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DEFENSE WITNESS AS “ACCOMPLICE”: SHOULD THE TRIAL JUDGE GIVE A “CARE AND CAUTION” INSTRUCTION?

CLIFFORD S. FISHMAN*

INTRODUCTION

The accomplice is a familiar figure in America’s criminal justice system.

Several people are arrested—perhaps all at once, perhaps over a period of days, weeks, months, or even years—and charged with concerted criminal activity. Whether the case involves a single, finite crime committed by two or three perpetrators, or a wide-ranging conspiracy that involves numerous crimes over many months or years, the odds are that, at some point prior to trial, the prosecutor will offer a deal to one or more of the suspects: admit your guilt, testify for the state against the others, and receive a substantial break as to charges, sentencing or both.¹

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The author would like to thank Justin Heminger for his assistance in preparing the final manuscript.

¹ Ideally, it is the little- or middle-sized fish who get the deal and help the prosecutor convict the sharks and killer whales. Sometimes, however, the little fish have nothing worthwhile to offer, and the major predator gets the break for “giving up” all the krill and minnows (I hereby eschew any further use of aquatic metaphors.). The process is highly

Accomplice testimony in a criminal trial is highly relevant and, often, essential in the prosecution of crime, particularly organized crime, white collar crime, and political corruption. Given the accomplice's obvious motive to tailor his or her testimony to satisfy the prosecutor, however, such testimony is also quite often of questionable reliability. Accordingly, lawmakers have sought to safeguard against false convictions based on such testimony. Some jurisdictions require such testimony to be corroborated;² some require the judge to issue a cautionary instruction to the jury about how to evaluate such testimony;³ and some jurisdictions require both measures.

But what about the reverse situation? Suppose someone who has already been convicted of the crime or conspiracy, or who has not yet stood trial, testifies at the defendant's trial as a *defense* witness, acknowledges his own criminal involvement, but insists that the defendant was *not* involved or was an innocent dupe?

controversial; indeed, in *United States v. Singleton*, 144 F.3d 1343, 1343-44 (10th Cir. 1998), a panel of the Tenth Circuit concluded that the government violated a federal bribery statute, 18 U.S.C. § 201(c)(2) (1993), when it promised Ms. Singleton's accomplice that it would not prosecute him for money laundering and narcotics violations if he testified against Singleton. The federal statute makes it a crime to

directly or indirectly, give[], offer[], or promise[] 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

Singleton, 144 F.3d at 1345 (quoting 18 U.S.C. § 201(c)(2) (1994)). "The judicial process is tainted and justice cheapened," the panel reasoned, "when factual testimony is purchased, whether with leniency or money." *Id.* at 1347.

The following year in *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999), the same court, rehearing the case en banc, reversed the panel decision. Stressing that the government's authority to offer a witness leniency in exchange for cooperation had long been considered part of the "sovereign prerogative," *id.* at 1301, the court concluded that "if Congress had intended [to] overturn this ingrained aspect of American legal culture [when it passed the anti-bribery statute], it would have done so in clear, unmistakable, and unarguable language," *id.* at 1302. For a worthwhile discussion of this practice and of proposals to regulate or control it, see R. Michael Cassidy, "*Soft Words of Hope:*" Giglio, *Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129 (2004).

² Among jurisdictions with a corroboration requirement, the prevailing view is that the state must introduce evidence independent of accomplice testimony that "tends to connect the defendant with the commission of the crime." See CLIFFORD S. FISHMAN, 1 JONES ON EVIDENCE § 5:54 (7th ed. Supp. 2005) (citing numerous state statutes and court decisions using this phrase or minor variations thereon). This standard is codified in numerous statutes and is also applied by courts in states without corroboration statutes or whose statutes do not specify the degree of corroboration required. See *id.*

³ See *id.* § 5:55.

At least three federal circuits have approved a trial judge's decision to give a cautionary accomplice testimony instruction when an alleged accomplice testifies *for the defendant*.⁴ Several state courts and at least one military court have done likewise.⁵ Other state courts, in contrast, have explicitly disapproved giving such an instruction⁶ and courts in at least one state are divided on the issue.⁷

⁴ See *United States v. Tirouda*, 394 F.3d 683, 687 (9th Cir. 2005); *United States v. Urdiales*, 523 F.2d 1245, 1248 (5th Cir. 1975); *United States v. Bolin*, 35 F.3d 306, 308 (7th Cir. 1974); *United States v. Cool*, 461 F.2d 521, 524-25 (7th Cir. 1972), *rev'd on other grounds*, 409 U.S. 100 (1972); *United States v. Nolte*, 440 F.2d 1124, 1126-27 (5th Cir. 1971).

⁵ See, e.g., *United States v. McCue*, 3 M.J. 509, 511 (A.F. Ct. Crim. App. 1977); *State v. Anthony*, 749 P.2d 37, 42-44 (Kan. 1988); *State v. Ramsey*, No. 83026, 2004 WL 1532287, at *49 (Ohio Ct. App. July 8, 2004) (unpublished opinion); *State v. Booker*, No. 80-2339-CR, 1981 WL 138944, at *4-6 (Wis. Ct. App. Oct. 19, 1981) (unpublished opinion); see also NEBRASKA SUP. CT. COMM. ON PRACTICE AND PROCEDURE, NEBRASKA JURY INSTRUCTIONS CRIMINAL 5.6 (2d ed. 2000). In its comment to Instruction 5.6, the Nebraska Supreme Court Committee on Practice and Procedure observed: "It seems reasonable to the Committee that when the defense calls an accomplice as a witness, a judge, on the state's request, would give as an instruction the first two lines of NJI2d Crim. 5.6." *Id.* at 5.6 cmt. Those first two lines read: "There has been testimony from (here insert name), a claimed accomplice of the defendant. You should closely examine (his, her) testimony for any possible motive (he, she) might have to testify falsely." *Id.* at 5.6.

⁶ See *People v. Guian*, 957 P.2d 928, 934 (Cal. 1998); *State v. Gardner*, 242 A.2d 1, 10 (N.J. 1968); *Commonwealth v. Jones*, 417 A.2d 201, 202-04 (Pa. 1980); *Commonwealth v. Russell*, 383 A.2d 866, 868-69 (Pa. 1978); see also *Wheelis v. State*, 340 So. 2d 950, 952 (Fla. Dist. Ct. App. 1976) (holding it error, in a trial of two defendants, to give an accomplice instruction as to testimony by one defendant which sought to exonerate them both).

⁷ In *People v. Touhy*, 197 N.E. 849 (Ill. 1935), the state supreme court commented, "No reason is advanced, and none is apparent, why one who is in fact an accomplice should not have his testimony scrutinized carefully before it is relied on, no matter on which side of the case he testified." *Id.* at 859. Some intermediate appellate courts, however, have treated this passage as dictum, concluding that the issue of whether a judge should issue such an instruction was not truly before the court. For opinions disapproving of such an instruction, see *People v. Jackson*, 398 N.E.2d 906, 910 (Ill. App. Ct. 1979), which held that it is error to give the standard "care and caution" instruction, but concluded that the error was harmless and that "there [wa]s nothing inherently unfair about a trial court cautioning the jury concerning the value of . . . testimony . . . when some basis exists for believing the witness had a motive to fabricate testimony favorable to defendant." See also *People v. Perryman*, 399 N.E.2d 727, 728 (Ill. App. Ct. 1980); *People v. Brown*, 370 N.E.2d 814, 816-17 (Ill. App. Ct. 1977); *People v. O'Neal*, 358 N.E.2d 47, 48-49 (Ill. App. Ct. 1976); *People v. Howard*, 263 N.E.2d 633, 634-35 (Ill. App. Ct. 1970). But see the specially concurring opinion of Judge Jones, *Perryman*, 399 N.E.2d at 817-18, disagreeing with the majority on this issue. One court, however, has upheld giving such an instruction where the defense witness partially incriminates and partially exonerates the defendant, *People v. Krush*, 458 N.E.2d 650, 653 (Ill. App. Ct. 1983), but not where the witness completely exonerates the defendant, *People v. Dodd*, 527 N.E.2d 1079, 1083-84 (Ill. App. Ct. 1988).

Part I of this article briefly reviews how courts have traditionally determined whether a *prosecution witness* is an “accomplice,” and will provide representative samples of cautionary instructions. Part II will examine the federal decisions⁸ upholding giving a similar instruction when the prosecutor claims that a *defense witness* is an accomplice and will show that several United States Supreme Court decisions which are frequently cited as supporting the practice do not really do so.⁹ Part III will argue that, except perhaps in very rare cases, it is not appropriate to give such an instruction about a defense witness.

I. DEFINING “ACCOMPLICE”: INSTRUCTING THE JURY ABOUT PROSECUTION ACCOMPLICE-WITNESSES

A. DEFINING “ACCOMPLICE”

For purposes of the issues discussed in this article, an accomplice is generally defined as a witness who, because of his or her involvement, could have been charged with or convicted for the same offense for which the defendant is being tried.¹⁰ Thus, as a matter of law, someone who was charged with the same crimes as those for which the defendant is currently being tried is generally considered an accomplice.¹¹ Someone who admits having committed that crime with the defendant is also considered an accomplice.¹²

⁸ State decisions supporting the practice generally cite the federal cases and adopt the same reasoning. *See supra* note 4.

⁹ Along the way, I also demonstrate why failure to adhere strictly to the explicit mandates of *The Bluebook* and other guides to legal citations can cause confusion and uncertainty in the law. *See infra* text accompanying notes 44-71.

¹⁰ *See* CAL. PENAL CODE § 1111 (West 2004) (defining accomplice as “one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given”); NEV. REV. STAT. ANN. § 175.291(2) (LexisNexis 2001); OR. REV. STAT. § 136.440 (2003); *People v. Horton*, 906 P.2d 478, 506 (Cal. 1995) (quoting CAL. PENAL CODE § 1111); *State v. Ortiz*, 747 A.2d 487, 507 (Conn. 2000); *State v. Shindell*, 486 A.2d 637, 644-45, 644 n.7 (Conn. 1985); *State v. Harris*, 589 N.W.2d 239, 241 (Iowa 1999); *Burley v. State*, 248 A.2d 404, 406 (Md. Ct. Spec. App. 1968).

¹¹ *See Harris v. State*, 420 So. 2d 812, 816-17 (Ala. Crim. App. 1982) (finding witness who had been indicted for and pled guilty to the same charge was accomplice as a matter of law); *People v. Pelc*, 476 N.Y.S.2d 661, 662-63 (N.Y. App. Div. 1984) (same); *Solis v. State*, 792 S.W.2d 95, 96-97 (Tex. Crim. App. 1990) (co-indictee).

¹² *See State v. Blazak*, 560 P.2d 54, 55-57 (Ariz. 1977); *People v. Tillotson*, 469 N.E.2d 520, 521 (N.Y. 1984); *State v. Hoadley*, 319 N.W.2d 505, 506-07 (S.D. 1982).

Otherwise, the burden of proving that a witness is an accomplice is on the defendant.¹³ Thus, for example, if a state witness admits participating in the acts in question, but claims lack of criminal intent, whether he was an accomplice is an issue for the jury to consider.¹⁴ Mere presence at the scene of a crime, absent more, is not sufficient to make one an accomplice as a matter of law.¹⁵ Complicity in a related offense generally does not suffice to categorize a witness as an accomplice,¹⁶ although exceptions to this rule do exist.¹⁷

B. "CARE AND CAUTION" INSTRUCTIONS: ACCOMPLICE AS PROSECUTION WITNESS

A substantial number of American jurisdictions require a trial judge to give a special jury instruction when an accomplice testifies as a prosecution witness. Such instructions use a variety of terms in advising juries how to assess such testimony. The words "care" and "caution" appear perhaps most frequently, but other cautionary words such as "suspicion" also appear.¹⁸ Other formulations are also used.¹⁹ In some jurisdictions, the

¹³ See *Stanley v. State*, 875 S.W.2d 493, 495 (Ark. 1994); *People v. Johnson*, 95 Cal. Rptr. 316, 318-19 (Cal. Ct. App. 1971).

¹⁴ See *Johnson v. State*, 792 S.W.2d 863, 867 (Ark. 1990); *Sosebee v. State*, 274 S.E.2d 717, 718 (Ga. Ct. App. 1980); *People v. Facey*, 499 N.Y.S.2d 517, 521 (N.Y. App. Div. 1986), *aff'd*, 506 N.E.2d 536 (N.Y. 1987); *People v. Rezey*, 490 N.Y.S.2d 622, 625 (N.Y. App. Div. 1985); *Drummond v. State*, 624 S.W.2d 690, 692 (Tex. Ct. App. 1981).

¹⁵ See *Williams v. State*, 654 So. 2d 74, 75-76 (Ala. Crim. App. 1994) (holding that where presence supported the inference of involvement in the crime, the issue must be presented to the jury); *Ortiz*, 747 A.2d at 507; *State v. Rakestraw*, 871 P.2d 1274, 1281-82 (Kan. 1994) (holding that where a rational fact-finder could conclude that the witness was an accomplice, the issue must be presented to the jury); *Spears v. State*, 900 P.2d 431, 440 (Okla. Crim. App. 1995); *Harris v. State*, 738 S.W.2d 207, 216 (Tex. Crim. App. 1986).

¹⁶ Thus, that a state witness was originally charged as an accessory after the fact, because he lied to police about what he saw, does not make him an accomplice to the underlying murder. *Rakestraw*, 871 P.2d at 1281-82.

¹⁷ For example, N.Y. CRIM. PROC. LAW § 60.22 (McKinney 2003) requires corroboration of a witness's testimony so long as the facts would permit bringing either the same or a related charge against the witness. In Texas, a state witness is an accomplice so long as he can be charged with the same offense, or with a lesser included offense. See *Herron v. State*, 86 S.W.3d 621, 631 (Tex. Crim. App. 2002); *Blake v. State*, 971 S.W.2d 451, 454-55 (Tex. Crim. App. 1998). Many states recognize a special rule in cases involving a thief and a receiver of stolen property. See FISHMAN, *supra* note 2, § 5:52.

¹⁸ Pattern Criminal Federal Jury Instructions for the Seventh Circuit, Instruction 3.13, entitled "Witnesses Requiring Special Caution," directs that, as to a witness who has received immunity or other benefits from the government, or who has "stated that he/she was involved in the commission of the offense as charged against the defendant," the judge should instruct the jury: "You may give his/her testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care." SEVENTH

CIRCUIT JUDICIAL COUNCIL, PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS 3.13 (1998), *available at* <http://www.ca7.uscourts.gov/Rules/pjury.pdf>.

The Ninth Circuit Manual of Model Criminal Jury Instructions, § 4.9 states,

[If a witness has received immunity or other benefits in exchange for his or her testimony, or is an accomplice,] in evaluating [the witness's] testimony, you should consider the extent to which or whether [his or her] testimony may have been influenced by [such factors]. In addition, you should examine [that witness's] testimony with greater caution than that of other witnesses.

NINTH CIRCUIT JURY INSTRUCTIONS COMMITTEE, NINTH CIRCUIT MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS § 4.9 (2003), *available at* <http://www.ce9.uscourts.gov/web/sdocuments.nsf/crim>.

The Criminal Pattern Jury Instructions for the Eleventh Circuit state,

The testimony of some witnesses must be considered with more caution than the testimony of other witnesses. [A former co-defendant who has pleaded guilty in hopes of receiving leniency in exchange for his testimony] may have a reason to make a false statement because the witness wants to strike a good bargain with the Government. So, while a witness of that kind may be entirely truthful when testifying, you should consider such testimony with more caution than the testimony of other witnesses.

JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT, ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) Special Instruction 1.2 (2003), *available at* <http://www.ca11.uscourts.gov/documents/jury/crimjury.pdf>.

California Jury Instructions—Criminal 3.18, entitled “Testimony Of Accomplice To Be Viewed With Care And Caution” reads,

To the extent that an accomplice gives testimony that tends to incriminate [the] defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in this case.

COMMITTEE ON STANDARD JURY INSTRUCTIONS, CALIFORNIA JURY INSTRUCTIONS CRIMINAL (CALJIC) Instruction 3.18 (2004).

Colorado Jury Instructions—Criminal, Instruction 4:06 directs that when the testimony of an accomplice is uncorroborated, the judge should instruct: “While you may convict upon this testimony alone, you should act upon it with great caution, subjecting it to a careful examination in the light of other evidence in the case.” COLORADO SUPREME COURT COMMITTEE ON CRIMINAL JURY INSTRUCTIONS, COLORADO CRIMINAL JURY INSTRUCTIONS Instruction 4:06 (1983).

Hawai'i Pattern Jury Instructions—Criminal, Instruction 6.01A states “Caution as to Accomplice,” reads,

The testimony of an alleged accomplice should be examined and weighed by you with greater care and caution than the testimony of ordinary witnesses. You should decide whether the witness's testimony has been affected by the witness's interest in the outcome of the case, or by prejudice against the defendant, or by the benefits that the witness stands to receive because of his/her testimony, or by the witness's fear of retaliation from the government.

HAWAI'I SUPREME COURT, HAWAI'I CRIMINAL JURY INSTRUCTIONS, Instruction 6.01A (2005), *available at* <http://www.courts.state.hi.us/> (follow “Legal References” hyperlink; then follow “Internet Resources” hyperlink; then follow “Jury Instructions” hyperlink).

See State v. Jones, 873 P.2d 122, 131 n.1 (Idaho 1994) (approving instruction that the jury must examine accomplice testimony “with care and caution and in light of all the evidence in the case”).

Illinois Pattern Jury Instructions-Criminal, Instruction 3.17 states, “When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case.” ILLINOIS SUP. CT. COMMITTEE ON JURY INSTRUCTIONS, ILLINOIS PATTERN JURY INSTRUCTIONS: CRIMINAL, Instruction 3.17 (4th ed. 2000).

Michigan Criminal Jury Instruction 5.6 states,

- (3) When you decide whether you believe an accomplice, consider the following:
(a) Was the accomplice’s testimony falsely slanted to make the defendant seem guilty because of the accomplice’s own interests, biases, or for some other reason?

....

- (4) In general, you should consider an accomplice’s testimony more cautiously than you would that of an ordinary witness. You should be sure you have examined it closely before you base a conviction on it.

STATE BAR OF MICHIGAN, MICHIGAN CRIMINAL JURY INSTRUCTIONS 5.6 (2d ed. 1989).

Mississippi Model Jury Instructions—Criminal §1:14, “Weight and credibility of accomplice testimony” states,

The Court instructs the jury that the law looks with suspicion and distrust on the testimony of an alleged informant, and requires the jury to weigh that testimony with great care and suspicion. You should weigh the testimony from an alleged informant, and passing on what weight, if any, you should give this testimony, you should weigh it with great care and caution, and look upon it with distrust and suspicion.

MISSISSIPPI JUDICIAL COLLEGE, MISSISSIPPI MODEL JURY INSTRUCTIONS - CRIMINAL §1:14 (2000).

Nebraska Jury Instructions—Criminal 2d, “Accomplice Testimony” states: “There has been testimony from (here insert name), a claimed accomplice of the defendant. You should closely examine (his, her) testimony for any possible motive (he, she) might have to testify falsely” NEBRASKA SUP. CT. COMM. ON PRACTICE AND PROCEDURE, *supra* note 5, at 5.6.

Oklahoma Uniform Jury Instructions-Criminal, OUJI-CR 9-43 states,

The testimony of an informer who provides evidence against a defendant for pay/(immunity from punishment)/(personal advantage/ vindication) must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer’s testimony has been affected by interest or by prejudice against the defendant is for you to determine.

OKLAHOMA COURT OF CRIMINAL APPEALS, OKLAHOMA UNIFORM JURY INSTRUCTIONS—CRIMINAL OUJI-CR 9-43 (2005), *available at* <http://www.okcca.net/online/download.jsp>.

¹⁹ The Eighth Circuit has approved the following:

You have heard testimony from (name of witness) who stated that [he] [she] participated in the crime charged against the defendant. [His] [Her] testimony was received in evidence and may be considered by you. You may give [his] [her] testimony such weight as you think it deserves. Whether or not [his] [her] testimony may have been influenced by [his] [her] desire to please the Government or to strike a good bargain with the Government about [his] [her] own situation is for you to determine.

JUDICIAL COMMITTEE ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 4.05 (2003).

instruction is discretionary.²⁰ In others it is mandatory.²¹ And some jurisdictions reject the propriety of such instructions altogether.²²

II. FEDERAL DECISIONS UPHOLDING ACCOMPLICE INSTRUCTIONS CONCERNING DEFENSE WITNESSES

In 1971, in *United States v. Nolte*,²³ the Fifth Circuit endorsed the practice of providing a cautionary accomplice instruction about a defense witness's testimony.²⁴ Apparently, this was the first federal circuit decision to do so, and remains the most widely cited federal or state case supporting the practice. Nolte, an attorney, was charged with receiving proceeds from three bank robberies committed by Homan, a client, while knowing the money was stolen, and was convicted on one count.²⁵ Homan originally agreed to testify for the government against Nolte but instead testified as a defense witness that Nolte was innocent.²⁶ The trial judge instructed the jury that an accomplice's testimony "should not be received by the jury as

²⁰ As the Third Circuit explained:

The trial court will generally be acting within its discretion if it allows defense counsel broad latitude to probe the credibility of accomplices and immunized witnesses, and instructs the jury to consider whether the witnesses' self-serving motives in testifying have destroyed or diminished their credibility. An immunized witness or accomplice charge is advisable when the jury has not otherwise been sufficiently alerted to the credibility concerns posed by the testimony of witnesses over whom the government wields particular power to reward or punish.

United States v. Isaac, 134 F.3d 199, 205 (3d Cir. 1998) (noting also that the "care and caution" instruction was first promulgated as an antidote to another generally given instruction, since disapproved, that the jury should presume that every witness is testifying truthfully). Similarly, the Hawai'i Supreme Court has held that "in some cases in which the testimony of an accomplice substantially aids the prosecution's proof, a trial court may act properly within its discretion if it refuses or otherwise fails to give an accomplice witness instruction." *State v. Okumura*, 894 P.2d 80, 105 (Haw. 1995) (listing factors the court should consider in deciding whether to give the instruction).

²¹ See *Moore v. State*, 787 So. 2d 1282, 1286-88 (Miss. 2001); *Wheeler v. State*, 560 So. 2d 171, 171-74 (Miss. 1990) (holding that it does not suffice to give a general instruction on how to evaluate witness credibility).

²² Indiana courts require that when an accomplice testifies for the state pursuant to a plea bargaining promising leniency, this must be disclosed to the jury, but that a cautionary instruction regarding that witness's credibility should not be given. See *Morgan v. State*, 419 N.E.2d 964, 968-69 (Ind. 1981); *Newman v. State*, 334 N.E.2d 684, 686-88 (Ind. 1975); *McLean v. State*, 638 N.E.2d 1344, 1347-48 (Ind. Ct. App. 1994). In *Morgan*, the state supreme court explained that "such an instruction would have [an] unduly disparag[ing] [effect] on the testimony of the defendants' accomplices, and for this reason, the refusal to give it was proper." 419 N.E.2d at 968-69.

²³ 440 F.2d 1124 (5th Cir. 1971).

²⁴ See *id.* at 1126-27.

²⁵ See *id.* at 1125.

²⁶ See *id.* at 1127.

that of an ordinary witness, but ought to be received as suspicious and with the greatest care and caution."²⁷

The Fifth Circuit upheld the trial judge's action, ruling that when a defendant has an accomplice testify on his behalf, it is the better practice, although not required, for courts to give a cautionary instruction.²⁸ For this proposition it cited two Supreme Court decisions, each of which held that it is the "better practice" to give such an instruction when an accomplice testifies *for the government*.²⁹ "The policy behind the practice," the Fifth Circuit commented, "is obvious: to alert the jury to the possibility of perjured testimony."³⁰ To justify applying this principle to testimony by a defense witness, that court quoted a third United States Supreme Court decision, *Washington v. Texas*³¹: "[W]hen one accomplice testifies for another, there is always the chance that each will try to 'swear the other out of the charge.'"³²

²⁷ *Id.* at 1126.

²⁸ *See id.* at 1126-27.

²⁹ *See id.* at 1126. *Nolte* cited *Caminetti v. United States*, 242 U.S. 470, 495 (1917) and *Holmgren v. United States*, 217 U.S. 509, 524 (1910). *Holmgren* was convicted of falsely swearing in a naturalization proceeding that he had known the applicant for five years and that the applicant had lived continuously in the United States for that period. *Holmgren*, 217 U.S. at 516. The applicant testified for the government at *Holmgren's* trial. *See id.* at 523-24.

The Court upheld the trial judge's refusal to give a cautionary instruction with regard to the applicant's testimony, noting that there was no evidence that the applicant had induced *Holmgren* to give the false testimony (thus, evidence was lacking that the applicant was complicit in obtaining *Holmgren's* perjury). *See id.* It also observed in dictum that it is "undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them." *Id.* at 524.

In *Caminetti*, codefendant Diggs was charged with two counts of the White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-24 (2000)), for transporting two females across a state line, one to be his "mistress and concubine," one to be *Caminetti's*. *See Caminetti*, 242 U.S. at 482-83. Defendant appealed the trial court's decision not to give a cautionary instruction that "the two girls" were accomplices whose testimony should be "received with great caution and believed only when corroborated by other testimony adduced in the case." *Id.* at 495. The Court, citing *Holmgren*, held that while "it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to such evidence[,] . . . there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them." *Id.* at 495 (citing JOEL PRENTISS BISHOP & H.C. UNDERHILL, BISHOP'S NEW CRIMINAL PROCEDURE § 1081 (2d ed. 1913)).

³⁰ *Nolte*, 440 F.2d at 1126.

³¹ 388 U.S. 14 (1967).

³² *Nolte*, 440 F.2d at 1126 (quoting *Washington*, 388 U.S. at 21).

The Fifth Circuit quoted *Washington* accurately, but *Washington* does not support the proposition for which it was quoted. In that case, Washington and a codefendant, Fuller, were accused of the shotgun killing of the young man who was dating Washington's former girlfriend.³³ Washington testified that he had tried to dissuade Fuller, who owned the shotgun, from shooting anyone, but that Fuller, who was intoxicated at the time, fired the shot anyway.³⁴ Fuller, who had already been convicted and sentenced to fifty years, was prepared to testify to corroborate Washington's version of events, but the trial judge, applying two Texas statutes which prohibited persons charged as principals, accomplices, or accessories in the same crime from testifying as witnesses for each other, precluded Fuller's testimony.³⁵ The Supreme Court held first, that a criminal defendant's Sixth Amendment right to have compulsory process for obtaining witnesses in his favor is applicable to the States through the Fourteenth Amendment and second, that the Texas statutes violated this right.³⁶

In explaining its holding, the Court noted that provisions like the Texas statutes evolved from the early common law rule that no party in civil or criminal litigation could testify, because of his interest in the outcome.³⁷ Even after that rule was abolished, the Court related, some jurisdictions retained the prohibition against one alleged accomplice testifying for another:

*It was thought that if two persons charged with the same crime were allowed to testify on behalf of each other, "each would try to swear the other out of the charge." This rule, as well as the other disqualifications for interest, rested on the unstated premises that the right to present witnesses was subordinate to the court's interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue.*³⁸

The Court then disparaged that thinking as ill-conceived from the start and absurd in its application, since a supposed accomplice who testifies for

³³ *Washington*, 388 U.S. at 15-16.

³⁴ *See id.* at 16.

³⁵ *See id.* at 16-17.

³⁶ *See id.* at 18, 22-23.

³⁷ *See id.* at 20.

³⁸ *See id.* at 21 (emphasis added). The italicized passage quotes *Benson v. United States*, 146 U.S. 325, 335 (1892). In a footnote, the Court in *Washington* further quoted *Benson*:

Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors.

388 U.S. at 21 n.18.

the state in the hopes of receiving lenient treatment is at least as likely to commit perjury as one testifying to the defendant's innocence.³⁹

Thus, the phrase from *Washington* quoted in *Nolte* does not support the proposition for which the Fifth Circuit cited it; the Supreme Court included that phrase in *Washington* as an example of earlier thinking which, in *Washington*, it explicitly rejected.

The Fifth Circuit, each time citing *Nolte*, has approved a cautionary instruction in such circumstances in at least two additional decisions.⁴⁰

The Seventh Circuit, similarly citing *Nolte*, has twice done likewise, each case, coincidentally, involving counterfeit currency: *United States v. Cool*,⁴¹ which the Supreme Court reversed on other (but related) grounds, the discussion of which will be deferred for a few paragraphs, and *United States v. Bolin*,⁴² which upheld giving such an instruction where the defendant's husband, after pleading guilty to counterfeiting charges, testified that his wife was innocent.⁴³

³⁹ See *Washington*, 388 U.S. at 22-23. The Court continued,

The rule disqualifying an alleged accomplice from testifying on behalf of the defendant cannot even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury. The absurdity of the rule is amply demonstrated by the exceptions that have been made to it. For example, the accused accomplice may be called by the prosecution to testify against the defendant. Common sense would suggest that he often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large. Moreover, under the Texas statutes, the accused accomplice is no longer disqualified if he is acquitted at his own trial. Presumably, he would then be free to testify on behalf of his comrade, secure in the knowledge that he could incriminate himself as freely as he liked in his testimony, since he could not again be prosecuted for the same offense. The Texas law leaves him free to testify when he has a great incentive to perjury, and bars his testimony in situations where he has a lesser motive to lie.

Id.

⁴⁰ See *United States v. Urdiales*, 523 F.2d 1245, 1248 (5th Cir. 1975); *United States v. Simmons*, 503 F.2d 831, 836-37 (5th Cir. 1974). In *Simmons*, it is not entirely clear whether the supposed accomplice was called by the government or by the defense.

⁴¹ 461 F.2d 521 (7th Cir. 1972), *rev'd on other grounds*, 409 U.S. 100 (1972).

⁴² 35 F.3d 306 (7th Cir. 1994).

⁴³ See *id.* at 307-08. The couple had just begun what they expected would be a lucrative career in counterfeiting, and recruited a friend to help them distribute their product. See *id.* at 307. The friend instead went to the authorities. See *id.* In addition to the friend's testimony, evidence against the defendant included recorded conversations in which she made incriminating statements, and substantial evidence taken from the defendant's home and garage, including counterfeit currency with a face value of more than \$29,000. See *id.* at 308.

In *United States v. Tirouda*,⁴⁴ the Ninth Circuit joined the Fifth and Seventh Circuits in upholding a “care and caution” instruction about a defense-witness-as-accomplice.⁴⁵ Tirouda, along with his wife and mother, were indicted for falsely claiming that Tirouda had been born in Mississippi and that he was therefore a United States citizen.⁴⁶ At his trial, his mother, who was not then being tried, testified that she had given birth to him during a brief sojourn in the United States.⁴⁷ The judge instructed,

You have heard the testimony from Tata Tirouda, who was also indicted in this case. As I told you before, she has pled not guilty and she is not on trial here now. However, because the government alleges that she is an accomplice in the crimes charged, you should consider such testimony with greater caution than that of other witnesses.⁴⁸

In approving the trial judge’s action, the Ninth Circuit stated: “Indeed, the Supreme Court has indicated that a district court does not err in giving an accomplice witness instruction favoring the prosecution.”⁴⁹ However, this conclusion misconstrues slightly the Supreme Court’s discussion of *Nolte* in *Cool v. United States*.⁵⁰

In *Cool*, the defendant was charged with possession of counterfeit money with intent to distribute.⁵¹ She and her husband gave a third person, Voyles, a ride to town; while Cool waited, Voyles went to a store and tried to use counterfeit money to make a purchase.⁵² Voyles was arrested as he walked back to Cool’s car.⁵³ Cool and her husband were instructed to follow the police car to the station.⁵⁴ A witness testified that he saw Cool throw a paper bag out of her car as she followed the police car; the bag contained more counterfeit currency.⁵⁵ A few counterfeit bills were also found under the right seat of Cool’s car.⁵⁶ Voyles pleaded guilty.⁵⁷ Cool

⁴⁴ 394 F.3d 683 (9th Cir. 2005).

⁴⁵ See *id.* at 685-88.

⁴⁶ See *id.* at 686.

⁴⁷ See *id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 687-88 (citing *Cool v. United States*, 409 U.S. 100, 103 (1972) (per curiam) (citing the rationale for such an instruction given in *Nolte* as posing “[n]o constitutional problem”) and *United States v. Nolte*, 440 F.2d 1124 (1971)).

⁵⁰ See 409 U.S. 100, 103 (1972) (per curiam).

⁵¹ *Id.* at 100.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 100-01.

⁵⁵ *Id.* at 101.

⁵⁶ *Id.*

⁵⁷ *Id.* at 101 & n.1.

testified at her trial that she had known nothing about the bogus currency.⁵⁸ Appearing as a defense witness, Voyles supported Cool's claim of ignorance.⁵⁹

The trial judge botched things badly, in effect instructing the jury to ignore Voyles' testimony unless they found it convincing beyond a reasonable doubt.⁶⁰ The Supreme Court reversed, holding that the instruction, which in essence placed on the defendant the obligation of proving his innocence, was fundamentally at odds with the principle that the government must prove guilt beyond a reasonable doubt.⁶¹ In the passage referred to in *Tirouda*, the Court in *Cool* commented,⁶²

Accomplice instructions have long been in use and have been repeatedly approved. [a] In most instances, they represent no more than a commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity. [b] But in most of the recorded cases, the instruction has been used when the accomplice turned State's evidence and testified against the defendant. [c] No constitutional problem is posed when the judge instructs a jury to receive the prosecution's accomplice testimony 'with care and caution.' [d] *Cf. United States v. Nolte*, 440 F.2d 1124 (CA5 1971).⁶³

Each of the cases (except *Nolte*) cited in this passage, indicated by brackets [a], [b], [c], and [d], involves an accomplice who testified *for* the government.⁶⁴

⁵⁸ *Id.* at 101.

⁵⁹ *Id.* at 100-01. Voyles claimed that after petitioner had driven him to his destination, he "removed some of the counterfeit bills from his satchel which he kept in petitioner's trunk, and concealed the rest of the bills in a sack which he placed under the front bumper by the headlight." *Id.* at 101. This was the sack, according to the defense, that a witness saw fall to the ground as petitioner drove to the police station. *Id.* Voyles explained the bills in the car by stating that when he saw the police approaching the car after he had used some of the bills, he tossed the remaining bills on his person onto the floor of the car, all without petitioner's knowledge. *Id.*

⁶⁰ *Id.* at 101-02.

⁶¹ "The clear implication of [the] instruction was that the jury should disregard Voyles' testimony unless it was 'convinced it is true beyond a reasonable doubt.' Such an instruction places an improper burden on the defense and allows the jury to convict despite its failure to find guilt beyond a reasonable doubt." *Id.* at 102-03.

⁶² The bracketed letters [a], [b], [c], and [d] in the passage that follows each represents a case cited by the Court; those cases are named and discussed *infra* note 64.

⁶³ *Cool*, 409 U.S. at 103 (emphasis added). The cases cited therein are listed and discussed in the next footnote.

⁶⁴ Where each bracketed letter appears in the quoted passage, the Court cited the following cases, using the language placed in quotation marks:

[a] "*See, e.g., Holmgren v. United States*, 217 U.S. 509, 523-524, 30 S. Ct. 588, 591-592, 54 L. Ed. 861 (1910)." *Holmgren* is discussed *supra* note 29.

Therefore, the following question presents itself: Does the Supreme Court's "cf." reference to *Nolte* carry the weight the Ninth Circuit attributed to it in *Tirouda*: "See *Cool v. United States*, . . . (citing the rationale for such an instruction given in *Nolte* . . . as posing '[n]o constitutional problem.')"⁶⁵

According to *The Bluebook: A Uniform System of Citation*, "[l]iterally cf. means 'compare,'"⁶⁶ and, when used as a citation signal, means: "Cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support."⁶⁷ Similarly, the *Association of Legal Writing Directors Citation Manual* directs that cf. should be used "when the cited authority supports the stated proposition only by analogy."⁶⁸ Both manuals agree that "[t]he citation's relevance will usually be clear to the reader only if it is explained. Parenthetical explanations . . . , however brief, are therefore recommended."⁶⁹

[b] "See, e.g., *Crawford v. United States*, 212 U.S. 183, 204, 29 S. Ct. 260, 268, 53 L. Ed. 465 (1909)." In *Crawford*, the Court, assessing the sufficiency of the evidence against the defendant, commented:

[T]he evidence of a witness, situated as was Lorenz [who had been indicted as a co-defendant, had pleaded guilty, and testified for the government], is not to be taken as that of an ordinary witness of good character in a case, whose testimony is generally and prima facie supposed to be correct. On the contrary, the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses.

Id. at 204.

[c] "See generally *McMillen v. United States*, 386 F.2d 29 (1st Cir. 1967), and cases cited therein." In *McMillen*, the First Circuit held that instructing the jury that every witness is presumed to testify truthfully, "combined with the failure to give a cautionary instruction as to the testimony of accomplice witnesses" was reversible error where "the only evidence connecting [defendant] with the bank robbery came from the mouths of others involved in that escapade." *Id.* at 36 (citing cases disapproving of the "presumption of truthfulness" instruction).

[d] "See, e.g., *United States v. George*, 319 F.2d 77, 80 (6th Cir. 1963)." In *George*, the court held that "[a]lthough it is the better practice for the trial judge to specifically charge the jury that the testimony of an accomplice should be received with care and caution and closely scrutinized," omitting that language was not reversible error where defendant did not explicitly request the instruction. *Id.* at 80. Furthermore, "the fact that certain witnesses for the Government were accomplices, whose testimony should be closely scrutinized, was adequately brought to the attention of the jury by counsel for both the Government and the defendants." *Id.*

⁶⁵ *United States v. Tirouda*, 394 F.3d 683, 687-88 (9th Cir. 2005).

⁶⁶ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 47 (Columbia Law Review et al. eds., 18th ed. 2005).

⁶⁷ *Id.*

⁶⁸ DARBY DICKERSON, ALWD CITATION MANUAL § 44.3 (2d ed. 2002).

⁶⁹ See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, *supra* note 66. Similarly, The ALWD Citation Manual advises, "When you use a signal, you are strongly encouraged to

Unfortunately, the Supreme Court in *Cool* offered no parenthetical explanation.⁷⁰ It is clear that the Court's main purpose was to dramatize the impropriety of the trial judge's instruction in that case. What we are left with, then, is this: "No constitutional problem is posed when the judge instructs a jury to receive the *prosecution's* accomplice testimony 'with care and caution.' . . . [Compare] *United States v. Nolte*"⁷¹

The Ninth Circuit, in *Tirouda*, read this as a wholehearted endorsement of the concept that a judge should give a cautionary instruction like that worded in *Nolte* when someone whom the prosecutor thinks is an accomplice testifies for the defense. Query whether the Supreme Court's unexplained use of "*cf.*" should be assigned such a high measure of significance. Yes, the Supreme Court's citation to *Nolte* could mean: "We endorse the instruction given in *Nolte*." But it could also mean something less, such as: "If it is ever appropriate to give an 'accomplice testimony should be received with caution' instruction about a defense witness—an issue we need not decide in this case—such an instruction should be worded like that in *Nolte*, without anything resembling the wholly inappropriate language in the instant case."

However, the ultimate question is not what the Supreme Court meant thirty-five years ago with its less-than-pellucid "*cf.*" Rather, the central question is whether it is fair, just, or appropriate for a trial judge to give such an instruction when the defense calls and elicits favorable testimony from someone whom the prosecutor claims was the defendant's accomplice.

III. EVALUATION

A. THE FALSE EQUIVALENCY

Courts that approve giving a "care and caution" instruction about a defense witness do so because they see the situation as equivalent to the situation where an accomplice testifies for the state. However, for a number of reasons this presents a false equivalency.

1. Prosecutor's Procedural and Tactical Advantages

In the typical case, the prosecutor has created and controlled every aspect of the situation. It is the prosecutor who chose to bring charges in the first place and it is the prosecutor who has called the witness. Usually,

use an explanatory parenthetical after the cited source to describe the force or meaning of the authority." DICKERSON, *supra* note 68, § 44.4.

⁷⁰ See *United States v. Cool*, 409 U.S. 100, 103 (1972).

⁷¹ See *id.* (emphasis added).

the prosecutor concedes that the alleged accomplice relationship exists between the witness and the defendant.⁷² Indeed, often the very fact that the witness claims to be the defendant's accomplice is what makes the witness so valuable to the prosecutor,⁷³ and has prompted the prosecutor to use his or her legal authority to entice the witness to switch sides. Particularly given the inherent risks that the witness is lying, giving a "care and caution" instruction about a prosecution witness is a reasonable measure to offset, somewhat, these procedural and tactical advantages.

By contrast, a defendant who calls a witness whom the prosecutor claims was an accomplice has controlled almost no aspect of what has happened in the courtroom. He or she certainly did not choose to be indicted, denies the alleged accomplice relationship existed, and calls the witness only in an attempt to disprove what the prosecutor has alleged.

2. Risk of Fabrication

Second, as the Supreme Court observed in *Washington*,⁷⁴ the supposed accomplice's motive to fabricate is generally far greater when he testifies for the prosecution than when he testifies for the defense.⁷⁵ Indeed, the prosecutor plays a significant role in determining the charges to which the witness has or will be permitted to plead guilty; how harshly or leniently he will be sentenced; and where (if at all) the witness will be incarcerated. Often during the negotiations that results in the bargain, the prosecutor uses this discretionary leverage to persuade the witness to testify, not to the facts as the accomplice might have originally described them,⁷⁶ but to the facts as

⁷² See *supra* notes 10-17 and accompanying text, which concern how to resolve a dispute between the prosecution and the defense as to whether the witness' testimony or other circumstances qualify him as an "accomplice."

⁷³ This is particularly so where the witness claims to have seen and heard the defendant do things which a criminal in a defendant's supposed situation would not allow anyone but an accomplice to witness.

⁷⁴ See *supra* notes 31-39 and accompanying text.

⁷⁵ See *Texas v. Washington*, 388 U.S. 14, 22-23 (1967).

⁷⁶ As anyone who has participated in the process knows, the typical accomplice-witness does not come completely "clean" during the initial debriefing and negotiations; rather, he or she will hold back some information. The accomplice may do so for several reasons: to avoid incriminating someone of whom he or she is afraid; to protect a friend or loved one; to avoid revealing the extent of his or her own involvement (it is not unusual for an accomplice to become an enthusiastic informant or witness during "official" hours, while continuing to engage in the same kinds of criminal activity "on the side"); or simply because the witness has become so accustomed to lying and dissembling that he or she does so as a conditioned reflex even where this is likely to harm rather than help him.

the prosecutor believes them to be.⁷⁷ Most often, the prosecutor gets what he or she bargained for: truthful testimony against one or more criminals, in exchange for a measure of leniency for the accomplice who has turned state's evidence—a result which the law regards as acceptable, or even desirable.

Occasionally, however, a prosecutor might quite sincerely and reasonably, but incorrectly, believe certain "facts" to be true, and might make it clear to the accomplice that there will be no deal unless the accomplice incorporates those "facts" into his testimony.⁷⁸ The risk is substantially greater that a supposed accomplice might falsely incriminate one or more defendants in order to have something to offer the prosecutor and thereby obtain a deal more generous than he deserves.⁷⁹

⁷⁷ I used this tactic as a prosecutor on occasion. I did so only when I was convinced—only when I *knew*—the actual roles the defendant and accomplice played in the crime. Sometimes this knowledge was based on the testimony of victims or other non-criminal witnesses, and I leaned on the accomplice to provide corroborating testimony. Occasionally this knowledge was based on evidence which, for one reason or another, was not admissible at trial. Sometimes this knowledge was based on less specific sources of "information and belief." Now, some three decades after I left the District Attorney's Office, I am still satisfied that I read the facts correctly in each of those cases. But I also accept now what I was less willing to acknowledge then: it is possible that on occasion I could have been wrong.

⁷⁸ It is also possible that a rogue prosecutor might insist that an accomplice testify to "facts" which the prosecutor knows are untrue, but, I am quite confident, for three reasons, that this occurs only rarely. First, most prosecutors are honorable men and women. Second, even a prosecutor tempted to suborn perjury would likely realize the high risk involved in doing so with a witness who has already demonstrated a willingness to turn on those with whom he had until recently been partners in wrongdoing. Third, a scheme to suborn perjury is likely to involve more than just the prosecutor and the witness. The police officers working the case would in all likelihood be part of, or learn of the deal. A prosecutor would have to be both dishonest and remarkably stupid to stake his or her career, not to mention liberty, on the expectation that none of those who know of the scheme will ever tell about it.

⁷⁹ This is one reason why the wise and conscientious prosecutor is reluctant to try a case based on accomplice testimony unless he can also offer substantial corroboration of the accomplice, even in jurisdictions that do not impose a corroboration requirement, because the corroboration substantially reduces the likelihood that the defendant is innocent. The other reason a wise and conscientious prosecutor is reluctant to try such a case without corroboration is that juries are often very skeptical of such testimony. I have seen first-hand, and have read many more court opinions, in which, in a multi-count trial based on accomplice testimony, the jury convicted defendants on those counts for which corroboration exists, and acquitted on the counts for which it was lacking. To any gentle reader or less-than-gentle law review editor who wants citations for the latter point, I offer this instead: In my thirty-seven years as an attorney and twenty-nine years as a law professor I have cited more than 17,000 court opinions in my treatises and articles; that does not include the cases I have read without citing (In my next incarnation, maybe I'll have a life instead?). Most of these are appellate decisions on a wide range of topics involving criminal law. I clearly recall that in a good number of them, the court, while discussing this or that issue

These possibilities, combined with our abhorrence of convicting someone who is innocent, explain why most jurisdictions require, or at least permit, a judge to give a "care and caution" instruction⁸⁰; doing so reflects and underscores the law's insistence that the prosecutor establish the defendant's guilt beyond a reasonable doubt.⁸¹

Except in rare circumstances, by contrast, a defendant rarely has leverage of this kind over a defense witness.⁸² There is, of course, a risk

(sufficiency of the evidence, the supposedly inherent lack of credibility of one or more government witnesses, supposedly prejudicial joinder of defendants or offenses, etc.), noted that the jury's acquittal on counts for which corroboration was lacking, and conviction only on counts for which it was present, indicates that defendants suffered no prejudice. Although I have cited many of those cases for other propositions of law, I did not earmark that aspect of their holdings, because they were not, at the time, germane to what I was writing. Nor, except in a very marginal sense, is that aspect of any particular appellate opinion germane to the current topic, either. I don't claim jurors make this distinction all of the time, or even most of the time; I only assert, as a fact I know to be true because I saw it in my days as a prosecutor and have read appellate decisions saying so, that it happens sometimes. You can take my word for it. Scout's honor.

⁸⁰ See FISHMAN, *supra* note 2, § 5:54.

⁸¹ Despite these risks, a plausible argument exists that a "care and caution" instruction is not necessary when the prosecutor offers the testimony of a self-professed accomplice. A prosecutor is constitutionally obligated to inform defense counsel of exculpatory information. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In *Giglio v. United States*, the Supreme Court held that "evidence of any understanding or agreement as to a future prosecution [of the accomplice witness] would be relevant to his credibility and the jury was entitled to know of it." 405 U.S. 150, 155 (1972). That a key state witness is testifying pursuant to a favorable plea bargain clearly qualifies as "Brady material." Cf. *United States v. Bagley*, 473 U.S. 667, 670-72, 676-77, 683-84 (1985) (noting that the Supreme Court does not differentiate between exculpatory and impeachment evidence when deciding whether it is *Brady* material). Defense counsel will surely use this information in cross-examining the accomplice-witness. Knowing this, the prosecutor will have the accomplice testify about the deal on direct examination, in the hopes of reducing its sting somewhat and to enable the prosecutor to tell the jury during final argument that she was "open and frank" with them and "did not attempt to hide" the informant's less than pristine past and strong motive to testify for the state. It costs nothing to be "open and frank" about information the other side has an absolute right to bring out anyway. See also Cassidy, *supra* note 1 (arguing that by keeping its promise to the accomplice-witness "soft," the government substantially reduces its impeachment value). Moreover, defense counsel undoubtedly will cover the same information, in greater detail and with maximum sarcasm and indignation, and, during closing argument, will urge the jury to reject the witness' testimony altogether. Moreover, judges routinely instruct juries in every case to consider whether a witness has a motive to lie or a stake in the outcome of the case. Accordingly, the Supreme Court has held that while it is the "better practice" for the trial judge to give an explicit "care and caution" instruction, this is not constitutionally required. See, for example, *Caminetti v. United States*, 242 U.S. 470, 495 (1917), which is discussed in note 29.

⁸² As the California Supreme Court observed in *People v. Guivan*:

[W]hen an accomplice is called by the defendant alone, it is error for the court to instruct the jurors *sua sponte* that it should view the testimony with distrust.

that the defense witness will give false exculpatory testimony; but that possibility always exists, and the prosecutor is not without persuasive responses. A prosecutor should not need a judicial instruction to get across to jurors that they should be skeptical of a mother's testimony on behalf of her son,⁸³ a son's testimony on behalf of his father,⁸⁴ or a husband's testimony on behalf of his wife.⁸⁵ Where a defense witness first insists on his own innocence, then tells federal officials that his attorney was involved in the criminal scheme, and then at trial testifies for the defense that his attorney was innocent, no judicial instruction should be necessary to get across the point that the witness' credibility is somewhat suspect.⁸⁶ The same is true where the admitted criminal's exculpatory testimony is inherently implausible.⁸⁷ If the accomplice has already been convicted, the prosecutor can point out, on cross-examination and during summation, that

The reason for the different rule when an accomplice is called by the defendant alone is evident: Because an accomplice does not ordinarily stand to benefit from providing testimony on behalf of the defendant, his or her statements are not necessarily suspect. . . . "The rule is otherwise for a prosecution witness since it is the accomplice's motive to testify falsely in return for leniency that underlies the close scrutiny given accomplice testimony offered against a defendant. . . . A defendant is powerless to offer this inducement."

957 P.2d 928, 933-34 (Cal. 1998) (citations omitted).

⁸³ See discussion *supra* notes 44-71 and accompanying text (United States v. Tirouda, 394 F.3d 683, 687 (9th Cir. 2005)).

⁸⁴ See *People v. Heikkinen*, 646 N.W.2d 190, 191-98 (Mich. Ct. App. 2002). At defendant's trial for assault, defendant's son, the only other person present, supported defendant's self-defense claim. See *id.* at 191. The trial judge instructed the jury:

If, after thinking about all the evidence, you decide that he did not take part in this crime, judge his testimony as you judge that of any other witness. But if you decide that Rick Heikkinen was an accomplice, then you must consider his testimony in the following way: Was the accomplice's testimony falsely slanted to make the defendant seem not guilty because of the accomplice's own interests, biases, or for some other reason?

Id. at 192. On appeal, the court upheld the instruction. *Id.* at 198.

⁸⁵ See discussion *supra* notes 41-43 and accompanying text (United States v. Bolin, 35 F.3d 306, 308 (7th Cir. 1974)).

⁸⁶ See discussion *supra* notes 23-39 and accompanying text (United States v. Nolte, 440 F.2d 1124, 1126-27 (5th Cir. 1971)).

⁸⁷ See, e.g., *supra* note 59; see also *Commonwealth v. Jones*, 417 A.2d 201, 202-04 (Pa. 1980). Defendant was accused of being one of three men who attempted to rob a store, then ran to their getaway car and sped off. *Id.* at 202. Minutes later police stopped the car; defendant was one of the three occupants. *Id.* One robber who had previously pleaded guilty testified that defendant had nothing to do with the robbery; rather, the robbers had interrupted their getaway to stop and give defendant a lift. *Id.* (Of course they did. Don't criminals *always* interrupt their getaway to pick up someone along the way?). The state supreme court correctly held that it was reversible error to give a "care and caution" instruction. *Id.* at 203-04.

the accomplice effectively has nothing to lose by trying to help out a friend.⁸⁸

There is, of course, a more insidious possibility: the witness is accepting sole responsibility for the crime because the defendant, or someone connected with him, has bribed or, more likely still, threatened, the witness or his family. Where there is evidence to support this possibility, the prosecutor will of course seek to offer it. For example, where a high-ranking member of a street gang is charged with a crime, a subordinate might falsely testify to his own guilt to exonerate the defendant, either out of loyalty or out of fear. In such a case, an expert witness on street gangs can testify that this is a common pattern among gang members.⁸⁹ But where the prosecutor lacks evidence to support this argument, a judicial instruction that the jury should distrust a defense witness merely because the government *claims* the witness was an accomplice seems unjustified.⁹⁰

B. IMPRESSION OF JUDICIAL PARTIALITY

Giving a “care and caution” instruction about a prosecution witness suggests judicial neutrality to the jury.⁹¹ If a prosecution witness is an

⁸⁸ See *United States v. Cool*, 461 F.2d 521, 524-25 (7th Cir. 1972), *rev'd on other grounds*, 409 U.S. 100 (1972); *United States v. Nolte*, 440 F.2d 1124, 1127 (5th Cir. 1971).

⁸⁹ See, e.g., *United States v. Padilla*, 387 F.3d 1087, 1090, 1094 (9th Cir. 2004). At defendant's trial for being a felon in possession of a firearm, police officers testified that after stopping Padilla's vehicle, Padilla threw away a handgun before he and Villa, a passenger, fled on foot. *Id.* at 1089. Villa testified for the defense that the gun was his and that when he got into Padilla's car, Padilla did not know Villa had the gun. See *id.* at 1090. Villa also testified (it is not clear whether this was elicited on direct or on cross) that he and Padilla were members of the same street gang. *Id.* In rebuttal, the government called a police officer, who, after being qualified as an expert witness on street gangs in general and that gang in particular, testified that one gang member would not testify against another, that it was customary for lower members in the gang hierarchy to accept blame to protect someone higher in the hierarchy as a show of loyalty, and that refusal to do so would bring punishment, including perhaps even death. *Id.* at 1090, 1094. On appeal, the Ninth Circuit upheld the trial judge's decision to admit this evidence, concluding, among other things, that its legitimate probative value was not substantially outweighed by the risk of unfair prejudice. *Id.* at 1094.

⁹⁰ Consider, for example, the instruction in *Tirouda v. United States*, 394 F.3d 683 (9th Cir. 2005), set out in the text accompanying *supra* note 48.

⁹¹ When an attorney knows that a judge will instruct the jury on an issue, it is a common trial tactic to sum up on the issue in a way that comes close enough to the probable language of the instruction to subtly suggest that the instruction endorses the attorney's argument in summation. Where a purported accomplice testifies as a prosecution witness, defense attorney's closing argument will naturally pound away at the supposed accomplice's motive to lie and will stress the reasons why the jury should not trust the witness or his testimony. The judge's “care and caution” instruction thus may appear to the jury to endorse counsel's

accomplice as a matter of law,⁹² or the prosecutor concedes the relationship, the "care and caution" is simply one portion of the overall instruction placing on the prosecutor the burden of proving guilt beyond a reasonable doubt. The same is true if a dispute exists and the judge gives a conditional instruction that the jury should use "care and caution" if they conclude that government witness merits classification as an accomplice.

Offering a "care and caution" instruction about a defense witness, by contrast, may give the appearance that the judge is endorsing the prosecutor's theory of the case. This appearance is most prominent if the instruction is worded as that in *Tirouda*: "because the government alleges that [the witness] is an accomplice in the crimes charged, you should consider such testimony with greater caution than that of other witnesses."⁹³ Even without this nearly explicit endorsement of the prosecutor's theory, however, any instruction that contains the word "accomplice" will likely have this effect, because in many ways the whole focal point of the trial may be to determine whether in fact the defense witness was the defendant's accomplice. If any such instruction is to be given, it should at least be worded more neutrally, as, for example, the Seventh Circuit Pattern Criminal Federal Jury Instruction 3.13.⁹⁴ The Seventh Circuit instruction directs that as to a witness who has "stated that he/she was involved in the commission of the offense as charged against the defendant," the judge should instruct the jury: "You may give his/her testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care."⁹⁵ But unless evidence exists supporting the inference that the supposed accomplice is in some way beholden or in thrall to the defendant, even this comparatively benign wording, in the absence of any evidence logically supporting it, carries an implicit endorsement of the government's theory. And if such evidence does exist, that evidence, and the prosecutor's right to argue the obvious inferences from it, should suffice to get the message across to the jury.

view of the case, but no more so than in any case in which an attorney tailors his or her argument to the issues and the probable jury instructions in the case.

⁹² See *supra* notes 10-12 and accompanying text.

⁹³ *Tirouda*, 394 F.3d at 687 (emphasis added). The one-sided nature of this instruction can be seen when compared to the instruction where a *prosecution* witness' status as an accomplice-or-not is disputed: The jury is told first to consider whether the witness was an accomplice, and only then to view such testimony with care and caution. See *supra* note 18 and accompanying text.

⁹⁴ SEVENTH CIRCUIT JUDICIAL COUNCIL, PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS 3.13 (1998), available at <http://www.ca7.uscourts.gov/Rules/pjury.pdf>.

⁹⁵ *Id.*

One additional situation merits discussion: a prosecutor may have evidence that the defense witness has in fact been threatened into falsely taking sole responsibility and testifying to the defendant's innocence, but cannot offer such evidence at trial.⁹⁶ If the prosecutor can persuade the judge by a preponderance of the evidence that such is the case, then, perhaps, a "care and caution" instruction would be appropriate.⁹⁷ This option should be available only where no other significant motive exists why a witness would falsely take "all the weight."

The showing would be on the record, and thus subject to appellate review. Defendant and defense counsel would participate in the proceeding unless the prosecutor can make a sufficiently persuasive *ex parte* showing that permitting such participation would jeopardize someone's life or compromise some vital legitimate law enforcement interest (e.g. disclose the existence of an ongoing wiretap). If the prosecutor invokes the *ex parte* process, his or her proof would be placed in a sealed record, subject to appellate review.

Any *ex parte* procedure connected with a trial is problematic, because it may deprive the defense of a realistic opportunity to challenge the prosecutor's argument in favor of the instruction; but I can imagine cases where it would be appropriate. In any event, in jurisdictions which now give trial courts discretion to give a "care and caution" instruction about defense witnesses, even an *ex parte* procedure provides the defendant with

⁹⁶ For example, information about the threat may come from an informant whom the prosecutor is unwilling or unable to call as a witness; or the prosecutor may have evidence that the witness was threatened, but may lack direct proof that the threats were made at the instigation of the defendant (which would preclude offering evidence of the threats at trial to show "consciousness of guilt").

⁹⁷ This proposal is modeled in part on Federal Rule of Evidence 804(b)(6), which directs that a litigant forfeits an otherwise valid hearsay objection to a declarant's hearsay statement if the litigant "has engaged in wrong-doing that was intended to, and did, procure the unavailability of the declarant as a witness." The situation is invoked most frequently by prosecutors who claim that would-be witnesses have been silenced by being killed or threatened. See generally FISHMAN, *supra* note 2, §§ 36:108-36:110. The Supreme Court has held that such wrongdoing also forfeits a criminal defendant's rights under the Sixth Amendment Confrontation Clause. *Reynolds v. United States*, 98 U.S. 145, 158-160 (1878); see also *Crawford v. Washington*, 541 U.S. 36, 62 (2004). The litigant seeking to invoke the exception must persuade the judge by a preponderance of the evidence that the factual requirements (wrongdoing, acquiescence, motive) have been established. The hearsay exception permits a prosecutor to introduce otherwise inadmissible hearsay evidence because the judge has been convinced by specific evidence that the defendant has prevented the declarant from testifying; the rule proposed herein would entitle the prosecutor to a "care and caution" instruction where the judge has been convinced by specific evidence that the defense witness (a) was the defendant's accomplice, and (b) has been forced by threats to take all the weight and falsely exonerate the defendant (the parallel between the hearsay exception and this proposal is, I concede, not a perfect one.).

considerably greater protection: the judge may give such an instruction only in a narrowly defined factual situation; the prosecutor must place his or her evidence on the record; and the issue is subject to appellate review.

IV. CONCLUSION

It is perfectly permissible for a prosecutor to call as a witness someone who acknowledges his guilt in the crime charged to testify that the defendant was his partner in crime. Given that such a witness is cooperating with the state in exchange for promised or hoped-for leniency, however, the situation carries an inherent risk that the witness may be shading or fabricating his testimony to ingratiate himself with the prosecutor. Thus, it is reasonable for the law to insist that the judge instruct the jury that such testimony should be received with “care and caution.”

Where a self-admitted participant in the crime testifies as a defense witness and insists the defendant was not involved (or was an innocent dupe), by contrast, there is nothing inherent in the situation that suggests the witness has a self-serving motive to lie. Moreover, Supreme Court decisions sometimes cited as supporting the giving of such an instruction do not in fact do so. Thus giving a “care and caution” instruction about such a witness tips the scales unfairly against the defendant, and, particularly in a close case, may undercut the presumption of innocence. Except perhaps in narrowly defined circumstances, such instructions simply should not be given.

