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CIVIL LIBERTIES *By Harvey A. Silverglate*

Immunity Is Not for Sale, Says the 10th Circuit

TWO POTENTIALLY momentous developments took place this July in the arena where federal prosecutors confer benefits in exchange for witness testimony.

On July 1, a three-judge panel of the 10th U.S. Circuit Court of Appeals decided *U.S. v. Singleton*, 1998 WL 350507. Written by Judge Paul J. Kelly Jr., the unanimous opinion held that it violated the federal witness bribery statute, 18 U.S.C. 201(c)(2), for prosecutors to confer "anything of value" to a prospective witness to obtain testimony.

Such a legal development by itself would not have been surprising, since even the government in *Singleton* conceded that a prosecutor could not offer a money bribe to a cooperating witness. What was revolutionary, however, was the further conclusion that "something of value" included the three promises that the government had exchanged for the witness's testimony—promises (1) not to prosecute the witness for certain offenses; (2) to bring the witness's cooperation to the attention of state authorities and (3) to inform the district court of that cooperation. It ordered the testimony of the rewarded witness suppressed at retrial.

The decision caused shock waves throughout federal prosecutorial circles, since "bought" testimony has become the currency of the realm, a widely used foundation for many federal prosecutions. While the ruling was called "stunning" by commentators (including one in a July 20 story in this paper), what surprised other veteran observers was that it took a court so long to recognize the obvious: that witness-buying by the government should be treated no differently from witness bribery by anyone else.

Indeed, the development should have come as no surprise to readers of this column, in view of an earlier article [NLJ, 9-23-96] criticizing the tactics used by Independent Counsel Kenneth Starr in securing the testimony of convicted Arkansas swindler David Hale. Mr. Hale cut a deal for a sentence reduction in exchange for his testimony that then-Gov. Bill Clinton had pressured him into making an improper $300,000 loan, with federal funds, to Susan McDougal, then a Clinton business partner.

Shortly after the 10th Circuit issued its opinion in *Singleton*, the Department of Justice announced that it would seek a stay pending the government's effort to obtain en banc review. The full court granted both a stay and en banc review even before the government filed its motion. In so doing, the full bench was not necessarily signaling disagreement with the panel, but it did seem concerned with the impact the panel's decision or the full bench's ultimate ruling could have on pending investigations and prosecutions.

Starr Witness Protection

Indeed, the decision may already have had an impact on the July 28 announcement by Mr. Starr that he had reached an agreement with former White House intern Monica Lewinsky, granting her immunity in exchange for her testimony in the independent counsel's investigation into whether she had a sexual relationship with the president and whether she and Mr. Clinton lied about it under oath.

The agreement was not for promises to do favors in exchange for, and after, an acceptable performance (as in Mr. Hale's case), but to confer immunity as authorized by the federal immunity statute before the grand jury appearance. Many bargains between federal prosecutors and willing witnesses occurred routinely in recent years, featuring promises that the prosecutor would go easy on the witness (or friends or relatives) after testimony, with the actual favors dependent upon the prosecutor's subjective satisfaction with the witness's performance.

Such favors and lenience, not authorized by the immunity statute, now may be unlawful bribes or threats. Before *Singleton*, the witness could lose the benefits of the promises if the prosecutor were not satisfied with the testimony. Now, that dissatisfaction is a threat only if the prosecutor can prove, beyond a reasonable doubt, that the witness committed perjury. Immunity, in short, is now the only clearly lawful inducement for testimony, and a perjury prosecution the only pressure when the witness testifies.

The *Singleton* panel insisted that its decision was based solely on the witness bribery statute and "in no way on the Constitution." Yet it is also true that there are obvious equal-protection and due-process problems when a witness bribery statute that, on its face, covers everyone is interpreted as inhibiting everyone except government. The 10th Circuit panel has boldly vindicated that bedrock civil liberties principle. One anxiously awaits further proceedings. NLJ

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