No. 09-1576 JUL 28 2010

IN THE

Supreme Court of the United States

JAMES BANNISTER,

Petitioner,

—v.—

ILLINOIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ILLINOIS SUPREME COURT

BRIEF OF THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.2 of the Rules of this Court, the Center on the Administration of Criminal Law at New York University School of Law ("The Center" or "Amicus"), with the consent of all parties, respectfully submits this brief of *amicus curiae* in support of Petitioner James Bannister.[1]

INTEREST OF *AMICUS CURIAE*

The Center on the Administration of Criminal Law is dedicated to defining good government practices in criminal prosecutions through academic research, litigation, and participation in the formulation of public policy. Although prosecutorial discretion is a central feature of criminal enforcement at all levels of government, there is a dearth of scholarly attention as to how prosecutors actually exercise their discretion, how they should exercise their discretion, and what mechanisms could be employed to improve prosecutorial decision-making. The Center's litigation program aims to bring the Center's empirical research and experience with criminal justice and prosecution practices to bear in important criminal justice cases in state and federal courts, at all levels. The Center focuses on cases in which the exercise of prosecutorial

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. The parties consented to the filing of this brief, and letters reflecting such consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

discretion raises significant substantive legal issues and files briefs in support of defendants and the government.

The Center files this amicus brief out of concern that the decision of a deeply-divided Illinois Supreme Court in *People v. Bannister*, upholding the use of so-called "consistency provisions" in plea agreements, is incompatible with the fair administration of justice, for the reasons set forth herein.

SUMMARY OF THE ARGUMENT

"The 'ultimate goal' of the criminal justice system is 'truth and justice.'" *Stone v. Powell*, 428 U.S. 465, 523 (1976). The use of "consistency provisions" in plea agreements—which require cooperating witnesses to testify consistently with their pre-trial statements in order to obtain the benefit of immunity or the possibility of a reduced charge or sentence—undermines this overarching goal.

Petitioner's brief argues that consistency provisions in plea agreements contravene this Court's Due Process jurisprudence by interfering with the witness's oath to tell the whole truth, and by impeding the ability of the jury to determine the truth for itself. (Pet. Br. 19.) Amicus submits this brief, in support of Petitioner, to explain further how the use of consistency provisions subverts the search for truth.

Although the testimony of an accomplice-turned-cooperator is often crucial to the prosecution of a case, it also presents the risk that it is untruthful and solely the product of the cooperator's strong incentive to obtain leniency from the government. Recognizing both the importance and challenges of cooperator testimony, our legal system has put in place a number of measures to seek

to minimize the inherent issues posed by reliance on cooperator testimony. Consistency provisions serve only to undermine such safeguards. First, consistency provisions are necessarily in tension with truth-telling provisions, which are typically included in plea agreements. Under well-established principles of contract interpretation, a consistency provision must be ascribed meaning and significance, within the context of a plea agreement, that is separate and apart from any truth-telling provisions contained in the same agreement. Thus, the only independent effect and meaning that a consistency provision may have within a plea agreement is to compel a cooperating witness to testify in a way that differs from the testimony he or she otherwise would provide if his or her plea agreement contained only standard provisions requiring truthful testimony. Moreover, by pre-determining the content of a witness's testimony based on a prosecutor's own evaluation of the truthfulness of those statements, consistency provisions also run counter to a witness's oath to tell the truth and the role of a neutral fact-finder as the sole determiner of the truth. Thus, consistency provisions undermine "'the truth-seeking function of trials.'" *Gray v. Netherland*, 518 U.S. 152, 185 (1996) (quoting *Gardner v. Florida*, 430 U.S. 349, 360 (1977)).

Only an approach to cooperator testimony that solely requires and emphasizes truth serves the interest of justice. Research confirms the challenges presented by cooperating witnesses—regarding the incentive and potential ability of cooperators to embellish or even fabricate truth, as well as the difficulties in detecting such deception. Even a prosecutor's ethical duties, and good-faith belief that a cooperator who testifies "consistently" is

testifying "truthfully," cannot counterbalance the ineluctable negative effects of consistency provisions.

The Center respectfully submits that the petition for certiorari should be granted because judicial sanction of consistency provisions—as the Illinois Supreme Court has granted in this case—will weaken key tenets central to the fair administration of justice.

ARGUMENT

I. CONSISTENCY PROVISIONS UNDERMINE THE SAFEGUARDS PUT IN PLACE TO MITIGATE THE RISKS AND CHALLENGES POSED BY COOPERATOR TESTIMONY

"[C]ourts have countenanced the use of informers from time immemorial [because] it is usually necessary to rely upon [informers] or cooperators." *United States v. Dennis*, 183 F.2d 201, 224 (2d Cir. 1950). Cooperators, especially when corroborated by other evidence, are an essential part of the criminal justice system and often are invaluable—even necessary—for the prosecution of a case. For example, the United States Attorney's Manual ("USAM") notes that: "In many cases, it may be important to the success of an investigation or prosecution to obtain the testimonial or other cooperation of a person who is himself/herself implicated in the criminal conduct being investigated or prosecuted." USAM 9-27.600(B)(1). However, that cooperator testimony is only acceptable to the extent that it is true and, as the studies discussed below illustrate, deception may be difficult to detect.

The potential risks and challenges posed by cooperator testimony—which is the result of a bargain for

leniency—are well-recognized. *See Commonwealth of N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1123-24 (9th Cir. 2001) (noting that "[o]ur system long ago recognized and embraced" the "kind of favoritism" granted to cooperators—who "purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration"—because "given our strict and demanding constitutional mandates and rules of evidence, not to do so would insulate many vile and dangerous outlaws from the reach of the law," but further acknowledging that "because of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to 'get' a target of sufficient interest to induce concessions from the government").

In light of the often critical importance of the testimony of cooperators to the prosecution of a case, and the concomitant risks such reliance may pose, our legal system has a number of safeguards that aim to minimize the potential for untruthful testimony. Plea agreements typically include and are conditioned upon the requirement that the defendant or cooperator testify truthfully and completely. This requirement furthers the testimonial oath to tell the truth. Moreover, the cooperator is subjected to cross-examination. In addition, closing arguments may be made, and jury instructions may be provided, that identify the possibility of self-interest. And, ultimately, the determination of a witness's credibility, and the assessment of the weight given his or her testimony, is left solely to the judgment of a neutral fact-finder. Consistency provisions

are inherently in tension with these safeguards, and thereby undermine the truth-seeking function of our legal system.

A. Plea Agreements Typically Use Truth-Telling Provisions

"The government has an obligation to ensure that cooperating witnesses testify truthfully." *United States v. Hartwell*, 448 F.3d 707, 719 (4th Cir. 2006). In line with this obligation, cooperation agreements are typically conditioned upon standard truth-telling provisions requiring the defendant or cooperating witness "to testify truthfully and completely before the grand jury and at any subsequent trials." *Bischel v. United States*, 32 F.3d 259, 261 (7th Cir. 1994) (noting that the plea agreement at issue included this "standard language"); *see also Hodge v. United States*, 554 F.3d 372, 374 (3d Cir. 2009) (discussing a plea agreement conditioned upon truthful, complete, and accurate testimony); *accord United States v. Cruz-Mercado*, 360 F.3d 30, 37 (1st Cir. 2004); *United States v. El-Gheur*, 201 F.3d 90, 92 (2d Cir. 2000); *United States v. Floyd*, 1 F.3d 867, 868 (9th Cir. 1993); *United States v. Crisp*, 817 F.2d 256, 258 (4th Cir. 1987); *Charbonneau v. State*, 904 A.2d 295, 302 (Del. 2006); *Commonwealth v. Miller*, 819 A.2d 504, 521 (Pa. 2002); *State v. Bolden*, 979 S.W.2d 587, 591 (Tenn. 1998); *State v. Marshall*, 690 A.2d 1, 38 (N.J. 1997); *Sessions v. State*, 890 P.2d 792, 795 (Nev. 1995); *People v. Rosenblum*, 218 A.D.2d 823 (N.Y. App. Div. 1995); *People v. Fauber*, 831 P.2d 249, 264 (Cal. 1992); *Commonwealth. v. Ciampa*, 547 N.E.2d 314, 319 (Mass. 1989); *State v. O'Connor*, 378 N.W.2d 248, 252 (S.D. 1985); *State v. Rivest*, 316 N.W.2d 395, 400 (Wis. 1982).

Furthermore, Section 9-27.630 of the United States Attorney's Manual provides that, "[t]o further encourage

full disclosure by the witness, it should be made clear in the agreement that the government's forbearance from prosecution is conditioned upon the witness's testimony or production of information being complete and truthful, and that failure to testify truthfully may result in a perjury prosecution." USAM 9-27.630.[2] Perhaps unsurprisingly, therefore, the USAM does not sanction—or even refer to—using consistency provisions in plea agreements.

B. Consistency Provisions Are Inherently in Tension with Truth-Telling Provisions in Plea Agreements

Plea agreements are essentially contracts and should be construed accordingly. *See Pucket v. United States*, 129 S.Ct. 1423, 1430 (2009); *see also People v. Evans*, 174 Ill.2d 320, 327 (Ill. 1996) (finding questions related to negotiated plea agreements "appropriate for the application of contract law principles"). The primary goal of contract interpretation is to give effect to the parties' intent. *McHenry Sav. Bank v. Autoworks of Wauconda, Inc.*, 924 N.E.2d 1197, 1205 (Ill. App. Ct. 2010) (citation omitted). When construing the terms of a contract, it is "presumed[d] that each contractual provision was inserted deliberately and for a purpose consistent with the parties' intent." *Id.* "Meaning and effect are to be given to all terms and provisions of a contract" because it is presumed that "language was not employed idly." *State Farm Mut. Auto. Ins. Co. v. Schmitt*, 419 N.E.2d 601, 603 (Ill. App. Ct.

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[2] *See also* Federal Public Defender's Office, Western District of New York, *available at* http://nyw.fd.org/cja/plea.pdf (example of a federal plea agreement form containing truth-telling provisions but no consistency provision) (last visited July 27, 2010).

1981). Therefore, a contract should be read in a manner that gives effect to all the provisions of the contract. *McHenry Sav. Bank*, 924 N.E.2d at 1205. Under these well-established principles of contract interpretation, a consistency provision must be ascribed meaning and significance, within the context of a plea agreement, that is separate and apart from any truth-telling provisions contained in the same agreement. Any other interpretation would improperly write out the consistency provision from the plea agreement.

Here, the plea agreement that the cooperator Michael Johnson entered into required him to "testify truthfully in all matters regarding the 1st Degree Murders of Dan Williams and Thomas Kaufman" but also required that "[s]uch truthful testimony *shall be consistent* with Michael Johnson's post-arrest statements." (Pet. App. 68A (emphasis added).) Under well-established principles of contract interpretation, the provision requiring that Mr. Johnson's testimony be "consistent" with his post-arrest statements must be understood to have meaning and effect that is different from the provision requiring that Mr. Johnson "testify truthfully in all matters regarding the 1st Degree Murders of Dan Williams and Thomas Kaufman." Courts must ascribe independent meaning and significance to this separate consistency provision. While the truth-seeking function of the criminal justice system is advanced by the provision requiring that a cooperator such as Mr. Johnson testify truthfully, the consistency provision conflicts with and negatively affects the truth-seeking function. If a cooperator, such as Mr. Johnson, is presented with a choice between testifying truthfully at trial or testifying consistently with his post-arrest statements—or, in Mr. Johnson's case, only *certain* of his post-arrest

statements—he will be incentivized to testify consistently in order to appear to comply with the terms of his plea agreement and obtain the considerable benefit of his bargain, even if such testimony is false. Thus, the consistency provision thwarts the truth-seeking function of the criminal justice system.

Moreover, the mere disclosure at trial of a consistency provision contained in a plea agreement is not sufficient to counteract these deleterious effects and justify the use of such a provision. Disclosing the consistency provision to the fact-finder has no effect on the cooperator's incentive to provide testimony that is consistent with his or her prior statements, yet false. And even if cross-examination might sometimes expose false cooperator testimony, the fact that consistency provisions serve no beneficial purpose to the criminal justice system's truth-seeking efforts means that they should not be condoned.

C. Consistency Provisions Undermine Other Fundamental Safeguards Of Our Judicial System

By binding cooperators to certain pre-trial statements that may be false, consistency provisions weaken fundamental safeguards of our legal system. As the Supreme Court of Illinois recognized in this case, "[o]ur legal system tests a witness' credibility through cross-examination and leaves the determination of that credibility to the finder of fact." *People v. Bannister*, 923 N.E.2d 244, 253 (Ill. 2009). Also crucial to the fact-finding process at trial, and to the efficacy of cross-examination itself, is a witness's oath to tell the truth. *See California v. Green*, 399 U.S. 149, 158 (1970) (noting that requiring a witness to

give his statements under oath "impress[es] him with the seriousness of the matter and guard[s] against the lie by the possibility of a penalty for perjury" and further emphasizing that cross-examination, under oath, is "the greatest legal engine ever invented for the discovery of truth") (internal quotation marks omitted). Consistency provisions, however, undermine the witness's taking of an oath to tell the truth. If the witness's prior, pre-trial statements are in fact not truthful, a provision requiring him or her to testify at trial consistently with those prior statements unavoidably conflicts with the witness's oath (and with the standard truth-telling provision typically included in a plea agreement). Thus, a consistency provision provides an added incentive for and pressure on a witness to testify falsely at trial. Perhaps more subtly pernicious, consistency provisions undermine the fact-finder's role of evaluating a witness's credibility. Such provisions pre-limit the testimony a witness will give before the fact-finder. Even a cooperator testifying truthfully, but constrained by previous statements, will be reluctant to provide supplementary truthful information at trial for fear that a prosecutor could deem it inconsistent and revoke the agreement. The safeguards put in place at trial were not built to—and do not—avoid these difficulties. Thus, consistency provisions subvert crucial tenets of our legal system.

II. ONLY AN APPROACH TO COOPERATOR TESTIMONY WHICH INSISTS EXCLUSIVELY UPON TRUTH SERVES THE INTEREST OF JUSTICE

A cooperator's self-interested incentive to acquire leniency, and to tailor facts to minimize his or her own

culpability, motivates testimony that fits the prosecutor's theory of the case and helps to convict someone else. *See* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 Pepp. L. Rev. 1, 50 (2000) ("Every defendant or target of an investigation knows that her only possibility of making a deal with the government for lenient treatment is a proffer of testimony helpful in convicting another defendant or target."); R. Michael Cassidy, *"Soft Words Of Hope:" Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 Nw. U. L. Rev. 1129, 1140 (2004) (noting that prosecutors report that "[a]ccomplice witnesses are very eager to please the government, precisely because they perceive that their future liberty and safety depend on it").

There is always a risk that such testimony may not be truthful. *See* Stephen S. Trott, *Words of Warning for Prosecutors Using Criminal as Witnesses*, 47 Hastings L.J. 1381, 1383, 1432 (1996) (concluding that "using informers is both central and extremely perilous to many prosecutions" and explaining that one of the two principal reasons prosecutors should be especially wary in using informers is that "[c]riminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law"). In some instances, as noted by one former Assistant United States Attorney ("AUSA") interviewed (along with a number of others in a survey about the use of cooperator testimony), "'[i]t is not that [the cooperator] thinks he's fabricating information[;] [h]e's just eager to please.'" Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 Fordham L. Rev. 917, 943 (1999). As noted by another former AUSA: "Many [cooperators] come in believing

This Is What They Want To Hear Time rather than This Is What Happened Time. Thus, the last thing you want to do is to feed them information because they will believe you want them to parrot back that information." *Id.* at 955. In a particularly candid assessment, a former chief of the Criminal Division in the United States Attorney's Office for the Southern District of New York responded as follows when asked whether he believed cooperators embellish the truth:

> All I know is that truth is elusive. Everyone tells you things and people don't even know if they are embellishing. The greater the incentive structure, the greater the risk of incriminating others. How much do you really remember? Mistakes and concurrences vary and now, if you tell them to a partisan lawyer and it fits the theory, it becomes frozen in the story because it is useful. The client is alert. His ears pick up when he reveals certain facts that pique the prosecutor or agent.

Id. at 953. Similarly, another former AUSA—who is now chief of staff to the New York Attorney General—recounted that "most prosecutors candidly admit that they are aware of instances in which cooperators have lied and the lies have gone undetected long enough to have an impact on the investigation." Steven M. Cohen, *What Is True? Perspectives of a Former Prosecutor*, 23 Cardozo L. Rev. 817, 824 n.16 (2002). And, whatever its frequency, studies illustrate that false cooperator testimony can have profound consequences. A 2004 study by the Northwestern University Center on Wrongful Convictions found that of the more than one-hundred death-row inmates who have

been exonerated since 1973, 45.9% were initially convicted at least in part on the testimony of cooperating witnesses. *See* Northwestern University School of Law Center on Wrongful Convictions, *The Snitch System*, 3 (2005).

The risk of untruthful testimony can be compounded by the fact that "[a]ccomplices can manipulate their versions of events without arousing much suspicion precisely because they are immersed in the details of the crime and know which aspects of the enterprise are verifiable and which are not." Cassidy, *supra*, at 1140. Indeed, the more critical the role played by cooperators in a case, the more difficult it may be to gauge the cooperator's truthfulness. As noted by a former AUSA: "For obvious reasons, when there is little information in the possession of (or available to) the prosecutor, the defendant's value as a cooperator increases. Unfortunately, that very lack of evidence tends to make it much more difficult to evaluate the veracity of the would-be cooperator." Cohen, *supra*, at 822. In such situations, "the prosecutor is forced to rely to a greater extent on his 'gut reaction' than on tangible evidence. How successful are prosecutors in relying on their 'gut reactions' when assessing would-be cooperators? The answer is unclear." *Id.* Thus, the use of cooperating witnesses "is laden with risk." *Id.*

Indeed, research demonstrates the difficulties in detecting deception. *See, e.g.*, Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 Cardozo L. Rev. 809, 809 (2002) (discussing empirical research by social psychologists and noting that based on dozens of studies the "compelling pattern emerges" that "people are poor human lie detectors") (citing Bella M. DePaulo et al., *The Accuracy-Confidence*

Correlation in the Detection of Deception, 1 Personality & Soc. Psychol. Rev. 346 (1997)). Research consistently indicates that the average person attempting to make a truthfulness determination is only accurate about 55 percent of the time, "barely better, statistically, than flipping a coin." Kassin, *supra*, at 810. Moreover, studies designed to scientifically evaluate the ability of observers to pick up on cues indicating lies (*e.g.*, eye contact or body language)—on which investigators' lie-detecting methods are frequently focused—reveal that such cues do not always reliably indicate whether the speaker is telling the truth. Kassin, *supra*, at 812; DePaulo et al., *supra*, at 347 ("[E]ven those cues that really are linked to deceit are linked only probabilistically. There is no behavior that always occurs when people are lying and never occurs when they are telling the truth."). Furthermore, the psychology of judging truthfulness often exhibits the powerful effect of confirmation bias. People naturally tend to view information that reinforces their *ex ante* beliefs favorably, and therefore seek out consonant evidence while scrutinizing dissonant evidence. *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 Wm. & Mary L. Rev. 1587, 1596-97 (2006). Although prosecutors act in good faith to find the truth, research shows that they, like anyone else would, face inherent difficulties in accurately detecting deception. *See id.* at 1593 (noting that "even 'virtuous,' 'conscientious,' and 'prudent' prosecutors fall prey to cognitive failures").

Thus, only the repeated and sole requirement that a cooperator's testimony be *truthful*—rather than "consistent" with certain of the cooperator's pre-trial statements—can further the government's (and more

generally the legal system's) aim of determining the truth. Inconsistent statements by a cooperator on the stand can be tested and impeached, allowing the fact-finder to assess the witness's credibility. But a prosecutor's good-faith belief that certain prior statements made by a cooperating witness are truthful—and that the witness should therefore be bound by a plea agreement to testifying consistently with those statements at trial—cannot counteract the dangers posed by consistency provisions, which, by their very nature, threaten the fair and efficient administration of justice.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 28, 2010