No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

YONG S. CHA

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United States v. Mezzanatto*, 513 U.S. 196 (1995), this Court held that the Government may elicit waivers during the plea bargaining process enabling the Government to use a defendant's statements to impeach a defendant's contrary trial testimony notwithstanding the Congressional proscription against such evidence in FED. R. EVID. 410 and FED. R. CRIM. P. 11(f). The Government now regularly insists on extracting waivers that allow statements during plea negotiations to be used to rebut defense counsel's presentation. The questions presented are:

I. When the Government has agreed not to use a defendant's statements except to refute a defense at trial, may the Government only use those proffer statements when the defense advances specific factual assertions contradicted by the proffer, as is the case in the Second Circuit, or may the Government use the proffer statements whenever the defense disputes the charges or seeks to minimize or deflect responsibility, as is the case in the Third, Sixth, Seventh and Ninth Circuits.

II. Whether waivers that allow the Government to lighten its burden depending upon defense counsel's litigation tactics – regardless of whether the defendant actually testifies or makes any false statement at trial –

unconstitutionally undermine the zealous advocacy of defense counsel and impede counsel's ability to subject the prosecution's evidence to meaningful adversarial testing.

LIST OF PARTIES

The caption of the case on the cover page contains the names of all the parties.

RELATED PROCEEDINGS

- *United States v. Pak*, No. 8:11-cr-181 JLS, U.S. District Court for the Central District of California. Judgment entered Oct. 19, 2015.
- *United States v. Lim*, No. 13-50520, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Feb. 27, 2015.
- *United States v. Cha*, No. 15-50465, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Oct. 26, 2018. Pet'n for reh'g denied Apr. 29, 2019.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Edward Cha respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, App. 1a, is unpublished but available at *United States v. Cha*, 769 Fed. Appx. 435 (9th Cir. 2019). The United States District Court's orders are included at App. 5a-26a.

JURISDICTION

The judgment of the Court of Appeals was entered October 26, 2018. An amended memorandum was filed, App. 1a, and a timely petition for rehearing was denied, April 29, 2019, App. 27a.

On July 18, 2019, Justice Kagan extended the time for filing a petition for writ of certiorari until August 28, 2019. No. 19A72. This Court has jurisdiction. 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Pertinent rules and constitutional provisions are set out in an

Appendix. App. 29a.

STATEMENT OF THE CASE

Because Edward Cha's defense lawyer cross-examined two immunized witnesses about undisputed lies they told and highlighted aspects of the Government's case that were otherwise uncorroborated, the Government was allowed to introduce evidence of inculpatory statements Cha made under an arrangement he was assured would "protect" him.

Edward Cha is a licensed CPA who owned medical billing companies. After a client was indicted for fraud, federal prosecutors asked to meet with him. He was granted immunity for direct use of his statements with an exception for use "to refute or counter at any stage of the proceedings (including this Office's case-in-chief at trial) any evidence, argument, statement or representation offered by or on behalf of your client in connection with any proceeding." C.R. #255, Ex. 3 ¶ 4(b).

A civil healthcare attorney opined he was protected and encouraged him to agree "in the hopes that, if they answered the Government's questions, [they] would have no more involvement in the matter." C.R. #255 Brewer ¶ 7.

In fact, Cha was a target from the outset. When the case was tried, Cha did not testify but his attorney cross-examined prosecution witnesses and presented defense witnesses. In addition to identifying demonstrable lies

by the prosecution's two chief witnesses and that the most damning aspects of their testimony was uncorroborated, counsel also presented evidence contradicting the circumstances of an alleged secret meeting.

The Government was allowed to "rebut" Cha's defense with inculpatory statements he made during the proffer session. Then Ninth Circuit affirmed. The rebuttal would have been precluded, or at least greatly circumscribed, in the Second Circuit.

A. Procedural Context

Edward Cha was convicted of aiding and abetting a client who submitted false documents in connection with a Medicare audit.

Based on a single question and answer elicited from the final defense witness, the court permitted the Government to introduce statements Cha made at a proffer session. R.T. 4/27/15: 205-212.[1]

The following morning, the district court denied defense counsel's motion to strike the offending question and answer, App. 15a-22a [R.T. 4/28/15: 16-23], opining the proffer statements were proper rebuttal to *everything* the final witness testified to. App. 20a [R.T. 4/28/15: 21]. In denying a contemporaneous mistrial motion, the district court revised its

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1. The Government first moved to introduce the proffer statements right after defense counsel's opening statement, the theme of which was "make them prove it," but eventually rested without ever obtaining a ruling on it.

explanation and opined the proffer was admissible rebuttal to *all* the cross-examination throughout the trial. App. 20a-22a [R.T. 4/28/15: 21-23].

After deliberating an hour, the jury requested a transcript of the agent's testimony about Cha's proffer statements. C.R. #338; R.T. 4/29/15: 112. An hour after being offered a readback in open court, the jury returned a verdict. C.R. #338, #340; R.T. 4/29/15: 114-16.

The district court sentenced Mr. Cha to 4 years probation and a $40,000 fine.[2] Probation was terminated early after 2½ years. C.R. #396, #397.

B. Summary of the Factual Charges

Medicare asked Byung Ho Pak, one of Cha's clients, to provide the charts of 28 patients for a post-payment audit. A pre-submission review of the 7,000 pages and nearly 2,500 daily treatment notes, standard in the industry, was going to be "very laborious," a "pretty enormous task."

Cha rebuffed Dr. Pak's initial request to perform the compliance review, explaining he was too busy. R.T. 6/3/13: 660-61; R.T. 4/23/15: 70.

Thereafter, Lim and Dr. Pak's wife met at Cha's office, begging him to

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2. Mr. Cha was the only one to suffer criminal penalties. The Government dismissed the case against Dr. Pak on the ground he was incompetent after misrepresenting the law to the judge about the need for an evaluation. R.T. 10/16/15:20. A month later, Dr. Pak's wife was granted immunity to testify against Mr. Cha. The Government conceded presenting insufficient evidence to convict the clinic manager. U.S.C.A.9 No. 13-50520, #45; C.R. #303.

help. Cha relented, charging between $30,000 and $40,000, a "not unreasonable" fee for the work. Cha took about a month to complete the project. When contacted by agents, Cha freely admitted being hired by the Paks and paid in installments, occasionally in cash. R.T. 4/22/15: 119; R.T. 4/28/15: 28.

Sena Choi, a PTA (physical therapy assistant) a medical transcriptionist, transcribed Pak's handwritten notes. The typed versions included detailed exercises and treatment notes that had no counterpart in the original files.

1. The Government Blindly Trusted So-Ja Pak's Uncorroborated Version of Recruiting Cha's Assistance

Dr. Pak's wife, So-Ja, gave immunized testimony that she withdrew $30,000 from her bank account and paid Cha in "cash," "all at once," "in a day or two." R.T. 4/22/15: 204-05; R.T. 4/23/15: 50-51, 59. No evidence corroborated any $30,000 lump-sum, up-front cash payment.[3]

She insisted: "I did not give him a check" and, after the initial $30,000 cash, "didn't give him any other money." R.T. 4/23/15: 51, 88. Confronted with a cancelled check from Cha's bank, she initially acknowledged "a check

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[3] She did not give the Government any bank records. R.T. 4/23/15: 64-65; R.T. 4/27/15: 104. The Government did not seek corroboration through her bank records. R.T. 4/22/15: 204-05; R.T. 4/23/15: 64-65. The Government had "nothing but [her] word;" "they just simply trusted me." R.T. 4/23/15: 64-65.

that [she] gave to Mr. Cha," "signed by [her]," drawn on her account, dated the day before Dr. Pak's records were due to Medicare, Ex. T, 42; R.T. 4/23/15: 54-56, 58. She then recanted, claiming not to recall, questioning if it was her handwriting, insisting "I did pay him cash." Mrs. Pak denied her checkbook would confirm the transaction: "probably been discarded," she volunteered, adding "I think there was a problem with the bank." The check was produced by Cha's bank pursuant to a grand jury subpoena.

2. Choi Transcribed Pak's Notes, Allegedly Without Ever Communicating with Him

When Sena Choi first met with government agents, she said she "was simply copying the information." When threatened with prosecution, Choi obtained immunity and claimed she supplemented Dr. Pak's notes at Cha's direction.

Choi proclaimed ignorance of the doctor's name, though acknowledging Dr. Pak's name was so prominent throughout the files it was impossible not to know they were his. She admitted lying to the grand jury when claiming she didn't see Dr. Pak's name in the files until 2011.

Choi understood that patient files belong to the doctor, not the biller, and that before making any alterations to a doctor's charts, the transcriber needed to check with the doctor. Choi said she never sought or received such

permission and claimed to have never spoken with Pak, only Cha. Choi confirmed some of Pak's notations were illegible and the only way to transcribe them was to talk to Dr. Pak. She acknowledged it would have been unreasonable for anyone to transcribe the 2,500 pages without ever speaking to Pak, especially since his name was on virtually every page.

Choi reportedly offered to transcribe Dr. Pak's handwritten notes for a flat fee of $3,000, which was substantially below market. She claimed to have been paid only by Cha and denied receiving any payment from Dr. Pak. R.T. 4/23/15: 152. However, Choi recognized "a 1099 [she] received from Dr. Pak" for 2009, addressed to her home. Ex. Q, V; R.T. 4/27/15: 18, 60-62.

3. Conflicting Evidence About the Computer and Software Program Choi Used

Choi transcribed the notes using special software for creating electronic medical records (EMRs). She falsely told the grand jury she did not know how to use the software until Cha trained her. R.T. 4/23/15: 159; R.T. 4/27/15: 31-32. In fact, she was using it 2 years before she ever met Cha. R.T. 4/27/15: 31, 76-77. At trial, she initially said Cha "told me how to use the computer program," before conceding Cha "did not train me." R.T. 4/23/15: 103, 156.

Choi claimed Cha gave her the computer with the pre-loaded EMR

software. Her former employer James Song, however, testified that, after referring her to Cha, Choi "asked to borrow a laptop computer [with] EMR software." Confronted with evidence she got the computer from Song, Choi claimed she "didn't recall very well."

That wasn't her only embellishment. Choi claimed to have obtained *two* computers from Cha, and used both. She never mentioned two computers to the grand jury or at any prior interview with agents; it was a fact Choi first brought up at trial. Song had only one laptop with EMR software, which has nothing to do with billing. Contrary to Choi's claim of using both laptops to make corrections, the EMR program cannot merge files into a single project.

4. Cha Candidly Disclosed Choi's Role, Which She Wanted to Conceal; Apart from Working at Home, Choi's Descriptions Are Uncorroborated

Choi did the transcriptions from home. She initially claimed Cha proposed she take the computer home, but later admitted *she* proposed it because she wanted to work at home.

Choi confirmed the handwritten charts were missing information. She added details "not contained in the original chart" "to make it look like . . . [a] real chart with real exercises and therapy" based on what she "imagined would be needed." She selected exercises "according to my discretion." Choi didn't know which exercises were actually performed and gave no thought to

finding out. She claimed to believe she was following Cha's instructions.

Choi said she never communicated with Cha by email. She had no writings corroborating her description of the work Cha hired her to do.

Choi's immunity agreement obligated her to produce all documents. She produced none. The Government never asked her to produce any. Neither Choi nor the Government had any documents corroborating her testimony.

Choi's admitted fraud in altering Pak's records was an offense reportable to the Physical Therapy Board even absent a conviction. She admitted committing crimes in 2009. In the six years since, Choi still hadn't reported them.

Choi's name was not visibly connected with the transcribed notes. When agents asked Cha who transcribed the notes, he did not recall but offered to review his files and find out.

When Cha told Choi the Government wanted to interview her, Choi told him to lie and say he didn't know her name. Persistent, Cha went to her home uninvited, told her she needed to cooperate, and persuaded her to meet with him and an attorney.

At the attorney's office, Choi again expressed anger that Cha disclosed her name instead of lying about it.

At the meeting, Choi "said I transcribed it exactly." Choi claimed,

however, that alone with him "in the elevator," she told Cha she'd altered the records, which he acknowledged knowing, but encouraged her to lie: "Let's talk as though I did [transcribe exactly] and I consented." Wendy Cho, Cha's business partner, was also at the meeting, testified this event could not have happened. She and Cha arrived together, separate from Choi. Choi left the meeting first. Cha did not go out with Choi. R.T. 4/27/15: 180-81.

5. Choi's Repeated Lies Earn Her Freedom

Choi acknowledged "There were times when I was not honest." She confessed to committing two crimes: falsifying medical records and lying to government agents. The Government was aware of her crimes and lies but granted her immunity anyway. She was required to testify against Cha. She characterized the deal as the Government paying for her testimony with her invaluable freedom, worth over $1,000,000.

She admitted other lies as well. She circulated a resume falsely claiming to have earned a B.S. from U.C. Irvine. She attended UCI but "did not get to graduate." She downplayed the falsehood: "I made a mistake."

Having previously transcribed charts for others, she lied to the grand jury that inputting Pak's charts "was entirely new to [her]." "Yes, that's what I answered at the time, although it was not true." She lied to the grand jury when saying she worked at Cha's office, trying to give the grand jury a false

impression. She admitted lying about her knowledge of Medicare rules.

6. Falsely Telling Cha He is "Protected" and Not a Target, Prosecutors Induce Cha to Inculpate Himself

Choi and Cha were interviewed by Government agents the same day. Sensitive to patient privacy, when called for an interview, Cha retained an attorney specializing in healthcare law to represent his company and its agents. The Government assured Cha's attorney he and Choi were just witnesses and that neither was a target. That assurance was false. Cha was, in fact, a target. R.T. 4/28/15: 105, 112; R.T. 6/4/13: 826-28, 870.

Having been assured they were not targets, the civil healthcare attorney did not refer Cha to an attorney with criminal expertise but agreed to represent both in proffer sessions that offered limited use immunity for statements made thereat. R.T. 4/28/15: 113-15.

Cha was not told about exceptions allowing the Government to use statements from the session if his *attorney* challenged evidence in a way the Government deemed inconsistent with his statements. He saw the proffer letter for the first time at the meeting, and was told it would "protect" him.

Although acknowledging assisting Pak in performing the pre-audit compliance review, Cha initially denied knowing of any problems with Pak's patient charts. As Sena Choi did after the meeting, aided only by a civil

lawyer, Cha concluded it was in his best interests to make self-inculpatory statements to his interrogators.

The Government introduced at trial that Cha said:

> • So-Ja Pak made an initial down-payment of a few thousand dollars cash and four to five additional installments ranging between $4,000 and $12,000, for a total of $43,000, which included $3,000 he paid Choi.
> • he was unable to provide an invoice because his old computer was discarded after being infected by a virus;
> • after reviewing several of Pak's files, he saw incomplete progress notes he thought could be problematic; that Pak also feared his notes would not meet Medicare guidelines and asked Cha to add more details to the notes;
> • he authorized Sena Choi to supplement the progress notes based on the patients' diagnoses;
> • he did not think the patients received the exact type of therapy documented in the typed notes; and
> • the process of creating the typed notes was wrong.

R.T. 4/28/15: 27-31.

On appeal, the Ninth Circuit held that "Because Cha's attorney made assertions at trial that were inconsistent with Cha's proffer statements, the district court did not err in admitting those statements into evidence." App. 3a.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are Split Over the Standard for Admitting Proffer Statements

Nearly 25 years ago, this Court authorized a slight departure from the common law rule excluding evidence of statements made during plea

negotiations. Notwithstanding the long-standing proscriptions against such evidence, the Court held the rules were amenable to waiver. In *United States v. Mezzanatto*, a defendant, after debriefing under a proffer agreement, testified contrary to what he said at the proffer. The Court upheld the impeachment of a testifying defendant with his inconsistent proffer statements, observing:

> Under any view of the evidence, *the defendant has made a false statement*, either to the prosecutor during the plea discussion or to the jury at trial; making the jury aware of the inconsistency will tend to increase the reliability of the verdict *without risking institutional harm to the federal courts*.

United States v. Mezzanatto, 513 U.S. 196, 205 (1995) (emphasis added).

The Government has vastly expanded the scope of waivers extracted as a pre-condition for plea discussions. No longer does it reserve merely the right to impeach trial testimony. It now seeks authority to rebut arguments of *defense counsel* regardless of whether the defendant testifies at all.

The Second Circuit has tempered these waivers by limiting them to refuting specific "factual assertions" made by the defense. Other circuits, however, including the Ninth, do not so limit the Government and allow the Government to introduce everything said at a proffer session to rebut anything "implied" or "inferred" by the defense.

Defense counsel should not be constrained to advancing only a particular version of events previously espoused by their clients. A

defendant's statements during plea negotiations are only one version of events; they are neither gospel nor even the only plausible interpretation of events. The admission of such statements to rebut plausible interpretations of the evidence advanced by defense counsel improperly reduces the Government's burden of proof and misperceives defense counsel's role as mere "spokesperson" rather than an advocate whose professional obligation is "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984).

A. *Mezzanatto* and Its Progeny

As a general matter, "Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) [now 11(f)] provide that statements made in the course of plea discussions between a criminal defendant and a prosecutor are inadmissible against the defendant." *Mezzanatto*, 513 U.S. at 197.[4]

In *Mezzanatto*, however, this Court "deemed enforceable a waiver provision allowing the Government to use a defendant's statements made during plea negotiations to impeach him when he testified in a manner inconsistent with those statements." *United States v. Rosemond*, 841 F.3d 95, 107 (2d Cir. 2016). Significantly, *Mezzanatto* "only considered the

4. "Rule 410 grew out of longstanding case law excluding this type of especially damning evidence." *United States v. Mitchell*, 633 F.3d 997, 1003 (10th Cir. 2011).

enforceability of proffer waivers for impeachment purposes." *United States v. Hardwick*, 544 F.3d 565, 570 (3d Cir. 2008).

When Mezzanatto sought to explore cooperation, the prosecutor insisted Mezzanatto "agree that any statements he made during the meeting could be used to impeach any contradictory testimony he might give at trial." *Mezzanatto*, 513 U.S. at 198.

After he admitted knowing a person's home laboratory was used to manufacture methamphetamine and a package he tried to sell an undercover officer contained methamphetamine, talks broke down. *Id.*, at 198-99.

At trial, Mezzanatto said he thought the home laboratory was "used . . . to manufacture plastic explosives for the CIA" and "denied knowing that the package he delivered to the undercover officer contained methamphetamine." *Id.*, at 199.

The lead opinion held Mezzanatto's waiver of Rules 11 and 410 enforceable and that the prosecutor was properly allowed to impeach *Mezzanatto* with statements *he* made at his proffer session. *Id.*, at 210-11.

Although evidentiary rules are "presumptively waiveable," the Court "agree[d] with respondent's basic premise: There may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably discrediting the federal courts." *Id.*, at 201, 204. Ultimately, however, because "Under any view of

the evidence, the defendant has made a false statement," the Court opined that impeachment would "tend to increase the reliability of the verdict" and "enhance[] the truth-seeking function of trials." *Mezzanatto*, 513 U.S. at 204-05 (emphasis added; emphasis removed).

Justice Ginsburg, joined by Justices Breyer and O'Connor, concurred insofar as the waiver was limited to impeaching a testifying defendant. *Mezzanatto*, 513 U.S. at 211 (emphasis added) (Ginsburg, J., concurring).

Justice Souter, joined by Justice Stevens, dissented. Although agreeing evidentiary rules were waivable, they opined that Congress had categorically rejected admitting plea discussions, which advanced institutional and public interests. *Mezzanatto*, 513 U.S. at 211-17 (Souter, J., dissenting).

Mezzanatto's progeny have borne out Justices Souter's and Stevens's fears that it would become standard practice for federal prosecutors to insist on Rule 410 waivers as a precondition for plea negotiations. *Mezzanatto*, 513 U.S. at 218 (Souter, J., dissenting). The Government has modified its standard waivers beyond impeachment, and, as occurred here, routinely demands a waiver authorizing proffer statements be used not only impeachment, but also "to refute or counter . . . any evidence, argument, statement or representation offered by or on behalf of your client in

connection with any proceeding."[5]

With all the circuits weighing in, none have found any limit to the waivers that may be elicited and exploited for the privilege of engaging in plea negotiations. They have diverged, however, on the standards for assessing when defense counsel's actions will trigger the waiver.

The circuits generally agree that, at least in the abstract, a defendant may challenge the sufficiency of the evidence, impeach and discredit witnesses, and cross-examine prosecution witnesses in a way suggesting they are lying, mistaken, or inaccurate. *E.g. United States v. Krilich*, 159 F.3d 1020, 1025-26 (7th Cir. 1999); *United States v. Rebbe*, 314 F.3d 402, 408 & n.2 (9th Cir. 2002; *Rosemond*, 841 F.3d at 109.

B. In the Second Circuit, The Government May Only Refute Specific Factual Assertions By the Defense

The Second Circuit has repeatedly emphasized that "Even in cases of expansive waivers, district courts need 'to consider carefully what fact, if any,

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5. See Jane Moriarty, et al., *Waiving Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation*, 38 HASTINGS CONST. L.Q. 1029, 1036 n.37 (2011), citing Mark Calloway, et al., *More Defendants are Asked to Waive Plea Deal Rights; Prosecutors Increasingly Insist that Defendants Waive Protections Against Use of Statements at Trial*, Nat'l L.J. S1 (Col. 1) (July 23, 2007)) ("[f]ederal prosecutors are now insisting, as part of the plea agreement process, that defendants waive their 'rights' under … FRE 410 … [and] *Mezzanatto* has served as the foundation for a line of cases that have expanded the breadth of these waivers over time.").

has actually been implied to the jury before deciding whether proffer statements fairly rebut it.'" *United States v. Roberts*, 660 F.3d 149, 158 (2d Cir. 2011), quoting *United States v. Barrow*, 400 F.3d 109, 119 (2d Cir. 2005); accord *Rosemond*, 841 F.3d at 103; *United States v. Oluwanisola*, 604 F.3d 124, 132 (2d Cir. 2010). For waivers not to negate trial, the Second Circuit insists the Government target proffer statements to a specific "factual assertion" by the defense. "We first ask whether there has been any evidence offered or elicited, or 'factual assertion' made, by or on behalf of the defendant that would trigger the Rule 410 waiver." *Rosemond*, 841 F.3d at 107. A presentation that "attacked the Government's proof without asserting any new facts" does not trigger the waiver. *Rosemond*, 841 F.3d at 111.

While all the circuits seem to accept, at least in theory, that disputing the evidentiary sufficiency will not trigger the waiver, the Second Circuit has been particularly vigilant to protect that right so long as the defense makes no affirmative "factual assertion" contradicted by proffer statements. Seeing "no principled way of distinguishing between a cross examination question that challenges a witness's perception of an event and a question that accuses the witness of fabricating an event," the Second Circuit insists that a "question that goes to the credibility of the government's witness, *without a factual assertion contradicting the facts admitted in the proffer statements*, is not sufficient to trigger the waiver." *Oluwanisola*, 604 F.3d at 133.

Two examples are in order.

Although a defendant admitted that a cooperating witness, Beckford, participated in unloading drugs from a flight that landed in New York, the defense presented evidence that Beckford had been in Miami that day and clocked into JFK airport over an hour after the flight was unloaded. The Second Circuit found this triggered the proffer statements. Evidence Beckford "could not have been present for the offloading of the 10:41 p.m. Barbados flight because his flight from Miami did not arrive in New York until 9:48 p.m. on November 5, and Beckford did not swipe into work at JFK until 12:03 am. on November 6 . . . contradicted [the defendant's] proffer statements *expressly* placing Beckford at the gate during the offloading of the Barbados flight." *Roberts*, 660 F.3d at 163 (emphasis original). The court upheld admitting proffer statements relating to Beckford. *Id.*, at 154-55.

In contrast, *Rosemond* exemplifies how counsel may defend without a waiver-triggering "factual assertion." A defendant in a murder conspiracy admitted in a proffer that, as a result of a planned confrontation, he knew the victim would die. Defense counsel sought to elicit from a co-conspirator that he "did not think this was going to be a murder" even though he "knew there was going to be a shooting" and they "never used the words 'murder' or 'kill.'" The district court found this triggered the proffer because "they implicitly asserted that the object of the conspiracy was something less than murder."

Rosemond, 841 F.3d at 103-04. The Second Circuit disagreed:

> There is a material difference between the statement "the Government's evidence fails to establish that Rosemond intended that Fletcher be murdered, as opposed to shot or injured," and asserting as fact that "the object of the conspiracy was to non-fatally assault Fletcher"; only the latter is a factual assertion that would trigger the waiver. Defense counsel never attempted to affirmatively argue or prove that Rosemond conspired to commit only a nonfatal shooting.

Rosemond, 841 F.3d at 110.

The Second Circuit recognized that sufficiency challenges "will often carry with them the inference that events did not actually occur consistent with the Government's theory, and thus – at some level – are arguably contrary to the proffer statements. The same is true when a defendant enters a plea of 'not guilty,' but these are not 'factual assertions' as they do not propose an alternate version of events inconsistent with the proffer statement." *Rosemond*, 841 F.3d at 111.

While the "line between challenging the sufficiency of the Government's evidence and implicitly asserting new facts can be a fine one . . . [u]nlike the statement 'Rosemond intended to commit a non-fatal shooting,' the argument that there is insufficient evidence of intent to murder suggests no new facts and injects no alternate version of events inconsistent with the proffer statements." *Id.*, at 108, 111. A genuine opportunity to contest the case means "Defense counsel must be permitted to 'draw the jury's attention to the lack of evidence' presented on specific elements without triggering the

waiver." *Rosemond*, 841 F.3d at 108, quoting *Oluwanisola*, 604 F.3d at 132.

C. In Other Circuits, The Government May Introduce Proffer Statements If There is Any Attempt to Dispute, Deflect or Minimize Guilt

The Third, Sixth, Seventh, and Ninth Circuits have a much lower barrier for receiving protected proffer statements.

The Ninth Circuit, where this case arises, found a waiver triggered, regardless of any specific factual assertion, where the defendant "*presented a defense* that was inconsistent with his proffer statements." *Rebbe*, 314 F.3d at 407 (emphasis added). Evidence "implying" a third party could have designed and executed the charged fraudulent plan alone and testimony "*implying* that Rebbe possessed no knowledge" about facts he admitted knowing about in his proffer statement triggered the waiver.[6]

The Ninth Circuit's approach could not be further apart from the Second Circuit's. Despite the defendant's acknowledgment that a victim was going to end up dead, the Second Circuit deemed it acceptable for the defendant to elicit evidence suggesting that "the Government's evidence fails

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6. "Rebbe presented evidence that he played no role in manufacturing duplicate deposit slips" whereas, in his proffer, he "admitted that he manufactured false duplicate deposit slips." *Rebbe*, 314 F.3d at 404, 407. Although this would appear to be a "factual assertion," the Ninth Circuit used a more forgiving test and authorized admitting a broader range of proffer statements than those limited to refuting specific "factual assertions."

to establish that Rosemond intended that Fletcher be murdered, as opposed to shot or injured" so long as defense counsel "never attempted to affirmatively argue or prove that Rosemond conspired to commit only a nonfatal shooting." *Rosemond*, 841 F.3d at 110. Both, however, under the Ninth Circuit's rule, would be "present[ing] a defense that was inconsistent with the proffer." *Rebbe*, 314 F.3d at 407.

The Seventh Circuit similarly elides any inquiry whether the defense advanced a "factual assertion." In the context of a scheme consummated by a feigned hole-in-one used to conceal a bribe, the defendant elicited testimony that the ninth hole was "close to the clubhouse and easily observed." *Krilich*, 159 F.3d at 1026. It is not clear that Krilich's proffer suggested anything to the contrary. The Seventh Circuit, however, found the waiver triggered because "Krilich wanted the jury to *infer* that no one would attempt to fake a hole-in-one there; that *implication* is inconsistent with the proffer." *Krilich*, 159 F.3d at 1026 (emphasis added).

Krilich also called two witnesses who said they were nearby and didn't see Krilich. Although accepting that one person's failure to see an event is not inconsistent with an admission the event occurred (and no suggestion his proffer addressed whether the witnesses had seen him or not), the testimony triggered the waiver because it "*implied* that Krilich did not fake the hole-in-one, contrary to what he admitted in his proffer." *Krilich*, 159 F.3d at 1026

(emphasis added). A corporate officer's testimony that "he was not aware of *any* bribes paid to any public official in connection with *any* project" also triggerred the waiver because of its "implication." *Id.* (emphasis original).

The Third Circuit upheld the admission of proffer statements in circumstances likely insufficient under the Second Circuit's "factual assertion" test. Murray "admitted to planning and participating in the slaying of" Rosa and Allen. *Hardwick*, 544 F.3d at 569. At trial, counsel "elicited testimony that another drug gang, led by Mark Lee, had [a] motive to kill Rosa." *Id.*, at 570-71. There was also defense evidence "Allen was disrupting Perez's drug sets and affecting his profits, in an attempt to pin the motive on Perez." *Hardwick*, 544 F.3d at 571.

Lee may well have had a motive to kill Rosa and Perez a motive to kill Allen. Motives do not show they did the deeds but it may raise a doubt as to the forcefulness of the Government's evidence. Nothing in *Hardwick* suggests Murray said Lee and Perez did not have the motives his attorney ascribed to them, without which, there was no "factual assertion" to be refuted with proffer statements.[7]

[7.] Lopez, who admitted shooting Allen and said he acted on Murray's order, was asked whether Perez gave him the gun and ordered the killing. *Id.*, at 571. The opinion does not suggest Murray admitted providing Lopez the gun used to kill Allen and, given that Murray worked for Perez, *Hardwick*, 544 F.3d at 568, it is not implausible that Murray's involvement was because Perez had a motive to kill Allen and provided the murder weapon to the killer.

Nonetheless, even if no "factual assertion" was made, that counsel's questions were "aimed at *inferring* that Lee and Perez, rather than Murray, were responsible for the murders" triggered the waiver. *Hardwick*, 544 F.3d at 571 (emphasis added). Even if no specific factual assertion was contradicted, Murray's proffer statements were admissible because the district judge "*felt* Murray was also attempting to challenge any *recollections* regarding Murray's role in the killings." *Id.*, (emphasis added).

Without a factual assertion, challenging witness recollection and credibility does not trigger wavier in the Second Circuit. *Rosemond*, 841 F.3d at 109. But doing so and raising doubts of his involvement does in the Third.

The Sixth Circuit follows the other circuits' lower standard for triggering waivers, rather than limiting the Government to refuting specific "factual assertions." *United States v. Shannon*, 803 F.3d 778 (6th Cir. 2015).

His supervisor testified that Shannon paid Medicare beneficiaries for signatures and account information on pre-signed medical notes, *Shannon*, 803 F.3d at 780, while acknowledging on cross-examination that he did not see Shannon pay patients, he didn't direct Shannon to pay patients, and he had no first-hand information of illegal payments. When the supervisor said he'd received calls from patients complaining they hadn't been paid, defense counsel asked "that meant he didn't pay them," "that's why they were calling, but they weren't paid, correct?" *Shannon*, 803 F.3d at 781-82.

Although the latter appear to be factual assertions, the Sixth Circuit followed the Third Circuit's *Hardwick* decision and asked more generally whether "inferences" might be "inconsistent with his proffer." *Shannon*, 803 F.3d at 785. The Sixth Circuit noted that *Hardwick* found it enough that a defendant "attempted to challenge his role in the crimes, contrary to his proffer statements." *Id.*, at 785. The panel noted that, in addition to challenging his supervisor's personal knowledge, the questions were also aimed "at inferring that Shannon did not pay beneficiaries, an inference that is inconsistent with his proffer statements." *Id.*

Because Shannon's attorney was "attempting to negate the fact that Shannon had ever paid beneficiaries – in contradiction to his proffer," admissions he paid beneficiaries were likely admissible even under the Second Circuit's test. But the Sixth Circuit's rule was not so limited. And, noting that "During the proffer session, Shannon made several inculpatory statements regarding his involvement in the health care fraud conspiracy," *Shannon*, 803 F.3d at 781, rather than limit the Government to Shannon's admission of paying beneficiaries, more broadly than permissible in the Second Circuit, the Sixth Circuit ruled "the Government was free to rebut this evidence by introducing Shannon's proffer statements," seemingly without limitation. *Shannon*, 803 F.3d at 786.

II. This Court Should Clarify the Standards for Triggering Waivers

"Criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions . . . are the result of guilty pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). A key, even if not exclusive, impetus for this development is the demand for the waivers to engage in plea discussions.

To foster the compromise of criminal actions, Rules 11(f) and 410 enable parties to discuss potential resolutions "without sacrificing their ability to defend themselves if no disposition is reached." *Barrow*, 400 F.3d at 116, citing FED. R. EVID. 410 advisory committee's note (1972); accord *Mezzanatto*, 513 U.S. at 206. It has long been considered "inherently unfair for the government to engage in [plea negotiations], only to use it as a weapon against the defendant when negotiations fail." *United States v. Ross*, 493 F.2d 771, 775 (5th Cir. 1974).

The integrity of the judicial system is compromised not only by requiring a defendant to incriminate himself with admissible evidence as a precondition of exploring a negotiated disposition. It is compounded by the threat rebuttal waivers pose to the reliability of trials.

A hallmark of the criminal justice system requires the Government's evidence to "survive the crucible of meaningful adversarial testing." *Cronic*,

466 U.S. at 656. If "presenting a defense" is "inconsistent" with self-inculpatory proffer statements, then meaningful adversarial testing is impossible. Limiting prosecution rebuttal to refuting a specific "factual assertion" or defintive "alternate version of events" is an essential check on a broad and amorphous trigger of generic "inconsistency."

Without evaluating whether the defense advanced a specific factual assertion, no intelligible principle exists for distinguishing when proffer statements may be admitted unless "inconsistency" simply means "contesting guilt." There is no "trial" if defendants cannot challenge the Government's evidence without triggering the waiver and challenge the veracity and credibility of testimony even if not its substance. *E.g. Krilich*, 159 F.3d at 1025-26; *Rebbe*, 314 F.3d at 408 & n.2. Even with the factual assertion test, "the distinction is more easily stated than applied." *Roberts*, 660 F.3d at 158. Without it, it's near impossible.

Only by limiting the Government to refuting specific factual assertions contained in the proffer may defendants conduct meaningful adversarial testing of the Government's case without triggering the proffer.

Courts outside the Second Circuit trigger waivers whenever questions are "aimed at *inferring* that [someone else was] responsible." *Hardwick*, 544 F.3d at 571 (emphasis added). But that's the essence of reasonable doubt – inviting jurors to infer that the Government's evidence is not ironclad.

Rosemond, 841 F.3d at 111 (counsel are "entitled to argue that certain inferences from the Government's proof should not be drawn").

If the defendant made inculpatory statements at the proffer, *any* challenge to the accuracy, credibility and reliability of the Government's case inevitably invites jurors to draw an "inference" at odds with the proffer statement. If the waiver is not a renunciation of trial, courts must recognize that the very point of a vigorous defense and meaningful adversarial testing is to question what inferences jurors should draw.

Otherwise, with no intelligible principle, defense counsel remain subject to the unreviewable idiosyncracies as to what inferences might possibly be drawn from a presentation.

The rationales appellate courts advance for hobbling defense counsel are misguided. These waivers do not encourage "truthful" statements at the proffer session.[8] The inherent dynamics of proffer sessions impel defendants to make self-inculpatory statements regardless of any waiver. Rebuttal waivers, by contrast, pull in the *opposite* direction, forcing defendants to "stop to think about the amount of trouble his openness may cause him if the plea

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8. *Cf. Rebbe*, 314 F.3d at 408 (rebuttal waivers "help ensure that criminal defendants make proffers to the Government that are straightforward and honest"); *Krilich*, 159 F.3d at 1025 ("A conditional waiver of the kind Krilich signed tends to keep the defendant honest, which makes the proffer device more useful to the both sides. For this strategy to work the conditional waiver must be enforceable; its effect depends on making deceit *costly*.") (emphasis original).

negotiations fall through," *Mezzanatto*, 513 U.S. at 214 (Souter, J., dissenting), a compelling incentive to *minimize* conduct and culpability.

Nor do rebuttal waivers "encourage[] criminal defendants to present defenses at trial that are not fraudulent." *Rebbe*, 314 F.3d at 408. "Fraudulent" defenses, already prohibited by professional ethics, ABA MOD. R. PRO'L COND. 3.1, 3.3, are not implicated. Truthful testimony is not fraudulent just because its does not track what another witness said, whether the other witness is a Government witness or a non-testifying defendant. Evidence at odds with a proffer statement is not "false" evidence. That a witness – even a defendant – may have said something at some point in time neither establishes nor negates its truth. It is simply potential evidence the jury is free to believe or disbelieve. So, too, is defense counsel.

And, unlike impeachment waivers, when applied to *counsel's* presentation waivers do not "promot[e] the truth-seeking function of trials." *Rebbe*, 314 F.3d at 407. If defense counsel cannot act as a check on the Government's case, the adversarial process ceases to function. The claim, moreover, is premised on a further assumption that the non-testifying defendant is the only person to know what happened and, perversely, the only one truthful and was in fact truthful at the proffer even though no deal materialized. Indeed, it is a curious irony that courts tend to rationalize admitting a defendant's proffer statements as promoting the truth when

negotiations often break down precisely because the defendant was *not* telling the truth. *E.g. Mezzanatto*, 513 U.S. at 198; *Oluwanisola*, 604 F.3d at 128.

Indeed, by chilling meaningful adversarial testing, applying rebuttal waivers to defense counsel's presentation *undermines* the truth-seeking function of trials by impeding counsel's ability to raise legitimate doubts. *Oluwanisola*, 604 F.3d at 131-33; *Rosemond*, 841 F.3d at 106-12. Society's "interest in not convicting the innocent" requires defense counsel "to put the State's case in the worst possible light." *United States v. Wade*, 388 U.S. 218, 257-58 (1967) (White, J., dissenting).

As applied to *counsel*, rebuttal waivers are one-sided extractions that advance no important interest and undermine "the adversarial process protected by the Sixth Amendment." *Cronic*, 466 U.S. at 656.[9]

These waivers, in fact, are counter-productive to encouraging early plea discussions. Experienced defense counsel recognize that, once a proffer waiver is signed, defending at trial is all but impossible. Barry Tarlow, *Queen for a Day – Proffer Your Life Away*, 29 CHAMPION 53 (Mar. 2005).

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9. Similarly, these rebuttal waivers always benefit the Government and only the Government. If the plea negotiations are successful, the Government obtains the conviction it wanted. If the plea negotiations fall through, the Government obtains valuable admissions from the defendant that it will almost assuredly be able to use at trial – and, even if not admit, at least temper the defense's vigorousness by vigilant threat of admission. The defendant, by contrast, if the deal falls through, is effectively deprived of counsel who can zealously highlight any and all the shortcomings in the Government's evidence.

Rebuttal waivers ensure that, for experienced counsel, plea negotiations won't begin until *after* a decision has *already* been made to forego trial.

Most of the justifications rest on a fundamental misunderstanding of counsel's role. Defense counsel is not the defendant. Neither alter ego nor spokesperson, "defense counsel is the professional representative of the accused." ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARD 4-1.2(e) (3d ed. 1993). "The 'alter ego' concept of a defense lawyer, which regards the lawyer strictly as a 'mouthpiece' for the client is [both] fundamentally wrong" and "destructive of the lawyer's usefulness." STANDARD 4-1.2, commentary.

Contrary to the "spokesperson" theory, "counsel's function . . . is to make the adversarial testing process work," *Strickland v. Washington*, 466 U.S. 668, 690 (1984), which includes "the overarching duty to advocate the defendant's cause," including the "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.*, at 668; *see also id.*, at 687; STANDARD 4-7.6, commentary.

Strategic and tactical decisions about the conduct of the litigation including "whether and how to conduct cross-examination . . . and what evidence should be introduced" is the exclusive province of defense counsel. STANDARD 4-5.2(b). "The lawyer should determine which witnesses should be called on behalf of the defendant . . . , what evidence should be introduced . . . [and] whether and how a witness should be cross-examined." STANDARD 4-

5.2, commentary.

As such, because they only challenge *counsel's* presentation – and not the testimony of a non-testifying defendant – rebuttal waivers do not regulate the defendant at all. They only regulate defense counsel trying to balance their obligation to challenge the prosecution's evidence without triggering a waiver jeopardizing their client's defense.[10]

Because they dissuade counsel from subjecting the Government's case to the crucible of meaningful adversarial testing and, once triggered, relieve the Government of its burden to prove guilt beyond a reasonable doubt, rebuttal waivers undermine the reliability of trials.

Rebuttal waivers should be among the class of rules "so fundamental to the reliability" of the criminal justice system that "they may never be waived without irreparably 'discredit[ing] the federal courts.'" *Mezzanatto*, 513 U.S. at 204, citing *Wheat v. United States*, 486 U.S. 153, 162 (1988).

[10.] Particular caution is required when the purported fact is asserted by counsel rather than through witness testimony or exhibits. . . . [C]ounsel's statements are not admissible evidence. Thus, arguments or questions challenging "the sufficiency of government proof," or the credibility of a witness "without a factual assertion contradicting facts admitted in the proffer statement," do not trigger a waiver provision.
Roberts, 660 F.3d at 158.

III. The Case is a Good Vehicle for the Issue Presented

Although not haggling over the details of a specific offer, they were still engaged in an integral part of plea negotiations. After being misled into believing that her clients were not current targets, Cha's healthcare lawyer agreed to the proffer session to stave off further prosecutorial scrutiny.

Such meetings are "the conventional first step" of plea negotiations. Benjamin Naftalis, *"Queen for a Day" Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statements Rules*, 37 COLUM. J.L. & SOC. PROBS. 1, 5 (2003). Indeed, plea discussions are sometimes properly aimed at persuading the Government to "not bring" charges. FED. R. CRIM. P. 11(c)(1)(A). *Cf. United States v. Young*, 223 F.3d 905, 908-09 (8th Cir. 2000).

Moreover, whether or not governed by Rule 410, it is undisputed that Cha's proffer statements were admitted under the proffer letter's rebuttal waiver which is governed by the same standard as other waivers. App. 3a.

Because this case arose in the Ninth Circuit, it was sufficient that Mr. Cha "presented a defense" that was, in some abstract way, "inconsistent with his proffer statement." *Rebbe*, 314 F.3d at 407. Had this case arisen in the Second Circuit, the proffer statements would not have been admitted or, at a minimum, would have been far more circumscribed.

1. Mrs. Pak claimed, without documentary corroboration, she

withdrew $30,000 "from my account" and paid Cha "all at once," "in a day or two." Although the Government subpoenaed some of the Paks' bank records and all of Cha's personal and business banking records, no evidence corroborated So-Ja Pak's claim she paid Cha $30,000 in cash "all at once." App. 15a [R.T. 4/28/15: 16]. Cha disputed So-Ja's testimony by producing a check written over a month after he was hired produced by Cha's bank.

The district judge admitted Cha's proffer statement acknowledging payment because the defense suggested "they don't have any evidence as to the $30,000 beyond her statement. They shouldn't believe her statements. She's a liar." App. 11a. [4/27/15: 210]

That would have been insufficient in the Second Circuit to trigger the waiver. Tendering a check did not dispute payment. It *conceded* payment. It disputed being "in cash," "all up front."[11] Challenging Mrs. Pak's lies about an alleged $30,00 lump-sum cash up-front payment was not a "factual assertion" Cha was *never* paid. In the Second Circuit, highlighting the lack of corroboration would not have triggered the waiver. *Rosemond*, 841 F.3d at 109, 112.

Moreover, once the Government "opened the door," Second Circuit

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11. The Government argued at the first trial, and Mrs. Pak blurted out at the second, "when that much money is given out . . . I thought this may – this may not be legal." R.T. 4/23/15: 85. (Of course, she had no basis for knowing the market value of the work he'd been asked to do.)

would have permitted defense counsel to "inquir[e] into exculpatory facts already elicited by the government" without triggering the waiver. *Rosemond*, 841 F.3d at 112. That Cha was paid in installments did not "refute or counter" Mrs. Pak lie about how she paid Cha. The Government could not use it as a ticket to assuage doubts about So-Ja's testimony and reduce its burden of proof when Cha challenged Mrs. Pak's credibility.

If merely pointing out the lack of corroborating evidence triggers the proffer statement, the waiver "would leave the defendant, for all practical purposes, defenseless." *Oluwanisola*, 604 F.3d at 132.

2. Choi claimed her only payment for the transcriptions was $3,000 from Cha. She admitted nothing supported that claim, "just your word."

The defense offered a 1099 issued to her by Dr. Pak. Choi denied receiving it or being paid anything by Dr. Pak. The expert on pre-audit reviews opined that $3,000 was too low for the volume of work and that $8,000 was more likely.

If there were a "factual assertion," it was that Choi received a supplemental payment from Dr. Pak. Cha's proffer statement addressed *his own* payment to Choi and that he was reimbursed by Pak. He knew nothing about, and said nothing about, whether Dr. Pak paid Choi additional money. Nothing in the proffer refuted the implication Choi received money from Pak.

Nor did Cha's lack of an invoice for his payment to Choi refute any "factual assertion" advanced by the defense. The defense case did not challenge Choi's claim she was paid by Cha. Whether Cha's computer had been infected by a virus and wiped clean, leaving him no invoice did not contradict Choi's lack of corroboration for her sources of payment.[12]

Here, again, under Second Circuit law, highlighting the Government's lack of corroboration would not have triggered admissibility of proffer statements. That Cha's attorney highlighted facts that could resonate with jurors did not justify lightening the Government's burden by introducing protected proffer statements.

3. Choi claimed, without corroboration, all her instructions came from Cha. She also claimed not knowing whose charts she transcribed, even though admitting no reasonable PTA would alter medical records without the doctor's permission and Dr. Pak's name was pervasive throughout the files. Choi also acknowledged that, because many of Pak's notations were illegible, it would have been unreasonable to transcribe 2,500 pages of them without talking to Dr. Pak.

[12.] The proffer statements did not even refute the defense. The defense elicited evidence that Choi's $3,000 from Cha was *below market*, suggesting she likely received the balance from another source, presumably Dr. Pak. Cha's explanation why he had no invoice did not refute the defense claim Choi was likely paid more than the $3,000 she received from Cha.

Cha's proffer statements that the progress notes looked incomplete and potentially problematic, that Dr. Pak agreed the notes were insufficient for Medicare, and Dr. Pak asked him to "fix the notes" or "add more things to the notes," or that he reportedly authorized Choi to add information to the files" and "gave [her] discretion on completing the progress notes" was unresponsive to whether Choi ever communicated with Dr. Pak.

None of the Government's rebuttal contradicted Cha's challenge to Choi's claims. The Government did not, for example, tender evidence Cha said Choi did not interact with Dr. Pak, that he instructed her not to interact with Dr. Pak, that he concealed Dr. Pak's identity from her, or that Choi had documents corroborating her assertions.

The cross-examination on these points simply suggested Choi was untruthful about the scope and nature of her communications which, under the Second Circuit's framework, would be "cross-examining a witness in a manner to suggest that he was lying or mistaken or was not reporting an event accurately," tactics that "are not factual assertions sufficient to trigger the waiver provision in a proffer agreement." *Rosemond*, 841 F.3d at 112.

Here, too, the Government should not have been allowed to use Cha's statements to bolster Choi's credibility and lighten its burden through statements he made in an agreement he was told would "protect" him.

4. Choi claimed that, while at the attorney's office, she met with Cha alone and told him she altered the records, that he admitted knowing that, and encouraged her to lie about it. The defense position was that the alleged conversation was a complete fabrication. Cha never mentioned any such interaction in his proffer statement.

To dispute it, he called his business partner who was at the meeting and affirmed she was with Cha throughout the meeting and Cha never left to be alone with Choi when he could have had a confidential conversation in an elevator. Ms. Cho explained they were paying the attorney by the hour and weren't going to waste time and money.

Having never mentioned the event in the proffer, Cha could not have triggered the waiver by disputing Choi's claim she and Cha left together for a secret conversation. The district court's claim that the implication was that Cha "didn't know anything and if you had, he would have said something or done something to reflect that he knew," App. 10a [R.T. 4/27/15: 209], "were no more inconsistent with the proffer waiver than entering a plea of not guilty or challenging the sufficiency of the evidence." *Rosemond*, 891 F.3d at 112.

The district court later elaborated that the "entire testimony of Ms. Cho really went to show that Mr. Cha had no knowledge of what Ms. Choi had done." App. 20a [R.T. 4/28/15: 21]. Ms. Cho was in no position to speculate

about Cha's state of mind but the district court suggested:

> the entire fact of the meeting, how the meeting proceeded, whether or not they had an opportunity to leave the meeting and discuss this together, all of that *went to the underlying question that is the subject of the proffer*, which was whether [he] knew that those . . . transcriptions had been falsified.

App. 20a [R.T. 4/28/15: 21].

But the question, at least in the Second Circuit, isn't over "the underlying question that is the subject of the proffer." It can't be. The subject of the proffer is invariably the defendant's guilt or innocence. If that "underlying question" triggers the proffer, it simply reinforces that such waivers foreclose a meaningful defense.

Had Cha's case been scrutinized under Second Circuit law, even though Cha's evidence implied that "the event did not occur the way the Government suggests . . . , such questions will usually be insufficient to trigger the 'factual assertion' requirement of the proffer waiver." *Rosemond*, 841 F.3d at 109.

Even if Wendy Cho's testimony implied a "factual assertion," at no time during the proffer session did Cha ever claim to have said *anything* to Choi before, during, or after the attorney prep session, let alone that he conferred with her outside the attorney's and Wendy Cho's presence.

The only "alternative version of events" tendered by Cha was that the side-meeting never happened. Nothing in the proffer statement contradicted that. The onslaught of proffer statements offered to show only he knew he

did something wrong would not have been permitted in the Second Circuit.

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In none of these instances was there a "factual assertion contradicting facts admitted in the proffer statements" such as would allow admission of proffer statements in the Second Circuit. Even if there were, the proffer statements admitted did not "counter[] and cast doubt on the truthfulness of the factual assertions advanced." *Rosemond*, 841 F.3d at 108. Cha's appeal was denied because he was prosecuted in the Ninth Circuit.

CONCLUSION

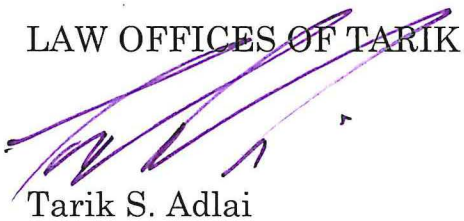
As happens whenever a defendant waives Rule 410 as a condition of exploring plea negotiations, "The statements [the defendant] made during his proffer session sealed his fate at trial." *Fifer v. United States*, 660 F. App'x 358, 365 (6th Cir. 2016) (Moore, J., dissenting).

We have arrived at the day, predicted by Justice Souter, where defendants are required to provide a "waiver of such scope that a defendant who gives it will be unable even to acknowledge his desire to negotiate a guilty plea without furnishing admissible evidence himself then and there," at which point "the possibility of trial if no agreement is reached will be reduced to fantasy." *Mezzanatto*, 513 U.S. at 218 (Souter, J., dissenting).

The Court should grant the petition for certiorari.

Respectfully Submitted,

LAW OFFICES OF TARIK S. ADLAI



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