CASELAW APPENDIX (C)

Plea Agreement Case Law

State v. Howington, 907 S.W.2d 403 (Tenn. 1995) at 410. The Supreme Court of Tennessee has held that a cooperation agreement "is different form the average commercial contract as it involves a criminal prosecution where due process rights must be fiercely protected. ... [A]mbiguities in the agreement must be construed against the State."

U.S. v. Goodrich, 493 F.2d 390 (9th Cir. 03/08/1974). Turning to the merits, appellants concede there is no law directly on point but analogizes their situation to a series of cases enforcing breached government "deals" where defendants were promised dismissals, immunity or leniency. In State v. Davis, 188 S.2d 24 (Fla. App. 1966), the court enforced a promise not to prosecute if the defendant submitted himself to a polygraph test which showed him to be telling the truth concerning his innocence. The test exonerated the defendant, and the appellate court upheld the trial court's dismissal of the attempted prosecution finding that "this was a pledge of public faith--a promise made by state officials--and one that should not be lightly disregarded." Also, in *Smith v. U.S.*, 321 F.2d 954, 955 (9th Cir. 1963), the court held that a government promise that a plea to a second charge would not result in a sentence longer than that already imposed for the first plea, and that the sentences would run concurrently, was violated when the defendant was sentenced to twice the time on the second plea.

U.S. v. Garcia, 519 F.2d 1343 (1975). More broadly, our court has written that "...when the prosecution makes a 'deal' within its authority and the defendant relies on it in good faith, the court will not let the defendant be prejudiced as a result of that reliance." *U.S. v. Goodrich*, 493 F.2d 390, 393 (9th Cir. 1974). Here, these principles are fully applicable to the deferred prosecution agreement between the Government and Garcia. The indictment upon which Garcia's convictions are based was obtained in violation of the express terms of the agreement and is therefore invalid. The upholding of the Government's integrity allows for no other conclusion.

Santobello v. New York, 404 U.S. 257 (1971). After negotiations with the prosecutor, petitioner withdrew his previous not-guilty plea to two felony counts and pleaded guilty to a lesser-included offense, the prosecutor having agreed to

make no recommendation as to sentence. At petitioner's appearance for sentencing many months later a new prosecutor recommended the maximum sentence, which the judge (who stated that he was uninfluenced by that recommendation) imposed. Petitioner attempted unsuccessfully to withdraw his guilty plea, and his conviction was affirmed on appeal. Held: The interests of justice and proper recognition of the prosecution's duties in relation to promises made in connection with "plea bargaining" require that the judgment be vacated and that the case be remanded to the state courts for further consideration as to whether the circumstances require only that there be specific performance of the agreement on the plea (in which case petitioner should be resentenced by a different judge), or petitioner should be afforded the relief he seeks of withdrawing his guilty plea. Pp. 260-263.

U.S. v. Garcia, 519 F.2d 1343 (9th Cir. 1975). Accused individuals who enter into plea bargaining agreements surrender several valuable Constitutional rights. See Santobello v. New York, 404 U.S. 257, 264, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971) (Douglas, J., concurring). Similarly, by entering into the deferred prosecution agreement, Garcia waived his valuable right to a speedy trial. In Santobello, the Supreme Court held that when a prosecutor makes a promise which serves as consideration or inducement for a guilty plea, the promise must be fulfilled. 404 U.S. at 262. More broadly, our court has written that "... when the prosecution makes a 'deal' within its authority and the defendant relies on it in good faith, the court will not let the defendant be prejudiced as a result of that reliance." U.S. v. Goodrich, 493 F.2d 390, 393 (9th Cir. 1974). Here, these principles are fully applicable to the deferred prosecution agreement between the Government and Garcia. The indictment upon which Garcia's convictions are based was obtained in violation of the express terms of the agreement and is therefore invalid. The upholding of the Government's integrity allows for no other conclusion. In their briefs, both the Government and Garcia agree with our view that the deferred prosecution agreement is analogous to a plea bargaining agreement.

Stone v. Cupp, 39 Or.App. 473, 592 P.2d 1044 Or.App., 1979. "Failure to scrupulously observe a plea bargain is cause for post conviction relief even where the sentencing court was uninfluenced by the irregularity, and (3) absent showing that proceedings which occurred prior to sentencing recommendation were affected by the breach, specific performance was the proper remedy, i. e., vacation of sentence, remand for a new sentence before a different circuit judge following a recommendation by

the prosecutor consistent with the agreement." ... " Postconviction court's finding of violation of plea agreement would be upheld if any evidence existed in the record to support it."

Closson v. State, 812 P.2d 966 (Alaska 1991). " When government claims that defendant has breached immunity or plea bargain agreement, burden is on government to prove, by a preponderance of the evidence, that substantial breach has occurred." ... " Where State breached promise of confidentiality contained in immunity agreement, defendant was entitled to specific performance; fundamental fairness dictated that State be held to strict compliance." ... " The court of appeals began its analysis in *Closson* by correctly noting that "[i]mmunity agreements are contractual in nature and general principles of contract law apply to the resolution of disputes concerning their enforcement and breach." 784 P.2d at 664 (citing *U.S. v. Irvine*, 756 F.2d 708, 710-11 (9th Cir.1985); *U.S. v. Carrillo*, 709 F.2d 35, 36 n. 1 (9th Cir.1983); *U.S. v. Brown*, 801 F.2d 352, 354 (8th Cir.1986)). The court of appeals also properly cautioned that "[a]lthough the analogy between immunity agreements and ordinary contracts is useful, immunity agreements are subject to constitutional restraints, foremost of which is the due process clause's overriding guarantee of fundamental fairness to the accused." *Closson*, 784 P.2d at 665 (citing *Surina v. Buckalew*, 629 P.2d 969, 975 (Alaska 1981))." ... " When the government claims that the defendant has breached an immunity or plea bargain agreement, the burden is on the government to prove, by a preponderance of the evidence, that a substantial breach occurred. *U.S. v. Gonzalez-Sanchez*, 825 F.2d 572, 578 (1st Cir.1987), *cert. denied, sub nom. Latorre v. U.S.*, 484 U.S. 989, 108 S.Ct. 510, 98 L.Ed.2d 508 (1987); Annotation, *Necessity and Sufficiency, in Federal Prosecution, of Hearing and Proof with Respect to Accused's Violation of Plea Bargain Permitting Prosecution on Bargained Charges*, 89 A.L.R.Fed. 753 (1988); Note, *The Standard of Proof Necessary to Establish that a Defendant has Materially Breached a Plea Agreement*, 55 Fordham L.Rev. 1059 (1987). A finding of breach will be upheld unless clearly erroneous. *Gonzalez-Sanchez*, 825 F.2d at 579." ... " Where an accused relies on a promise of immunity to perform an action that benefits the state, this individual too will not be able to "rescind" his or her actions. Therefore, we believe that the remedy of specific performance is equally applicable to Closson's situation, whether viewed as a remedy for a breach or for an anticipatory breach. *See also* *People v. Fisher*, 657 P.2d 922, 925 (Colo.1983) ("no other remedy short of enforcement of the promise would secure fundamental fairness to the defendant"). ... The Supreme Court found such a breach to be a

violation of fundamental fairness. The defendant had " 'bargained' and negotiated" for this promise so "the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial." *Id. at 262, 92 S.Ct. at 498*. "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." We recognize that not all of the judicial concerns of plea bargaining are implicated when the prosecution grants immunity in exchange for cooperation without requiring the accused to plea to a lesser charge. However, we have previously applied the principles of *Santobello* to prosecutorial breaches outside the plea bargaining arena. *Surina, 629 P.2d at 978*. We believe that the interests of fairness and the integrity of the criminal justice system require the application of those principles here as well. *See U.S. v. Carter, 454 F.2d 426, 427-428 (4th Cir.1972); People v. Fisher, 657 P.2d 922, 927 (Colo.1983); State v. Kuchenreuther, 218 N.W.2d 621, 623-24 (Iowa 1974)*. ... Many courts consider the defendant's detrimental reliance as the gravamen of whether it would be unfair to allow the prosecution to withdraw from a plea agreement. *See* Annotation, *Right of Prosecutor to Withdraw From Plea Bargain Prior to Entry of Plea, 16 A.L.R.4th 1089, 1094-1100 (1982)*.

U.S. v. Harvey, 869 F.2d 1439 C.A.11 (Fla.),1989. " Due process requires the government to adhere to the terms of any plea bargain or immunity agreement it makes. See Mabry v. Johnson, 467 U.S. 504, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984) (plea agreement); Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971) (plea agreement); In re Arnett, 804 F.2d 1200 (11th Cir.1986) (plea agreement); Rowe v. Griffin, 676 F.2d 524 (11th Cir. 1982) (immunity); U.S. v. Weiss, 599 F.2d 730, 737 (5th Cir.1979) (immunity) (Tuttle, J.) ("To protect the voluntariness of a waiver of fifth amendment rights, where a plea, confession, or admission is based on a promise of a plea bargain or immunity, the government must keep its promise."). See also Plaster v. U.S., 789 F.2d 289 (4th Cir.1986) (immunity); Johnson v. Lumpkin, 769 F.2d 630 (9th Cir.1985) (plea agreement); U.S. v. Carter, 454 F.2d 426, 427 (4th Cir.1972) (in banc) (immunity) ("if the promise was made to defendant as alleged and the defendant relied upon it in incriminating himself, the government should be held to abide by its terms"). This is true because by entering into a plea agreement the defendant forgoes his important constitutional right to a jury trial, or by testifying under a grant of immunity he forgoes his fifth amendment privilege. In either case courts will enforce the agreement when the defendant or

witness has fulfilled his side of the bargain." ... " When a defendant has demonstrated that he testified under a grant of use immunity, the burden shifts to the prosecution which then has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent" of the testimony given under the grant of immunity. See Braswell v. U.S., 487 U.S. 99, 108 S. Ct. 2284, 2295, 101 L. Ed. 2d 98 (1988); Kastigar, 406 U.S. at 460, 92 S. Ct. at 1665. See also Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 n. 18, 84 S. Ct. 1594, 1609 n. 18, 12 L. Ed. 2d 678 (1964)." ... " It follows then that the case law concerning the interpretation of plea agreements is relevant to the interpretation of this type of an agreement made by the prosecutor. See id. at 528 ("this contractual analysis applies equally well to promises of immunity from prosecution"). This court interprets a plea agreement consistently with what the defendant reasonably understood when he entered the plea. In re Arnett, 804 F.2d 1200, 1201-02 (11th Cir.1986). The court first determines whether the written agreement is ambiguous on its face. If the agreement is unambiguous and there is no allegation of government overreaching, the court will enforce the agreement according to its plain words. U.S. v. (Michael) Harvey, 791 F.2d 294, 300 (4th Cir.1986). If the agreement is ambiguous, the ambiguity "should be resolved in favor of the criminal defendant." Rowe, 676 F.2d at 526 n. 4 (ambiguity over whether Attorney General's promise bound future Attorney General was resolved in favor of the defendant); see In re Arnett, 804 F.2d at 1203 (government breached the agreement when it sought forfeiture of defendant's farm since written agreement ambiguous as to whether government would seek forfeiture of property and government could not satisfy heavy burden of proving defendant understood government reserved right to seek property forfeiture): U.S. v. (Michael) Harvey, 791 F.2d at 301 (imprecision in terms of written agreement construed against the government)." See (Michael) Harvey, 791 F.2d at 300 (due process requires holding government to a greater degree of responsibility for ambiguity in plea agreement than defendant). Furthermore, to the extent that the government's argument is based on the belief the government had no authority to enter the agreement as Harvey perceived it because it granted immunity for future crimes, it is not persuasive. First, it is not apparent that Harvey would know that the government did not have the power to enter the agreement as he perceived it. Second, that argument ignores the possibility that the government may have lead Harvey to believe (or at least contributed to his misunderstanding) that the agreement offered such immunity.

Finally, this court has never refused to enforce a plea agreement just because the government made a bad deal.

Tyoga Closson v. State, 812 P.2d 966 Supreme Court of Alaska (1991). " The court of appeals began its analysis in Closson by correctly noting that "immunity agreements are contractual in nature and general principles of contract law apply to the resolution of disputes concerning their enforcement and breach." 784 P.2d at 664 (citing U.S. v. Irvine, 756 F.2d 708, 710-11 (9th Cir. 1985); U.S. v. Carrillo, 709 F.2d 35, 36 n.1 (9th Cir. 1983); U.S. v. Brown, 801 F.2d 352, 354 (8th Cir. 1986)). The court of appeals also properly cautioned that "although the analogy between immunity agreements and ordinary contracts is useful, immunity agreements are subject to constitutional restraints, foremost of which is the due process clause's overriding guarantee of fundamental fairness to the accused." Closson, 784 P.2d at 665 (citing Surina v. Buckalew, 629 P.2d 969, 975 (Alaska 1981)). In Surina v. Buckalew, 629 P.2d 969 (Alaska 1981), we confronted the situation where a witness made a self-incriminating statement in reliance on the prosecution's promise of immunity. We stated that when the prosecution breaches an immunity agreement, the promisee is entitled to rescission, which "should have the effect of placing the individual in the same position he would have been in had he not engaged in the agreement." Id. at 975 n.14. However, because of the inherent impossibility of rescinding an incriminating statement, we noted that "the alternative remedies of 'rescission' and 'specific performance' will collapse into one, in most cases." Id Where an accused relies on a promise of immunity to perform an action that benefits the state, this individual too will not be able to "rescind" his or her actions. Therefore, we believe that the remedy of specific performance is equally applicable to Closson's situation, whether viewed as a remedy for a breach or for an anticipatory breach. Fundamental fairness dictates that the state be held to strict compliance after it breached its promise to Closson. Many courts consider the defendant's detrimental reliance as the gravamen of whether it would be unfair to allow the prosecution to withdraw from a plea agreement. See Annotation, Right of Prosecutor to Withdraw From Plea Bargain Prior to Entry of Plea, 16 A.L.R.4th 1089, 1094-1100 (1982). Here, Closson cooperated with the state and took risks on behalf of the state, which he would not have otherwise done but for the agreement. Moreover, Closson's cooperation conferred a large benefit on the state. To the extent that detrimental reliance is determinant, fundamental fairness dictates that the state should be required to specifically perform its part of the bargain. Here, Closson

cooperated fully with every reasonable request. As a result of Closson's assistance, the state was able to proceed in a very important case. Thus, given Closson's substantial performance of his part of the bargain, the indeterminate scope of the agreement, the fact that fundamental fairness weighs heavily in favor of Closson, and the state's breach of the agreement, we find it would be unfair for the state to renege on its part of the bargain. As one court has explained, "it would be grave error to permit the prosecution to repudiate its promises in a situation in which it would not be fair and equitable to allow the State to do so." *Kisamore v. State*, 286 Md. 654, 409 A.2d 719, 721 (Md. 1980) (quoting *State v. Brockman*, 277 Md. 687, 357 A.2d 376, 383 (Md. 1976)). See also *People v. Fisher*, 657 P.2d 922, 925 (Colo. 1983) ("no other remedy short of enforcement of the promise would secure fundamental fairness to the defendant"). In the plea bargaining arena, the U.S. Supreme Court has held that states should be held to strict compliance with their promises. In *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), the prosecutor promised that, in return for a guilty plea, he would not make a sentence recommendation. However, at sentencing, a different prosecutor represented the state and he recommended the maximum sentence. The Judge imposed the maximum sentence, but stressed that he was compelled to do so by the facts and was not influenced by the prosecutor's recommendation. Id. at 259. The Supreme Court found such a breach to be a violation of fundamental fairness. The defendant had "'bargained' and negotiated" for this promise so "the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial." Id. at 262. "When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Id. We recognize that not all of the judicial concerns of plea bargaining are implicated when the prosecution grants immunity in exchange for cooperation without requiring the accused to plea to a lesser charge. However, we have previously applied the principles of Santobello to prosecutorial breaches outside the plea bargaining arena. Surina, 629 P.2d at 978. We believe that the interests of fairness and the integrity of the criminal Justice system require the application of those principles here as well. See *U.S. v. Carter*, 454 F.2d 426, 427-428 (4th Cir. 1972); *People v. Fisher*, 657 P.2d 922, 927 (Colo. 1983); *State v. Kuchenreuther*, 218 N.W.2d 621, 623-24 (Iowa 1974)."