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Michael S. Gershowitz

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WAIVER OF THE PLEA-STATEMENT RULES

United States v. Mezzanatto, 115 S. Ct. 797 (1995)

I. INTRODUCTION

In *United States v. Mezzanatto*,¹ the United States Supreme Court held that a criminal defendant could waive his right to the plea-statement exclusionary provisions embodied in Federal Rule of Evidence 410² and Federal Rule of Criminal Procedure 11(e)(6)³ ("Rules" or "plea-statement Rules").⁴ The Rules currently provide that statements made by a criminal defendant during plea negotiations with a prosecutor are inadmissible in a proceeding against the defendant.⁵

Mezzanatto involved a criminal defendant who, prior to settlement negotiations, waived the plea-statement Rules for impeachment purposes at the behest of the prosecutor.⁶ In holding that a knowing and voluntary waiver of the plea-statement Rules is valid and enforceable, Justice Thomas, writing for a seven person majority, relied in large part on the general presumption that criminal defendants can waive statutory, contractual and even the most fundamental constitutional rights.⁷

This Note argues that the majority, ignoring the plain language and legislative history of the plea-statement Rules, improperly placed the Rules within the general presumption favoring waiver. In addition, this Note argues that prosecutors cause defendants to enter into contracts of adhesion by demanding that they waive the plea-statement Rules. This Note further contends that the Court's opinion affirms the growing practice of prosecutors to demand waiver of the plea-statement Rules automatically, thereby circumventing the Rule's exclusionary provisions. Writing in dissent, Justice Souter correctly warned that the Court's decision could ultimately allow defendants to waive the protections of the plea-statement Rules for use in the government's case in chief.

¹ 115 S. Ct. 797 (1995).

² FED. R. EVID. 410.

³ FED. R. CRIM. P. 11(e)(6).

⁴ The plea-statement Rules are "substantively identical." *Mezzanatto*, 115 S. Ct. at 801.

⁵ FED. R. CRIM. P. 11(e)(6); FED. R. EVID. 410. See *infra* notes 18-23 and accompanying text for the text of the plea-statement Rules.

⁶ *Mezzanatto*, 115 S. Ct. at 800.

⁷ *Id.* at 801, 806.

II. BACKGROUND

A. FEDERAL RULE OF EVIDENCE 410 AS ENACTED IN 1974

In promulgating the original version of Federal Rule of Evidence 410, the Advisory Committee indicated that the purpose of excluding offers to plead guilty or *nolo contendere* was to promote the resolution of criminal cases by compromise.⁸ The plea-statement Rules are rooted in cases that examine the practical difficulties of admitting evidence of withdrawn guilty pleas.⁹ While the Judiciary Committees of the House and Senate agreed on the basic premise that courts should exclude withdrawn pleas, they differed in their views on admitting statements related to plea negotiations.¹⁰ The Senate's view that courts could admit plea statements for impeachment purposes and in prosecutions for perjury ultimately prevailed in the first version of Rule 410.¹¹

As originally enacted, Rule 410 included the following explicit exceptions admitting plea statements, "[t]his rule shall not apply to the introduction of voluntary and reliable statements made in court on the record . . . where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement." While the original version of the Rule allowed plea statements for impeachment purposes, it also indicated that it would not take effect until August 1, 1975, and that any subsequent amendment to the Federal Rules of Criminal Procedure inconsistent with the Rule would supersede it.¹² On July 31, 1975, the day before the original version of

⁸ FED. R. EVID. 410 advisory committee's note, 56 F.R.D. 183, 228 (1972).

⁹ See *Kercheval v. United States*, 274 U.S. 220 (1927) (admitting into evidence a withdrawn guilty plea would undermine the defendant's right to withdraw the plea and jeopardize his right to a fair trial); *People v. Spitareli*, 173 N.E.2d 35 (N.Y. 1961) (admitting the withdrawn plea would force the accused to take the stand in order to account for the plea and its withdrawal).

¹⁰ Compare H.R. REP. NO. 650, 93rd Cong., 2nd Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 7075, 7082 (House Committee on the Judiciary reporting that statements made in connection with pleas should be inadmissible for any purposes) with S. REP. NO. 1277, 93rd Cong., 2nd Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7057 (Senate Committee on the Judiciary indicating that to deter defendants from lying "with impunity" statements made in connection with a plea that are determined to be reliable should be admissible for impeachment purposes and in subsequent perjury prosecutions).

¹¹ H.R. CONF. REP. NO. 1597, 93rd Cong., 2nd Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 7098, 7100. However, the joint conference also recognized that the issue of admitting withdrawn pleas and statements connected to those pleas warranted further exploration and indicated the anticipated consideration of Rule 11(e)(6) of the Federal Rules of Criminal Procedure would provide the opportunity to address the issue further. The Conference also stated its intention that any subsequently enacted Federal Rule of Criminal Procedure inconsistent with Rule 410 would supersede it. *Id.*

¹² FED. R. EVID. 410, Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1933 (1975).

Federal Rule of Evidence 410 was to take effect, Congress amended Rule 11(e) (6) of the Federal Rules of Criminal Procedure. The provision of Rule 410 regarding the admissibility of plea statements for impeachment purposes did not survive the superseding inconsistency of Rule 11(e) (6).¹³

B. FEDERAL RULE OF EVIDENCE 410, AS AMENDED IN 1975

When Congress amended Rule 410 in order to bring it into conformity with Rule 11(e) (6), the most notable change was the omission of the exception allowing plea statements to be used for impeachment purposes. The House Committee on the Judiciary recognized the use of plea statements in a subsequent prosecution for perjury as the only exception to the exclusionary rule.¹⁴

In amending Rule 11(e) (6) in 1975, Congress explored the use of plea statements in subsequent proceedings in greater depth than it did in passing the original version of Rule 410.¹⁵ After reconsidering the plea-statement Rules, Congress opted to adopt the House version of the Rule, which notably declined to recognize an exception for impeachment purposes.¹⁶ Because Rule 11(e) (6), the basis for the 1975 amendments to Rule 410, took effect prior to the enabling date of the original version of Rule 410, the only version of the Rule that contained a provision recognizing an exception for impeachment was never in force.¹⁷

C. THE CURRENT VERSION OF THE PLEA-STATEMENT RULES

Congress' major objective in revising the plea-statement Rules in 1980 was to define with greater precision the inadmissibility of evidence relating to pleas or statements made during plea negotiations.¹⁸ Prior to the 1980 revisions, the only exception to the Rules concerned pleas or plea statements used in prosecutions for perjury.¹⁹ In creating a more precise rule, Congress added a second exception to the

¹³ Compare the original FED. R. EVID. 410, *supra* note 12, with the amended version of FED. R. CRIM. P. 11(e) (6), 28 U.S.C. App. (1976).

¹⁴ H.R. REP. NO. 247, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N 674, 679.

¹⁵ See *supra* note 11.

¹⁶ H.R. CONF. REP. NO. 414, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 713, 714; *United States v. Chapman*, 718 F. Supp. 1390, 1392 (N.D. Ind. 1989) (case law supports assertion that "Congress had considered, but explicitly rejected . . . an exception for impeachment use of statements covered by the Rule").

¹⁷ *United States v. Martinez*, 536 F.2d 1107, 1108 (5th Cir. 1976).

¹⁸ FED. R. CRIM. P. 11(e) (6) Advisory Committee's Note, 77 F.R.D. 507, 533 (1978).

¹⁹ FED. R. EVID. 410, 28 U.S.C. App. at 149 (1976).

general rule of non-admissibility.²⁰ The new exception made plea statements admissible "in any proceeding wherein another statement made in the course of the same plea discussions had been introduced and the statement ought in fairness be considered contemporaneously with it."²¹ In its effort to make the plea-statement Rules more precise, Congress declined to add an exception recognizing a waiver of the exclusionary rule.²² The current version of the plea-statement Rules reads in relevant part:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

....

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) 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, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.²³

D. THE SPLIT IN THE CIRCUITS

The circuits have taken different approaches regarding the absence of an explicit exception providing for waiver of the plea-statement Rules. In *United States v. Dortch*,²⁴ the Seventh Circuit concluded that a criminal defendant can waive his right to the exclusionary provisions of the plea statement Rules prior to entering into plea negotiations with a prosecutor.²⁵ The *Dortch* court relied on the general presumption that defendants may waive their rights, without considering why the plea-statement Rules might fall outside this general presumption.²⁶ While *Dortch* held that a defendant may waive the plea-statement Rules for impeachment purposes only, the case indicated that the Seventh Circuit will tolerate an even more expansive waiver of the exclusionary protections of the Rules.²⁷

²⁰ *Id.*

²¹ FED. R. CRIM. P. 11(e)(6); FED. R. EVID. 410.

²² See *United States v. Lawson*, 683 F.2d 688, 693 (2d Cir. 1982) ("We regard this legislative history as demonstrating Congress' explicit intention to preclude use statements made in plea negotiations for impeachment purposes.").

²³ FED. R. CRIM. P. 11(e)(6); FED. R. EVID. 410.

²⁴ 5 F.3d 1056 (7th Cir. 1993).

²⁵ *Dortch*, 5 F.3d at 1068; see also *United States v. Goodapple*, 958 F.2d 1402, 1409 (7th Cir. 1992).

²⁶ *Dortch*, 5 F.3d at 1068-69.

²⁷ *Id.* at 1068. The court noted that the only question before it was whether the defend-

The Ninth Circuit reached a contrary result in *U.S. v. Mezzanatto*, concluding that a criminal defendant cannot waive the protection of the plea-statement Rules.²⁸ The appellate court considered the exclusionary provision to be absolute, with only two explicitly proscribed exceptions.²⁹ In addition, the Ninth Circuit distinguished the plea-statement Rules from rights and protections more personal in nature, and concluded that because the exclusionary provisions were procedural safeguards to protect the whole system of plea-bargaining, they were beyond the control of individual defendants and prosecutors.³⁰

The Second and Tenth Circuits also addressed the use of plea statements for impeachment purposes.³¹ While neither circuit directly addressed the issue of waiver, both circuits provided support for the position that the plea-statement Rules cannot be waived. The Second Circuit rejected the use of plea statements for impeachment because “[c]alculations as to use for impeachment purposes will clearly affect the discussions and impair the frank and open atmosphere Rules 410 and 11(e)(6) were designed to foster.”³² The Tenth Circuit, after citing the Ninth Circuit’s rejection of waiver of the plea-statement Rules in *Mezzanatto*, explicitly joined the Ninth Circuit’s position and held that plea statements were inadmissible for impeachment purposes.³³

III. FACTS AND PROCEDURAL HISTORY

On August 1, 1991, San Diego Narcotics Task Force (SDNTF) Agents executed a search warrant at the Rainbow, California, residence of Gordon Shuster.³⁴ The agents arrested Shuster after discov-

ant waived the protections of the plea-statement Rules for impeachment purposes. *Id.* In examining the defendant’s waiver of the plea-statement Rules, the court determined that the defendant waived the protections for any purpose other than for use in the prosecutions case in chief. *Id.* This limitation was not based on any interpretation of the plea-statement Rules themselves, but rather on the terms stated in the defendant’s proffer letter. *Id.* It seems to follow that if the terms of a proffer letter waives the exclusionary protection for all purposes, courts will allow unrestricted use of statements made in plea negotiations.

²⁸ *United States v. Mezzanatto*, 998 F.2d 1452, 1456 (9th Cir. 1993).

²⁹ *Id.* at 1454. The court was reluctant to add a third exception in the absence of any evidence that Congress intended there to be one: “Given the precision with which these rules are generally phrased, the comparative recentness of their promulgation, and the relative ease with which they are amended, the courts can afford to be hesitant in adding an important feature to an otherwise well-functioning rule.” *Id.* at 1456.

³⁰ *Id.*

³¹ See *United States v. Acosta-Ballardo*, 8 F.3d 1532, 1536 (10th Cir. 1993); *United States v. Lawson*, 683 F.2d 688, 692-94 (2d Cir. 1982).

³² *Lawson*, 683 F.2d at 692.

³³ *Acosta-Ballardo*, 8 F.3d at 1536.

³⁴ Brief for Petitioner at 2, *United States v. Mezzanatto*, 115 S. Ct. 797 (1995) (No. 93-

ering a methamphetamine laboratory at his residence.³⁵ Shuster agreed to cooperate with the agents, and several hours after his arrest, contacted defendant-respondent Mezzanatto through Mezzanatto's pager.³⁶ When Mezzanatto responded to the pager, Shuster told him a friend wanted to purchase a pound of methamphetamine for \$13,000.³⁷ In addition, Shuster said that the friend would "front" even more money to purchase another pound of the narcotic to be delivered later.³⁸ Shuster arranged to meet Mezzanatto later that day.³⁹ Pursuant to Shuster's arrangements, he and Mezzanatto met at a local restaurant that evening.⁴⁰

At the restaurant, Shuster introduced an undercover officer as his "friend."⁴¹ The officer asked Mezzanatto if he had "brought the stuff with him," and Mezzanatto indicated that it was in his car.⁴² The officer then accompanied Mezzanatto to the car, where Mezzanatto produced a brown paper package.⁴³ The officer inspected the package, which contained approximately one pound of methamphetamine, and asked how long it would take to obtain the second pound.⁴⁴ Mezzanatto responded that it would take about six hours.⁴⁵ Mezzanatto then produced a glass pipe (later found to contain methamphetamine residue) and asked the officer if he wanted a "hit."⁴⁶ The officer said he would first get Mezzanatto's money, and, as he left the car, he gave a prearranged arrest signal.⁴⁷ Mezzanatto was then arrested and charged with possession of methamphetamine with intent to distribute in violation of 21 U.S.C. § 841(a)(1).⁴⁸

On October 17, 1991, Mezzanatto and his attorney requested a meeting with the prosecutor to discuss the possibility of cooperating with the government.⁴⁹ The prosecutor agreed and met with Mezzanatto and his attorney later that day.⁵⁰ Prior to the meeting, Mez-

1340).

³⁵ *Mezzanatto*, 115 S. Ct. at 800.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Petitioner's Brief at 2, *Mezzanatto* (No. 93-1340).

³⁹ *Mezzanatto*, 115 S. Ct. at 800.

⁴⁰ Petitioner's Brief at 2, *Mezzanatto* (No. 93-1340).

⁴¹ *Mezzanatto*, 115 S. Ct. at 800; Petitioner's Brief at 2, *Mezzanatto* (No. 93-1340).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Petitioner's Brief at 3, *Mezzanatto* (No. 93-1340).

⁴⁵ *Id.*

⁴⁶ *Mezzanatto*, 115 S. Ct. at 800.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

zanatto consulted with his attorney for about five minutes.⁵¹ At the outset of the meeting, the prosecutor advised Mezzanatto that he was not obligated to talk, but that if he chose to divulge information, it would have to be completely truthful.⁵² The prosecutor conditioned continuing the meeting on Mezzanatto's agreement that the government could use any statements he made during the discussion to impeach inconsistent statements he might make at trial in the event the case reached that stage.⁵³ After conferring with his lawyer, Mezzanatto agreed to the prosecutor's conditions, and the meeting continued.⁵⁴

During the meeting, Mezzanatto admitted that he knew the package he attempted to sell to the undercover police officer contained methamphetamine; however, he also stated that, prior to his arrest, he dealt only in one ounce quantities of methamphetamine.⁵⁵ Mezzanatto also initially claimed that he did not know about the methamphetamine laboratory at Shuster's Rainbow residence, and that he was only acting as a broker for Shuster.⁵⁶ Later on in the meeting, however, Mezzanatto admitted that he knew about the laboratory.⁵⁷ Attempting to minimize his involvement in Shuster's operation, Mezzanatto claimed that he had not visited the Rainbow property for at least a week prior to his arrest.⁵⁸ In response, the government confronted Mezzanatto with surveillance evidence that showed his car on the Rainbow property the day before the arrest.⁵⁹ Citing Mezzanatto's failure to offer completely truthful information, the prosecutor ended the meeting.⁶⁰

Mezzanatto's case proceeded to trial, where he opted to take the stand in his own defense.⁶¹ Mezzanatto testified that he thought Shuster used his laboratory to manufacture explosives for the CIA.⁶² In addition, Mezzanatto denied any involvement in methamphetamine trafficking and claimed that he did not know the package he delivered to the undercover police officer contained methamphet-

⁵¹ Brief for Respondent at 1, *United States v. Mezzanatto*, 115 S. Ct. 797 (1995) (No. 93-1340).

⁵² *Mezzanatto*, 115 S. Ct. at 800.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

amine.⁶³ Mezzanatto described his involvement in the events leading to his arrest in the context of his belief that Shuster was employed by the CIA.⁶⁴

Over the objection of defense counsel, the prosecutor cross-examined Mezzanatto about his statements from the October 17 meeting that were inconsistent with his trial testimony.⁶⁵ Mezzanatto denied ever stating that he knew the package contained methamphetamine or that he trafficked the narcotic in one ounce quantities.⁶⁶ The prosecutor then impeached Mezzanatto by calling an agent who had attended the October 17 meeting to recount the prior statements.⁶⁷

The jury convicted Mezzanatto, and the District Court sentenced him to 170 months in prison.⁶⁸ Mezzanatto appealed his conviction, arguing that he could not waive the Rules' exclusion of his plea negotiation statements, even for the limited purpose of impeachment.⁶⁹ A divided panel of the Court of Appeals for the Ninth Circuit reversed Mezzanatto's conviction.⁷⁰

The Ninth Circuit began its analysis by noting that the scope and legislative history of the plea-statement Rules indicated that Congress expressed an "explicit intention to preclude use of statements made in plea negotiations for impeachment purposes."⁷¹ The court also discussed the importance of plea bargaining in the criminal justice system and the need to encourage frank discussion at the negotiation stage.⁷² The Ninth Circuit reasoned that allowing waivers to the plea-statement Rules' protections would contradict Congress' clear intent to foster plea settlements.⁷³ In addition, the court concluded that Congress could easily amend the Rules if it determined that they should include a waiver exception.⁷⁴

The Supreme Court of the United States granted certiorari⁷⁵ to determine whether a criminal defendant could waive the exclusionary protections provided by Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) and to resolve the inconsistency

⁶³ *Id.*

⁶⁴ Petitioner's Brief at 5, *Mezzanatto* (No. 93-1340).

⁶⁵ *Mezzanatto*, 115 S. Ct. at 800.

⁶⁶ Petitioner's Brief at 6, *Mezzanatto* (No. 93-1340).

⁶⁷ *Mezzanatto*, 115 S. Ct. at 800-01.

⁶⁸ *Id.* at 801.

⁶⁹ *Id.*

⁷⁰ *United States v. Mezzanatto*, 998 F.2d 1452 (9th Cir. 1993).

⁷¹ *Id.* at 1454 (quoting *United States v. Lawson*, 683 F.2d 688, 693 (2d Cir. 1982)).

⁷² *Id.* at 1454-55.

⁷³ *Id.* at 1455.

⁷⁴ *Id.* at 1456.

⁷⁵ 114 S. Ct. 1536 (1994).

among the circuits.⁷⁶

IV. SUMMARY OF OPINIONS

A. MAJORITY OPINION

In an opinion authored by Justice Thomas,⁷⁷ the Supreme Court reversed the decision of the Ninth Circuit, holding that a defendant can waive the exclusionary protections of the plea-statement Rules.⁷⁸ The Court first addressed the Ninth Circuit's conclusion that Congress intended to preclude waiver agreements that circumvent the protections offered in Rules 410 and 11(e)(6).⁷⁹ Justice Thomas wrote that absent an indication that Congress intended to preclude waiver, the Court generally presumes that parties can waive statutory provisions through voluntary and knowing agreements.⁸⁰ Referring to protections such as the double jeopardy defense, compulsory self-incrimination and the right to a jury trial, the Court stated: "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution."⁸¹

The Court then indicated that cases specifically addressing the Federal Rules of Criminal Procedure comport with the general notion of the presumptive availability of waiver.⁸² Justice Thomas added that, generally, the Federal Rules of Evidence accommodate a presumption of waiver, referring specifically to evidentiary stipulations that preclude subsequent objections regarding the authenticity of documents or the use of hearsay.⁸³ "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," the Court declined to read into the Rules any preclusion of waiver.⁸⁴ Relying on the freedom of contract

⁷⁶ Compare *United States v. Dortch*, 5 F.3d 1056 (7th Cir. 1993) with *United States v. Mezzanatto*, 998 F.2d 1452 (9th Cir. 1993).

⁷⁷ Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Ginsburg, and Breyer joined in Justice Thomas' opinion.

⁷⁸ *United States v. Mezzanatto*, 115 S. Ct. 797, 806 (1995).

⁷⁹ *Id.* at 801.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* The Court recognized that the inclusion of an express waiver clause in a rule could indicate that Congress intended to preclude waiver in circumstances not specifically stated. *Id.* at 801-02. The Court referred to Federal Rules of Criminal Procedure 43 and 7(a) as examples of rules where Congress precluded waiver, and then distinguished them from the rules at issue in *Mezzanatto's* case. *Id.* at 802.

⁸³ *Id.*

⁸⁴ *Id.* at 803. Interestingly, the Court of Appeals refused to read a waiver into the rules as an additional exception to the exclusion provision because of the "precision with which these rules are generally phrased . . . and the relative ease with which they can be

and the latent presumption of the waivability of most legal rights and protections, the Court indicated that Mezzanatto bore the burden of affirmatively establishing that the plea-statement Rules could not be set aside by agreement.⁸⁵

The Court then addressed the three arguments suggested by Mezzanatto for concluding that the Rules were beyond the control of the parties. Mezzanatto's first argument, that the plea-statement Rules provide the criminal defendant with an unwaivable guarantee of fair procedure, failed to persuade the Court that a defendant could never relinquish the protection of the exclusionary provisions.⁸⁶ Justice Thomas responded to Mezzanatto's argument by discussing the need to protect the reliability of the fact-finding process as a whole, rather than addressing the guarantee of procedural fairness to an individual defendant.⁸⁷ He focused on the likelihood that the "admission of plea statements for impeachment purposes" will enhance "the truth-seeking function of trials and will result in more accurate verdicts."⁸⁸

The Court also rejected Mezzanatto's second argument, that waiver of the plea-statement Rules is fundamentally inconsistent with Congress' goal of encouraging voluntary settlement.⁸⁹ The Court noted that prosecutors, like defendants, have an interest in settling cases, and that one tool to encourage settlement is to offer prosecutorial leniency or full immunity in exchange for information.⁹⁰ Justice Thomas recognized that because prosecutors have limited resources, they cannot easily investigate the credibility of information they receive from a cooperating defendant.⁹¹ He then reasoned that prosecutors gain some promise of receiving reliable information when defendants waive their protection of the plea-statement Rules for impeachment purposes.⁹² Justice Thomas speculated that without such an assurance of receiving reliable information, prosecutors might be deterred from entering into plea negotiations or cooperation discussions.⁹³

Finally, the majority addressed Mezzanatto's third argument regarding prosecutorial misconduct and the large disparity in bargain-

amended." *United States v. Mezzanatto*, 998 F.2d at 1452, 1456 (9th Cir. 1993).

⁸⁵ *United States v. Mezzanatto*, 115 S. Ct. 797, 803 (1995).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 804.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 805.

ing power between the government and criminal defendants.⁹⁴ The Court determined that the possibility of prosecutorial fraud or coercion could be best addressed on a case-by-case basis.⁹⁵ The Court established the presumption 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.”⁹⁶ Finding that Mezzanatto made no showing that he acted unknowingly or involuntarily, the Court refused to recognize prosecutorial overreaching or abuse as a basis to invalidate his waiver agreement.⁹⁷

Because Mezzanatto failed to establish any basis upon which to challenge the presumption of the waivability of the plea-statement Rules’ protections, the Court reversed the ruling of the court of appeals.⁹⁸

B. JUSTICE GINSBURG’S CONCURRENCE

Justice Ginsburg included a short concurring opinion⁹⁹ in which she clarified her understanding of the Court’s opinion:

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.¹⁰⁰

C. JUSTICE SOUTER’S DISSENT

Relying heavily on the plain meaning, congressional intent and legislative history of the plea-statement Rules, Justice Souter authored a dissenting opinion¹⁰¹ in which he challenged the majority’s decision and explored possible ramifications of the Court’s holding.¹⁰² Justice Souter referred to the “unconditional” language of the plea-statement Rules as a possible basis to determine that they do not permit waiver.¹⁰³ He indicated that the combination of the directive, “except

⁹⁴ *Id.*

⁹⁵ *Id.* at 806.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Justices O’Connor and Breyer joined Justice Ginsburg’s opinion.

¹⁰⁰ *Mezzanatto*, 115 S. Ct. at 806 (Ginsburg, J., concurring). This is Justice Ginsburg’s concurrence in its entirety.

¹⁰¹ Justice Stevens joined in Justice Souter’s opinion.

¹⁰² *Mezzanatto*, 115 S. Ct. at 806-09 (Souter, J., dissenting).

¹⁰³ *Id.* at 806-07 (Souter, J., dissenting).

as otherwise provided in this rule, evidence . . . is not admissible against the defendant . . .”¹⁰⁴ and the absence of any provision allowing waiver provided a strong basis for “[b]elievers in plain meaning” to conclude that parties cannot waive the Rules by agreement.¹⁰⁵ Acknowledging the majority’s reliance on the general presumption favoring waivers of rights, Justice Souter then analyzed whether the presumption should operate in regard to the plea-statement Rules.¹⁰⁶

First, Justice Souter looked to the Advisory Committee Notes to the Rules to determine if Congress revealed its intention regarding waiver.¹⁰⁷ Justice Souter recognized that the Notes convey two clear assumptions made by Congress when it adopted the Rules.¹⁰⁸ First, in light of the underlying fact that the judicial system could not resolve at trial every civil and criminal case filed, Congress intended the Rules to encourage plea discussions and settlements.¹⁰⁹ Second, Congress determined that conditions of unrestrained candor represent the most effective means of encouragement.¹¹⁰ Justice Souter determined that these two assumptions demonstrate that Congress enacted the Rules to create something more than a personal right solely to protect individual defendants.¹¹¹ Instead, Justice Souter determined that Congress enacted the Rules to serve the interests of the entire judicial system.¹¹² Justice Souter maintained that Congress cannot “be presumed to have intended to permit waivers that would undermine the stated policy of its own Rules.”¹¹³ Consequently, he concluded that individual defendants cannot waive the Rules’ protections.¹¹⁴

Justice Souter also argued that Congress could not have intended to allow a waiver exception to the provisions by referencing the potential consequences of treating the plea-statement Rules as default provisions in the absence of a waiver agreement.¹¹⁵ He noted that under current practice, many prosecutors already utilize standard forms that require defendants to waive their rights under the Rules as a condition to entering into plea negotiations.¹¹⁶ Referring to the govern-

¹⁰⁴ FED. R. CRIM. P. 11(e)(6); FED. R. EVID. 410.

¹⁰⁵ *Mezzanatto*, 115 S. Ct. at 807 (Souter, J., dissenting).

¹⁰⁶ *Id.* (Souter, J., dissenting).

¹⁰⁷ *Id.* (Souter, J., dissenting).

¹⁰⁸ *Id.* at 808 (Souter, J., dissenting).

¹⁰⁹ *Id.* at 807-08 (Souter, J., dissenting).

¹¹⁰ *Id.* at 808 (Souter, J., dissenting).

¹¹¹ *Id.* (Souter, J., dissenting).

¹¹² *Id.* (Souter, J., dissenting).

¹¹³ *Id.* (Souter, J., dissenting) (citing *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 704 (1945)).

¹¹⁴ *Id.* (Souter, J., dissenting).

¹¹⁵ *Id.* (Souter, J., dissenting).

¹¹⁶ *Id.* at 808-09 (Souter, J., dissenting).

ment's concession that defendants generally have no choice but to comply with prosecutorial requests for waiver agreements, Justice Souter warned that the majority's opinion would cause the waiver exception to the plea-statement provisions to overcome the Rules themselves.¹¹⁷ In addition, he emphasized that the Rules draw no distinction between the use of a statement for impeachment and for use in the case-in-chief.¹¹⁸ Consequently, Justice Souter warned that the majority's opinion opened the door to allow defendants to waive the plea-statement exclusionary Rules for any use by the prosecutor.¹¹⁹

Lastly, the dissent revisited the fact that the Court's opinion permits prosecutors to require waiver agreements simply as a condition to enter into negotiations.¹²⁰ As a result, the possibility exists that a defendant who wants merely to enter a guilty plea will be unable to do so "without furnishing admissible evidence against himself then and there."¹²¹ Justice Souter concluded that he was unable to reconcile the potential ramifications of the majority's opinion with Congress' intention in adopting the Rules "to promote candid discussion in the interest of encouraging compromise."¹²²

V. ANALYSIS

This Note argues that the Supreme Court improperly determined that a criminal defendant could waive the protections of the plea-statement Rules. In part A, this Note asserts that the general presumption favoring the availability of waiver should not apply to the plea-statement Rules. Part B argues that because the plea-statement Rules protect the legislatively favored plea-bargaining system, their provisions are beyond the control of the parties to litigation. In part C, this Note argues that agreements to waive the plea-statement Rules are unenforceable contracts of adhesion. Finally, part D of this Note examines the likely ramifications of the Court's decision.

A. THE GENERAL PRESUMPTION FAVORING WAIVER SHOULD NOT APPLY TO RULES 410 AND 11(e)(6)

The general presumption supporting the ability to waive rights and protections should not apply to the plea-statement Rules. Both the majority and dissenting opinions agree that, generally, a waiver of

¹¹⁷ *Id.* at 809 (Souter, J., dissenting).

¹¹⁸ *Id.* (Souter, J., dissenting).

¹¹⁹ *Id.* (Souter, J., dissenting).

¹²⁰ *Id.* (Souter, J., dissenting).

¹²¹ *Id.* (Souter, J., dissenting).

¹²² *Id.* at 809-10 (Souter, J., dissenting).

rights is presumptively available.¹²³ While Justice Souter makes no attempt to dispute the existence of the general presumption, he persuasively argues that Congress enacted the plea-statement Rules with the intention of precluding waiver, thereby rendering irrelevant the general presumption relied upon by the majority.¹²⁴ Both the plain language of the plea-statement Rules and their legislative history support Justice Souter's position that the Rules fall outside the scope of this general presumption.

1. *The Plain Language of the Rules Prohibits an Implied Waiver*

Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) each clearly state, "[e]xcept as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant." The Rules then explicitly state two exceptions, neither of which provides for waiver.¹²⁵

Crosby v. United States,¹²⁶ a case cited by the majority, addressed how to interpret rules that include the "except as otherwise provided" language.¹²⁷ *Crosby* analyzed Rule 43 of the Federal Rules of Criminal Procedure, which contains an "except as otherwise provided" phrase similar to the one included in the plea-statement Rules.¹²⁸ Rule 43 establishes a defendant's right to be present at criminal proceedings against him; however, Rule 43 also explicitly provides for several instances where the defendant is considered to have waived his right to be present.¹²⁹ In *Crosby*, a unanimous Court¹³⁰ stated:

¹²³ *Id.* at 801, 806.

¹²⁴ *Id.* at 806 (Souter, J., dissenting).

¹²⁵ The only two instances where the Rules do not bar the admissibility plea-statements are:

- (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or
- (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

FED. R. CRIM. P. 410, FED. R. EVID. 11(e)(6).

¹²⁶ 113 S. Ct. 748 (1993).

¹²⁷ *Id.* at 751.

¹²⁸ *Id.*

¹²⁹ FED. R. CRIM. P. 43. The *Crosby* Court specifically analyzed the following language of Rule 43:

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,

- (1) is voluntarily absent after the trial has commenced

The Rule declares explicitly: "The defendant shall be present . . . at every stage of the trial . . . *except as otherwise provided* by this rule." The list of situations in which the trial may proceed without the defendant is marked as exclusive . . . by the express use of a limiting phrase. In that respect the language and structure of the Rule could not be more clear.¹³¹

The *Crosby* Court was unwilling to recognize any exceptions to Rule 43 other than those explicitly stated in the text of the rule.¹³² The Court in *Crosby* specifically refused to recognize a waiver exception that was broader than an exception defined in the text of the rule.¹³³ *Crosby's* unambiguous interpretation of the "except as otherwise provided" language indicates that the plea-statement Rules also contain an exclusive list of exceptions. Because waiver by the defendant is not provided for in the plea-statement Rules, the majority erred by recognizing an unnamed waiver exception.

The majority in *Mezzanatto* suggested that Rule 43's inclusion of a limited waiver exception provides the basis for excluding other waiver exceptions and distinguishes it from the plea-statement Rules in a manner that prevents the Rules from barring waiver.¹³⁴ The majority, however, was incorrect. The majority argued that in defining one waiver exception in drafting Rule 43, Congress "occupied the field" and precluded consideration of other waiver exceptions.¹³⁵ By relying on the concept of "field occupation" the majority argued that an explicit mention of a limited waiver in a Rule is a necessary element to preclude waiver in other, unnamed circumstances.¹³⁶ The majority then concluded that because the plea-statement Rules do not mention any waiver exceptions, waiver of their provisions must be freely available.¹³⁷ This argument ignores *Crosby's* reliance upon the clear import of an "except as otherwise provided" phrase as well as the *Crosby* Court's silence regarding the concept of field occupation.¹³⁸ The *Mezzanatto* majority relied upon the alternative theory of field occupation to distinguish *Crosby* and ignore its clear and unambiguous precedent. Without such distinction, the nearly identical "except as otherwise provided" language examined in *Crosby* and included in the

Crosby, 113 S. Ct. at 751 (quoting FED. R. CRIM. P. 43).

¹³⁰ Interestingly, the unanimous Court in *Crosby* included Justices Rehnquist, Kennedy, Scalia and Thomas, the four justices who form the core of the majority in *Mezzanatto*.

¹³¹ *Crosby*, 113 S. Ct. at 751 (emphasis added).

¹³² *Id.* at 753.

¹³³ *Id.*

¹³⁴ *United States v. Mezzanatto*, 115 S. Ct. 797, 802 (1995).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Crosby*, 113 S. Ct. at 751.

plea-statement Rules directs the Court to bar any implicit waiver exception.

2. *The Legislative History Indicates Congressional Intent to Foreclose a Defendant From Waiving the Rules' Protections*

The legislative history of the plea-statement Rules provides additional grounds to challenge the majority's reliance on the presumption of waiver.¹³⁹ Justice Souter looked to the Advisory Committees' Notes on Rules 410 and 11(e)(6) to support the argument that Congress intended to place the plea-statement Rules beyond the possibility of waiver.¹⁴⁰ He noted that the Advisory Committee promulgated the Rule 410 to promote the "disposition of criminal cases by compromise."¹⁴¹ The stated, primary purpose of the plea-statement Rules directly addresses the dilemma that "the federal judicial system could not possibly litigate every civil and criminal case filed in the courts."¹⁴² In order to effectuate the disposition of cases through settlement, the Advisory Committee saw the need to create a zone of "unrestrained candor."¹⁴³ Congress enacted the plea-statement Rules to create and protect the conditions of unrestrained candor necessary to encourage settlements.¹⁴⁴ In addressing Congress' choice of method to encourage the disposition of criminal cases by settlement, Justice Souter correctly noted:

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 [the plea-statement] 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).¹⁴⁵

The Court erred by not deferring to Congress' determination that there must be no restrictions on a defendant's candor in plea discussions.¹⁴⁶ In fact, Congress specifically rejected the particular restriction on candor that the majority's opinion endorsed, the use of plea-statements for impeachment purposes.¹⁴⁷ Congress promulgated

¹³⁹ *Mezzanatto*, 115 S. Ct. at 807-08 (Souter, J., dissenting).

¹⁴⁰ *Id.* (Souter, J., dissenting).

¹⁴¹ *Id.* at 807 (Souter, J., dissenting) (quoting 28 U.S.C. app. at 750).

¹⁴² *Id.* (Souter, J., dissenting).

¹⁴³ FED. R. CRIM. P. 11(e)(6) Advisory Committee's Note, 77 F.R.D. 507, 533 (1978).

¹⁴⁴ *Mezzanatto*, 115 S. Ct. at 807-08 (Souter, J., dissenting).

¹⁴⁵ *Id.* at 808 (Souter, J., dissenting).

¹⁴⁶ *Id.* at 806, 808 (Souter, J., dissenting).

¹⁴⁷ Recall that Congress removed the use of plea-statements for impeachment purposes

the plea-statement Rules to help dispose of criminal cases by compromise. In doing so, Congress established a systemic safeguard that operated by providing the defendant protection from his own plea-related statements or reconsidered pleas of guilty or *nolo contendere*.¹⁴⁸

B. THE RULES PROVIDE SYSTEMIC, NOT MERELY PERSONAL PROTECTIONS

The fact that the plea-statement Rules create something more than a personal right bears important ramifications in assessing the waivability of the Rules.¹⁴⁹ "Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate."¹⁵⁰ By tracing the legislative history and policies behind the Rules and recognizing the public interests served in settling cases, Justice Souter directly answers the majority's challenge to establish a basis to conclude that the Rules are beyond the ambit of the general presumption favoring waiver.¹⁵¹

The majority demonstrated the breadth of the presumption by listing examples of rights and evidentiary rules that parties may waive by agreement.¹⁵² The examples provided by the Court establish that a presumption exists, but no faction of the Court disputed the general recognition of the ability to waive rights and evidentiary provisions in most cases. The Court failed to establish that the plea-statement Rules are more like the examples cited to demonstrate the general rule than the type of systemic protection Justice Souter argues that parties cannot waive.

The majority, for example, refers to evidentiary stipulations to the admissibility of evidence made in preparation for trial and waiver of hearsay objections at trial to demonstrate that the presumption of waivability exists within the Rules of Evidence.¹⁵³ For example, in *Tupman Thurlow v. Castillo*¹⁵⁴ and *United States v. Wing*,¹⁵⁵ the Second and Ninth Circuits respectively allowed parties to enter into stipulations that evidence was authentic and admissible. Similarly, in *Sac and Fox Indians of the Mississippi in Iowa v. Sac and Fox Indians of the Missis-*

as an exception to Federal Rule of Evidence 410 after passing Federal Rule of Criminal Procedure 11(e)(6). See *supra* parts II.A, II.B.

¹⁴⁸ *Id.* at 808 (Souter, J., dissenting).

¹⁴⁹ *Id.* (Souter, J., dissenting).

¹⁵⁰ *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945).

¹⁵¹ See *Mezzanatto*, 115 S. Ct. at 803.

¹⁵² *Id.* at 801-02.

¹⁵³ *Id.* at 802.

¹⁵⁴ 490 F.2d 302, 309 (2d Cir. 1974).

¹⁵⁵ 450 F.2d 806, 811 (9th Cir. 1971).

sippi in Oklahoma,¹⁵⁶ the Court determined that hearsay evidence was properly admissible at trial by the consent of both parties.

Although the examples cited by the Court demonstrate that the presumption favoring waiver exists within the Rules of Evidence, they all involve preparation for and the facilitation of trial.¹⁵⁷ The primary objective of the plea-statement Rules, however, is to avoid trial through compromise.¹⁵⁸ While the plea-statement Rules may ultimately impact the admissibility of evidence at trial, they exist in order to influence the behavior of the parties in a pre-trial setting.¹⁵⁹ In this sense, the plea-statement Rules are unlike the vast majority of the Rules of Evidence.¹⁶⁰ By allowing waiver of the plea-statement Rules at the negotiation stage, the Court compromises the means by which Congress attempted to promote the systemic goal of settling cases.¹⁶¹

Waiver of the plea-statement Rules at trial, on the other hand, would not compromise the systemic goal of settling cases. By the time a case progresses to trial, settlement negotiations have presumably failed, and the systemic considerations have disappeared. At this point, the plea-statement Rules only function to protect the defendant's right to exclude from evidence what he said during plea discussions, and waiver would not implicate Congress' goals in passing the Rules. If, for some reason, a defendant wanted to waive the plea-statement protections at trial rather than prior to or during an attempt to reach a settlement, the waiver would more closely resemble the examples cited by the Court in support of the general presumption favoring waiver.¹⁶² In this limited context, waiver of the plea-statement Rules would not be inconsistent with Congressional intent; nonethe-

¹⁵⁶ 220 U.S. 481, 488 (1910).

¹⁵⁷ Justice Thomas argues that "[d]uring the course of trial, parties frequently decide to waive evidentiary objections, and such tactics are routinely honored by trial judges." *Mezzanatto*, 115 S. Ct. at 802 (citing 21 WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5032, at 161 (1977)).

¹⁵⁸ FED. R. EVID. 410 Advisory Committee's Note, 56 F.R.D. 183, 228 (1972).

¹⁵⁹ By creating a "zone of unrestrained candor," the plea-statement Rules attempt to create an atmosphere in which the disposition of cases by compromise is most likely. See *supra* part V.A.2.

¹⁶⁰ A very small handful of the Federal Rules of Evidence attempt to affect pre-trial behavior. For example, Federal Rule of Evidence 407, which generally excludes evidence of subsequent remedial measures, attempts to encourage people to take steps in furtherance of safety. FED. R. EVID. 407 Advisory Committee's Note, 56 F.R.D. 183, 225 (1972). Similarly, Federal Rule of Evidence 412 (often referred to as the "Rape Shield Statute") offers evidentiary protections to alleged victims of a sex offense in order to encourage victims of sexual misconduct to report crimes and participate in the prosecution of alleged offenders. FED. R. EVID. 412 Advisory Committee's Note, H.R. CONF REP NO. 711, 103rd Cong., 2d Sess. 383 (1994).

¹⁶¹ *United States v. Mezzanatto*, 115 S. Ct. 797, 808 (1995) (Souter, J., dissenting).

¹⁶² See *supra* notes 153-56 and accompanying text.

less, the plain language of the Rules would still bar waiver.¹⁶³

C. PROSECUTORIAL DEMAND OF WAIVER FORCES DEFENDANTS TO ENTER INVALID CONTRACTS OF ADHESION

Principles of contract law govern the realm of plea bargaining.¹⁶⁴ Defendants usually have no leverage to challenge demands for waivers of the plea-statement Rules, "and the use of waiver provisions as contracts of adhesion has become accepted practice."¹⁶⁵ A danger inherent in the plea bargaining system is that the criminal defendant will yield valuable procedural rights simply because his bargaining position is so inferior to that of the prosecutor.¹⁶⁶

The majority rejected the idea that prosecutors unfairly force waiver of the plea-statement Rules upon criminal defendants.¹⁶⁷ The Court stated, "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.'"¹⁶⁸ While the majority refers to the defendant's ability to gain substantial benefits in exchange for pleading guilty, waiver of the plea-statement Rules brings no such benefits to the accused. The defendant who actually pleads guilty can offer his plea in exchange for a lesser charge, leniency in sentencing, or protection from further prosecution.¹⁶⁹ The waiver examined by the Court in *Mezzanatto* achieves comparatively little, if anything at all, for the criminal defendant.¹⁷⁰

In the case at hand, *Mezzanatto* and the prosecutor had already begun their meeting before the prosecutor demanded that *Mezzanatto* waive his rights to the plea-statement Rules for impeachment purposes.¹⁷¹ When the prosecutor demanded that *Mezzanatto* waive the plea-statement Rules, he offered nothing in exchange beyond continuing the meeting at his discretion.¹⁷² *Mezzanatto*, on the other hand, relinquished a substantial evidentiary protection. The prosecutor enjoyed the benefit of that waiver without sacrificing anything

¹⁶³ See *supra* part V.A.1. for a discussion of the plain language of the plea-statement Rules.

¹⁶⁴ *United States v. Mesa-Rincon*, 911 F.2d 1433, 1446 (10th Cir. 1990).

¹⁶⁵ *Mezzanatto*, 115 S. Ct. at 809 (Souter, J., dissenting).

¹⁶⁶ *United States v. Schaffer*, 12 M.J. 425, 428 (C.M.A. 1982).

¹⁶⁷ *Mezzanatto*, 115 S. Ct. at 806.

¹⁶⁸ *Id.* at 805-06 (quoting *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978)).

¹⁶⁹ See, e.g., *United States v. Ailsworth*, 899 F. Supp. 511 (D. Kan. 1995).

¹⁷⁰ See *Mezzanatto*, 115 S. Ct. at 800 (presenting situation where waiver of plea-statement Rule necessary to continue conversation with prosecutor).

¹⁷¹ *Id.*

¹⁷² *Id.*

more than the time necessary to allow Mezzanatto to offer his statement.¹⁷³ The majority erred in comparing such an unbalanced exchange with a plea-bargain in which both prosecutor and defendant gain the mutual benefit of avoiding trial.¹⁷⁴

D. RAMIFICATIONS OF THE COURT'S DECISION

The Court's decision may render the plea-statement Rules "dead letters."¹⁷⁵ The majority's implicit waiver exception allows prosecutors and the defendants from whom they demand a plea-statement waiver to circumvent the explicit provisions of the Rules. As evidence that the impeachment waiver is beginning to swallow up the protections of the Rules, the dissent cited the growing practice among prosecutors of routinely requiring such a waiver.¹⁷⁶ In arguing the validity of waiver for impeachment purposes, the majority states, "[i]f 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."¹⁷⁷ This statement is revealing for several reasons. First, it suggests that the default practice of prosecutors will be to rely on waiver for impeachment rather than the explicit provisions of the plea-statement Rules.¹⁷⁸ The majority indicates that prosecutors will defer to the protections afforded a defendant in the Rules only in instances where the information needed from defendants is crucial.¹⁷⁹ Therefore, according to the majority, defendants with anything less than crucial information will be forced to forego the protections of the plea-statement Rules.¹⁸⁰ In addition, by indicating that prosecutors may agree to leave intact

¹⁷³ The majority's opinion allows a prosecutor to demand waiver prior to beginning plea negotiations, extract a confession or other evidence detrimental to the defendant's case, and end the discussion without conceding anything.

¹⁷⁴ See *Bordenkircher v. Hayes*, 434 S. Ct. 357, 363 (1978) ("[p]lea-bargaining flows from a 'mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial" (quoting *Brady v. United States*, 397 U.S. 742, 752 (1970))).

¹⁷⁵ *Mezzanatto*, 115 S. Ct. at 806 (Souter, J., dissenting).

¹⁷⁶ *Id.* at 808-09 (Souter, J., dissenting) (citing *Petition for Certiorari* at 10-11 and *United States v. Stevens*, 935 F.2d 1380, 1396 (3d Cir. 1991)) ("Plea agreements . . . commonly contain a provision stating that proffer information that is disclosed during the course of plea negotiations is . . . admissible for purposes of impeachment.").

¹⁷⁷ *Id.* at 805.

¹⁷⁸ Nothing in the opinion prevents this result. Ironically, this hails widespread use for impeachment purposes of statements made during plea settlement negotiations back into practice. This is specifically what Congress chose to exclude from Federal Rule of Evidence 410 in its first revision. See *supra* notes 16-19 and accompanying text.

¹⁷⁹ *Mezzanatto*, 115 S. Ct. at 805.

¹⁸⁰ See *United States v. Mezzanatto*, 1994 WL 757606 (1994) (Oral Argument) (Government conceding that defendants are usually in no position to challenge demands for impeachment waivers).

the provisions of the plea-statement Rules, the Court places the operation of the Rules within the realm of prosecutorial discretion.

Additionally, prosecutorial demand for waiver of the Rules' exclusionary provisions may expand beyond admissibility for impeachment and force defendants to allow the Government to use their plea-statements for the case in chief.¹⁸¹ In examining the possibility that prosecutors will expand the scope of their demands for waiver, Justice Souter pointed out the lack of any distinction within the Rules between the use of a statement for impeachment purposes and use in the prosecutor's case-in-chief.¹⁸² Such an expansion of the Government's waiver demands would circumvent entirely the purposes of the plea-statement Rules.

Justice Ginsburg's concurring opinion reveals a possible rift within the Court, giving credence to Justice Souter's fears that prosecutors will expand the waiver exception to the point of swallowing up the Rules.¹⁸³ The primary message of Justice Ginsburg's concurrence was to state her understanding that the Court's opinion did nothing more than recognize a limited waiver allowing prosecutors to impeach defendants with statements made during plea negotiations.¹⁸⁴ If Justice Thomas had desired, he could have obviated the need for a separate concurring opinion by adding to his opinion a single line limiting the Court's decision to waivers for impeachment purposes; however, no such clarification appears in the Court's decision. It appears that Justice Thomas was unwilling to so limit his opinion to prevent Justice Ginsburg from writing separately.

Justice Thomas' unwillingness to limit the Court's opinion to waivers for impeachment purposes indicates his likely view that prosecutors should be able to demand waivers of the plea-statement Rules for use in the case-in-chief.¹⁸⁵ Justice Thomas may have been prevented from explicitly stating this view for fear of losing Justices Ginsburg, O'Connor, and Breyer to the dissent. Had Justice Thomas forced the concurring Justices to choose between Justice Souter's position of barring waiver of the plea-statement Rules entirely and the opposite extreme of allowing complete waiver of the Rules he might have found himself writing for a dissenting faction of the Court rather than the majority. The foregoing discussion of the split within the Court is admittedly speculative, but it suggests that wholesale waiver of the

¹⁸¹ *Mezzanatto*, 115 S. Ct. at 809 (Souter, J., dissenting).

¹⁸² *Id.* (Souter, J., dissenting).

¹⁸³ *Id.* (Souter, J., dissenting).

¹⁸⁴ *Id.* at 806 (Ginsburg, J., concurring).

¹⁸⁵ It follows that Chief Justice Rehnquist and Justices Kennedy and Scalia who also did not join in Justice Ginsburg's concurrence, share Justice Thomas' view.

plea-statement Rules may have been the decisive issue for the Justices.

VI. CONCLUSION

Justice Thomas incorrectly determined that defendants can waive the protections of the plea-statement Rules. The majority's adherence to the general presumption of waiver in the context of the Rules' exclusionary provisions ignored the plain language of the Rules. In addition, Congress' clear purpose in enacting the plea-statement Rules as well as the Rules' legislative history indicates that the general presumption favoring waiver should not apply. The Court's decision erroneously endorses the widespread use of waiver to circumvent the provisions of the plea-statement Rules for impeachment purposes and, perhaps, the prosecution's case-in-chief as well.

MICHAEL S. GERSHOWITZ