INTERNAL REVENUE SERVICE

CC:EL:CT-117400-98 December 15, 1998
MYanes
UIL 9999.9800
Number: **199906030**
Release Date: 2/12/1999

MEMORANDUM FOR ASSISTANT REGIONAL COUNSEL (Criminal Tax)

FROM: Barry J. Finkelstein
Assistant Chief Counsel (Criminal Tax)

SUBJECT: Anti-Gratuity Statute - 18 U.S.C. § 201(c)(2)

In light of recent court decisions concerning the applicability of the anti-gratuity statute to government agents, this memorandum provides an analysis of 18 U.S.C. § 201(c)(2) and a review of those decisions and their legal import.

## Summary

The anti-gratuity statute, 18 U.S.C. § 201(c)(2), makes it a crime to give a witness anything of value in exchange for testimony taken, under oath or affirmation, as part of any proceeding. For sometime, the government has benefitted from the view that the anti-gratuity statute has not applied to the government. This view is premised upon the long standing practice that government agents make "deals" with defendants in exchange for testimony or other assistance. Accordingly, courts have routinely disregarded any potential application of 18 U.S.C. § 201(c)(2) in situations where a plea bargain is in place and the defendant challenges the "deal" in an attempt to suppress a government witness' testimony. Under current practices, if there is a prosecution witness who made a deal with the government in exchange for testimony, the defense's only remedy, which is deemed appropriate, is to impeach the credibility of that witness by questioning the witness about the plea bargain. A three judge panel of the Tenth Circuit in United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), challenged this long standing practice by applying the statute to the government. Although the opinion was vacated shortly after issued, probably due to the potential flood of appeals created by its applicability, there have been to date two district court opinions which followed the rationale of the Singleton court. The majority of the courts that have addressed the issue, however, have declined to follow Singleton, and in fact, have decided against its rationale.

Section 201 of Title 18, (Bribery, Graft and Conflicts of Interest), addresses corruption

of public officials and witnesses. Section 201(c)(2), at issue here, deals specifically with bribery of a witness and provides as follows :

> 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, any committee of either House of both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom; ... shall be fined under this title or imprisoned for not more than two years or both.

Legal Landscape

Before the argument was raised in the Tenth Circuit, there were few instances where an attempt was made to apply § 201(c)(2) to prosecutors. The holding in Singleton went against long standing and well settled principles. The results led to numerous defense motions to suppress the testimony of accomplices who had made plea agreements with the government.

In Singleton, the Tenth Circuit reversed the conviction of Ms. Singleton on one count of conspiracy to distribute cocaine and seven counts of money laundering. Ms. Singleton was listed as either the sender or recipient on eight wire transfers sent on behalf of the conspiracy that used Western Union services to transfer drug money. Prior to trial, Ms. Singleton moved under 18 U.S.C. § 201(c)(2), the anti-gratuity statute, to suppress the testimony of Napoleon Douglas, a coconspirator who entered into a plea agreement with the government. Ms. Singleton argued the government violated the statute which prohibits offering unlawful inducements to a witness by impermissibly promising Douglas leniency in return for his testimony. The district court denied the motion ruling that § 201(c)(2) did not apply to government agents. As part of Ms. Singleton's appeal, she argue the district court erred in allowing the testimony of a coconspirator as that testimony was the product of an illegal act by the prosecution. The argument was that the prosecution violated § 201(c)(2) by giving the coconspirator "something of value," in the form of a plea bargain, in exchange for his testimony against her. The Tenth Circuit found defense arguments persuasive and as this was post conviction, reversed the verdict and ordered the case remanded for a new trial. Shortly after the decision was published, however, the court *sua sponte* vacated the opinion and ordered a rehearing *en banc* that took place in November 1998; the outcome is still unknown. Thus, the opinion no longer has any authoritative weight.

In reaching this landmark decision, the Tenth Circuit reviewed *de novo* the district court's interpretation of the federal statute at issue, 18 U.S.C. § 201(c)(2). In holding that government plea bargaining violated the anti-gratuity statute, the court followed the

Supreme Court's emphasis on the primacy of statutory plain language. The court based its holding on a statutory construction analysis which included the Supreme Court's recognized limited canon of construction, under United States v. Nardone, 302 U.S. 379, 383 (1935), providing that statutes do not apply to the government or affect governmental rights unless the text expressly includes the government. Here, the court found the canon inapplicable and as the statute was neither vague or ambiguous, the plain meaning of the statute should be followed. To support its plain meaning holding, the court also analyzed the structure of the statute and harmonized it with conflicting statutes. The court also reviewed relevant precedent and possible law enforcement justification, finding neither persuasive.

Several opinions decided after Singleton have refused to follow the Tenth Circuit's reasoning finding that the well settled rule that the anti-gratuity statute does not apply to government agents should continue to apply. For example, in United States v. Dunlap, No. 98-CR-206-M, 1998 U.S. Dist. LEXIS 12759 (D. Colo. Aug. 12, 1998), the court analyzed § 201(c)(2) within the confines of other federal statutes which authorize plea agreements. The court held that as plea agreements have been expressly authorized by Congress through their enactment of federal sentencing statutes and guidelines, immunity statutes, and Federal Rules of Criminal Procedure, it cannot be considered then, that § 201(c)(2) prohibits those same plea agreements. From a different perspective, the court in United States v. Guillaume, No. 97-6007-CR, 1998 U.S. Dist. LEXIS 15192, at *3 (S.D. Fla. Aug. 3, 1998), reviewed the Singleton panel's analysis and held Nardone's limited canon of statutory construction applied, contrary to Singleton, to federal prosecutors to exclude their "deal" making from falling within § 201(c)(2) prohibitions.

Conversely, in United States v. Lowery, No. 97-368-CR, 1998 U.S. Dist. LEXIS 12771 (S.D. Fla. Aug. 4, 1998), Judge Zloch, also of the Southern District of Florida, followed the Tenth Circuit's reasoning, despite the fact that the opinion was vacated, holding the plain meaning of the federal statute should govern any analysis. Section 201(c)(2), thus applies to prohibit prosecutors from granting plea bargains to government witnesses. In addition, Judge Berrigan of the Eastern District of Louisiana in United States v. Fraguela, No. 96-0339, 1998 U.S. Dist. LEXIS 14347 (E.D. La. Aug. 28, 1998), adopted much of the rational of the Lowery opinion, finding the results in Singleton and the opinion of Judge Zloch to be controlling.

The Statute

It is settled law that a court must follow the plain meaning rule when construing a

statute.[1] Section 201(a) provides definitions for some terms but not others, this selectivity compels us to "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used," Richards v. United States, 369 U.S. 1, 9 (1962), and not defined. Section 201(c)(2) begins with "whoever," a term used throughout § 201 but not defined by § 201(a), the definitions subsection. Thus, in applying the plain meaning rule and using the ordinary meaning of words, the meaning of this term denotes everyone; is all inclusive. To date, because there have been few cases which have dealt with § 201(c)(2), the meaning of the term "whoever" has not been narrowed carving out any exceptions. The term "anything of value" is very broad and more open to interpretation; thus, some courts, for example, have given the term "anything of value" a subjective meaning, i.e., that the defendant attach some value to that which he receives.[2] Conversely, other courts have given an objective interpretation to the term such that the thing of value has to have a value that is recognized or appreciated by others.[3]

The statute's "for or because of" language requires that the promises be motivated by the anticipated testimony. The language does not, however, lead to a quid pro quo relation between the testimony and the promises. It has been stated time and again that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 504 U.S. 249, 253-

---

[1] See e.g., United States v. American Trucking Ass'n, 310 U.S. 534, 542-43 (1940). The plain meaning rule resulted from several cases construing statutes whose interpretations were challenged. Their analysis led to the following conclusions : "[t]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." Caminetti v. United States, 242 U.S. 470, 485 (1917). This "'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed." Ardestani v. I.N.S., 502 U.S. 129, 135-36 (1991)(citations omitted)(quoting Rubin v. United States, 449 U.S. 424, 430 (1981)). Moreover, the "requirement that the Court accept the plain language is tempered only by the admonition that a literal interpretation must be rejected if it would lead to an absurd result." United States v. Revis, No. 97-CR-163-H, 1998 U.S. Dist. LEXIS 16067, at *18, (N.D. Okla. Oct. 8, 1998). In addition, the use of specific limitations in the one statute cannot fairly be read as imposing limitations upon general provisions in other statutes. Russello v. United States, 464 U.S. 16, 25 (1983).

[2] See United States v. Williams, 705 F.2d 603, 623 (2d Cir.) cert. denied, 464 U.S. 1007 (1983); United States v. Gorman, 807 F.2d 1299, 1305 (6th Cir. 1986); United States v. Schwartz, 785 F.2d 673, 680 (9th Cir. 1986).

[3] See United States v. Picquet, 963 F.2d 54, 55 (5th Cir.), cert. denied, 506 U.S. 902 (1992); United States v. Sheker, 618 F.2d 607, 609 (9th Cir. 1980).

54 (1992). Thus, our plain meaning analysis ends following the well settled law that "where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." Caminetti v. United States, 242 U.S. 470, 485 (1917).

Plea Bargaining in General

The concept of giving cooperating accomplices some form of leniency dates back to the common law of England and has been recognized, approved and legally sanctioned by the United States Congress, the United States Sentencing Commission and the United States Courts.[4] As plea bargaining is a legally sanctioned process, a defendant may enforce the agreement with the remedy of specific performance when there is a breach by the government.[5] Generally, it is accepted as a reality that in criminal prosecutions, an agreement for leniency may be granted to an individual in exchange for assistance in a criminal investigation or for testimony in a criminal prosecution.[6] This practice of plea bargaining enables the government to obtain necessary testimony in order to effectuate criminal investigations and prosecutions in circumstances where the absence of such testimony would lead to the release of suspected criminals to the detriment of society.[7] Accordingly, plea agreements are essential to the administration of justice and are encouraged by the courts.

Under the usual terms of a plea agreement, a government witness/defendant is required to testify truthfully regarding the crime being investigated or prosecuted. Any leniency granted the witness/defendant under a plea agreement reflects the substantial assistance given in the investigation or prosecution of another person who has committed a crime. This exchange of reduced sentences or immunity for testimony,

---

[4] See, e.g., Rex v. Rudd, 99 Eng. Rep. 1114 (1775); 18 U.S.C. § 3521(b)(1) and (d)(1)(A), 18 U.S.C. § 3553(e), 18 U.S.C. §§ 6001-6005, 28 U.S.C. § 994(n), Fed. R. Crim. P. 11(e) and 35(b), U.S.S.G § 5K1.1; Brady v. United States, 397 U.S. 742, 751 (1970), The Whiskey cases (United States v. Ford), 99 U.S. 594 (1878), United States v. Locascio, 6 F.3d 924, 930 (2d Cir. 1993), cert. denied, 511 U.S. 1070 (1994), United States v. Persico, 832 F.2d 705, 716-17 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988), United States v. Ming He, 94 F.3d 782, 787-89 (2d Cir. 1996).

[5] See, e.g., Santobello v. New York, 404 U.S. 257, 262 (1971); United States v. Lewis, 896 F.2d 246, 249 (7th Cir. 1990); United States v. La Guardia, 902 F.2d 1010, 1016 (1st Cir. 1990); United States v. Kuntz, 908 F.2d 655, 657 (10th Cir. 1990).

[6] 21 Am Jur 2d, Criminal Law § 221.

[7] United States v. Guillaume, No. 97-6007-CR, 1998 U.S. Dist. LEXIS 15192, at *2 (S.D. Fla. Aug. 3, 1998).

however, presents the danger that a witness/defendant, influenced by his own interests, will promise to testify to anything desired by the prosecution.[8] Nevertheless, because deal striking is so necessary to enforcing the law and obtaining convictions, safeguards have been established to protect against such abuses and to protect a defendant's due process rights.[9] "Courts have uniformly held that a witness may testify so long as: (1) the government's bargain with him is fully divulged so that the jury can evaluate his credibility; (2) defense counsel is permitted to cross-examine the accomplice about the agreement; and (3) the jury is specifically instructed to weigh the accomplice's testimony with caution." United States v. Guillaume, 1998 U.S. Dist. LEXIS 15192, at *3.[10] By following these safeguards, the competing interests of effective law enforcement and the need for reliable testimony in court are balanced, and manifests the belief that "the government cannot be expected to depend exclusively upon the virtuous in enforcing the law." United States v. Richardson, 764 F.2d 1514, 1521 (11th Cir. 1985).

So ingrained is the right of defense counsel to cross examine a government witness about the plea agreement that this right to cross examination is secured by the Confrontation Clause of the Sixth Amendment, which guarantees an accused the right to be confronted with the witnesses against him.[11] The Supreme Court has "recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Davis v. Alaska, 415 U.S. 308, 316-17 (1974). The attempt to demonstrate bias or motivation of government witnesses is one area of cross examination that is always open, particularly to defendants in criminal proceedings; the purpose of which is to demonstrate that the testimony may be influenced by a promise, hope or expectation of immunity or leniency with respect to the pending charges against him, as a consideration for testifying against the defendant. The opportunity to cross examine witness bias becomes critically important where the witness is the government's key witness whose largely uncorroborated testimony establishes one or more elements of the crime.

---

[8] See 32 A.L.R. 4th 990, 992 (1981).

[9] See Giglio v. United States, 405 U.S. 150, 153-55 (1972); United States v. Dailey, 759 F.2d 192, 196 (1st Cir. 1985); United States v. Insana, 423 F.2d 1165, 1169 (2d Cir.) cert. denied, 400 U.S. 841 (1970).

[10] See also, United States v. Cervanted-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987); Dailey, 759 F.2d at 196, Insana, 423 F.2d at 1169; United States v. Barrett, 505 F.2d 1091, 1101-102 (7th Cir. 1974)(construing §201(c)(2)'s predecessor, § 201(h), with respect to civil immunity).

[11] See Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986).

Moreover, because a criminal defendant has the opportunity to perform expansive cross examination of a government witness, the government is afforded great latitude in selecting cooperating witnesses. For example, even an informant who is promised a contingent fee by the Government is not per se disqualified from testifying in a federal criminal trial.[12] This results from the established methods employed to enable the jury to make a fair assessment of the character and motivations of the witness by presenting to the jury any agreements existing between the government and the witness. Noting that plea agreements have long been sanctioned by both case law and statutes, logic dictates that this sanctioned process cannot be said to violate the anti-gratuity statute, § 201(c)(2). This has been the conclusion reached by courts that have addressed the issue in light of the Singleton opinion.[13]

Limited Canon of Statutory Construction

The United States Supreme Court described in Nardone, a canon of statutory construction which provides that statutes which tend to restrain or diminish the powers or rights of the sovereign do not apply to the government or affect governmental rights unless the text of the statute expressly includes the government.[14] The Singleton panel analyzed this canon but determined that it only applied to two classes of statutes, and found that § 201(c)(2) did not fit in either class.

The cases in which Nardone applied the canon of statutory construction fall into two classes. The first class is comprised of statutes which, unless the government is exempted, deprive the government of a recognized or established prerogative, title, or interest.[15] The classic example of a statute within this first class is exempting the

---

[12] United States v. Cervantes-Pacheco, 826 F.2d 310 (5th Cir. 1987).

[13] See e.g., United States v. Dunlap, No. 98-CR-206-M, 1998 U.S. Dist. LEXIS 12759 (D. Colo. Aug. 12, 1998)(holding that under a strict textual analysis, any promise by the government involving the prosecuting attorney, the defendant and his defense counsel, and the court would make the parties complicitors in the commission of a crime); United States v. Arana, No. 95-CR-80272, 1998 U.S. Dist. LEXIS 11466 (E.D. Mich. July 24, 1998)(holding that under the Singleton court's premise, any court which accepts a plea agreement would be criminally liable for violating § 201(c)(2), stating that "it would be absurd to conclude that Congress intended federal judges to be held criminally liable for taking such actions").

[14] See also, United States v. Herron, 87 U.S. 251, 256 (1873).

[15] United States v. Nardone, 302 U.S. 379, 383 (1935).

sovereign from statutes of limitations.[16] The court in Nardone explained further that "the rule of exclusion of the sovereign is less stringently applied where the operation of the law is upon the agents or servants of the government rather than on the sovereign itself." Nardone, 302 U.S. at 383. The second class is comprised of those statutes which would create an absurdity if applied to the government, as, for example, a speed limit applied to a policeman pursuing a criminal or a driver of a fire engine responding to an alarm.[17]

Courts that addressed the applicability of § 201(c)(2) to the government have held that there is no application, both because it deprives the government of a recognized and established prerogative, interest, or title and results in an obvious absurdity, and because it threatens the effectiveness of the government in the investigation and prosecution of crime.[18] These courts have held, therefore, that Congress presumptively excluded the government from the application of § 201(c)(2). To further lend support to this conclusion, an analysis of each class is helpful.

Recognized or Established Prerogative Interest or Title

The recommendation of leniency in exchange for testimony is a recognized and established right of the government in the investigation and prosecution of crimes. "No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence." United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987). Congress and the courts have sanctioned this traditional prosecutorial granting of leniency. Consequently, as this practice falls within the first class in the canon, the government therefore is presumptively excluded from the application of § 201(c)(2).

Obvious Absurdity

Likewise, applying § 201(c)(2) to prosecutors would work an obvious absurdity in the application of federal statutes because it would prevent prosecutors from engaging in plea bargaining. To date, other than the now vacated Singleton opinion and two other District Court opinions which followed Singleton, there have been no cases where

---

[16] Id.

[17] Id. at 384.

[18] See, e.g., United States v. Hill, No. 2:98-CR-06, 1998 U.S. Dist. LEXIS 15900, at *12 (E.D. Tenn. Oct. 6, 1998); United States v. Guillaume, 1998 U.S. Dist. LEXIS 15192, at *2; United States v. Reid, No. 3:98CR64, 1998 U.S. Dist. LEXIS 12675, at *6-10 (E.D. Va. July 28, 1998); United States v. Arana, 998 U.S. Dist. LEXIS 11320, at *3-4.

§ 201(c)(2) was applied to a prosecutor. The federal sentencing statutes[19] and guidelines[20] promulgated as a result of Congressional action allowing courts to impose a lower sentence than would otherwise be imposed to reflect a defendant's substantial assistance, were enacted subsequent to § 201(c)(2), and are in direct conflict with the court's analysis in Singleton. It is obvious that Congress intended either to immunize the government from § 201(c)(2), or to supersede the bribery statute as it applies to prosecutors. Similarly, Fed. R. Crim. P. 35(b), provides for the reduction of a sentence upon the government's motion if made within one year after the imposition of the sentence also to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense.[21]

Applying § 201(c)(2) to prosecutors also works an absurdity in view of the federal immunity statutes.[22] These statutes, which authorize the rewarding of substantial assistance after it is rendered, provides further evidence that Congress intended to exclude the government from the application of § 201(c)(2) when granting leniency in exchange for testimony. In addition, the Singleton panel's attempt to reconcile these statutes by declaring that substantial assistance does not include testimony is not in line with existing case law. Thus, the application of § 201(c)(2) to prosecutors would not only result in the exclusion of accomplice testimony, but would lead to the absurd conclusion that prosecutors routinely violate the law by promising defendants some form of leniency in exchange for their testimony.

Legislative History

It is sometimes helpful to look to the legislative history for insight into Congress' intent in passing a particular statute. Unfortunately, there is little legislative history on 18 U.S.C. § 201(c)(2), because from its inception, this statute has not caused much debate. It first appeared in the United States Code as result of the public law passed in 1948, becoming part of the second supplement to the 1946 code, which amended the bribery and graft sections. Until that time, the bribery and graft sections included several provisions specifically relating to public officials but only limited general bribery provisions. The general bribery provisions included one, which made it a crime for a witness to accept a bribe, yet, there was no counterpart present in Title 18, U.S.C., 1940 ed., making it unlawful to offer a bribe to a witness.

---

[19] 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n).

[20] U.S.S.G. § 5K1.1.

[21] Fed. R. Crim. P. 35(b).

[22] 18 U.S.C. §§ 6001-6005.

In 1948, the 80th Congress, 2d Session, codified U.S.C. Title 18 Crimes and Criminal Procedure through Pub. L. No. 772, H.R. 3190. This greatly simplified and organized the numbering of the sections making it easier to use and find specific crimes. As part of this codification, § 209, (Offering a Bribe to a Witness), was added to specifically provide a counterpart to § 210, (Acceptance of a Bribe by a Witness).[23]

Section 209 remained unchanged until 1962, when the bribery, graft and conflicts of interest sections of Title 18, U.S.C. 1946 ed., were overhauled. The main focus in 1962, however, was on the conflicts of interest sections because several of the statutes being used were from the 1800s and were overly broad in some respects but in others, prohibited activities which were crucial to the workings of the government. The bribery and graft sections, however, remained relatively unchanged and were merely combined under one section, § 201, with multiple subsections. Unfortunately, because the primary focus was on the conflicts of interest rules, little attention was paid to the bribery and graft sections, resulting in a legislative history on those sections which are not illuminating.

## Conclusion

In concluding, the statutory class "whoever" in § 201(c)(2), the anti-gratuity statute, was not intended to encompass government agents actually engaged in the investigation or prosecution of a crime. The law has always recognized a manifest difference between private individuals offering a potential witness money in exchange for testimony in court and a prosecutor promising a witness to recommend leniency in exchange for testimony, the first one is illegal, the second is not. The fact that § 201(c)(2) has never been applied to federal prosecutors is evidence of this. In addition, the safeguards that have been established to minimize abuses of the well established practice of plea bargaining, makes clear that Congress and the courts sanction this practice as a necessary investigatory and prosecutorial tool. If you have any questions or concerns with respect to this issue, please contact Marta Yanes on (202) 622-4470.

---

[23] The language of § 209 was derived in part from § 240 of 18 U.S.C. 1940 ed., § 210 of 18 U.S.C. 1946 ed., and in part based on §§ 91, 200, 237 of 18 U.S.C. 1940 ed.