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MEMORANDUM FOR ASSISTANT REGIONAL COUNSEL (CRIMINAL TAX)

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

SUBJECT: Anti-Gratuity Statute - 18 U.S.C. § 201(c)(2)
10th Circuit Decides Singleton Case

In follow-up to our memorandum dated January 5, 1999 on the anti-gratuity statute, 18 U.S.C. § 201(c)(2), the Tenth Circuit, *en banc*, reheard and decided the Singleton case on January 8, 1999. United States v. Singleton, No. 97-3178, 1999 U.S. App. LEXIS 222 (10th Cir. Jan. 8, 1999) (Singleton II). The court overturned the panel decision, (Singleton I), and affirmed the District Court's denial of the motion to suppress coconspirator's testimony holding 18 U.S.C. § 201(c)(2) inapplicable as to government agents. Specifically, the *en banc* court held that "18 U.S.C. § 201(c)(2) does not apply to the United States or an Assistant United States Attorney functioning within the official scope of the office." Singleton II at *2-3. In essence, the court found Singleton's basic argument, when taken to its logical conclusion, "patently absurd."

The majority's analysis centered around the apparent dispute as to who is encompassed by the term "whoever" in the statute. There has been little dispute as to the significance of the remaining terms. The court looked to the dictionary to define the term "whoever" finding its ordinary meaning to be "whatever person: any person." Singleton II at *9. Consequently, the court reasoned that excluding the government from the term "whoever" was required as the United States is not a being but rather an inanimate entity. Likewise, the court believed that United States Attorney's and their assistants, (prosecutors in general), are excluded because prosecutors and the United States are inseparable under the inference that prosecutors become the alter ego of the United States when exercising the United State's power of prosecution. The court cited United States v. Ware, No. 97-5771, 1998 U.S. App. LEXIS 30836 (6th Cir. Dec. 3, 1998), recently decided in the Sixth Circuit, to bolster it's position that Assistant United States Attorneys (AUSA) work as government alter egos when prosecuting criminal matters in the name of the United States. Recognizing a distinction in a

prosecutor's duties, the court stated that prosecutors become agents of the United States when they conduct other government business in their offices. Nevertheless, the court held that the rules of statutory construction would lead to the same conclusion. This is based on the rule that "[s]tatutes of general purport do not apply to the United States unless Congress makes the application clear and indisputable." Singleton II at *10. The court also applied United States v. Nardone, 302 U.S. 379, 383 (1935), a canon of statutory construction which provides that statutes which tend to restrain or diminish the powers or rights of the sovereign do not apply to the government or affect governmental rights unless the text of the statute expressly includes the government.

The court noted that from the common law, courts "have drawn a longstanding practice sanctioning the testimony of accomplices against their confederates in exchange for testimony." Singleton II at *13. No practice is more ingrained than the granting of lenience in exchange for testimony, the court concluded, and it created a vested sovereign prerogative in the government. Furthermore, the court stated, "Congress is understood to legislate against a background of common-law adjudicatory principles." Singleton II at *14. "Thus, where a common-law principle is well established . . . the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." Singleton II at *14-15 (quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991)(citations omitted)). Furthermore, the court noted that "in the American criminal prosecution, the granting of lenience is an authority that can only be exercised by the United States through its prosecutor; therefore, any reading of section 201(c)(2) that would restrict the exercise of this power is surely a diminution of sovereignty not countenanced in our jurisprudence." Singleton II at *14. Additionally, the court concluded that applying § 201(c)(2) to the United States was absurd because to subject the government to § 201(c)(2) means to make a prosecutor a criminal, a violator of the law subject to criminal prosecution. Finally, the court also noted that there were numerous statutes and rules with which Singleton's reading of § 201(c)(2) would conflict, further lending support to their holding.

In a concurring opinion, Judge Lucero agreed with the majority as to the holding but felt the key element in excluding prosecutors from the application of the general anti-gratuity statute was the existence of other, more specific statutes and rules, which explicitly authorize and sanction the use of plea bargaining in carrying out their prosecutorial duties. It is because of this conflict between the anti-gratuity statute and other statutes and rules, that Judge Lucero could not join the dissent. Additionally, Judge Lucero disagreed with the majority's conclusion that the word "whoever" in § 201(c)(2), as it is used to define the class of persons who can violate the statute, cannot include the government or its agents as that holding, in essence, would overrule Nardone. In Nardone, the statutory language held to include the government "also connotes a being and not an entity." Singleton II at *21. Judge Lucero also noted that in applying that definition, the results are in direct conflict with the requirements of

1 U.S.C. § 1 which states in part: "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies and joint stock companies, as well as individuals." 1 U.S.C. § 1 (1998). In other words, the requirements include inanimate entities contrary to the majority's definition.

The dissent, which included the original panel, was authored by Judge Kelly who wrote for the panel in Singleton I. The original panel's holding that government plea bargaining violated the anti-gratuity statute was based on an emphasis on the primacy of statutory plain language and based on a statutory construction analysis which included the limited canon of construction, under Nardone. In that opinion, the panel found the canon inapplicable and as the statute was neither vague or ambiguous, the plain meaning of the statute should be followed.

Their dissent was based on the same premise that courts must apply unambiguous statutes as they are written. Finding no ambiguity within § 201(c)(2) and no exceptions carved out of § 201(c)(2) for the government or its prosecutors, the dissent opined the anti-gratuity statute should apply to governmental exchanges of leniency for testimony. Their belief is that Congress, the policymaking branch of the government, and not the courts, are to determine the applicability of § 201(c)(2) to prosecutors and criminal defendants.

The majority of courts which addressed the issue in light of Singleton I refused to follow the Tenth Circuit's reasoning finding that the well settled rule that the anti-gratuity statute does not apply to government agents should continue to apply. Among these were articulated decisions from the Fifth and Sixth Circuits which also rejected the Singleton I panel's reasoning and were cited with approval by the Tenth Circuit. See Ware, 1998 U.S. App. LEXIS 30836, United States v. Haese, No. 97-10307, 1998 U.S. App. LEXIS 30798 (5th Cir. Dec. 7, 1998). Other circuits have dismissed the issued as unpersuasive in single sentence holdings. See United States v. Dike, No. 98-4136, 1998 U.S. App. LEXIS 31587 (4th Cir. Dec. 17, 1998), United Stated v. Eubanks, No. 98-4053, 1998 U.S. App. LEXIS 29372 (4th Cir. Nov. 18, 1998), United States v. Briones, Nos. 97-10369, 97-10370, 97-10371, 97-10372, 1998 U.S. App. LEXIS 30641 (9th Cir. Nov. 30, 1998).

As of this point, however, there are still two district courts which followed the Singleton I panel opinion in applying the anti-gratuity statute to the actions of prosecutors. See United States v. Lowery, No. 97-368-CR, 1998 U.S. Dist. LEXIS 12771 (S.D. Fla. Aug. 4, 1998, United States v. Fraguela, No. 96-0339, 1998 U.S. Dist. LEXIS 14347 (E.D. La. Aug. 28, 1998). If you have any questions or concerns with respect to this issue, please contact Marta Yanes on (202) 622-4470.