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**“Queen for a Day” or “Courtesan for a Day”:
The Sixth Amendment Limits to Proffer Agreements**

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On March 13, 2001, in United States v. Duffy,¹ Judge Nina Gershon invalidated a significant clause in the Eastern District of New York’s standard proffer agreement. The clause purports to allow the government to use a defendant’s proffer statements not merely to impeach his subsequent trial testimony, but also “to rebut any evidence offered or elicited, or factual assertions made, by or on behalf of” the defendant.² Judge Gershon found the provision incompatible with a defendant’s Sixth Amendment right to put forward a “meaningful defense” and “to have the effective assistance of counsel.”³ Judge Gershon is the first judge to strike down this clause, which has surfaced across the country in the last few years as prosecutors have compelled ever-broader waivers from proffering defendants.

The Duffy opinion is important in several respects: (1) it attempts to stake out a constitutional boundary for waivers in proffer agreements; (2) it disagrees with the reasoning in opinions from the Seventh and District of Columbia Circuits upholding nearly identical provisions and (3) it illustrates a number of problems left undecided by the Supreme Court’s fractured opinion in United States v. Mezzanatto.⁴ In Mezzanatto, the Court ruled that the immunity conferred upon defendants’ proffered statements is presumptively waivable for purposes of impeaching the defendant, but it left open the question of whether inadmissibility was waivable for other purposes.

Duffy and similar cases reveal a conflict between two competing principles that underlie the criminal justice system: the notion of trial as a truth-seeking device versus guarantees of procedural fairness that transcend the result in any particular case. Some would argue that the truth-finding objective is paramount, and that once a defendant has admitted his guilt in a proffer, he should not be able to assert his innocence in court without being confronted with that admission. Anything less, they would argue, works a fraud on the jury and undermines the integrity of the justice system. Others would assert that a defendant’s proffer should not require such a Faustian bargain and that a fair procedure must be maintained that recognizes the defendant’s unequal bargaining power as compared to the government. A draconian proffer

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¹ 133 F. Supp. 2d 213 (E.D.N.Y. 2001).

² Id. at 214.

³ Id. at 216.

⁴ 513 U.S. 196 (1995).

agreement, they would argue, effectively waives the right to any meaningful defense, reducing trial to a sham.

Proffer Agreements

Proffer agreements, commonly called "Queen for a Day" agreements, are used routinely in federal criminal practice. In a typical proffer agreement, an individual agrees to provide information to the prosecution at an informal debriefing. In return, the government promises to refrain from offering the proffer statements at any subsequent trial. In entering into a proffer agreement, the defendant's goal is usually to achieve a cooperation plea agreement.⁵ Cooperation agreements provide that if the defendant substantially assists the government, he will receive a §5K1.1 letter at sentencing. That letter, the Holy Grail of cooperating defendants, allows the court to impose a sentence below the Guidelines range.

Proffer agreements have traditionally allowed the government to use a defendant's proffer statements to impeach his subsequent testimony and to develop leads to new evidence. Within the last few years, however, prosecutors and other agencies have insisted on broader waivers like the one in Duffy.⁶ Under this type of provision, a defendant who proceeds to trial is effectively muzzled from asserting any substantive defense inconsistent with his prior admission of guilt, on peril of opening the door to the introduction of the proffer statements.

The Presumption of Waivability

1. United States v. Mezzanatto

The seminal case on proffer agreements is the Supreme Court's 1995 decision in United States v. Mezzanatto,⁷ which upheld the prosecution's use of proffer statements to impeach the defendant's trial testimony. In Mezzanatto, the defendant testified at trial in a manner that contradicted his proffer statements. Pursuant to the proffer agreement, the prosecution impeached him with his proffer statements and he was convicted.

On appeal, Mezzanatto argued that, notwithstanding his contrary agreement, the government was precluded from using his proffer statements at trial under Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6). Both rules provide that statements made in the course of plea discussions between a defendant and government attorney that do not result in a plea of guilty, or that result in a plea of guilty later withdrawn, are inadmissible against the defendant.⁸

⁵ In some cases, an individual will proffer in hopes of convincing the prosecutor to refrain from bringing charges.

⁶ See, e.g., United States v. Krilich, 159 F.3d 1020 (7th Cir. 1998); United States v. Burch, 156 F.3d 1315 (D.C. Cir. 1998); United States v. Chiu, 109 F.3d 624 (9th Cir. 1997); United States v. Lauersen, 2000 WL 1693538 (S.D.N.Y. Nov. 13, 2000). The clause has also been included in substance in the proffer agreement currently in use by the United States Securities and Exchange Commission Enforcement Division, New York Regional Office.

⁷ 513 U.S. 196 (1995).

⁸ Both rules contain identical exceptions to their exclusionary provisions, none of which is relevant here.

Mezzanatto had been charged with possession with intent to distribute methamphetamine. He and his counsel met with the prosecutor to discuss the possibility of cooperating with the government. The prosecutor conditioned proceeding with the proffer on Mezzanatto's agreement "that any statements he made during the meeting could be used to impeach any contradictory testimony he might give at trial if the case proceeded that far."⁹ Mezzanatto and his counsel agreed to the terms. During the proffer, Mezzanatto admitted to distributing methamphetamine but minimized and misrepresented some of his conduct. The government concluded that Mezzanatto was lying and terminated the proffer. Mezzanatto proceeded to trial and testified in his own defense, contradicting his proffered admissions. On cross-examination, the prosecutor confronted Mezzanatto with his inconsistent statements. Mezzanatto denied having made them and the government called an agent who was present at the proffer session to testify about Mezzanatto's admissions. The Ninth Circuit reversed the conviction, holding that the protections of Rules 410 and 11(e)(6) cannot be waived.¹⁰

The Supreme Court disagreed, reasoning that Rules 410 and 11(e)(6), like many other procedural rights enjoyed by defendants, "are presumptively waivable."¹¹ In its opinion, the Court rejected the idea that rigid enforcement of Rules 410 and 11(e)(6) was necessary to ensure a fair procedure for the defendant. Rather, the Court reasoned, the admission of plea statements for impeachment purposes would enhance the truth-seeking function of trials and result in more accurate verdicts.¹² The Court also rejected the arguments that (i) the use of plea statements for impeachment purposes would interfere with Congress's clear intent to encourage plea negotiations, and (ii) because of the much greater bargaining power enjoyed by the prosecution, the defendant had no choice but to accept the waiver sought by the government.¹³

In a one-paragraph concurrence, Justices Ginsburg, O'Connor and Breyer cautioned that waivers that allowed plea statements to be used for more than impeachment might not be permissible.¹⁴

Dissenting, Justices Souter and Stevens noted that defendants generally lack the power to refuse waivers, meaning that Rules 410 and 11(e)(6) could effectively be nullified by federal prosecutors who present defendants with what are essentially contracts of adhesion.¹⁵ Moreover, viewing the majority's holding as having no principled limit, the dissent predicted that prosecutors would demand increasingly broad waivers that would "in time come to function as a waiver of trial itself." Presaging Duffy, they posited that "[i]n such cases, the possibility of trial if no agreement is reached will be reduced to a fantasy."¹⁶

⁹ 513 U.S. at 198.

¹⁰ Id. at 198-99.

¹¹ Id. at 201.

¹² Id. at 204.

¹³ Id. at 206-10.

¹⁴ Id. at 211.

¹⁵ Id. at 216.

¹⁶ Id. at 217-18.

2. The Expansion of Mezzanatto Beyond Impeachment

In the six years since Mezzanatto, prosecutors have sought and enjoyed waivers that seemed as limitless as Justices Souter and Stevens feared. For example, in United States v. Chiu,¹⁷ the Ninth Circuit allowed prosecutors to use a defendant's proffer statements to prepare several of their witnesses for trial, despite a proffer agreement that barred them from offering the defendant's plea statements in their case-in-chief.¹⁸ In United States v. Burch, the D.C. Circuit ruled that the defendant's statements at his plea allocution and in a subsequent debriefing were admissible in the government's case-in-chief despite the fact that the defendant had withdrawn his plea.¹⁹ The Burch court found no limiting principle in Mezzanatto and saw no reason for "drawing any distinction in this case between permitting waivers for purposes of impeachment or rebuttal and permitting waivers for the prosecution's case-in-chief."²⁰

In United States v. Krilich,²¹ the Seventh Circuit upheld a provision nearly identical to what Judge Gershon would later strike down in Duffy. In Krilich, the defendant was charged with RICO conspiracy, bribery and fraud charges. Krilich signed a proffer agreement with the government that allowed the government to introduce his proffer statements if he "subsequently testif[ied] contrary to the substance of the proffer or otherwise present[ed] a position inconsistent with the proffer"²² During the proffer session, Krilich admitted his participation in the fraud and bribery. As part of the fraud, Krilich had arranged to use a golf tournament as the means for a bribe to a town mayor whose support was needed for a bond offering. Krilich arranged that the mayor's son would hit a hole-in-one that would entitle him to a large prize at a golf tournament. After the mayor's son teed off at the ninth hole, Krilich, palming one of the son's golf balls, reached into the cup and then displayed the ball to evidence the purported hole-in-one.²³

At trial, Krilich's attorney was able to elicit on cross-examination of the government witness that the ninth hole was easily observed. Two government witnesses also testified that they did not think that Krilich was at the ninth hole at the time of the hole-in-one.²⁴ The district court concluded that Krilich's attorney had elicited testimony inconsistent with his client's proffer and allowed the prosecutor to introduce Krilich's proffered admissions at trial.

¹⁷ 109 F.3d 624.

¹⁸ Id. at 625.

¹⁹ 156 F.3d at 1322.

²⁰ Id. at 1321.

²¹ 159 F.3d 1020.

²² Id. at 1024.

²³ Id.

²⁴ Id. at 1026.

The Court of Appeals, affirming the district court's decision, rejected Krilich's contention that the waiver clause in the proffer agreement applied only to evidence that Krilich "presented" through his own witnesses.²⁵ Fulfilling the Mezzanatto dissent's prophecy, the government argued that the waiver provision meant that "putting on *any* defense permit[ted] the United States to introduce the statements."²⁶ Judge Easterbrook rejected this position ruling that defense counsel was permitted to impeach government witnesses without opening the door to the proffer statements, so long as the testimony elicited by defense counsel was not "contrary to" or "inconsistent with" the defendant's admission of guilt.²⁷

However, as Krilich itself amply shows, this theory of impeachment is more easily stated than practiced. The Seventh Circuit concluded that testimony along the lines of "I did not see Krilich palm a golf ball at the ninth hole on June 19" would not have triggered admission of Krilich's proffer. However, testimony that the ninth hole was near the clubhouse and easily observed, which was actually elicited by defense counsel, was inconsistent with the proffer and thus did trigger admission of the proffered statement. In the court's reasoning, the latter testimony suggested that no one would attempt to fake a hole-in-one in such a visible location – an implication that was inconsistent with Krilich's proffer.²⁸

As Krilich demonstrates, slender, even ephemeral distinctions may determine when testimony elicited by defense counsel is "inconsistent" with a defendant's proffer statements. However, it would be nearly impossible for the cross-examining lawyer to constantly gauge the fine distinctions of what is "inconsistent" with his client's proffer. Indeed, if defense counsel elicited too good an answer for his client, he would possibly have to seek to have it stricken or face the coup de grace admission of his client's proffer in the government's rebuttal case.

United States v. Duffy: the Limits of Waivability

In Duffy, the defendant proffered to the government pursuant to a standard proffer agreement of the Eastern District of New York.²⁹ In his proffer, Duffy admitted to his role in the criminal securities fraud conspiracy charged by the government. Duffy sought a cooperation agreement in which he would be allowed to plead to a misdemeanor. When the government refused, Duffy decided to go to trial. Recognizing the strait-jacket imposed by the proffer agreement, Duffy challenged it on constitutional grounds, arguing that it effectively operated as a waiver of trial.³⁰ In response, the government argued that Duffy still had a defense available to him but conceded that, if he did not wish to open the door to his proffer statements, the defense was limited to arguing that the government had not met its burden of proof and making "general attacks" on the credibility of the government's witnesses (the latter of which is arguably

²⁵ Id. at 1025.

²⁶ Id.

²⁷ Id.

²⁸ Id. at 1025-26.

²⁹ 133 F. Supp. 2d at 214.

³⁰ Duffy did not challenge the parts of the proffer agreement that allowed the government to develop leads from his statements or to use them as substantive evidence with which to cross-examine him if he testified. Id. at 215.

subsumed by the former). Further, the government contended that Duffy's attorney could not contradict the proffer in his opening statement or summation.³¹

Judge Gershon found that the waiver provision so constricted Duffy's defense that it unacceptably interfered with his Sixth Amendment right to make a meaningful defense and to have the effective assistance of counsel.³² She rejected the reasoning set forth in Burch and Krilich and observed that these courts had expanded Mezzanatto beyond what a majority of the Supreme Court, or in her view the Second Circuit, would allow.³³ In this regard, Judge Gershon noted that at least two district court judges in the Second Circuit have also questioned the validity of a waiver that extends use of the defendant's proffered statements beyond impeachment.³⁴

In striking down the waiver provision of the proffer agreement, Judge Gershon expressed discomfort with the notion that Duffy would be handcuffed from arguing any affirmative theory of factual innocence. She also recognized the impossibility for a trial judge and a cross-examiner to assess the fine distinctions between evidence that is inconsistent with the defendant's proffer statements and evidence that is not.

Both of these points have considerable force. Hair's breadth distinctions – as proposed in the Krilich opinion – present innumerable line-drawing problems for the trial judge. As Judge Gershon suggested, it would be impractical for defense counsel to pre-screen nearly every question with the judge, yet such a procedure would be the only way to avoid inadvertently opening the door to the proffer statements. Among many other problems, pre-screening would deprive cross-examination of its vigor as it would become deadened by repeated sidebars. Alternatively, if the court refused to preview defense counsel's questions, counsel would be left with no option but to move to strike otherwise favorable testimony that might open the door to the proffer statements. Such a scenario would be both confusing to the jury and unseemly. The problems only magnify when one considers that a government witness on cross-examination can either carelessly, or even intentionally, answer a question in a manner that is inconsistent with the defendant's proffer, thus opening the door to the proffer statements despite defense counsel's caution. The potential for confusion, uncertainty and collateral disputes are unmistakable.³⁵

³¹ Id.

³² Id. at 216.

³³ Id. at 216, 218.

³⁴ Id. at 216 (citing United States v. Doe, 1999 WL 243627, at *9 (E.D.N.Y. Apr. 1, 1999) (stating that enforceability of waiver is "subject to question, at least when the waiver extends beyond the use of statements to impeach the defendant") and United States v. Fronk, 173 F.R.D. 59, 71 n.10 (W.D.N.Y. 1997) ("[I]t certainly is not clear whether a majority of the Supreme Court would uphold the type of waiver at issue here, one that is not limited to impeachment purposes"). See also United States v. Lauersen, 2000 WL 1693538, at *8 (citing same authority).

³⁵ Lauersen, which was decided shortly after Duffy, highlighted a parallel situation that may affect the vigor of counsel's defense where a client has proffered testimony to the government. In Lauersen, the Southern District of New York limited the government's use of a Duffy-like provision in a proffer agreement to impeachment purposes only, citing the "groundswell of doubt" in the Second Circuit over the enforceability of such provisions. However, the court went on to rule that it would not permit defense counsel to introduce any testimony or evidence, or present any argument whatsoever, that directly contradicted specific factual statements contained in his client's proffer statement because doing so would violate the attorney's ethical obligations to the court. 2000 WL 1693538, at *8

In the Duffy opinion, Judge Gershon focused on two other important points, which she appeared to link. First, she noted the principle that, in criminal cases, contractual waivers are closely scrutinized and narrowly construed, especially when they implicate essential rights.³⁶ This principle, however, is not dispositive. Important institutional and societal values collide when a defendant, who has admitted his guilt, seeks to present a defense that contradicts his admission and seeks to prevent the jury from learning about his self-inculpation. Nevertheless, the Duffy court drew from Second Circuit case law to determine that plea agreements “should be construed strictly against the government and that ‘general fairness principles’ could be used to invalidate particular terms.”³⁷

Second, and more persuasively, Judge Gershon recognized that in plea negotiations the government has “awesome advantages in bargaining power.”³⁸ Because of the severity of the Sentencing Guidelines, defendants are under tremendous pressure to cooperate, but they cannot do so without signing the proffer agreement.³⁹ Moreover, unlike a plea agreement, where a defendant has already assured himself of a reduced sentence, a proffer agreement offers only the opportunity to speak to the government. If the defendant admits guilt in the proffer but does not secure a cooperation agreement, he has effectively waived his ability to defend himself at trial. The government, however, has only agreed not to use the defendant’s statements in its case-in-chief. Even prosecutors acting in complete good faith in multi-defendant cases will hear proffers from numerous defendants, intending only to “sign up” one of the profferors as a cooperator. The remaining profferors who are rejected as cooperating witnesses, sometimes because they are simply unnecessary, may be forced to plead guilty because, having admitted their guilt, the waiver provision has effectively pinioned their defense. Furthermore, while the defendant is left in a terrible position if his proffer is rejected, the government, at worst, is in the same position it would have been in anyway.⁴⁰ In fact, since the government is only precluded from using the

(citations omitted); see United States v. Jones, 900 F.2d 512, 520 (2d Cir. 1990) (citing Nix v. Whiteside, 475 U.S. 157, 176 (1986)); Benedict v. Henderson, 721 F. Supp. 1560, 1563 (N.D.N.Y. 1989); People v. DePallo, 2001 WL 735739 (NY Ct. App. July 2, 2001); see also Model Code of Professional Responsibility, DR 7-102; ABA Ethical Consideration 7-26.

Although at first glance, Lauersen appears akin to Duffy in that both cases expressly curbed the government’s use of proffer statements against defendants outside the context of impeachment, the impact of Lauersen on criminal trials can be more closely analogized to cases like Krilich. In the Krilich line of cases, the government may affirmatively use proffer statements against criminal defendants, effectively binding the defendant to his earlier statements. Under the reasoning set forth in Lauersen, defense counsel is precluded by ethical obligations from presenting any defense that contradicts the proffer statements, effectively binding the defendant in a similar manner. The only discernible difference seems to be that in the Lauersen-like cases, a defendant may become “unbound” by seeking new counsel. This creates a motivation for the defendant to change counsel that is unseemly and damaging to the integrity of the criminal justice system.

³⁶ 133 F. Supp. 2d at 217 (citing United States v. Ready, 82 F.3d 551, 556 (2d Cir. 1996)). See United States v. Mezzanatto, 513 U.S. at 204.

³⁷ 133 F. Supp. 2d at 217.

³⁸ Id. (quoting United States v. Ready, 82 F.3d at 559).

³⁹ Id.

⁴⁰ Id. at 217-18.

information in its direct case,⁴¹ and may use the information to shape its direct case, it has greatly improved its position in every respect. For all these reasons, from the defendant's perspective, "Queen for a Day" treatment may often be more akin to "courtesan for a day" treatment.

In Krilich, the Seventh Circuit theorized that defendants actually benefit from expansive waivers because the more they surrender their rights to defend themselves, the more credibility they will have with prosecutors.⁴² Judge Gershon rejected this argument, and we agree with her analysis on this point.⁴³ It is a dubious proposition that as prosecutors have expanded the scope of the waivers they seek from defendants, they correspondingly have gained confidence that the proffers are more credible. To the contrary, a defendant, who knows in an initial proffer that he may be forever dooming his ability to defend himself at trial by making factual admissions may choose to be less forthcoming, or even lie, until he assesses his chances of being "signed up." Further, it is our experience that prosecutors would not refuse to hear the proffers of defendants in the absence of a broad waiver especially since (a) they are motivated to pursue overriding law enforcement objectives and (b) a narrower waiver does not disadvantage them, but merely limits their advantages if the case proceeds to trial.⁴⁴

As Judge Gershon further noted, perhaps the most serious problem with a Duffy-type waiver is the risk that it might actually chill plea bargaining in contravention of Congress's policy choices.⁴⁵ The inclusion of the Duffy waiver is unquestionably viewed by many defense counsel as a significant risk factor, even in the case of a whistle-blower client, who risks sacrificing a meaningful defense if negotiations break down or the government never establishes a case against anyone but the whistle-blower.⁴⁶ Recently, some commentators have suggested that defendants reject "Queen for a Day" agreements and proceed without any waivers under the fuller protections of Rules 410 and 11(e)(6).⁴⁷ Our opinion, however, is that this option is simply unavailable. Prosecutors generally refuse to forego or tinker with the language of proffer agreements. Thus, a defendant who chooses not to sign the proffer agreement in effect chooses not to proffer.

In Duffy, the government argued that a defendant who contradicts his self-inculpatory proffer would be perpetrating a "fraud on the court" that requires admissions of the proffer statements.⁴⁸ Judge Gershon dismissed this argument by analogizing to cases in which evidence

⁴¹ See e.g., United States v. Chiu, 109 F.3d 624.

⁴² Krilich, 159 F.3d at 1024-25.

⁴³ 133 F. Supp. 2d at 218.

⁴⁴ But see United States v. Mezzanatto, 513 U.S. at 207-08 (stating that prosecutors may be unwilling to engage in proffers without a waiver allowing use of plea statements for impeachment purposes).

⁴⁵ 133 F. Supp. 2d at 218; see also Mezzanatto, 513 U.S. at 213-14 (Souter, J., dissenting) (citing to Advisory Committee Notes).

⁴⁶ Hafetz & Garson, "The 'Queen for a Day' Agreement: A High Risk Venture," Business Crimes Bulletin, (April 2001); Morvillo & Anello, "Cooperation: The Pitfalls and Obligations for Defense Attorneys," N.Y.L.J. (Dec. 5, 2000).

⁴⁷ See, e.g., Hafetz & Garson, supra n. 46.

⁴⁸ 133 F. Supp. 2d at 218.

of guilt has been suppressed on constitutional grounds.⁴⁹ In our view, however, the analogy is imperfect since such evidence is often admissible in the government's rebuttal case. A more fundamental point is that Congress could not have drafted Rules 410 and 11(e)(6) without understanding that if the plea process breaks down, the defendant's admission of guilt will be excluded and the defendant will likely contradict that admission at trial. Congress presumably did not view itself as licensing rampant fraud on the federal courts. Rather, it struck a compromise that encourages guilty pleas yet preserves a viable defense when plea negotiations break down.

Conclusion

Duffy reveals a collision of fundamental values relating to truth-finding and procedural fairness in federal criminal trials. As courts wrestle with the issues left open by Mezzanatto, and circuits come into conflict, the constitutional limits to waiver explored by Judge Gershon in Duffy may ultimately be headed back to the Supreme Court.

⁴⁹ Id.