University of Miami Law Review

Volume 55
Number 4 *Evidence Symposium*

Article 16

7-1-2001

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Recommended Citation

Professor Daniel J. Capra, *Admissibility of Plea Agreements on Direct Examination: The Limits Vanish*, 55 U. Miami L. Rev. 751 (2001)
Available at: https://repository.law.miami.edu/umlr/vol55/iss4/16

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Admissibility of Plea Agreements on Direct Examination: The Limits Vanish

PROFESSOR DANIEL J. CAPRA

James Carlson's Comment on the admissibility of plea agreements makes a compelling case that the prosecution has virtually unfettered discretion to admit the plea agreement of a cooperating witness on direct examination. What began as a relatively uniform limitation on "bolstering" and "impermissible vouching" has been reduced to minimal limitations on only the most outrageous prosecutorial misconduct.

THE DANGER OF ADMITTING PLEA AGREEMENTS

Three concerns are raised when the government introduces a plea agreement on direct examination of a cooperating witness. The first, and probably least serious, is that the government is engaged in "bolstering" the credibility of its witness. The general rule is that it is unnecessary to provide information to support a witness' credibility until such time as that credibility has been attacked. If parties were permitted to bolster their witnesses, a lot of court time would be spent in introducing information that might ultimately be unnecessary. If the witness' credibility is never attacked, there is no reason to provide this supporting evidence because the shared assumption is that witnesses are presumed credible unless there is reason to think otherwise.[1] Moreover, a good deal of otherwise inadmissible information might be introduced in the guise of supporting credibility, such as prior statements of the witness that would otherwise be hearsay. Admitting this evidence for "credibility" purposes seems a substantial cost that ought to be avoided, at least until the opponent attacks that credibility.[2]

The second concern with admitting plea agreements is that the government may somehow "vouch" for the credibility of the cooperating

1. *See* 1 MCCORMICK ON EVIDENCE 123 (John W. Strong ed., 5th ed. 1999): "[A]s a general proposition, bolstering evidence is inadmissible. As of the direct examination, it is uncertain whether the cross-examiner will attack the witness' credibility; the counsel might waive cross-examination or cross-examine solely for the purpose of eliciting new facts on the merits which support the counsel's theory of the case. If the opposing counsel does so, all the time devoted to the bolstering evidence on direct examination will have been wasted. For that reason, the witness's proponent must ordinarily hold information favorable to the witness's credibility in reserve for rehabilitation."

2. This is why a prior consistent statement of a witness is not admissible to support credibility unless the witness credibility has been attacked and the statement is probative in rebuttal. *See generally* Tome v. United States, 513 U.S. 150 (1995).

witness. It is the jury's job to assess the witness' credibility on the basis of the testimony and evidence presented. It therefore would be improper for the government to assert that it knew the witness was telling the truth, possibly on the basis of extrinsic information not admitted at trial. As applied to plea agreements, the vouching problem could arise where there is something in the agreement indicating the government's belief that the witness is telling the truth. An example, is a clause in the agreement stating that the government had independently verified the truth of the witness' account. Alternatively, there could be a clause in the agreement that the government could emphasize at trial as demonstrable evidence that the witness had to be telling the truth. An example is a clause providing that the witness has agreed to submit to a polygraph examination as part of the deal.

The third and most substantial concern with introducing plea agreements of cooperating witnesses, is that the jury will misuse the agreement as evidence of the defendant's guilt. At least this is so where the witness pleads guilty to committing a crime that is tied in some way to the defendant. The classic case is where the defendant is charged with conspiracy and the witness has pleaded guilty to the same conspiracy. As the Third Circuit stated in *United States v. Toner*:[3]

> From the common sense point of view[,] a plea of guilty by an alleged fellow conspirator is highly relevant upon the question of the guilt of another alleged conspirator. If A's admission that he conspired with B is believed, it is pretty hard to avoid the conclusion that B must have conspired with A. This is one of the cases, therefore, where evidence logically probative is to be excluded because of some countervailing policy. The foundation of the countervailing policy is the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else. Acquittal of an alleged fellow conspirator is not evidence for a man being tried for conspiracy. So, likewise, conviction of an alleged fellow conspirator after a trial is not admissible as against one now being charged. The defendant had a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else.[4]

RESPONSE FROM THE COURTS

Mr. Carlson's well-researched Comment shows that the courts have generally downplayed the three concerns set forth above, to the point where plea agreements are almost always admissible on direct examina-

3. 173 F.2d 140 (3rd Cir. 1949).
4. *Id.* at 142.

tion. The three dangers from admitting plea agreements on direct examination are generally dismissed by the courts, as follows:

1. The concern over bolstering: Courts have answered that the government has the right to anticipate that defense counsel will bring up the plea agreement in an attempt to show that the cooperating witness has a motive to falsify. The courts conclude that the agreement therefore can be brought out on direct examination to "remove the sting" from the anticipated impeachment and to prevent the jury from thinking that the government was hiding negative evidence.

2. The concern over vouching: Courts have held that the government does not vouch for its witnesses simply by introducing their plea agreements. Rather, vouching is a concern only in those unusual cases in which the agreement includes government attestations that the witness has told the truth or that the witness has agreed to take a polygraph examination.[5]

3. The concern over misuse of the plea agreement as evidence of the defendant's guilt: The courts have generally held that plea agreements are admissible under Federal Rule of Evidence 403 despite their prejudicial effect. Courts reason that the prejudicial effect of the plea agreement can be diminished somewhat by an instruction to the jury directing it to use the evidence only for proper purposes. Courts usually find that this prejudicial impact, as diminished by the instruction, does not substantially outweigh the probative value of the plea agreement for such purposes as assessing the witness' credibility.

Mr. Carlson seems to conclude that free admissibility of a plea agreement on direct examination is an inappropriate result. It seems to me, however, that where the defendant is going to introduce the agree-

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5. *See, e.g.*, United States v. Thornton, 197 F.3d 241, 252 (7th Cir. 1999) (stating the government should avoid "unnecessarily repetitive references to truthfulness" in the agreement); United States v. Blinker, 795 F.2d 1218 (5th Cir. 1986) (finding clause in agreement attesting to government's independent verification was improperly admitted because it amounted to government vouching for the credibility of the witness); United States v. Brown, 720 F.2d 1059 (9th Cir. 1983) (holding prosecutor improperly referred to the fact that as part of plea bargain agreements several government witnesses agreed to submit to polygraph tests); United States v. Hilton, 772 F.2d 783 (11th Cir. 1985) (finding it was error to permit the government to introduce plea bargain documents containing references to polygraph examinations and to argue that its witnesses were credible because they agreed to take such examinations). Clauses in the agreement under which the witness agrees to testify truthfully are, by contrast, admissible, so long as the prosecutor does not improperly rely on such a clause to specifically argue that the witness must have been telling the truth. Truth telling clauses are considered to add nothing to the witness' already-existing obligation to tell the truth. *See, e.g.*, United States v. Tocco, 200 F.2d 401 (6th Cir. 2000) (holding no abuse of discretion in the admission of a cooperating witness plea agreement that contained a promise to provide truthful information; introduction of the entire agreement permitted the jury to consider fully the witness possible conflicting motivations, and the prosecutor did not improperly rely on the truthfulness provision in closing argument to vouch for the witness).

ment on cross-examination in an attempt to show that the witness is lying in order to get a deal, it is only fair to permit the government to bring out the agreement on direct. The government should be able to blunt the impact of an anticipated attack; otherwise, the impeachment evidence will look much more important than it really is.[6] More importantly, if the government cannot refer to the plea agreement on direct, it will suffer a negative consequence when the agreement is raised on cross-examination. The jury may think that the government was trying to hide the fact that a deal was made with the witness. This would be an unfair inference if the agreement was barred from direct by an evidence rule rather than by the government's own decision. Moreover, under Federal Rule of Evidence 607, the prosecution has the right to impeach a witness it calls. To the extent a plea agreement impeaches a witness for bias, the prosecution would much rather conduct that impeachment in a relatively gentle manner on direct examination—leaving defense counsel to seem overreactive if she then emphasizes the agreement on cross-examination. So where the defendant is going to raise the agreement on cross-examination, the agreement carries substantial probative value for the government's case. As a general rule, this probative value is probably not *substantially* outweighed by the risk that the jury will use the agreement as evidence of the defendant's guilt even though instructed not to do so.[7] Therefore, in this kind of case, the plea agreement ordinarily should be admissible on direct examination of the cooperating witness.

The situation arguably changes, however, if the defendant promises not to refer to the agreement on cross-examination or elsewhere in the trial. Why should the plea agreement be admitted to remove the sting of a cross-examination that the defendant promises will never occur? The recent en banc consideration by the Third Circuit in *United States v. Universal Rehabilitation Services (PA), Inc.*,[8] provides a good overview and a marvelous discussion of both sides of the issue. The defendants were tried for mail fraud and related offenses. Two cooperating witnesses testified and on direct examination their guilty pleas and plea agreements were offered into evidence. The agreements apparently contained no vouching or polygraph clauses. But the defendants objected

6. The rule that a party may "remove the sting" of anticipated cross-examination and impeachment is not solely for the benefit of prosecutors. Defense counsel and counsel in civil cases often find it advisable to refer in direct examination to the prior convictions of their witnesses. *See generally* Wilson v. Williams, 182 F.3d 562, 574 (7th Cir. 1999) (en banc).

7. *See* FED. R. EVID. 403 (providing that relevant evidence can be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury).

8. 205 F.3d 657 (3rd Cir. 2000) (en banc).

nonetheless. The defendants recognized that plea agreements are routinely admitted on direct to allow the prosecution to "remove the sting" of an anticipated attack by the defendant on the witness' motive to falsify. The defendants did not deny this as a proper purpose;[9] nor could they.[10]

The defendants in *Universal* argued instead that the rationale for admitting plea agreements on direct is premised on the assumption that defense counsel will in fact raise the agreement on cross-examination and attack the cooperating witness for bias. To head off the prosecution's legitimate concern that the agreements would be raised on cross-examination, the defendants proffered a concession. They promised that at trial they "will not raise the guilty plea/plea agreements on cross examination nor seek to raise any inference on which the accomplices' pleas of guilty would be admissible to rebut."[11] The defendants argued that this proffered concession meant that there was no longer any need to bring out the plea agreements on direct examination. They asserted that their concession robbed the plea agreements of any probative value, so that admitting the agreements would be an abuse of discretion under Federal Rule of Evidence 403.[12]

The trial court in *Universal* was unpersuaded by the defendants' argument. It reasoned that the agreements were still probative, despite the defendants' proffered concession, because if they were not introduced "the jury is going to wonder whether or not [the witnesses] have been charged. It's going to wonder perhaps what they have been promised by the prosecutor if anything and what they may be getting in return for their testimony."[13] This risk of jury speculation would not be ameliorated by the defendants' promise not to bring up the plea agreements.

The risk of prejudice in admitting a plea agreement is, of course, that the jury will impermissibly use it as substantive evidence that the defendant is guilty. The trial judge in *Universal* weighed this risk against the probative value of the agreements, considered the effect of a limiting instruction in diminishing the prejudicial effect, and decided that the agreements could be admitted on direct examination of each witness. The jury was instructed not to use the agreements as evidence of the defendants' guilt.[14] The defendants were convicted of a single count of mail fraud. Notably, they had been charged with a number of counts and acquitted of all but one. The defendants were convicted of

9. *Universal*, 205 F.3d at 662-63.
10. *See id.* at 665.
11. *Id.* at 672 n.3.
12. *See id.* at 662-63.
13. *Id.* at 662.
14. *Id.*

the very count to which the cooperating witnesses had pleaded guilty.[15] What a coincidence!

On appeal, the basic question was whether the trial court abused its discretion under Rule 403 when it admitted the plea agreements even though the defendants agreed not to bring them up at the trial. The majority of the en banc court found no abuse of discretion. It argued that the plea agreements were probative on three points, even after the defendants agreed not to raise them. Specifically, the plea agreements were probative: "(1) to allow the jury accurately to assess the credibility of the witness; (2) to eliminate any concern that the jury may harbor concerning whether the government has selectively prosecuted the defendant; and (3) to explain how the witness has first-hand knowledge concerning the events about which he/she is testifying."[16]

The defendants responded that it was unnecessary to provide proof of the witnesses' credibility because the defendants by their concession agreed not to attack the witnesses' credibility. But this was not sufficient for the majority. The majority noted that jurors are instructed that they are to determine the credibility of all witnesses who testify, and this is so even if the witness' credibility is not attacked.[17] Therefore, credibility remained a live issue even after the defendants' concession.

This argument is problematic because while credibility remains a live issue, the admission of the plea agreement in the absence of an attack will actually *harm* the credibility of the prosecution witness; meaning that the prosecution should not be able to argue that it needs to admit the agreement to prove the witness' credibility. The agreement will raise an inference that the witness has a motive to falsify in order to get his deal—an inference that would not otherwise have been raised. The majority's argument essentially permits the prosecutor to offer the plea agreements for the impermissible purpose of proving the defendant guilty, because no rational prosecutor would offer evidence of credibility when that evidence impeaches her own witness' credibility in the absence of any anticipated attack.

The defendants responded to the majority's argument that credibility could not be taken out of the case by citing *Old Chief v. United States*.[18] In *Old Chief*, the Court found an abuse of discretion under Rule 403 when the trial court admitted evidence of the defendant's prior felony conviction even though the defendant offered to stipulate that he

15. *Id.* at 663.

16. *Id.* at 665.

17. *Id.* at 665-66.

18. 519 U.S. 172 (1997).

had been convicted of a felony.[19] The conviction was admitted as proof of the defendant's status as a felon, an element of the felon-firearm-possession crime with which he was charged. The *Old Chief* Court held that the government was required to accept the proffered stipulation because its probative value was equal to that of the conviction itself, i.e., the stipulation was determinative proof of the felony status element of the crime charged. The trial court erred in admitting the prejudicial conviction when there was equally probative and less prejudicial evidence available to prove the status element of the crime.[20]

The majority in *Universal* distinguished *Old Chief* as a case where the proffered stipulation "was of equal probative value to the government's proffered evidence."[21] This was not the case with the defendants' offer to refrain from bringing up the plea agreements of the cooperating witnesses. Essentially the defendants' concession meant, in the best of circumstances, that any motive the witnesses would have to lie in order to get a deal with the government would not be considered by the jury. But the plea agreements were probative for other purposes beyond explaining bias. Specifically, the plea agreements were probative to (1) counteract the possibility that the jury might believe that the defendants were being selectively prosecuted instead of the equally culpable witnesses, and (2) explain how the witnesses had first hand knowledge concerning the matters to which they were testifying.[22]

Because the plea agreements in *Universal* retained probative value despite the defendants' concession, the remaining question was whether the trial court properly balanced that probative value with the risk of prejudicial effect. The majority argued that the prejudicial effect in this case was diminished by the fact that the jury was instructed a number of times not to use the plea agreements as substantive evidence of the defendants' guilt. These instructions minimized the risk that the jury would use the agreements impermissibly.[23]

The majority emphasized that the court of appeals can reverse a district court's Rule 403 decision only if there was an abuse of discretion. The question is not whether the trial court misbalanced the factors of probative value and prejudicial effect. The question is whether no reasonable jurist, balancing these factors, would have admitted the plea agreements. Under this deferential standard of review, the majority had little difficulty in affirming the trial court. As the majority stated, the

19. *Id.* at 178.
20. *Id.* at 186.
21. *Universal*, 205 F.3d at 666.
22. *Id.* at 667.
23. *Id.* at 668-69.

trial court had not acted "arbitrarily or irrationally—and therefore did not abuse its discretion" under Rule 403.[24]

PRACTICAL PROBLEMS WITH DEFENSE CONCESSIONS

Before we get to the dissents in *Universal*, it might be appropriate to consider another potential (though unexpressed) concern of the *Universal* majority. The defendants' proffered concession was that they would not "raise the guilty plea/plea agreements on cross examination nor seek to raise any inference on which the accomplices' pleas of guilty would be admissible to rebut."[25] This stipulation is not exactly crystal-clear. By way of contrast, Old Chief's proffered stipulation left no ambiguity. He offered to stipulate that he had been convicted of a felony, which was the precise element of the crime with which he was charged.[26] Now consider the defendants' promise in *Universal* not to "raise" the plea agreement. What does "raise" mean? Does it mean that the defendants will make no *specific* reference to the guilty pleas? What if defense counsel asks the witness "have you ever spoken with a government agent before testifying today?" The prosecution would howl that this is an indirect reference that "raises" the plea agreement. But defense counsel might respond that he was not referring to the agreement at all—he was just inquiring into whether anyone in the government had helped the witness prepare his trial testimony. What does the court do then?

Other questions arise about the stipulation procedure in practice. What if the defense counsel simply accuses the witness of being a liar? Does this "raise" the plea agreement? What if counsel charges the witness with being the person who duped the defendant to commit the crime that the witness himself benefitted from? Indeed, where the witness is obviously involved with the same activity as the defendant, what kind of cross-examination would *not* raise an inference that could be rebutted by the plea agreement?

The above questions raise a legitimate concern that the defendants' proffered concession in *Universal* was too vague and slippery to be enforceable—or at least raise the possibility that a court might be wary before holding that the defendants' promise rendered alternative evidence inadmissible. Under these circumstances, the government is justifiably concerned that the defense is impinging on the prosecution's ability to present its evidence in the most meaningful and compelling way. As the Supreme Court noted in *Old Chief*, the proponent ordinarily

24. *Id.* at 669.
25. *Id.* at 672.
26. Old Chief v. United States, 519 U.S. 172, 175 (1997).

has the right to present its case in the way it sees fit, subject to the Federal Rules of Evidence; attempts by the adversary to control the proof by way of stipulation are not favored.[27]

There is another practical problem with the defendants' proffered concession in *Universal*. Assume it can be determined that the defendants violated the concession by either raising the agreements or raising an inference that the agreements can rebut. What happens then? Presumably the prosecution would then get to introduce the agreements. But by then it might be too late to help the prosecution very much. To take a simple example, assume the prosecution is not permitted to elicit the agreements on direct, and defense counsel on cross-examination accuses the defendant of being a government snitch, only out for what he can get from the government. The prosecution would then, presumably, get to introduce the plea agreement on re-direct. However, that is obviously an insufficient protection of the government interest that is protected when the agreement is brought out on direct.

The prosecution wants to introduce the agreement on direct in order to remove the sting of anticipated impeachment and prevent the jury from thinking that the prosecution is hiding negative evidence. These legitimate prosecutorial objectives are not protected by the ability to introduce the agreements on *redirect* after defense counsel violates the stipulation. The damage at that point has been done. Perhaps some of the damage can be alleviated by a limiting instruction, in which the trial judge tells the jury that it is not to draw a negative inference from the fact that the prosecutor brought out the agreements on re-direct rather than on direct examination. But this instruction, even if effective, cannot restore the prosecution's interest in removing the sting of anticipated impeachment by bringing out the agreements gently and lovingly on direct examination.

An even more serious practical problem exists if defense counsel attacks the motives of the cooperating witnesses in *closing argument*. Now what is the court to do? Must it allow the government to reopen its case to introduce proof of the agreements? That remedy will not satisfy the prosecution because reopening will look like a desperate ploy by the government. The government will look like it has a lack of confidence in the strength of the evidence it has already presented. Again, a limiting instruction might diminish some of the prejudice suffered by the government if it were to reopen its case; the jury could be instructed not to draw a negative inference about the strength of the government's case

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27. *See id.* at 186. For more discussion on *Old Chief*, see my response to Ms. Hervic's Comment. Daniel J. Capra, *Out-of-Court Accusations Offered For "Background": A Measured Response From the Federal Courts*, 55 U. MIAMI L. REV. 803 (2001).

or the timing of its presentation of the agreement. But the possibility of having to reopen the case after defense counsel violates its proffered concession might well give a court pause before holding that the defendant, by proffering such a concession, can prevent the government from bringing out a plea agreement on direct.

Perhaps the real answer to the problems that might arise if defense counsel violates the terms of the concession is this: If the trial judge agrees to exclude the agreement conditioned on defense counsel complying with its promise not to raise the agreement, defense counsel is very unlikely to violate that promise. If the defense counsel raises the plea agreements after agreeing not to do so, she certainly risks sanctions from the court. She also risks a court holding that the entirety of the plea agreement is admissible, including provisions that defense counsel would rather not have the jury hear about. And finally, if courts were to hold that defendants could keep plea agreements out of the case by agreeing not to raise them, and then defendants continually reneged on their promises and raised the agreements anyway, courts would no longer permit the practice. Defendants would be back to facing the admission of the entire plea agreement on direct examination without any ability to control the risk of prejudice by promising not to mention the agreement on cross.

Perhaps any concern over the costs of the "defense concession" approach is overstated. Even so, the concern is not negligible, and the *Universal* majority may have thought that a rule allowing defendants to control the proof of plea agreements would be fraught with difficulty.

A More Careful Balance of Interests

All that said, there is significant power in the argument that where the defendant concedes that he will not bring up the plea agreement, it should fall out of the case unless the defendant reneges on that concession. The majority in *Universal* argued that the concession was not "*equally* probative" to the agreement itself, because the agreement was still probative to answer jury speculation about selective prosecution, and to explain how the cooperating witnesses had personal knowledge of the matters to which they were testifying.[28] But even if this is so, it does not mean that admitting the agreement satisfies Rule 403.

The analysis of both the trial court and the majority in *Universal* basically ends by stating that the proffered concession and the plea agreements are not "*equally* probative"[29] and therefore the agreements

28. *Universal*, 205 F.3d at 667.
29. *Id.* (citing *Old Chief*, 519 U.S. at 191).

can still be admitted under Rule 403.[30] However, this is not a very careful Rule 403 analysis, and it ignores the fundamental teaching of *Old Chief*. As Chief Judge Becker states in his dissent in *Universal*, *Old Chief* stands for the proposition that under Rule 403, "proffered evidence must not be analyzed as an island unto itself."[31] Rather, admissibility of a piece of evidence under Rule 403 can only be evaluated in comparison with other available means of proof on the same point. The reason the Court reversed Old Chief's conviction for felon firearm possession was that his proffered stipulation of a felony conviction was just as probative, and not nearly as prejudicial, as actual proof of the conviction itself. Put another way, the probative value of the felony conviction was *diminished* by the availability of other proof of the defendant's felony status (i.e., the stipulation). In contrast, the prejudicial effect of the conviction remained constant; the jury would use the nature of the specific conviction as proof that Old Chief was a bad person with a propensity to commit a certain kind of crime. This risk of prejudice had to be balanced against the diminished probative value of the felony conviction in light of the alternative evidence. So, it was not surprising that the *Old Chief* Court concluded that the prejudice resulting from admission of the conviction substantially outweighed its probative value.[32]

Applying this more nuanced *Old Chief* analysis to the facts of *Universal*, it is apparent that the Rule 403 inquiry cannot simply end when the court finds that the plea agreements remain probative even after the defendants' promise not to raise them. The question is whether the *diminished* probative value, in light of the concession, is substantially outweighed by the obvious risk that the jury will use the plea agreements as proof that the defendants are guilty. As Judge Roth states in his dissent in *Universal*, the evaluation of the probative value of the plea agreements "cannot be made without a consideration of the defendants' commitment" not to raise the agreements.[33]

If such a balance of diminished probative value were to be conducted, should the trial court have permitted the plea agreements to be introduced despite the defendants' commitment not to raise them? According to the majority, the agreements remained probative (1) to allay any jury concerns that the defendants had been selectively prosecuted, and (2) to establish that the witnesses had personal knowledge of the events to which they were testifying.[34] What is the probative strength of the agreements for these purposes?

30. *See id.* at 669.

31. *Id.* at 683.

32. *Old Chief*, 519 U.S. at 191.

33. *Universal*, 205 F.3d at 676.

34. *Id.* at 665.

As to selective prosecution, evidence of the plea agreements seems at first blush to be very probative. The cooperating witnesses in *Universal* were relatively major players in the charged scheme. The jury may well have wondered why the defendants were being prosecuted and these witnesses were not. Evidence of the plea agreements would explain the situation and diminish any such speculation. The jury would see that the defendants were not being singled out because the witnesses were charged as well. It is true that the defendants were not, making a selective prosecution argument. But the government has a legitimate concern that the jury may speculate about prosecutorial selectivity even if the argument is not raised, given the fact that similarly situated people are seemingly being treated quite differently.

Yet this does not end the inquiry. If the government is concerned about jury speculation, why not just ask the court to instruct the jury that it should not speculate about selective prosecution? Why resort to introducing evidence that is prejudicial to the defendant, in order to allay a concern over jury speculation that, while legitimate, may not in fact arise? Judge Roth, dissenting in *Universal*, makes the compelling argument that the best way to avoid jury speculation is "to instruct the jury members that they should concern themselves only with the guilt or innocence of defendants and not with the possibility of selective prosecution or the involvement of any other persons in any alleged scheme."[35] Again, the possibility of less prejudicial alternatives—in this case a limiting instruction—did not receive proper consideration by the *Universal* majority.

Indeed, there is a good argument that the use of an instruction is a more efficient way to deal with jury speculation than is introducing the prejudicial plea agreement. Under the prosecution's scenario, evidence must be presented to eliminate the risk of jury speculation. But this evidence carries with it prejudicial effect, so the jury is instructed that it cannot use the plea agreements as evidence of guilt. In other words, to allay the risk of jury speculation, the prosecution proposes admission of evidence and a limiting instruction to prevent jury speculation on a different subject. Under the defendants' view, the risk of jury speculation is handled by a cautionary instruction without the need to introduce any evidence. As Chief Judge Becker notes in his dissent in *Universal*, the defendants' suggested mode of presentation "takes less time and is more direct."[36] Certainly, this greater efficiency is a consideration that must be taken into account when balancing the probative value of evidence against the risks of prejudice, confusion and delay under Rule 403.

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35. *Id.* at 682.
36. *Id.* at 685.

What about the probative value of the plea agreement in establishing that the witnesses had personal knowledge about the matters to which they testified? It seems obvious that the probative value for this purpose is minimal. The plea agreement proves nothing more about the witnesses' personal knowledge than their in-court testimony already shows. Judge Roth, in his dissent in *Universal*, points up the flaw in the argument that a plea agreement is probative of the witness' personal knowledge:

> I am left wondering . . . how the introduction of a witness's guilty plea into evidence establishes the basis for his or her firsthand knowledge of the crime. Presumably, all that the introduction of the guilty plea establishes is that the witness pleaded guilty. It is the witness's testimony itself that establishes the basis for his or her firsthand knowledge of the crime—the witness has firsthand knowledge because s/he was present during or participated in the crime, not because s/he pleaded guilty to the crime.[37]

Admitting the plea agreement to prove the witness' personal knowledge amounts to impermissible bolstering. The witness has stated on the stand that she witnessed the crime. In the absence of an attack on that assertion (e.g., cross-examination asserting that the witness wasn't really there) there is no reason to introduce the plea agreement. It is simply cumulative on the question of personal knowledge.

THE SUM OF THE RULE 403 BALANCING

So how should the Rule 403 balancing have come out in *Universal*, where the defendants concede that they will not raise the plea agreement on cross-examination?

On the probative value side is the following:

1. The probative value in removing the sting of anticipated impeachment and preventing the implication that the government is hiding evidence appears, at first glance, to be zero, given the defendants' proffered concession. But, it would seem appropriate to give some consideration to the possibility that the concession might be vague and hard to enforce, and would result in practical problems if violated. These are not specifically considerations of "probative value," but they are relevant considerations for the court in determining whether the defendants' concession is indeed an adequate alternative to proof of the agreements. The less adequate the concession alternative, the more probative are the plea agreements.

2. The probative value in preventing the jury from speculating about selective prosecution seems fairly high at first glance, but it is

37. *Id.* at 672.

significantly minimized by the alternative possibility of an instruction to the jury forbidding such speculation.

3. The probative value in proving the witnesses' personal knowledge is essentially zero in the absence of an attack on this point.

Considering the cumulative effect of the probative value of the plea agreements on all of these points and in light of the defendants' concession, one could only say that the probative value is not overwhelming. On a probative value scale of one to hundred, I would give it about a twenty, only because the defendants' promise not to raise the agreement is not a perfect alternative in all circumstances.

On the prejudicial effect side is the following:

1. The risk that the jury will use the plea agreements as evidence of the defendants' guilt seems, at first glance, to be quite powerful. The prejudice is especially high because one of the counts charged against the defendants was precisely the crime to which the cooperating witnesses pled guilty. On the other hand, under Rule 403 the prejudicial effect that is considered is that remaining *after a limiting instruction is given.*[38] In *Universal*, the trial court instructed the jury on three occasions that it was not to consider the agreements as evidence of the defendants' guilt. One might argue in response that the jury convicted the defendants on only one count—the count to which the witnesses pled guilty. So it seems apparent that the instructions had little effect. The effect of a limiting instruction in minimizing prejudice, however, should be assessed as of the time the instruction is given, and not in light of the verdict rendered. So, it is fair to state that the risk of prejudice resulting from the admission of the plea agreements is substantial, but somewhat reduced by the instructions to the jury. On a prejudicial effect scale from one to a hundred, I would give it about a fifty.

In balancing the above factors, it must be remembered that the evidence is excluded only if the prejudicial effect *substantially* outweighs the probative value. This is where judgment calls are made and reasonable minds often differ. I can say that if I were the trial judge in *Universal*, I would not have permitted the prosecution to introduce the plea agreements after the defendants promised not to raise them at trial. I would have made the defendants aware that their concession would be fully enforced—no funny stuff. I would have instructed the jury, upon the government's request, that it was not to concern itself with how the government chose to try the defendants before them as compared to other possible perpetrators, but was only to concern itself with the guilt

38. *See* STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL 88-89 (7th ed. 1998); *See also*, FED. R. EVID. 403 advisory committee note.

or innocence of the defendants before the court. I believe that in light of the alternatives available—i.e., concession from the defendants and limiting instruction to diminish the risk of jury speculation on selective prosecution—the remaining probative value of the plea agreements was substantially outweighed by the risk of prejudice to the defendants.

I am hard-pressed to say, however, that the trial court in *Universal* abused its discretion, that is to say acted irrationally, in coming out the other way. There is some residual probative value in the agreements, even after the defendants' concession and a limiting instruction. And limiting instructions can diminish the prejudicial effect of the agreements. Given the role of appellate judges in reviewing Rule 403 determinations, the majority's viewpoint in *Universal* is understandable. After all, the trial court did explicitly balance the Rule 403 factors, and it was the trial court who saw the witnesses and heard the proffered concession. It is hard to reverse that decision on a cold record.

That being said, the fundamental problem with affirming the trial court in *Universal,* is that it means that plea agreements will *always* be admissible on direct examination. The *Universal* facts present the strongest facts possible for exclusion of the plea agreements. The best reasons for admitting the agreements on direct are to remove the sting of anticipated impeachment and to counter the implication that the prosecution is hiding negative evidence. Where these risks are virtually eliminated by the defendants' promise not to raise the agreements, and yet the trial court still holds that the agreements are admissible under Rule 403, it is apparent that plea agreements will be admissible in every case and there is nothing that the defendant can do to keep them out. The only prohibitions remaining are that (1) vouching clauses in the agreements will have to be struck, and (2) the prosecution will not be able to argue that the witnesses must be telling the truth because they entered into these agreements. But these limits are left for unusual and extreme cases.

Because affirming the trial court in *Universal* means that plea agreements are essentially automatically admissible, the Court of Appeals should have stepped in and found an abuse of discretion. While the abuse of discretion standard is deferential, it should not mean that trial court decisions admitting prejudicial evidence are impervious to review, no matter the circumstances. As Judge Sloviter stated in her dissent in *Universal*:

> The majority's holding that a guilty plea is admissible to permit the jury to assess the credibility of the witness, even in the absence of an attack on the witness's credibility, or to dispel jury concern about selective prosecution, even if the defendant has not so contended, transmutes a case-by-case analysis under Fed.R.Evid. 403 into a gen-

> eral rule of admissibility. I see no justification for such a rule.[39]

It is troubling that the *Universal* court essentially ceded its reviewing authority over the admissibility of plea agreements on direct examination. Given the defendants' promise not to refer to the agreements, *Universal* presented the best case for imposing some minimal limitation that would protect defendants from what everyone agrees is prejudicial information.

It does not follow, however, that the decision in *Universal* means that plea agreements of cooperating witnesses will be automatically admitted in all trials, no matter what the defendant does. The court in *Universal* did indeed abdicate its authority to review trial court decisions admitting plea agreements. But it did not hold that trial courts *must* admit these agreements. It simply held that the trial court did not abuse its wide discretion in admitting the plea agreements.[40] It is very likely that if the court had reviewed the trial court's decision to *exclude* the agreements, its review would have been similarly deferential. The court would undoubtedly have found that the trial court did not abuse its wide discretion in excluding the plea agreements, given their limited probative value and high prejudicial effect.

So it is to be hoped that trial courts will use their discretion to exclude plea agreements from jury consideration when the defendant makes a solid, clear commitment that he will not raise: (1) the plea or plea agreement; (2) any attack on the witness' motive to falsify that might arise from an interest in cooperation or cutting a deal; or (3) any inference that the defendant was selectively prosecuted. If the trial court does the right thing and excludes the plea agreement when such a clear promise is made, it should instruct the jurors upon request that they should concern themselves only with the guilt or innocence of the defendants and not with the possibility of selective prosecution or the involvement of the witnesses in the crimes charged.

What About Rule 608?

As Mr. Carlson points out, several courts have held that Federal Rule of Evidence 608 imposes limitations on the prosecution's use of plea agreements on direct examination. The dissenters in *Universal* made a half-hearted attempt to argue that the trial court's decision to admit the witnesses' plea agreements violated Rule 608. For example, Judge Roth stated: "Arguably, under Rule 608(a), absent an attack on [the cooperating witnesses'] credibility, their guilty pleas are

39. *Universal*, 205 F.3d at 686-87.
40. *Id.* at 669.

inadmissible."[41]

This argument is not borne out by the language of Rule 608(a) however. Rule 608(a) states that the credibility of a witness may be attacked or supported "by evidence in the form of opinion or reputation" but subject to the limitation that "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."[42] By its terms, Rule 608(a) limits only the *forms* of proof of a witness' credibility. It imposes limits on opinion or reputation evidence of credibility. A plea agreement, however, is neither opinion nor reputation evidence. Therefore, Rule 608(a) does not apply.

What about Rule 608(b)? That Rule provides as follows:

> Specific instances of conduct of a witness, for the purposes of attacking or supporting the witness' credibility, . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness. . .[43]

In *Universal,* Judge Roth argued that in admitting the plea agreements on direct examination, the trial court acted "at odds with Rule 608(b)."[44] But this argument is weak. For one thing, it is not clear that a plea agreement is "conduct" of a witness within the meaning of the Rule. For another, the Rule simply states that certain evidence pertinent to credibility may not be proved by "extrinsic evidence." The Rule itself imposes no limitation on *referring* to or testifying to evidence of credibility on direct examination. It simply provides that the information covered by the Rule cannot be proved by extrinsic evidence. Thus, at most, Rule 608(b) would prohibit introduction of the plea agreement itself into evidence; it does not prohibit the prosecutor from asking the witness about the agreement or eliciting testimony about the terms of the agreement and the witness' understanding of it, etc.

But most importantly, Rule 608(b) applies only when the evidence is offered to attack or support the witness' *character for truthfulness.* The Rule does not apply to evidence offered to prove other aspects of the witness' credibility, such as bias/motive to falsify, inconsistent statements, contradiction, and capacity. The United States Supreme Court made this clear in *United States v. Abel* where the Court held that extrinsic evidence of a witness' motive to falsify could be admitted subject to Rule 403.[45] The exclusionary language of Rule 608(b) was held inappli-

41. *Id.* at 680.
42. FED. R. EVID. 608(a).
43. FED. R. EVID. 608(b).
44. *Universal,* 205 F.3d at 680.
45. 469 U.S. 45 (1984).

cable because it applied only when the sole purpose of admitting the extrinsic evidence is to prove the witness' character for veracity.[46] A plea agreement of a cooperating witness is not offered to prove the witness' character for truthtelling. Entering into a plea agreement is no indication of whether the witness is generally a liar. Rather, the plea agreement is offered to prove that the witness has a motive to lie about the defendant's involvement in order to preserve his deal with the government. This is evidence of bias. Under *Abel*, it is therefore not covered by Rule 608(b).[47]

In sum, Rule 608 provides no authority for the trial court to exclude the plea agreement of a cooperating witness. Whatever protection exists for defendants must come from Rule 403.[48]

CONCLUSION

Mr. Carlson's Comment paints a bleak landscape for defendants when the government presents the testimony of a cooperating witness. The result is that, in all but the most unusual circumstances, the jury will get to hear that the witness has pleaded guilty to the same crime with which the defendant is charged, and it will also be informed of the terms

46. *Id.* at 56; *see also* United States v. Grover, 85 F.3d 617 (4th Cir. 1996) (finding extrinsic evidence is not admissible to attack a witness' character for veracity, but it is admissible for impeachment by way of contradiction, subject to Rule 403); United States v. Lindemann, 85 F.3d 1232, 1243 (7th Cir. 1996) (where the defendant suggested that a witness falsely implicated him to obtain a plea agreement, the government was properly permitted to prove that the witness cooperated against a number of people; such evidence tended to rebut the suggestion that the testimony was a lie he told in his own self-interest: "The admissibility of evidence regarding a witness's bias, diminished capacity, and contradictions in his testimony is not specifically addressed by the Rules and thus admissibility is limited only by the relevance standard of Rule 402. Therefore, because the attack at issue was on Burns' bias, and not on his character for truthfulness in general, Lindenmann's contention that the limitations of Rule 608 should have applied is incorrect. Moreover, because bias is not a collateral issue, it was permissible for evidence on this issue to be extrinsic in form").

47. Admittedly, Rule 608(b) appears broader than the Court construed it in *Abel*. It states that extrinsic evidence is prohibited when offered to support or attack the witness' "credibility." Credibility is a broader term than "character for veracity" and could be construed to cover evidence of bias as well as other types of impeachment evidence. But as indicated in *Abel*, the courts construe the Rule 608(b) reference to "credibility" to really mean "character for veracity."

The Advisory Committee on Evidence Rule has proposed an amendment to Rule 608(b) that would substitute the term "character for truthfulness" for the existing term "credibility." This proposed amendment has been released for public comment. *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure 171-174 (Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, August 2001).

48. *See generally* Edward Imwinkelreid, *The Silence Speaks Volumes: A Brief Reflection on Whether it is Necessary of Even Desirable to Fill the Seeming Gaps in Article VI of the Federal Rules of Evidence*, 1998 U. ILL. L. REV. 1013 (1998) (concluding that for the most part misapplication of the Article VI rules has occurred because some courts have failed to recognize that Rule 403 operates as a default provision for impeachment questions that are not specifically treated in Article VI).

of the agreement itself. The jury may well assume that because the witness has pleaded guilty, the defendant is guilty as well. The only protection the defendant will receive is a limiting instruction.

It does not have to be this way, however. Trial courts certainly have the discretion to exclude a plea agreement when the defendant makes a clear commitment not to raise it at any point in the trial. While a trial court might be concerned about how such a commitment will be enforced, there is some comfort in the fact that defense counsel will have the incentive to live up to her promise; by doing so, she saves herself from sanctions and the client from substantial prejudice. The trial court should therefore exercise its discretion to exclude the plea agreement of a cooperating witness when the defense counsel promises not to raise it at trial and lives up to that promise.