## ***APPENDIX B – PLEA AGREEMENTS***

**(Including Cooperation & Immunity)**

**Immunity Agreement Case Law**

***In re Kenneth H.,*** 80 Cal.App.4th 143, 95 Cal.Rptr.2d 5 Cal.App. 3 Dist., 2000. The Court of Appeal, Scotland, J., held that: (1) plea agreement was subject to specific enforcement, and (2) effect of specific enforcement would be to require prosecutor to move for dismissal. Plea agreement, which had not been submitted for court approval, was subject to specific enforcement, where district attorney proposed, and parties agreed, that minor would pay for and take polygraph examination, and would plead guilty to inflicting cruelty upon an animal if he failed examination, but charge would be dropped if he passed; juvenile relied upon agreement to his detriment by giving up his Fifth Amendment right against self-incrimination, paying $350 for private polygraph examination, and taking examination. Prosecutor may withdraw from a plea bargain before a defendant pleads guilty or otherwise detrimentally relies on that bargain; absent detrimental reliance on the bargain, the defendant has an adequate remedy by being restored to the position he occupied before he entered into the agreement. Fact that the court is not bound by a plea agreement entered into by the prosecutor and the accused, and the fact that a plea agreement made by the parties before it is submitted for court approval is akin to an executory contract which does not bind the accused, do not undermine the principle that the prosecutor should be bound by the agreement if the accused has relied detrimentally upon it. Under the circumstances of this case, we conclude that the prosecution could not renege on its plea agreement. As we shall explain, the need for public confidence in the integrity of the prosecutor's office requires the prosecution to abide by its promise if the accused has relied detrimentally upon the agreement. As to the motion for specific enforcement of his agreement with Deputy District Attorney Goldkind, the minor contends it should have been granted because he relied upon the agreement to his detriment by giving up his Fifth Amendment right against self-incrimination and paying $350 for the polygraph examination. The People disagree, arguing the agreement is unenforceable because it "was not actually a plea bargain" and had not been approved by the juvenile court. The People wisely do not attempt to defend the juvenile court's rationale for denying the minor's motion for specific performance, i.e., (1) Deputy District Attorney Goldkind "was operating under a misapprehension as to what in fact transpired with respect to the meeting with the minor and [polygraph examiner] Mansfield," (2) consequently, there "was miscommunication that prevented a meeting of the minds," and (3) "although we may have [had] reliance [by the minor], we never

had an agreement." Nothing in the record supports a conclusion that the agreement was entered into based upon a misunderstanding. The agreement was simple-if the minor submitted to, and passed, a polygraph examination administered by Lister, the People would move to dismiss the petition. The minor complied with his part of the agreement, but the prosecution reneged on its promise. The minor has the better argument. The question "whether a prosecutor can withdraw from a plea bargain before the bargain is submitted for court approval" recently was addressed in *People v. Rhoden* (1999) 75 Cal.App.4th 1346, 1351-1352, 89 Cal.Rptr.2d 819. Noting that the question "appears to be an issue of first impression in California courts," *Rhoden* reviewed cases from other jurisdictions, as well as secondary authority (*id.* at pp. 1352-1355, 89 Cal.Rptr.2d 819), and concluded "a prosecutor may withdraw from a plea bargain before a defendant pleads guilty *or otherwise detrimentally relies on that bargain.*" (Id. at p. 1354, 89 Cal.Rptr.2d 819, italics added.) "'Absent detrimental reliance on the bargain, the defendant has an adequate remedy by being restored to the position he occupied before he entered into the agreement.' " ( *Id.* at p. 1356, 89 Cal.Rptr.2d 819, quoting *State v. Becke`s* (1980) 100 Wis.2d

1, 7, 300 N.W.2d 871, 874.) The fact that the court is not bound by a plea agreement entered into by the prosecutor and the accused, and the fact that a plea agreement made by the parties before it is submitted for court approval is akin to an executory contract which does not bind the accused, do not undermine the principle that the prosecutor should be bound by the agreement if the accused has relied detrimentally upon it. The integrity of the office of the prosecutor is implicated because a "'pledge of public faith'" occurs when the prosecution enters into an agreement with an accused. (*Butler v. State* (1969) 228 So.2d 421, 424.) A court's subsequent approval or disapproval of the plea agreement does not detract from the prosecutorial obligation to uphold "our historical ideals of fair play and the very majesty of our government····" (*Id.* at p. 425.) The "failure of the [prosecutor] to fulfill [his] promise ··· affects the fairness, integrity, and public reputation of judicial proceedings." (*U.S. v. Goldfaden* (5th Cir.1992) 959 F.2d 1324, 1328.) Here, the minor relied upon the agreement by waiving his Fifth Amendment right to remain silent and by paying $350 to take the polygraph examination. The People believe this is insufficient to warrant enforcement of the agreement. They argue: "Although by submitting to a polygraph examination [the minor] may have given up his Fifth Amendment right to remain silent, his statements were not used for any purpose in adjudication or disposition. The only other detriment [the minor] suffered was financial-the $350 fee paid for the test····

[A]ttempting to recoup this kind of loss is better addressed in a civil action under principles of contract law. It does not involve a denial of due process or abridgment of liberty and cannot warrant dismissal of a juvenile petition charging criminal behavior." We are unpersuaded. "'A defendant relies upon a [prosecutor's] plea offer by taking some substantial step or accepting serious risk of an adverse result following acceptance of the plea offer. [Citation.] Detrimental reliance may be demonstrated where the defendant performed some part of the bargain. [Citation.]' " (Rhoden, *supra,* 75 Cal.App.4th at p. 1355, 89 Cal.Rptr.2d 819, quoting *Reed v. Becka* (1999) 333 S.C. 676, 511 S.E.2d 396, 403.) By paying for, and submitting to, the polygraph examination, the minor took a substantial step toward fulfilling his obligation under the agreement, and accepted a serious risk that he might suffer an adverse result, i.e., fail the examination, which he would not have been required to take but for the agreement. Accordingly, we conclude that the prosecution should be bound by its agreement.

***Surina v. Buckalew***, 629 P.2d 969, Alaska, 1981. "Use and derivative use immunity" prohibits only the use of the compelled testimony and its fruits against the defendant; witness may still be prosecuted for crimes referred to in the compelled testimony as long as the subsequent prosecution is based entirely on independently obtained evidence. As a matter of both federal and state due process, prosecutor's promise of immunity made in return for a surrender of privilege against self-incrimination is binding on the prosecution. Prosecutors had inherent authority, even in absence of enabling legislation, to grant immunity and to use that grant to compel testimony which would otherwise be protected by privilege against self-incrimination. Modern notions of due process have belied the notion that a prosecutor may invoke his discretion to evade promises made to a defendant or potential defendant as part of an agreement or bargain. In *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), the U.S. Supreme Court dealt with this issue in the context of plea bargaining. In that case, the prosecution promised to make no sentence recommendation, in exchange for the defendant's guilty plea; but the prosecutor inadvertently breached this agreement at sentencing. The Supreme Court held that the prosecutor's reneging on his part of the plea bargain agreement required either that the defendant be given an opportunity to withdraw his plea (and thus recover his right to trial), or that specific performance of the promise be mandated. Id. at 263, 92 S.Ct. at 499, 30 L.Ed.2d at 433. We think that this logic applies with equal force to the privilege against self-incrimination. If a prosecutorial promise of immunity is

made, it cannot be breached without allowing the promisee an opportunity to reconsider and revoke his part of the bargain.

***Mabry, Commissioner, Ark Dept. of Correction v. Johnson*** - No. 83-328 - In the Supreme Court of the United States (1983). Under the contractual doctrine of detrimental reliance or promissory estoppel, detrimental reliance on a promise is treated as if it were consideration; the effect is to stop the offeror from revoking his proposal. This solves the problems that otherwise would occur if the offeror were permitted to revoke his offer after the offeree had partially performed or substantially changed his position to his detriment in reliance on the offer. In the plea bargaining context, the doctrine of detrimental reliance would fully vindicate the rights of the accused and cure any unfairness resulting from the government's ability to revoke its nonbinding unilateral offer. See Goodrich, 493 F.2d at 393. An example of detrimental reliance might be a defendant's cooperation with law enforcement officials by testifying or providing valuable information, or by making restitution to victims. If the government has bargained for such actions, in return for which it would receive a guilty plea and recommend a light sentence or dismissal of other charges, and if the defendant has cooperated in reliance on the bargain, the circumstances may be such that the government should not thereafter be permitted to renege on the concessions it has offered to induce the defendant's actions. See *United States v. Carrillo*, 709 F.2d 35, 37 (9th Cir. 1983); *State v. Brockman*, 277 Md. 687, 357 A.2d 376 (1976); *State v. Kuchenreuther*, 218 N.W.2d 621 (Iowa 1974). In some instances, the reliance may be less active. For example, a defendant might be induced by a plea proposal to neglect preparation for his defense; in such a case, the mere passage of time without trial preparation might constitute detrimental reliance. Moreover, a due process claim might be made out upon a showing that the government's conduct in the plea bargaining negotiations was motivated by bad faith or an attempt to gain undue advantage over the defendant. A defendant assisted by competent counsel is not without recourse in the face of what he considers a manipulative use of the plea bargaining system.

***Cabral v. State*** 871 P.2d 1285. Purpose of grant of immunity is to permit individual to give information or testimony, not otherwise obtainable, without forfeiting privilege against self-incrimination. Where extent of grant of immunity is vague or ambiguous, it will be construed as being coextensive with constitutional privilege against self-incrimination. Privilege against self-incrimination bars use of information obtained by state under grant of immunity from being used in punitive manner

in subsequent criminal prosecution against individual who provided that information.

In the ***Supreme Court of Alaska Surina v. Buckalew***, 629 P.2d 969 (Ak 1981). "For we are of the view that, as a matter of both federal and state due process, a prosecutor's promise of immunity made in return for a surrender of the privilege against self-incrimination is binding on the prosecution. Modern notions of due process have belied the notion that a prosecutor may invoke his discretion to evade promises made to a defendant or potential defendant as part of an agreement or bargain. In *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), the U.S. Supreme Court dealt with this issue in the context of plea bargaining. Even if this principle should eventually prove not to be the rule under federal law, we hold it to be the rule as a matter of due process under the Alaska Constitution art. I, s 7. That being the case, a defendant or witness does have more to rely upon than merely the "grace or favor" of the prosecutor; our courts stand ready to recognize and give effect to a prosecutorial promise of immunity made part of an agreement where proven, whether authorized by statute or not, and to allow the defendant some redress for prosecutorial reneging. As such, the logic of the argument made in Temple, Apodaca, and Doyle is stripped of its force, and does not persuade us to follow those cases. It requires a further step beyond holding that a prosecutor will be bound by his immunity promises, whether statutorily authorized or not, when voluntarily accepted by a witness as part of a bargain; we must further consider whether such binding effect justifies the use of such a promise to compel self-incriminating testimony. The privilege against self-incrimination is concerned with the danger to a witness forced to give testimony leading to the inflicting of "penalties affixed to the criminal acts." *Kastigar v. U.S.*, 406 U.S. 441, 453, 92 S.Ct. 1653, 1661, 32 L.Ed.2d 212, 222 (1972); *Ullmann v. U.S.*, 350 U.S. 422, 438-39, 76 S.Ct. 497, 506-07, 100 L.Ed. 511, 524-25 (1956); *Boyd v. U.S.*, 116 U.S. 616, 634, 6 S.Ct. 524, 534, 29 L.Ed. 746, 752 (1886). A witness may not refuse to testify upon a claim of Fifth Amendment privilege where there is "no real or substantial hazard of incrimination," *E.L.L. v. State*, 572 P.2d 786, 788 (Alaska 1977). It follows that where the hazard of incrimination has been removed, the privilege against self-incrimination is no longer required. It is undisputed that the promises made here met constitutional standards, under which testimony could be constitutionally compelled. See Kastigar v. U.S., 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972)."

***U.S. Supreme Court Kastigar v. U.S.,*** 406 U.S. 441 (1972). The U.S. can compel testimony from an unwilling witness who

invokes the Fifth Amendment privilege against compulsory self-incrimination by conferring immunity, as provided by 18 U.S.C. 6002, from use of the compelled testimony and evidence derived there from in subsequent criminal proceedings, as such immunity from use and derivative use is coextensive with the scope of the privilege and is sufficient to compel testimony over a claim of the privilege. Transactional immunity would afford broader protection than the Fifth Amendment privilege, and is not constitutionally required. In a subsequent criminal prosecution, the prosecution has the burden of proving affirmatively that evidence proposed to be used is derived from a legitimate source wholly independent of the compelled testimony. Pp. 443-462. The statute is a product of careful study and consideration by the National Commission on Reform of Federal Criminal Laws, as well as by Congress. The Commission recommended legislation to reform the federal immunity laws. The recommendation served as the model for this statute. In commenting on its proposal in a special report to the President, the Commission said: "We are satisfied that our substitution of immunity from use for immunity from prosecution meets constitutional requirements for overcoming the claim of privilege. Immunity from use is the only consequence flowing from a violation of the individual's constitutional right to be protected from unreasonable searches and seizures, his constitutional right to counsel, and his constitutional right not to be coerced into confessing. The proposed immunity is thus of the same scope as that frequently, even though unintentionally, conferred as the result of constitutional violations by law enforcement officers." Second Interim Report of the National Commission on Reform of Federal Criminal Laws, Mar. 17, 1969, Working Papers of the Commission, 1446 (1970). The Commission's recommendation was based in large part on a comprehensive study of immunity and the relevant decisions of this Court prepared for the Commission by Prof. Robert G. Dixon, Jr., of the George Washington University Law Center, and transmitted to the President with the recommendations of the Commission. See National Commission on Reform of Federal Criminal Laws, Working Papers, 1405-1444 (1970).

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## 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.

*Tyoqa 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)."