FBA/OC UPCOMING EVENTS

Please check www.fbaoc.com in the coming months for details.

Rule 410 and 11(f) Waivers Have No Place in Criminal Plea Agreements

By Kenneth M. Miller[1]

Federal Rule of Evidence 410 ("Rule 410") and Federal Rule of Criminal Procedure 11(f) ("Rule 11") make plea negotiations and withdrawn guilty pleas inadmissible against a suspect/defendant at trial. These rules exist to encourage frank discussions between prosecutors, suspects/defendants and defense counsel. Nonetheless, in *United States v. Mezzanato,* the Supreme Court held that these protections can be waived.

Mezzanato addressed plea agreements in the "Cooperation Context," which is where the suspect/defendant pleads guilty, but offers evidence against others in an attempt to eliminate or lower his or her punishment. There are two other contexts, however, in which Rule 410 waivers can arise: (1) The "Unconsummated-Plea Context," which is where the defendant signs a plea agreement, but never actually pleads guilty; (2) The "Withdrawn-Plea Context," which is where the defendant signs a plea agreement, pleading guilty, but later withdraws the guilty plea, opting instead to go to trial. As discussed in more detail below, courts have varying opinions on when and if pleas can be entered into evidence or used for impeachment in these contexts.

In the "Unconsummated-Plea" and "Withdrawn-Plea" contexts, waivers of Rules 410 and 11(f) have no place in plea agreements. Federal courts should find that such waivers are not enforceable in the Unconsummated-Plea Context because the voluntariness of the plea agreement has not been subject to the rigors of a change-of-plea hearing under Rule 11. Additionally, while a withdrawn plea has been the subject of a Rule 11 hearing, when a defendant is permitted to withdraw a guilty plea, it is because he or she has a right to trial. That right is cheapened when the government can use a withdrawn plea agreement to obtain a conviction.

Background

In 1927, the Supreme Court in *United States v. Kerchevel* held that withdrawn guilty pleas were inadmissible in federal prosecutions because admitting them would essentially nullify the right to trial.[2]
(*Continued on Page 9*)

Waivers (*Continued from Page 6*)

As the Ninth Circuit put it, "[a] fair trial cannot be had if the jury must weigh with all the other evidence, pro and con, the one overwhelming piece of evidence: the defendant pleaded guilty."[3]

Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(f)

Rule 410 goes further than *Kerchevel* and provides that withdrawn guilty pleas and statements made in plea negotiations are not admissible against a defendant except in a perjury prosecution or where the defendant offers evidence of the statements herself.[4] Rule 11 governs guilty pleas and provides that the admissibility of withdrawn guilty pleas is governed by Rule 410.[5] Thus, withdrawn guilty pleas and statements by defendants or their attorneys made in the plea negotiation process (whether or not they lead to guilty pleas) are presumptively inadmissible against a defendant at trial.

Mezzanato*: The Court Weighs In*

In *United States v. Mezzanoto*,[6] the Court held that a suspect/defendant can waive the protections of Rule 410.[7] After his arrest, Mezzanato attempted to cooperate with the government's investigation by meeting with the prosecutor. In exchange for the opportunity to cooperate, the prosecutor demanded that Mezzanato agree that his statements could be used to impeach him if he proceeded to trial. Mezzanato agreed and discussed the crime with the prosecutor. The parties did not reach a plea agreement. Mezzanato testified at trial, was impeached with his prior statements and convicted.

The Ninth Circuit reversed the conviction reasoning that Advisory Notes to Rule 410 reflected Congressional intent that the protections of Evidence Rule 410 cannot be waived.[8] Rule 410 and 11(f) were "designed to promote plea agreements by encouraging frank discussion in negotiations . . . ."[9] Permitting waiver would undermine the plea process.[10] Further, these rules were designed to protect suspects/defendants, so the government should not be permitted to "extract" waivers.[11] The Ninth Circuit cited cases from the Second and Eighth Circuits, and Wright & Miller's *Federal Practice and Procedure*.[12]

The Supreme Court disagreed and held that the protections of Rules 410 and 11(f) were subject to waiver just like most trial rights. The Court found that rather than undermining a fair procedure, "[t]he admission of plea statements for impeachment purposes *enhances* the truth-seeking function of trials and will result in more accurate verdicts."[13] The Court also reached the (suspect) conclusion that permitting waiver actually encourages settlement because without the waiver prosecutors might be unwilling to meet with suspects/defendants in the "'cooperation context."[14] Finally, "[t]he mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether."[15]

Three concurring justices noted that allowing such evidence in the government's case-in-chief (rather than limiting it to impeachment evidence) could actually undermine a suspect/defendant's incentive to negotiate and inhibit plea bargaining. The concurring justices also noted that this issue was not presented because the government only offered Mezzanato's statements for impeachment purposes. To be clear, impeachment waivers are different than case-in-chief waivers because they help protect the jury from perjured testimony and thereby protect judicial integrity. Case-in-chief waivers do not similarly protect judicial integrity from perjured testimony (because the evidence is not offered in response to allegedly perjured testimony). Still, most appellate courts have not limited *Mezzanato* to impeachment evidence.[16] Because courts interpret impeachment waivers very broadly (and admit a lot of evidence that is not strictly impeachment), it's not clear how much difference the issue makes.[17]

As stated above, issues concerning Rule 410 waivers arise in at least three separate contexts. Because waivers in the "Cooperation Context" were explicitly endorsed by the *Mezzanato* Court, their enforcea-

(*Continued on Page 12*)

Waivers (*Continued from Page 9*)

bility is not subject to productive debate. However, waivers in the "Unconsummated-Plea Context" and the "Withdrawn-Plea Context" have not been expressly endorsed by courts and there are good reasons not to enforce them.[18]

Unconsummated Plea Agreements

Prosecutors often write into plea agreements that, upon signing, defendants waive the protections of Rule 410 and Rule 11(f). But not all defendants that sign plea agreements end up pleading guilty. This situation faced the Eighth Circuit in *United States v. Washburn*.[19] There, the defendant signed a plea agreement that waived Rule 410 protections, but never entered a guilty plea and instead proceeded to trial. The written factual basis in the plea agreement was offered against him at trial and he was convicted. The Eighth Circuit affirmed. Because there was no evidence the agreement was entered unknowingly or involuntarily, the plea agreement was a contract that was effective when signed. "[A] dialogue between the district court and the defendant regarding the knowing and voluntary nature of a plea agreement that usually occurs at a change of plea hearing 'is not a prerequisite for a valid waiver' of a particular right."[20]

> "[T]he waiver that permits admission of the withdrawn plea's factual basis cheapens the grant of the right to trial because the government can use the supposedly withdrawn admissions to prove its case."

But Rule 11 hearings are solemn proceedings designed to ensure that guilty pleas are knowing, voluntary and have a sufficient factual basis.[21] It is because of the solemn nature of the admissions in a change-of-plea hearing that a guilty plea waives claims for all constitutional claims that arose before the guilty plea.[22]

Moreover, it was important to the *Mezzanato* Court that permitting Rule 410 waivers in the "Cooperation Context" furthered accurate fact finding.[23] That makes sense when you are impeaching a defendant *with her own words*. But plea agreements, and their factual bases, are written by prosecutors. As for the defendant, numerous factors beyond truth may go into the decision to plead guilty, e.g. fear of even greater punishment, the financial and emotional cost of trial, loyalty to or fear of others, etc. A Rule 11 plea colloquy is designed to ensure the plea and its factual basis is based on the truth and not something else. Any federal plea that does not survive the scrutiny of a Rule 11 plea colloquy is suspect. A defendant should not be bound by the provisions of a plea agreement until after a district court has found that it is knowing, voluntary and based on an adequate foundation. And this can only be done after hearing the defendant's solemn testimony in open court at a Rule 11 hearing.[24]

Finally, allowing such waivers unnecessarily encourages conflicts between defendants and their counsel. *Mezzanato* makes clear that Rule 410 waivers are not enforceable unless they are knowing and voluntary. Where a plea agreement is signed but the defendant backs out of the deal, there are often only two witnesses to whether the Rule 410 waiver was knowingly and voluntary: the defendant and his or her lawyer. If the defendant claims the waiver was not knowing and voluntary, there will almost certainly be a conflict between the defendant and the lawyer who signed the agreement and attested that it *was* knowing and voluntary. The rules of evidence and criminal procedure should not be interpreted to encourage such conflicts.

Withdrawn Guilty Pleas

Enforcing Rule 410 waivers for actual guilty pleas that the district court permits to be withdrawn raises different issues. In these cases, the waiver is

(*Continued on Page 17*)

Waivers (*Continued from Page 12*)

taken after a Rule 11 hearing and generally results in a knowing and voluntary plea that is supported by an adequate factual basis. In *United States v. Mitchell*,[24] the defendant's plea agreement expressly waived the protections of Rule 410 in the event he was later able to withdraw his guilty plea. The defendant succeeded in withdrawing his guilty plea and proceeded to trial. At trial, statements from the plea agreement and plea colloquy were used extensively in the government's case-in-chief and the defendant was convicted. On appeal, the Tenth Circuit focused on whether the government could use such evidence in its case-in-chief and concluded it could. The court reasoned that the *Mezzanato* Court specifically found Rule 410 protections can be waived and there was no evidence that the suspect/defendant's waiver was not knowing and voluntary.

But guilty pleas involve the waiver of a myriad of rights, including, among others, the right to plead not guilty, the privilege against self-incrimination, and the right to confront accusers. The fact that a right can be waived is not the issue. When a plea is withdrawn, all of these validly waived rights are restored and the defendant has the right to a jury trial (a right that was waived), to cross examine witnesses (a right that was waived), and the right to require the government to prove its case beyond a reasonable doubt (another right that was waived). Presumably, the waiver of Rule 410's protections is not restored because its protections were specifically waived in advance, as all of the aforementioned rights were also waived. And, the waiver that permits admission of the withdrawn plea's factual basis cheapens the grant of the right to trial because the government can use the supposedly withdrawn admissions to prove its case. As the *Kerchevel* Court stated: "The effect of the court's order permitting the withdrawal was to adjudge that the plea of guilty be held for naught. Its subsequent use as evidence against petitioner was in direct conflict with that determination."[26]

Summary

Mezzanato was clear that the protections of Rules 410 and 11(f) can be waived. This makes sense in the "Cooperation Context" because the government is using a suspect/defendant's own words against him or her. But, federal appellate courts have been too quick to extend those waivers to the "Unconsummated-Plea" and "Withdrawn-Plea Contexts."

The "Unconsummated-Plea Context" involves a document drafted by a federal prosecutor upon which a defendant is supposed to be thoroughly examined in open court by a federal judge in a Rule 11 hearing before it can be relied upon. Without a Rule 11 hearing, admissions in a plea agreement are insufficiently reliable to be trusted. The "Withdrawn-Plea Context" involves a defendant who has been re-given the right to a trial. But that *right* is limited or even nullified by admitting the "withdrawn" plea agreement. Such waivers should not be admissible against defendants--as the Federal Rules' drafters intended. For these reasons, Rule 410 and 11(f) waivers have no place in criminal plea agreements.

---

[1] Kenneth M. Miller is a Partner with Bienert, Miller & Katzman, PLC. The views expressed here are the author's and not those of Bienert, Miller & Katzman, its clients, or the FBA/OC.
[2] 274 U.S. 220, 223-24 (1927).
[3] *Standon v. Whitley*, 994 F.2d 1417, 1422 (9th Cir. 1993).
[4] *See* Fed. R. Evid. 410(b).
[5] *See* Fed. R. Crim. P. 11(f).
[6] 513 U.S. 196 (1995).
[7] *Id.* at 197. Two dissenting justices agreed with the Ninth Circuit that "we are bound to respect the intent that the Advisory Committee's Notes to the congressionally enacted Rules reveal." *Id.* at 213 (Souter, J., dissenting). Because of the government's vastly greater bargaining power in the plea negotiations, "the majority ruling . . . will render the Rules largely dead letters . . . ." *Id.* at 211 (Souter, J., dissenting).
[8] *United States v. Mezzanato*, 998 F.2d 1452, 1455 (9th Cir. 1993).
[9] *Id.* at 1454.
[10] *Id.* at 1455.
[11] *Id.* at 1456.
[12] *Id.* at 1454-55.

(*Endnotes continued on Page 18*)

Waivers (*Continued from Page 17*)

[13] 513 U.S. at 204-05.
[14] *Id.* at 207. The conclusion is suspect because prosecutors who want to make cases against other bad guys have nothing to lose by meeting with suspects who want to give them information on other bad guys.
[15] *Id.* at 210.
[16] *See, e .g.*, *United States v. Mitchell*, 633 F.3d 997 (10th Cir. 2011) (Rule 410 waiver in court-accepted plea agreement is enforceable after defendant successfully withdraws from the plea. Evidence admissible in government's case-in-chief); *United States v. Sylvester*, 583 F.3d 285 (5th Cir. 2009) (After signing a Rule 410 waiver and confessing, defendant proceeded to trial where confession was used in government's case-in-chief. Court found no reason to limit *Mezzanatto* to rebuttal waivers); *United States v. Burch*, 156 F.3d 1315 (D.C. Cir. 1998) (Rule 410 waiver in court-accepted plea agreement, where plea colloquy specifically covered Rule 410 waiver, is enforceable after defendant withdraws plea and evidence is admitted in government's case-in-chief).
[17] *See, e.g., United States v. Hardwick,* 544 F.3d 565, 570-71 (3d Cir. 2008) (expansive impeachment waiver triggered by counsel's cross examination of government witness, even where defendant did not testify).
[18] Where a plea agreement is rejected by the district court at a Rule 11 hearing, any Rule 410 waiver is presumably not knowing and voluntary as it was entered pursuant to an invalid plea agreement. Because Rule 11 is designed to protect defendants, it would be a cruel irony if those protections precluded a guilty plea, but permitted the admission of the factual basis for a rejected guilty plea (that would likely cause the defendant's conviction).
[19] 728 F.3d 775 (8th Cir. 2013).
[20] *Id.* at 781-82 (citing *United States v. Michelson,* 141 F.3d 867, 871 (8th Cir. 1998)).
[21] *See* Fed. R. Cr. P. 11(b) and Advisory Notes (1966) ("The fairness and adequacy of the procedures on acceptance for pleas of guilty are of vital importance in according equal justice to all in the federal courts"). *See also Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity.").
[22] *See Tollett v. Henderson,* 411 U.S. 258 (1973).
[23] *Mezzanato,* 513 U.S. at 204 ("The admission of plea statements for impeachment purposes *enhances* the truth-seeking function of trials and will result in more accurate verdicts.") (emphasis in original).
[24] *See United States v. Alvarez-Tautimez,* 160 F.3d 573, 576 (9th Cir. 1998) ("Unless and until a court accepts a guilty plea, a defendant is free to renege on a promise to so plead.") (citations omitted).
[25] 633 F.3d 997 (10th Cir. 2011).
[26] 274 U.S. at 224.

Magistrate McCormick (*Cont'd from Page 16*)

I also worked with some fantastic people who were not only fun to work with but are terrific lawyers committed to serving the people of Orange County. I also really enjoyed working with many dedicated and talented federal law enforcement agents. It was very satisfying to work as a team with one or more agents to map out an investigative plan that would then lead to an indictment and eventually a conviction.

You've spent most of your adult life in Southern California. Did you grow up here? What do you like most about the area?

I graduated from high school in the high desert of San Bernardino County. From there I went to UC Irvine and became an Orange County convert. I met my wife Melissa during law school and we now live in her hometown here in Orange County.

Whenever I visit almost any other part of the country it is hard not to appreciate how lucky we have it here—a wonderful setting, a dynamic business atmosphere, and a terrific local legal community.

What are some of your hobbies outside of work? And we hear you like golfing—have you ever had a hole-in-one?

My wife and I have three children under the age of 6, so my hobby hours have gotten very short. I run 4 or 5 days a week. I still play golf when I can find the time, which isn't very often, as my rising handicap index will attest. I have, over my 30+ years of playing golf, been a witness to 3 holes-in-one. Never one of my own, however.

[1] *Samrah Mahmoud and Brent Westcott are associate attorneys at the Orange County office of Crowell & Moring.*