

BENCHMEMO: UNITED STATES v. MARIE HICKS TRICE, CR 86-00062-R  
Motion to be heard Friday, 31 October 1986, at 2:00

ATTORNEYS: United States -- George Metcalf

Defendant -- David P. Baugh

Judge, this is before you on the defendant's motion to dismiss the indictment. She is charged with seven counts of embezzlement from the savings and loan association where she worked. I don't think the motion has any merit, but you may want to have an evidentiary hearing.

#### FACTS

Judge, I think you're familiar with the facts here, so briefly: The defendant alleges that she was told by an FBI special agent that if she cooperated her case would be resolved by pretrial diversion or no prosecution. (She doesn't say what "cooperation" meant. There is no suggestion that it meant a plea bargain or testifying against anyone else.) She further alleges that the agent told her that she did not need a lawyer to represent her during questioning and that the agent told her that the Assistant U.S. Attorney had affirmed the agent's statements to her. The Government, of course, denies these allegations. The requisite written agreement for pretrial diversion was never executed.

#### ARGUMENT

The defendant argues, relying on Cooper v. United States, 594 F.2d 12 (4th Cir. 1979), which was overruled by the U.S. Supreme Court in Mabry v. Johnson, 467 U.S. 504 (1984), that fairness requires that the Government's promises be specifically enforced. She states that the relevant question is whether there was "conversation between the defendant and a government agent, wherein issues were discussed which led the defendant to reasonably conclude that pretrial diversion or 'non-prosecution' was to be the resolution to her case, if she cooperated." The defendant claims that waiver of counsel during noncustodial interrogation amounts to detrimental reliance.

#### THE LAW

Judge, as I mentioned, the cases the defendant relies upon have been overruled by the Supreme Court's decision in Mabry.

Mabry held that a criminal defendant's acceptance of a prosecutor's plea bargain does not create a constitutional right to have the bargain specifically enforced where the prosecutor withdraws the offer prior to the acceptance of the guilty plea. A plea bargain is "a mere executory agreement which, until embodied in the judgement of a court, does not deprive an accused of liberty or any other constitutionally protected interest," 467 U.S. at 507, so that it may be withdrawn.

As a general rule, fundamental fairness requires that promises made during plea-bargaining and analogous contexts be respected. See Santobello v. New York, 404 U.S. 257, 262-63 (1971). That rule, however, is typically subject to two conditions: (1) the agent must be authorized to make the promise; and (2) the defendant must rely to his detriment on that promise. Johnson v. Lumpkin, 769 F.2d 630, 633 (1985).

The Fifth Circuit has held that, where "the only prejudice that could result from the breach of an agreement is simply that [the defendant] is prosecuted, . . . the appropriate analysis is not whether [the defendant] subjectively expected not to be prosecuted but whether there was a promise held out to which the government, as a matter of fair conduct, might be bound." United States v. Weiss, 599 F.2d 730, 738 (5th Cir. 1979).

The Fourth Circuit, in Plaster v. United States, 789 F.2d 289 (4th Cir. 1986), has recently split some very fine hairs and ruled that Mabry does not apply to immunity agreement cases. It held that, if authorized, an immunity agreement is binding on the government even if the defendant has not suffered actual prejudice by some self-incriminating act done in reliance on the agreement. (Not, I would argue, the soundest position to take.)

#### CONCLUSION

Judge, the situation in this case would probably more properly be characterized as an immunity-from-prosecution case than a plea bargain case since, according to the defendant, no guilty plea was contemplated. However, it's not clear what the value of the defendant's "cooperation" was to the Government to warrant its alleged promise not to prosecute anyway.

If the defendant claims that she has been prejudiced by the Government's obtaining statements from her in violation of her right to counsel, the proper motion would be one to exclude those statements.

Judge, I think an evidentiary hearing is preferable because of the Fourth Circuit's hair-splitting in Plaster. The questions that should be answered are: (1) Was there an agreement? (2) What was the nature of the agreement, i.e., "plea bargain" or "immunity"? (3) Was the agreement authorized? (4) Did the defendant rely on the agreement to her detriment?

LAF