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Plea Negotiations: Why the Presumption of Waivability Does Not Apply to Federal Rule of Evidence 410, 51 J. Marshall L. Rev. 839 (2018)

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PLEA NEGOTIATIONS: WHY THE PRESUMPTION OF WAIVABILITY DOES NOT APPLY TO FEDERAL RULE OF EVIDENCE 410

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I. INTRODUCTION

It has been estimated that “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”¹ Given these strikingly high statistics, it is no wonder that it is widely agreed that plea bargaining “is not some adjunct to the criminal justice system; it is the criminal justice system.”² With such emphasis placed on plea bargaining in the United States criminal justice system, a watchful eye must be kept on the procedures prosecutors prescribe in obtaining the overwhelming majority of their convictions.³ This is ever-important

1. Judge John L. Kane, *Plea Bargaining and the Innocent: It’s Up to Judges to Restore Balance*, THE MARSHALL PROJECT, www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent (last visited October 20, 2016).

2. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407–08 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

3. Kane, *supra* note 1.

today as a recent, invidious trend has begun to develop over the last half-century, ushering in era where the rights of criminal defendants in the plea-bargaining process have withered on the vine.⁴ This trend began in *United States v. Mezzanatto*, 513 U.S. 196 (1994), where it was held that a criminal defendant's rights under Federal Rule of Evidence 410 ("Fed. R. Evid. 410") could be waived such that statements made during a plea negotiation that were later withdrawn from could be used to impeach a defendant.⁵ More recently, many prosecutors have begun to demand that defendants agree to waive their rights under Fed. R. Evid. 410, to the extent that if "[plea] negotiations fail and the case goes to trial, any statements defendants make during negotiations are admissible against them in the government's case-in-chief."⁶

As a matter of law, this article will demonstrate how this practice reaches well-beyond the scope of Fed. R. Evid. 410 and must be constrained to ensure that Congress' original intent is honored in order to avoid raising the specter of wrongful convictions⁷ and to protect against the dissipation of rights for criminal defendants that already persists in this nearly all-encompassing arena of justice.⁸ Following this introduction Section II will conduct an examination into the history behind plea bargaining, its constitutionality, and its ascendancy to near-universal application in criminal cases.⁹ In Section III, the subversion of the language of Fed. R. Evid. 410 and the drafter's intent therein, is scrutinized to expose how Fed. R. Evid. 410's current utilization debases the rule's true meaning and purpose.¹⁰ This will be followed by a look into how Fed. R. Evid. 410 was originally undermined in *Mezzanatto*, opening the door to prosecutors' present attempts at rendering the rule toothless.¹¹ Then, a recount of a taxonomy of cases stretching across several jurisdictions that have upheld this perversion of the Fed. R. Evid. 410 will be detailed to unearth its expanding acceptance, highlighting the need for the Supreme Court of the United States to intervene and restore the rights of criminal defendants enshrined

4. GEORGE FISHER, EVIDENCE 142 (2013).

5. *United States v. Mezzanatto*, 513 U.S. 196 (1994).

6. FISHER, *supra* note 4, at 142.

7. Bruce A. Green and Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 491 (2009).

8. Kane, *supra* note 1.

9. *Bram v. United States*, 168 U.S. 532, 540 (1897); *Brady v. United States*, 397 U.S. 742, 743 (1970).

10. *See Mezzanatto*, 513 U.S. at 215 (1994) (Souter J. dissenting) (stating that "if the generally applicable (and generally sound) judicial policy of respecting waivers of rights and privileges should conflict with a reading of the Rules as reasonably construed to accord with the intent of Congress, there is no doubt that congressional intent should prevail"); *but see contra United States v. Sylvester*, 583 F.3d 285, 287 (5th Cir. 2009).

11. *Mezzanatto*, 513 U.S. at 205.

in the rule.¹² Section IV details a proposal on how these issues should be addressed on both a judicial and legislative level while pinpointing the pathologies the current landscape poses on criminal defendants, the criminal justice system, and society at large. Finally, in Section V, a brief summary of these overall issues, and my proposals as to how to address them will be rehashed with one final reminder that action must be taken to prevent Fed. R. Evid. 410 case-in-chief waivers.

II. BACKGROUND

A. *Historical Context*

An ever-widening purview of rights that criminal defendants may waive has continued to broaden, stripping individuals of some of their most fundamental protections against governmental attempts to take one's life, liberty, or property.¹³ While the practice of permitting rights to be waived is well entrenched in the United States criminal justice system, and often for good reason, it was not intended to provide prosecutors with *carte blanche* to continue to manufacture new and more deleterious ways in which such rights may be impinged at their convenience.¹⁴ Yet, before examining the current prosecutorial, and for that matter, judicial overreach that seeks to extend this trend beyond all legal capacity, a perusal of historical context and precedent is necessary to understand how the United States criminal justice system has arrived at where it is today.¹⁵ In doing so, a brief history of plea bargaining will be accounted, as well as how the standards for confessions led to the construction for constitutional pleas in order to prevent against the very type governmental coercion at issue in this article. Next, a look at Fed. R. Evid. 410(a) itself, and the Congressional intent behind it, as well as how a waiver of one's rights applies in the current context.

1. *Plea Bargaining, From the Beginning*

As aforementioned, plea bargaining today “*is* the criminal justice system.”¹⁶ However, this should not come as a surprise as

12. *Contra* United States v. Mitchell, 633 F.3d 997 (2011); *contra* United States v. Jim 786 F.3d 802 (2012); *contra* United States v. Washburn 728 F.3d 775 (2013).

13. *See* Boykin v. Alabama, 395 U.S. 238, 242-44 (1969) (observing that that entry of a guilty plea involves waiver of the right against self-incrimination, the right to trial by jury, and the right to confront one's accusers); United States v. Raynor, 989 F. Supp. 43, 44 (D.D.C. 1997).

14. *Bram*, 168 U.S. at 539.

15. *Id.*; *Brady*, 397 U.S. at 742-743 (1970); *Mezzanatto*, 513 U.S. at 201.

16. *Frye*, 132 S. Ct. at 1407–08 (emphasis added).

such negotiations have been a relative mainstay throughout American criminal justice history.¹⁷ One of the first cases to detail a plea bargain, known as a “charge bargain” at the time, was an 1808 case involving Josiah Stevens. Stevens was a “common seller” of alcohol who faced a four-count indictment for operating without a liquor license.¹⁸ The court’s clerk reported that “the said Josiah [Stevens] says he will not contend with the Commonwealth. And Samuel Davis Esquire Atty. for the Commonwealth in this behalf says that... he will not prosecute the first and third counts against him any further.”¹⁹ Thus, when Stevens pled *nolo contendere*, “[he] spared [himself] any admission of guilt while giving the court the power to convict and sentence [him].”²⁰

2. Voluntary and Intelligent

While the case involving Stevens was one of the first plea bargains to be on record, this case was by no means revolutionary.²¹ “In the Court of General Sessions of the Peace... seventy-three percent of adjudicated cases in 1789-1790 ended in plea, and sixty-six percent of those in 1799-1800.”²² These statistics were high, in essence affirming the advantages plea bargaining has consistently offered the criminal justice system,²³ prosecutors,²⁴ and even defendants.²⁵ However, it was not until the modern standards of voluntary and intelligent confessions were established,²⁶ which paved the way to how plea bargains would be reviewed,²⁷ that such

17. GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 21, (2003).

18. *Id.*

19. *Id.*

20. *Id.* at 23 (alteration in original).

21. *Id.*

22. *Id.* at 22.

23. See Monroe Legal Group, *Plea Bargaining and Judicial Economy*, FINDLAW (Nov. 5, 2017) www.criminal.findlaw.com/criminal-procedure/plea-bargains-and-judicial-economy.html (observing how “the primary benefit of plea bargains to a judge is that plea bargains reduce their already crowded calendar of court cases”).

24. Paul Bergman and Sara J. Bergman, *Why Judges and Prosecutors Engage in Plea Bargaining*, NOLO (Nov. 5, 2016), www.nolo.com/legal-encyclopedia/why-judges-prosecutors-engage-plea-bargaining.html; see also FISHER, *supra* note 17.

25. See *What Are the Advantages and Disadvantages of Accepting a Plea Bargain?*, LEGAL RESOURCES (Nov. 6, 2016), www.hg.org/article.asp?id=33881 (detailing how plea bargaining presents the following advantages to criminal defendants: lighter sentences; reduced charges; cost savings, and finality of the case).

26. See generally *Brady*, 397 U.S. 742 (1970) (finding that “waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences”).

27. *Bram*, 168 U.S. at 532 (1897).

reliance on plea bargains ascended to its current ubiquity.²⁸

a. Confessions and Plea Bargaining

In order to understand how modern plea bargaining is governed, it is first necessary to understand the elements of a valid confession as the latter gave way to the former.²⁹ In the seminal case, *Bram v. United States*, 168 U.S. 532 (1897), the Court reviewed a conviction whereby defendant, Bram, was convicted of murder and sentenced to death.³⁰ The key aspect of Bram's conviction turned on whether the purported confession Bram gave, without counsel, to a detective could be admitted into evidence at trial.³¹ In reviewing this confession, the Court sought to implement structures that ensured the efficacy of the Fifth Amendment such that no person "shall be compelled in any criminal case to be a witness against himself."³² To do this, the Court re-emphasized the English common law maxim, *nemo tenetur seipsum accusare*, and turned to the treatise Russel on Crimes which imparted:

A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.³³

From there, the Court held that "[a] confession... must be *free and voluntary*: that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."³⁴ Therefore, "[t]he true test of admissibility is that a confession is made freely, voluntarily, and without compulsion or inducement of any sort."³⁵ The Court's application of these principles to the facts revealed that Bram's confession was not voluntary and thus, improperly admitted rendering the judgment's reversal.³⁶

28. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992).

29. Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 *FORDHAM L. REV.* 2011, 2033 (2000).

30. *Bram*, 168 U.S. at 532.

31. *Id.* at 536.

32. *Id.* at 539.

33. WILLIAM OLDNALL RUSSELL, *ON CRIMES* 478 (1819); *Hopt v. Utah*, 110 U.S. 574 (1883); *Pierce v. United States*, 160 U.S. 355 (1896); *Sparf v. United States*, 156 U.S. 51, 55 (1895); *Wilson v. United States*, 162 U.S. 613 (1896).

34. RUSSELL, *supra* note 33, at 478 (emphasis added).

35. *Bram*, 168 U.S. at 543 (1897) (holding that the general rule that the confession must be free and voluntary, that is, not produced by inducements engendering either hope or fear, is settled by the authorities referred to at the outset) (alteration in original).

36. *Id.* at 548.

The principles required for a valid confession set forth in *Bram* were heavily relied upon when the Court set the standards for the constitutionality of plea bargaining.³⁷ Yet, the Court took a more liberal approach on how to apply plea bargaining guidelines in this context.³⁸ In *Brady v. United States*, 397 U.S. 742 (1970), defendant, Brady, pled not guilty to federal charges of kidnapping. However, upon learning that his co-defendant had confessed and would be testifying against him, Brady changed his plea to guilty to avoid the risk of receiving the death penalty.³⁹ In seeking post-conviction relief, Brady argued that the only reason he entered his guilty plea was to avoid the possibility of the death penalty, and thus, it was not voluntary on account of the coercive effects of the sentencing scheme.⁴⁰

The Court began its opinion by recognizing that “[a] guilty plea is a grave and solemn act to be accepted only with care and discernment. U.S. Const. amend. V requires that such a plea be the voluntary expression of a defendant's own choice.”⁴¹ Then, in echoing *Bram*, it reinforced that “[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” Moreover, “[t]he agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of a defendant.”⁴² However, the Court created a separation between what was coercive and what was voluntary when it found that although the possible death penalty sentence Brady faced was the “but for” cause of his guilty plea,⁴³ this did “not necessarily prove that the plea was coerced and invalid as an involuntary act.”⁴⁴ Instead, the Court ultimately held that, “unlike pleading guilty in response to threats, pleading guilty in response to promises of more lenient treatment is voluntary.”⁴⁵

This decision was clearly discordant with *Bram*, which required that “to be admissible, [a confession] must be free and voluntary: that is, it must not be extracted by any... threats or violence, *nor obtained by any direct or implied promises*, however slight, nor by the exertion of any improper influence.”⁴⁶ Yet, the

37. *Brady*, 397 U.S. 742 (1970).

38. *Id.*

39. *Id.* at 744; Blank, *supra* note 29, at 2028.

40. *Brady*, 397 U.S. at 744.

41. *Id.* at 747 (alteration in original).

42. *Id.* at 748.

43. Blank, *supra* note 29, at 2045.

44. *See Brady*, 397 U.S. at 749 (finding that “the possibly coercive impact of a promise of leniency was presumptively dissipated by the presence and advice of counsel”).

45. *Id.*

46. *See Bram*, 168 U.S. at 543 (1897) (holding that “the general rule that confessions must be free and voluntary, that is, not produced by inducements engendering either hope or fear, is settled by the authorities referred to at the

Court justified this distinction on the grounds that unlike *Bram*, *Brady* "had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty."⁴⁷ Furthermore, the Court provided even greater latitude for governmental securitization of guilty pleas by holding that "[a] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise."⁴⁸

Interestingly, the Court provided this latitude while recognizing that "it has been estimated that about 90%, and perhaps 95%, of all criminal convictions are by pleas of guilty; between 70% and 85% of all felony convictions are estimated to be by guilty plea."⁴⁹ Yet, the Court was not swayed by these statistics as it held that the "mutuality of advantage" presented by plea bargaining "perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty."⁵⁰ Still, in another convoluted twist, the *Brady* decision admitted "[o]f course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or the system which produces them."⁵¹

outset") (alteration in original).

47. *Brady*, 397 U.S. at 744; Blank, *see supra* note 29, at 2040 (observing that "in an end-run around *Bram*, the Court treated the assistance of counsel as a proxy for voluntariness in pleading, effectively establishing that a counseled plea is presumptively valid").

48. *See id.* at 749 (finding that a criminal defendant is not entitled to withdraw his guilty plea "merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action") (alteration in original); Blank, *supra* note 29, at 2038 (discussing how "[t]he *Brady* Trilogy marked the decisive moment in the Court's treatment of plea bargains" when the Court "substantially undercut any argument that systemic problems such as coercive sentencing schemes or peremptory bargaining tactics were rendering large numbers of guilty pleas invalid").

49. *Brady*, 397 U.S. 742, 750 (1970) (citing Donald J. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial*, 24 WASH. & LEE L. REV. 162, 168 (1967)).

50. *See Brady*, 397 U.S. at 751 (finding that defendants are "motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury").

51. *Id.* at 752-53; *see generally* Blank, *supra* note 29, at 2042 (finding that "under the twin banners of 'mutuality of advantage' and 'rehabilitation,' the Court definitively proclaimed the constitutionality of bargained-for guilty pleas).

B. Federal Rule of Evidence 410 and Congressional Intent

1. Federal Rule of Evidence 410(a)

Federal Rule of Evidence 410(a) provides:

(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 (4) 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.⁵²

The application of Fed. R. Evid. 410(a) was first laid out in *Kercheval v. United States*, 274 U.S. 220 (1927), wherein the Court held that withdrawn guilty pleas were inadmissible in federal prosecutions.⁵³ This is because “[a] plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction” as nothing else is required, “a court has nothing to do but give judgment and sentence.”⁵⁴ Accordingly, “[o]ut of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.”⁵⁵ Therefore, “[w]hen one so pleads he may be held bound. But, on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence.”⁵⁶ In doing so, “[t]he court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just.”⁵⁷

2. Congressional intent

How Fed. R. Evid. 410 was intended to be governed was

52. FED. R. EVID. 410.

53. *Kercheval v. United States*, 274 U.S. 220, 228 (1927).

54. *Id.*

55. *Id.*

56. *See id.* at 230 (finding that “to admit the withdrawn plea would... effectively place the accused in a dilemma utterly inconsistent with the decision to award him a trial”).

57. *Id.* at 231.

detailed in The Notes of the Committee on the Judiciary which state, “[a]s adopted by the House, rule 410 would make inadmissible pleas of guilty or *nolo contendere* subsequently withdrawn as well as offers to make such pleas.”⁵⁸ The Notes go on to say that “[s]uch a rule is clearly justified as a means of encouraging pleading. However, the House rule... render[s] inadmissible for any purpose statements made in connection with these pleas or offers as well.”⁵⁹ Furthermore, the Notes state “[a]s with compromise offers generally... free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it.”⁶⁰ Ironically, in *United States v. Sylvester*, 583 F.3d 285 (2005), this interpretation was recognized, yet ignored by the United States Court for the Fifth Circuit Court of Appeals when it agreed that “Congress has accepted... Fed. R. Evid. 410 with their goal of permitting candid plea discussions, serving personal as well as institutional interests.”⁶¹

C. Waiver of Rights

The precedent the *Sylvester* court relied upon lies in *Mezzanatto*, the landmark case whereby the rights enshrined in Fed. R. Evid. 410 were first deemed to be waivable by the Supreme Court.⁶² There, appellant Gary Mezzanatto was charged with possession of methamphetamine in violation of 21 U.S.C. § 841(a)(1).⁶³ At Mezzanatto's request, “the government held a plea bargaining meeting with him where the prosecutor informed Mezzanatto that any statements he made during the meeting could be used to impeach any inconsistent testimony he offered at trial.”⁶⁴ Mezzanatto agreed to this, and the meeting began but it did not conclude in an agreement.⁶⁵ At trial, Mezzanatto offered testimony that was inconsistent with statements he made during the plea negotiations and the government introduced the prior statements to impeach Mezzanatto.⁶⁶ Mezzanatto objected, on the grounds that Fed. R. Evid. 410 deems evidence of a guilty plea that is later

58. Notes of Advisory Committee on Proposed Rules (2011).

59. *See id.* (stating that “in certain circumstances such statements should be excluded. If, for example, a plea is vitiated because of coercion, statements made in connection with the plea may also have been coerced and should be inadmissible on that basis”).

60. *Id.*

61. *See United States v. Sylvester*, 583 F.3d 285, 203 (2005) (finding that “any argument relying on congressional intent to promote candor is too weak to justify refusing to allow use of plea statements in the government's case-in-chief”).

62. *Mezzanatto*, 513 U.S. at 202.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

withdrawn as inadmissible,⁶⁷ but the trial court overruled the objections, admitted the statements for impeachment, and the jury found Mezzanatto guilty.⁶⁸

The Ninth Circuit Court of Appeals reversed.⁶⁹ There, the court found that “the government should not be given the ability to extract a waiver of these rules from a defendant who is in a weak bargaining position.”⁷⁰ Given the imbalance of bargaining power, it was held that “[a] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy.”⁷¹ The court went on to admonish that “[t]o allow the government to enforce its waiver agreement would... adversely affect the public interest in efficient criminal case resolution.”⁷² This was due to the idea that “to equate the waiver of these rules with that of an asserted constitutional protection is a false equality.”⁷³ Therefore, “[t]o write in a waiver in a waiverless rule promulgated by the Supreme Court and Congress, on the other hand, is not an inescapable duty.”⁷⁴

Upon granting certiorari, the Supreme Court overturned the Ninth Circuit.⁷⁵ Contrarian to the appellate decision, and Fed. R. Evid. 410, the Court held that “the plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights,” but it has “repeatedly [been] held that the government may encourage a guilty plea by offering substantial benefits in return for the plea.”⁷⁶ More specifically, “[a] party may waive any provision... of a statute, intended for his benefit. The most basic rights of criminal defendants are subject to waiver. A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.”⁷⁷ Further, “absent some affirmative indication of Congress' intent to preclude waiver,

67. *Kercheval*, 274 U.S. at 228.

68. *Id.*

69. *Mezzanatto*, 998 F.2d at 1458.

70. *See id.* at 1455 (finding that the government secured the attempted waiver from Mezzanatto, “not as part of a plea bargain, but... for the opportunity to enter into discussions that could have, but did not, lead to a plea bargain”).

71. *Id.* at 1457; *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704, (1945).

72. *Mezzanatto*, 998 F.2d at 1458.

73. *Id.*

74. *Id.*

75. *Mezzanatto*, 513 U.S. at 196.

76. *Id.* at 209-10 (alteration in original)

77. *Id.* at 208; *see Peretz v. United States*, 501 U.S. 923, 936 (1991). (finding that “the most basic rights of criminal defendants are . . . subject to waiver”); *see also Ricketts v. Adamson*, 483 U.S. 1, 10 (1987) (finding that double jeopardy defense waivable by pretrial agreement); *see also Boykin v. Alabama*, 395 U.S. 238, 243, (1969) (holding that knowing and voluntary guilty plea waives privilege against compulsory self-incrimination, right to jury trial, and right to confront one's accusers).

statutory provisions are subject to waiver by voluntary agreement of the parties.”⁷⁸ Therefore, without an “affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement rules [under] Fed. R. Evid. 410... is valid and enforceable.”⁷⁹

It should be noted that in Justice Ginsburg’s concurrence, she agreed with the majority to the extent that “a waiver allowing the Government to impeach with statements made during plea negotiations is compatible with Congress’ intent to promote plea bargaining.”⁸⁰ However, in a stark adumbration, Justice Ginsburg warned 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.”⁸¹ However, given that “the Government ha[d] not sought such a waiver,”⁸² this issue was not undertaken in *Mezzanatto*. However, such a waiver and all of its implications will comprise the proceeding sections of this comment.

III. ANALYSIS

This section will detail how the presumption of waivability of Fed. R. Evid. 410 became expanded to allow such evidence in the prosecutor’s case-in-chief.⁸³ Next, it will be shown how this ill-conceived presumption of waivability has spread across the judicial landscape such that it is now the mainstay in Fed. R. Evid. 410 jurisprudence.⁸⁴ This will be followed by a look into how pernicious the expansion of the presumption of waivability in a prosecutor’s case-in-chief is compared to impeachment, given the serious difference in conviction effectiveness between the two types of evidence.⁸⁵ Finally, a look at the text surrounding Fed. R. Evid. 410

78. *Mezzanatto*, 513 U.S. at 208; see *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (holding that the Sixth Amendment right to counsel may be waived); see *Evans v. Jeff D.*, 475 U.S. 717, 730-732 (1986) (finding that the prevailing party in civil-rights action may waive its statutory eligibility for attorney’s fees).

79. *Id.* at 212.

80. *Id.* at 220 (Ginsburg, J. concurring).

81. *Id.*

82. *Id.*

83. *Sylvester*, 583 F. 3d. at 294.

84. *United States v. Mitchell*, 633 F.3d 997, 1004 (2011) (holding that “evidence from plea negotiations is ordinarily inadmissible under Fed. R. Evid. 410. But the protections of the rule may be waived”); see generally *United States v. Jim*, 786 F.3d 802, 810 (2015) (holding that “a defendant can waive his Rule 410 protections”); see *United States v. Washburn*, 2012 U.S. Dist. LEXIS 10490 (finding that “under Rule 410, statements made in the course of plea negotiations are inadmissible against the defendant, however this right of the defendant is waivable by agreement”, unless there is “some affirmative indication that the agreement was entered into unknowingly or involuntarily”).

85. See Julia A. Keck, *Recent Development: United States v. Sylvester: The*

and a defiance of the Congressional intent therefor will be accounted to highlight the warning Justice Ginsburg set out in *Mezzanatto*.⁸⁶

A. Inception of Federal Rule of Evidence 410 Waivers

Fifteen years after *Mezzanatto*, the issue of prosecutorial induced waivers of a criminal defendant's Fed. R. Evid. 410 rights reached the United States Court of Appeals for the Fifth Circuit in *Sylvester*.⁸⁷ There, Donald Sylvester was arrested and charged with the murder of a federal witness who was set to testify against a member of a large-scale drug conspiracy.⁸⁸ Sylvester met with prosecutors at the United States Attorney's Office, was advised of his *Miranda* rights, and informed of the charges against him.⁸⁹ The prosecutor informed Sylvester that he had discretion to ask the Attorney General to refrain from seeking the death penalty if Sylvester agreed to a full confession that could be used against him in court.⁹⁰ Sylvester then agreed to waive his Fed. R. Evid. 410⁹¹ rights to object to the admission of incriminating statements at trial in the event that plea negotiations failed. The prosecutor fulfilled his promise in recommending to the Attorney General not to seek capital punishment, however, Sylvester changed his mind and decided to go to trial.

At trial, Sylvester moved pursuant to Fed. R. Evid. 410, to suppress statements he made during plea negotiations which the district court denied, finding his waiver to be knowing and voluntary.⁹² Sylvester's statements were presented at trial and a jury subsequently convicted him on ten felony counts involving murder. He was sentenced to concurrent life sentences.

On appeal, the Fifth Circuit considered whether the government may use a defendant's statements made in the course of plea negotiations in its case-in-chief when the defendant, as a condition to engaging in negotiations with the government, knowingly and voluntarily waived all rights to object to such use.⁹³ Extending the ruling set down in *Mezzanatto*, the court held the government could.⁹⁴ The court opined, "[o]rdinarily, under Fed. R.

Expansion of the Waiver of Federal Rule of Evidence 410 To Allow Case-in-Chief Use of Plea Negotiation Statements, 84 TUL. L. REV. 1385, 1390 (2010) (detailing how "[a] second problematic consequence is that the case-in-chief waiver essentially serves as a waiver of the right to trial").

86. *Mezzanatto*, 513 U.S. at 214 (Ginsburg, J. dissenting).

87. *Sylvester*, 583 F.3d. 285.

88. *Id.*

89. *Id.*

90. *Id.* at 286.

91. FED. R. EVID. 410.

92. *Sylvester*, 583 F.3d at 287.

93. *Id.* at 288.

94. *See id.* at 289 (affirming that in the seminal case of *United States v.*

Evid. 410... statements made by a defendant during plea negotiations are inadmissible at trial. These Rules address both individual and systemic concerns in their attempt to permit the unrestrained candor which produces effective plea discussions.”⁹⁵ The opinion went on to detail the dangers of waiving Fed. R. Evid. 410⁹⁶ rights by acknowledging “that there is a disparity between the parties’ bargaining positions” which could lead to, “in theory an innocent defendant [] execut[ing] such a waiver (and thus inject false statements into the admissible record).”⁹⁷ Furthermore, this imbalance in bargaining power posed “[t]he hazard of an impulsive and improvident response to a seeming but unreal advantage [that] might prove coercive... [and] overbear the will of the defendant with a meaningful defense.”⁹⁸

In the face of this, however, the Fifth Circuit expanded on the presumption that “[m]ost rights afforded criminal defendants... are not inalienable.”⁹⁹ In doing so, the court dismissed the aforementioned prevarications concomitant to waiving Fed. R. Evid. 410 rights and instead focused on the notion that to “ignore relevant evidence of culpability simply because that evidence was discovered during the course of plea negotiations would arguably undermine the truth-seeking function of our criminal justice system.”¹⁰⁰ In light of this finding, the court went on to hold that “any argument relying on congressional intent to promote candor is too weak to justify refusing to allow use of plea statements in the government’s case-in-chief. Impeachment waivers do not undermine these efforts, and [this court] sees no reason why this rationale should not extend to case-in-chief waivers as well.”¹⁰¹

B. Domino Theory

Sylvester now stands as the harbinger for permitting prosecutors to seek a waiver of a criminal defendant’s Fed. R. Evid.

Mezzanatto, seven members of the U.S. Supreme Court has held that a criminal defendant can waive Rule 410 protection and make otherwise excludable plea statements admissible at trial absent some affirmative indication that the agreement was entered into unknowingly or involuntarily).

95. *Id.*

96. FED. R. EVID. 410.

97. *Id.* at 292.

98. *See id.* at 293 (finding that while even gross disparity in relative bargaining power does not mean waiver is inherently unfair and coercive, the United States Court of Appeals for the Fifth Circuit is not prepared to say that rank difference in individual cases cannot render the defendant’s plea involuntary).

99. *Id.* at 290.

100. *See id.* at 291 (finding that presumably a defendant who is actually guilty will still seek the benefit of his bargain, and remain candid even after making a waiver, lest his deception invalidate his bargained-for agreement).

101. *Id.* at 294.

410 rights in order to use the information garnered in plea negotiations against the defendant in their case-in-chief; a trend that has begun to sweep across several circuits.¹⁰²

In *United States v. Mitchell*, the same issue was in front of the United States Court of Appeals for the Tenth Circuit.¹⁰³ There, again, the court extrapolated out from *Mezzanatto*, holding that “[t]he U.S. Supreme Court has sanctioned the use of Fed. R. Evid. 410 evidence for impeachment and during the government’s rebuttal case.”¹⁰⁴ In line with that reasoning, the court held that “[a]bsent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of Fed. R. Evid. 410 is valid and enforceable.”¹⁰⁵ Therefore, “[i]f a defendant engaged in plea discussions signs a document providing that his or her statements may be used at trial to impeach or rebut contrary testimony, Fed. R. Evid. 410 will not bar the statements.”¹⁰⁶

This was again echoed in *United States v. Quiroga*.¹⁰⁷ There, the United States Court of Appeals for the Eighth Circuit reiterated that while “[u]nder Rule 410, statements made in the course of plea negotiations are inadmissible against the defendant,” in the wake of *Mezzanatto*, “[t]his right of the defendant, however, is waivable by agreement, unless there is ‘some affirmative indication that the agreement was entered into unknowingly or involuntarily.’”¹⁰⁸ The contagion of Fed. R. Evid. 410 case-in-chief waivers, which extends beyond the cases here listed,¹⁰⁹ reveals how courts across the country have begun to fall like dominos in accordance with *Sylvester*, exposing an unjustified reading of *Mezzanatto* that is in sharp contrast with the Congressional intent of Fed. R. Evid. 410,¹¹⁰

102. *Mitchell*, 633 F.3d at 1004; *Jim*, 786 F.3d at 810; *Washburn*, 2012 U.S. Dist. LEXIS 10490.

103. See *Mitchell*, 633 F.3d 997, 1002 (2011) (finding that “evidence from plea negotiations is ordinarily inadmissible under Fed. R. Evid. 410 but the protections of the rule may be waived”).

104. *Id.*

105. *Id.*

106. *Id.*

107. *United States v. Quiroga*, 554 F.3d 1150, 1159 (2009).

108. *Id.* at 1154 (quoting *Mezzanatto*, 513 U.S. at 210 (1995)).

109. See *United States v. Mayer*, 748 F. Supp. 2d 1022, 1028 (2010) (holding that “the right in Fed. R. Evid. 410 to be protected from use of statements made in the course of plea negotiations is waivable by agreement” unless it is shown that “there is some affirmative indication that the agreement was entered into unknowingly or involuntarily”); see *Washburn*, 2012 U.S. Dist. LEXIS 10490 (finding that under Rule 410, “statements made in the course of plea negotiations are inadmissible against the defendant, however this right of the defendant is waivable by agreement”, unless there is “some affirmative indication that the agreement was entered into unknowingly or involuntarily”).

110. See *Keck*, *supra* note 84, at 1390 (stating that there was much debate between the House and the Senate over the final wording of the Rule, “but the statutory history indicated that Congress intended to prohibit the use of

precipitating a slippery slope of actual and ostensible adjudicative debasements.¹¹¹

C. *Impeachment versus Case-In-Chief*

Sylvester and its progeny stand for the proposition that because the Supreme Court held in *Mezzanatto* that Fed. R. Evid. 410 rights against impeachment may be waived, a natural extension of this holding permits waivers for statements made in plea negotiations in a prosecutor's case-in-chief.¹¹² However, this is a false equivalency that unjustly places the possibility of impeachment on equal footing with the guaranty of a case-in-chief admission of statement.¹¹³

The most glaring problem with equating impeachment with arming prosecutor's cases in chief with plea bargaining statements, is that the former may only occur against witnesses who testify¹¹⁴, while the latter may be used at trial, regardless.¹¹⁵ This is important as "[t]he empirical evidence suggests that up to half of all criminal defendants decline to testify in their defense."¹¹⁶ If one was to play this tape through to the end, it stands to reason, that if a criminal defendant at one time felt compelled to enter into a plea agreement, then subsequently withdrew from this course of action, the likelihood of him or her taking the stand thereafter would be even far less (especially now that they are threatened with impeachment under *Mezzanatto*). As such, under *Sylvester, et al.*, the admissibility of plea negotiation statements via a Fed. R. Evid. 410 waiver is tantamount to forfeiture of one's right to a fair trial.¹¹⁷ This is true because when a defendant engages in plea discussions that eventually fail, the use of his or her statements in the prosecution's case-in-chief eliminates the need for the prosecution to present other evidence to trial other than this de facto confession

statements made during plea negotiations to impeach the defendant at a later date").

111. *Id.* at 1393 (detailing how "Rule 410 is not a rule of evidence protecting personal interests, and thus, cannot be waived by an individual defendant").

112. *Sylvester*, 583 F.3d at 293 (2005); *Mitchell*, 633 F.3d at 1002 (2011); *Mayer*, 748 F. Supp. 2d at 1029 (2010).

113. See *Keck, supra* note 84, at 1391 (warning that an exception to Rule 410 "to allow use of otherwise inadmissible statements will eventually swallow the Rule, completely undermining the purpose of enacting the Rule in the first place." Additionally, "Congress would not have enacted Rule 410 if it intended the Rule to be circumvented so easily and frequently that circumvention became the norm, rather than the exception").

114. FED. R. EVID. 60.

115. FISHER, *supra* note 4.

116. Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants With Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 301 (2008).

117. See *Keck, supra* note 84, at 1393 (warning that "[a] second problematic consequence is that the case-in-chief waiver essentially serves as a waiver of the right to trial").

to the crime.¹¹⁸

Conversely, “[a] lawyer impeaches a witness by casting doubt on the witness’s accuracy or trustworthiness,” by either contradicting previous statements or attacking the witness’s character.¹¹⁹ The success of such impeachment attempts are ultimately left to the jury to decide and, as a result, do not command the same finality as *de facto* confessions found in Fed. R. Evid. 410 case-in-chief waivers (it goes without saying that should a criminal defendant choose not testify then he or she may not be impeached and any statements made during plea negotiations would not be admitted at trial under *Mezzanatto* alone). Therefore, the notion that because the Supreme Court found Fed. R. Evid. 410 rights against impeachment to be waivable (which is an objectionable stance as discussed below), in no way should lead to the automatic presumption that case-in-chief waivers shall follow suit given the sincere difference in the levels of severity each waiver poses to criminal defendants.¹²⁰

D. “Except as Otherwise Provided”

Even if one were to disagree with the discernibility of severity between impeachment waivers and case-in-chief waivers, and find as many courts now have, that the former logically leads to the latter, it is important to note that waivers of any kind find no basis in Fed. R. Evid. 410’s legislative intent¹²¹ and are contrarian to established precedent regarding other federal rules of evidence as shown below.¹²²

In *Crosby v. United States*, the Court looked at whether a federal district court was correct in permitting a trial *in absentia* to proceed in the face of Federal Rule of Criminal Procedure 43 (“Fed. R. Crim. P. 43”)¹²³, which states that a defendant must be present at every stage of trial “except as otherwise provided” by the Rule and which lists situations in which a right to be present may be waived.¹²⁴ On certiorari, the Government conceded that Rule 43 “does not specifically authorize the trial *in absentia* of a defendant who was not present at the beginning of his trial,” but argued that “Rule 43 does not purport to contain a comprehensive listing of the

118. *Id.*

119. FISHER, *supra* note 4.

120. Keck, *supra* note 84 at 1390.

121. Michael S. Gershowitz, *Supreme Court Review: Waiver Of The Plea-Statement Rules, United States v. Mezzanatto*, 115 S. Ct. 797, 808 (1995), 86 J. CRIM. L. & CRIMINOLOGY 1439, 1445 (1996).

122. *See Crosby v. United States*, 113 S. Ct. 748, 753 (1993) (holding that Rule 43’s express use of the limiting phrase “except as otherwise provided” clearly indicates that the list of situations in which the trial may proceed without the defendant is exclusive).

123. FED. R. OF CRIM. P. 43.

124. *Crosby*, 113 S. Ct. at 755.

circumstances under which the right to be present may be waived."¹²⁵ In a unanimous decision, the Court disagreed and found that “[t]he Rule declares explicitly: ‘The defendant shall be present . . . at every stage of the trial . . . except as otherwise provided by this rule’ (emphasis added).”¹²⁶ Therefore, “the list of situations in which the trial may proceed without the defendant is marked as exclusive not by the ‘expression of one’ circumstance, but rather by the express use of a limiting phrase. In that respect the language and structure of the Rule could not be more clear.”¹²⁷

As with Fed. R. Crim. P. 43, the Advisory Notes on Fed. R. Evid. 410 contain the same limiting phrase and provide that “[t]he Committee added the phrase ‘*Except as otherwise provided* by Act of Congress’ to Rule 410 as submitted by the Court in order to preserve particular congressional policy judgments as to the effect of a plea of guilty or of *nolo contendere*.” (emphasis added).¹²⁸ This language, and the concomitant precedent found in *Crosby*, were outright ignored by the majority in *Mezzanatto*.¹²⁹ Instead, the Court held that “[t]he Rules’ failure to include an express waiver-enabling clause does not demonstrate Congress’ intent to preclude waiver agreement.”¹³⁰ “Rather,” the Court went on, “the 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.”¹³¹ However, Fed. R. Evid. 410, like FRCP 43, clearly outlines the exceptions for when its bar on admissibility may be circumvented and “[i]n that respect the language and structure of the Rule could not be more clear.”¹³² Therefore, despite the presumption of waivability, *Crosby*’s unanimous interpretation of the “except as otherwise provided” clause must transfer to Fed. R. Evid. 410, which not only contains the same language, but also contains an exclusive list of exceptions.¹³³ This leads to the only possible logical conclusion,

125. *Id.* at 751.

126. *Id.* at 753.

127. *Id.*

128. H.R. REP. NO. 93–650 (2011).

129. Gershowitz, *supra* note 120, at 810 (showing how “the *Mezzanatto* majority relied upon the alternative theory of field occupation to distinguish *Crosby* and ignore its clear and unambiguous precedent”).

130. *Mezzanatto*, 513 U.S. at 200.

131. *See id.* at 201 (holding that “respondent bears the responsibility of identifying some affirmative basis for concluding that the Rules depart from the presumption of waivability”).

132. Donald J. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial*, 24 WASH. & LEE L. REV. 162, 169 (1967); *Crosby*, 113 S. Ct. at 755.

133. FED. R. EVID. 410(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

which is that the majority erred in its ruling in *Mezzanatto*.

E. Defiance of Congressional Intent

The majority in *Mezzanatto* also ran afoul of the legislative intent behind the enactment of Fed. R. Evid. 410.¹³⁴ There, the Court minimized Congress' intent to protect against impediments on a defendant's candor in plea discussions to a mere individual right, thereby stripping the Rule of its true purpose.¹³⁵ *A fortiori*, Fed. R. Evid. 410 was not intended to simply create an individual right, but rather a forum through which the criminal justice system as a whole would embolden plea discussions and settlements.¹³⁶ The majority's short-sided interpretation of Fed. R. Evid. 410, and the Advisory Notes therefor, was taken to task in Justice Souter's dissent in *Mezzanatto*, where he opined that "if the generally applicable... judicial policy of respecting waivers of rights and privileges should conflict with a reading of the Rules as reasonably construed to accord with the intent of Congress, there is no doubt that congressional intent should prevail."¹³⁷ Furthermore "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."¹³⁸ Therefore, "[w]hether 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."¹³⁹

Moreover, the majority presumed that the express-waiver cases, e.g. *Crosby*, describe the limited circumstances wherein the recognition of waiver is circumscribed, "and since the Rule[] in question here say[s] nothing about 'waiver' as such," the matter is ended.¹⁴⁰ Yet, there is "indeed, good reason to believe that Congress rejected the general rule of waivability when it passed the Rule[] in issue here."¹⁴¹ This is evidenced by the fact that "Congress must have understood that the judicial system's interest in candid plea

proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

134. *Mezzanatto*, 513 U.S. at 214 (Souter, J. dissenting).

135. *Id.* at 215 (Souter, J. dissenting).

136. *Id.* at 216 (Souter, J. dissenting), citing *Santobello v. New York*, 404 U.S. 257, 260 (1971).

137. *Id.* at 215 (Souter, J. dissenting).

138. *See id.* (Souter, J. dissenting) (stating that 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").

139. *Id.*

140. *Id.* at 211 (alteration in original).

141. *Id.* at 212.

discussions would be threatened by recognizing waivers under Rules 410,” given that “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.”¹⁴² To ignore this fact would swallow up Fed. R. Evid. 410, severely attenuating the protections it was designed to afford.¹⁴³ Therefore, the *Mezzanatto* majority not only obscured the legislative intent of Fed. R. Evid. 410 by shrinking its application to the criminal justice system at large, it actively read a waiver presumption into the unambiguous language where none existed. Accordingly, the decisions in *Sylvester, et al.*, which used *Mezzanatto* as a crutch to expand permissible waivers of Fed. R. Evid. 410 rights should be rendered null and void as the derivation for such an expansion has proven to be averse to sound legal reasoning, standing precedent, and Congressional intent.¹⁴⁴

IV. PROPOSAL

Undeniably, Fed. R. Evid. 410 has been placed at the center of an imbroglio in the American criminal justice system. As has been shown, the strength of protections afforded to criminal defendants through Fed. R. Evid. 410 has deteriorated over time as affixed by prosecutors and affirmed by courts. At first, the Court took an unequivocal stance in *Kercheval* against denying criminal defendants the rights enshrined in Fed. R. Evid. 410.¹⁴⁵ Then, the Court swiftly vanquished the purpose and effect of Fed. R. Evid. 410 in *Mezzanatto* by holding that the rights therein may be waived such that any statements a criminal defendant makes during plea negotiations may be brought up for impeachment at trial.¹⁴⁶ However, this trend did not stop there, as recently several federal district and appellate courts have begun to hold that *Mezzanatto* opened the door for criminal defendants to not only waive their Fed. R. Evid. 410 rights for impeachment purposes, but to waive them so prosecutors may use plea negotiation statements during the government’s case-in-chief.¹⁴⁷ This waiver amounts to nothing short of a defendant losing his or her right to a fair trial¹⁴⁸ and discourages the practice of plea bargaining – a practice Fed. R. Evid. 410 was enacted to promote.¹⁴⁹ In order to stymie the deleterious

142. *Id.* at 218.

143. Gershowitz, *supra* note 116, at 809.

144. Keck, *supra* note 106, at 1390; *supra* note at 121; *Mezzanatto*, 513 U.S. at 215 (Souter, J. dissenting).

145. *Kercheval*, 274 U.S. at 228.

146. *Mezzanatto*, 513 U.S. at 215.

147. *Sylvester*, 583 F.3d 285; *Mitchell*, 633 F.3d 997; *Jim*, 786 F.3d 802; *Mayer*, 748 F. Supp. 2d at 1022; *Washburn*, 2012 U.S. Dist. LEXIS 10490.

148. Keck, *supra* note 84, at 1393. A second problematic consequence is that the case-in-chief waiver essentially serves as a waiver of the right to trial.

149. *Mezzanatto*, 513 U.S. at 216 (Souter, J. dissenting).

effects case-in-chief waivers present, this article proposes that at least one of three actions be taken: (1) the Supreme Court directly overturn *Mezzanatto*; (2) the Supreme Court review a case on Fed. R. Evid. 410 case-in-chief waivers and find against them; and/or (3) Congress acts to explicitly amend the language of Fed. R. Evid. 410 to indicate waivers of the rights therein are impermissible.

A. Overturning *Mezzanatto*

Given the difference in severity between impeachment and case-in-chief waivers detailed in section III, it is hard to imagine that courts would find justification for the latter without the former. *A verbis ad verbera*. This is evidenced by the fact that the courts that have presumed case-in-chief waivers did so by relying on the *Mezzanatto* decision.¹⁵⁰ Furthermore, it is illuminating when peering into how not only courts, but prosecutors viewed the availability of such waivers *ante* this ruling that case-in-chief waivers were never an issue prior to *Mezzanatto*. It is difficult, then, to argue that a direct correlation, if not causation, does not exist between *Mezzanatto*¹⁵¹ and the current degradation of Fed. R. Evid. 410 found in the subsequent cases.¹⁵²

If the Court were to overturn *Mezzanatto*, the lower courts would then be forced to revisit case-in-chief waivers. Upon doing so, the bedrock of current justifications finding in favor of case-in-chief waivers would be erased, leaving courts in a much weaker position to substantiate its contemporary theories. Inevitably, courts would have to rely on the unambiguous language of Fed. R. Evid. 410 and the clear congressional intent behind enacting it. This would force them to find the exceptions provided within the Rule itself are the only permissible “waivers” allowed under this Rule. This would then permit the true essence of Fed. R. Evid. 410 to be re-established – permitting criminal defendants to once again speak candidly during plea negotiations. It would also allow such defendants to take the stand without the fear of impeachment, rightfully providing them an unabashed opportunity to defend directly on their own behalf.

150. *Sylvester*, 583 F.3d 285; *Mitchell*, 633 F.3d 997; *Jim*, 786 F.3d 802; *Mayer*, 748 F. Supp. 2d at 1022; *Washburn*, 2012 U.S. Dist. LEXIS 10490.

151. *See Mezzanatto*, 513 U.S. at 220 (Ginsburg, J. concurring) (finding 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”).

152. *Sylvester*, 583 F.3d 285; *Mitchell*, 633 F.3d 997; *Jim*, 786 F.3d 802; *Mayer*, 748 F. Supp. 2d at 1022; *Washburn*, 2012 U.S. Dist. LEXIS 10490.

B. A Direct Decision on Fed. R. Evid. 410 Case-In-Chief Waivers

A more direct way in which case-in-chief waivers could be prohibited is if the Supreme Court tackled this issue head-on. As it stands currently, case-in-chief waivers have only been addressed as high as the appellate level with nothing on the docket for the Supreme Court's January 2018 docket.¹⁵³ However, given the reluctance of the Court to directly overturn its prior decisions,¹⁵⁴ this is probably the more likely source of restitution for Fed. R. Evid. 410 rights. In doing so, the Court could finally address the forewarning Justice Ginsburg laid out in her concurrence in *Mezzanatto* wherein she advised 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."¹⁵⁵ It has now become imperative that the Court as whole to recognize the dangers posed by case-in-chief waivers Justice Ginsburg so intuitively picked up on before this issue ever truly came to light.¹⁵⁶ The recent expansion of *Mezzanatto's* holding is not only contrarian to language of Fed. R. Evid. 410,¹⁵⁷ but to the Congressional intent for enacting the rule,¹⁵⁸ and the Court's previous precedent.¹⁵⁹ By granting certiorari on this issue, it would permit the Court the opportunity to slam the door shut on the misconstrued opinions¹⁶⁰ that have read its decision in *Mezzanatto* as opening up the opportunity for such waivers.

C. Congressional Action

Finally, if the courts will not act, Congress must. Certainly, Congress must recognize that the adjudications rendered in *Mezzanatto, Sylvester, et al.*,¹⁶¹ has directly contradicted its clear intentions for enacting Fed. R. Evid. 410.¹⁶² Consequently, the

153. Amy Howe, *Justices Release January Calendar*, SCOTUSBLOG (Nov. 17, 2017) www.scotusblog.com/2017/11/justices-release-january-calendar/.

154. See generally Government Publishing Office, *Supreme Court Decisions Overruled By Subsequent Decision* (Nov. 17, 2017) www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-12.pdf (stating that only 220 cases decided by the United States Supreme Court have been later overturned).

155. *Mezzanatto*, 513 U.S. at 220 (Ginsburg, J. concurring).

156. *Id.*

157. Donald J. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial*, 24 WASH. & LEE L. REV. 162, 168 (1967).

158. *Mezzanatto*, 513 U.S. at 214 (Souter, J. dissenting).

159. *Crosby*, 113 S. Ct. at 755.

160. *Sylvester*, 583 F.3d 285; *Mitchell*, 633 F.3d 997; *Jim*, 786 F.3d 802; *Mayer*, 748 F. Supp. 2d at 1022; *Washburn*, 2012 U.S. Dist. LEXIS 10490.

161. *Jim*, 786 F.3d 802; *Mayer*, 748 F. Supp. 2d at 1022; *Mitchell*, 633 F.3d 997; *Sylvester*, 583 F.3d 285; *Washburn*, 2012 U.S. Dist. LEXIS 10490.

162. *Jim*, 786 F.3d 802; *Mayer*, 748 F. Supp. 2d at 1022; *Mitchell*, 633 F.3d

current judicial landscape underlying this issue sits on faulty ground that cannot be supported by the duly elected representatives of the people who in their collective wisdom set out clear guidelines for how plea negotiations, and the information garnered therein, should be governed. This dichotomy invokes the counter-majoritarian difficulty courts consistently face wherein a government that derives its legitimacy from majority rule, effectuates its laws through unelected officials.¹⁶³ Still, the entire basis of the *Mezzanatto* decision rested on the presumption of waivability, of course not found in the Rule's language.¹⁶⁴ Therefore, should Congress amend Fed. R. Evid. 410 such that it contained language that either expressly denied waivers of its rights, or limited waivers to certain situations, not including case-in-chief waivers, it would pull the rug out from under *Mezzanatto* and its progeny.¹⁶⁵

D. Effects of Inaction

If these proposals remain merely theoretical, the system as-is, will continue to render injurious effects on criminal defendants, the criminal justice system, and society at large. The greatest threat case-in-chief waivers pose are their potential to lead to wrongful convictions. It has been well documented that interrogation¹⁶⁶ and plea negotiation techniques are designed to put the government in a domineering position over the defendant¹⁶⁷ – an imbalance of power that was recognized, yet ignored in *Mezzanatto*.¹⁶⁸ During these proceedings the government's "goals are to convince a suspect that the authorities know he is guilty, to cut off a suspect's denials of guilt, and to provide a suspect with a motive for the crime that will appear to lessen his blame."¹⁶⁹ These techniques have become so effective that they have led to an incalculable amount of innocent defendants confessing to crimes they never actually committed.¹⁷⁰

What this means is that should a false confession be procured

997; *Washburn*, 2012 U.S. Dist. LEXIS 10490.

163. Kenneth Ward, *The Counter-Majoritarian Difficulty and Legal Realist Perspectives of Law: The Place of Law In Contemporary Constitutional Theory*, 18 J. L. & POLITICS 851, 857 (2002).

164. *Mezzanatto*, 513 U.S. at 201.

165. *Sylvester*, 583 F.3d 285; *Mitchell*, 633 F.3d 997; *Jim*, 786 F.3d 802; *Mayer*, 748 F. Supp. 2d at 1022; *Washburn*, 2012 U.S. Dist. LEXIS 10490.

166. Welsh S. White, *False Confessions and The Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 110 (1997).

167. FRED E. INBAU, JOHN E. REID, AND JOSEPH P. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS (2013).

168. *Mezzanatto*, 513 U.S. at 210.

169. INBAU, *supra* note 166 at 79-81.

170. *Id.* at 48, 80; Gisli H. Gudjonsson, *The Psychology of Interrogations, Confessions And Testimony* 235-40, 260-73 (John Wiley & Sons 2003) (1992); Richard Ofshe, *Coerced Confessions: The Logic of Seemingly Irrational Action*, 6 CULTIC STUD. J. 1 (1989).

through these hyper-effective techniques during a plea negotiation, and a defendant later withdraws, this mendacious assertion the defendant was contrived into providing will be used against him at trial, all but rendering him or her guilty of the charged offense. This is especially troubling as it was held in *Sylvester* that “[a] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.”¹⁷¹ The implications this poses to a criminal defendant are obvious and severe.¹⁷² Under the current paradigm, not only will a criminal defendant be held accountable for statements made as a result of coercive techniques during the prosecution’s case-in-chief, the fact that this plea “rested on a faulty premise” has been held as essentially harmless error as to the final ruling.¹⁷³

Per the criminal justice system, defendants will be less inclined to enter plea negotiations which not only threatens the pecuniary resources of the judiciary,¹⁷⁴ it also dissuades defendants who are likely to give up information during plea negotiations in order to lessen their own sentences from doing so.¹⁷⁵

Finally, in regard to society at large, a wrongful conviction poses several threats including, but not limited to: putting the wrong suspect behind bars; allowing the actual criminal to remain in and prey on society; the wasting of taxpayer funded proceedings (for the trial of the wrong defendant, the ostensible trial of the true defendant, and/or the imprisonment of the individual who has been wrongfully convicted); and a loss of public confidence in the criminal justice system.¹⁷⁶ Incontrovertibly, when considering all of these ailments together, ample justification is provided for why judicial, legislative, or combined action must be taken to thwart the pernicious effects Fed. R. Evid. 410 case-in-chief waivers have on a micro and macro scale.¹⁷⁷

171. *Sylvester*, 583 F.3d at 293.

172. Keck, *supra* note 84 at 1393. A second problematic consequence is that the case-in-chief waiver essentially serves as a waiver of the right to trial.

173. Gudjonsson, *supra* note 169 at 260-73; *Sylvester* 583 F.3d at 293.

174. Ken Strutin, *Truth, Justice, and the American Style Plea Bargain*, 77 ALB. L. REV. 825, 831 (2013/2014).

175. *Plea Bargain Pros and Cons*, FINDLAW (Nov. 17, 2017) www.criminal.findlaw.com/criminal-procedure/plea-bargain-pros-and-cons.html.

176. Jon B. Gould & Richard A. Leo, *A Century of Criminal Justice: II. "Justice" In Action: One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 836 (2010).

177. *Id.*; Keck, *supra* note 84 at 1393; White, *supra* note 161 at 110; Gudjonsson, *supra* note 166 at 260-73; Ofshe, *supra* note 165; *Sylvester* 583 F.3d at 293.

V. CONCLUSION

In conclusion, the current jurisprudence upon which Fed. R. Evid. 410 case-in-chief waivers is based, is founded on faulty premises that distort Fed. R. Evid. 410's unambiguous language, ignore the Congressional intent behind enacting the Rule, and wrongfully and injuriously expand upon the Supreme Court's improvident precedent on this issue. The malignant implications of this misplaced reasoning pose serious risks and harms to criminal defendants, the criminal justice system, and society at large. It is imperative, then, that swift action be taken by the judiciary, the legislature, or both, to ameliorate the devastating effects Fed. R. Evid. 410 case-in-chief waivers present as federal district and circuits around the country have begun to accept their implementation.