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Note

***United States v. Mezzanatto*: An Unheeded Plea to Keep the Exclusionary Provisions of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) Intact**

I. Introduction

In August of 1991, defendant Gary Mezzanatto was arrested for possession of narcotics.¹ When he and his attorney approached the prosecutor to attempt to plea bargain, they were told that plea bargain discussions would only be available under one condition: that Mr. Mezzanatto sign a waiver of his right to have any statements made during the plea negotiations excluded from use for impeachment purposes at trial.²

Generally speaking, Federal Rule of Evidence 410³ [hereinafter Rule 410] and Federal Rule of Criminal Procedure

1. See *United States v. Mezzanatto*, 115 S. Ct. 797, 800 (1995). The trial court opinion was unreported; therefore, all facts and holdings of that case referred to in this Note are taken from the United States Supreme Court or Ninth Circuit Court of Appeals decisions.

2. See *id.*

3. FED. R. EVID. 410. The text of the rule is as follows:

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements.

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:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of *nolo contendere*;

11(e)(6)⁴ [hereinafter Rule 11(e)(6)], which govern plea negotiations, preclude the use of statements made during a plea negotiation as evidence against a defendant at trial.⁵ By asking for and obtaining a waiver of this right, the prosecutor would be able to use the statements made by Gary Mezzanatto at trial in the event that the plea negotiations did not result in a plea of guilty.⁶ Faced with the option of potentially having his words used against him later, or not bargaining at all (in which event he would have little hope of a charge reduction or dismissal), Mr. Mezzanatto chose to sign the waiver.⁷

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(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for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.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 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.

Id.

4. FED. R. CRIM. P. 11(e)(6). The text of the rule is as follows:

Rule 11. Pleas.

(e) Plea Agreement Procedure.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, 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:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which 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 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.

Id.

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

6. See *Mezzanatto*, 115 S. Ct. at 800.

7. See *id.*

The prosecutor and Mr. Mezzanatto failed to reach a plea agreement, and the United States District Court for the Southern District of California allowed Mr. Mezzanatto's statements to be used against him at trial, where he was subsequently convicted.⁸ On appeal, the Ninth Circuit Court of Appeals held that the prosecution's waiver demand should not have been permitted, as Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) [hereinafter collectively referred to as Rules] do not provide for such a waiver.⁹ The United States Supreme Court heard the case in late 1994, and in early 1995 it reversed the Ninth Circuit in a 7-2 decision.¹⁰ The Court held that a defendant *may* waive the rights granted to him by these Rules, as long as the waiver is knowingly and voluntarily made.¹¹

As a result of the United States Supreme Court's decision, any prosecutor may require that such a waiver be signed prior to discussing any plea negotiations. Insistence upon a waiver such as the one allowed by the United States Supreme Court in *United States v. Mezzanatto*¹² places a defendant in jeopardy should the parties fail to agree upon a plea. If a defendant signs a waiver of his right to have plea bargain statements excluded from use against him at trial, and subsequently takes the stand in his own defense, under the Court's holding in *Mezzanatto* he may be impeached by the prosecutor with any contrary admissions made during the bargaining session.

Part II of this Note will discuss plea bargaining, the content and legislative history of the Rules, and the general presumption of waivability of the Federal Rules. Additionally, it will discuss those rules and rights which cannot be waived by a defendant and the importance of looking at legislative intent when determining which of the Federal Rules are subject to waiver. Part III will summarize in detail the facts and holding of *United States v. Mezzanatto*.¹³ Part IV will evaluate the decision of the United States Supreme Court in light of legislative

8. See *id.* at 801.

9. See *United States v. Mezzanatto*, 998 F.2d 1452, 1456 (9th Cir. 1993), *rev'd*, 115 S. Ct. 797 (1995).

10. See *Mezzanatto*, 115 S. Ct. at 799-800.

11. See *id.* at 806.

12. 115 S. Ct. 797.

13. *Id.*

intent, and will analyze what the future of these Rules will hold and what the potential consequences of this case will be with regard to defendants' rights. Part V will conclude that, in *Mezzanatto*, the Court failed to recognize the design of Congress by allowing the background presumption of waivability of rules and rights to supersede the clear legislative intent behind Rule 410 and Rule 11(e)(6).

II. Background

A. Plea Bargaining

Plea bargaining, in general terms, reduces the potential sentence that a defendant may receive in exchange for a guilty plea by that defendant.¹⁴ Typically, a prosecutor will promise to dismiss or reduce a charge, or recommend a certain sentence to the judge, in exchange for the defendant's plea.¹⁵ The Rules consider both charge and sentence bargains in their context; charge bargains are "predicated on the dismissal of other charges," while sentence bargains are "predicated either upon the recommendation of or agreement not to oppose a particular sentence, or upon a guarantee of a particular sentence."¹⁶

Plea bargains or negotiations can occur in two types of situations: charge or sentence bargaining,¹⁷ and bargaining in exchange for cooperation with a prosecutor.¹⁸ In a charge or sentence bargaining context, the purpose of the plea bargain is to reach an agreement between the prosecutor and defense counsel as to what charge will be used or what sentence will be recommended in exchange for the plea.¹⁹ In the context of bargaining in exchange for cooperation, the prosecutor looks to gain information from the defendant, in exchange for which the prosecutor is willing to compromise on the charges he imposes upon the defendant.²⁰ A common example of this can be found

14. See 8 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 11.02, at 11-38 (2d ed. 1996).

15. See *id.*

16. *United States v. Carrigan*, 778 F.2d 1454, 1462 (10th Cir. 1985).

17. See, e.g., *id.* at 1456.

18. See Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 2 (1992).

19. See *Carrigan*, 778 F.2d at 1462.

20. See Hughes, *supra* note 18 and accompanying text.

in conspiracy cases, or in cases where a defendant will offer information about other offenses or offenders in exchange for leniency.²¹

The prosecutor has a great deal of discretion in plea bargaining²² and, some might say, an unfair advantage.²³ The prosecution generally controls all of the terms and conditions of the negotiation and can even refuse to negotiate with a given defendant,²⁴ as a defendant does not have a Constitutional right to a plea bargain.²⁵ Furthermore, prosecutors may forego the plea bargain process entirely and proceed to trial, if they so choose.²⁶ Notwithstanding the prosecutor's enormous discretion, it is assumed that prosecutors will not abuse their responsibility.²⁷ As the United States Supreme Court has stated, "tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty."²⁸ In fact, "in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties."²⁹

Plea bargains are an important tool utilized by the criminal justice system for expedient disposition of cases.³⁰ The use of plea bargaining to dispose of cases decreases the expense and

21. See *id.* at 13-14; see also *United States v. Mezzanatto*, 998 F.2d 1452, 1455 (9th Cir. 1993), *rev'd*, 115 S. Ct. 797 (1995). The court there stated:

prosecutors of those engaged in criminal conspiracies desire the fullest cooperation of those accused of participation therein. Frequently only by such cooperation can the organizers of the conspiracy, the higher-ups, be identified and prosecuted. Rules 11(e)(6) and 410 aid in obtaining this cooperation. A lesser member of the conspiracy will more freely provide useful information to the prosecutors if he knows that none of his statements in plea bargaining sessions can be used against him.

Id.

22. See *infra* notes 24-25 and accompanying text.

23. See *Mezzanatto*, 998 F.2d at 1456 (declaring "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.").

24. See *Russell v. Collins*, 998 F.2d 1287, 1294 (5th Cir. 1993) ("It is well established that a prosecutor has discretion to enter into plea bargains with some defendants and not with others.").

25. See *United States v. Wheat*, 813 F.2d 1399, 1405 (9th Cir. 1987), *aff'd*, 486 U.S. 153 (1988).

26. See *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977).

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

28. *Newton v. Rumery*, 480 U.S. 386, 397 (1987) (plurality opinion).

29. *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926).

30. See *Mezzanatto*, 998 F.2d at 1454.

time needed to conduct a trial, and is an efficient way of dealing with criminals while minimizing the burden on the court system.³¹

The United States Supreme Court has stated that "the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."³² In *Santobello v. New York*,³³ where a prosecutor breached the plea bargain agreement entered into with the defendant, the Court discussed the importance of plea negotiations, stating that:

[d]isposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.³⁴

For these reasons, among others, it is an "essential component of the administration of justice" and "is to be encouraged."³⁵ This system of bargaining has become standard practice in disposing of criminal cases,³⁶ and benefits both the prosecutor and

31. See *id.*; see also Bradley I. Ruskin, *The Judiciary Budget Crisis*, 205 N.Y. L.J. 95 (1991). Mr. Ruskin notes that the court system is currently overburdened, and states:

[o]ne can observe the magnitude of the crisis in every one of our courts. For example, . . . the Criminal Courts have had to respond to huge increases over the past five years, which make the proper administration of justice impossible and plea bargains the inexorable reality in a system where a complete trial occurs in only approximately one third of [one] percent of indictments.

Id.

32. *Blackledge v. Allison*, 431 U.S. 63, 71 (1977).

33. 404 U.S. 257 (1971).

34. *Id.* at 261.

35. *Id.* at 260.

36. See WAYNE R. LAFAYE & JERROLD H. ISRAEL, 2 CRIMINAL PROCEDURE § 20.1, at 556 (1984).

the guilty defendant.³⁷ To help administer this system of case disposition and to ensure fairness to both parties, Congress enacted the plea negotiation rules, Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6).³⁸

B. *Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6)*

Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) are substantively identical,³⁹ and state in relevant part:

[e]xcept 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: . . . any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty⁴⁰

These Rules as to the inadmissibility of statements made during the course of a plea bargain have only two exceptions:

such a statement is admissible (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.⁴¹

The first exception may be summarized as follows: if, during the course of a subsequent trial or other proceeding, a defendant introduces statements that were made during the plea bargain negotiations, he has opened the door for the prosecution to also introduce such statements in order that the jury might get a complete account of the proceeding.⁴² The second exception, that the statements are admissible in a separate proceed-

37. See *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978) (stating that the government "may encourage a guilty plea by offering substantial benefits in return for the plea").

38. See generally FED. R. EVID. 410 advisory committee's notes; FED. R. CRIM. P. 11(e)(6) advisory committee's notes.

39. See *supra* notes 3-4.

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

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

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

ing against the defendant for perjury, allows for the punishment of a defendant who takes the stand and gives testimony which is contrary to his statements given during the plea negotiations.⁴³ This exception provides for the admissibility of statements made during plea negotiations in a *separate trial for perjury*, and *not* in the trial for the original offense.⁴⁴

The Rules were enacted in 1975,⁴⁵ and as subsequently amended, resulted in the versions currently used today.⁴⁶ In 1975, the original Court's Evidence Rule 410 was in the process of revision to be added to the Federal Rules of Evidence as Rule 410.⁴⁷ At this time, the Senate proposed the addition of the following language to Rule 410: "[t]his Rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with [an offer to plead guilty] where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement."⁴⁸ The Conference Committee, the congressional committee in charge of analyzing proposals to the Federal Rules, adopted the Senate proposal,⁴⁹ but with a provision that Rule 410 would "be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule, and which takes effect after the date of the enactment of the Act establishing these Federal Rules of Evidence."⁵⁰ Rule 410 was thus enacted on January 2, 1975, and was scheduled to take effect on August 1, 1975, provided that there were not any amendments to the Federal Rules of Criminal Procedure which would supersede Rule 410.⁵¹

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

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

45. See Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, § 3(10), 89 Stat. 370, 372 (1975); Federal Rules of Evidence and Criminal Procedure Amendments of 1975, Pub. L. No. 94-149, § 1(9), 89 Stat. 805 (1975).

46. FED. R. EVID. 410; FED. R. CRIM. P. 11(e)(6); see *supra* notes 3-4.

47. See 10 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 410.01[1.-2], at IV-185-86 (2d ed. 1996).

48. See *id.* at IV-188.

49. See H.R. CONF. REP. NO. 93-1597, at 6-7 (1974) reprinted in 1974 U.S.C.A.N. 7098, 7100.

50. See 10 MOORE ET AL., *supra* note 47, § 410.01 [1.-2], at IV-185 (quoting Federal Rules of Evidence Act of 1975, Pub. L. No. 93-595, 88 Stat. 1926, 1933 (1975)).

51. See *id.*

The Conference Committee noted that the issue of plea statement admissibility was about to be discussed again in the context of revisions to the Federal Rules of Criminal Procedure, which revisions, as proposed, *were* "inconsistent" with the Conference's Evidence Rule 410.⁵² The proposed versions offered by the Senate and the House of Representatives were at odds with each other as to the language to be used in Rule 11(e)(6).⁵³ The version of Rule 11(e)(6) proposed by the House permitted the

limited use of pleas of guilty, later withdrawn, or *nolo contendere*,⁵⁴ offers of such pleas, and statements made in connection with such pleas or offers [to be used] in a perjury or false statement prosecution if the plea, offer, or related statement was made under oath, on the record, and in the presence of counsel.⁵⁵

In contrast, the Senate version permitted "evidence of voluntary and reliable statements made in court on the record *to be used for the purpose of impeaching the credibility of the declarant* or in a perjury or false statement prosecution."⁵⁶ The Conference Committee adopted the House version with some changes, expressly rejecting the language offered by the Senate which would have allowed the use of plea statements to impeach the credibility of the declarant.⁵⁷ In the Joint Explanatory Statement of the Committee of Conference, the Committee stated, "[t]he Conference adopts the House version with changes. The

52. See H.R. CONF. REP. NO. 93-1597, at 6-7 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7100.

53. See 10 MOORE ET AL., *supra* note 47, § 410.03[1], at IV-193.

54. *Nolo contendere* is defined as:

a plea in a criminal case which has a similar legal effect as pleading guilty. Type of plea which may be entered with leave of court to a criminal complaint or indictment by which the defendant does not admit or deny the charges, though a fine or sentence may be imposed pursuant to it. The principal difference between a plea of guilty and a plea of *nolo contendere* is that the latter may not be used against the defendant in a civil action based upon the same acts.

BLACK'S LAW DICTIONARY 1048 (6th ed. 1990) (citations omitted).

55. H.R. CONF. REP. NO. 94-414, at 10 (1975), *reprinted in* 1975 U.S.C.C.A.N. 713, 714.

56. *Id.* (emphasis added). No Senate report accompanied this proposal; therefore all information regarding the Senate's proposed legislation for Rule 11(e)(6) is taken from the Conference Report.

57. See *id.*

Conference agrees that neither a plea nor the offer of a plea ought to be admissible for any purpose.”⁵⁸

On July 31, 1975, the Federal Rules of Criminal Procedure Amendments Act became law, amending, among other things, Rule 11(e)(6).⁵⁹ On December 12, 1975, a version of Rule 410 which was identical in substance to Rule 11(e)(6) was passed by Congress,⁶⁰ thus conforming Rule 410 to Rule 11(e)(6), and substantively resulting in the version of Rule 410 used today.⁶¹

It is important to note that while the Rules do not expressly prohibit waiver in their text,⁶² their legislative history indicates that Congress carefully considered and set forth within the body of the Rules the circumstances under which statements made in the course of plea negotiations should be admissible.⁶³ While the Rules say that evidence of a statement made during a plea bargain is not allowed to be admitted against the participating defendant in a civil or criminal proceeding, the Rules do not speak to a defendant's ability or inability to waive this protection granted to him.⁶⁴ In the absence of an express mention of waiver, the courts are left to decide the legislative intent with respect to waiver when the Rules were enacted by Congress.⁶⁵

C. *Presumption of Waivability*

The United States Supreme Court has stated that, “[r]ather than deeming waiver presumptively unavailable absent some sort of express enabling clause,” there should be a presumption that rights and rules may be waived.⁶⁶ In fact, over a century

58. *Id.*

59. Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, § 3(10), 89 Stat. 370, 372 (1975).

60. Federal Rules of Evidence and Criminal Procedure Amendments of 1975, Pub. L. No. 94-149, § 1(9), 89 Stat. 805 (1975).

61. FED. R. EVID. 410. An amendment to Rule 11(e)(6) was enacted in 1979 which more precisely described what evidence of pleas and plea discussions is inadmissible. FED. R. CRIM. P. 11(e)(6) advisory committee's note. At this time, the Advisory Committee again addressed the legislative intent behind these Rules, stating, “this history shows that the purpose of [FED. R. EVID. 410 and FED. R. CRIM. P.] 11(e)(6) is to permit the unrestrained candor which produces effective plea discussions” *Id.*

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

63. See *supra* notes 45-58 and accompanying text.

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

65. See *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706 (1945).

66. *United States v. Mezzanatto*, 115 S. Ct. 797, 801 (1995).

ago, in *Shutte v. Thompson*,⁶⁷ the Court stated, "[a] party may waive any provision, either of a contract or of a statute, intended for his benefit."⁶⁸ While the waiver referred to in *Shutte* was concerned with the protections surrounding a deposition, this language has since been used to justify waivers of several different types of rights and privileges.⁶⁹

Courts have allowed for the waiver of several Constitutional rights, including the Sixth Amendment right to counsel⁷⁰ and right to be present at all stages of a trial,⁷¹ the Fifth Amendment privilege against self-incrimination,⁷² and the Fourth Amendment right against unlawful search and seizure.⁷³ While a prevailing party in a civil rights action is, by statute, eligible for attorney fees, that eligibility may also be waived.⁷⁴ Furthermore, a defendant can waive his privilege against being placed in double jeopardy,⁷⁵ his right to a public trial,⁷⁶ his right to have hearsay evidence precluded from use against him at trial,⁷⁷ and his right to object to documentary evidence if admissibility of that evidence is stipulated to prior to trial.⁷⁸ A defendant waives his rights by making a knowing and voluntary guilty plea,⁷⁹ and by failing to assert his rights at

67. 82 U.S. (15 Wall.) 151 (1873).

68. *Id.* at 159.

69. See *infra* notes 70-81 and accompanying text.

70. See *Faretta v. California*, 422 U.S. 806, 834 (1975); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

71. See *United States v. Gagnon*, 470 U.S. 522, 528 (1985).

72. See *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990).

73. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973); *Segurola v. United States*, 275 U.S. 106, 110-11 (1927).

74. See *Evans v. Jeff D.*, 475 U.S. 717, 730-32 (1986).

75. See *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987); *United States v. Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984).

76. See *Levine v. United States*, 362 U.S. 610, 619 (1960).

77. See *Sac and Fox Indians of Miss. in Iowa v. Sac and Fox Indians of Miss. in Okla.*, 220 U.S. 481, 488-89 (1911).

78. See *United States v. Bonnett*, 877 F.2d 1450, 1458-59 (10th Cir. 1989); *Tupman Thurlow Co. v. S.S. Cap Castillo*, 490 F.2d 302, 309 (2d Cir. 1974); *United States v. Wing*, 450 F.2d 806, 811 (9th Cir. 1971).

79. See *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (stating that a guilty plea waives a defendant's privilege against compulsory self-incrimination, right to jury trial, and right to confront one's accusers).

trial in a timely way.⁸⁰ In sum, "[t]he most basic rights of criminal defendants are similarly subject to waiver."⁸¹

In fact, courts have liberally enforced contracts to alter the Evidence Rules.⁸² "[A] contract to deprive the court of relevant testimony . . . stands on a different ground than one admitting evidence that would otherwise have been barred by an exclusionary rule. One contract is an impediment to ascertaining the facts, the other aids in the final determination of the true situation."⁸³ Accordingly, a defendant may waive a great many privileges and rights both before and during the trial process.⁸⁴

D. *Rules/Rights Which Cannot Be Waived*

While courts have allowed waiver of many rights,⁸⁵ there are a great many circumstances in which waiver is not permitted by the courts.⁸⁶ Waiver can be rendered impermissible by express language in a statute or rule prohibiting a waiver of that statute or rule.⁸⁷ Such an express statement of intent not to allow waiver of a Federal Rule of Evidence or a Federal Rule of Criminal Procedure can indicate Congressional intent to "occupy the field," thereby leaving no question of interpretation to the courts.⁸⁸

In *Smith v. United States*,⁸⁹ the United States Supreme Court discussed an example of an express clause in a statute which prohibits waiver.⁹⁰ The Court, in *Smith*, dealt with the

80. See *Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.").

81. *Peretz v. United States*, 501 U.S. 923, 936 (1991) (questioning whether a waiver could be used so that a magistrate instead of an Article III judge could preside over felony jury trial selection, the Court held "there is no Constitutional infirmity in the delegation of felony trial jury selection to a magistrate when the litigants consent").

82. See Note, *Contracts to Alter the Rules of Evidence*, 46 HARV. L. REV. 138, 142-43 (1933).

83. *Id.* at 142-43.

84. See *supra* notes 70-81 and accompanying text.

85. See *supra* notes 70-81 and accompanying text.

86. See *infra* notes 87-88 and accompanying text.

87. See *United States v. Mezzanatto*, 115 S. Ct. 797, 801-02 (1995).

88. *Id.*

89. 360 U.S. 1 (1959).

90. See *id.*

waiver provision contained in Federal Rule of Criminal Procedure 7(a).⁹¹ In *Smith*, the defendant was charged with transporting a kidnapping victim across state lines, a crime which carried a maximum sentence of death.⁹² Federal Rule of Criminal Procedure 7(a) provided that “[a]n offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information.”⁹³ This rule, therefore, allowed for a waiver of prosecution by indictment, but only in non-capital cases.⁹⁴ The United States Attorney for the case sought and received a waiver of the defendant’s right to indictment, and defendant was sentenced, at the trial court level, to thirty years in prison.⁹⁵ The United States Supreme Court reversed and remanded, holding that “[t]o construe the provisions of the Rule loosely to permit the use of informations where, as here, the charge states a capital offense, would do violence to that Rule”⁹⁶

Federal Rule of Criminal Procedure 43 [hereinafter Rule 43] is another rule which cannot be waived.⁹⁷ Rule 43 requires the presence of a defendant “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.”⁹⁸ However, the continuity of a trial shall not be suspended if the defendant, having been present at the beginning of the trial, is voluntarily absent after the trial has commenced.⁹⁹ In *Crosby v. United States*,¹⁰⁰ the United States Supreme Court considered the issue of whether the government could begin a trial in absentia of a defendant who had fled the jurisdiction.¹⁰¹ The gov-

91. See *id.* at 6.

92. See *id.* at 2.

93. FED. R. CRIM. P. 7(a).

94. See *id.*

95. See *Smith*, 360 U.S. at 3-4.

96. *Id.* at 9.

97. See FED. R. CRIM. P. 43.

98. FED. R. CRIM. P. 43(a).

99. See FED. R. CRIM. P. 43(b)(1).

100. 506 U.S. 255 (1995).

101. See *id.* at 256.

ernment argued that, while Rule 43 did not specifically authorize a trial in absentia, it also did not "purport to contain a comprehensive listing of the circumstances under which the right to be present may be waived."¹⁰² Therefore, the government reasoned, the defendant had waived his right to be present at trial as a result of his flight.¹⁰³ The United States Supreme Court disagreed with the prosecution's argument and stated that the right to be present was considered unwaivable in felony cases, at common law,¹⁰⁴ and that the presence of a defendant at the beginning of trial is necessary to be sure that his absence is knowing and voluntary.¹⁰⁵ Therefore, a defendant cannot waive his right to be present by virtue of not being present at the beginning of trial.¹⁰⁶

The Court, in *Wheat v. United States*,¹⁰⁷ refused to uphold a defendant's waiver of his right to conflict-free counsel.¹⁰⁸ The Court stated that "where a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver, and insist that defendants be separately represented."¹⁰⁹ The Seventh Circuit Court of Appeals has agreed that there are limitations as to what waivers the courts should allow.¹¹⁰ As the court humorously stated, "[n]o doubt there are limits to waiver; if the parties stipulated to trial by [twelve] orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept."¹¹¹

102. *See id.* at 258 (quoting Brief for United States at 16, *Crosby v. United States*, 506 U.S. 255 (1993) (No. 91-6194)).

103. *See id.*

104. *See id.*

105. *See id.* at 259.

106. *Crosby v. United States*, 506 U.S. 255, 262 (1995).

107. 486 U.S. 153 (1988).

108. *See id.* at 164.

109. *Id.* at 162.

110. *See United States v. Josefik*, 753 F.2d 585 (7th Cir. 1985). The defendant in *Josefik* agreed to waive the provisions of Federal Rule of Criminal Procedure 24(c) and allow an excused alternate juror to deliberate; the court upheld the defendant's conviction in a later challenge to the waiver since there was not any prejudice to him in this instance. *See id.* at 587.

111. *Id.* at 588.

While the presence of an express clause in a rule can make waiver unavailable, waiver will also be prohibited in instances where the legislative history of a statute or rule evidences intent not to allow waiver.¹¹² In *Brooklyn Savings Bank v. O'Neil*,¹¹³ the structure and legislative history of the Fair Labor Standards Act¹¹⁴ made unwaivable particular statutory entitlements guaranteed to employees because the entitlements evinced a specific "legislative policy" of "prevent[ing] private contracts" on such matters.¹¹⁵ William O'Neil was employed for two years as a night watchman for Brooklyn Savings Bank.¹¹⁶ The hours he worked entitled him to overtime compensation under the Fair Labor Standards Act.¹¹⁷ No such compensation was paid to him during the term of his employment.¹¹⁸ Over two years after O'Neil left his job, Brooklyn Savings Bank calculated what they owed to O'Neil under the terms of the Act, and offered him a check in exchange for a waiver of any rights he had under the Act.¹¹⁹ O'Neil agreed to the Bank's offer, accepted the check, and signed the release given to him.¹²⁰ The check amount did not include any compensation for liquidated damages arising from Brooklyn Savings Bank's failure to timely pay the overtime wages.¹²¹

O'Neil brought an action in New York City Municipal Court to recover the liquidated damages due to him under the Act.¹²² His complaint was dismissed by that court because he "failed to prove a cause of action" and because he had "released any claim for liquidated damages or counsel fees."¹²³ This decision was reversed by the Appellate Term, which held that O'Neil was an employee within the meaning of the Act, and, as such, he was entitled to recover compensation resulting from his employer's

112. See *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 712-13 (1945).

113. 324 U.S. 697 (1945).

114. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (1938) (current version at 29 U.S.C. § 201 (1995)).

115. *Brooklyn Savings Bank*, 324 U.S. at 706.

116. See *id.* at 699.

117. See *id.* at 699-700.

118. See *id.* at 700.

119. See *id.*

120. See *id.*

121. See *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 700 (1945).

122. See *id.*

123. *Id.*

failure to make overtime payments to him as required by the Act.¹²⁴ The holding of the Appellate Term was affirmed by the New York Appellate Division¹²⁵ and by the New York Court of Appeals,¹²⁶ and the United States Supreme Court granted certiorari¹²⁷ to determine "whether the respondent's release of all further claims and damages under the Act, given at the time he received payment of the overtime compensation due under the Act, is a defense to an action subsequently brought solely to recover liquidated damages."¹²⁸

The Court preliminarily determined that O'Neil's relinquishment of his right to make a claim under the Act for the liquidated damage amount constituted a waiver of his right rather than acceptance of a settlement offer for a dispute over the amount to be paid.¹²⁹ The Court, having decided that O'Neil's actions were a waiver of his rights under the Act, turned to the question of whether or not such a waiver was permissible.¹³⁰

It has been held in this and other courts 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. 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. With respect to private rights created by a federal statute, . . . the question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute.¹³¹

124. *See id.* at 700-01.

125. *O'Neil v. Brooklyn Savings Bank*, 267 A.D. 317, 46 N.Y.S.2d 631 (1943).

126. *O'Neil v. Brooklyn Savings Bank*, 293 N.Y. 666, 56 N.E.2d 259 (1944).

127. *Brooklyn Savings Bank v. O'Neil*, 323 U.S. 698 (1944).

128. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 701 (1945).

129. *See id.* at 703. This question of whether the release was given by O'Neil "in settlement of a bona fide dispute between the parties with respect to coverage or amount due under the Act or whether it constituted a mere waiver of his right to liquidated damages" was not determined by the trial court or any of the other state courts. *Id.* The United States Supreme Court's finding that the release given by O'Neil was not in exchange for a settlement offer, but instead constituted a "mere waiver" allowed them to address the question of whether such a waiver of O'Neil's right to liquidated damages could be upheld. *See id.* at 703-04.

130. *See id.* at 704.

131. *Id.* at 704-05 (citations omitted) (footnote omitted).

The Court in *Brooklyn* found that “[n]either the statutory language, the legislative reports nor the debates indicates that the question [of whether or not this right may be waived] was specifically considered and resolved by Congress.”¹³² The Court further stated that “[i]n the absence of evidence of specific Congressional intent, it becomes necessary to resort to a broader consideration of the legislative policy behind this provision as evidenced by its legislative history and the provisions in and structure of the Act.”¹³³ Reviewing the legislative history of the Fair Labor Standards Act, the Court found that Congress’ intent in creating the Act was to protect segments of the population from potential exploitation by employers.¹³⁴

The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce.¹³⁵

The Court further stated that “[t]o permit an employer to secure a release from the worker who needs his wages promptly will tend to nullify the deterrent effect which Congress plainly intended that [Section] 16(b) [of the Fair Labor Standards Act] should have.”¹³⁶ Allowing contracts whereby a party’s rights are waived “approximates situations where courts have uniformly held that contracts tending to encourage violation of laws are void as contrary to public policy.”¹³⁷ Petitioner Brooklyn Savings Bank argued that in other instances where waivers of rights have been prohibited, there has been a specific provision in the acts or statutes in question which prohibited a waiver of those rights.¹³⁸ Therefore, as the Fair Labor Standards Act does not speak to waivability of its provisions, waiver should not be prohibited.¹³⁹ The Court’s response to this argument was that “[t]here is no indication why Congress did not

132. *Id.* at 705-06 (footnotes omitted).

133. *Id.* at 706.

134. *See* Brooklyn Savings Bank v. O’Neil, 324 U.S. 697, 706 (1945).

135. *Id.* at 706-07 (footnote omitted).

136. *Id.* at 709-10.

137. *Id.* at 710 (footnote omitted).

138. *See id.* at 712.

139. *See id.*

embody a similar provision in the Act under consideration in this case. Absence of such provisions, however, has not prevented the courts from invalidating waivers where the legislative policy would be thwarted by permitting such contracts."¹⁴⁰

In sum, there is an assumption by the United States Supreme Court that the Federal Rules of Evidence and Criminal Procedure are presumptively waivable, and to rebut that presumption there must be a showing that a specific rule is not waivable.¹⁴¹ An express provision in a rule stating that waiver of that rule is not permitted would evidence this.¹⁴² In the absence of such a provision stating that the right or privilege contained therein is not subject to waiver, a court must look to the legislative intent behind the rules.¹⁴³

E. *Evidence of Legislative Intent To Counter Judicial Intervention*

It is Congress' job to make the rules and the courts' job to enforce those rules.¹⁴⁴ In *Tennessee Valley Authority v. Hill*,¹⁴⁵ the petitioner allegedly sought to circumvent the Endangered Species Act¹⁴⁶ and complete erection of a dam in an area designed to protect wildlife.¹⁴⁷ In reviewing the Act, the Court stated "[o]ur individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned . . . the judicial process comes to an end."¹⁴⁸

140. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 713 (1945).

141. *See United States v. Mezzanatto*, 115 S. Ct. 797, 801 (1995).

142. *See, e.g.*, FED. R. CRIM. P. 7(a); *see supra* notes 89-96 and accompanying text.

143. *Brooklyn Savings Bank*, 324 U.S. at 706.

144. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.").

145. 437 U.S. 153 (1978).

146. Endangered Species Act of 1973, Pub. L. No. 93-205, §§ 2-15, 17, 87 Stat. 884 (1973) (current version at 16 U.S.C. § 1531 (1995)).

147. *See Hill*, 437 U.S. at 162.

148. *Id.* at 194.

The United States Supreme Court again held in *Touche Ross & Co. v. Redington*¹⁴⁹ that “[t]he ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.”¹⁵⁰ Thus, when a rule is silent or ambiguous a court must look to the intent behind the rule to determine Congress’ reasoning rather than attempt to usurp the legislature’s authority.¹⁵¹ Evidence of congressional intent is often found in the Advisory Committee’s Notes to the Federal Rules,¹⁵² and in the conference or committee reports.¹⁵³ In the introduction immediately preceding the Federal Rules of Evidence, the late Edward Cleary, Reporter to the Advisory Committee for the Federal Rules of Evidence, stated that “[t]he involved congressional committees and subcommittees were thoroughly familiar with the Notes, and except where changes were made in the rules, the Notes should be taken as the equivalent of a congressional committee report as representing the thinking of Congress.”¹⁵⁴ He further stated:

[q]uestions as to what a rule really means present probably the most basic problem of interpretation. The language of the rule itself should be taken as the prime source of meaning, read in the light of such context as may be relevant. The most relevant context will often be legislative history, which on occasion may override an apparently plain and unmistakable meaning of the words of the rule. The result may be startling, as when the Court of Appeals for the District of Columbia Circuit concluded that a conviction for attempted burglary used for impeachment under Rule 609(a) did not involve dishonesty as the language was used in the rule. Yet the opposite conclusion would have been most difficult to reach in view of the legislative history of the rule.¹⁵⁵

149. 442 U.S. 560 (1979).

150. *Id.* at 578.

151. *See Brooklyn Savings Bank*, 324 U.S. at 706.

152. *See Williamson v. United States*, 114 S. Ct. 2431, 2442 (1994) (Kennedy, J., concurring).

153. *See, e.g., Northeast Bancorp v. Board of Governors of the Fed. Reserve System*, 472 U.S. 159, 170 (1985) (stating that conference or committee reports indicate legislative intent).

154. Edward W. Cleary, *Introduction to FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES* at iv (1984).

155. *Id.* at v (footnotes omitted).

Justice Kennedy's concurring opinion in *Williamson v. United States*¹⁵⁶ discussed the United States Supreme Court's recognition of Advisory Committee Notes for use as evidence of legislative intent.¹⁵⁷

When as here the text of a Rule of Evidence does not answer a question that must be answered in order to apply the Rule, and when the Advisory Committee Note does answer the question, our practice indicates that we should pay attention to the Advisory Committee Note. We have referred often to those Notes in interpreting the Rules of Evidence, and I see no reason to jettison that well-established practice here.¹⁵⁸

In *Hudleston v. United States*,¹⁵⁹ the Court looked to the Advisory Committee's Notes for guidance in the interpretation of Federal Rule of Evidence 404(b) [hereinafter Rule 404(b)].¹⁶⁰ The petitioner in that case asked the Court to read Rule 404(b) as mandating a preliminary showing that evidence to be introduced is for a proper purpose before it can be concluded that the trial court should introduce it at trial.¹⁶¹ The rule contained nothing in its text to intimate such a reading, and so the Court looked to the Advisory Committee Notes for guidance.¹⁶² The Advisory Committee specifically declined to comment on this and stated that "the trial court should assess such evidence under the usual rules for admissibility."¹⁶³ The Court then concluded that such a reading was "simply inconsistent with the legislative history behind Rule 404(b)."¹⁶⁴

Similarly, in the case of *United States v. Owens*,¹⁶⁵ the United States Supreme Court noted that the Advisory Committee Notes to the Rules evidenced that Congress was aware of a problematic evidentiary issue, and that Congress declined to make an exception to Federal Rule of Evidence 801(d)(1)(C)

156. 114 S. Ct. 2431 (1994).

157. *See id.* at 2442 (Kennedy, J., concurring).

158. *Id.*

159. 485 U.S. 681 (1988).

160. *See id.*

161. *See id.* at 686-87.

162. *See id.* at 687-88.

163. *Id.* at 688.

164. *Id.*

165. 484 U.S. 554 (1988).

[hereinafter Rule 801(d)(1)(C)] in order to resolve the issue.¹⁶⁶ Under Rule 801(d)(1)(C), a prior statement identifying a person is not hearsay if the declarant is "subject to cross-examination concerning the statement."¹⁶⁷ In *Owens*, a corrections guard who was allegedly attacked by respondent Owens was unable to respond at trial to cross-examination questions concerning the attack, due to memory loss caused by his injuries.¹⁶⁸ Respondent Owens argued that since, due to memory loss, the declarant in this case was unable to explain the basis for his identification of the respondent, the identification should be considered hearsay and excluded from use at trial.¹⁶⁹ The Court disagreed, stating that the declarant *was* subject to cross-examination at trial, and that an assertion of memory loss "can be effective in destroying the force of the prior statement."¹⁷⁰ The Court further noted that Congress was aware of the problem of "witness forgetfulness of an underlying event," since they defined unavailability of a witness in Rule 804(a)(3) to encompass situations where a declarant "testifies to a lack of memory of the subject matter of [his] statement."¹⁷¹ However, the Court noted, Congress chose not to write a similar provision into Rule 801.¹⁷² "The reasons for that choice are apparent from the Advisory Committee's Notes on Rule 801 and its legislative history Thus, despite the traditional view that such statements were hearsay, the Advisory Committee believed that their use was to be fostered rather than discouraged."¹⁷³

Committee reports, too, represent the thoughts and intent of Congress, as "[a] committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation."¹⁷⁴ In fact, the United States Supreme Court has stated, in dicta, "[t]he most

166. See *id.* at 562.

167. FED. R. EVID. 801(d)(1)(C).

168. See *Owens*, 484 U.S. at 556.

169. See *id.* at 561.

170. *Id.* at 562.

171. *Id.* (citing FED. R. EVID. 804(a)(3)).

172. See *id.* at 562.

173. *Id.*

174. *Zuber v. Allen*, 396 U.S. 168, 186 (1969).

dependable sources of legislative intent are the reports of the responsible committees.”¹⁷⁵

F. *Rule 410 and 11(e)(6) - Can They Be Waived?*

As stated above, Rule 410 and Rule 11(e)(6) make no express mention of waiver in their text.¹⁷⁶ Therefore, absent a showing that these Rules are exempt from the general rule, that rules and statutes are presumptively waivable by those that would benefit from them,¹⁷⁷ waiver should be upheld.¹⁷⁸ In the case of plea bargaining rules, however, a great deal has been written as to the legislative intent behind the promulgation of these Rules,¹⁷⁹ which the United States Supreme Court in *Mezzanatto* found unpersuasive.¹⁸⁰

The Advisory Committee Notes to the Rules do not expressly discuss waiver.¹⁸¹ The Advisory Committee Notes do state quite clearly, however, that “[e]xclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise.”¹⁸² Additionally, the Conference Committee expressly rejected the language offered by the Senate when the Rules were promulgated which would have allowed an exception to the Rules so that a defendant’s credibility could be impeached.¹⁸³ As was noted by the American Bar Association commentary, a rule contrary to the one adopted by Congress “would discourage plea negotiations and agreements, for defendants would have to be constantly concerned whether, in light of their plea negotiation activities, they could success-

175. *North Haven Bd. of Educ. v. Bell*, Secretary of Educ., 456 U.S. 512, 548 at n.11 (1982) (Powell, J., dissenting).

176. See *supra* notes 3-4, 62-65 and accompanying text.

177. See *supra* Part II.C.

178. See *United States v. Mezzanatto*, 115 S. Ct. 797, 801 (1995).

179. See *infra* notes 181-99 and accompanying text; see *supra* notes 48-58 and accompanying text.

180. See *Mezzanatto*, 115 S. Ct. at 805 n.5.

181. See FED. R. EVID. 410 advisory committee’s notes; FED. R. CRIM. P. 11(e)(6) advisory committee’s notes.

182. FED. R. EVID. 410 advisory committee’s notes; FED. R. CRIM. P. 11(e)(6) advisory committee’s notes (quoting FED. R. EVID. 410 advisory committee’s notes).

183. See FED. R. EVID. 410 advisory committee’s notes; FED. R. CRIM. P. 11(e)(6) advisory committee’s notes; see *supra* notes 57-58 and accompanying text.

fully defend on the merits if a plea ultimately was not entered.”¹⁸⁴

Circuit courts have addressed the issue of the use of plea statements for impeachment purposes since the promulgation of the Rules.¹⁸⁵ The Eighth Circuit, in *United States v. Verdoorn*,¹⁸⁶ faced this issue when two appellants argued that the trial court erred in not allowing them to show that all of the defendants had been offered sentence reductions in exchange for their testimony against co-conspirators.¹⁸⁷ The appellants believed that such a showing would have “challenge[d] the credibility of the government’s entire case, i.e., disclose[d] the lengths to which the government [would have gone] in attempting to obtain vital testimony to prosecute its case,” and therefore, evidence of the offer of a plea bargain was improperly excluded.¹⁸⁸ The Court of Appeals disagreed, noting that the then-recently promulgated Rule 11(e)(6) forbade admissibility of offers to plea.¹⁸⁹ “If such a policy is to be fostered, it is essential that plea negotiations remain confidential to the parties if they are unsuccessful,” stated the court.¹⁹⁰ “Meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence.”¹⁹¹

The Second Circuit spoke on this issue in *United States v. Lawson*,¹⁹² where the government used plea negotiation statements to impeach defendant Lawson’s testimony at trial.¹⁹³ The Second Circuit Court of Appeals, in deciding whether or not plea bargain statements were incorrectly admitted, stated that “[w]e are aided in resolving this question by an unusually clear legislative history. In considering these rules, Congress debated and rejected proposals that statements made in connection with an offer to plead guilty be available for impeachment

184. ABA Standards for Criminal Justice 14-3.4, commentary at 90 (2d ed. 1980).

185. See *infra* notes 186-95.

186. 528 F.2d 103 (8th Cir. 1976).

187. See *id.* at 107.

188. *Id.*

189. See *id.*

190. *Id.*

191. *Id.*

192. 683 F.2d 688 (2d Cir. 1982).

193. See *id.* at 691.

purposes.”¹⁹⁴ After a lengthy discussion of the legislative history of the Rules, the court declared, “[w]e regard this legislative history as demonstrating Congress’ explicit intention to preclude use of statements made in plea negotiations for impeachment purposes.”¹⁹⁵

Treatises, too, have commented on the subject. LaFave and Israel, in their text *Criminal Procedure*, stated that waiver of the exclusionary provisions of the Rules could have a “chilling effect” on the entire plea bargaining process.¹⁹⁶ Additionally, the well-regarded treatise, *Federal Practice and Procedure*,¹⁹⁷ by Wright & Graham, oft quoted by the United States Supreme Court in its opinion in *United States v. Mezzanatto*,¹⁹⁸ stated:

[a]t common law and under the original version of Rule 410, plea-connected statements could be used as prior inconsistent statements to impeach the person who made the plea. Some courts also permitted pleas to be used for this purpose. Although it might be argued that the use of the evidence for this purpose is not substantive and therefore is not “against” the person who made the plea, the legislative history makes it clear beyond any doubt that Congress, in deleting the impeachment provision from the original rule, intended that Rule 410 should bar the use of pleas and plea related statements for impeachment.¹⁹⁹

Thus, although the Rules do not expressly address the issue of waiver in their text, there is a great deal of legislative history to indicate that Congress carefully considered the particular circumstances wherein statements made during the course of plea negotiations should be admissible. Congress’ rejection of the Senate proposal, coupled with the inclusion in the Rules of a remedy allowing for punishment of a perjuring defendant, demonstrated, to many, Congress’ clear intent not to allow plea negotiation statements to be used against a defendant at trial.

194. *Id.* at 692.

195. *Id.* at 692-93.

196. LAFAVE & ISRAEL, *supra* note 36, § 20.2, at 611.

197. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* (1980).

198. 115 S. Ct. 797 (1995).

199. 23 WRIGHT & GRAHAM, *supra* note 197, § 5349, at 416.

III. United States v. Mezzanatto

In August, 1991, Gary Mezzanatto was arrested in the state of California and charged with possession of methamphetamine, a narcotic substance.²⁰⁰ Approximately two months later, Mr. Mezzanatto and his attorney requested a meeting with the prosecutor to discuss the possibility of a plea bargain in exchange for Mezzanatto's cooperation with the government.²⁰¹ The prosecutor agreed, but on the condition that Mezzanatto sign an agreement stating that any statements made during the plea negotiations could be used to impeach any contradictory testimony given at trial, should the case proceed that far.²⁰² After conferring with his attorney, Mr. Mezzanatto agreed to the prosecution's terms and made a statement.²⁰³ The prosecutor and Mr. Mezzanatto failed to reach an agreement during the plea negotiations and the case proceeded to trial before the United States District Court for the Southern District of California.²⁰⁴

As part of his defense at trial, Mezzanatto took the stand to testify.²⁰⁵ His testimony was inconsistent with certain statements made during the plea negotiations, and, over defense counsel's protestation, the court allowed the prosecution to introduce relevant portions of Mezzanatto's plea account to contradict his testimony and impeach him.²⁰⁶ Mezzanatto was found guilty by the trial court, and was sentenced to 170 months in prison.²⁰⁷ Defense counsel filed an appeal, and the case was heard by the Ninth Circuit Court of Appeals.²⁰⁸

The Ninth Circuit Court of Appeals held that Mr. Mezzanatto could not waive his protection against admission of statements he made during plea negotiations.²⁰⁹ The Court of Appeals further held that it was not harmless error for the trial

200. United States v. Mezzanatto, 115 S. Ct. 797, 800 (1995).

201. *See id.*

202. *See id.*

203. *See id.*

204. *See id.*

205. *See id.*

206. *See* United States v. Mezzanatto, 115 S. Ct. 797, 800-01 (1995).

207. *See id.* at 801.

208. *See* United States v. Mezzanatto, 998 F.2d 1452 (9th Cir. 1993), *rev'd*, 115 S. Ct. 797 (1995).

209. *See id.* at 1456.

court to allow the prosecution to impeach Mezzanatto with statements made during the course of plea negotiations.²¹⁰ As a result of the decision, the case was reversed and remanded.²¹¹

After providing a brief summary of the facts and the holding of the trial court, the majority opinion, written by Circuit Judge Sneed, analyzed the scope of the Rules.²¹² The court found that neither of the two exceptions to otherwise absolute Rules provide for the use of such statements for impeachment.²¹³ The court also examined the legislative history of the Rules and determined that "Congress unmistakably did not want statements made during plea negotiations to be used to impeach defendants."²¹⁴ The majority opinion did not, however, turn solely on Congressional intent. For the majority, the issue was whether or not the protections afforded by the Rules could be waived.²¹⁵

The Ninth Circuit Court of Appeals held that the Rules could not be waived by a defendant.²¹⁶ According to this court, the prohibition against the admission of plea negotiation statements had to be analyzed "in the broader context of the criminal justice system."²¹⁷ The majority declared that the Rules "were designed to promote plea agreements by encouraging frank discussion."²¹⁸ If the Rules were subject to waiver, "[m]eaningful dialogue between the parties would, as a practical matter, be impossible."²¹⁹ To allow the government to enforce its waiver agreement would contravene the policy of efficient case resolution that the Rules were originally designed to achieve and thus subvert legislative intent on the subject.²²⁰ The Ninth Circuit relied on the United States Supreme Court's reasoning in

210. *See id.*

211. *See id.*

212. *See id.* at 1454.

213. *See id.*; *see supra* note 41 and accompanying text.

214. *United States v. Mezzanatto*, 998 F.2d 1452, 1454 (9th Cir. 1993), *rev'd*, 115 S. Ct. 797 (1995).

215. *See id.*

216. *See id.* at 1456.

217. *Id.* at 1454.

218. *Id.*

219. *Id.* at 1455 (quoting *United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976)).

220. *See United States v. Mezzanatto*, 998 F.2d 1452, 1455 (9th Cir. 1993), *rev'd*, 115 S. Ct. 797 (1995).

Brooklyn Savings Bank v O'Neil,²²¹ stating that "[a]llowing a waiver of these rules would contravene and thwart the policy — efficient case resolution through plea bargaining — these rules were designed to effectuate."²²² The Ninth Circuit quoted the language used by the *Brooklyn* Court, "[w]here 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."²²³

Furthermore, the majority determined that while other rights could be waived during the plea bargaining process,²²⁴ the Rules are an inherent part of the negotiating system itself.²²⁵ The waiver of the Rules would do damage to the system created by Congress and the United States Supreme Court.²²⁶ "[The Rules] do not guarantee substantive rights so much as they guarantee fair procedure," stated the Ninth Circuit.²²⁷ The majority reasoned that in the absence of Congressional mandate, courts are not free to write a waiver into a waiverless rule.²²⁸

To write in a waiver in a waiverless rule promulgated by the Supreme Court and Congress, on the other hand, is not an inescapable duty. It more resembles unwelcome advice. Given the precision with which these [R]ules 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.²²⁹

221. 324 U.S. 697 (1945).

222. *Mezzanatto*, 998 F.2d at 1455 n.3.

223. *Id.* (quoting *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1945)).

224. *See id.* at 1456. The right to pursue a civil remedy in exchange for a dismissal of all criminal charges may be waived. *See id.* at 1455 (citing *Newton v. Rumery*, 480 U.S. 386, 492-98 (1987) (plurality opinion)). The right to appeal may also be waived. *See id.* at 1455-56 (citing *Navarro-Botello*, 912 F.2d 318, 319-20 (9th Cir. 1990)).

225. *See Mezzanatto*, 998 F.2d at 1456.

226. *See id.* at 1455. The Ninth Circuit Court of Appeals stated, "meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence." *Id.* (quoting *Verdoorn*, 528 F.2d at 107).

227. *Id.* at 1456.

228. *See id.*

229. *Id.*

Finally, the court held that “the government should not be given the ability to extract a waiver of these [R]ules from a defendant who is in a weak bargaining position.”²³⁰ Such power would invite prosecutorial abuse²³¹ and act as a deterrent to a defendant who would otherwise freely enter into a plea bargain, thereby frustrating the policy intended by the Rules.²³²

In his dissent, Chief Justice Wallace began by listing a series of the fundamental Constitutional rights and protections that a criminal defendant may waive.²³³ “Against this backdrop,” he then stated, “the majority create[d], without the assistance of precedent, a per se rule which invalidates any and all waivers of the protections afforded not by such basic and fundamental rights, but by [the Rules.]”²³⁴ Judge Wallace further pointed out that the majority opinion summarily ignored the issue of whether Mezzanatto’s waiver was knowing and voluntary.²³⁵

The remainder of the dissenting opinion analyzed and rejected the three bases upon which the majority arrived at its conclusion: (1) “that to allow waiver would subvert the policies advanced by the Rules,” (2) that writing a waiver into the Rules would amount to “unwelcome advice” and (3) “that the availa-

230. *Id.*

231. *See* United States v. Mezzanatto, 998 F.2d 1452, 1455-56 (9th Cir. 1993), *rev’d*, 115 S. Ct. 797 (1995).

232. *See id.* at 1456.

233. *See id.* (Wallace, C.J., dissenting). In his opinion, Judge Wallace stated that “[a] criminal defendant may waive the most fundamental rights and protections afforded him or her by the Constitution or a statute.” *Id.* (citing *Peretz v. United States*, 501 U.S. 923, 936 (1991); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990)).

A defendant, for example, may knowingly and voluntarily waive the Fourth Amendment right to be free from warrantless searches, the Fifth Amendment privilege against self-incrimination, the Sixth Amendment rights to counsel, to a jury trial, and to confront and cross-examine witnesses, and the statutory rights to appeal, and to pursue valid civil rights claims against government officials. A defendant, by failing to object at trial, also may implicitly waive his or her Fourth Amendment right against unlawful search and seizure, Fifth Amendment privilege against self-incrimination, and against being placed in double jeopardy, and Sixth Amendment rights to be present at all stages of trial, and to a public trial.

Id. at 1456-57 (citations omitted).

234. *Id.* at 1457.

235. *See id.*

bility of waivers would tempt governmental abuse.”²³⁶ Judge Wallace concluded that these bases do not support the majority’s position, and that there is no rational basis for distinguishing the plea statement Rules from any of the more fundamental Constitutional rights which have already been found to be subject to waiver.²³⁷

The United States Supreme Court granted the prosecutor’s petition for certiorari²³⁸ and, by a seven to two vote, reversed the Ninth Circuit and remanded.²³⁹ The Court held that waiver of the exclusionary provisions of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) is available with a showing that the defendant knowingly and voluntarily made the decision to waive.²⁴⁰

The majority opinion, written by Justice Clarence Thomas, stated that the Ninth Circuit’s finding that a waiver is presumptively unavailable is contrary to the Court’s past decisions allowing waiver of statutory as well as Constitutional rights.²⁴¹ The Court noted that cases interpreting the Federal Rule of Criminal Procedure have held that waiver is presumptively available and that evidentiary rules can also be waived.²⁴² Stipulations regarding evidence are a regular occurrence in trial practice, and serve an important purpose and function.²⁴³

By finding a “background presumption”²⁴⁴ that all rules are waivable in the absence of “some affirmative indication of Congress’ intent to preclude waiver,”²⁴⁵ the Court decided that Mezzanatto bore the burden of showing why the provisions of the Rules should not be waivable.²⁴⁶ Respondent Mezzanatto, in response to the burden imposed upon him, raised three argu-

236. *Id.* (quoting *Mezzanatto*, 998 F.2d at 1455-56).

237. *See* *United States v. Mezzanatto*, 998 F.2d 1452, 1456, 1457 (9th Cir. 1993) (Wallace, C.J., dissenting), *rev’d*, 115 S. Ct. 797 (1995).

238. *See* *United States v. Mezzanatto*, 998 F.2d 1452 (9th Cir. 1993), *cert. granted*, 114 S. Ct. 1536 (1994).

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

240. *See id.* at 806.

241. *See id.* at 801.

242. *See id.* at 801-02.

243. *See id.* at 802.

244. *Id.* at 803.

245. *United States v. Mezzanatto*, 115 S. Ct. 797, 801 (1995).

246. *Id.* at 803.

ments for why these Rules should not be allowed to be waived by a defendant.²⁴⁷

Mezzanatto first asserted "that the plea statement rules establish a 'guarantee [to] fair procedure' that cannot be waived."²⁴⁸ In response to this argument, the majority agreed that some things may not be waived and that there are limits to waiver.²⁴⁹ However, the Court found this argument to be unpersuasive, stating that enforcement of an agreement like the one made between Mezzanatto and the prosecution here would not "discredit the federal courts."²⁵⁰ To the contrary, the majority felt that enforcement of such an agreement by allowing plea-related statements to be used for impeachment purposes at a trial would enhance the ability of the courts to seek the truth, and would result in more accurate verdicts.²⁵¹

Justice Thomas stated that the Rules create a privilege belonging to a defendant²⁵² which, like other evidentiary privileges, can be waived or varied by a defendant.²⁵³ Justice Thomas further pointed out that, while the Rules provide that statements made by a defendant during a plea negotiation are not admissible against that defendant, the Rules do not bar a defendant from offering those same statements into evidence for his own advantage.²⁵⁴ The majority opinion viewed this aspect of the Rules as evidence that Congress, in adopting the Rules, anticipated "a degree of party control that is consonant with the background presumption of waivability."²⁵⁵ The Court then noted that the Ninth Circuit had relied on *Brooklyn Savings*

247. *See id.* at 803-06.

248. *Id.* at 803 (quoting Brief for Respondent at 12, *United States v. Mezzanatto*, 115 S. Ct. 797 (1995) (No. 93-1340)).

249. *See id.* Justice Thomas explained that a court can refuse a defendant's relinquishment of his right to conflict-free legal representation. *See id.* (citing *Wheat v. United States*, 486 U.S. 153, 162 (1988)). Thomas also quoted *United States v. Josefik*, 753 F.2d 585 (7th Cir. 1985), to explain that there are limits to waiver. *See id.* For the full quotation from *United States v. Josefik*, see *supra* notes 110-11 and accompanying text.

250. *See Mezzanatto*, 115 S. Ct. at 803 (quoting 21 CHARLES ALAN WRIGHT & KENNETH GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* § 5039, at 207-08 (1977)).

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

252. *Id.*

253. *See id.* at 803-04.

254. *See id.* at 804.

255. *Id.*

Bank v. O'Neil,²⁵⁶ but stated that *Brooklyn* "is easily distinguishable in this regard."²⁵⁷

Brooklyn Savings Bank held that certain statutory entitlements guaranteed to employees by the Fair Labor Standards Act were unwaivable because the structure and legislative history of the Act evinced a specific "legislative policy" of "prevent[ing] private contracts" on such matters. Respondent has identified nothing in the structure or history of the plea-statement Rules that suggests that they were aimed at preventing private bargaining; in fact, the above discussion suggests that the Rules adopt a contrary view.²⁵⁸

Mezzanatto's second argument was that "waiver is fundamentally inconsistent with the Rules' goal of encouraging voluntary settlement."²⁵⁹ When faced with the prospect of waiving his rights to have plea negotiation statements kept inadmissible, a defendant may forego participation in a plea discussion.²⁶⁰ "[E]nforcement of waiver agreements," argued Mezzanatto, "acts 'as a brake, not as a facilitator, to the plea-bargain process.'"²⁶¹ The majority noted that this fear of a "chilling effect" was of primary concern to the Ninth Circuit in its decision.²⁶² The Court found that the Ninth Circuit was concerned with the incentives of a defendant to bargain, but did not show the same concern for the other party to the transaction, the prosecution.²⁶³ Justice Thomas stated that while some defendants may be discouraged from negotiation when faced with a waiver, some prosecutors might be unwilling to bargain in its absence.²⁶⁴ This is particularly true in a situation where a prosecutor is searching for information which a defendant can provide in a criminal investigation, and a plea negotiation is offered in the context of cooperation.²⁶⁵ Because a prosecutor

256. 324 U.S. 697 (1945).

257. *Mezzanatto*, 115 S. Ct. at 804 n.4.

258. *Id.* (citations omitted).

259. *Id.* at 804.

260. *See id.*

261. *Id.* (citing Brief for Respondent at 23 n.17, *United States v. Mezzanatto*, 115 S. Ct. 797 (1995) (No. 93-1340)).

262. *Id.* (citing *Mezzanatto*, 998 F.2d at 1455).

263. *See United States v. Mezzanatto*, 115 S. Ct. 797, 804 (1995).

264. *See id.*

265. *See id.*

must know that the testimony will be credible,²⁶⁶ a prosecutor may insist on the ability to impeach a defendant for providing false statements.²⁶⁷ In the absence of a waiver agreement, the majority noted, prosecutors might never even enter the plea negotiations; therefore, it is not persuasive to suggest that waiver of the Rules would discourage voluntary settlement.²⁶⁸ "In sum, there is no reason to believe that allowing negotiation as to waiver of the plea-statement Rules will bring plea bargaining to a grinding halt; it may well have the opposite effect."²⁶⁹

Lastly, Mezzanatto asserted "that waiver agreements should be forbidden because they invite prosecutorial overreaching and abuse."²⁷⁰ Because of the extreme disparity in the bargaining power of the parties in a plea negotiation, Mezzanatto argued, a waiver agreement would be "inherently unfair and coercive."²⁷¹ The majority's response was that this would be an unfair assumption.²⁷² Just because there is a mere potential for prosecutorial abuse, the bargaining process should not stop altogether.²⁷³ To counter Mezzanatto's forecast of exploitation, the Court decided that the proper response, rather than forbidding a defendant from waiving his exclusionary rights, is to scrutinize each case to determine whether the waiver agreement was fraudulent or coerced.²⁷⁴ In conclusion, the Court held 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."²⁷⁵

Justice Ginsburg wrote the concurring opinion and was joined by Justices O'Connor and Breyer.²⁷⁶ She succinctly restated the Court's holding as a finding that "allowing the Government to impeach [a defendant] with statements made during

266. *See id.*

267. *See id.*

268. *See id.* at 805.

269. *United States v. Mezzanatto*, 115 S. Ct. 797, 805 (1995).

270. *Id.*

271. *Id.* (quoting Brief for Respondent at 26, *United States v. Mezzanatto*, 115 S. Ct. 797 (1995) (No. 93-1340)).

272. *See id.* at 806.

273. *See id.*

274. *See id.*

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

276. *See id.* (Ginsburg, J., concurring).

plea negotiations is compatible with Congress' intent to promote plea bargaining."²⁷⁷ Justice Ginsburg's purpose in writing, however, was to emphasize that this ruling allows only for use of the defendant's statements for impeachment purposes.²⁷⁸ She further suggested that a waiver to allow such statements to be used in a prosecution's case-in-chief might more severely inhibit a defendant from attempting to negotiate a plea, and such a use would be contrary to the legislative intent behind the Rules.²⁷⁹ However, since the government had not attempted to use Mezzanatto's statements in such a fashion, Justice Ginsburg declined to explore this idea further.²⁸⁰

Justice Souter's dissent, joined by Justice Stevens, suggested that the question that the Court should have answered in this case was whether Congress intended "to create a personal right subject to waiver by its individual beneficiaries" when the Rules were adopted, and not whether respondent Mezzanatto had met his burden of showing why the Rules should not be waived.²⁸¹ Justice Souter stated that the majority reached its decision not by answering the question of whether or not Congress intended for this particular rule to be waived, but by relying "on the general presumption in favor of recognizing waivers of rights, including evidentiary rights."²⁸² Justice Souter agreed with the majority that there is a presumption of waivability of rights and privileges and that it is a sound policy, but he further stated that where waiver of a right or privilege conflicts "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."²⁸³

The majority assumption, stated Justice Souter, appeared to be that the only instances in which waiver of a right or privilege would be foreclosed is where a rule expressly allows for waiver in its text.²⁸⁴ Accordingly, since there was no mention of

277. *Id.*

278. *See id.*

279. *See id.*

280. *See id.*

281. *United States v. Mezzanatto*, 115 S. Ct. 797, 806 (1995) (Souter, J., dissenting).

282. *Id.* at 807.

283. *Id.* at 806.

284. *See id.* at 807.

waiver in the text of the Rules in question here, the majority upheld the contract between Mezzanatto and the prosecutor.²⁸⁵ But Justice Souter, finding "more to go on," argued that there was "good reason to believe that Congress rejected the general rule of waivability when it passed the Rules in issue here."²⁸⁶

The dissenting opinion argued that the Advisory Committee Notes to the Rules state that the purpose of these Rules is to dispose of cases by compromise, and that "[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."²⁸⁷ Justice Souter proposed that the Advisory Committee's Notes show that Congress made two assumptions when the Rules were adopted: first, that plea bargains and pleas "are to be encouraged," and second, that conditions of unrestricted candor, without fear of recrimination, "are the most effective means of encouragement."²⁸⁸

When the statements of intent evidenced in the Advisory Committee's Notes are combined with the Court's findings in *Santobello* that plea-bargaining is to be encouraged,²⁸⁹ the protections provided to a defendant by the Rules, believed Justice Souter, are "meant to create something more than a personal right shielding an individual from his imprudence. Rather, the Rules are meant to serve the interest of the federal judicial system . . . by creating the conditions understood by Congress to be effective in promoting reasonable plea agreements."²⁹⁰ Souter further stated that there is "no indication that Congress intended merely a regime of such limited openness as might happen to survive market forces sufficient to supplant a default rule of inadmissibility."²⁹¹ Having found evidence of legislative intent in a number of sources to rebut the presumption of waivability, Justice Souter then stated that the intent must be

285. *See id.*

286. *Id.*

287. *United States v. Mezzanatto*, 115 S. Ct. 797, 807 (1995) (Souter, J., dissenting) (quoting FED. R. EVID. 410 advisory committee's notes).

288. *Id.* at 808.

289. *See supra* notes 33-35 and accompanying text.

290. *Mezzanatto*, 115 S. Ct. at 808 (Souter, J., dissenting).

291. *Id.*

followed, not usurped by the United States Supreme Court as it was in this case.²⁹²

The potential consequences which could stem from the majority opinion make it even more likely that Congress did not intend for the protections of the Rules to be waivable, reasoned Justice Souter.²⁹³ His first prediction for the future of the Rules was that they will, in time, cease to be applied at all.²⁹⁴ Because defendants generally are unable to contest a prosecutor's demand for a waiver, as their alternative is not to plea bargain at all, use of waivers such as the one presented to Mr. Mezzanatto will be routine.²⁹⁵ Justice Souter's second predicted consequence of the majority decision is that, in time, prosecutors will demand a waiver of a defendant's right to trial in exchange for the mere *opportunity* to enter into a plea bargain.²⁹⁶

[A]lthough the erosion of the Rules has begun with this trickle, the majority's reasoning will provide no principled limit to it. The Rules draw no distinction between use of a statement for impeachment and use in the Government's case in chief. If objection can be waived for impeachment use, it can be waived for use as affirmative evidence, and if the government can effectively demand waiver in the former instance, there is no reason to believe it will not do so just as successfully in the latter. When it does, there is nothing this Court will legitimately be able to do about it. The Court is construing a congressional Rule on the theory that Congress meant to permit its waiver. Once that point is passed, as it is today, there is no legitimate limit on admissibility of a defendant's plea negotiation statements beyond what the Constitution may independently impose or the traffic may bear.²⁹⁷

IV. Analysis

Justice Thomas has stated that there is a "background presumption" that all rules and rights are waivable.²⁹⁸ To rebut that presumption, therefore, there must be "some affirmative

292. *See id.*

293. *See id.*

294. *See id.*

295. *See id.* at 809.

296. *See United States v. Mezzanatto*, 115 S. Ct. 797, 809 (1995) (Souter, J., dissenting).

297. *Id.*

298. *See supra* notes 241-46 and accompanying text.

indication of Congress' intent to preclude waiver."²⁹⁹ Congressional intent can be shown either by express language in a rule stating that the rule in question is not subject to waiver, or, in the absence of such express language, by looking to the legislative intent behind the rule.³⁰⁰

The United States Supreme Court in *Brooklyn Savings Bank v. O'Neil*³⁰¹ stated that "the question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute."³⁰² When the Court, in *Brooklyn*, found that no such language in the Fair Labor Standards Act existed to give an indication of Congress' intent with respect to waiver of the Act's provisions, it did not immediately presume that Congress' intent was to allow waiver.³⁰³ On the contrary, the Court stated, "[i]n the absence of evidence of specific Congressional intent, it becomes necessary to resort to a broader consideration of the legislative policy behind this provision as evidenced by its legislative history and the provisions in and structure of the Act."³⁰⁴ Using this language, the Court found that the legislative history of this Act evinced a policy of preventing private contracts between employers and employees which contracts, if allowed, could potentially exploit employees and endanger the public welfare.³⁰⁵

The Ninth Circuit Court of Appeals relied heavily on the language of *Brooklyn* in their holding that waiver of the rights granted to a defendant under the plea bargaining Rules should not be allowed.³⁰⁶ The Ninth Circuit, using the language of *Brooklyn*, determined that "[a]llowing a waiver of these [R]ules would contravene and thwart the policy — efficient case resolution through plea bargaining — these rules were designed to effectuate."³⁰⁷ The United States Supreme Court, however, did not find *Brooklyn* to be dispositive of the issue, stating that *Brooklyn* is distinguishable from the case at bar since the his-

299. See *supra* note 245 and accompanying text.

300. See *supra* notes 87, 112 and accompanying text.

301. 324 U.S. 697 (1945).

302. See *supra* note 131 and accompanying text.

303. See *supra* notes 132-33 and accompanying text.

304. See *supra* note 133 and accompanying text.

305. See *supra* notes 134-35 and accompanying text.

306. See *supra* notes 221-23 and accompanying text.

307. See *supra* notes 221-22 and accompanying text.

tory of the Fair Labor Standards Act evinced a policy of “prevent[ing] private contracts’ on such matters.”³⁰⁸

The Court in *Mezzanatto* thus distinguished *Brooklyn* by stating that there is “nothing in the structure or history of the plea-statement Rules that suggests that they were aimed at preventing private bargaining.”³⁰⁹ This limited analysis misinterprets the relevant point that the Court in *Brooklyn* tried to make: that in order to find congressional intent with regard to waiver when a rule or statute is silent, courts must “resort to a broader consideration of the legislative policy behind [the] provision.”³¹⁰ The *Mezzanatto* Court, in discussing *Brooklyn*, limited the applicability of *Brooklyn* to the legislative policy behind the issue that faced the Court in that instance: preventing private bargaining.³¹¹ While it may be argued that the Rules are similarly designed to promote a larger public policy by preventing private bargaining, Justice Thomas, in *Mezzanatto*, did not extend the essential elements of the Court’s decision in *Brooklyn*, and in fact only discussed its application in the narrow context of private bargaining, and not in the broader context of legislative intent.³¹²

Despite the United States Supreme Court’s previous statements regarding the importance of looking to legislative intent to determine a question left unanswered,³¹³ the *Mezzanatto* Court chose to ignore that path of analysis here. Justice Thomas’ opinion relies on the numerous rules and rights which courts have found to be waivable.³¹⁴ Such a history, he believes, creates a “background presumption” that, in the absence of express intent by Congress, rules and rights are waivable.³¹⁵ By not following the *Brooklyn* Court’s statement that a “broader consideration of the legislative policy . . . as evidenced by legislative history”³¹⁶ is imperative in an instance such as that which

308. See *supra* notes 256-58 and accompanying text.

309. See *supra* note 258 and accompanying text.

310. See *supra* note 133 and accompanying text.

311. See *supra* notes 256-58 and accompanying text.

312. See *supra* notes 256-60 and accompanying text.

313. See *supra* notes 131, 133, 150, 158 and accompanying text.

314. See *supra* notes 241-46 and accompanying text.

315. *Mezzanatto*, 115 S. Ct. at 801-03; see *supra* notes 241-46 and accompanying text.

316. *Brooklyn Savings Bank*, 324 U.S. at 706.

the *Mezzanatto* Court faced, Justice Thomas' analysis of these rules is incomplete.

The majority in *Mezzanatto* stated that "the mere existence of a policy justification for the plea-statement Rules cannot provide a sound basis for rejecting the background presumption of waivability."³¹⁷ This statement clearly ignores the analytical approach of *Brooklyn*. If the *Mezzanatto* Court's "presumption of waivability" contravenes the very policy which Congress intended to establish when the plea statement Rules were enacted,³¹⁸ then that presumption, logically, is overcome. A contrary finding clearly ignores legislative intent, and results in the United States Supreme Court usurping Congress' authority. Justice Souter believed that "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) . . . [T]he policy [the majority] endorse[d] is not the policy that Congress intended when it enacted the Rules."³¹⁹ When notice is taken of the legislative history of these Rules,³²⁰ it would appear that Justice Souter's dissent is correct. As the United States Supreme Court stated in *Touche Ross & Co.*, "[t]he ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law."³²¹ Although there is no express waiver provision in the Rules' text, the evidence that Justice Thomas sought of an "affirmative indication" of Congress' intent not to waive the Rules' provisions was there to be seen, and that intent should have been enough to overcome the majority's presumption that these Rules should be waivable.

An examination of the early legislative proposals for amendments to the Rules is crucial in showing the legislative intent behind the promulgation of the current versions of the Rules. Congress explicitly rejected the Senate's proposal to write an impeachment provision into the Rules,³²² and instead

317. *Mezzanatto*, 115 S. Ct. at 805 n.5.

318. See *supra* notes 57-58 and accompanying text.

319. *Mezzanatto*, 115 S. Ct. at 808 (Souter, J., dissenting) (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)).

320. See *supra* Part II.B.

321. See *supra* notes 149-50 and accompanying text.

322. See *supra* notes 57-58 and accompanying text.

chose to state that the purpose behind the Rules was to foster free communication and candid discussion.³²³ Justice Thomas stated that "there is no basis for concluding that waiver will interfere with the Rules' goal of encouraging plea bargaining,"³²⁴ but it is difficult to imagine how "free communication" and "candid" discussion can occur when a defendant has a threat, such as the one imposed by the government in this case, hanging over his head.³²⁵ While Justice Thomas indicated that the Ninth Circuit only considered the interests of a defendant, he seems interested primarily in those of the prosecutor.³²⁶ This analysis ignores the issue of the transaction's effect on the plea bargaining process as a whole, and the issue of whether, by ignoring the relative bargaining strengths of the parties to a plea negotiation, the waiver process itself "discredits the federal courts."³²⁷

The Rules already have an express exception providing for punishment of a defendant who commits perjury.³²⁸ The text of the Rules, as enacted by Congress, allows for the admissibility of a defendant's plea bargaining statements in a criminal proceeding for perjury or false statement.³²⁹ While the majority feels that permitting waiver of the rights guaranteed by the plea statement Rules "enhances the truth-seeking function of trials,"³³⁰ it is apparent that Congress considered the use of plea statements for impeachment purposes, and expressly rejected that enabling language in favor of the ability of a prosecutor to bring a perjury trial or other criminal proceeding for false statement.³³¹ The ill that the Court in *Mezzanatto* attempted to cure was anticipated by Congress, and the remedy was already prescribed in the text of the Rules.³³² Justice Thomas stated, "we will not interpret Congress' silence as an implicit rejection of

323. FED. R. EVID. 410 advisory committee's notes; FED. R. CRIM. P. 11(e)(6) advisory committee's notes.

324. See *United States v. Mezzanatto*, 115 S. Ct. 797, 804 (1995).

325. See *supra* notes 287-88 and accompanying text.

326. See *supra* notes 263-68 and accompanying text.

327. See *supra* note 250 and accompanying text.

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

329. See *supra* notes 41, 43-44 and accompanying text.

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

331. See *supra* Part II.B; note 41 and accompanying text.

332. See *supra* note 41 and accompanying text.

waivability.”³³³ Congress was not mute, however; Justice Thomas turned a deaf ear toward the intent which the Legislature clearly manifested in a rejection of the idea that plea negotiation statements ought to be allowed to impeach a defendant.

The majority’s reasoning opens a door to potentially disastrous consequences. The credibility and integrity of the court system will be violated if Justice Souter’s two predictions come to pass.³³⁴ First, the Rules will be swallowed by the exception and they probably won’t be followed at all.³³⁵ “[I]t is probably only a matter of time until the Rules are dead letters,”³³⁶ stated Souter, and he is correct. There is little reason for a prosecutor not to take full advantage of the cards the Court has dealt them, and automatically demand a waiver before each negotiation.

Second, there is no way to stop the prosecution from requesting more than just a waiver of the right to use plea statements for impeachment purposes.³³⁷ “[A]lthough the erosion of the Rules has begun with this trickle, the majority’s reasoning will provide no principled limit to it,” stated Justice Souter.³³⁸ The language used by the majority allows for a waiver of a defendant’s right to exclusion of plea negotiation statements as long as the waiver given by that defendant is knowingly and voluntarily made.³³⁹ This language could, potentially, allow a prosecutor to use a defendant’s statement in the prosecutor’s case in chief,³⁴⁰ or allow a demand that a defendant waive his *right to trial* in exchange for the prosecutor’s agreement to *enter into* a plea negotiation.³⁴¹ While the waiver will be acceptable

333. *Mezzanatto*, 115 S. Ct. at 803.

334. *See supra* notes 293-97 and accompanying text.

335. *See supra* notes 294-95 and accompanying text.

336. *Mezzanatto*, 115 S. Ct. at 809 (1995) (Souter, J., dissenting).

337. *See supra* notes 296-97 and accompanying text.

338. *See supra* note 297 and accompanying text.

339. *See supra* note 275 and accompanying text.

340. *See supra* notes 278-80 and accompanying text. While the issue in this particular case was use of plea statements to impeach a defendant, Justice Souter notes that the language of the Rules does not draw a distinction between use of the statements for impeachment purposes and use as affirmative evidence. *See supra* note 297 and accompanying text. Justice Ginsburg does, however, note that such a use could “more severely undermine a defendant’s incentive to negotiate, and thereby inhibit plea bargaining.” *Mezzanatto*, 115 S. Ct. at 806 (Ginsburg, J., concurring).

341. *See supra* note 296 and accompanying text.

as long as it is "knowing and voluntary,"³⁴² given the relative bargaining strength of the prosecution, one wonders when such a waiver exacted as a price for entering into a discussion is truly voluntary.

In the absence of an indication of legislative intent to the contrary, the majority's rationale and the basis for their decision is correct; the presumption of waivability has a solid foundation in precedent.³⁴³ However, in *Mezzanatto*, the majority failed to look beyond the text of the Rules to determine whether Congress intended for the provisions of these Rules to be waivable. The United States Supreme Court did not recognize the intent of Congress which was there to be seen, and in so doing they ignored the fact that Congress' will must prevail over the judiciary's desire to interpret statutes as they see fit.

V. Conclusion

The decision in *Mezzanatto* marks the beginning of the end for Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6). Allowing negotiation discussions to be used at trial to impeach a defendant violates the very principles Congress intended to promote when it enacted these Rules. The Rules, which were intended to create an efficient system of case resolution through plea negotiations, have effectively been eviscerated by this holding of the United Supreme States Court, as the Court relied solely on the presumption of waivability of all rules and rights, rather than deferring to the legislative intent behind these Rules which was arguably there to be seen. In so doing, the United States Supreme Court has vastly eroded the strengths of these Rules and their ability to protect a defendant if a negotiation does not result in an acceptable plea, as prosecutors are unlikely to invite a defendant to negotiate a plea without exacting the price of a waiver of the right to have any statements made in the negotiation excluded from use at trial.

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342. See *supra* note 105 and accompanying text.

343. See *supra* Part II.C.