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# Bargaining for Testimony: Bias of Witnesses Who Testify in Exchange for Leniency

Spencer Martinez

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# BARGAINING FOR TESTIMONY: BIAS OF WITNESSES WHO TESTIFY IN EXCHANGE FOR LENIENCY

SPENCER MARTINEZ<sup>1</sup>

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## I. INTRODUCTION

In 1994, Carmine Avellino, a member of the Lucchese Crime Family, was indicted by a federal grand jury and charged with eight offenses, including racketeering and murder.<sup>2</sup> The main witness against Avellino was Alphonso D'Arco, a former boss of the Lucchese Family who had entered into a cooperation agreement with the government in 1991.<sup>3</sup> D'Arco had testified at several trials and before at least one grand jury.<sup>4</sup> His testimony proved pivotal in the 1992 trial of Vittorio Amuso, a former head of the Lucchese family,<sup>5</sup> and would eventually prove important in the 1997 trial of Vincent Gigante, the boss of the larger and more powerful Genovese group.<sup>6</sup> Law enforcement officials, and the press, reveled in D'Arco's exposure of the notorious crime ring and the resulting convictions of many of its officers and associates. Significantly less attention was paid to the way D'Arco's testimony was obtained.

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<sup>1</sup>J.D., University of California, Hastings College of the Law, 1999; B.S., University of California, Davis, 1996. This note is dedicated to my parents and my brothers. Thank you for your support and encouragement.

<sup>2</sup>United States v. Avellino, 136 F.3d 249, 251 (2d Cir. 1998).

<sup>3</sup>*Id.*

<sup>4</sup>*Id.* at 251-52.

<sup>5</sup>*Life Term for Boss of Lucchese Family*, N.Y. TIMES, Oct. 10, 1992, at A4.

<sup>6</sup>Joseph P. Fried, *Ex-Mobster Testifies That Gigante Backed a Plot to Kill Gotti*, N.Y. TIMES, July 16, 1997, at B1.

D'Arco became a federal witness after Amuso stripped him of his authority, and he became afraid that the Lucchese family was plotting to kill him.<sup>7</sup> By cooperating, he obtained immunity from prosecution for ten of his relatives and in-laws.<sup>8</sup> D'Arco himself was allowed to plead guilty to RICO conspiracy and was promised a sentence of no more than twenty years, despite his leadership of a Cosa Nostra crime family and his array of acknowledged offenses.<sup>9</sup> The government also reserved the right to adjust his sentence downward if his cooperation proved "satisfactory."<sup>10</sup> The prosecution of Avellino and many of his cohorts was successful, but even the court had to note D'Arco's powerful incentive to lie when presented with such a package.<sup>11</sup>

In spite of advances in scientific and statistical evidence, the success of a criminal prosecution continues to hinge primarily on witness testimony. Such evidence is difficult to come by, especially in the case of more sophisticated criminals or defendants who commit crimes through syndicates that insulate them from the relevant *actus reus*. Therefore, prosecutors must often look to other criminals for case-building testimony.

Eliciting testimony from such witnesses often requires that a "deal" be struck, whereby the government promises the guilty witness some degree of leniency for his cooperation. "Bargaining" for witness testimony in this fashion has long been recognized as a legitimate, necessary practice.<sup>12</sup> However, the ramifications of such agreements have always caused concern for those involved with defendants' rights, as the cooperating witness has a strong incentive to commit perjury to reap the full benefit of the "contract." This is especially true now that agreements are becoming more liberal with respect to what the government may offer the cooperating witness, what the witness is obligated to do in return, and how the witness is to suffer in the event he fails to perform or fails to secure the desired effect. Clearly the most important safeguard against false testimony is the defendant's right to cross-examine the cooperating witness as to bias. The defendant's discretion to probe into cooperation agreements, however, is not on par with the government's increasing discretion in what it may offer a criminal witness in exchange for his testimony.

This note explores the risk that a criminal witness will lie on the stand when he testifies pursuant to a cooperation agreement. Section II is a history of cooperation agreements and how the permissible scope of such agreements has been curbed in the interests of defendants' rights. Section III examines the practice as it exists

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<sup>7</sup>Michael Marriott, *Mob Informer Questioned on Life of Lies*, N.Y. TIMES, May 30, 1992, at A4.

<sup>8</sup>*Avellino*, 136 F.3d at 259.

<sup>9</sup>*Id.* at 251, 259.

<sup>10</sup>*Id.* at 251.

<sup>11</sup>*Id.* at 259.

<sup>12</sup>*See, e.g.,* *Ingram v. Prescott*, 149 So. 369, 370 (Fla. 1933) ("From the earliest times, it has been found necessary, for the detection and punishment of crime, for the state to resort to the criminals themselves for testimony with which to convict their confederates in crime. . . . Therefore, on the ground of public policy, it has been uniformly held that a state may contract with a criminal for his exemption from prosecution if he shall honestly and fairly make a full disclosure of the crime, whether the party testified against is convicted, or not.").

today, and how, in spite of the risk of perjury, state and federal prosecutors are being given increasing discretion in drafting cooperation agreements. In section IV, the “safeguards” available to the defendant which test the veracity of allegedly-biased testimony are discussed. The conclusion is that the methods available to defendants for scrutinizing allegedly-biased testimony do not offset the risk of perjury created by government cooperation agreements, but the veracity of that testimony can be more sufficiently scrutinized through broader cross-examination.

## II. HISTORY OF COOPERATION AGREEMENTS

In early common law, an accomplice’s motive to lie in a criminal trial was extreme, as his fate hinged on the outcome of the defendant’s trial. Prior to the 18<sup>th</sup> century, when a person indicted for a capital offense was arraigned, he had the option of either confessing before he pleaded, and appealing to the court’s mercy, or accusing another of being an accomplice in the crime in order to obtain a pardon.<sup>13</sup> Under the second option, “approvement,” the accusing witness was entitled to a pardon as a matter of law if his testimony resulted in conviction of the accomplice.<sup>14</sup> If the alleged accomplice was acquitted, however, the witness himself was executed.<sup>15</sup> Another practice in use during the age of approvement permitted an accused to receive *equitable* right to a pardon by fully confessing his crime and revealing his accomplices.<sup>16</sup> However, the criminal who stepped forward could not be the principal actor, and his testimony had to result in conviction.<sup>17</sup>

The practice of trading pardons for convictions evolved into a system where pardons were granted in exchange for complete, truthful testimony, regardless of the trial’s outcome.<sup>18</sup> Testimony so obtained was reportedly initially challenged in seventeenth century treason cases, but courts nonetheless deemed it competent, though of diminished credibility.<sup>19</sup> This view was incorporated into standard

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<sup>13</sup>The Whiskey Cases, 99 U.S. 594, 599 (1878).

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* The doctrine of approvement had met with severe criticism prior to its obsolescence. Chief Justice Hale wrote, “The truth is that more mischief hath come to good men, by these kinds of approvements by false accusations of desperate villains, than benefit to the public by the discovery and convicting of real offenders.” Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, n.19 (1992) (quoting MATTHEW HALE, PLEAS OF THE CROWN 226 (1678)).

<sup>16</sup>*The Whiskey Cases*, 99 U.S. at 600 (“Where the accomplice has made a full and fair confession of the whole truth and is admitted as a witness for the crown, the practice is, if he act fairly and openly and discover the whole truth, though he is not entitled of right to a pardon, yet the usage, the lenity, and the practice of the court is to stop the prosecution against the accomplice, the understanding being that he has an equitable title to a recommendation for the king’s mercy.”).

<sup>17</sup>Hughes, *supra* note 15, at 7-8

<sup>18</sup>Neil B. Eisenstadt, *Let’s Make a Deal: A Look at United States v. Dailey and Prosecutor-Witness Cooperation Agreements*, 67 B.U. L. REV. 749, 761 (1987).

<sup>19</sup>*Id.*

treatises on criminal law, evidence, and procedure, all of which helped shape modern American jurisprudence.<sup>20</sup>

### III. THE MOTIVE TO LIE

Significantly, the Supreme Court in *The Whiskey Cases* articulated no requirement of judicial approval for cooperation agreements. In fact, the Court explicitly recognized the prosecutor's right to unilaterally enter into such agreements as he saw fit so that he might efficiently conduct any given criminal prosecution.<sup>21</sup> Modern cases cite the Separation of Powers doctrine in reaffirming this policy.<sup>22</sup> Thus, the courts may intervene when a cooperation agreement compromises a defendant's Constitutional rights or when approval is needed for a sentencing arrangement. Otherwise, the prosecutor has wide latitude in who he may bargain with and what terms he may offer.<sup>23</sup>

#### A. Discretion of the Prosecutor in Selecting His Cooperating Witnesses

The prosecutor has plenary authority to choose which defendants will be charged and which will be offered a "deal" in exchange for cooperation.<sup>24</sup> As a protector of the public interest, the prosecutor is bound to neutralize the largest number of units possible of dangerousness and culpability, expressed in terms of criminal behavior.<sup>25</sup> When the case against a group of defendants is flimsy, he must engage in a utilitarian calculation whereby the relative dangerousness and culpability of each defendant is evaluated.<sup>26</sup> He then may offer favorable treatment to certain suspects in exchange for testimony against their more dangerous cohorts.<sup>27</sup> Except as hereafter provided,

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<sup>20</sup>*Id.* at 762.

<sup>21</sup>*The Whiskey Cases*, 99 U.S. at 603 ("Consequently it is regarded as the province of the public prosecutor and not of the court to determine whether or not an accomplice, who is willing to criminate himself and his associates in guilt, shall be called and examined for the State. Of all others, the prosecutor is best qualified to determine that question, and he alone is supposed to know what other evidence can be adduced to prove the criminal charge.").

<sup>22</sup>*See, e.g.*, *United States v. Greene*, 697 F.2d 1229, 1235 (5th Cir. 1983), *cert. denied*, 463 U.S. 1210 (1983) (prosecutorial discretion grounded in separation of powers doctrine). *See also* *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . .").

<sup>23</sup>*Eisenstadt*, *supra* note 18, at 764-65.

<sup>24</sup>*Hughes*, *supra* note 15, at 12.

<sup>25</sup>*Id.* at 14.

<sup>26</sup>*Id.* at 15.

<sup>27</sup>The United States Department of Justice recognizes the "utilitarian" approach as a legitimate practice. PRINCIPLES OF FEDERAL PROSECUTION, Part F (1980), provides, in relevant part:

1. Except as hereafter provided, the attorney for the government may, with supervisory approval, enter into a non-prosecution agreement in exchange for a person's cooperation when, in his judgment, the person's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.

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Although commentators view the utilitarian approach as the correct one,<sup>28</sup> the prosecutor's degree of control is a cause for concern because he may grant leniency to a witness with no compunction about lying. For example, in 1992 the federal government entered into a plea agreement with underboss Salvatore "Sammy the Bull" Gravano for testimony against John Gotti and dozens of other Gambino crime family members.<sup>29</sup> Gotti was convicted of murder and racketeering and sentenced to life in prison without the possibility of parole.<sup>30</sup> By contrast, Gravano spent less than three years in prison, despite his participation in nineteen murders and countless other crimes.<sup>31</sup> Gravano claimed he cooperated with the government to "turn [his] life around," and "[get] away from what [he] was doing."<sup>32</sup> Even assuming Gravano's proclamations were true,<sup>33</sup> they hardly made his testimony inherently trustworthy.

### B. The Nature of Cooperation Agreements

Just as the prosecutor has authority to select his cooperating witnesses, he also has broad discretion in what he may offer for their testimony.<sup>34</sup> The Gravano example clearly demonstrates how much criminals facing harsh penalties can gain if given the opportunity to cooperate. Thus, once the prosecutor enters into a cooperation agreement with a witness, that witness has a strong incentive to ensure that, at least in the eyes of the prosecutor, he has performed his end of the bargain. The witness consequently has a strong motive to proffer "valuable" evidence, even if none exists.

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<sup>28</sup>See, e.g., Hughes, *supra* note 15, at 15 ("This utilitarian approach is surely the correct one.").

<sup>29</sup>Arnold H. Lubasch, *Gravano Ends Testimony After 9 Exhaustive Days*, N.Y. TIMES, Mar. 14, 1992, at A5.

<sup>30</sup>PETER MAAS, UNDERBOSS: SAMMY THE BULL GRAVANO'S STORY OF LIFE IN THE MAFIA 296 (1997).

<sup>31</sup>Lubasch, *supra* note 29, at A5.

<sup>32</sup>*Id.*

<sup>33</sup>John Gotti's defense attorneys portrayed Gravano as a career criminal who would do and say anything to avoid spending the rest of his life in prison. *Id.* Further, in his biography, Gravano recalls deciding to testify after his brother-in-law visited him in prison, told him he would "go down on this case," and suggested that he cooperate. MAAS, *supra* note 30, at 285.

<sup>34</sup>Eisenstadt, *supra* note 18, at 763.

## 1. The Prosecutor's Reward to the Witness

Prosecutors have many methods at their disposal for inducing a witness to testify. In *United States v. Smentek*,<sup>35</sup> the government promised to bring the cooperation of the principal witnesses, convicted drug dealers, to the attention of the sentencing judge.<sup>36</sup> The key witness in *Giglio v. United States*,<sup>37</sup> a co-conspirator in an operation to pass forged money orders, testified in exchange for immunity from prosecution. In *Campbell v. Reed*,<sup>38</sup> the cooperation agreement set forth that, in exchange for the accomplice-witness' testimony against the defendant, several charges against him would be dismissed and the prosecution would recommend a sentence of only two years.<sup>39</sup> In *Sanders v. United States*,<sup>40</sup> the key witness, an informer for the Iowa Division of Narcotic & Drug Enforcement, was regularly given subsistence payments. The court validated the payments, but reversed the defendant's conviction on three counts only because the arrangement was not brought out at trial.<sup>41</sup>

A criminal defendant facing extensive jail time naturally has a strong incentive to seek ways to limit or escape punishment. The government has the power to implore the sentencing tribunal for leniency, limit terms of imprisonment, drop charges or, in limited cases, make monetary payments in exchange for cooperation. Hence, to a certain degree, the government bribes suspects from a position of considerable power, using the threat of incarceration as a bargaining chip. A criminal defendant who engages in like behavior is guilty of a felony.<sup>42</sup>

In *United States v. Singleton*,<sup>43</sup> the defense raised this argument to challenge the admissibility of a prosecution witness' testimony. The defendant, Sonya Singleton, alleged the government violated section 201(c)(2) of Title 18 of the United States

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<sup>35</sup>*United States v. Smentek*, No. 81 CR 664-10, 90 C2079, 90 C2290, 1991 WL 101665 at \*1 (N.D. Ill. June 4, 1991).

<sup>36</sup>*See also United States v. Araujo*, 539 F.2d 287 (2d Cir. 1976) (co-conspirators in money-laundering operation testified against defendant in exchange for the government's promise to bring the witness' cooperation to the attention of the sentencing judge).

<sup>37</sup>405 U.S. 150 (1972).

<sup>38</sup>594 F.2d 4 (4th Cir. 1979).

<sup>39</sup>Ten separate charges were pending against the defendant at the time of his trial: two counts of second-degree burglary, three counts of felonious breaking or entering, and five counts of felonious larceny. Upon his conviction, he received a sentence of 43 years. *Id.* at 6, n.1.

<sup>40</sup>541 F.2d 190 (8th Cir. 1976).

<sup>41</sup>*Id.* at 192, 194.

<sup>42</sup>18 U.S.C. § 1512(b)(1) provides, in relevant part: "Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to influence the testimony of any person in an official proceeding . . . shall be fined not more than \$250,000 or imprisoned not more than ten years, or both." 18 U.S.C. § 1512(b)(1) (1994).

<sup>43</sup>144 F.3d 1343 (10th Cir. 1998).

Code by promising leniency to a witness in return for his testimony against her.<sup>44</sup> Section 201(c)(2) provides:

Whoever . . . directly or indirectly gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, . . . authorized by the laws of the United States to hear evidence or take testimony . . . shall be fined under this title or imprisoned for not more than two years, or both.<sup>45</sup>

In exchange for his testimony against Singleton, the government had promised Napoleon Douglas, a co-conspirator, (1) not to prosecute him for certain crimes then under investigation; (2) to inform the district court of the nature and extent of his cooperation prior to his sentencing; and (3) to advise the Mississippi parole board of the nature and extent of his cooperation.<sup>46</sup> Singleton appealed her conviction, asserting that the government had promised Douglas “something of value”—leniency—in exchange for his testimony, in violation of section 201(c)(2).<sup>47</sup>

The Court of Appeals for the Tenth Circuit agreed.<sup>48</sup> The court reasoned that “anything of value” need not be limited to items reducible to monetary or tangible value, and that “it is difficult to imagine anything more valuable than personal physical freedom.”<sup>49</sup> The court continued: “Although the information promised by the government would certainly not guarantee Mr. Douglas’s release, it was an invaluable step toward that end.”<sup>50</sup> The government’s intervention on Douglas’s behalf was therefore of great value, and its promise not to prosecute him for certain offenses was even more valuable: “Besides guaranteed physical freedom he was guaranteed freedom from the burden of defending himself from the stigma of prosecution and conviction as well.”<sup>51</sup> The government’s conduct was therefore “covered by the plain language and meaning of section 201(c)(2).”<sup>52</sup>

The Tenth Circuit vacated the *Singleton* opinion nine days later and granted rehearing en banc.<sup>53</sup> Further, other circuits have almost uniformly rejected the Tenth Circuit’s *Singleton* ruling or, in the alternative, deemed it uncontrolling or legally

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<sup>44</sup>*Id.* at 1344.

<sup>45</sup>18 U.S.C. § 201(c)(2) (1994).

<sup>46</sup>*Singleton*, 144 F.3d at 1344.

<sup>47</sup>*Id.*

<sup>48</sup>*Id.* at 1350.

<sup>49</sup>*Id.*

<sup>50</sup>*Id.*

<sup>51</sup>*Singleton*, 144 F.3d at 1350. The court also noted that Douglas clearly subjectively valued the government’s promises, as they were all he bargained for in return for his testimony and guilty plea. The court regarded his testimony that he wanted the government’s assistance to help “everything work out for [him]” as proof to that effect. *Id.* at 1350-1.

<sup>52</sup>*Id.* at 1351.

<sup>53</sup>*Id.* at 1360.

distinguishable.<sup>54</sup> Prosecutors therefore continue to retain wide latitude in what inducements they may offer a criminal witness in exchange for their testimony. Section 201(c)(2), while binding against criminal defendants, does not inhibit prosecutors' long-standing right to "bribe" a witness for cooperation.

## 2. The Witness' Obligations

In denouncing cooperation agreements as unduly prejudicial to the defendant, the *Singleton* court focused on the consideration the cooperating witness was to receive in exchange for his testimony: the prosecution's specific promises to drop charges and to speak on behalf of Douglas violated 18 U.S.C. § 201(c)(2) because such promises comprised "anything of value." The court did not address the fact that, to a certain degree, Douglas' reward was contingent on the "quality" of his testimony.<sup>55</sup> Yet it is the contingent nature of cooperation agreements that arguably gives the criminal witness the greatest incentive to lie.<sup>56</sup>

Cooperation agreements are, in effect, contracts for services that are executory on both sides.<sup>57</sup> Pursuant to some agreements, the witness' obligation to the state lasts several months, or even years.<sup>58</sup> The prosecution must therefore retain the power to enforce the agreement for as long as necessary to assure that it ultimately receives the benefit of its bargain.

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<sup>54</sup>*See, e.g.*, *United States v. Mejia*, No. 98 CR. 4 (JGK), 1998 WL 598098 (S.D.N.Y. Sept. 8, 1998) (federal statute does not apply to the Government unless the Government is expressly included within its scope; because §201(c)(2) does not expressly include the Government within its scope, it cannot be applied to the Government); *United States v. Allen*, No. 97-CV-4698, 1998 WL 575264 (E.D. Pa. Sept. 2, 1998) ("Singleton is not the law in this Circuit and is no longer the law in the Tenth Circuit"); *United States v. Reid*, No. 3:98CR64, 1998 WL 481459 (E.D. Va. July 28, 1998) (Section 201(c)(2) does not apply to the U.S. Attorney); *United States v. Arana*, No. 95-CR-80272, 1998 WL 420673 (E.D. Mich. July 24, 1998) (Application of Section 201(c)(2) to the government would create an absurdity); *United States v. McGuire*, No. 98-40047-01 DES, 1998 WL 564234 (D. Kan. Aug. 19, 1998) (*Singleton* opinion not controlling). *But see* *United States v. Lowery, Jr.*, 15 F. Supp.2d 1348 (S.D. Fl. 1998) ("Certainly, if testimony purchased by a defendant is tainted, testimony purchased by the Executive Branch is no less tainted. The most logical construction of Section 201(c)(2), therefore, is one that prohibits all agreements for testimony, irrespective of who enters into them.").

<sup>55</sup>In exchange for Douglas' testimony, the government promised to advise the sentencing court and the Mississippi parole board "of the nature and extent of the cooperation provided." *Singleton*, 144 F.3d at 1344. Clearly, the prosecution's communications to these agencies were determined in part by how "complete" Douglas' testimony was and how "useful" against the defendant that testimony proved to be.

<sup>56</sup>In *United States v. Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980), the court declared it "obvious that promises of immunity or leniency premised on cooperation in a particular case may provide a strong inducement to falsify in that case."

<sup>57</sup>Hughes, *supra* note 15, at 2.

<sup>58</sup>*See, e.g.*, *United States v. Dailey*, 759 F.2d 192 (1st Cir. 1985) (Key witnesses against defendants entered into plea agreement in March of 1984. Defendants were not tried until May and June, and government anticipated a number of other prosecutions in a number of jurisdictions extending over a number of years); *United States v. Stantini*, 85 F.3d 9 (2d Cir. 1996) (Murder suspects indicted in April, 1993 for murder. Key witness entered into cooperation agreement with government in November, 1991.).

Courts are taking an increasingly liberal view as to what exactly that “benefit” may be. Some courts have held that the government can require no more than “full and truthful testimony” before it is obliged to perform.<sup>59</sup> Most courts, however, permit the extent of the government’s favors to be determined, at least in part, by the quality or utility of the witness’ testimony from the government’s perspective.<sup>60</sup> Clauses to that effect may even be written into the relevant cooperation agreement. Thus, the cooperating witness may be confronted with a “sliding scale” by which he secures an increasing degree of leniency in exchange for increasingly incriminating testimony. Under such circumstances, the pressure on the witness to please is extreme and there is a plausible risk that the witness will commit perjury to do it.

In *United States v. Dailey*, the defendant sought to exclude the testimony of three witnesses for precisely this reason.<sup>61</sup> Dailey was charged with organizing and managing a continuing criminal enterprise to import and distribute marijuana.<sup>62</sup> The key witnesses against him were three operators of a smaller drug enterprise who had previously been arrested and indicted.<sup>63</sup> In March of 1984, witnesses Frappier and Minnig entered into plea agreements which made explicit the relationship between the effectiveness of their testimony and the sentences they would ultimately receive.<sup>64</sup> Dailey contended that the contingent nature of the agreement had “provided such an inducement for the accomplices to testify falsely that their testimony should be stricken from the record.”<sup>65</sup>

In the trial of Dailey’s codefendant, Salvatore Caruana, the district court denied an identical motion to strike, holding that the standard procedural safeguards—having the agreement read to the jury, allowing defense counsel to cross-examine the witnesses with respect to the agreements, and instructing the jury to scrutinize the

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<sup>59</sup>*See, e.g.*, *United States v. Winter*, 663 F.2d 1120, 1133 (1st Cir. 1981) (testimony might be tainted if leniency is dependent on evaluation by the government).

<sup>60</sup>*See, e.g.*, *United States v. Kimble*, 719 F.2d 1253 (5th Cir. 1983) (no due process violation found where witness’ sentence recommendation contingent on the acceptance of the adequacy of his cooperation); *United States v. Edwards*, 549 F.2d 362 (5th Cir. 1977) (testimony of informant permitted even though his reward was contingent on final outcome of his undercover work); *United States v. Valle-Ferrer*, 739 F.2d 545 (11th Cir. 1984) (informant’s anticipated receipt of \$1,000 if testimony resulted in conviction did not render him incompetent to testify).

<sup>61</sup>*Dailey*, 759 F.2d at 193.

<sup>62</sup>*Id.*

<sup>63</sup>*Id.*

<sup>64</sup>*Id.* at 194. (Paragraph 5, the relevant provision of the agreement, provided: “The defendant agrees to fully cooperate, as defined in Paragraph 2. If, at the time of sentencing on the Maine indictment, the defendant has fully cooperated with the United States, . . . the Government will recommend a specific term of imprisonment which does not exceed twenty (20) years and, depending principally upon the value to the Government of the defendant’s cooperation, the Government, in its sole discretion, may recommend a sentence of ten (10) years; . . . . If, at the time of sentencing on the Maine indictment, . . . the Court finds by a preponderance of the evidence that the defendant has not fully cooperated . . . then the court shall sentence the defendant to a term of imprisonment of thirty-five (35) years.”)

<sup>65</sup>*Id.*

accomplices' testimony with care—were sufficient to protect the defendant's due process rights.<sup>66</sup> The district court in *Dailey* reached the opposite conclusion and excluded the witness testimony, but the Court of Appeals for the First Circuit reversed, citing three reasons.<sup>67</sup> First, the terms “value” and “benefit” in the agreement were ambiguous, distinguishing this case from that relied upon by the defense in its argument for exclusion.<sup>68</sup> Second, the government had a valid interest in drafting a plea bargain certain enough to assure the witnesses' compliance, but contingent enough to persuade the witnesses to continue cooperating “until the fund of knowledge they held had been completely tapped and utilized in the investigation and prosecution of their alleged confederates.”<sup>69</sup> Finally, the court felt the provision requiring the imposition of a thirty-five year sentence for failure to give “full cooperation” adequately protected the defendant against perjury.<sup>70</sup>

The *Dailey* court then reviewed a number of cases in which key testimony had been obtained through contingent plea agreements.<sup>71</sup> In all the cases relied upon, the testimony was admitted despite the acknowledged risk of perjury created by the agreement's terms.<sup>72</sup> The court in *United States v. Kimble* explained:

The jury had both the power and duty to determine whether [the accomplice] was to be believed in whole or in part. The jury obviously believed him, at least to the extent that it returned the guilty verdicts on two counts. *The plea agreement, prior statements and prior criminal record all went to the weight of [the accomplice's] testimony, not its admissibility.*<sup>73</sup>

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<sup>66</sup>*Dailey*, 759 F.2d at 194.

<sup>67</sup>*Id.* at 194, 200.

<sup>68</sup>*Dailey* relied on *United States v. Waterman*, 732 F.2d 1527 (8th Cir. 1984), *vacated en banc, id.* at 1533, to support his motion to strike. In *Waterman*, the plea agreement included a government promise to recommend a two-year reduction in the accomplice's sentence if his “truthful testimony led to further indictments. . . .” *Id.* at 1530. The government's requirement of this specific occurrence was held to be a violation of due process. *Id.* at 1531.

<sup>69</sup>*Dailey*, 759 F.2d at 197.

<sup>70</sup>*Id.* The court noted that “full cooperation” was defined in the agreement as the giving of “complete and honest testimony.” The agreement provided that failure to give “full cooperation” would result in a sentence of 35 years. “Lying, therefore, appears to carry with it a risk of being caught in the lie and consequently receiving 35 years for failing to give honest testimony, rather than ten years for providing valuable information.” *Id.*

<sup>71</sup>*Id.* at 198-200.

<sup>72</sup>Among the many cases listed by the court were: *United States v. Insana*, 423 F.2d 1165, 1168-69 (2d Cir. 1970) (court rejected due process challenge to the admission of testimony from two accomplices who had yet to be sentenced); *United States v. Borman*, 437 F.2d 44, 45-46 (2d Cir. 1971) (trial court did not err by allowing testimony of unsentenced accomplice who had pled guilty, where jury was properly cautioned as to the witness' credibility); *United States v. Kimble*, 719 F.2d 1253 (5th Cir. 1983) (testimony of accomplice permitted where cooperation agreement provided for a sentence of 20 years if his cooperation was considered adequate by the government). *See also supra* note 61.

<sup>73</sup>*Kimble*, 719 F.2d at 1257 (emphasis added).

The *Dailey* court summarily applied the same reasoning and deemed the testimony admissible. The court acknowledged the risk of perjury inherent in the contingent agreement, but deemed it no greater than it was in *Kimble* or other like cases.<sup>74</sup> Finally, the court concluded that the “traditional safeguards” against perjury—reading the agreement to the jury, cross-examination of the cooperating witness, and cautionary jury instructions from the court regarding the testimony of accomplices—were adequate to protect Dailey’s rights.<sup>75</sup>

The assurances against perjury cited in *Dailey* and *Kimble* are clearly overrated. Criminal defendants enter into cooperation agreements to reduce or avoid the penalties for their crimes. When the penalty at issue is jail time, the witness testifies to preserve his personal, physical freedom—essentially, his life.<sup>76</sup> Courts have repeatedly acknowledged the witness’ strong motive to lie under such circumstances.<sup>77</sup> On the other hand, the witness’ testimony does not seem to be comparably swayed toward truthfulness by the threat of being caught in a lie and charged with perjury.<sup>78</sup> Therefore, the efficacy of protection from false testimony apparently hinges on the *Dailey* “traditional safeguards,” and particularly, on the defendant’s right to cross-examination. However, while the government’s discretion in drafting cooperation agreements has vastly expanded, the methods a defendant may use to expose a witness’ possible biases have not kept pace.

#### IV. FLUSHING OUT FALSE TESTIMONY

A witness who testifies pursuant to a cooperation agreement is furnished with incentives to lie beyond his personal biases and reservations. When the government either creates or sharply enhances its own witness’ motivation to lie, adversarial fairness requires special safeguards to protect defendants. *Dailey* listed the “traditional safeguards” as follows:

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<sup>74</sup>*Dailey*, 759 F.2d at 200.

<sup>75</sup>*Id.* at 200.

<sup>76</sup>*See Singleton*, 144 F.3d at 1350 (The obvious purpose of the government’s proposed actions was to reduce his jail time, and it is difficult to imagine anything more valuable than personal physical freedom.).

<sup>77</sup>*See, e.g., United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (“It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence . . .”), *cert. denied*, 484 U.S. 1026 (1988); *United States v. Schwartz*, 785 F.2d 673, 680 (9th Cir. 1986) (“A violation of trust which is influenced by the offer of an intangible service is no less damaging . . . than if the influence was in the form of a cash kickback.”); *United States v. Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980) (“We think it obvious that promises of immunity or leniency premised on cooperation in a particular case may provide a strong inducement to falsify in that case.”).

<sup>78</sup>President Clinton’s false statements in *Jones v. Clinton*, 858 F. Supp. 902 (E.D. Ark. 1994), regarding his sexual relationship with Monica Lewinsky, indicate that the threat of a perjury charge is not sufficient to ensure truthful testimony when the witness knows the truth will condemn him. Furthermore, for the key witness in *United States v. Gambino*, 59 F.3d 353 (2d Cir. 1995) and *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993), the penalty for perjury was clearly insignificant compared to the penalties for the key witness, a former mafia underboss, sought to avoid by testifying.

The agreements should be read to the jury and made available during deliberations; defense counsel may cross-examine the accomplices at length about the agreements; and the jury should be given the standard cautionary instruction concerning the testimony of accomplices and a special cautionary instruction concerning the nature of each accomplice's contingent agreement and the risk it creates, particularly in instances where the accomplice's testimony cannot be corroborated.<sup>79</sup>

The court in *Dailey* considered these measures sufficient to protect the defendant in that case. However, defense attorneys do not have as much discretion in the application of such measures as prosecutors have in drafting cooperation agreements.

#### A. *Discovery of the Cooperation Agreement*

As a matter of due process, the prosecution may be compelled to disclose any exculpatory information to the defense, including the existence of witness cooperation agreements.<sup>80</sup> Defense attorneys request the details of such agreements, and the cooperating witnesses' criminal records, as a regular part of preparation.<sup>81</sup> Federal prosecutors generally disclose such agreements even absent a specific request.<sup>82</sup>

The Supreme Court, however, eroded the *Brady* principle in *United States v. Bagley*.<sup>83</sup> In 1977, Bagley was indicted on fifteen charges of narcotics and firearms violations. Before trial, defense counsel filed a discovery motion requesting, among other things, "[t]he names and addresses of witnesses that the government intends to call at trial, the prior criminal records of witnesses, and any deals, promises or inducements made to witnesses in exchange for their testimony."<sup>84</sup>

In response, the government disclosed a series of affidavits signed by its two principle witnesses, but did not disclose that any deals or inducements had been made.<sup>85</sup> After Bagley's conviction, however, he discovered copies of ATF contracts, signed by the key witnesses, stating that the government would pay the witnesses commensurate with the information furnished.<sup>86</sup>

The Supreme Court upheld Bagley's conviction, reasoning:

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<sup>79</sup>*Dailey*, 759 F.2d at 200.

<sup>80</sup>*Brady v. Maryland*, 383 U.S. 83 (1963).

<sup>81</sup>*Eisenstadt*, *supra* note 18, at 29.

<sup>82</sup>*Id.* at 65, n.115.

<sup>83</sup>473 U.S. 667 (1985).

<sup>84</sup>*Id.* at 669-70.

<sup>85</sup>*Id.* at 670.

<sup>86</sup>*Id.* at 671.

The printed portion of the forms stated that the vendor "will provide" information to the ATF and that "upon receipt of such information by the Regional Director, Bureau of Alcohol, Tobacco, and Firearms, or his representative, and upon the accomplishment of the objective sought to be obtained by the use of such information to the satisfaction of said Regional Director, the United States will pay to said vendor a sum commensurate with the services and information rendered."

The holding in *Brady v. Maryland* requires disclosure only of evidence that is both favorable to the accused and material either to guilt or punishment. A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.<sup>87</sup>

Reversal was therefore not warranted because “the disclosure would have had no effect upon [the district court’s] finding that [Bagley] was guilty of the offenses for which he was convicted.”<sup>88</sup>

Commentators have attacked *Bagley* as indefensible in light of the specific requirements of the Sixth Amendment’s confrontation clause.<sup>89</sup> Even if the ruling is constitutionally sound, it grants the prosecution a clear advantage over the defense: the government may “induce a witness to lie, fail to disclose the inducements, and then escape reversal on the grounds that disclosure would not have produced a different result.”<sup>90</sup> The defendant may therefore be deprived of this opportunity to challenge the veracity of the testimony.

### B. Cautionary Instructions to the Jury

When a witness testifies pursuant to a cooperation agreement, the court must inform the jury of the exact nature of the agreement and instruct the jury to weigh the accomplice’s testimony with care.<sup>91</sup> In most instances, the instruction represents “no more than a commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity.”<sup>92</sup> Moreover, the instruction must be worded in a way that conforms with the burden of proof at trial.<sup>93</sup>

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<sup>87</sup>*Id.* at 674-75.

<sup>88</sup>*Id.* at 673.

<sup>89</sup>*See, e.g., Eisenstadt, supra* note 18, at 29 (“Confrontation, the right to the effective assistance of counsel in pursuing confrontation, and independent general due process considerations demand that in all cases of cooperation the government make full pretrial disclosure to the defense.”).

<sup>90</sup>*Id.*

<sup>91</sup>*United States v. Insana*, 423 F.2d 1165, 1169 (2d Cir. 1970) (“What is important in this situation is that . . . the judge instruct the jury that in weighing the testimony of such witnesses they give adequate attention to the motives which may underlie such testimony.”); *United States v. Dailey*, 759 F.2d 192, 200 (1st Cir. 1985) (“[T]he jury should be given the standard cautionary instruction concerning the testimony of accomplices and a special cautionary instruction concerning the nature of each accomplice’s contingent agreement and the risk that it creates . . .”).

<sup>92</sup>*Cool v. United States*, 409 U.S. 100, 103 (1972).

<sup>93</sup>The instruction in *United States v. Dailey* provided, in pertinent part: “Frappier, Minnig, [and] Tindall . . . are accomplices to the events about which they testified. And the testimony of an accomplice must always be scrutinized by a jury with great care and great caution. . . . And you should not convict a defendant on the unsupported testimony of an accomplice unless you believe *beyond a reasonable doubt* that the accomplice is telling the truth.” *Dailey*, 759 F.2d at 200 (emphasis added). The instruction in *Cool v. United States*, in which the criminal witness testified to exonerate the defendant, read: “If the testimony carries conviction and you are convinced it is true *beyond a reasonable doubt*, the jury should give it the same effect as

The benefit the defendant derives from the court's cautionary instructions to the jury is uncertain. Although particular attention is called to the contingent nature of some cooperation agreements,<sup>94</sup> the present form of the warning does not convey the extent of a witness' incentive to lie to reap that agreement's full benefits. Further, courts do not mention how easily a cooperating witness may fabricate testimony when, as is often the case, that witness is the sole source of inculpatory evidence.<sup>95</sup> The defense will likely make these points vigorously on summation, but that is no substitute for a charge by the court.<sup>96</sup>

### C. Cross-Examination by the Defense

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to confront witnesses testifying against him.<sup>97</sup> The Supreme Court has interpreted this guarantee as affording the defendant the right to cross-examine witnesses about the matters relating to their biases, interests, or motives to make false or misleading statements.<sup>98</sup> Cross-examination is thus the principal means by which the believability of a witness and the truth of his testimony is tested.<sup>99</sup> Further, only cross-examination can fully expose the gravity of a cooperation agreement and the strength of a witness' compulsion to lie to reap its benefits.

Courts have long recognized that in order to counterbalance the witness' incentive to lie, the defendant must be given wide latitude as to what questions he may ask regarding that witness' possible biases. In *Alford v. United States*,<sup>100</sup> the trial court did not permit the defense to ask a witness whether his detention by

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you would to a witness not in any respect implicated in the alleged crime . . . ." *Cool*, 409 U.S. at 102 (emphasis added). The instruction in *Cool* was found to be in error because it reduced the level of proof necessary for the Government to carry its burden: "Indeed, where, as here, the defendant's case rests almost entirely on accomplice testimony, the effect of the judge's instructions is to require the defendant to establish his innocence beyond a reasonable doubt." *Id.* at 104.

<sup>94</sup>The relevant instruction in *Dailey* reads: "With respect to Frappier, Minnig and Tindall, particularly keep in mind in judging their testimony and their credibility that the government has the power to confer or withhold future advantages, depending on the value of their cooperation." *Dailey*, 759 F.2d at 200.

<sup>95</sup>*See, e.g.*, *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993); *United States v. Avellino*, 136 F.3d 249 (2d Cir. 1997).

<sup>96</sup>*Eisenstadt*, *supra* note 18, at 33.

<sup>97</sup>U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

<sup>98</sup>*See, e.g.*, *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) ("Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination."); *Davis v. Alaska*, 415 U.S. 308, 319 (1974) ("Confrontation means more than being allowed to confront the witnesses physically.").

<sup>99</sup>*Davis*, 415 U.S. at 316.

<sup>100</sup>282 U.S. 687 (1931).

federal authorities might have influenced his testimony.<sup>101</sup> In reversing, the Supreme Court emphasized the importance of allowing the defendant to “place the witness in his proper setting and put the weight of his testimony and his credibility to the test, without which the jury cannot fairly appraise them.”<sup>102</sup> The Court also stressed that because the source of a witness’ biases, if any, is uncertain, cross-examination is necessarily exploratory. It was therefore essential that “reasonable latitude be given the cross-examiner, even though he is unable to state to the court what fact a reasonable cross-examination might develop.”<sup>103</sup>

More recent decisions have adhered to these principles. In *Davis v. Alaska*,<sup>104</sup> the Supreme Court held that refusal to allow the defendant to cross-examine the key prosecution witness about his probationary status constituted a violation of the defendant’s Sixth Amendment right of confrontation.<sup>105</sup> The Court noted that “exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.”<sup>106</sup> The Court further held that simply allowing the defense to ask a witness on cross-examination whether he was biased, without permitting further exploration “to make a record from which to argue why [the witness] might have been biased” prevents effective cross-examination.<sup>107</sup> The Court described the result as “constitutional error of the first magnitude,” incurable even by a showing of lack of prejudice.<sup>108</sup>

The Court has thus explicitly recognized that cross-examination plays a key role in counterbalancing the risk of perjury by criminal witnesses, and that defendants must therefore be given wide latitude during cross-examination to ensure a fair trial. The courts of the several states have overwhelmingly reached the same conclusion.<sup>109</sup> Nevertheless, trial courts retain broad discretion to limit the scope of cross-examination “based on concerns about, among other things, harassment, prejudice,

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<sup>101</sup>*Id.* at 690 (“[I]f the witness had been convicted of a felony that fact might be proved, but not that he was detained in custody.”).

<sup>102</sup>*Id.* at 693.

<sup>103</sup>*Id.* at 692.

<sup>104</sup>415 U.S. 308 (1974).

<sup>105</sup>*Id.* at 320. The crucial witness for the prosecution was on probation after having been adjudicated a delinquent for burglarizing two cabins. Alaska law permitted the exclusion of the witness’ convictions because of his status as a juvenile at the time of the offenses. The defendant sought to demonstrate that the witness testified out of fear or concern of possible jeopardy to his probation: “Not only might [the witness] have made a hasty and faulty identification of petitioner to shift suspicion away from himself. . . but [he] might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation.” *Id.* at 310-11.

<sup>106</sup>*Id.* at 317.

<sup>107</sup>*Id.* at 318.

<sup>108</sup>*Id.* See also *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (trial court’s prohibition of inquiry into the possibility of bias on behalf of a prosecution witness regarding dismissal of a pending charge violated defendant’s right to confrontation).

<sup>109</sup>Booth M. Ripke, *Restricting The Right To Cross-Examine Witnesses For Bias*, 56 Md. L. REV. 793, 800-01 (1997).

confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."<sup>110</sup> Further, reversal is warranted only where there has been "clear abuse of discretion, and a showing of prejudice to the defendant."<sup>111</sup> The defendant may thus be deprived of his right to expose a cooperating witness' possible biases because, in the trial court's opinion, other considerations outweigh the defendant's right to inquire into those biases.

Often, the trial court's exercise of this discretion will not result in recognizable prejudice to the defendant. In *State v. McCall*,<sup>112</sup> the defendant was convicted of second-degree reckless injury through the testimony of Robert Wade, the defendant's victim.<sup>113</sup> The defendant attempted to impeach Wade by inquiring into an alleged agreement between Wade and the prosecutor regarding recently dismissed charges against him.<sup>114</sup> The circuit court denied the defense permission to proceed with its line of questioning, concluding that the proffered evidence was irrelevant and that its limited probative value was substantially outweighed by the danger of confusing the issues and wasting time on collateral matters. The Wisconsin Supreme Court found no error, citing three reasons: (1) the dismissal of the three charges did not affect Wade's testimony at trial;<sup>115</sup> (2) the prosecutor had alternative, compelling reasons for dismissing the charges;<sup>116</sup> and (3) the defense was able to significantly attack Wade's credibility, notwithstanding the restriction on cross-examination.<sup>117</sup> Clearly, Wade's veracity was sufficiently scrutinized even without evidence of the dismissed charges.<sup>118</sup>

Nonetheless, many cases exist in which the trial court's exercise of discretion has resulted in clear prejudice to the defendant. In *United States v. Parker*,<sup>119</sup> the trial court barred cross-examination of a key witness regarding pending charges against her for murdering her husband. The defendant argued on appeal that such cross-

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<sup>110</sup>*Van Arsdall*, 475 U.S. at 679.

<sup>111</sup>*United States v. Wood*, 834 F.2d 1382, 1384 (8th Cir. 1987).

<sup>112</sup>549 N.W.2d 418 (Wis. 1996).

<sup>113</sup>*Id.* at 420.

<sup>114</sup>*Id.*

<sup>115</sup>*Id.* at 422 (The trial court noted the small difference between the statement Wade delivered to the police immediately following the shooting and his testimony at trial.).

<sup>116</sup>*Id.* at 422-23 (Wade was paralyzed by the gunshot wound inflicted by the defendant. The prosecutor claimed he dismissed the charges against him because his incarceration would be difficult, and his state prevented from committing similar crimes in the future.).

<sup>117</sup>*McCall*, 202 549 N.W.2d at 423 at 41 (Defense counsel was able to note that Wade had ten prior criminal convictions; he had been in prison and was an alcoholic; he had bought cocaine from the defendant on more than one occasion; and he had been drinking all day and had smoked cocaine prior to the shooting.).

<sup>118</sup>*See also United States v. Morrison*, 98 F.3d 619 (D.C. Cir. 1996) (refusal to allow government witness to answer question about whether she had to testify against defendant or else lose her children as a result of her own conviction was not reversible error, because (1) answer was speculative, and (2) any error was harmless, as the defense had previously elicited the answer she sought).

<sup>119</sup>133 F.3d 322 (5th Cir. 1998).

examination would have shown the witness had an incentive to slant her testimony to receive favor in the pending case.<sup>120</sup> The Court of Appeal found no error, reasoning, “[the defendant] has presented no evidence that federal prosecutors agreed to give a favorable recommendation for or intercede on behalf of [the witness] in the pending state case.”<sup>121</sup>

Similarly, in *United States v. Qualls*,<sup>122</sup> four key witnesses were government narcotics agents who, at the time of the trial, were suspended from their positions as a result of indictments brought against them. The defendant sought to cross-examine the agents to show bias due to the possible favoritism to be given them by the government in exchange for their testimony.<sup>123</sup> The trial court barred inquiry into the indictments, reasoning that it would lead to a trial of the witnesses rather than the defendant.<sup>124</sup> The Court of Appeals affirmed, relying primarily on the government’s announcement that it had not entered into any bargains with the indicted agents.<sup>125</sup>

In *United States v. Triplett*,<sup>126</sup> police searched a key witness’ home after he was arrested for attempting to cash stolen money orders. The trial court did not permit the defendants to cross-examine the witness about an alleged controlled substance recovered during that search.<sup>127</sup> The Court of Appeal found no error, noting that the material was never identified as a controlled substance and the witness was never charged with its possession.<sup>128</sup> Further, the witness testified that he had not entered into any agreement with the government which conditioned his testimony on favorable treatment of future drug charges.<sup>129</sup>

The rulings in these cases unduly compromise the defendant’s Sixth Amendment right to confrontation for several reasons. First, federal cases have recognized that a criminal witness may have a motive to lie because of an *implicit* promise of leniency from the government.<sup>130</sup> Thus, in *Parker* and *Qualls*, the absence of a tangible agreement would not have conclusively shown that no agreement in fact existed in the eyes of the witness. Second, and more importantly, even when no promise of leniency has been explicitly or implicitly made, a prosecution witness may be biased

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<sup>120</sup>*Id.* at 327.

<sup>121</sup>*Id.*

<sup>122</sup>500 F.2d 1238, 1239 (8th Cir. 1974).

<sup>123</sup>*Id.* at 1240.

<sup>124</sup>*Id.*

<sup>125</sup>*Id.*

<sup>126</sup>104 F.3d 1074, 1079 (8th Cir. 1996).

<sup>127</sup>*Id.*

<sup>128</sup>*Id.*

<sup>129</sup>*Id.*

<sup>130</sup>*See, e.g.,* McGeshick v. Fiedler, 3 F.3d 1083 (7th Cir. 1993) (witness testified that he was told that if he cooperated, “maybe things would go easier for him,” although no clear promises were made).

upon an *expectation* or *hope* of leniency in exchange for his testimony.<sup>131</sup> Limiting cross-examination to an exploration of explicit “deals” therefore denies the defendant a full opportunity to bring witness biases to the attention of the fact-finder, in clear violation of the confrontation clause.<sup>132</sup>

#### V. LEVELING THE PLAYING FIELD

Clearly, one characteristic of cooperation agreements that has survived since its birth is the witness’ motive to lie to secure the government’s favor. Although the prosecutor’s broad discretion in selecting cooperating witnesses and drafting agreements is problematic from the defendant’s point of view, cost-efficient protection from perjury cannot be achieved by redacting the prosecutor’s power, for two reasons. First, the risk of perjury presented by a cooperation agreement, though concededly present, is outweighed by the benefit society reaps in the form of convictions that could not have been realized without cooperating witness testimony.<sup>133</sup> Second, and more importantly, no matter who selects the testifying witnesses in a criminal trial, it is impossible to predict their veracity with 100% accuracy.

Only the defendant’s Sixth Amendment “safeguards” can sufficiently put that veracity to the test. However, the first two safeguards—discovery of the cooperation agreement and cautionary instructions to the jury by the court—merely call the factfinder’s attention to the existence of the agreement and provide certain restrictions on acceptance of the testimony, regardless of how the agreement or the instruction is worded. Only the third safeguard, cross-examination, can expose how much the testimony of a witness is influenced by government promises. Thus, to offset the government’s increasing discretion in offering and drafting agreements, the defense must be given greater discretion in the scope of its cross-examination.

Granting defendants such leeway, ironically, would require the courts to do nothing more than give precedent its proper import. The Supreme Court in *Alford v. United States* stressed the defendant’s right to “place the witness in his proper setting and put the weight of his testimony and his credibility to the test.”<sup>134</sup> The Court further stated that the trial court may exercise its reasonable judgment in determining when a line of questioning is *exhausted*, but that there is no obligation to protect a witness from being discredited.<sup>135</sup> In *Davis v. Alaska*, the Court identified cross-examination as “the principal means by which the believability of a witness and the

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<sup>131</sup>*See, e.g.,* Commonwealth v. Evans, 512 A.2d 626 (Pa. 1986) (court recognized that witness may have testified in favor of prosecution in order to receive favorable treatment in an unrelated crime, even though prosecution had not made any agreements or promised to make any agreements to that effect).

<sup>132</sup>*Davis v. Alaska*, 415 U.S. at 316-17 (1973). “The partiality of a witness is subject to exploration at trial, and is ‘always relevant as discrediting the witness and affecting the weight of his testimony.’ We have recognized that the exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.”

<sup>133</sup>*See supra* note 26.

<sup>134</sup>*Alford*, 282 U.S. at 692.

<sup>135</sup>*Id.* at 694 (emphasis added).

truth of his testimony are tested.”<sup>136</sup> Therefore, “[s]ubject always to the broad discretion of the trial judge to preclude *repetitive and unduly harassing* interrogation, the cross-examiner is not only permitted to delve into the witness’ story to test the witness’ perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.”<sup>137</sup> Likewise, in *Delaware v. Van Arsdall*, the Court noted that trial judges may limit cross-examination based on “concerns about . . . *harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.*”<sup>138</sup> However, the partiality of a witness is “always relevant as discrediting the witness and affecting the weight of his testimony.”<sup>139</sup>

The rulings in *State v. McCall*<sup>140</sup> and *United States v. Morrison*<sup>141</sup> were not in error because, in limiting the cross-examination, the trial courts adhered to these principles. In *McCall*, the defendant sufficiently exposed the witness’ biases even though he was not permitted to inquire into recently dismissed charges pending against the witness.<sup>142</sup> Inquiry into the charges would have been repetitive and a waste of the court’s time. Likewise, in *Morrison* there was no error because the defendant was able to expose the witness’ sources of bias in spite of the trial court’s limitations on cross-examination.<sup>143</sup> Again, further inquiry would have been repetitive.

The rulings in *United States v. Parker*,<sup>144</sup> *United States v. Qualls*,<sup>145</sup> and *United States v. Triplett*,<sup>146</sup> by contrast, are problematic because the trial courts’ limitations on cross-examination left the defendant no comparable means to scrutinize the witnesses’ veracity. In each of those cases, the trial court limited cross-examination because the defendant presented no clear evidence of an explicit agreement between the government and the witness.<sup>147</sup> No inquiry into implicit or expected promises was permitted, and yet the existence of either one would have permitted the jury to infer witness partiality. The courts in these cases apparently barred such inquiry not for reasons of judicial economy or witness protection, but because, absent tangible agreements, the source of bias was too speculative. Yet the Supreme Court has long

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<sup>136</sup>*Davis*, 415 U.S. at 316.

<sup>137</sup>*Id.* (emphasis added).

<sup>138</sup>*Van Arsdall*, 475 U.S. at 679 (emphasis added).

<sup>139</sup>*Davis*, 415 U.S. at 316.

<sup>140</sup>549 N.W.2d 418 (Wis. 1996).

<sup>141</sup>98 F.3d 619 (D.C. Cir. 1996).

<sup>142</sup>*See supra* notes 114-118 and accompanying text.

<sup>143</sup>*See supra* note 119.

<sup>144</sup>133 F.3d 322 (5th Cir. 1998).

<sup>145</sup>500 F.2d 1238 (8th Cir. 1974).

<sup>146</sup>104 F.3d 1074 (8th Cir. 1996).

<sup>147</sup>*See supra* notes 120-30 and accompanying text.

recognized the legitimacy of cross-examination in situations where the source of witness bias cannot be precisely known.<sup>148</sup>

The trial judge is to be afforded considerable discretion in determining what evidence is relevant. *Parker*, *Qualls*, and *Triplett* make clear, however, that more deference must be afforded the cross-examiner, particularly when no other evidence of witness bias has been introduced or permitted. In order to comply with the Sixth Amendment as interpreted by the Supreme Court, evidence of charges pending against witnesses should be placed in front of the jury so that the jury may fully assess the value of the witness' testimony, regardless of the terms or existence of a cooperation agreement. Such evidence is not "repetitive" or "unduly harassing." On the contrary, its exclusion denies the defendant his means of testing adverse testimony, and consequently, his Constitutional right to confrontation.

#### VI. CONCLUSION

Inherent in all cooperation agreements is the risk that a criminal witness will commit perjury in order to reap the fullest benefit of the bargain. This is especially true when the government makes some or all of the reward contingent on a future factor, such as the prosecutor's "satisfaction" with the quality of the testimony. Nevertheless, attacks on the government's practice of entering such agreements have rightly failed simply because the benefits of such agreements—increased conviction of more dangerous criminals, and deterrence of other criminals because of the risk their cohorts might one day turn against them—outweigh the cost to society of deterring a criminal witness from committing perjury.

However, a criminal witness' motive to lie is a genuine cause for concern. It goes without saying that no method can be 100% effective in protecting a defendant from perjured testimony. Nonetheless, the court and the defense have several methods to scrutinize the testimony of any witness who arguably has an interest in the outcome of the trial. Of these, the most important is cross-examination.

The defendant's discretion in what questions he may ask a testifying witness on cross-examination cannot completely offset the motive to lie the government furnishes that witness through promises of leniency or immunity. Thorough cross-examination can, however, permit a jury to meaningfully appraise the truth of a witness' testimony. For that reason, courts must give the cross-examiner wider latitude in what questions he may ask, absent repetitive evidence or undue harassment. A tangible risk of witness perjury will nonetheless remain, but that cost will be easier to justify in terms of society's increased safety.

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<sup>148</sup>See *supra* notes 101-104 and accompanying text.