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## NOTE: AN EQUITABLE TREATMENT OF UNAUTHORIZED PROSECUTORIAL PROMISES OF IMMUNITY

Pamela Hammers and James Stephens were jointly charged with the murder of Cynthia Walker and with manslaughter for causing the death of Ms. Walker's unborn child. Hammers, as a result of plea bargaining with the prosecuting attorney, agreed to waive her privilege against self-incrimination and to testify against Stephens. The prosecuting attorney agreed to move for a *nolle prosequi* and to grant Hammers total immunity to the charges against her. On the trial date Hammers was present in court and ready to testify, but the case was continued on motion of the State. At this time Hammers' attorneys confirmed with the prosecuting attorney the existence of their agreement. Subsequently, Stephens changed his plea from not guilty to guilty of second degree murder and agreed to testify against Hammers. Hammers was then notified that the prosecuting attorney was withdrawing from the immunity agreement and would prosecute her on the charges of murder and manslaughter. Hammers had made a statement concerning the crimes with which she and Stephens were charged. The prosecution returned this statement, and it was erased from the tape on which it was recorded. Hammers' motion to stay and to enjoin the prosecution on the basis of the immunity agreement was denied. No reference to the statement was made during her trial. She was found guilty of second degree murder and sentenced to eight years' imprisonment.<sup>1</sup>

The Arkansas Supreme Court found that since the immunity agreement had not been approved by the trial court, it was not enforceable on statutory grounds. It nevertheless held that Hammers' claim was enforceable on equitable principles if the trial court should find, after considering the terms of the agreement, that Hammers had in good faith performed her part of the bargain. *Hammers v. State*, 261 Ark. 585, 550 S.W.2d 432 (1977).

One of the prosecution's most important tools is the statutory authority to grant immunity to a witness in order to secure the benefit of the witness' testimony.<sup>2</sup> The origin of immunity grants can be traced to the common law doctrine of approvement. Approvement provided that a person indicted for treason or felony might confess the truth of the charge and accuse another as his

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1. *Hammers v. State*, 261 Ark. 585, 590-92, 550 S.W.2d 432, 434-35 (1977).  
2. Ark. Stat. Ann. §§ 28-531 to -536 (Cum. Supp. 1977).

accomplice in order to obtain a pardon for himself.<sup>3</sup> Later the English courts adopted a proceeding whereby an accomplice, after making a full confession and giving evidence for the Crown, obtained an equitable right to a recommendation of mercy.<sup>4</sup>

The first American immunity statute was enacted in 1857.<sup>5</sup> Congress, recognizing the need to obtain testimony and still protect the privilege against self-incrimination,<sup>6</sup> gave immunity to persons testifying in a congressional inquiry. Since this enactment, Congress and the state legislatures have utilized immunity legislation to mitigate the impact of the fifth amendment privilege.<sup>7</sup>

Inasmuch as immunity statutes generally operate in an area of constitutional protection, the United States Supreme Court has taken special care to weigh the sufficiency of such statutory grants.<sup>8</sup> Traditionally, nothing short of complete immunity was deemed constitutionally permissible and thus, until recent years, most of the immunity statutes granted "transactional immunity."<sup>9</sup> Transactional immunity precludes prosecution of a witness for or on account of any transaction, matter, or thing concerning which a witness testifies. The witness is immunized from criminal liability for any crime discussed in his testimony. Transactional immunity may not be revoked, even though the testimony provided was not truthful, but the lying witness may be prosecuted for perjury. In 1972, however, the United States Supreme Court held in *Kastigar v. United States*<sup>10</sup> that total immunity from prosecution is not required by the fifth amendment. It was held that "use immunity,"<sup>11</sup> immunity from the use of the compelled testimony and the fruits thereof, is

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3. *United States v. Ford*, 99 U.S. 594, 599 (1879).

4. *Id.* at 600-01 (citing 2 T. Starkie, *A Practical Treatise on the Law of Evidence*, and *Digest of Proofs*, in *Civil and Criminal Proceedings* 15 (4th American ed. Philadelphia 1832) (1st ed. London 1824)).

5. Act of Jan. 24, 1857, Ch. 19, 11 Stat. 155: "[N]o person examined and testifying before either House of Congress, or any Committee of either House, shall be held to answer criminally in any court of justice, or subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify. . . ."

6. U.S. Const. amend. V.

7. *Id.*

8. See generally *Kastigar v. United States*, 406 U.S. 441 (1972); *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964); *Ullmann v. United States*, 350 U.S. 422 (1956); *Brown v. Walker*, 161 U.S. 591 (1896); *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

9. For a full treatment of constitutional and statutory questions, see 51 B.U.L. Rev. 616 (1971).

10. 406 U.S. 441 (1972).

11. "Use and derivative use" immunity prohibits only the use of the compelled evidence and its fruits against the witness; thus, the witness may still be prosecuted for crimes referred to in his compelled testimony if the subsequent prosecution is based on independently obtained testimony. See *id.* at 448-59.

sufficient to comply with the constitutional privilege against self-incrimination.

In the absence of specific statutory authority, both federal and state courts have long held that although there is no legal right to immunity, an accomplice who testifies for the prosecution has an equitable claim to immunity.<sup>12</sup> The equitable principle is that if an accomplice testifies fully and fairly, he will not be prosecuted for the offense disclosed.<sup>13</sup>

In several recent decisions, a promise of immunity made by the prosecution has been enforced even though the particular agreements were not made pursuant to applicable statutory provisions. For example, a California appellate court in *People v. Brunner*<sup>14</sup> used the contractual theory of estoppel to enforce a bargain made by the prosecutor and the defendant. The defendant had been promised immunity from prosecution if she would provide incriminating testimony about her involvement in a crime which would also incriminate other members of a gang. The defendant gave her testimony, even though the prosecutor had failed to comply with the California immunity statute which required court approval of such agreements. When, in a second trial, the defendant recanted her testimony and claimed the fifth amendment privilege, she was indicted for participation in the crime. The appellate court upheld the lower court and enforced the bargain, reasoning that the defendant had originally testified in reliance on the state's promise and that the state had received substantially what it bargained for.

A federal district court in *United States v. Paiva*<sup>15</sup> enforced an agreement wherein the defendant promised to cooperate with the prosecution in exchange for immunity. The defendant refused to provide information which was not required by the agreement and the prosecutor indicted the defendant for the original offense. The court dismissed the indictment and reasoned that the judiciary, exercising its supervisory powers over the administration of justice, may require the executive branch to adhere to the standard of fair play. The *Paiva* court did not consider whether the promise was within permissible authority, but rather held that the interest at stake was the "[p]ublic confidence in the fair and honorable ad-

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12. *United States v. Ford*, 99 U.S. 594 (1879); *United States v. Lévy*, 153 F. 2d 995 (3rd Cir. 1946); *Lowe v. State*, 111 Md. 1, 73 A. 637 (1909); *Commonwealth v. St. John*, 173 Mass. 566, 54 N.E. 254 (1899).

13. *United States v. Ford*, 99 U.S. 594 (1879); *People v. Bryant*, 409 Ill. 467, 100 N.E.2d 598 (1951); *Camron v. State*, 32 Tex. Crim. 180, 22 S.W. 682 (1893).

14. 32 Cal. App. 3d 908, 108 Cal. Rptr. 501 (1973).

15. 294 F. Supp. 742 (D.D.C. 1969).

ministration of justice."<sup>16</sup>

In *United States v. Carter*<sup>17</sup> the Fourth Circuit Court of Appeals explicitly held that an unauthorized promise of immunity by a federal prosecutor was binding upon the government. The court recognized that immunity may ordinarily be granted only upon compliance with federal statutory requirements, but it reasoned that where the defendant has provided incriminating testimony because of such a promise, the agreement may be enforced.<sup>18</sup> The court ordered that if the promise were made, relied upon, and breached as alleged, the indictment should be dismissed.<sup>19</sup>

The United States Supreme Court in *Santobello v. New York*<sup>20</sup> concluded that when a plea bargain agreement is such that the plea was induced by the prosecutor's promise, then the promise must be kept.<sup>21</sup> The defendant, after being indicted on two felony counts, agreed to plead guilty to a lesser offense, provided the other felony charges be dropped and the prosecutor not make a sentencing recommendation. At the sentencing hearing, a new prosecutor, apparently ignorant of the agreement, recommended the maximum sentence. The Court vacated the judgment and remanded the case to the state court to determine whether specific performance of the agreement or the opportunity to withdraw the guilty plea should be defendant's remedy.<sup>22</sup>

In Arkansas prior to 1973, when the legislature passed a general immunity statute,<sup>23</sup> the only immunity legislation had been statutes dealing with particular narrow areas. One statute, for example, provided use immunity for an accomplice who testified before a grand jury.<sup>24</sup> Another granted use immunity to a defendant in a suit to recover money lost by gaming or betting when the defendant answered interrogatories propounded by the plaintiff.<sup>25</sup> However, there was no statute governing general grants of immunity from prosecution to persons testifying in criminal matters. The 1973 Act was

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16. *Id.* at 747 (citing *Sherman v. United States*, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring)).

17. 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1974).

18. *Id.* at 427-28.

19. *Id.* at 428. Since the case before the court involved only the defendant's allegations concerning the agreement, the judgment of conviction was vacated and the case remanded for an evidentiary hearing.

20. 404 U.S. 257 (1971).

21. *Id.* at 262.

22. *Id.* at 262-63.

23. Ark. Stat. Ann. §§ 28-531 to -536 (Cum. Supp. 1977).

24. Ark. Stat. Ann. § 43-915 (Repl. 1967).

25. Ark. Stat. Ann. §§ 34-1607 to -1608 (Repl. 1962).

passed for the purpose of establishing guidelines to facilitate prosecutions and to clarify the authority of the prosecuting attorney to make such grants. The Act required that the prosecuting attorney apply for and obtain a written order from the judge of the circuit court approving any grant of immunity.

In the first Arkansas case addressing the problem of immunity, *Runnels v. State*,<sup>26</sup> the court did not consider equitable principles in reaching its decision. Runnels had been tried and convicted of first degree murder. He moved for a new trial, claiming he had been surprised by being put on trial after the State's attorney had promised him immunity from prosecution in exchange for his testimony. There was no statutory provision for immunity; nevertheless, the court held that it was within the discretion of the public prosecutor to determine whether an accomplice should be permitted to become "State's evidence" and whether, if he did, he was afterward entitled to exemption from further prosecution by reason of his cooperation. The court found no error in either the prosecution or the submission of Runnels' confession to the jury. It was found that prosecutorial discretion to deny immunity to an accomplice continued even after the accomplice had testified. No mention was made of any supervisory authority which might reside in the courts. Since *Runnels* there apparently have been no reported cases addressing the question of prosecutorial immunity grants.

In *Hammers v. State*<sup>27</sup> the court held that a claimant was equitably entitled to enforcement of an *unauthorized* immunity agreement, provided that its terms were complied with in good faith. In remanding the case, the court ordered the trial court to determine what promises were made by the prosecutor and the extent of the appellant's performance of the bargain.<sup>28</sup> Based upon these factual determinations, the trial court was to decide whether Hammers was entitled to relief on equitable principles.<sup>29</sup>

Since the immunity agreement between Hammers and the prosecuting attorney was never approved by the trial court pursuant to the 1973 Act,<sup>30</sup> and since Hammers did not come within the terms of any other Arkansas statute governing immunity, her claim had to be viewed as one for relief on equitable rather than legal principles.<sup>31</sup> The court recognized that where no statute governs, there has

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26. 28 Ark. 121 (1873).

27. 261 Ark. 585, 550 S.W.2d 432 (1977).

28. *Id.* at 605, 550 S.W.2d at 442.

29. *Id.*

30. Ark. Stat. Ann. §§ 28-531 to -536 (Cum. Supp. 1977).

31. *Hammers v. State*, 261 Ark. 585, 597-98, 550 S.W.2d 432, 438 (1977).

long been an established practice of enforcing agreements to grant immunity or sentencing consideration to an accomplice who testifies fully in good faith for the prosecution.<sup>32</sup> The court also recognized that there was opposing authority holding that an agreement for immunity made without the consent or advice of the trial court was unenforceable.<sup>33</sup> In considering the relief to be granted and the means of obtaining such relief, the court found a wide divergence of authority.<sup>34</sup>

The court concluded that even when the prosecution opposes enforcement of an agreement, it lies within the discretion of the trial court to determine if there is an equitable claim to immunity.<sup>35</sup> If the appellant has fulfilled the agreement in good faith, the court should enforce it for reasons of public policy. Although the State contended that the appellant had not acted in good faith, the court held this charge had not been sustained by the evidence. The court found that Hammers was at all times ready and willing to testify for the State.<sup>36</sup> Having thus established the basis for an equitable right to immunity, the court directed that if the circuit court found appellant entitled to relief on remand, the jury verdict should be set aside and the charges dismissed.<sup>37</sup>

The impact of *Hammers* is that it recognizes nonstatutory immunity that is based on a doctrine of fairness and that the judiciary has the power to supervise and enforce. Although the court recognized the principle that in the absence of statutory authority no binding immunity agreement can be made,<sup>38</sup> it refused to apply that rule inflexibly. This holding may be viewed as a policy decision based on fairness to the defendant and on the knowledge that allowing a prosecutor to revoke an agreement would affect the willingness of other defendants to cooperate with the prosecution. A grant of immunity is an aid to effective law enforcement, and for it to work there must be an inducement to testify.

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32. *Id.* at 595, 550 S.W.2d at 436.

33. *Id.* at 596, 550 S.W.2d at 437.

34. *Id.* at 597, 550 S.W.2d at 438. Remedies ranged from the agreement providing no protection at all to permitting the agreement's use as a plea in bar.

35. *Id.* at 599, 550 S.W.2d at 439.

36. *Id.* at 593, 550 S.W.2d at 436.

37. *Id.* at 604-05, 550 S.W.2d at 442. The court commented several times on the "very unsatisfactory record" in this case, but stated that in spite of this handicap, it would have attempted a determination whether Hammers had carried the burden of proving the agreement and her compliance, had the trial court ruled upon those matters. However, the trial judge ruled simply that Hammers was not entitled to immunity because no agreement for it had been approved by the court and because the State had not sought approval or moved for a nolle prosequi.

38. *Id.* at 596, 550 S.W.2d at 437.

The court's refusal to invalidate the unauthorized promise of immunity might be criticized as a violation of a specific legislative mandate. The legislature had established the procedure to be followed for any grant of immunity to be made.<sup>39</sup> It is arguable that the court, in relaxing the necessity of fulfilling these requirements, has ignored the legislative command. The decision, however, can be justified on the basis of sound public policy. This is not a case of a judicial grant of immunity; the grant did not originate by virtue of the court's initiative. It is rather an exercise of the court's supervisory power over prosecutorial conduct. *Hammers* seems to indicate that the prosecution will not be protected from an unwise agreement. Administrative questions of prosecutorial power to grant immunity and of statutory requirements for the grant are outweighed by the state's interest in the fair administration of justice.

Immunity is a type of guilty plea where there is no adjudication of guilt. By considering the prosecutor's promise of immunity as the result of plea bargaining, an alternative rationale is available upon which to rest this decision. In a plea bargain, as *Santobello v. New York*<sup>40</sup> has shown, the promise of the prosecution to recommend leniency or reduction of charges is binding. The judiciary controls the sentencing power and should require that a prosecutor's promise which induces a plea be fulfilled. Immunity is the perfect or ultimate plea bargain, as there is no sentence or probation involved. Therefore, since grants of immunity call for no sentence by the judiciary, and since the prosecutor's promise to recommend immunity should be binding, the court, if applying plea bargain notions, should be forced to validate the grant of immunity.

The decision in *Hammers*,<sup>41</sup> on either of the conceptual bases discussed, is a progressive treatment of unauthorized promises of immunity and is in keeping with recent federal decisions. It is a

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39. Ark. Stat. Ann. §§ 28-531 to -536 (Cum. Supp. 1977).

40. 404 U.S. 257 (1971).

41. On remand the trial court ruled that *Hammers* was not entitled to relief on equitable principles and reinstated her conviction. On a second appeal the Arkansas Supreme Court reversed and dismissed. With one justice dissenting, the court determined that the record showed *Hammers* to be ready and willing to testify at all times. The court found the State had made the bargain and had taken full advantage of it until after Stephens entered his plea of guilty and promised to testify against *Hammers*. Thus, the court concluded that *Hammers* was entitled to immunity on equitable principles and that the trial court had erred in not so ruling. The necessity of obtaining a witness' testimony and the establishment of a statewide standard upon which both defendants and prosecutors could rely were significant public policy considerations contributing to the court's decision. Justice Fogleman registered a vigorous dissent based on the fact that the court allowed de novo review in a criminal case! *Hammers v. State*, 263 Ark. Adv. Sh. 378, 565 S.W.2d Adv. Sh. 406 (1978).



policy decision which should prove beneficial to all parties concerned. In the future the prosecutor must weigh carefully the public interest and the value of an offender's testimony before making any promises. The defendant, knowing that the agreement will be enforced, will be more willing to bargain in hope of favorable treatment, and the public faith will be preserved.

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