert. denied*, 460 U.S. 1086 (1983); *United States v. Anderson*, 654 F.2d 1264, 1268 (8th Cir.), *cert. denied*, 454 U.S. 1127 (1981), 1156 (1982); *see also Darden v. United States*, 405 F.2d 1054, 1056 (9th Cir. 1969) (plea bargaining between prosecutor and co-defendant does not amount to coerced testimony against defendant); *Minkin v. United States*, 383 F.2d 427, 428 (9th Cir. 1967) (same).

<sup>10</sup> *See, e.g., Haakinson v. United States*, 238 F.2d 775, 779 (8th Cir. 1956) and cases cited therein.

<sup>11</sup> *See Rosen v. United States*, 245 U.S. 467, 471 (1918); *United States v. Miceli*, 446 F.2d 256, 258-59 (1st Cir. 1971); *United States v. Margolis*, 138 F.2d 1002, 1004 (3d Cir. 1943); *United States v. Kubacki*, 237 F. Supp. 638, 643-44 (E.D. Pa. 1965); *United States v. Segelman*, 83 F. Supp. 890, 892-93 (W.D. Pa. 1949).

<sup>12</sup> *See infra* note 13; *see also Note, Accomplice Testimony Under Conditional Promise of Immunity*, 52 COLUM. L. REV. 138, 140 (1952).

<sup>13</sup> *People v. Medina*, 41 Cal. App. 3d 438, 455, 116 Cal. Rptr. 133, 145 (1974) ("[A] defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion."); *People v. Green*, 102 Cal. App. 2d 831, 839, 228 P.2d 867, 871 (1951) ("miscarriage of justice" caused by state's use of testimony which was tainted beyond redemption because of condition upon which immunity depended); *State v. Miller*, 100 Mo. 606, 626, 13 S.W. 832, 838 (1890) ("I do not believe that such a bargain as this to *testify against the life of another* should receive any countenance or sanction in a court of justice . . .") (emphasis added); *Franklin v. State*, 94 Nev. 220, 223-24, 577 P.2d 860, 862 (1978) ("[I]f the circumstances of the plea bargain would reasonably cause the alleged accomplice to believe he must testify in a particular fashion, then a less explicit arrangement also violates the defendant's due process rights."); *Harris v. State*, 15 Tex. Crim. 629, 634 (1883) ("A witness thus situated by the terms of the contract and the pendency of the indictment would, we believe, swear any and all things. . . . [W]e . . . will not sustain a conviction obtained in such manner.").

Until recently, at least two federal courts concurred in this analysis and implied that testimony made pursuant to contingent agreements should be excluded from evidence.<sup>14</sup> Other federal and state courts, however, admit the testimony of accomplices who are sentenced after testifying under traditional agreements.<sup>15</sup> Although a delayed sentence is not explicitly contingent upon the testimony's content, similar reasoning applies to both delayed sentences and contingent agreements. In both cases, the accomplice's perception of what the government wants to hear will affect his testimony. In this respect, the courts have treated delayed sentencing and contingent agreements inconsistently.

## B. The Standards of Procedural Due Process

The fifth and fourteenth amendments to the United States Constitution require fair procedures in state and federal courts. Although the Supreme Court has used various factors to determine the exact requirements of procedural due process, the concept of fundamental fairness is a constant theme. The Court has upheld accomplice plea bargains as constitutional; however, the exact limitations upon prosecutorial discretion with respect to these agreements remains unclear.

### 1. *The Doctrine*

Due process guarantees defendants a right to fair procedure and has traditionally operated to exclude involuntary confessions<sup>16</sup> and unreliable witness testimony.<sup>17</sup> Such exclusions are particularly

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<sup>14</sup> See *United States v. Winter*, 663 F.2d 1120, 1133 (1st Cir. 1981) (possibly improper to invite witness to believe agreement contingent upon government's satisfaction with testimony), *cert. denied*, 460 U.S. 1011 (1983); *United States v. Librach*, 536 F.2d 1228, 1230 (8th Cir.) (An immunity agreement entered with an accomplice (Fowler) did not constitute unfair prosecutorial conduct because "[t]he agreement was made and binding upon the government before Fowler testified; it was not contingent upon the government's satisfaction with the content of the testimony. Fowler could testify truthfully and fully pursuant to the agreement without fear of reprisal."), *cert. denied*, 429 U.S. 939 (1976).

<sup>15</sup> *E.g.*, *United States v. Insana*, 423 F.2d 1165, 1168-69 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970); *United States v. Vida*, 370 F.2d 759, 767-68 (6th Cir. 1966), *cert. denied*, 387 U.S. 910 (1967); *People v. Lyons*, 50 Cal. 2d 245, 265-66, 324 P.2d 556, 566-67 (1958) (en banc); *State v. Harper*, 713 S.W.2d 7, 10 (Mo. Ct. App. 1986).

<sup>16</sup> See, *e.g.*, *Mincey v. Arizona*, 437 U.S. 385 (1978) (questioning of seriously wounded defendant in intensive care and transcription of defendant's written answers resulted in unreliable and involuntary statements); *Rogers v. Richmond*, 365 U.S. 534 (1961) (confession resulting from impermissible police methods involuntary and untrustworthy); *Spano v. New York*, 360 U.S. 315 (1959) (same).

<sup>17</sup> See, *e.g.*, *Manson v. Brathwaite*, 432 U.S. 98 (1977) (unduly suggestive police procedures in obtaining witness identification of suspect may result in testimony so unreliable that it violates due process rights of defendant); *Foster v. California*, 394 U.S. 440 (1969) (same).

necessary when customary methods of exposing unreliability, such as cross-examination, impeachment, and the jurors' evaluation of credibility, cannot adequately safeguard a defendant's interest in being tried upon reliable evidence.<sup>18</sup>

Under current doctrine, the Supreme Court generally considers four factors important in determining the requirements of procedural due process for a criminal trial: whether the questioned procedure threatens the reliability of the fact-finding process,<sup>19</sup> whether the practice has been historically accepted,<sup>20</sup> whether a per se constitutional prohibition should be imposed,<sup>21</sup> and the administrative costs of any prohibition.<sup>22</sup> The Court has fluctuated as to which factors it should assess in a particular case and the weight that it should accord each factor; some cases concentrate on the reliability of evidence obtained by questioned procedures and others give more importance to historical or administrative considerations.<sup>23</sup>

#### a. *Reliability of the Fact-Finding Process*

Some courts give high priority to due process rights that further the goal of accuracy in the fact-finding process. For example, the Supreme Court excludes involuntary confessions as unreliable

<sup>18</sup> C. McCORMICK, *McCORMICK ON EVIDENCE* § 174, at 496-97 (E. Cleary 3d ed. 1984) (context of suggestive line-ups). This rule clearly extends to matters dealing with a witness's credibility. *LaFrance v. Bohlinger*, 499 F.2d 29, 34 (1st Cir.) (coerced testimony of witnesses is unreliable and should be excluded), *cert. denied*, 419 U.S. 1080 (1974); *see infra* notes 122-26 and accompanying text (explaining why jurors cannot accurately weigh testimony given under contingent agreements).

<sup>19</sup> *See, e.g.*, *Stone v. Powell*, 428 U.S. 465, 490 (1976) (claim of illegal search and seizure different from most other claims because application of exclusionary rule deflects truth-finding process); *Schneekloth v. Bustamonte*, 412 U.S. 218, 251 (1973) (Powell, J., concurring) (unlike claim of denial of effective counsel, claim of illegal search and seizure does not impugn integrity of fact-finding process).

<sup>20</sup> *See, e.g.*, *United States v. Watson*, 423 U.S. 411 (1976) (historical acceptance of warrantless arrests); *Costello v. United States*, 350 U.S. 359 (1956) (tradition that grand jury may consider evidence inadmissible at trial).

<sup>21</sup> *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966) (to avoid involuntary confession, police must recite suspect's rights before interrogation); *Manson v. Brathwaite*, 432 U.S. 98, 125 (1977) (Marshall, J., dissenting) (per se rule would discourage use of unreliable investigatory methods).

<sup>22</sup> *See, e.g.*, *Steagald v. United States*, 451 U.S. 204 (1981) (costs should be considered in determining if particular type of search is unreasonable under fourth amendment); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) (same).

Professors LaFave and Israel suggest that these four factors are the most important and consistently applied measures that the Supreme Court has used in assessing procedural due process in a criminal context. 1 W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 2.8, at 109 (1984).

<sup>23</sup> *Id.*; *see, e.g.*, *Stone v. Powell*, 428 U.S. 465 (1976) (reliability of fact-finding accuracy given higher priority than other due process interests); *Santobello v. New York*, 404 U.S. 257 (1971) (administrative costs emphasized in holding that plea bargaining permissible); *Costello v. United States*, 350 U.S. 359 (1956) (grand jury may consider evidence inadmissible at trial because such consideration is historically accepted).

evidence.<sup>24</sup> Similarly, a prosecutor cannot attempt to use a defendant's post-arrest silence after receiving *Miranda* warnings for impeachment.<sup>25</sup>

In cases concerning police procedures for witness identification of suspects,<sup>26</sup> the Court has voiced the concern that juries not hear the testimony unless the evidence has "aspects of reliability."<sup>27</sup> Judges must assess the totality of the circumstances when deciding whether the procedures used are so "unnecessarily suggestive" that they deny the defendant due process.<sup>28</sup> "[R]eliability is the linchpin in determining the admissibility of identification testimony."<sup>29</sup>

Because disallowing certain pretrial practices greatly increases the reliability of the evidence offered, the prohibition of these practices enhances the fairness of the trial process. In *Foster v. California*,<sup>30</sup> for example, the Supreme Court excluded identification testimony because the police procedure used in obtaining the identification rendered the testimony unreliable. In *Foster*, the only witness to an armed robbery viewed a three-man line-up, and when the witness could not positively identify the defendant the police arranged a one-to-one meeting. Even after this confrontation, however, the witness was unsure of the identification, so one week later the police arranged a second line-up of five men in which the defendant was the only man from the first line-up to appear. This time the witness identified the defendant.<sup>31</sup> The Court held that the elements of the identification procedure made it inevitable that the witness would testify as he did. Because the pretrial procedure was "unnecessarily suggestive," it undermined the reliability of the witness's testimony and admission of the testimony violated due process.<sup>32</sup>

#### b. *Historical Acceptance*

The Supreme Court has noted that historical acceptance of a

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<sup>24</sup> See cases cited *supra* note 16.

<sup>25</sup> See *Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976) ("Silence in the wake of [*Miranda*] warnings may be nothing more than the arrestee's exercise of [his] *Miranda* rights. . . . [I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach . . .").

<sup>26</sup> *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972); *Foster v. California*, 394 U.S. 440 (1969); *Stovall v. Denno*, 388 U.S. 293 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967).

<sup>27</sup> *Manson*, 432 U.S. at 112.

<sup>28</sup> *Stovall*, 388 U.S. at 302; see also *Gilbert*, 388 U.S. at 274 (admitting such testimony would "seriously aggravate whatever derogation exists of the accused's right to a fair trial").

<sup>29</sup> *Manson*, 432 U.S. at 114.

<sup>30</sup> 394 U.S. 440 (1969).

<sup>31</sup> *Id.* at 441-42.

<sup>32</sup> *Id.* at 442-43.

procedure supports the validity of its use.<sup>33</sup> In *Costello v. United States*,<sup>34</sup> for example, the Court permitted a grand jury to consider testimony inadmissible at trial.<sup>35</sup> The Court stated that grand jurors historically have great latitude in weighing all available information to determine whether to bring an indictment.<sup>36</sup> The Court therefore refused to quash the indictment on the grounds that it was supported by unreliable evidence.

c. *Desirability of a Per Se Rule*

In some instances the Supreme Court has favored rulings tailored to specific cases and particular circumstances, recognizing that, despite unorthodox procedures, reliable evidence should not be excluded. At other times, the Court has adopted broader per se prohibitions because they provide more guidance to courts and law enforcement agencies.<sup>37</sup> Blanket prohibitions have the advantage of preventing lower courts from readily evading case-by-case standards through opaque and intricate rulings that merely reflect the courts' individual values.<sup>38</sup> The Supreme Court has consistently held that certain guarantees require absolute protection without regard to a

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<sup>33</sup> See *United States v. Watson*, 423 U.S. 411 (1976) (historical acceptance of warrantless arrests); *Ross v. Moffitt*, 417 U.S. 600 (1974) (no right to counsel for discretionary state appeals or petitions for certiorari to Supreme Court because consistent policy that counsel not needed); *Green v. United States*, 356 U.S. 165 (1958) (viewed from historical perspective federal courts have power to punish for criminal contempt without indictment or jury trial), *overruled*, *Bloom v. Illinois*, 391 U.S. 194 (1968); *Costello v. United States*, 350 U.S. 359 (1956) (upholding tradition that grand jury may consider evidence inadmissible at trial).

The Justices, however, have somewhat modified this stance when interpreting guarantees that arguably were intended to be in accord with the views of contemporary society. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 620 (1949) (Rutledge, J., concurring) (“[O]ur Constitution today would be very different from what it is if such a narrow and literal construction of each of its terms had been transmuted into an inflexible rule of constitutional interpretation.”); see also 1 W. LAFAVE & J. ISRAEL, *supra* note 22, at 111 (Justices generally agree that historical acceptance has less significance in interpreting “open-ended” guarantees); Corwin, *Judicial Review in Action*, 74 U. PA. L. REV. 639, 660 (1926) (arguably, due process clause was intended to be “moulded to the views of contemporary society”).

<sup>34</sup> 350 U.S. 359 (1956).

<sup>35</sup> *Id.* at 363.

<sup>36</sup> *Id.* at 362.

<sup>37</sup> The Court's treatment of the admissibility of confessions in fifth amendment cases illustrates the difficulties encountered in developing case-by-case standards. Eventually, the Court turned to an application of per se requirements in *Miranda v. Arizona*, 384 U.S. 436 (1966). 1 W. LAFAVE & J. ISRAEL, *supra* note 22, at 114 n.21. See generally Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 535 (change in Court's treatment of search and seizure cases).

<sup>38</sup> 1 W. LAFAVE & J. ISRAEL, *supra* note 22, at 114 & n.23 (citing Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785 (1970) and Kitch, *The Supreme Court's Code of Criminal Procedure: 1968-1969 Edition*, 1969 SUP. CT. REV. 155, as articles supporting view that Court is concerned with lower courts' insensitivity to constitutional claims, especially where guilt is clear).

case-by-case balancing of reliability.<sup>39</sup>

On the other hand, the Supreme Court has held that courts must decide the constitutionality of witness identification procedures on a case-by-case basis.<sup>40</sup> The Court refused to apply per se prohibitions against suggestive witness identification procedures because they can prove reliable and necessary under certain circumstances.<sup>41</sup>

#### d. *Administrative Costs*

Expansive due process standards often impose a substantial burden on the administration of the criminal justice system. These costs include increased expenses,<sup>42</sup> additional hearings,<sup>43</sup> and obstacles to criminal punishment.<sup>44</sup> Because the Supreme Court has given varying weight to costs,<sup>45</sup> debate continues regarding the extent to which the Court should consider the practical effects of its constitutional decisions.<sup>46</sup> Nevertheless, there is a consensus that the Court should consider administrative costs only where a sub-

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<sup>39</sup> The fifth amendment right to freedom from self-incrimination, for example, receives absolute protection. *See, e.g.*, *New Jersey v. Portash*, 440 U.S. 450, 459 (1979).

<sup>40</sup> *See supra* notes 26-32 and accompanying text.

<sup>41</sup> *See Simmons v. United States*, 390 U.S. 377, 385-86 (1968) (identification of suspect by five bank employees day after robbery from group snapshots was reliable enough to be admitted); *Stovall v. Denno*, 388 U.S. 293 (1967) (confrontation and identification of accused in hospital did not violate due process when no one knew how long hospitalized witness would live).

<sup>42</sup> *See, e.g.*, *Mayer v. City of Chicago*, 404 U.S. 189 (1971) (indigent defendant has right to free record of proceeding in misdemeanor appeals); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (indigent defendants entitled to appointed counsel at trial).

<sup>43</sup> *See, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471 (1972) (requirement of preliminary hearing in parole reevaluation proceedings).

<sup>44</sup> *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (exclusion of evidence obtained in violation of fourth amendment will undoubtedly allow some criminals to go free).

<sup>45</sup> *See, e.g.*, *United States v. Calandra*, 414 U.S. 338 (1974) (damage to institution of grand jury caused by invoking fourth amendment exclusionary rule outweighs incremental detrimental effect on police behavior); *Morrissey*, 408 U.S. at 471 (1972) (no discussion of costs of new requirement of preliminary hearing in parole reevaluation proceedings); *Santobello v. New York*, 404 U.S. 257, 260 (1971) (plea bargaining should be encouraged because it conserves judicial resources).

<sup>46</sup> *See, e.g.*, *Mayer v. City of Chicago*, 404 U.S. 189, 196-97 (1971) (Court cannot balance state's fiscal interest against defendant's need to have transcript for appeal because state interest is irrelevant); *Baldwin v. New York*, 399 U.S. 66, 75 (1970) (Court should not consider administrative costs when interpreting Constitution); *Williams v. Florida*, 399 U.S. 78, 112-13 (1970) (Black, J., concurring in part, dissenting in part) (same); *Scott v. Illinois*, 440 U.S. 367, 384 (1979) (Brennan, J., dissenting) (costs of providing counsel for indigent defendants in cases which do not involve imprisonment are "irrelevant and speculative"); *Douglas v. California*, 372 U.S. 353, 359 (1963) (Clark, J., dissenting) (assistance of counsel upon appeal puts too great burden on state judicial machinery). The Court has stated that if the constitutional command is unequivocal, costs are irrelevant. *Payton v. New York*, 445 U.S. 573, 602 (1980). Fourth amendment cases, however, frequently discuss the practical costs of particular rulings. *See, e.g.*, *Steagald v. United States*, 451 U.S. 204, 220-22 (1981) (costs of requiring search war-

stantial burden on the criminal justice system exists.<sup>47</sup>

## 2. *The Procedural Due Process of Accomplice Plea Agreements*

Until recently, few courts had directly analyzed the procedural due process implications of accomplice plea bargaining. In *Lisenba v. California*<sup>48</sup> the Supreme Court held that a traditional agreement of prosecutorial leniency in return for accomplice testimony did not violate the due process rights of the defendant. Like most courts, however, the Supreme Court has recognized that accomplice agreements may encourage perjured testimony.<sup>49</sup> Despite this realization, many courts have held that the terms of accomplice plea agreements merely affect the weight of the testimony, not its admissibility.<sup>50</sup> These courts have determined that mandatory disclosure of the terms of the agreements and defense attorneys' cross-examinations sufficiently expose incentives to lie so that jurors can properly weigh witnesses' credibility.

Courts have carved out one exception to the theory that accomplice agreements affect only the weight of the testimony. This exception applies when the prosecution interferes with a defense witness's free and unhampered decision to testify. If the prosecutor influences the witness to testify for the prosecution instead of the defense or interferes with the content of his testimony for the defense, some courts will find a violation of the defendant's due process right to a fair trial.<sup>51</sup> When such a due process violation occurs, an appellate court must reverse the lower court's conviction without regard to the actual prejudice to the defendant.<sup>52</sup>

rant before entering home); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 316-22 (1978) (costs of requiring warrant to inspect work areas).

<sup>47</sup> See *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (costs of providing indigent defendants with counsel in cases not involving imprisonment outweigh the benefits); *Miranda v. Arizona*, 384 U.S. 436, 481 (1966) (warnings against self-incrimination do not substantially interfere with efficient administration of criminal justice system).

<sup>48</sup> 314 U.S. 219, 227 (1941).

<sup>49</sup> *Washington v. Texas*, 388 U.S. 14, 22-23 (1967); see *supra* notes 13-14 and accompanying text.

<sup>50</sup> See, e.g., *United States v. Gomez*, 810 F.2d 947, 956 (10th Cir.), *cert. denied*, 107 S. Ct. 2488 (1987); *United States v. Kimble*, 719 F.2d 1253, 1257 (5th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *United States v. Evans*, 697 F.2d 240, 245 (8th Cir.), *cert. denied*, 460 U.S. 1086 (1983); *United States v. McCallie*, 554 F.2d 770, 772 (6th Cir. 1977); *United States v. Borman*, 437 F.2d 44, 45-46 (2d Cir.), *cert. denied*, 402 U.S. 913 (1971). For an argument *contra*, see *infra* notes 122-26 and accompanying text.

<sup>51</sup> *United States v. Fricke*, 684 F.2d 1126, 1130 (5th Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983); *United States v. Goodwin*, 625 F.2d 693, 703 (5th Cir. 1980); *United States v. Henricksen*, 564 F.2d 197, 198 (5th Cir. 1977); *United States v. Thomas*, 488 F.2d 334, 336 (6th Cir. 1973).

<sup>52</sup> *United States v. Hammond*, 598 F.2d 1008, 1013 (5th Cir. 1979); *United States v. Morrison*, 535 F.2d 223, 228 (3d Cir. 1976).

## II

## RECENT DEVELOPMENTS IN ACCOMPLICE PLEA BARGAINING

In recent years, several federal courts have tried cases involving contingent plea agreements between prosecutors and accomplices. In these cases, the accomplice pleaded guilty and agreed to testify against the defendant in return for a reduction in sentence. The deals, however, were contingent upon either success in obtaining further indictments<sup>53</sup> or the value to the prosecution of the testimony or information provided.<sup>54</sup> The defendants argued that under these circumstances witnesses will go to any length, including perjury, to obtain the benefits of their bargain. The defendants claimed that such governmental encouragement of perjury violates the fundamental right to a fair trial guaranteed by the due process clause of the fifth amendment.<sup>55</sup>

In 1985, the Eighth Circuit addressed these issues in *United States v. Waterman*.<sup>56</sup> In *Waterman*, the prosecution's witness, Eugene Gamst, pleaded guilty and agreed to testify before a grand jury. He was promised a two-year reduction in sentence if the grand jury handed down more indictments, and was told that the appropriate authorities would be informed if he cooperated at trial.<sup>57</sup> After receiving a ten-year sentence, Waterman questioned the constitutionality of the agreement,<sup>58</sup> claiming that the agreement encouraged perjury at trial to an extent that cross-examination could not rectify. Although other evidence buttressed the reliability of Gamst's testimony, an Eighth Circuit panel held that Gamst's testimony violated Waterman's due process rights because the government offered favorable treatment to Gamst contingent upon the outcome of his testimony.<sup>59</sup> Upon rehearing en banc, however, the evenly divided Eighth Circuit vacated the panel decision and affirmed the district court's determination that the contingent agreement did not violate due process.<sup>60</sup>

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<sup>53</sup> *United States v. Waterman*, 732 F.2d 1527, 1528 (1984), *vacated en banc*, No. 83-2159 (8th Cir. Sept. 20, 1984), *cert. denied*, 471 U.S. 1065 (1985); *United States v. Baresh*, 595 F. Supp. 1132, 1134 (S.D. Tex. 1984).

<sup>54</sup> *United States v. Spector*, 793 F.2d 932 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 876 (1987); *United States v. Fallon*, 776 F.2d 727 (7th Cir. 1985); *United States v. Dailey*, 759 F.2d 192 (1st Cir. 1985).

<sup>55</sup> *Spector*, 793 F.2d at 936; *Fallon*, 776 F.2d at 732; *Dailey*, 759 F.2d at 194; *Waterman*, 732 F.2d at 1530; *Baresh*, 595 F. Supp. at 1133.

<sup>56</sup> 732 F.2d 1527 (1984), *vacated en banc*, No. 83-2159 (8th Cir. Sept. 20, 1984), *cert. denied*, 471 U.S. 1065 (1985).

<sup>57</sup> 732 F.2d at 1529 nn.1 & 2.

<sup>58</sup> *Id.* at 1530. Although Waterman questioned the agreement itself, clearly the use of the resulting testimony at trial was the act that violated his due process rights.

<sup>59</sup> *Id.* at 1531.

<sup>60</sup> *Id.* at 1533. One of the three panel judges, Chief Judge Lay, did not participate

Deciding a similar issue in *United States v. Dailey*,<sup>61</sup> a Massachusetts district court held the admission of accomplice testimony unconstitutional, relying in part on the reasoning of the three-judge panel in *Waterman*.<sup>62</sup> By the time the First Circuit heard *Dailey* on appeal, the Eighth Circuit had vacated the *Waterman* panel opinion.<sup>63</sup> The First Circuit nevertheless distinguished the panel opinion<sup>64</sup> when it vacated the district court's ruling.<sup>65</sup>

The defendant in *Dailey* argued that the contingent accomplice agreements violated his due process rights because the agreements required more than full and truthful testimony. Two of the three agreements contained a promise for full cooperation in return for a recommendation of a sentence not to exceed twenty years.<sup>66</sup> Furthermore, depending upon the value of the witnesses' testimony, the prosecution could recommend a sentence of only ten years.<sup>67</sup> The agreement with the third witness consisted of a four-month stay of sentencing, the possibility of a further stay, and the potential for government support on a motion for sentence reduction.<sup>68</sup> These last two benefits depended upon the value or "benefit" of the information to the government as determined by the prosecutor.<sup>69</sup> The district court noted that the agreements required more than full cooperation by the witnesses because otherwise the provisions con-

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in the en banc vote because of illness. If he had voted and maintained his former position, the lower court would have been reversed.

<sup>61</sup> 589 F. Supp. 561 (D. Mass. 1984).

<sup>62</sup> *Id.* at 563-64. The district court decided *Dailey* prior to the reconsideration of *Waterman* en banc.

After the district court's decision in *Dailey*, the Maine district court decided *United States v. Kenney*, 598 F. Supp. 874 (D. Me. 1984). In *Kenney*, an accomplice plea agreement required "actively assisting law enforcement officials in procuring the arrest and subsequent conviction of his associates." *Id.* at 878. Because *Waterman* had not yet been vacated en banc and *Dailey* had not yet been vacated on appeal, the court distinguished *Kenney* from these cases in upholding the agreement. The court stated that the contingency in *Kenney* depended upon the accomplice taking an active part in making drug buys and recording telephone conversations rather than procuring the arrest per se. *Id.* at 880. Furthermore, the court stated that the insistence upon truthful testimony in the agreement removed any incentive to fabricate. *Id.* at 879.

<sup>63</sup> *Waterman* was decided on May 2, 1984 and vacated on September 20, 1984. 732 F.2d at 1527. *Dailey* was decided June 22, 1984, 589 F. Supp. at 561, and vacated on April 5, 1985. 759 F.2d at 192.

<sup>64</sup> *Id.* at 196-98.

<sup>65</sup> *Id.* at 201. The distinction that the First Circuit deemed important was that the *Dailey* agreements were dependent upon an indefinite standard, i.e., testimony that was valuable to the prosecution. *Id.* at 197. Because the agreements in *Waterman* were conditioned upon further indictments, the First Circuit found that although these agreements were perhaps impermissibly premised upon successful prosecution, the *Dailey* agreements were not. *Id.*

<sup>66</sup> *Id.* at 194.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 195-96.

<sup>69</sup> *Id.* at 196. For the text of this agreement, see 589 F. Supp. at 565-66.

cerning the ten-year sentences and the further stay of sentencing would be superfluous.<sup>70</sup> Therefore, the district court concluded that the prosecutor provided the witnesses with incentives to lie by conditioning further rewards upon the government's satisfaction.<sup>71</sup>

The First Circuit disagreed with this analysis and concluded that the agreements did not encourage perjury to an unconstitutional degree. The court viewed the leniency available under the agreements as independent from the prosecution's success.<sup>72</sup> Furthermore, the court stated that the government had established a legitimate interest in making the plea bargain contingent. Because the first two witnesses were suspected of being major drug importers with many connections, the prosecution could encourage full cooperation more effectively by using contingent agreements.<sup>73</sup> The First Circuit regarded these circumstances as "fairly compelling reasons for having made these plea agreements somewhat open-ended,"<sup>74</sup> implying that the governmental interest in the agreements outweighed the possible harm of perjured testimony. The court concluded that the requirements of due process were satisfied, and the testimony was admitted.<sup>75</sup>

The First Circuit relied in part on *United States v. Kimble*<sup>76</sup> in refusing to exclude the testimony of the witnesses.<sup>77</sup> In *Kimble*, an accomplice pleaded guilty and agreed to testify in return for a twenty-year sentence conditioned upon "the acceptance of the adequacy of his cooperation."<sup>78</sup> Although the witness acknowledged that he had repeatedly committed perjury on previous occasions, the court decided that the agreement did not put impermissible pressure upon the witness to lie again. The court held that the agreement should only affect the weight of the evidence, not its admissibility.<sup>79</sup>

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<sup>70</sup> *Id.* at 563.

<sup>71</sup> *Id.* at 564.

<sup>72</sup> *Dailey*, 759 F.2d at 197.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 200. The First Circuit vacated the district court's pre-trial order barring the three accomplices' testimony and remanded to the District of Massachusetts for further proceedings. *Id.* at 201.

In *United States v. Silvestri*, 790 F.2d 186 (1st Cir.), *cert. denied*, 107 S. Ct. 197 (1986), the defendants urged the court to reconsider its holding in *Dailey* because several witnesses in *Silvestri* testified under the same plea agreement used in *Dailey*. The First Circuit rejected the defendant's arguments for the same reasons set forth in *Dailey*. 790 F.2d at 188 n.1.

<sup>76</sup> 719 F.2d 1253 (5th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984).

<sup>77</sup> *Dailey*, 759 F.2d at 198-99.

<sup>78</sup> *Kimble*, 719 F.2d at 1255.

<sup>79</sup> *Id.* at 1256-57. *Kimble* can be distinguished from *Dailey*, however, because the *Kimble* agreement did not necessarily encourage biased or perjured testimony. The twenty year sentence recommendation in *Kimble* was not contingent upon the value of

In the aftermath of *Waterman* and *Dailey*, two circuit court cases have found contingent plea agreements constitutional. In *United States v. Fallon*<sup>80</sup> the Seventh Circuit held that the prosecutor could condition the charges brought against a co-conspirator upon the level of his cooperation at the defendant's trial. The agreement further stated that "if the level of cooperation would materialize as represented, . . . the government would, at the time of sentencing, recommend that the client not be incarcerated" and that the prosecution would "be in the best posture to evaluate the witness' efforts" after trial.<sup>81</sup> In *United States v. Spector*<sup>82</sup> the Eighth Circuit upheld a similar agreement contingent upon cooperation in "solving and prosecuting crimes." Both courts noted the cases' factual similarity to *Dailey* and found its reasoning persuasive.<sup>83</sup> Limiting instructions to the jury, impeachment, and cross-examination were deemed procedurally adequate to safeguard against any dangers to due process.<sup>84</sup>

*United States v. Baresh*<sup>85</sup> is the only recent case in which a federal court deemed a plea bargain agreement so conducive to perjury that it tainted the testimony beyond any possibility of redemption.<sup>86</sup> In *Baresh*, the contingent plea agreement provided the witness with a pardon and permission to keep assets obtained with his narcotics profits if his testimony led to the arrest and indictment of two specified defendants. If the testimony did not lead to arrest and indictment, however, the witness probably would receive a fifteen-year sentence even if he told the full truth.<sup>87</sup> The district court for the Southern District of Texas concluded that the witness's devastating and totally uncorroborated testimony against a defendant whom the government had originally doubted it could indict was so unreliable that its admission violated the defendant's due process rights.<sup>88</sup>

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the testimony to one party, as in *Dailey*, but merely upon the "adequacy" of the testimony. The witness's previous record may have encouraged the prosecution to condition the sentence in this manner to encourage truthful, rather than perjured, testimony.

<sup>80</sup> 776 F.2d 727, 733 (7th Cir. 1985).

<sup>81</sup> *Id.*

<sup>82</sup> 793 F.2d 932, 936-37 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 876 (1987).

<sup>83</sup> 776 F.2d at 733-34; 793 F.2d at 937.

<sup>84</sup> 776 F.2d at 734; 793 F.2d at 937.

<sup>85</sup> 595 F. Supp. 1132 (S.D. Tex. 1984).

<sup>86</sup> *United States v. Peters*, 791 F.2d 1270, 1299-1301 (7th Cir.), *cert. denied*, 107 S. Ct. 168 (1986), distinguished *Baresh*, *Dailey*, and *Waterman* in deciding that no contingent plea agreement, and therefore no due process violation, existed.

<sup>87</sup> 595 F. Supp. at 1134 n.2.

<sup>88</sup> *Id.* at 1136-37.

### III ANALYSIS

The Constitution guarantees that the government may not imprison a person except in accordance with fair procedures.<sup>89</sup> Prosecutorial use of outcome-oriented agreements to obtain favorable testimony exceeds the parameters of fair criminal procedure. Defendants lack comparable bargaining leverage that would enable them to elicit similarly favorable testimony from witnesses. Prosecutors, whose duty is to seek justice rather than convictions,<sup>90</sup> should not place the desire for convictions ahead of the pursuit of unbiased testimony. Buying testimony with conditional leniency tips the scales of justice by inviting perjury.

Two factors support the prohibition of contingent plea agreements. First, the admission of testimony obtained by contingent plea agreements violates the defendant's due process rights. Because contingent plea agreements encourage embellishment or fabrication, the resulting testimony is not reliable. The Supreme Court has stated that due process requires the exclusion of patently unreliable testimony. Other factors used to assess due process implications, such as administrative burdens and historical acceptance, also indicate that using contingent plea agreements violates the defendant's due process rights.

Second, courts should disallow these agreements under their inherent supervisory powers to require reliable evidence and to uphold fair procedural standards at trial. The exclusion of testimony induced by contingent agreements maintains a minimal level of accuracy in admitted evidence because the witness's overwhelming incentives to lie frustrate the effectiveness of cross-examination. The goals of deterring prosecutorial overreaching and upholding judicial integrity also provide grounds for the exclusion of testimony made under contingent plea agreements. The judicial duty to ensure a fair trial mandates the prohibition of prosecutorial practices which border on the bribery of witnesses.

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<sup>89</sup> The fifth amendment's guarantee of due process requires fair procedures at trial. *See, e.g.,* *Manson v. Brathwaite*, 432 U.S. 98 (1977) (admission of unreliable testimony regarding identification of suspect made pursuant to suggestive police procedures violates due process); *Stovall v. Denno*, 388 U.S. 293 (1967) (same). Like the due process clause, the sixth amendment requires fair conduct and procedures at trial. However, the concerns of the sixth amendment are generally limited to the right to a speedy and public trial by an impartial jury, the right to be informed of the nature of the accusation and confront government witnesses, and the right to assistance of counsel and compulsory process. *See* *Mayer v. City of Chicago*, 404 U.S. 189 (1971) (indigent's right to free transcript in misdemeanor appeals); *Douglas v. California*, 372 U.S. 353 (1963) (indigent's right to appointed counsel on first appeal).

<sup>90</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935); A.B.A., *supra* note 8, § 1.1(c).

## A. Due Process Analysis

The Supreme Court has traditionally considered four factors when assessing a criminal defendant's due process right to a fair trial.<sup>91</sup> An analysis of these factors indicates that the use of testimony made under contingent plea agreements is unconstitutional.

### 1. *Reliability of the Fact-Finding Process*

The principles illustrated by *Foster v. California*,<sup>92</sup> where the Court excluded identification testimony because the suggestiveness of the identification procedure undermined its reliability, apply to contingent plea agreements. Bargains conditioned upon the prosecution's satisfaction with a witness's testimony are more than "unnecessarily suggestive." In effect, they demand rather than suggest that witnesses testify in certain ways in order to receive the agreement's benefits.<sup>93</sup> These agreements constitute a far more persuasive suggestion than improper line-up procedures, however, because the suggestion inherent in a contingent agreement is cou-

<sup>91</sup> See *supra* notes 19-23 and accompanying text.

<sup>92</sup> 394 U.S. 440 (1969); see *supra* notes 30-32 and accompanying text.

<sup>93</sup> Even absent contingent rewards, courts recognize that accomplices have a great interest in lying in favor of the government: "To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large." *Washington v. Texas*, 388 U.S. 14, 22-23 (1967).

A traditional plea agreement already contains a great incentive for the accomplice to testify with the aim of pleasing the prosecutor. *Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977); see also *Washington*, 388 U.S. at 22-23 (allowing accused accomplice to testify for prosecution creates great incentive for perjury); *United States v. Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980) ("[P]romises of immunity or leniency premised on cooperation in a particular case may provide a strong inducement to falsify in that case."); *DuBose v. LeFevre*, 619 F.2d 973, 979 (2d Cir. 1980) (agreements in general terms create an incentive on witness's part to testify favorably for state); Note, *A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 HARV. L. REV. 887, 890 (1981) ("[P]romises of favorable treatment directly premised on 'cooperative' testimony create a clear incentive for falsification.").

In an agreement premised solely upon indictment, conviction, or the prosecutor's satisfaction with the witness's testimony, that incentive becomes virtually irresistible. See *United States v. Baresh*, 595 F. Supp. 1132, 1135 (S.D. Tex. 1984) (agreement contingent upon indictments "placed far more stress upon [witness's] veracity (though buttressed by the government's requirement of truthfulness) than its gossamer frailness could withstand"); *United States v. Turner*, 490 F. Supp. 583, 602 (E.D. Mich. 1979) (credibility of witness is more suspect when he believes that leniency is contingent upon his testimony), *aff'd*, 633 F.2d 219 (6th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *People v. Green*, 102 Cal. App. 2d 831, 838-39, 228 P.2d 867, 871-72 (1951) (agreement premised upon conviction of defendant resulted in unfair trial); Note, *supra* note 12, at 140 ("Judicial censure of bargains conditioned upon effective prosecution of the defendant stems from a feeling that they exert so great a pressure upon a witness to perjure himself that a conviction based on such testimony cannot be upheld.").

pled with significant rewards to the witness.<sup>94</sup> The likelihood of unreliability is therefore much greater when incarceration is at stake. Such reward-induced testimony thus falls within the category of evidence which is so unreliable that its admission violates the defendant's due process rights. As the panel in the *Waterman* decision stated, there is "no place in due process law for positioning the jury to weed out the seeds of untruth planted by the government."<sup>95</sup>

## 2. *Historical Acceptance*

The Supreme Court has suggested that historical acceptance of certain procedures creates a strong presumption of constitutionality.<sup>96</sup> Contingent agreements, however, historically have not been accepted. Before *Waterman* and *Dailey*, no federal court had held that contingent plea agreements satisfy the requirements of due process. Indeed, no federal case had addressed the question. Similarly, before 1984, no state court had upheld the use of such agreements to procure testimony at trial.<sup>97</sup> Thus, considering the short history of acceptance of contingent plea agreements, the "historical acceptance" factor lends no support to the practice of conditioning a lenient sentence upon satisfactory accomplice testimony. This is particularly true considering society's increased concern within the past century for fair trial procedures.<sup>98</sup>

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<sup>94</sup> The availability of rewards in return for specific testimony constitutes bribery in the layman's usage of the term, if not according to statutory definition. See *infra* notes 145-48 and accompanying text.

<sup>95</sup> 732 F.2d at 1532.

<sup>96</sup> See cases cited *supra* note 33.

<sup>97</sup> See *supra* note 13 and accompanying text. After the federal courts' decisions in *Waterman* and *Dailey*, some state courts have been more receptive to contingent plea agreements. In *State v. O'Connor*, 378 N.W.2d 248, 251-52 (S.D. 1985) (plurality opinion), for example, the South Dakota Supreme Court assessed a plea agreement that was contingent upon the recovery of stolen property and the arrest of co-conspirators. In upholding the constitutionality of the agreement the court cited *Waterman* and *Dailey* and stated:

Contingent plea agreements should be reserved for the very exceptional cases. They cannot be contingent upon the return of an indictment or a guilty verdict. In the rare exceptional cases where the value and the extent of the accomplice's knowledge is uncertain, but likely to be very great, and there is full disclosure to the jury, a constitutional violation does not occur. In this case, the O'Connor plea agreement involved truthful testimony of a co-conspirator and other witnesses leading to the arrest. Although we do not approve of these types of contingent plea agreements, in this case it is not a violation of due process rights under the Fifth Amendment. The jury was fully aware of the plea agreement and O'Connor had a full and complete opportunity to cross-examine the benefactor of that agreement.

*Id.* at 252 (citations omitted).

<sup>98</sup> The Court's concern with fairness at trial has increased as society's concern has increased. *Gideon v. Wainwright*, 372 U.S. 335 (1963), which overruled *Betts v. Brady*, 316 U.S. 455 (1942), illustrates this trend. In holding that indigent defendants must be

### 3. *Desirability of a Per Se Rule*

The Supreme Court has applied a case-by-case analysis of some trial procedures where the procedures in question were reliable and necessary under the circumstances.<sup>99</sup> This reasoning, however does not apply fully to contingent agreements. Contingent agreements are never necessary to obtain accomplice testimony because traditional plea agreements of leniency in return for truthful testimony already serve the government's purpose of obtaining testimony. Traditional agreements allow the prosecution to scrutinize the truth of the testimony and withhold the benefits of the agreement if the witness fails to disclose the full truth. Contingent agreements only add the threat to the witness that telling the truth alone may not result in collecting the bargained-for benefits. Furthermore, per se rules deter misconduct more forcefully than a case-by-case analysis of the circumstances.<sup>100</sup> Thus, contingent agreements are unnecessary and merit a per se prohibition.

### 4. *Administrative Costs*

Courts have offered several administrative justifications for contingent accomplice plea agreements. First, a prosecutor may not know the extent of a witness's knowledge and therefore has an interest in negotiating an agreement that places a premium on full and complete testimony.<sup>101</sup> Second, some accomplice witnesses who are trying to escape punishment<sup>102</sup> or fear reprisals from the defendant have no incentive to testify truthfully, especially if they lied under oath before.<sup>103</sup> Third, a prosecutor reluctant to bargain with an accomplice may want to condition the bargain upon concrete results to ensure that the government reaps some benefit from its leniency.<sup>104</sup>

Prosecutors do not need to use contingent plea agreements to achieve valid prosecutorial objectives, however, because traditional plea agreements already perform such functions. Under the first

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appointed counsel in felony cases, the *Gideon* Court agreed that *Betts* was "an anachronism when handed down." 372 U.S. at 345. *Bloom v. Illinois*, 391 U.S. 194 (1968), also highlights changed attitudes toward the criminal justice process. By overruling *Green v. United States*, 356 U.S. 165 (1958), *Bloom* rejected the historical acceptance of federal courts' power to punish for criminal contempt without an indictment or a jury trial.

<sup>99</sup> See *supra* notes 40-41 and accompanying text.

<sup>100</sup> *Manson v. Brathwaite*, 432 U.S. 98, 110 (1977); see *Neil v. Biggers*, 409 U.S. 188, 199 (1972) ("The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available . . .").

<sup>101</sup> *Dailey*, 759 F.2d at 197; *O'Connor*, 378 N.W.2d at 252 (plurality opinion).

<sup>102</sup> *E.g.*, *Kimble*, 719 F.2d at 1255.

<sup>103</sup> See, *e.g.*, *id.*

<sup>104</sup> *E.g.*, *Waterman*, 732 F.2d at 1533; *Baresh*, 595 F. Supp. at 1137.

justification where the prosecutor seeks complete information, the contingent agreement elicits no more testimony than the standard plea bargain. Because the prosecution does not know the extent of a witness's knowledge, the prosecutor must make a subjective decision whether to confer or withhold the benefits of the bargain. Even if the witness fails to reveal information, the prosecutor might still grant the full bargained-for leniency because he was unaware of the deficiency. These kinds of judgments are often the basis of traditional bargains. If the prosecution finds that the witness is not revealing the whole truth, the court can release the government from its promises under the agreement.<sup>105</sup>

As to the second justification, similar reasoning applies. The government may withhold the benefits of the agreement if it finds that the witness has not told the truth. The conditions of the bargain will not affect the government's ability to distinguish perjury from fact.

The third justification is indefensible because prosecutors have a duty to seek the truth, not merely convictions.<sup>106</sup> That duty "extends not only to marshalling and presenting evidence to obtain a conviction, but also to protecting the court and the accused from having a conviction result from misleading evidence or perjured testimony."<sup>107</sup>

Traditional plea bargains adequately achieve any administrative interest served by making plea bargains contingent. The prosecution has the same power in both cases to deny the benefits of the bargain if the accomplice fails to reveal the full truth, and the same impotence in discerning whether the witness is withholding information. Further, a traditional plea bargain restricts the defendant's fundamental right to a fair trial less than a contingent plea bargain because it does not needlessly encourage perjury.

The prohibition of contingent plea agreements should have a negligible effect upon the efficient administration of the judicial system. Although excluding testimony made pursuant to reward-induced agreements initially may deny the introduction of important evidence, prosecutors quickly will revert to traditional plea bargains. When prosecutors realize that contingent agreements fail judicial scrutiny, they will prefer to bargain within the limits of fairness rather than risk the testimony's exclusion.<sup>108</sup>

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<sup>105</sup> *United States v. Swinehart*, 614 F.2d 853, 858 (3d Cir.), *cert. denied*, 449 U.S. 827 (1980); *United States v. Simmons*, 537 F.2d 1260, 1261 (4th Cir. 1976).

<sup>106</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935); A.B.A., *supra* note 8, § 1.1(c).

<sup>107</sup> *DeLuzio v. People*, 177 Colo. 389, 396, 494 P.2d 589, 593 (1972).

<sup>108</sup> In civil cases the Supreme Court has developed a clearer, more overtly utilitarian standard for weighing procedural due process questions than it has applied in criminal

## B. Other Approaches

Even if courts do not hold contingent plea agreements unconstitutional, they may exercise their supervisory powers to exclude testimony obtained pursuant to such agreements. Inherent supervisory powers enable judges to control the rules of their courts in order to achieve acceptable maximum levels of accuracy in admitted evidence. Prosecutorial misconduct and undue prejudice to the defendant may also merit the exclusion of certain evidence.

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cases. In *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), the Court set forth the following test:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Some scholars suggest that this utilitarian civil law due process standard, along with an analysis of fairness, should apply to criminal due process cases because the civil standard more directly weighs the benefits of the procedures against their societal costs. Professor Nowak, for example, pinpointed *Scott v. Illinois*, 440 U.S. 367 (1979), in which the Supreme Court determined that indigent defendants may be denied appointed counsel if the potential punishment does not include imprisonment, as a criminal case in which the civil law standard should have been applied:

Even if the Court were to find the sixth amendment irrelevant [in determining whether an indigent should have the right to counsel where no incarceration could be imposed], it should have examined due process values. Were this a civil case where a party was asking for some procedural safeguard, the Court, employing the *Mathews* balancing test, would have examined the worth of the safeguard to the individual and its value in insuring a reliable fact determination. . . . The *Scott* majority engaged in no such analysis. Use of the suggested due process methodology model would have required the Court to examine the value in a fair criminal process to both the individual and society, the chance that individual rights were endangered by the absence of counsel, and the societal worth of having the added assurance of systemic fairness and equality of treatment in the adversary process.

Nowak, *Criminal Law: Foreword—Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & CRIMINOLOGY 397, 408 (1979) (footnote omitted).

Contingent plea bargains fail the *Mathews* civil procedural due process test. *Mathews* requires that the judge weigh the defendant's interest in a trial on reliable evidence and the risk of deprivation of that interest against the value to and burdens on the state of using alternative procedures.

The Supreme Court has stated that admissible evidence must have certain indicia of reliability. See *supra* notes 24-32 and accompanying text. Because contingent agreements encourage biased or perjured testimony, a clear danger exists that these agreements will lead to violating the defendant's due process rights. Substituting traditional plea agreements for contingent agreements and excluding testimony tainted by contingent agreements greatly promotes the processes of a fair trial at no cost to the government. The use of the *Mathews* balancing test therefore demonstrates that contingent plea agreements violate the civil due process standards advocated by Professor Nowak for use in criminal cases.

### 1. *Exclusionary Rules of Evidence*

Exclusionary rules prohibit prosecutors from using evidence obtained in violation of the defendant's fourth,<sup>109</sup> fifth,<sup>110</sup> and sixth<sup>111</sup> amendment rights. The Constitution does not compel the exclusion of evidence obtained in violation of the defendant's rights; rather, the Supreme Court has held that the courts should employ exclusionary rules to deter official misconduct and promote accuracy. The common reference to the term "exclusionary rule" in fourth amendment cases is unfortunate because this usage tends to divert discussion from other contexts that require exclusion.<sup>112</sup> Exclusions based on an effort to promote fair trials are designed to further an interest in accuracy<sup>113</sup> and thus are distinguishable from most other exclusions, such as the fourth amendment exclusions, which aim to deter unconstitutional governmental conduct.<sup>114</sup>

In *Williamson v. United States*<sup>115</sup> the Fifth Circuit barred admission of an informer's testimony in an effort to maintain a standard of reliability. The court found the informer's testimony untrustworthy because a contingent fee arrangement induced the informer to purchase illicit whiskey from the suspects in return for a specified fee for each seller caught. The court declared that such agreements render the ensuing evidence inadmissible because the arrangement tends to "frame up" the defendant and eliminates the possibility of a fair trial.<sup>116</sup> The court noted that "it becomes the duty of the courts in federal criminal cases to require fair and lawful conduct from federal agents in the furnishing of evidence of crimes."<sup>117</sup>

In both contingent fee arrangements and contingent plea agreements, prosecutors reward one who testifies against the defendant.<sup>118</sup> Contingent plea agreements, however, involve much higher stakes; a reduction of a jail sentence by several years is far

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<sup>109</sup> See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (evidence seized in violation of fourth amendment excluded from state trial); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (evidence seized in violation of fourth amendment excluded from federal trial).

<sup>110</sup> See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (fifth amendment privilege against self-incrimination secured).

<sup>111</sup> See, e.g., *Massiah v. United States*, 377 U.S. 201, 207 (1964) (statements obtained in violation of right to counsel excluded).

<sup>112</sup> "Whether exclusion is or should be required in these contexts presents issues significantly different but no less important than those in the Fourth Amendment context." C. McCORMICK, *supra* note 18, § 164, at 445.

<sup>113</sup> See *supra* text accompanying notes 24-32; *infra* text accompanying note 120.

<sup>114</sup> *Stone v. Powell*, 428 U.S. 465, 492 (1976).

<sup>115</sup> 311 F.2d 441 (5th Cir. 1962).

<sup>116</sup> *Id.* at 444.

<sup>117</sup> *Id.*

<sup>118</sup> *Baresh*, 595 F. Supp. at 1136 (reversal required only when "specific defendant was picked out for the informer's efforts by a government agent" (quoting *United States v. Lane*, 693 F.2d 385, 387-88 (5th Cir. 1982))).

more valuable than a few hundred dollars. These heightened stakes increase the likelihood that the bargain will heavily influence the content of the testimony. In accordance with the *Williamson* rule, courts should exclude evidence obtained pursuant to contingent plea agreements because these agreements encourage perjury and courts have a duty to require "fair and lawful conduct" from governmental representatives. As one state court noted, "[J]ustice is not served where the prosecutor must simultaneously purchase and coerce testimony in order to obtain a conviction which might not be achieved with trustworthy evidence."<sup>119</sup>

Courts employ other exclusionary rules when limiting instructions cannot sufficiently diminish a jury's estimation of the evidence's credibility. Such prominent exclusionary rules as the hearsay rule, the opinion rule, the rules excluding bad character as evidence of a crime, and the original documents ("best evidence") rule have the elucidation of truth as their common purpose.<sup>120</sup> The exclusion of evidence at trial constitutes the last effective legal control over the introduction of unreliable evidence. Courts must assert such control because the evidence, regardless of its reliability, will sway the jury. Limiting instructions as to the diminished weight that the jury should give unreliable evidence often have little effect.<sup>121</sup>

Some courts argue that because prosecutors must reveal the conditions of plea bargains at trial,<sup>122</sup> juries can accurately weigh and discount the credibility of witnesses testifying under contingent agreements.<sup>123</sup> Although courts widely accept this reasoning as applicable to ordinary plea bargains,<sup>124</sup> such reasoning lacks force with contingent plea agreements. Traditional agreements involve straightforward exchanges which juries can competently evaluate. Under an ordinary agreement, a witness lies mainly to downplay his

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<sup>119</sup> *Franklin v. State*, 94 Nev. 220, 225, 577 P.2d 860, 863 (1978).

<sup>120</sup> See C. McCORMICK, *supra* note 18, § 72, at 170-71. Admittance of hearsay without certain "indicia of reliability" violates the defendant's right to confrontation and due process. *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *Barber v. Page*, 390 U.S. 719, 721 (1968); *Pointer v. Texas*, 380 U.S. 400, 404 (1965).

<sup>121</sup> See *Manson v. Brathwaite*, 432 U.S. 98, 120 (1977) (juries are often unduly receptive to untrustworthy evidence); see also McCORMICK, *supra* note 18, § 59, at 152 (juries may use evidence for improper purpose despite limiting instructions). See Lind, *The Psychology of Courtroom Procedure* (citing psychological studies that question jurors' obedience to instructions), in *THE PSYCHOLOGY OF THE COURTROOM* 13, 29-31 (N. Kerr & R. Bray eds. 1982).

<sup>122</sup> *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>123</sup> *Fallon*, 776 F.2d at 734; *Dailey*, 759 F.2d at 200; *Kimble*, 719 F.2d at 1257; *O'Connor*, 378 N.W.2d at 252 (plurality opinion).

<sup>124</sup> See, e.g., *United States v. Tapia*, 738 F.2d 18 (1st Cir.) (credibility of informer's testimony hoping to avoid jail term question for jury), *cert. denied*, 469 U.S. 869 (1984); *United States v. Insana*, 423 F.2d 1165 (2d Cir.) (mere fact that witness may receive reduced sentence does not disqualify testimony; jury knows witness pleaded guilty and is awaiting sentence), *cert. denied*, 400 U.S. 841 (1970).

own culpability. Because jurors come across self-exculpatory conduct in their daily lives, they can readily understand this motivation and discount the credibility of the testimony accordingly. Under contingent agreements, the witness aims not to exculpate himself, but to incriminate the defendant. Jurors likely have more difficulty quantifying the force of this motivation. Moreover, agreements contingent upon the prosecution's satisfaction or the outcome of the case pressure witnesses in an unpredictable manner. Witnesses will assess differently the testimony necessary to satisfy the prosecutor; although some will testify truthfully, others will embellish their testimony to varying degrees to ensure prosecutorial favor. Neither judge nor jury can assess accurately the subjective nature of the impact and ascertain the extent to which the terms of the agreement have altered the content of the testimony.<sup>125</sup> This element of uncertainty frustrates the jury's duty to judge the witness's credibility because the government has complicated the credibility issue by imposing external constraints upon the witness's testimony.<sup>126</sup>

Paradoxically, the more profound the impact of the agreement, the more problems the jury will have in assessing its impact. The greater the witness's stake in the prosecution's success, the less an exhaustive cross-examination will reveal. When the witness's future depends upon the recounting of persuasive testimony, he will formulate a logical and consistent story.<sup>127</sup> Furthermore, the witness

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<sup>125</sup> Contingent agreements might also affect a witness's testimony in the same way that hypnosis affects testimony. A growing majority of states will not admit posthypnotic testimony because during hypnosis the subject may subconsciously invent details to please the hypnotist. Later the subject becomes certain of the accuracy of his memory and will testify with conviction. See *United States v. Valdez*, 722 F.2d 1196, 1201-04 (5th Cir. 1984) (posthypnotic testimony excluded because it is so unreliable that it violates due process and the right to confrontation); *People v. Shirley*, 31 Cal. 3d 18, 723 P.2d 1354, 181 Cal. Rptr. 243 (discussion of hypnotic memory as constructive rather than reproductive), *cert. denied*, 459 U.S. 860 (1982). As with a participant of hypnotic induction, the memory of a witness subject to a contingent agreement may be affected by the strong desire to please the prosecutor. This impact upon perception and memory may further insulate the witness's testimony from effective cross-examination.

<sup>126</sup> *Rex v. Robinson*, 30 B.C.R. 369, 376 (1921) ("It is this element of uncertainty and the impossibility of determining the extent of it that makes this case so peculiar and unsatisfactory, and it cannot properly, in my opinion, be viewed as a question of credibility for the jury but one of frustration of their right to pass upon credibility.").

<sup>127</sup> It is obvious that if the witness did get the impression from the Court that unless he told the same story to the Court as he did to the police, he would be executed, then his testimony was tainted beyond redemption and could not, in a legal sense, be weighed by the jury, because the witness was no longer a free agent and there was no standard by which his veracity could be tested or estimated. This is not merely a matter going to the credibility of the witness, but something fundamentally deeper, *viz.*, that by action of the Court itself the witness was fettered in his testimony and put in so dire a position that the value of his evidence was not capable of appraisal. . . .

probably will adhere to any previous untrue statements with perseverance. Thus, admission of such testimony is potentially more prejudicial than probative.

By eliminating the effectiveness of cross-examination in determining the truth, the government extinguishes any opportunity to develop accomplice testimony favorable to the defendant.<sup>128</sup> The lack of effective cross-examination renders testimony "impure, dubious and 'tainted beyond redemption.'" <sup>129</sup> Courts must exclude such testimony because they cannot determine whether the prosecution would have offered the same evidence absent the government's use of contingent plea agreements.

## 2. *Supervisory Powers: The Duty to Maintain Standards of Procedure and Prejudice*

Judges have the inherent power to control the procedures and rules of their courts. The Supreme Court has approved the exercise of supervisory powers to suppress evidence improperly obtained by the government.<sup>130</sup> This inherent supervisory role "implies the

<sup>128</sup> As noted in Brief of Appellee at 45, *United States v. Dailey*, 759 F.2d 192 (1st Cir. 1985) (No. 84-1578), a parallel can be drawn between the exclusion of testimony resulting from contingent plea bargains and the exclusion of witness testimony about some thing destroyed by the government before the defendant had an opportunity to examine or analyze it. See *United States v. Carrasco*, 537 F.2d 372 (9th Cir. 1976) (trial judge erred in refusing to strike testimony of Drug Enforcement Administration agent, whose diary of events was destroyed in violation of federal law). Where the prosecution is responsible for the destruction of evidence possibly favorable to the defendant, and the destruction renders any cross-examination fruitless, courts should not allow the prosecution to use that evidence for its own purposes in court.

<sup>129</sup> *People v. Green*, 102 Cal. App. 2d 831, 839, 228 P.2d 867, 872 (1951) (quoting *Robinson*, 30 B.C.R. at 375).

Because the defendant exercises his sixth amendment right to confrontation of the prosecution's witnesses primarily through cross-examination, *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965), contingent agreements raise confrontation clause concerns. When an agreement constrains a witness to testify in a certain manner, it limits relevant inquiries into guilt or innocence. Substantial limitations upon relevant cross-examination violate the defendant's right to question adverse witnesses. See *United States v. Valdez*, 722 F.2d 1196, 1201-02 (5th Cir. 1984) (posthypnotic testimony possibly violates sixth amendment confrontation clause because it renders cross-examination ineffective); *Fourteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1983-84*, 73 GEO. L.J. 249, 657-67 (1984) (sixth amendment rights are violated if right to cross-examination has been irreparably prejudiced). Consequently, the defendant is denied his fundamental right to a fair trial. *People v. Medina*, 41 Cal. App. 3d 438, 450, 116 Cal. Rptr. 133, 141 (1974) (under contingent immunity arrangement, defendants were denied "any effective cross-examination" and were "deprived of the fundamental right to a fair trial"); *Franklin v. State*, 94 Nev. 220, 223, 577 P.2d 860, 862 (1978) (agreeing with *Medina* rationale).

<sup>130</sup> See, e.g., *Elkins v. United States*, 364 U.S. 206, 223-24 (1960) (whether evidence was obtained by an unreasonable search and seizure by state officers is question of federal law in which federal court must make independent inquiry); *McNabb v. United States*, 318 U.S. 332, 341-42 (1943) (court may formulate rules of evidence to apply in federal criminal prosecution beyond those provided in Constitution).

duty of establishing and maintaining civilized standards of procedure and evidence."<sup>131</sup> The Supreme Court has stated:

[F]ederal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress. The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights; to preserve judicial integrity . . . ; and finally, as a remedy designed to deter illegal conduct.<sup>132</sup>

Because prosecutors have broad discretion in the formation of plea agreements,<sup>133</sup> judges must protect defendants from prosecutorial misconduct. Courts have invoked their supervisory powers to require fair governmental conduct at trial<sup>134</sup> and have reversed lower courts if the misconduct prejudicially affected the defendant's substantive rights.<sup>135</sup> Allowing the prosecution to use the plea bargaining process to coerce a witness into testifying in a particular fashion prejudices the defendant's right to a fair trial.

The reasoning behind the fourth amendment exclusionary rules offers an illustration of the exercise of courts' supervisory powers. Under the fourth amendment, all exclusions are justified on at least one of two grounds: deterrence of future illegal or unconstitutional conduct<sup>136</sup> or preservation of the integrity of the judicial system.<sup>137</sup>

Excluding testimony made pursuant to contingent agreements should provide a strong deterrent to prosecutorial overreaching. Once the parameters of prosecutorial discretion are clear, prosecutors will not make contingent arrangements for fear that courts will exclude important testimony.

Excluding testimony made pursuant to a contingent agreement

<sup>131</sup> *McNabb*, 318 U.S. at 340.

<sup>132</sup> *United States v. Hasting*, 461 U.S. 499, 505 (1983) (citations omitted).

<sup>133</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

<sup>134</sup> *See Alcorta v. Texas*, 355 U.S. 28, 30-31 (1957) (conviction reversed because prosecutor knew but did not disclose that witness was testifying falsely); *Mallory v. United States*, 354 U.S. 449 (1957) (conviction reversed because suspect not timely brought before magistrate or warned that he had right to counsel or right to remain silent); *cf. United States v. Librach*, 536 F.2d 1228, 1230 (8th Cir.) (accomplice plea agreement was not contingent upon government satisfaction with testimony and therefore did not require exercise of supervisory powers in excluding testimony), *cert. denied*, 429 U.S. 939 (1976).

<sup>135</sup> *United States v. Brown*, 720 F.2d 1059, 1072-75 (9th Cir. 1983) (prosecutor's reference to witness's polygraph test constituted impermissible vouching of witness's credibility and "'more probabl[y] than not . . . materially affected the verdict[s]," requiring new trial (quoting *United States v. Mouton*, 617 F.2d 1379, 1385 (9th Cir.), *cert. denied*, 449 U.S. 860 (1980))).

<sup>136</sup> *Terry v. Ohio*, 392 U.S. 1, 29 (1968); *Elkins v. United States*, 364 U.S. 206, 217, 222 (1960); *Wolf v. Colorado*, 338 U.S. 25, 31 (1949).

<sup>137</sup> *Mapp v. Ohio*, 367 U.S. 643, 659 (1961); *Elkins*, 364 U.S. at 222-23; *Weeks v. United States*, 232 U.S. 383, 392-93 (1914).

will improve the accuracy and integrity of the fact-finding process. Preserving the integrity of the judicial system requires appropriate limitations upon prosecutorial discretion.<sup>138</sup> Allowing prosecutors to encourage perjury in return for lenient sentences diminishes public respect for the criminal justice system.<sup>139</sup> By enforcing contingent plea bargains, courts sanction the prosecutor's power to persuade an accomplice to disregard his oath of truthfulness in order to obtain penal leniency. This use of the bargaining process by the prosecution perverts the truth-seeking purpose of the judicial system.

Courts also have the power to exclude evidence that creates a substantial danger of undue prejudice.<sup>140</sup> In this context, undue prejudice means a tendency to suggest decision on an improper basis.<sup>141</sup> A judge should weigh the probable effectiveness of a limiting instruction before making the exclusionary decision.<sup>142</sup> Regardless of limiting instructions, however, admittance of evidence made pursuant to reward-induced agreements creates a great risk of unfair prejudice because the jury most likely will give the testimony greater weight than it merits.<sup>143</sup> Even if the judge directs the jury to give

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<sup>138</sup> *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Marion*, 404 U.S. 307 (1971); *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>139</sup> Not only were notorious criminals escaping substantial punishment after long and arduous government efforts to put them behind bars, but substantial harm was being done to the truth-seeking process, which is supposed to be one of the principal aims of the criminal justice system. Convicted criminals were being used to breed other criminal convictions, with *none* of the criminals receiving substantial punishment as long as they could contribute to enlarging the "body count." (The body count here, of course, is at least as misleading as that provided by General William Westmoreland's staff in Vietnam, since the bodies are not really down and out after conviction. They rise from their ashes as federal witnesses.)

Silvergate, *Brief Cases*, Boston Phoenix, Sept. 3, 1985, at 3, col. 1 (criticizing First Circuit's reversal of district court's decision in *Dailey*; see *supra* text accompanying notes 61-75).

<sup>140</sup> Case law explicitly recognizes that a judge has great discretion in controlling the admission of evidence. See, e.g., *United States v. Brown*, 547 F.2d 1264, 1266 (5th Cir. 1977) ("trial court's ruling on relevancy and materiality of evidence will not be disturbed absent a clear showing of an abuse of discretion"). Federal Rule of Evidence 403 codifies this power: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." See also UNIF. R. EVID. 45 ("Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will . . . b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury . . .").

<sup>141</sup> FED. R. EVID. 403 advisory committee's note.

<sup>142</sup> See FED. R. EVID. 105.

<sup>143</sup> See *supra* note 121 and accompanying text.

less weight to certain evidence, these limiting instructions cannot diminish the testimony's initial impression upon the jury.

### 3. *Contingent Agreements and the Bribery of Witnesses*

One bribes a witness to induce him to change his testimony. Although prosecutors may enter into contingent agreements without a corrupt purpose, therefore avoiding the statutory definition of bribery,<sup>144</sup> these agreements induce witnesses to testify in a certain manner regardless of the truth. Like bribed testimony, testimony made under contingent agreements is extremely unreliable.

Congress prohibits the bribery of witnesses and the acceptance of bribes in 18 U.S.C. § 201.<sup>145</sup> A person commits bribery by corruptly giving or promising to give anything of value to a witness in return for favorable testimony. Although prosecutors probably do not arrange contingent plea agreements with corrupt intent, they negotiate those bargains, by definition, with the intent to obtain particular testimony. Because prosecutors already have the ability to obtain truthful testimony through traditional plea bargains, contingent agreements can only serve the purpose of eliciting particular testimony which the prosecutor wants to introduce at trial. The obvious danger of this practice is that the prosecutor ignores the principle that all persons are assumed innocent until proven guilty and instead usurps the jury's role of determining guilt.<sup>146</sup>

The witness's awareness of the prosecutor's wishes influences the testimony of that witness; therefore, the contingent agreement violates the spirit, if not the letter, of the law. Congress drafted 18 U.S.C. § 201 to enhance the veracity of in-court testimony. In contrast, contingent plea agreements reduce the veracity of witnesses

<sup>144</sup> See *infra* note 145.

<sup>145</sup> Bribery of public officials and witnesses

.....  
 (d) Whoever, directly or indirectly, corruptly gives, offers, or promises anything of value to any person, . . . with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court . . . or

(e) Whoever, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value . . . in return for being influenced in his testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding . . .

Shall be fined not more than \$20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, . . .

18 U.S.C. § 201(d), (e) (1982).

<sup>146</sup> See *Franklin v. State*, 94 Nev. 220, 223 n.2, 577 P.2d 860, 861 n.2 (1978) ("[T]his case demonstrates the potential for injustice which is inherent in selling an admitted felon leniency, in order to buy testimony against another person whom the Constitution presumes innocent, but who nonetheless has been tried and found guilty in the prosecutor's mind.").

by encouraging perjury. The government hinders the principal truth-seeking aim of the statute by using contingent plea bargaining as a prosecutorial tool.

The American Bar Association Standards address the bribery of witnesses by stating that it is unprofessional conduct for an attorney to compensate a witness, other than an expert, for giving testimony.<sup>147</sup> The Code of Professional Responsibility specifically prohibits contingent payments:

A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case.<sup>148</sup>

Contingent plea bargains are, in effect, bribes passing from the government to accomplices in return for specific testimony under oath. Defendants lack comparable leverage in obtaining favorable witnesses and are therefore at a strong disadvantage at the trial's outset. Judicial tolerance of these agreements obstructs legislative intent as codified in 18 U.S.C. § 201 and inhibits the search for truth.

#### CONCLUSION

Courts must prohibit contingent agreements between accomplices and prosecutors. Plea bargains conditioned upon indictment, conviction, or prosecutorial satisfaction with testimony encourage perjury. The admission of such unreliable testimony violates the due process right of the defendant to a fair trial and cannot be justified on the grounds of historical acceptance or administrative efficiency. Furthermore, judicial refusal to strike down contingent agreements pursuant to the court's inherent supervisory powers results in the admission of prejudicial evidence and allows the prosecutor to make a mockery of the truth-seeking function of the criminal justice system.

*Yvette A. Beeman*

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<sup>147</sup> The A.B.A. Standards state: "(a) It is unprofessional conduct to compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse an ordinary witness for the reasonable expenses of attendance upon court . . ." A.B.A., *supra* note 8, § 3.2(a).

<sup>148</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(C) (1980).