Evidence:

Plea & Plea-Related Statements (Rule 410)

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Plea and Plea-Related Statements

I. The Rule

Federal Rule of Evidence 410. Pleas, Plea Discussions, and Related Statements

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

> (1) a guilty plea that was later withdrawn;
>
> (2) a *nolo contendere* plea;
>
> (3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or
>
> (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):

> (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or
>
> (2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

II. Historical Origins

The Federal Rules of Criminal Procedure were adopted in 1946. As originally enacted, and until adoption of the Federal Rules of Evidence, the Federal Rules of Criminal Procedure did not contain a rule rendering evidence of withdrawn guilty pleas, pleas of *nolo contendere*, and offers to plead guilty and *nolo contendere* inadmissible. Thereafter, the Federal Rules of Evidence were adopted in 1975; Federal Rule of Evidence 410 was an attempt to codify common law precedent finding that withdrawn guilty pleas, pleas of *nolo contendere*, and offers to plead guilty and *nolo contendere*

were inadmissible against an accused. The Advisory Committee noted that the rationale behind holding offers to plead guilty and *nolo contendere* inadmissible was that they lead to "the promotion of disposition of criminal cases by compromise." In other words, as with *civil* negotiations under Federal Rule of Evidence 408, the parties to a *criminal* negotiation are more likely to speak candidly about the strengths and weaknesses of their cases and reach an agreement if they know that their statements will not see the light of day in open court should negotiations break down.

Soon after the enactment of Federal Rule of Evidence 410, Federal Rule of Criminal Procedure 11(e)(6), which contained nearly identical language, was adopted. After later amendments, the former Rule 11(e)(6) is now Federal Rule of Criminal Procedure 11(f), which merely states that "[t]he admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410."

Of all of the Federal Rules of Evidence, Federal Rule of Evidence 410 easily has the most complicated legislative history, and the convoluted process that led to its adoption understandably created confusion for the courts applying it. The foregoing section will explain the 2 main points of confusion created by the Rule and how the Rule was amended in an attempt to clarify it.

III. Prohibited Evidence Under the Rule

A. Rule 410(a)(1) and withdrawn guilty pleas

Federal Rule of Evidence 410(a)(1) deems inadmissible "a guilty plea that was later withdrawn…." There are several circumstances under which a defendant can withdraw a guilty plea. According to Federal Rule of Criminal Procedure 11(d),

> A defendant may withdraw a plea of guilty or *nolo contendere*:
>
> (1) before the court accepts the plea, for any reason or no reason; or
>
> (2) after the court accepts the plea, but before it imposes sentence if:
>
> (A) the court rejects a plea agreement under 11(c)(5); or
>
> (B) the defendant can show a fair and just reason for requesting the withdrawal.

If any of these circumstances apply, and a defendant is allowed to withdraw his guilty plea, Rule 410(a)(1) prohibits the admission of evidence of the withdrawn guilty plea against the defendant. Thus, for instance, in *United States v. Newbert*, 504 F.3d 180 (1st Cir. 2007), the defendant initially pleaded guilty to possession with the intent to distribute cocaine but was allowed to withdraw his plea after uncovering post-plea evidence of actual innocence: that a family "friend" placed a pill bottle in the defendant's basement shortly before his arrest. Before the defendant's ensuing trial, the government moved *in limine* for an order that the withdrawn guilty plea was admissible, but the district court denied the motion and the First Circuit thereafter affirmed, pursuant to Rule 410(a)(1).

Moreover, courts consistently have found that Rule 410(a)(1) renders inadmissible not only the withdrawn guilty plea itself but also evidence related to the withdrawal. For example, in *United States v. Young*, 2011 WL 96627 (W.D. Ky. 2011), the defendant initially pleaded guilty but then moved to withdraw the guilty plea under the advisement of new counsel. The court allowed this withdrawal after a hearing during which the defendant submitted an affidavit, testified, and presented a newly discovered letter. When the prosecution thereafter moved to present into evidence the affidavit, testimony, and letter, the court denied the motion, finding that evidence related to a withdrawn guilty plea is inadmissible under Rule 410(a)(1). *See* Colin Miller, *Going Into Withdrawal: Western District of Kentucky Finds Evidence Related To Plea Withdrawal Inadmissible Under Rule 410*, EvidenceProf Blog, January 15, 2011;

http://lawprofessors.typepad.com/evidenceprof/2011/01/410-us-v-youngslip-copy-2011-wl-96627wdky2011.html.

As will be noted, *infra*, however, prosecutors are increasingly forcing defendants to sign waivers to get to the plea bargaining table. If the defendant signs a waiver indicating that he waives the protections of Rule 410 by entering and then withdrawing a guilty plea, evidence of the defendant's withdrawn guilty plea would be admissible despite Rule 410(a)(1) because the defendant's withdrawal would have triggered the waiver. *See, .e.g., United States v. Quiroga*, 554 F.3d 1150 (8th Cir. 2009); Colin Miller *Withdrawal Symptoms: Eighth Circuit Opinion Raises Question Of Whether Moving To Withdraw A Guilty Plea Breaches A Plea Agreement*, EvidenceProf Blog, April 8, 2012;

http://lawprofessors.typepad.com/evidenceprof/2009/02/410-us-v-quirog.html.

The Advisory Committee's Note to Rule 410 indicates that Rule 410(a)(1) is derived from *Kercheval v. United States*, 274 U.S. 220 (1927), in which the Supreme Court "pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial."

Hypothetical 1: Robert Thieman is charged with assault in the first degree and related crimes based upon shooting a .22 rifle at the victim's vehicle after consuming at least 6 beers. Thieman pleaded guilty to the crimes charged after the prosecutor prepared a sentencing assessment report (SAR) in conjunction with the preparation of that plea. Thereafter, the trial judge rejected the plea agreement, and Thieman withdrew his guilty plea and entered a plea of not guilty. At trial, the prosecution called the prosecutor who reached the plea agreement with Thieman, and she testified that when she was interviewing him for the SAR, he admitted to drinking 6-12 beers before the crime charged. Should the prosecutor be allowed to render this testimony consistent with Rule 410? *See* State v. Thieman, 353 S.W.3d 384 (Mo. App. S.D. 2011); Colin Miller, *Withdrawal Symptoms: Court Of Appeals Of Missouri Finds Statements Related To Withdrawn Guilty Plea Inadmissible*, EvidenceProf Blog, April 8, 2012;

http://lawprofessors.typepad.com/evidenceprof/2012/04/missouri-supreme-court-rule-2402d5states-that-except-as-otherwise-provided-in-this-rule-2402d5-evidence-of-a-plea.html.

Hypothetical 2: William Meece is charged with burglary, robbery, and murder. Meece initially reached a plea deal with the Commonwealth's Attorney in which he would plead guilty in exchange for the Commonwealth recommending a sentence of life without parole for 25 years. Meece pleaded guilty but then successfully filed a motion to withdraw his guilty plea. At Meece's ensuing trial, the prosecution played a video recording of a conversation between the Commonwealth's Attorney and Meece before he pleaded guilty. On the recording, the Commonwealth's Attorney could be heard saying,

> For purposes of both tapes, there is an audiotape being made and a video recording of this, this is made pursuant to your agreement to cooperate fully with us…and it is my understanding that if we have more questions that you will be available as part of your agreement to cooperate with us, to answer any questions we have and that may include some more questions, here in just a little while. After

> we take a break, you enter your formal plea in open court and then we come back, is that fair?

Was this recording properly played? *See* Meece v. Commonwealth, 348 S.W.3d 627 (Ky. 2011).

B. Rule 410(a)(2) and *nolo contendere* pleas

Federal Rule of Evidence 410(a)(2) deems inadmissible "a *nolo contendere* plea…." The primary difference between a guilty plea and a *nolo contendere* plea (known in some jurisdictions as a plea of "no contest") "is that the latter may not be used against the defendant in a civil action based upon the same acts." Johnson v. State, 6 P.3d 1261, 1262 n.1 (Wyo. 2000). *Nolo contendere* is a Latin phrase meaning "I will not contest it," and that is exactly what a defendant does by entering such a plea: He does not admit guilt but instead chooses not to contest the criminal charge and leaves open the possibility of contesting a subsequent civil (or criminal) action against him. For instance, in *Patterson v. Odell*, 909 S.W.2d 648 (Ark. 1995), the Supreme Court of Arkansas found that the defendants' pleas of *nolo contendere* to criminal charges of negligent homicide based upon a car accident were inadmissible in a subsequent civil action for wrongful death based on the same accident. Courts allow these pleas in part to "facilitate plea dispositions by conserving judicial resources that might otherwise be consumed by defendants who went to trial because they feared collateral civil consequences." *Allen v. Martin*, 203 P.3d 546, 565 (Colo. App. 2008).

But what if a criminal defendant pleads *nolo contendere* and then becomes a civil *plaintiff* instead of a civil *defendant*? For example, let's say that a defendant (1) is charged with arson in connection with a fire at his house and pleads *nolo contendere*; and (2) then turns around and brings a civil action against his insurance company for failing to honor his homeowner's insurance policy? *See Lichon v. American Universal Ins. Co.*, 433 N.W.2d 394 (Mich.App. 1988). Is evidence of the defendant's plea inadmissible under Rule 410(a)(2)? This was one of the two points of contention after the initial enactment of the Rule. As originally enacted, Rule 410 stated that

> Except as otherwise provided by Act of Congress, evidence of a plea of guilty, later withdrawn, or a plea of *nolo contendere*, or of an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer.

In 1979, Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) were amended in part by moving the word "against" from its position in the original Rules to its present position before the words "the defendant." The Advisory Committee's Note explained the amendment as follows:

> An ambiguity presently exists because the word "against" may be read as referring either to the kind of proceeding in which the evidence is offered or the purpose for which it is offered. The change makes it clear that the latter construction is correct.

Thus, according to the Committee, the pre-amendment Rules were susceptible to two constructions:

Construction one is that the pre-amendment Federal Rules referred to the **kind of proceeding** in which a party attempts to admit the *nolo contendere* plea. Under this reading, then, "in any civil or criminal action, case, or proceeding against the person who made the plea or offer," that plea is inadmissible. So, if a defendant pleaded *nolo contendere* to arson, his plea would then be inadmissible against him if: 1) the flames burned a neighbor's property, and the neighbor civilly sued the defendant for monetary damages, or 2) after the arson trial, an individual burned by the flames succumbed to his injuries and died, and the state charged the defendant with murder and/or manslaughter. Example one is a "civil...proceeding against the person who made the plea," and example two is a "criminal…proceeding against the person who made the plea...." Conversely, under this construction, if the defendant pleaded *nolo contendere* to arson, the Federal Rules would **not** prohibit admission of his *nolo contendere* plea if he subsequently sued his insurance company for failing to pay on his insurance policy covering the burned property because this subsequent case would not be a "proceeding against the person who made the plea…." Instead, it would be a proceeding for the benefit of the person who made the plea (and against the insurance company).

Construction two is that the pre-amendment Federal Rules referred to the **purpose** for which the *nolo contendere* plea was used. Under this construction, the *nolo contendere* plea would be inadmissible against the person making the plea in all three of the above examples. While the case in the third example would not be a "proceeding against the person making the plea," the civil defendant (the insurance company) would be seeking to use the plea against the pleading party to prove that he maliciously set the

fire, preventing him from recovering on his insurance policy. Because the plea would thus be used against the pleading party, it would be inadmissible.

The 1979 amendment, combined with the Advisory Committee's Note, seems to make clear that "the latter construction," *i.e.,* construction two, "is correct." Until 1988, it appears that all courts adhered to this latter construction and did not allow for a civil defendant to introduce a civil plaintiff's prior *nolo contendere* plea into evidence. *See* Colin Miller, The Best Offense is a Good Defense: Why Criminal Defendants' Nolo Contendere Pleas Should be Inadmissible Against Them When They Become Civil Plaintiffs, 75 U. CIN. L. REV. 725, 735 (2006).

All that changed, however, with the Sixth Circuit's opinion in *Walker v. Schaeffer*, 854 F.2d 138 (6th Cir. 1988). In *Schaeffer*, two men arrested for disorderly conduct in a McDonald's parking lot following a high school football game pleaded "no contest." The men then filed a civil action for false arrest/imprisonment against their arresting officers, who unsuccessfully moved for summary judgment, with the district court deeming the "no contest" pleas inadmissible against the civil plaintiffs. On the officers' appeal, the Sixth Circuit reversed, finding that

> This case does not present the kind of situation contemplated by Rule 410: the use of a *nolo contendere* plea against the pleader in a subsequent civil or criminal action in which he is the *defendant*….In this case, on the other hand, the persons who entered prior no-contest pleas are now plaintiffs in a civil action. Accordingly, use of the no-contest plea for estoppel purposes is not "against the defendant" within the meaning of Fed. R. Evid. 410. This use would be more accurately characterized as "for" the benefit of the "new" civil defendants, the police officers.

Since *Schaeffer*, courts are split on the issue of whether civil *plaintiffs* can use Rule 410(a)(2) to preclude the admission of their prior *nolo contendere* pleas. Courts are also split over whether Rule 410(a)(2) solely precludes the admission of the *nolo contendere* plea itself or whether it also precludes admission of the resulting conviction. On one side of the issue are courts such as the Ninth Circuit, which held in *United States v. Nguyen*, 465 F.3d 1128 (9th Cir. 2006), that

> Rule 410's exclusion of a *nolo contendere* plea would be meaningless if all it took to prove that the defendant committed the crime charged was a certified copy of

> the inevitable judgment of conviction resulting from the plea. We hold that Rule 410 prohibits the admission of *nolo contendere* pleas and the convictions resulting from them as proof that the pleader actually committed the underlying crimes charged.

On the other side of the issue are courts like the Fifth Circuit, which found in *United States v. Williams*, 642 F.2d 136 (5th Cir. 1981), that a conviction based on a *nolo contendere* plea is as conclusive as a conviction based on a guilty plea or verdict, rendering it admissible notwithstanding the inadmissibility of the underlying plea pursuant to Rule 410(a)(2).

Hypothetical 3: William Moser is charged with indecent assault and related crimes after placing his hand under his 13 year-old step-granddaughter's shirt and rubbing her breast. While being investigated for this crime, Moser claimed "that he placed his hand on the victim's chest to determine if she was breathing adequately because the victim admittedly was suffering from a chest cold and had been coughing throughout the night." In order to refute this claim, the Commonwealth filed a motion *in limine* seeking to introduce Moser's earlier *nolo contendere* plea to indecent assault of his then 17 year-old daughter. Should the court deem evidence of this plea admissible? *See Commonwealth v. Moser*, 999 A.2d 602 (Pa. Super. 2010).

Hypothetical 4: Curtis Brown is indicted for trafficking in cocaine and three counts of distribution of cocaine. Brown was represented by Jerry Theos and Arthur Howe at trial, which ended with Brown being convicted and sentenced to a total of 40 years' incarceration. Theos and Howe also represented Brown on direct appeal, which ended with the Supreme Court of South Carolina affirming his conviction. Brown then filed a successful application for post-conviction relief, alleging ineffective assistance of counsel. After relief was granted, Brown entered a "no contest" plea and was sentenced to 8 years' incarceration. He then brought a legal malpractice claim against Theos and Howe. In response, Theos and Howe seek to admit Brown's "no contest" plea into evidence to prove that the result at trial would not have been different regardless of the quality of their performance. How should the court rule? *See Brown v. Theos*, 550 S.E.2d 304 (S.C. 2001).

C. Federal Rule of Evidence 410(a)(3) and statements made during plea proceedings

Federal Rule of Evidence 410(a)(3) deems inadmissible "a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure…." The primary Rule 11

proceeding is the plea colloquy under Federal Rule of Criminal Procedure 11(b)(1), which states that "[b]efore the court accepts a plea of guilty or *nolo contendere*, the defendant may be placed under oath, and the court must address the defendant personally in open court."

If the defendant makes incriminatory statements during this colloquy, Rule 410(a)(3) deems these statements inadmissible against the defendant in a subsequent criminal or civil proceeding. For instance, in *United States v. Price*, 2008 WL 4768872 (11th Cir. 2008), the defendant entered into a plea agreement with the prosecution after being charged with crimes related to his alleged participation as the "getaway" car driver in a bank robbery. During the plea colloquy, however, the plea was rejected after the defendant refused to admit that he *knowingly* participated in the bank robbery although he did admit to driving the car used in the robbery. After the prosecution referenced the defendant's colloquy statements at trial and the defendant was convicted, he appealed, and the Eleventh Circuit found that his statements were admitted in violation of Rule 410(a)(3).

The language of Rule 410(a)(3) also clearly covers plea allocutions. *See United States v. Orlandez-Gamboa*, 320 F.3d 328, 331 (2nd Cir. 2003). The right to allocute, to address the court on any subject, prior to the imposition of sentence, is "ancient in law," *United States v. Behrens*, 375 U.S. 162, 165 (1963), and currently codified in Federal Rule of Criminal Procedure 32(i)(4)(A)(ii), which provides that "[b]efore imposing sentence, the court must…address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence."

If during a plea allocution, the defendant makes incriminatory statements, those statements will not be admissible against the defendant in a subsequent criminal or civil proceeding pursuant to Rule 410(a)(3). For instance, in *United States v. Udeagu*, 110 F.R.D. 172 (E.D.N.Y. 1986), the defendant pleaded guilty to knowing and intentional importation of heroin and possession with intent to distribute and then described his participation in the crime in detail during a plea allocution. *See id.* The defendant thereafter withdrew his guilty plea and filed a successful motion *in limine* to preclude the prosecution from presenting his plea allocution statements into evidence pursuant to Rule 410(a)(3). *See id.*

Hypothetical 5: Volkan Mergen was suspected of committing an arson and related crimes. The AUSA assured Mergen that if he entered a guilty plea in connection with the arson, the AUSA would file a 5K1.1 departure with the court; if not, Mergen could face a sentence of up to 25 years.

Mergen agreed to plead guilty, and during the plea allocution, the defendant gave the following testimony under oath: "I traveled with others by car from Staten Island to New Jersey to obtain gasoline to be used to set fire to a house. In New Jersey, we obtained gasoline and then traveled by car to Staten Island. In Staten Island, we drove to a house and one of the individuals set fire to the house using the gasoline. At the time of these events, I was cooperating with the government but I did not have authorization to set fire to a house or to obtain gasoline for that purpose." Mergen thereafter withdrew his guilty plea. At his ensuing trial, can the prosecution introduce Mergen's testimony? See *United States v. Mergen*, 2010 WL 395974 (E.D.N.Y. 2010) *See* Colin Miller, *Plea Plea Me: Plea Allocution & Waiver Triggers Rule 410(a)(3) & 410(b)(1) In Arson Case*, EvidenceProf Blog, May 28, 2012;

http://lawprofessors.typepad.com/evidenceprof/2012/05/federal-rule-of-evidence-4103provides-that-in-a-civil-or-criminal-case-evidence-of-the-following-is-not-admissible-agains.html.

Hypothetical 6: Alberto Orlandez-Gamboa was arrested in Colombia on charges of kidnapping and murder. Later, the United States indicted Gamboa in connection with crimes that he allegedly committed as the leader of a Colombian drug cartel. A month before the U.S. sought Gamboa's extradition, Gamboa attended a series of meetings with Colombian prosecutors held pursuant to Colombia's "anticipated sentencing process." This process provides criminal defendants with an opportunity for reduced sentences in exchange for acceptance of charges. As a result of these meetings, Gamboa signed eight statements that "include detailed descriptions of Gamboa's drug trafficking activities." In Gamboa's subsequent prosecution in the United States, he claims that his signed statements were the equivalent of a plea allocution, rendering them inadmissible under Rule 410(a)(3). Should the court agree? *See United States v. Orlandez-Gamboa*, 320 F.3d 328 (2nd Cir. 2003).

D. Rule 410(a)(4) and statements made during plea discussions

Federal Rule of Evidence 410(a)(4) deems inadmissible "a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea." Statements made during plea discussions are typically called "proffer statements" because they take place during a proffer session, during which the defendant is proffering information in exchange for a potential plea deal. In some cases, a defendant will make

incriminatory statements during formal plea discussions with the prosecutor, and it will be clear that those statements will be inadmissible against him at a subsequent civil or criminal trial. *See, e.g., United States v. Stein*, 2005 WL 1377851 (E.D. Pa. 2005).

In other cases, it will be unclear whether the defendant made the incriminatory statements during plea discussions. The test that the vast majority of courts apply in determining whether discussions are plea discussions comes from the Fifth Circuit's opinion in *United States v. Robertson*, 582 F.2d 1356 (5th Cir. 1978). According to the court in *Robertson*, in deciding whether the defendant made protected statements during plea discussions,

> The trial court must apply a two-tiered analysis and determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances.

In applying this test, the court's decision must be "'driven by the specific facts and circumstances surrounding the interchange at issue.'" *United States v. Bridges*, 46 F. Supp. 2d 462, 465 (E.D. Va. 1999).

Under the first factor, in some cases, it will be clear through direct or circumstantial evidence that the accused did not have the subjective expectation that he was negotiating a plea. For instance, the accused himself might admit that he knew that he was not negotiating a plea. *See, e.g., Owen v. Crosby*, 854 So. 2d 182, 189-90 (Fla. 2003) ("Owen acknowledged that he knew if he confessed there was a possibility that he could receive a death sentence because McCoy could not 'guarantee promises.'"). Or, the accused might make an incriminatory statement without anyone present mentioning anything relating to "pleas, plea settlements, plea negotiations, plea discussions, pleas in abeyance, or dismissed charges." *West Valley City v. Fieeiki*, 157 P.3d 802, 808 (Utah 2007).

In closer cases, "[t]he court must appreciate the tenor of the conversation." *Robertson*, 582 F.2d at 1367. While courts should not "[r]equire 'a preamble explicitly demarcating the beginning of plea discussions,'" "when such a preamble [i]s delivered, it cannot be ignored." *Id.* Therefore, when the defendant in *Calabro v. State*, 995 So. 2d 307 (Fla. 2008), made incriminatory statements after stating, "I will like to avoid the trial and have some kind of plea agreement," the Supreme Court of Florida easily found that the first *Robertson* factor was satisfied.

While the "magic words" of such a preamble are not required, statements evincing a contrary expectation or other contextual evidence can lead to a court finding that the first ***Robertson*** factor is not satisfied. For example, in *Fieeiki*, the Supreme Court of Utah found that the accused, an officer, did not have the subjective expectation that he was negotiating a plea because, *inter alia*,

> First, the prosecutor had not filed any charges at the time of the September 9, 2003 meeting….Second, Defendant was forewarned of his *Miranda* rights prior to the meeting, and defense counsel responded, without mention of a negotiation, that such warnings were not necessary because Defendant was not in custody and was a law enforcement officer. Third, Defendant's statement was recorded, supporting an inference that it might subsequently be used as evidence by the prosecution.

Assuming that the accused can establish that he had the subjective expectation that he was negotiating a plea, the question then becomes whether that expectation was objectively reasonable under the second *Robertson* factor. Again, this analysis depends upon the facts of a particular case. In *United States v. Morgan*, 91 F.3d 1193, 1196 (8th Cir. 1996), the Eighth Circuit found that the defendant's subjective expectation that he was negotiating a plea was not objectively reasonable because

> (1) no specific plea offer was made; (2) no deadline to plead was imposed; (3) no offer to drop specific charges was made; (4) no discussion of sentencing guidelines for the purpose of negotiating a plea occurred—only a generalized discussion to give the suspect an accurate appraisal of his situation occurred; and (5) no defense attorney was retained to assist in the formal plea bargaining process.

Conversely, in *State v. Nowinski*, 102 P.3d 840 (Wash. App. Div. 1 2004), the Court of Appeals of Washington reversed a conviction after concluding that the trial court erred in finding that the defendant's statements were not protected by Rule 410. The defendant had told detectives "that he wanted to make a deal so he wouldn't have to go to jail for a long time period," prompting the detectives to get a prosecutor. *Id.* The prosecutor then "told the defendant that there would be no deal that night and that he needed to take the information the defendant provided back to consult with his boss before making a charging decision." *Id.* The Court of Appeals of Washington found that this was sufficient to satisfy the second *Robertson*

factor because "[t]he prosecutor did not disabuse [the defendant] of his expectation that a deal would be offered, but merely commented that no deal would be made 'that night.'" *Id.*

The initial Federal Rule of Evidence 410(a)(4) led to the second point of confusion that had to be resolved. The initial version of Rule 410(a)(4) covered statements made "in connection, and relevant to" an offer to plead, meaning that it could potentially apply not only to discussions between defendants and prosecutors but also to discussions between defendants and police officers, postal inspectors, or other law enforcement personnel. In response, Rule 410(a)(4) was amended so that it now only covers statements made during "plea discussions with an attorney for the prosecuting authority…." Courts however, have found that "[t]his rule can be fairly read to apply to statements made to a government attorney during the course of plea discussions *or to an agent whom the government attorney has authorized to engage in plea discussions." United States v. O'Neal*, 992 F.2d 1218 (6th Cir. 1993) (emphasis added). For instance, in *Kreps v. Commonwealth*, 286 S.W.3d 213 (Ky. 2009), the Supreme Court of Kentucky found that the trial court erred in deeming admissible statements a defendant made to a detective after the detective, while in the presence of the defendant, called the prosecutor and then told the defendant that he was acting with the prosecutor's authority. Most courts, however, have found that Rule 410(a)(4) does not apply when a defendant incorrectly believes that he is speaking to an agent with authority to negotiate a plea, even if the mistaken belief was reasonable. *See, e.g., United States v. Lindsey*, 2010 WL 4822939 (D. Minn. 2010).

By modifying the language of Rule 410(a)(4) so that it now covers "plea discussions," Congress also intended a second effect. According to the Advisory Committee, "by relating the statements to 'plea discussions' rather than an 'offer to plead,' the amendment ensures 'that even an attempt to open plea bargaining [is] covered under the same rule of inadmissibility." Accordingly, in *Russell v. State*, 614 So. 2d 605 (Fla. App. 1 Dist. 1993), the District Court of Appeal of Florida, First District, found that the trial court erred in deeming admissible a defendant's letter to a prosecutor in which he offered to plead guilty in exchange for a sentencing concession.

That said, courts vary in have varied in how liberally they construe the phrase "plea discussions." For instance, in *United States v. Penta*, 898 F.2d 815 (1st Cir. 1990), the defendant made incriminatory statements to a U.S. Attorney at

> a number of conferences, during which time the attorney was openly trying to build a case against

> defendant's associates, and, in the attorney's unexpressed belief, defendant felt, or at least feared, that he, too, would be indicted, and "was trying to get us to agree not to prosecute him, or get us to agree that we would recommend probation or a minimum jail sentence…."

In other words, the defendant was arguably trying to open plea bargaining, but the First Circuit shut that door on appeal, finding that "plea discussions means plea discussions" and that the defendant's conferences with the U.S. Attorney never reached that level. *Id.*

Hypothetical 7: Eric Harris was found dead in the back seat of a burned-out automobile. Within days, two detectives identified 17 year-old Mr. Nunes as a suspect. The detectives told Nunes and his father that they would treat fairly the first person to come forward with helpful information. The father hired an attorney, who set up a meeting at the State Attorney's Office. Prior to taking a statement from Nunes, the assistant state attorney made it clear that there was no plea offer on the table and that no plea deal was expected at that time. He did describe the process by which the State would decide to offer a plea deal. He stressed that before the State could offer any plea, it would have to verify the accuracy of Nunes's information and submit the case for review by the State Attorney's homicide committee. With that warning, Nunes gave a lengthy recorded statement in which he implicated himself in the death of Mr. Harris. Nunes was not arrested at that time, and he was allowed to go home with his father. He also agreed to cooperate further with the detectives. Nunes is later charged with murder and related crimes. Should his recorded statement be deemed admissible? *See* *Nunes v. State*, 988 So. 2d 636 (Fla. App. 2 Dist. 2008).

Hypothetical 8: Kevin Hare is investigated for wire fraud and related crimes after telling an insurance company operator that the operator could get a license to operate his company in Missouri if he paid bribe money to certain Missouri officials. At an initial meeting, Hare made incriminatory statements to an AUSA, who testified at a suppression hearing that Hare and he had discussed the Sentencing Guidelines somewhat but only in general terms. At Hare's inquiry, the AUSA informed him that the Guidelines would call for definite jail time, absent cooperation due to the amount of money involved. Specifically, the AUSA "told him that a 5k motion would reduce his exposure under the guidelines" but further testified that they "did not discuss [the] specifics of where the guidelines came out." The AUSA did not discuss specific charges with Hare and did

not offer any plea bargain. After this initial meeting, Hare continued to cooperate with the government and eventually entered into a plea bargain. Hare was later apprehended as he attempted to flee to Canada. At trial, the prosecution wants to introduce Hare's statements from the initial meeting. Should the statements be deemed admissible? *See United States v. Hare*, 49 F.3d 447 (8th Cir. 1995).

Hypothetical 9: Jason Clay is charged with possession with intent to deliver less than 50 grams of cocaine. While incarcerated, Clay wrote a letter to the prosecutor, which stated:

> Mr. O'hair,
>
> My name is Jason Clay. I am writing this letter in concern of myself, and helping you and your team out.
>
> I am lock up [sic] for controlled substance-Delivery/manufacture of Cocaine, and I have names of people who supplies [sic] the cocaine and I want to make a deal. [redacted portion]
>
> I am willing to help you out I know where these people stay, all I'm asking for is a chance, I realize I have a mistake [sic] and I want to correct it.
>
> Thank you for taking the time to read this letter.

Should the court deem the letter admissible? See *People v. Clay*, 2002 WL 1065280 (Mich. App. 2002).

IV. Permissible Evidence Under the Rule

A. Rule 410(b)(1) and the rule of completeness

Federal Rule of Evidence 410(b)(1) contains an exception allowing for the admission of evidence of a statement made under Rule 410(a)(3) or Rule 410(a)(4) "in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together…" As noted, the language of Federal Rule of Evidence 410(a) only precludes the admission of evidence of certain pleas and plea-related statements "against the defendant who made the plea or participated in the plea discussions…." Accordingly, under some circumstances, some courts allow defendants to present evidence of these pleas and plea-related statements. The Advisory Committee gave the following example to justify the exception: "[I]f a defendant upon a motion to dismiss a prosecution on some ground were able to admit certain statements made in aborted plea discussions in his favor, then other

relevant statements made in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue."

For instance, in *United States v. Jenkins*, 2007 WL 3355601 (E.D. Pa. 2007), the defendant impeached a witness for the prosecution by presenting evidence that the defendant implicated the witness during plea bargaining, giving the witness a motive to testify against him. Accordingly, under Rule 410(b)(1), the prosecution was entitled to respond by presenting other statements by the defendant during plea bargaining that incriminated the defendant in the crime charged. *See id.* As the Advisory Committee explained, the exception is modeled after the "rule of completeness" contained in Federal Rule of Evidence 106 "as the considerations involved are very similar."

What this means is that even if a defendant references a protected plea or plea-related statement, the reference does not trigger the exception in Rule 410(b)(1) unless fairness requires a more complete accounting of the plea or statement because the partial accounting created a "false impression." *Abdygapparova v. State*, 243 S.W.3d 191, 205 (Tex. App.-San Antonio 2007). So, for example, in *Abdygapparova*, the prosecutor asked the defendant whether her statement to police was her complete recollection of the events giving rise to the charges against her, prompting the defendant to respond that some details were left out and that she had mentioned this during plea bargaining. *See id.* The prosecutor than followed up by asking the defendant about several incriminatory statements that she made during plea bargaining. *See id.* On appeal, the Court of Appeals of Texas, San Antonio, found that these follow-up questions should not have been asked because the defendant mentioned plea bargaining but did not leave "a false impression with the jury." *Id.*

Finally, it should be noted that some courts have found that Federal Rule of Evidence 410(a) also prohibits *defendants* from presenting evidence of protected pleas and plea-related statements. For instance, in *Pearson v. State*, 818 P.2d 581, 584 (Utah App. 1991), the Court of Appeals of Utah cited to several federal and state court opinions to conclude that "[f]airness dictates that the restriction should apply to both parties in the negotiations." In these jurisdictions, then, the exception in Rule 410(b)(1) has been rendered a nullity because neither side will be able to present evidence concerning protected pleas and plea-related statements, meaning that the exception could never apply unless evidence is erroneously admitted.

Hypothetical 10: Delmus Thompson is charged with two counts of possession of cocaine with intent to sell and deliver and two counts of sale and delivery of cocaine. On direct examination, Thompson testifies that during plea bargaining he rejected the prosecution's offer of a guilty plea in exchange for a recommended 17 month sentence and that he would have refused an offer of 12 months as well, knowing that he risked 7 years' incarceration if he were found guilty at trial. On cross-examination, the prosecution asks Thompson about an officer's promise to help him get probation but how that promise fell apart during plea bargaining because Thompson's criminal record was too extensive to permit probation under the law. Was this question proper? *See State v. Thompson*, 543 S.E.2d 160 (N.C. App. 2001).

Hypothetical 11: Shelby Neugebauer is convicted of involuntary manslaughter after killing the victim while driving drunk. During sentencing, Neugebauer testifies that since the accident he had volunteered at the Ronald McDonald House, entered an outpatient program to manage his alcohol abuse, and participated in two therapy groups to deal with his grief. In response, the prosecutor asked Neugebauer a question that sought to elicit from Neugebauer that defense counsel advised him during plea bargaining to participate in charitable work and counseling to improve his chances for probation and not for the philanthropic and socially redeeming reasons usually associated with such activities. Was the question proper? *See Neugebauer v. State*, 974 S.W.2d 374 (Tex. App.-Amarillo 1998).

B. Rule 410(b)(2) and perjury/false statement proceedings

Federal Rule of Evidence 410(b)(2) contains an exception allowing for the admission of evidence of a statement made under Rule 410(a)(3) or Rule 410(a)(4) "in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present." So, for instance, assume that a defendant reaches a plea bargain with the prosecution and then admits to the crime and offers a guilty plea under oath. If the judge rejects the plea bargain and the defendant later testifies at trial that he did not commit the subject crime, his admissions under oath in connection with the failed plea bargain would be admissible if the prosecution later brought a perjury action against him. *See State v. Rodriguez*, 656 A.2d 53 (280 N.J. Super. A.D. 1995). An example of a criminal proceeding for a false statement that would also trigger the exception contained in Rule 410(b)(2) can be found in *United States v. Endo*, 635 F.2d 321 (4th Cir. 1980), in which the defendant was prosecuted for making a false declaration before a grand jury or court in violation of 18

USC § 1623. According to the Advisory Committee, this exception exists so that a defendant cannot make statements under oath and then "be able to contradict his previous statements and thereby lie with impunity."

Hypothetical 12: Lorraine Gleason is charged with aiding in the preparation of fraudulent income tax returns and related crimes. Gleason was a member of The Universal Life Church (TULC), which issued "mail order church charters," through which as few as three people could be designated as a congregation. Gleason allegedly assisted such congregations by telling members that they could donate to TULC earnings from their regular occupations, getting a charitable contributions deduction, and then withdraw the money from the church, tax-free, for the upkeep of their "churches" (their homes). Gleason pleads guilty and admits under oath that she knows that the receipts attached to a tax return were fraudulent. Gleason later withdraws her guilty plea, and the prosecutor indicates that if Gleason testifies at trial, he will question her about the tax return. The prosecutor also informs Gleason that if she states that she did not know that the return was fraudulent, he will be compelled to seek a perjury indictment. Gleason claims that this threat denied her the constitutional right to testify. Is she correct? *See United States v. Gleason*, 766 F.2d 1239 (8th Cir. 1985).

V. Waivers

The most important development under Federal Rule of Evidence 410 since its adoption is the Supreme Court approving the practice of prosecutors forcing defendant to waive some or all of their rights under the Rule to get to the plea bargaining table.

United States v. Mezzanatto, 513 U.S. 196 (1995)

Justice Thomas delivered the opinion of the Court.

Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) provide that statements made in the course of plea discussions between a criminal defendant and a prosecutor are inadmissible against the defendant. The court below held that these exclusionary provisions may not be waived by the defendant. We granted certiorari to resolve a conflict among the Courts of Appeals, and we now reverse.

I

On August 1, 1991, San Diego Narcotics Task Force agents arrested Gordon Shuster after discovering a methamphetamine laboratory at his residence in Rainbow, California. Shuster agreed to cooperate with

the agents, and a few hours after his arrest he placed a call to respondent's pager. When respondent returned the call, Shuster told him that a friend wanted to purchase a pound of methamphetamine for $13,000. Shuster arranged to meet respondent later that day.

At their meeting, Shuster introduced an undercover officer as his "friend." The officer asked respondent if he had "brought the stuff with him," and respondent told the officer it was in his car. The two proceeded to the car, where respondent produced a brown paper package containing approximately one pound of methamphetamine. Respondent then presented a glass pipe (later found to contain methamphetamine residue) and asked the officer if he wanted to take a "hit." The officer indicated that he would first get respondent the money; as the officer left the car, he gave a prearranged arrest signal. Respondent was arrested and charged with possession of methamphetamine with intent to distribute, in violation of 84 Stat. 1260, as amended, 21 U.S.C. § 841(a)(1).

On October 17, 1991, respondent and his attorney asked to meet with the prosecutor to discuss the possibility of cooperating with the Government. The prosecutor agreed to meet later that day. At the beginning of the meeting, the prosecutor informed respondent that he had no obligation to talk, but that if he wanted to cooperate he would have to be completely truthful. As a condition to proceeding with the discussion, the prosecutor indicated that respondent would have to agree that any statements he made during the meeting could be used to impeach any contradictory testimony he might give at trial if the case proceeded that far. Respondent conferred with his counsel and agreed to proceed under the prosecutor's terms.

Respondent then admitted knowing that the package he had attempted to sell to the undercover police officer contained methamphetamine, but insisted that he had dealt only in "ounce" quantities of methamphetamine prior to his arrest. Initially, respondent also claimed that he was acting merely as a broker for Shuster and did not know that Shuster was manufacturing methamphetamine at his residence, but he later conceded that he knew about Shuster's laboratory. Respondent attempted to minimize his role in Shuster's operation by claiming that he had not visited Shuster's residence for at least a week before his arrest. At this point, the Government confronted respondent with surveillance evidence showing that his car was on Shuster's property the day before the arrest, and terminated the meeting on the basis of respondent's failure to provide completely truthful information.

Respondent eventually was tried on the methamphetamine charge and took the stand in his own defense. He maintained that he was not involved in methamphetamine trafficking and that he had thought Shuster used his home laboratory to manufacture plastic explosives for the CIA. He also denied knowing that the package he delivered to the undercover officer contained methamphetamine. Over defense counsel's objection, the prosecutor cross-examined respondent about the inconsistent statements he had made during the October 17 meeting. Respondent denied having made certain statements, and the prosecutor called one of the agents who had attended the meeting to recount the prior statements. The jury found respondent guilty, and the District Court sentenced him to 170 months in prison.

A panel of the Ninth Circuit reversed, over the dissent of Chief Judge Wallace. 998 F.2d 1452 (1993). The Ninth Circuit held that respondent's agreement to allow admission of his plea statements for purposes of impeachment was unenforceable and that the District Court therefore erred in admitting the statements for that purpose. We granted certiorari because the Ninth Circuit's decision conflicts with the Seventh Circuit's decision in *United States v. Dortch*, 5 F.3d 1056, 1067-1068 (1993).

II

The Ninth Circuit noted that these Rules [410 and 11(e)(6)] are subject to only two express exceptions, neither of which says anything about waiver, and thus concluded that Congress must have meant to preclude waiver agreements such as respondent's….

The Ninth Circuit's analysis is directly contrary to the approach we have taken in the context of a broad array of constitutional and statutory provisions. Rather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption….

Our cases interpreting the Federal Rules of Criminal Procedure are consistent with this approach. The provisions of those Rules are presumptively waivable….

The presumption of waivability has found specific application in the context of evidentiary rules. Absent some "overriding procedural consideration that prevents enforcement of the contract," courts have held that agreements to waive evidentiary rules are generally enforceable even over a party's subsequent objections….Courts have "liberally enforced" agreements to waive various exclusionary rules of

evidence….Thus, at the time of the adoption of the Federal Rules of Evidence, agreements as to the admissibility of documentary evidence were routinely enforced and held to preclude subsequent objections as to authenticity….And although hearsay is inadmissible except under certain specific exceptions, we have held that agreements to waive hearsay objections are enforceable....

Indeed, evidentiary stipulations are a valuable and integral part of everyday trial practice. Prior to trial, parties often agree in writing to the admission of otherwise objectionable evidence, either in exchange for stipulations from opposing counsel or for other strategic purposes. Both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure appear to contemplate that the parties will enter into evidentiary agreements during a pretrial conference. *See* Fed.Rule Civ.Proc. 16(c)(3); Fed.Rule Crim.Proc. 17.1. During the course of trial, parties frequently decide to waive evidentiary objections, and such tactics are routinely honored by trial judges….

III

Because the plea-statement Rules were enacted against a background presumption that legal rights generally, and evidentiary provisions specifically, are subject to waiver by voluntary agreement of the parties, we will not interpret Congress' silence as an implicit rejection of waivability. Respondent bears the responsibility of identifying some affirmative basis for concluding that the plea-statement Rules depart from the presumption of waivability.

Respondent offers three potential bases for concluding that the Rules should be placed beyond the control of the parties. We find none of them persuasive.

A

Respondent first suggests that the plea-statement Rules establish a "guarantee [to] fair procedure" that cannot be waived. Brief for Respondent 12. We agree with respondent's basic premise: There may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably "discredit[ing] the federal courts." *See…United States v. Josefik*, 753 F.2d 585, 588 (CA7 1985) ("No doubt there are limits to waiver; if the parties stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing

to accept"). But enforcement of agreements like respondent's plainly will not have that effect. The admission of plea statements for impeachment purposes *enhances* the truth-seeking function of trials and will result in more accurate verdicts.…Under any view of the evidence, the defendant has made a false statement, either to the prosecutor during the plea discussion or to the jury at trial; making the jury aware of the inconsistency will tend to increase the reliability of the verdict without risking institutional harm to the federal courts.

Respondent nevertheless urges that the plea-statement Rules are analogous to Federal Rule of Criminal Procedure 24(c), which provides that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." Justice KENNEDY's concurrence in *United States v. Olano*, 507 U.S. 725, 741…(1993), suggested that the guarantees of Rule 24(c) may never be waived by an agreement to permit alternate jurors to sit in on jury deliberations, and respondent asks us to extend that logic to the plea-statement Rules. But even if we assume that the requirements of Rule 24(c) are "the product of a judgment that our jury system should be given a stable and constant structure, one that cannot be varied by a court with or without the consent of the parties,"…the plea-statement Rules plainly do not satisfy this standard. Rules 410 and 11(e)(6) "creat[e], in effect, a privilege of the defendant,"…and, like other evidentiary privileges, this one may be waived or varied at the defendant's request. The Rules provide that statements made in the course of plea discussions are inadmissible "against" the defendant, and thus leave open the possibility that a defendant may offer such statements into evidence for his own tactical advantage. Indeed, the Rules contemplate this result in permitting admission of statements made "in any proceeding wherein another statement made in the course of the same ... plea discussions *has been introduced* and the statement ought in fairness be considered contemporaneously with it."…Thus, the plea-statement Rules expressly contemplate a degree of party control that is consonant with the background presumption of waivability.

B

Respondent also contends that waiver is fundamentally inconsistent with the Rules' goal of encouraging voluntary settlement….Because the prospect of waiver may make defendants "think twice" before entering into any plea negotiation, respondent suggests that enforcement of waiver agreements acts "as a brake, not as a facilitator, to the plea-bargain process."…

We need not decide whether and under what circumstances substantial "public policy" interests may permit the inference that Congress intended to override the presumption of waivability, for in this case there is no basis for concluding that waiver will interfere with the Rules' goal of encouraging plea bargaining. The court below focused entirely on the *defendant's* incentives and completely ignored the other essential party to the transaction: the prosecutor. Thus, although the availability of waiver may discourage some defendants from negotiating, it is also true that prosecutors may be unwilling to proceed without it.

Prosecutors may be especially reluctant to negotiate without a waiver agreement during the early stages of a criminal investigation, when prosecutors are searching for leads and suspects may be willing to offer information in exchange for some form of immunity or leniency in sentencing. In this "cooperation" context, prosecutors face "painfully delicate" choices as to "whether to proceed and prosecute those suspects against whom the already produced evidence makes a case or whether to extend leniency or full immunity to some suspects in order to procure testimony against other, more dangerous suspects against whom existing evidence is flimsy or nonexistent."…Because prosecutors have limited resources and must be able to answer "sensitive questions about the credibility of the testimony" they receive before entering into any sort of cooperation agreement,…prosecutors may condition cooperation discussions on an agreement that the testimony provided may be used for impeachment purposes… If prosecutors were precluded from securing such agreements, they might well decline to enter into cooperation discussions in the first place and might never take this potential first step toward a plea bargain.

Indeed, as a logical matter, it simply makes no sense to conclude that mutual settlement will be encouraged by precluding negotiation over an issue that may be particularly important to one of the parties to the transaction. A sounder way to encourage settlement is to permit the interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining chips. To use the Ninth Circuit's metaphor, if the prosecutor is interested in "buying" the reliability assurance that accompanies a waiver agreement, then precluding waiver can only stifle the market for plea bargains. A defendant can "maximize" what he has to "sell" only if he is permitted to offer what the prosecutor is most interested in buying. And while it is certainly true that prosecutors often need help from the small fish in

a conspiracy in order to catch the big ones, that is no reason to preclude waiver altogether. If prosecutors decide that certain crucial information will be gained only by preserving the inadmissibility of plea statements, they will agree to leave intact the exclusionary provisions of the plea-statement Rules.

In sum, there is no reason to believe that allowing negotiation as to waiver of the plea-statement Rules will bring plea bargaining to a grinding halt; it may well have the opposite effect.[FN6] Respondent's unfounded policy argument thus provides no basis for concluding that Congress intended to prevent criminal defendants from offering to waive the plea-statement Rules during plea negotiation.

[FN6] Respondent has failed to offer any empirical support for his apocalyptic predictions, and data compiled by the Administrative Office of the United States Courts appear to contradict them. Prior to the Ninth Circuit's decision in this case (when, according to the Solicitor General, federal prosecutors in that Circuit used waiver agreements like the one invalidated by the court below, see Pet. for Cert. 10–11), approximately 92.2% of the convictions in the Ninth Circuit were secured through pleas of guilty or *nolo contendere*….During that same period, about 88.8% of the convictions in all federal courts were secured by voluntary pleas….

C

Finally, respondent contends that waiver agreements should be forbidden because they invite prosecutorial overreaching and abuse. Respondent asserts that there is a "gross disparity" in the relative bargaining power of the parties to a plea agreement and suggests that a waiver agreement is "inherently unfair and coercive."…Because the prosecutor retains the discretion to "reward defendants for their substantial assistance" under the Sentencing Guidelines, respondent argues that defendants face an "'incredible dilemma'" when they are asked to accept waiver as the price of entering plea discussions…..

The dilemma flagged by respondent is indistinguishable from any of a number of difficult choices that criminal defendants face every day. The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government "may encourage a guilty plea by offering substantial benefits in return for the plea."…"While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an

inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'"….

The mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether. "Rather, tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty."…Thus, although some waiver agreements "may not be the product of an informed and voluntary decision," this possibility "does not justify invalidating *all* such agreements."…Instead, the appropriate response to respondent's predictions of abuse is to permit case-by-case inquiries into whether waiver agreements are the product of fraud or coercion. We hold that absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable.

IV

Respondent conferred with his lawyer after the prosecutor proposed waiver as a condition of proceeding with the plea discussion, and he has never complained that he entered into the waiver agreement at issue unknowingly or involuntarily. The Ninth Circuit's decision was based on its *per se* rejection of waiver of the plea-statement Rules. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

Justice Ginsburg, with whom Justice O'Connor and Justice Breyer join, concurring.

The Court holds that a waiver allowing the Government to impeach with statements made during plea negotiations is compatible with Congress' intent to promote plea bargaining. It may be, however, that a waiver to use such statements in the case in chief would more severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining. As the Government has not sought such a waiver, we do not here explore this question.

Justice Souter, with whom Justice Stevens joins, dissenting.

Congress probably made two assumptions when it adopted the Rules: pleas and plea discussions are to be encouraged, and conditions of unrestrained candor are the most effective means of encouragement. The provisions protecting a defendant against use of statements made in his plea bargaining are thus meant to create something more than a

personal right shielding an individual from his imprudence. Rather, the Rules are meant to serve the interest of the federal judicial system (whose resources are controlled by Congress), by creating the conditions understood by Congress to be effective in promoting reasonable plea agreements. Whether Congress was right or wrong that unrestrained candor is necessary to promote a reasonable number of plea agreements, Congress assumed that there was such a need and meant to satisfy it by these Rules. Since the zone of unrestrained candor is diminished whenever a defendant has to stop to think about the amount of trouble his openness may cause him if the plea negotiations fall through, Congress must have understood that the judicial system's interest in candid plea discussions would be threatened by recognizing waivers under Rules 410 and 11(e)(6)….There is, indeed, no indication that Congress intended merely a regime of such limited openness as might happen to survive market forces sufficient to supplant a default rule of inadmissibility. Nor may Congress be presumed to have intended to permit waivers that would undermine the stated policy of its own Rules….

The unlikelihood that Congress intended the modest default rule that the majority sees in Rules 11(e)(6) and 410 looms all the larger when the consequences of the majority position are pursued. The first consequence is that the Rules will probably not even function as default rules, for there is little chance that they will be applied at all. Already, standard forms indicate that many federal prosecutors routinely require waiver of Rule 410 and 11(e)(6) rights before a prosecutor is willing to enter into plea discussions….As the Government conceded during oral argument, defendants are generally in no position to challenge demands for these waivers, and the use of waiver provisions as contracts of adhesion has become accepted practice. Today's decision can only speed the heretofore illegitimate process by which the exception has been swallowing the Rules….Accordingly, it is probably only a matter of time until the Rules are dead letters.

The second consequence likely to emerge from today's decision is the practical certainty that the waiver demanded will in time come to function as a waiver of trial itself. It is true that many (if not all) of the waiver forms now employed go only to admissibility for impeachment. But although the erosion of the Rules has begun with this trickle, the majority's reasoning will provide no principled limit to it. The Rules draw no distinction between use of a statement for impeachment and use in the Government's case in chief. If objection can be waived for

> impeachment use, it can be waived for use as affirmative evidence, and if the Government can effectively demand waiver in the former instance, there is no reason to believe it will not do so just as successfully in the latter. When it does, there is nothing this Court will legitimately be able to do about it. The Court is construing a congressional Rule on the theory that Congress meant to permit its waiver. Once that point is passed, as it is today, there is no legitimate limit on admissibility of a defendant's plea negotiation statements beyond what the Constitution may independently impose or the traffic may bear. Just what the traffic may bear is an open question, but what cannot be denied is that the majority opinion sanctions a demand for waiver of such scope that a defendant who gives it will be unable even to acknowledge his desire to negotiate a guilty plea without furnishing admissible evidence against himself then and there. In such cases, the possibility of trial if no agreement is reached will be reduced to fantasy. The only defendant who will not damage himself by even the most restrained candor will be the one so desperate that he might as well walk into court and enter a naked guilty plea. It defies reason to think that Congress intended to invite such a result, when it adopted a Rule said to promote candid discussion in the interest of encouraging compromise.

As indicated by Justice Ginsburg's concurring opinion, the Supreme Court only approved of the use of "impeachment waivers" in *Mezzanatto*. An impeachment waiver typically says something like: If a defendant engages in plea discussions and a plea agreement is not reached or the plea is withdrawn, any statement that the defendant makes during plea discussions can "be used for impeachment purposes if the defendant testifies in any way inconsistent with the…statement." *United States v.Tamez-Gonzalez* 103 F.3d 126 (5th Cir. 1996).

In other words, for an impeachment waiver to be triggered, the defendant must both (1) testify at trial; and (2) provide testimony that is inconsistent with his statement(s) during plea discussions. In the event that both of these conditions are satisfied, the prosecution can *only* use the statement(s) during plea discussions to impeach the defendant (*i.e.,* to argue that the contradiction reveals the defendant to be untrustworthy as a witness) and not to prove the truth of the matter asserted in the prior statement(s). For example, in *Mezzanatto*, when the defendant testified at trial that he did not know that the package he delivered to the undercover officer contained methamphetamines, the impeachment waiver he had signed allowed the prosecution to cross-examine him regarding his statement during plea

discussions in which he admitted knowing that the package contained methamphetamines. But this cross-examination could only be used to show that the contradiction rendered the defendant untrustworthy as a witness (impeachment) and could not be used to prove that the defendant actually knew that the package contained methamphetamines.

In finding that the Court in *Mezzanatto* only approved of impeachment waivers, Justice Ginsberg noted that the Court was not addressing the issue of whether a defendant can be forced to sign "case-in-chief waiver" to get to the plea bargaining table. A case-in-chief waiver typically says something along the lines of:

> Defendant…agrees that once he and his counsel have executed this…Voluntary Confession and Plea Agreement, the State can seek to admit it as evidence against him in any future criminal prosecution, and that he and his counsel will not interpose any legal objection to its admission into evidence. *United States v. Mitchell*, 2010 WL 5490771 (E.D. Tex. 2010).

In other words, when a defendant signs a case-in-chief waiver, the prosecution can introduce the defendant's statements made during plea discussions regardless of whether the defendant testifies or presents any other evidence that contradicts his prior statements. Practically speaking, this means that at trial the prosecution can introduce the defendant's statements during its case-in-chief, hence the name. And, unlike with an impeachment waiver, the prosecution can use the statements to prove the truth of the matter asserted.

For instance, in *United States v. Young*, 223 F.3d 905 (8th Cir. 2000), a defendant charged with federal drug trafficking crimes executed an affidavit admitting each element of the crimes charged during plea discussions. When the defendant later breached his plea agreement, the prosecution was allowed to admit the affidavit during its case-in-chief to prove the defendant's guilt for each of the crimes charged because he had signed a case-in-chief waiver. To date, five federal circuits have addressed the constitutionality of case-in-chief waivers,[1] and each of these circuits – the 4th, 5th, 8th, 10th, and D.C. Circuits – has found the waivers to be valid. *See* Colin Miller, *The Case-In-Chief Waiver, Take 2: 4th Circuit Becomes 5th Circuit*

[1] The First Circuit was confronted with a case-in-chief waiver in *United States v. Newbert*, 504 F.3d 180 (1st Cir. 2007), but found that the waiver was not triggered.

Court To Approve Case-In-Chief Waivers, EvidenceProf Blog, December 5, 2011;

http://lawprofessors.typepad.com/evidenceprof/2011/12/in-relevant-partfederal-rule-of-evidence-410provides-that-in-a-civil-or-criminal-case-evidence-of-the-following-is-not-a.html.

While the 2nd, 3rd, 6th, 7th, 9th, and 11th Circuits have not addressed the constitutionality of case-in-chief waivers, "each of these circuits has approved use of rebuttal waivers." Colin Miller, Deal or No Deal: Why Courts Should Allow Defendants to Present Evidence that They Rejected Favorable Plea Bargains, 59 U KAN. L. REV. 407, 431 (2011). A rebuttal waiver typically says something along the lines of

> [T]he office may use any statements made by [the defendant]…as substantive evidence to rebut, directly or indirectly, any evidence offered or elicited, or factual assertions made, by on or behalf of [the defendant] at any stage of a criminal prosecution.

In other words, when a defendant signs a rebuttal waiver, the prosecution can introduce the defendant's statements made during plea discussions only if the defendant directly or indirectly contradicts those statements at trial. Unlike with an impeachment waiver, that contradiction does not need to consist of the defendant's testimony. Instead, at trial, the defendant can contradict his statements made during plea discussions through his counsel's opening statement, exhibits, the testimony of defense witnesses, and even statements elicited from witnesses for the prosecution on cross-examination.

As an example, in *United States v. Roberts*, 660 F.3d 149 (2nd Cir. 2011), the defendant was charged with crimes connected with a conspiracy to import cocaine while he worked for American Airlines at John F. Kennedy International Airport. He thereafter signed a waiver, permitting the government to use statements made pursuant to the agreement as substantive evidence to "rebut, directly or indirectly, any evidence offered or elicited, or factual assertions made, by or on behalf of [the defendant] at any stage of a criminal prosecution." *Id.* During plea discussions, the defendant thereafter admitted that he was present during the unloading of a November 5th flight from Barbados in which the cocaine was discovered. *Id.* At trial, defense counsel introduced as an exhibit the defendant's swipe-card records, which showed that he "did not swipe into work until November 6th at three minutes after midnight." *Id.* The Second Circuit found that this exhibit rebutted the defendant's statement during plea

discussions and allowed the prosecution to present it into evidence. *Id.* And, unlike under impeachment waivers, the statements were admissible as substantive evidence to prove the truth of the matter asserted: that the defendant was actually present for the unloading of the flight. *Id. See* Colin Miller, *In Rebuttal: 2nd Circuit Finds Rebuttal Waiver Triggered in American Airlines/Cocaine Case*, EvidenceProf Blog, October 4, 2011,

http://lawprofessors.typepad.com/evidenceprof/2011/10/410-us-v-roberts-f3d-2011-wl-4489813ca2-ny2011.html.

Prosecutors now "routinely seek to avoid the…burdens and complications [of Rule 410] by demanding that a defendant" sign one of these three types of waivers. *United States v. Rasco*, 262 F.R.D. 682, 690 (S.D. Ga. 2009).

Hypothetical 13: Roger Rebbe, an accountant, is suspected of preparing false tax returns. Specifically, the prosecution believes that Rebbe told the CEO for Sherman Oaks Tree Service (SOTS) to create a Blue Account and a Green Account. All SOTS income would go into the Blue Account, but only some of that income would be placed in the Green Account and reported as income. Rebbe and his attorney meet with government agents, who inform them that they will not engage in plea discussions unless they both sign a waiver, which states that

> the government may use...statements made by you or your client at the meeting and all evidence obtained directly or indirectly from those statements for the purposes of cross-examination should your client testify, or to rebut any evidence, argument or representations offered by or on behalf of your client in connection with the trial.

Rebbe and his attorney sign the waiver, and Rebbe admits that he told the CEO to create the Blue Account. A plea agreement is not reached, and the case proceeds to trial. After the government rests its case, Rebbe requests an advisory opinion "as to whether the admissibility of [his] proffer statements had been triggered." The district court refuses to rule on the issue, and Rebbe does not testify. He does, however, call witnesses to testify that Rebbe possessed no knowledge about the Blue Account. The court thereafter allows the prosecution to present Rebbe's admission into evidence. After he is convicted, Rebbe appeals, claiming that "his proffer statements were admissible only to impeach him should he testify at trial…." Is he correct? See *United States v. Rebbe*, 314 F.3d 402 (9th Cir. 2002).

Hypothetical 14: Vince "Hot Rod" Morris and Paul "Paulie" Hysell, members of the Pagans Motorcycle Club, rob a FDIC insured bank. Morris agrees to turn State's evidence, with word getting back to Michael Stevens, a correctional officer at Morris' prison and the brother of a member of a "support club" for the Pagans. Stevens says that he "love[s] Pauley" and that "a snitch is the worst thing in the world." He also allegedly gives cigarettes to an inmate in exchange for the inmate threatening Morris. Stevens is indicted for conspiracy to retaliate against a person cooperating with law enforcement. As part of plea discussions, Stevens signs a stipulation of facts and a waiver stating

> Mr. Stevens agrees that if he withdraws from this agreement, or this agreement is voided as a result of a breach of its terms by Mr. Stevens, and he is subsequently tried on any of the charges in the superseding indictment, the United States may use and introduce the "Stipulation of Facts" in the United States case-in-chief, in cross-examination of Mr. Stevens or of any of his witnesses, or in rebuttal of any testimony introduced by Mr. Stevens or on his behalf.

After Stevens later refuses to plead guilty, his case proceeds to trial, and the prosecution seeks to admit the stipulation of facts as part of its case-in-chief. Should the court deem it admissible? *See United States v. Stevens*, 455 Fed. Appx. 343 (4th Cir. 2011); *See* Colin Miller, *The Case-In-Chief Waiver, Take 2: 4th Circuit Becomes 5th Circuit Court To Approve Case-In-Chief Waivers*, EvidenceProf Blog, December 5, 2011;

http://lawprofessors.typepad.com/evidenceprof/2011/12/in-relevant-partfederal-rule-of-evidence-410provides-that-in-a-civil-or-criminal-case-evidence-of-the-following-is-not-a.html.

Hypothetical 15: Robert Krilich is charged with fraud and conspiracy to violate RICO after allegedly palming a golf ball and pretending to pull it out of the ninth hole during a hole-in-one contest after the mayor's son hit a shot off of the ninth tee. According to the prosecution, Krilich pulled the ball trick to curry favor with the mayor, whose support was needed for a bond offering to finance an apartment complex to be built by Krilich. Before plea discussions, the prosecutor gets Krilich to sign a statement saying:

> [S]hould [Krilich] subsequently testify contrary to the substance of the proffer or otherwise present a position inconsistent with the proffer, nothing shall

> prevent the government from using the substance of the proffer at sentencing for any purpose, at trial for impeachment or in rebuttal testimony….

During plea discussions, Krilich admits, "I faked the hole-in-one on the ninth hole." A plea bargain is not reached. Krilich doesn't testify at trial, but, during cross-examination, his attorney gets two witnesses for the prosecution "to say that they were at the ninth hole when [the son] hit the shot but didn't think that Krilich was at the ninth hole then." Should the court deem Krilich's statement that he made during plea discussions admissible? *See United States v. Krilich*, 159 F.3d 1020 (7th Cir. 1998).

VI. Rule 410 Motions

Some concise examples of motions connected to evidence sought to be admitted or excluded under Rule 609 can be found at:

- *United States v. D-1, Umar Farouk Abdulmutallab*, 2011 WL 7277354 (E.D. Mich. 2011) (Motion to Suppress Statements Made to Government Agents at the Milan Correctional Facility) [Rule 410(a)(3)].
- *Lee v. Marlowe*, 2009 WL 4066872 (N.D. Ohio 2009) (Defendant's Motion *in Limine* to Exclude Evidence of No Contest Pleas and Criminal Convictions and Memorandum in Support) [Rule 410(a)(2)].
- *Salter v. McNesby*, 2007 WL 4659522 (N.D. Fla. 2007) (Defendant's Memorandum of Law Regarding Impact of Plaintiff's Arrest and Plea [Rule 410(a)(2) for plea by civil *plaintiff*].