

[Who We Are](#)
[Press Room](#)
[News & Issues](#)
[CLE & Events](#)
[Committees](#)
[Members Only](#)
[Champion Magazine](#)
[Indigent Defense](#)
[Federal Legislation](#)
[State Legislation](#)
[Affiliate Organizations](#)
[Lawyer Resources](#)
[Foundation](#)
[NACDL.org](#)
 [Print or Email This Page](#)

RICO Report

March 2005, Page 53

Queen For A Day-- Proffer Your Life Away

 By *Barry Tarlow*

The current situation is best summed up in the overblown rhetoric of Judge John Martin in *United States v. Fernandez*, 98 Cr. 961 (S.D.N.Y. May 3, 2000): In the post-Guidelines world "Counsel's ability to persuade the judge or jury is now far less important than his ability to persuade the prosecutor that the defendant should be allowed to cooperate with the government." See *Rollin', Rollin', Rollin': RICO Report*, *The Champion* (Sept. 2003).

Those accused of committing crimes face extreme pressures. Even after *United States v. Booker*, ___ U.S. ___, 125 S. Ct. 7387 (2005), they confront extraordinarily harsh penalties. Their fate is often in the hands of a single prosecutor. In an attempt to reduce the potential prison time, their lawyers agree to proffer debriefings euphemistically called "Queen for a Day" sessions. They go into these sessions tentatively planning to minimize their own responsibility, to incriminate others, whether truly or falsely, and to test the waters to see whether they can lower their potential sentence by giving the prosecutor whatever he or she wants. Unfortunately, there is no free look at what is behind the green door.

These sessions, as originally designed, were extraordinarily unfair. The accused was required to reveal everything he knew about the crimes under investigation and other wrongdoing of which he might be aware. The agreements provided that, in the prosecutor's absolute discretion, if the defendant was truthful and his information was useful, he would be offered some benefit.

Whether there would be a deal and what it would be were not determined until after the sessions were over. Of course, if no deal was offered or agreed upon, the defendant could theoretically go to trial. If he testified, however, he could be impeached with statements made at a Queen for a Day session, and any evidence discovered as a result of any debriefings could be used against him.

As the Queen for a Day concept developed, it almost prevented defendants who participated in proffer sessions from being able to defend themselves at trial. The defense bar must shoulder its share of responsibility for the development and widespread acceptance of Queen for a Day sessions. Years ago, when these sessions had not yet become commonplace, the Chief Assistant United States Attorney in Los Angeles spoke to the white collar defense bar as he was about to retire. He pointed out that he could never understand why defense lawyers would agree to participate in this relatively new, one-sided procedure that was totally restructuring the plea negotiation process. Because defense lawyers readily agreed to or were coerced into participating in the sessions, prosecutors eventually thought of a "brilliant" concept. Since this arrangement did not absolutely preclude the accused from defending the case, why not ask for



more?

With the scales tipped so heavily in favor of the prosecution, weighed down by mandatory minimums, Guideline Sentencing and § 5K1.1 departures, the last thing legal doctrine needed was a further erosion of the restrictions on the prosecutor's ability to extort and use incriminating statements obtained in proffer sessions. Yet in *United States v. Velez*, 354 F.3d 190 (2d Cir. 2004), a panel of the Second Circuit led by Judge Jose A. Cabranes, together with Chief Judge John M. Walker, Jr. and Judge Pierre N. Leval, misguidedly endorsed the validity of provisions in a proffer agreement waiving the accused's evidentiary protections at trial, not only for purposes of impeachment of the defendant but also in the prosecution's case-in-chief whenever the defense lawyer challenged the government's case or witnesses.

Thanks to this opinion, defendants now bear all the risk of the prosecutor's dissatisfaction with their statements. They are backed into a corner where they are deprived of any ability to defend themselves. The result is appalling, as the *Velez* case makes clear.

There was nothing flashy or complicated about Jose Velez's case. He was a felon, and in August 2001, three New York City police officers claimed they saw him drop a handgun from his waistband. Three months later, the AUSA filed an indictment charging him with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

Velez and his lawyer agreed to participate in two Queen for a Day sessions. Someone must have forgotten to tell him about the rules. At the first session, he "asserted his innocence, claiming that he did not possess the gun found on the ground where he had been standing." *United States v. Velez*, 354 F.3d at 191.

After changing counsel, his new lawyer arranged a second meeting four months later. Before the meeting began, Velez signed an agreement allowing the AUSA to "use [any] statements [he] made [there] to rebut any evidence or arguments offered by or on [his] behalf . . . (including arguments made or issues raised *sua sponte* by the district court) at any stage of the criminal prosecution . . . in any prosecution brought against [him]." *Id.*, at 192 (emphasis added). Whether Velez would receive a deal or what it would be solely depended on the whim of the prosecutor. It is difficult to believe either Velez or his lawyer understood the scope of this waiver. He then recanted his claims of innocence and said he owned the gun. Although a third proffer session was discussed, it never materialized, and when plea negotiations fell through, he went to trial. *Id.*

Because of his agreement, Velez implicitly waived the protections of subsections (3) and (4) of Federal Rule of Evidence 410. These provisions generally prohibit courts from admitting an accused's statements made during plea agreement negotiations with the prosecutor or ill-fated plea discussions. See Fed. R. Evid. 401(3),(4). Ordinarily, absent a waiver or a gross strategic misstep by a defense lawyer, such statements are inadmissible even for purposes of impeachment. See 2 Weinstein's Federal Evidence, *supra*, § 410.09[1], at 410-28.2 (citing *United States v. Acosta-Ballardo*, 8 F.3d 1532, 1536 (10th Cir. 1993)). Of course, proffer agreements, perhaps appropriately, limited the impeachment exception long ago.

Velez's lawyer was understandably wary of letting the statements from the proffer come into evidence. So he was careful not to open the door. In a motion *in limine*, Velez asked the court for a ruling on what might trigger the admissibility of his statements. When the trial court suggested that anticipated testimony (which remained nondescript) would open the door, Velez chose not to present the testimony. *United States v. Velez*, 354 F.3d at 192.

Having failed to get a deal, and being deprived of his ability to offer exculpatory evidence, Velez could not effectively defend himself. Not surprisingly, the jury returned a guilty verdict, and he was sentenced to 10 years' imprisonment.

On appeal, Velez argued, in part, that the proffer agreement was unconstitutional if it applied to evidence or cross-examination material other than his own testimony, which demonstrated that he was innocent. The unconscionable waiver denied him a defense, the effective assistance of counsel and a fair trial. *Id.*, at 193.

Put another way, Velez argued that the Second Circuit should not extend the decision reached in *United States v. Mezzanatto*, 513 U.S. 196 (1995), where the Supreme Court held that an accused could waive the evidentiary right under Rule 410 to prevent proffers from being used to impeach later inconsistent statements. The holding in *Mezzanatto* is not particularly troubling. The argument that a defendant should not be given a license to commit perjury is certainly persuasive.

For a few years, it seemed that the Second Circuit might not extend *Mezzanatto*. It construed waivers of important rights narrowly and construed plea agreement language against the drafter; namely, the United States. But the legal landscape began to shift after *Mezzanatto*.

The Seventh Circuit had already created some troubling precedent in reliance upon it. In *United States v. Krilich*, 159 F.3d 1020 (7th Cir. 1998) (Easterbrook, J.), criticized in *Proffer Evidence to the Prosecution? Only if Your Client Plans to Plead Guilty: RICO Report*, The Champion (Aug. 1999), the court unexpectedly held that a cross-examination of prosecution witnesses could trigger the waiver of the protections. The language in Krilich's proffer agreement was particularly benign. It read, "[S]hould [Krilich] subsequently testify contrary to the substance of the proffer or otherwise present a position inconsistent with the proffer, nothing shall prevent the government from using the substance of the proffer at sentencing for any purpose, at trial for impeachment or in rebuttal testimony, or in a prosecution for perjury." *United States v. Krilich*, 159 F.3d at 1024. No one, including the prosecution, foresaw that the cross-examination of prosecution witnesses about their ability to observe would be construed as the presentation of a position inconsistent with the proffer. But that is exactly what Judge Frank H. Easterbrook said when, rejecting the rule that such agreements should be construed against the prosecution, he wrote for the *Krilich* panel and held that cross-examination triggered the waiver. *Id.*, at 1024.

There was some reason to believe that the decision was simply an aberration. This expansive reading of the waiver flew in the face of the settled practices and conventional understandings among prosecutors and defense attorneys in the Seventh Circuit as to what the waiver language meant; namely, that the statements would only be admitted to impeach the directly contradictory testimony of the defendant. Disregarding this important, more reasonable interpretation of the waiver language, the *Krilich* court reached its extraordinary conclusion. It is interesting to attempt to divine how this could be a knowing and intelligent waiver when neither the defense lawyer nor the client had any inkling about to what they were agreeing.

A waiver, of course, should depend on the scope of the language in the Queen for a Day agreement. Even if the Seventh Circuit's interpretation of the agreement before it was simply wrong, prosecutors discovered a "better idea." Why not simply broaden the language of the proffer agreements? After all, who was there who would or could now object?

In *United States v. Burch*, 156 F.3d 1315 (D.C. Cir. 1998) (Wald, J.), the D.C. Circuit held that courts may admit statements made pursuant to waivers appearing within the corners of a plea agreement even when the pleas are withdrawn. The statements are admissible not only for purposes of impeachment, but also in the prosecution's case-in-chief. *Id.*, at 1320–21. Seeing the writing on the wall after *Burch*, NACDL Parliamentarian David S. Rudolf and Gordon Widenhouse wrote, "*Burch* sounds the alarm regarding this important issue. The likelihood that prosecutors will increasingly use waivers to circumvent the protections of various rules . . . looms large." *Mezzanatto Clears Waivers: In Open Court*, The Champion (Dec. 1998).

In the wake of the decisions in *Krilich* and *Burch*, a split arose among the district courts in New York. In keeping with Second Circuit precedent, Judge Nina Gershon questioned the propriety of waivers permitting the evidence to be used in the prosecution's case-in-chief. See *United States v. Duffy*, 133 F. Supp. 2d 213 (E.D.N.Y. 2001). Like her colleagues on the Second Circuit, Judge Gershon recognized the vast disparity in bargaining power between the prosecution and a person accused of a crime. See also *United States v. Ready*, 82 F.3d 551, 558–59 (2d Cir. 1996). This disparity affects the analysis under constitutional law, principles of fairness and rules of contract law. After all, if this isn't a contract of adhesion, what is?

Judge Gershon concluded that when a provision broadly waives the protections of Rule 410 for

purposes other than impeachment, it prevents the accused “from making any sort of meaningful defense.” *United States v. Duffy*, 133 F. Supp. 2d at 216. The defense lawyer has no clear guidance in advance as to what will open the door to incrimination; so, the only responsible option is to present no real defense at all.

The Queen for a Day process is an unconscionable arrangement that has become ingrained in the plea bargaining process. The author’s office has been able to maintain the position of not participating in client proffer sessions. The client who is not a target can refuse the opportunity to proffer evidence, and the prosecutor, though often reluctant to do so, is free to grant immunity if she is interested in obtaining the testimony. Years ago, the lawyer was the person who would make the proffer, and even today this option, at times, can still be negotiated. There is absolutely no rational basis for requiring the defendant to personally make a proffer before the outline of the plea bargain is agreed to other than many prosecutors now want it done that way. Of course, if the lawyer is making the proffer, he is also free to advance the astonishing concept that his client is not guilty or to argue the client played a minor role and is not deserving of particularly harsh treatment. After all, even in this day and age, cases are still disposed of without forcing defendants to become informers.

An additional problem has developed. Some prosecutors have become lazy and reversed the traditional approach to investigating crime. While the use of the Queen for a Day process is often rationalized as enabling prosecutors to go after “the heavies,” in practice prosecutors find it much easier to strike deals with whales who testify against minnows, since those at the top of the food chain have more information than those at the bottom end. See *Rollin’, Rollin’, Rollin’: RICO Report*, The Champion (Sept. 2003), at 61; cf. *United States v. Brigham*, 977 F.2d 317, 317–18 (7th Cir. 1992) (“Drones of the organization — the runners, mules, drivers, and lookouts — have nothing comparable [to their bosses] to offer [in exchange for a sentence reduction]. They . . . know little information of value . . . Defendants unlucky enough to be innocent have no information at all . . .”) (Easterbrook, J.).

Judge Gershon noted that while the prosecution dictates the terms of the proffer agreement, “the only thing that a defendant is guaranteed is the chance to convince the prosecutor to enter a deal. At the same time, the defendant bears all of the risk.” *Id.*, at 217. The rawness of the deal only underscores the inequality of bargaining power. In this light, the agreement not only violates fundamental notions of fairness, but also violates an accused’s Sixth Amendment right to mount a defense with the effective assistance of counsel. *Id.*, at 216.

Given the then-current state of the law in the Second Circuit, Judge Gershon expressed doubt whether the appellate court would reach the same result as the *Krilich* and *Burch* courts. *United States v. Duffy*, 133 F. Supp. 2d at 216. The Second Circuit frequently construed these waivers of important rights narrowly, considering broader public interests in deciding how to interpret them. See *United States v. Ready*, 82 F.3d at 556 (right to appeal); *United States v. Padilla*, 186 F.3d 136, 138, 140–41 (2d Cir. 1999) (statutes of limitations and constitutional defenses to the admission of evidence). Having often recognized the great bargaining disadvantage faced by defendants, the circuit seemed poised to limit the breadth of the waivers.

Across the Brooklyn Bridge, however, Judge Denny Chin, a former AUSA who reportedly still strongly encourages students to seek work as prosecutors, had a different view. In *United States v. Gomez*, 210 F. Supp. 2d 465 (S.D.N.Y. 2002), he reviewed the same language at issue in *Griffin* and *Duffy* (and later in *Velez*); namely, “the Government may use statements made by Client at the meeting and all evidence obtained directly or indirectly therefrom . . . to rebut any evidence or arguments offered by or on behalf of Client (including arguments made or issues raised *sua sponte* by the District Court) . . .” *Id.*, at 469 (emphasis omitted). Clearly, under a superficial reading of the agreement any defense whatsoever could trigger the use of the proffered statements. Indeed, the language suggests that a prosecutor could admit the defendant’s statements if the district court judge expressed well-founded doubts about the credibility of a prosecution witness. This contract of adhesion, however, seems to obviously undermine the right to a fair trial.

Judge Chin followed the lead of the *Krilich* and *Burch* courts and concluded that statements made during a Queen for a Day session could be used during the prosecution’s case-in-chief.

Disagreeing with Judge Gershon, he emphasized different principles of fairness and contract law. He naively viewed the prosecution and defense as being on an equal-enough footing and wrote that in exchange for the waiver the defendant receives the benefit of the prosecutor's ear and a chance at a possible plea agreement. *Id.*, at 475. "Fairness requires that he be held to that agreement." *Id.*

As to the issue of unbalanced bargaining relationships, he placed the responsibility for the imbalance of power squarely on the accused's shoulders: "[I]t is the defendant's guilt and the availability of evidence to prove his guilt that creates the disparity in bargaining power." *Id.*, at 476. In Judge Chin's view of fairness, it is only right to enforce the agreements and wrong to limit them. Of course, this ignores the reality of our criminal justice system. Overcharging is not uncommon, the penalties that were prescribed under the guidelines had become extraordinarily harsh and the discretion of the prosecutor had expanded so that before the decision in *United States v. Booker*, ___ U.S. ___, 125 S. Ct. 738 (2005), it might have exceeded the power of the sentencing judge.

Judge Chin appears to have been unaware that at times innocent people not only are charged, but are convicted of crimes and even plead guilty to crimes they did not commit to avoid a harsher punishment. See Samuel H. Pillsbury, *Even the Innocent Can Be Coerced Into Pleading Guilty: Perspective on Justice*, L.A. Times, Nov. 28, 1999, at M5 (discussing the entry of false guilty pleas in cases relating to the scandal in the Los Angeles Police Department, Rampart investigations: "The Rampart cases mock the bland assurances of the U.S. Supreme Court that innocent defendants will not plead guilty as long as they have lawyers."); Jan Hoffman, *Police Refine Methods So Potent, Even the Innocent Have Confessed*, N.Y. Times, March 30, 1998, at A17; Michael D. Harris, *Judge Throws Out Guilty Plea in Lance Helms Murder Case*, L.A. Daily J., Sept. 15, 1997; *Evidence Clears Them But the Law Does Not*, N.Y. Times, Nov. 26, 1995; Roger Parloff, *False Confessions*, *The American Lawyer* 58 (May 1993). Considering the harsh penalties imposed by the guidelines, Judge Chin quite simply chose to ignore reality. See Samuel H. Pillsbury, *Even the Innocent Can Be Coerced Into Pleading Guilty: Perspective on Justice*, L.A. Times, Nov. 28, 1999, at M5 ("We must also take seriously the potential for abuse that harsh mandatory penalties and extended liability schemes present in the so-called 'give and take' of plea negotiation. These rules give prosecutors such influence over sentencing that in some cases they have nearly unilateral authority over case disposition.").

According to the *Gomez* court, the waivers also serve public policy by encouraging the accused to be truthful (in the view of the prosecutor and agents) and by facilitating plea negotiations and cooperation. Judge Chin was dismissive of worries that defense counsel might have to lay down, rather than risk the admission of incriminating statements. *Id.*, at 476. Defense lawyers can defend as vigorously as they want, he said, so long as they are prepared to answer for the incriminating proffers.

Judge Chin's remarks should have remained lost in the Federal Supplement 2d. Unfortunately, Circuit Judge Cabranes incorporated them into Second Circuit law when he validated the language of the Velez's proffer agreement and followed the trend that began in the Seventh and D.C. Circuits in *Krilich* and *Burch*.

Like the agreements in *Griffin*, *Duffy* and *Gomez*, Velez's agreement broadly stated, "[t]he Government . . . may use statements made by [defendant] at the meeting to rebut any evidence or arguments offered by or on behalf of [defendant] (including arguments made or issues raised *sua sponte* by the District Court)." *United States v. Velez*, 354 F.3d at 192. Recognizing that knowing and voluntary waivers of the evidentiary protections of Rule 410 can be permissible at least in some circumstances, *United States v. Mezzanatto*, 513 U.S. at 210, the panel expressly declined to adopt the *Duffy* court's analysis and instead joined the *Gomez* court.

Rather than seriously discussing the appellate precedents concerning the "awesome" power of the prosecution, the panel agreed with Judge Chin that "fairness dictates that the agreement be enforced." *United States v. Gomez*, 210 F. Supp. 2d at 475, *quoted in United States v. Velez*, 354 F.3d at 195. While the panel claimed it was not ignoring the concern over the imbalance of power, in fact it merely adopted Judge Chin's blame-shifting analysis and strangely faulted the

accused for the predicament.

The panel was also persuaded that a failure to enforce the waivers would permit the accused to lie, “for [t]he [accused] will know that his proffer statements cannot be used against him at trial as long as he does not testify, even if he presents inconsistent evidence or arguments.” *United States v. Velez*, 354 F.3d at 195 (quoting *United States v. Gomez*, 210 F. Supp. 2d at 475) (internal quotation marks omitted). Compare *More Prosecutorial Double-Speak: RICO Report*, The Champion (March 2004) (discussing the Fifth Circuit’s allowance in *Beathard v. Johnson*, 177 F.3d 340 (5th Cir. 1999), of the prosecution’s inconsistent arguments in successive cases); *with Inconsistent Prosecution Arguments in Successive Cases Violate Due Process: RICO Report*, The Champion (Aug./Sept. 2000); *Inconsistent Arguments in Successive Cases and the Obligations of Defense Lawyers — Is Defense Different?: RICO Report*, The Champion (Jan./Feb. 1998); *Limitations on the Prosecution’s Ability to Make Inconsistent Arguments in Successive Cases: RICO Report*, The Champion (Dec. 1997).

In support of this idea, the *Velez* court cited *Krilich* for the proposition that in proffer sessions, “a prosecutor needs assurance that the defendant is being candid” and that “for this strategy to work the conditional waiver must be enforceable; its effect depends on making deceit costly.” *United States v. Krilich*, 159 F.3d at 1025, quoted in *United States v. Velez*, 354 F.3d at 195.

This brand of short-sighted thinking is wrong-headed. See *Proffer Evidence to the Prosecution? Only if Your Client Plans to Plead Guilty: RICO Report*, The Champion (Aug. 1999). The conditional waiver does not make deceit costly; it makes deviation from the prosecution’s script costly. To obtain a truthful defense, a proffer agreement need only be conditioned upon the accused’s truthful testimony. Any condition that the law permits does not require testimony, documents and cross-examination consistent with any proffer made during plea negotiations. In the absence of false testimony by the defendant, if the plea falls through and the independent evidence exonerates the defendant or is insufficient to convict him, the appropriate result is a verdict of not guilty. If the prosecutor wanted a conviction, why not simply set out in the proffer agreement that in exchange for the opportunity to negotiate, the accused agrees to plead guilty. After all, under *Velez*, all that is left is a “slow plea.”

Despite assertions to the contrary, a prosecutor armed with a waiver has no assurance that the testimony is candid but instead is only sure that he or she can rely upon it in an attempt to obtain convictions, even if the testimony is untruthful. See *Commonwealth v. Meuse*, 423 Mass. 831, 833 (1996) (“When a prosecution witness testifies pursuant to a plea agreement containing a promise to tell the truth, and the jury are aware of the promise, the judge should warn the jury that the government does not know whether the witness is telling the truth.”); see also *Imbler v. Pachtman*, 424 U.S. 409, 440 (1976) (“[I]t is very difficult if not impossible for attorneys to be absolutely certain of the objective truth or falsity of the testimony which they present.”). The waivers might be helpful in the interest of obtaining convictions, but courts should not confuse this with the interest in obtaining proper outcomes.

In a move uncharacteristic of Judge Cabranes, the *Velez* court confused the logical analysis and created a false dichotomy. The panel wrongly assumed that the choice is between a rule that permits waivers only when the defendant testifies inconsistently and one that permits them in any case. This approach ignores the issue of whether a waiver process should be able to prevent legitimate attacks on the credibility of the prosecution’s own witnesses, as well as the presentation of exculpatory evidence. Although a defendant might be prevented from personally presenting conflicting testimony, he should not be disabled from defending himself. If the prosecution chooses to call liars or perjurers to the stand, the burden of enduring their false testimony should not rest upon the defendant, tainting our criminal justice system. As then-Associate Attorney General and Circuit Judge Stephen Trott eloquently wrote in a Justice Department publication, “Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law. This willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and doublecrossing anyone with whom they come into contact.” U.S. Dep’t of Justice, *Prosecution of Public Corruption Cases*, 117–18 (Feb. 1988), discussed in *The Highwayman*

Visits the Marianas: Informers Beware: RICO Report, *The Champion* (June 2001), at 52; Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 *Hast. L. J.* 1381, 1394 (1996). To allow informers' testimony to go completely unchecked is a dangerous development in the law.

The *Velez* court also naively commented that the invalidation of waivers like the broad one at issue "would clearly interfere with plea bargaining and cooperation efforts." *United States v. Velez*, 354 F.3d at 195. This is a bad joke. Plea negotiation and informer recruitment have gone on successfully since long before the Queen for a Day sessions, the blanket waivers or the guidelines ever existed. Without the evidentiary safe harbor provided by Rule 410, defendants actually have less incentive to come to the bargaining table, where they must surrender fundamental rights in exchange for merely the hope of a deal. The *Velez* panel ignored this legitimate concern of the *Duffy* court. Without reasonable protections, some negotiations might not even start. Without these deals, the prosecution stands to lose significant sources of information upon which it relies to obtain so many convictions. Thus, the real danger to plea bargaining and informer agreements comes from overzealous prosecutors pushing for blanket waivers that amount to "slow pleas," not the courts that would have limited their reach.

The panel closed with classically cavalier and deprecatory rhetorical flourish. It offered a suggestion for action that the court might believe is innocuous, but in fact is preposterous: "[A] defendant remains free to present evidence inconsistent with his proffer statements, with the fair consequence that, if he does, 'the Government [is] then . . . permitted to present the defendant's own words in rebuttal.'" *Id.*, at 196 (quoting *United States v. Gomez*, 210 F. Supp. 2d. at 476).

In all this, what Judge Cabranes and his peers ignored, and Judge Gershon in *Duffy* recognized, was the critical difference between a waiver of mere evidentiary importance and a waiver of constitutional dimension. It is one thing to say that the rights and privileges that attach to evidentiary rules can be waived. When people waive their rights under Rule of Evidence 410 or any other evidentiary rule, it is not usually a matter of fundamental importance. When the effect of waiving such rights essentially deprives the accused of the ability to defend himself and permits false testimony to go unchallenged, it is an entirely different matter. Such waivers implicate constitutional rights and fundamental notions of fairness and require a far more careful analysis. Unfortunately, the point seemed lost on the Second Circuit.

Overview Testimony And Distortion Of The Fact-Finding Process

In a complicated case, little can be more effective in presenting the prosecution's theory of the case to the jury than the testimony of an experienced law enforcement officer who summarizes and characterizes all the evidence in a clear and coherent way. The testimony effectively gives the prosecutor a third bite at the apple. In addition to the opening and closing arguments, summary testimony provides another opportunity to explain the prosecution's case. Indeed, such testimony is often the most persuasive version of the story because it comes in the guise of fact, not argument, and it bears the imprimatur and experience of a government agent.

"Summary testimony" is nothing new. It has long been admissible "so long as [the witness] bases [his or] her summary on evidence received in the case and is available for cross-examination." *United States v. King*, 616 F.2d 1034, 1041 (8th Cir. 1980) (citing *United States v. Esser*, 520 F.2d 213 (7th Cir. 1975)).

Real summary testimony, however, is exactly what its name implies: testimony summarizing evidence already admitted or admissible. For example, it is often offered at the end of a complex tax case to organize the documents and accounting information and relate it to the tax returns in issue. See, e.g., *United States v. Pree*, 384 F.3d 378, 392 (7th Cir. 2004) (IRS Agent Michael Welch testified as the prosecution's last witness to analyze stock sales and describe income tax consequences); *United States v. Ray*, 370 F.3d 1039, 1046 (10th Cir. 2004) (complex drug case, stating "In complex tax cases, we have allowed the government to admit summary testimony so long as the district court gives appropriate limiting instructions."); citing *United States v. Mann*, 884 F.2d 532, 538-39 (10th Cir. 1989)); *United States v. Sabino*, 274 F.3d 1053, 1067 (6th Cir. 2001) ("In a tax case, the summary witness is allowed to summarize and analyze the facts indicating willful tax evasion so long as the witness does not directly embrace

the ultimate question of whether the defendant did in fact intend to evade income taxes.”) (internal quotations and citations omitted).

Recently, prosecutors have tried to introduce more than mere summaries of the evidence from their star witnesses. Instead of contenting themselves with persuasive digests of the evidence already admitted, they have called witnesses to provide so-called “overview testimony.” Overview testimony is testimony by a law enforcement officer, often the lead case agent, who testifies in the early stages of the trial and paints a general picture of the prosecution’s theory of the case. The testimony often cuts to the ultimate issues of the case and includes an analysis of the evidence that may be admitted, based on the agent’s experience in similar cases or investigations. It also carries with it an unspoken promise, often unkept, that the AUSA will later offer evidence supporting each aspect of the testimony.

Fortunately, the emerging trend among the federal courts is to condemn this disturbing practice. In *United States v. Griffin*, 324 F.3d 330 (5th Cir. 2003), the Fifth Circuit concluded that the admission of this type of testimony is error. The First Circuit followed the Fifth Circuit’s lead in *United States v. Casas*, 356 F.3d 104 (1st Cir. 2004), and *United States v. Garcia-Morales*, 382 F.3d 12 (1st Cir. 2004).

Even so, when courts find error, they do not necessarily reverse convictions. While the judiciary might finally draw a firm and fast line against admitting prejudicial and misleading overview evidence, that does not mean most guilty verdicts will be set aside. Given the frequency with which courts find errors to be harmless, some prosecutors may very well continue the practice.

Guilt By Decree

If ever there were a case where overview testimony might be helpful, it would have been *United States v. Griffin*, *supra*, 324 F.3d 330. The Fifth Circuit’s review of the basic facts of the case spanned nine full printed pages, setting forth the relationships and activities of three people and their sundry business interests related to a conspiracy to commit government contract fraud, bribery and money laundering against the United States and a Texas governmental authority. *Id.* at 337–46. Surely, some sort of objective summary was in order and could be helpful to the jury.

In 1995, then-Governor George W. Bush appointed the lead defendant, Florita Bell Griffin, to a six-year term of membership on the Board of Directors of the Texas Department of Housing and Community Affairs (“Texas Housing Department”). The department oversaw the state’s financing of affordable housing and other community services. *Id.* at 337, 338; see Ty Meighan, *Griffin Case May Change State Law*, Corpus Christi Caller-Times, April 7, 2001; Kevin Fullerton, *All in the Family*, Austin Chronicle, Oct. 27, 2000. As with most state housing authorities, the Texas Housing Department was a conduit for federal funds, and Griffin played a key role in deciding how federal funds and benefits would be distributed.

Griffin hatched a scheme with some friends to make a quick buck. She knew co-defendant Terrence Bernard Roberts, a partner in a small Texas real estate development business, One Golden Oaks, Ltd. In March 1997, she and Roberts joined together with builder Barry Hammond and the third co-defendant, Joe Lee Walker, to form Barry Hammond Homes Incorporated (“Hammond Homes”). The company was set up to receive money from projects reviewed by the Texas Housing Department. Roberts’s other building company, One Golden Oaks, would bid on projects for which Hammond Homes served as the general contractor. *United States v. Griffin*, 324 F.3d at 340. The four divided the stock in the business evenly, and Griffin’s shares went to companies that disguised her involvement. *Id.*, at 339.

In meetings chaired by Griffin where Roberts and Walker appeared, the Texas Housing Department approved requests for millions of dollars in funds and tax credits going to One Golden Oaks. *Id.*, at 340. The scam went well until Hammond Homes ran short on cash due to payroll obligations that would not wait for the influx of government monies. Griffin ostensibly procured a loan for the company. She even personally called the manager of the Texas Housing Department’s credit underwriting department when the company’s application for building funds was denied due to deficiencies. *Id.*, at 340–41.

To generate cash, the company bought a parcel of land, then sold less than one-fifth of it at an inflated price to One Golden Oaks, producing an instant profit. The four divvied up the proceeds and the remaining land among themselves, with Griffin receiving best share of the land. *Id.*, at 342.

The scheme finally unraveled when Griffin, Roberts and Walker plotted in November 1997 to cut Hammond out of the business. Getting wind of the intrigue, Hammond investigated the relationships between all the businesses involved and soon contacted Roberts's business partner at One Golden Oaks to tell him some of what had been going on.

Not happy with being burned on the land deal, Roberts's partner tape-recorded telephone conversations in an attempt to get answers from Roberts about where all the money went. When his questions were rebuffed, his lawyer contacted the United States Attorney's Office. *Id.*, at 343–45.

In 1999, a grand jury returned an indictment charging Griffin, Roberts and Walker with a conspiracy to defraud the United States in violation of 18 U.S.C. § 371. The indictment said the conspiracy furthered the commission of various illegal activities; namely, theft by fraud of the Texas Housing Department's property in violation of 18 U.S.C. § 666(a)(1)(A), the acceptance and offering of bribes valued at \$5,000 or more in violation of 18 U.S.C. § 666(a)(1)(B) and (a) (2), respectively, and money laundering by hiding the proceeds of unlawful activity in violation of 18 U.S.C. § 1956(a)(1)(B)(i). Separate counts charged Griffin, Roberts and Walker with the underlying thefts, the acts of aiding and abetting in them, the bribes and the laundering of money. Another count charged the three with mail fraud in violation of 18 U.S.C. § 1341, and a final count charged Griffin and Walker with a separate instance of mail fraud. *United States v. Griffin*, 324 F.3d at 345–46.

At trial, the prosecution called as its second witness FBI Agent Robert Martin. *Id.* at 348. Martin testified as a non-expert witness to summarize the investigation and the alleged conspiracy. The problem was that his testimony came before the other evidence of the crimes was admitted. Using charts and pictures, Martin discussed his understanding and interpretation of the defendants' activities and roles. He also testified that Griffin was on the Board of the Texas Housing Department and said, without having personal knowledge, that she owned a quarter interest in Hammond Homes. Griffin's counsel lodged hearsay objections. The AUSA assured the court that documentary and testimonial evidence would later be proffered to support Martin's story. The trial court admitted the evidence. *Id.* As Martin testified, District Judge Nancy F. Atlas to her credit repeatedly clarified to the jury that he lacked personal knowledge of some of the facts and was only offering a point of view. *Id.*, at 348–49.

The jury returned guilty verdicts against all three defendants on all counts. *Id.*, at 346. The court sentenced Griffin to seven years and three months of imprisonment and Roberts and Walker to 57 months. *Id.*

Interestingly, although then-Governor Bush did not ask Griffin to resign when the indictment was returned, after the verdicts his administration sought a resignation. Griffin stubbornly refused to resign until the day before her sentencing hearing. See Ty Meighan, *Griffin Case May Change State Law*, Corpus Christi Caller-Times, April 7, 2001.

On appeal, Griffin was represented by Julian R. Murray, Jr. who was one of a team of lawyers who recently freed Wilbert Rideau from Louisiana prisons after his fourth trial for capital murder. Rideau had spent 44 years in prison and had been nominated for an Academy Award for his work in co-directing the documentary *The Farm*. He was called "the most rehabilitated man in America." See Adam Liptak, *Freed After 44 Years, A Prison Journalist Looks Back and Ahead*, N.Y. Times, Jan. 17, 2005. Murray argued in *Griffin* that the trial court committed reversible error when it admitted the testimony of Agent Martin's overview testimony. Griffin contended that Martin was allowed to make conclusory statements to the jury about the ultimate issues of the case. *United States v. Griffin*, 324 F.3d at 348.

Because Griffin's former lawyer had diligently objected at trial, the Fifth Circuit applied the

harmless error doctrine. The panel, led by Judge E. Grady Jolly with Judges Jerry Edwin Smith and Harold R. DeMoss, Jr. in agreement, first noted that although courts have a tradition of accepting properly supported summary evidence, a witness cannot summarize facts that are not yet in evidence. *Id.*, at 349. Thus, Martin was not a summary witness, but rather an “overview witness.”

Harshly criticizing the tactic, Judge Jolly wrote, “[w]e unequivocally condemn this practice as a tool employed by the government to paint a picture of guilt before the evidence has been introduced.”

Id. If the court were to decide otherwise, it “would greatly increase the danger that a jury ‘might rely upon the alleged facts in the [overview] as if [those] facts had already been proved,’ or might use the overview ‘as a substitute for assessing the credibility of witnesses’ that have not yet testified.” *Id.* (quoting *United States v. Scales*, 594 F.2d 558, 564 (5th Cir. 1979)). This shortcut past the actual evidence effectively deflates the prosecution’s burden of proof. The panel appropriately held that a trial court commits error by admitting the testimony.

Even when a practice is error, however, the question remains whether the error justifies a reversal. In *Griffin*, the court found the admission of overview testimony to be harmless, so reversal was not warranted. The panel reasoned that the testimony was intended to clarify complicated evidence, the trial court called the jury’s attention to the opinionated nature of the testimony, Martin’s chart of the so-called conspiracy was not taken to the jury room, it also was not demonstrably misleading, and the later evidence supported his testimony. *Id.*, at 350.

This is little consolation to the defendant. The court seemed to set the bar fairly low. The testimony, “In my job as an FBI Agent, I found that John X distributed the cocaine for the Cali Cartel,” can be intended to clarify complicated evidence. So what?! The trial court admittedly failed to give the jury an actual cautionary instruction about the testimony. Further, once an agent with an air of respectability and experience gives “overview testimony,” it matters little if his or her chart makes it into the jury room. The court’s most important assessment is that the other evidence fully supported the testimony. The remaining question should be whether it is highly unlikely that the agent’s opportunity to offer a concise, credible synopsis influenced the jury’s verdict.

Thus, the *Griffin* panel’s decision was a mixed blessing for those accused of crimes. While it established the rule that overview testimony is erroneous, it also provided guidance for prosecutors to use the testimony in a way that avoids reversal while actually prejudicing the jury and enhancing the likelihood of producing a guilty verdict.

Guilt By Innuendo

The First Circuit, however, found the abuse of “overview testimony” not only to be error, but reversible error. In *United States v. Casas*, *supra*, 356 F.3d 104, Ralph Casas, Raphael Segui-Rodriguez, Feliciano Nieves and Winston Cunningham were charged with being participants in a 60-man conspiracy to possess with intent to distribute cocaine and heroin from Puerto Rico to New York City by way of Miami in violation of 21 U.S.C. § 846. They were also accused of aiding and abetting others in knowingly possessing the drugs, intending to distribute them in violation of 21 U.S.C. § 841. *Id.*, at 111. Since the other 56 defendants faced additional charges, the court severed the trial and granted the four men a separate trial.

Even without the overview testimony, it was unlikely that two defendants would avoid a guilty verdict. Evidence tended to show that Nieves and Segui-Rodriguez were deeply involved in the ring’s operations in Puerto Rico. Segui-Rodriguez was a bodyguard and assistant to the undisputed leader of the organization, Israel Perez-Delgado. *Id.*, at 110. Nieves was the leader’s brother and participated in the transportation of drugs and money. *Id.*, at 111.

Meanwhile in Miami, Casas and Cunningham were baggage handlers at American Airlines. They supposedly used their jobs to smuggle the drugs past customs officials and airport security guards. *Id.*, at 108. According to the prosecution, Casas was the key player in Florida, recruiting other coworkers to handle luggage shipments as they made their way through the airport to flights bound for New York. *Id.*, at 109. Some evidence suggested that when the head of the

organization was arrested, Casas tried to assume control. *Id.*, at 110.

Unlike his three co-defendants, however, Cunningham had little, if anything, to do with the organization. He denied any involvement in the ring and was linked to it only by his nickname, "Rasta," which some coworkers used.

Someone using the name of "Rasta" provided assistance to the organization, but it was unclear whether Cunningham was the right man. *Id.*, at 109–10. In fact, one of the witnesses identifying Cunningham as "Rasta" at trial previously testified in the trial of the 56 others that "Rasta" was Bryan Francis, a known member of the organization. *Id.* at 116.

To tighten its grip on the defendants, including Cunningham, the prosecution opened its case with the testimony of DEA Agent Stoothoff. Although Stoothoff only had personal knowledge about a drug transaction he observed and a search he helped to conduct (only the first of which involved Segui-Rodriguez and neither of which directly involved Cunningham, Casas or Nieves), his testimony did not end there. He generally discussed the overall investigation of the "organization's" activities and described a cooperative effort between DEA agents in New York and Puerto Rico. He talked about the size and scope of the transportation-related activities, impressing upon the jury the vastness and sophistication of the so-called conspiracy.

Stoothoff also directly implicated the defendants. He testified that the names found in a business organizer seized in a raid, including the names of three of the four accused, were not innocuous but were those of "members of the 'organization,' which he defined as the 'drug trafficking group that was associated with Israel Perez-Delgado.'" *Id.*, at 118. When asked to list the people he actually determined to be members of the organization, he did not hesitate to include people whom he only heard others identify. "[H]e did not differentiate the testimony that was based on personal knowledge from other sources of information, often hearsay." *Id.*, at 119.

Stoothoff also testified as to ultimate issues of guilt. For example, he said that in Miami his investigation uncovered the involvement of " 'Winston — well, at the time we knew the name of Rasta, we later identified that Rasta as being Winston Cunningham.'" *Id.*, at 118. This conclusory testimony "was at least partially based on information provided by Israel Perez-Delgado, who cooperated after he was arrested," *id.*, but Perez-Delgado did not testify at the trial.

This illustrates a critical problem with overview testimony. Based on an untrustworthy source saving his own skin, Agent Stoothoff was permitted to say that he personally knew that Cunningham and the others were guilty. Further, the prosecution was able to present the testimony with the cleaned-up visage of a federal agent, rather than in the questionable form of a drug smuggler who would be subject to a withering cross-examination. The benefits to the prosecution of such a tool are difficult to overstate.

When the jury returned convictions against all four accused, they appealed on numerous grounds. Most important here, they challenged the admissibility of Agent Stoothoff's "overview testimony."

Finding the testimony to be "fatally flawed for very basic reasons," *id.*, at 119, a First Circuit panel composed of Chief Judge Michael Boudin and Circuit Judges Sandra L. Lynch and Jeffrey R. Howard looked to Griffin for guidance. Like the Fifth Circuit, the First Circuit observed that being the first witness in the case, Stoothoff obviously "was not [providing] a summary of testimony admitted in evidence." *Id.*, at 119.

Unlike the circumstances in *Griffin*, however, "there [was] no indication that Agent Stoothoff's conclusions . . . were even based on testimony that was eventually presented at trial and could be evaluated by the jury. [He] merely said that his conclusions were based on the 'investigation.'" *Id.* This type of allusion to facts not properly in evidence, when permitted, provides a blatant avenue to introduce evidence and conclusions through the backdoor, which the prosecution could not or would not otherwise offer. The failure to deliver on the evidentiary promise made in overview testimony presents exactly the danger that should be enough to make the error reversible in every case.

Just as in the Detroit “Sleeper Cell” Case discussed last month, *United States v. Koubriti*, (U.S. Dist. Ct. E.D. Mich. Case No. 01-CR-80778), overview testimony significantly heightens the danger that innocent people will be convicted based on evidence that is shaky at best. See *Terrorism Prosecution Implodes: The Detroit “Sleeper Cell” Case: RICO Report*, The Champion (Jan./Feb. 2005). It is important to remember that witnesses such as Special Agent Paul George in *Koubriti* or Agent Stoothoff in *Casas* supposedly provide factual evidence, not argument. Thus, when the witness actually inserts opinions and conclusory remarks, it is difficult if not impossible to separate fact from argument and opinion or to cure the prejudice in the jury.

The testimony is not a mere organizational tool for the prosecution similar to a diagram during closing argument. Instead, it is similar to charts, summaries and calculations relating to voluminous materials, which is admissible into evidence under Federal Rule of Evidence 1006. See also *United States v. Griffin*, 324 F.3d at 349–50 (comparing summary testimony to summary charts in considering whether an instance of overview testimony was harmful error); *United States v. Meshak*, 225 F.3d 556, 582 (5th Cir. 2000) (“In light of the similar concerns at issue in Rule 1006 and Rule 611 cases, Rule 1006 cases are instructive in analyzing this Rule 611 issue”). Indeed, courts admit the summary testimony, when appropriate, under either Rule 1006 or Rule 611(a), which permits courts to govern the presentation of evidence in a way that avoids a needless waste of time. See 6 Joseph M. McLaughlin, Weinstein’s Federal Evidence § 1006.04[3], at 1006–12 (2d ed. 2001) (contrasting *United States v. Mohney*, 949 F.2d 1397, 1404–05 (5th Cir. 1991), and *United States v. Winn*, 948 F.2d 145, 158 (5th Cir. 1991) (Rule 1006), with *United States v. Paulino*, 935 F.2d 739, 752–54 (6th Cir. 1991) (Rule 611(a)), and *United States v. Baker*, 10 F.3d 1374, 1411 (9th Cir. 1993) (same)); see, e.g., *United States v. Ray*, 370 F.3d 1039, 1046 (10th Cir. 2004) (finding testimony inadmissible under Rule 1006 if it is based on underlying testimony rather than documents and inadmissible under Rule 702 if the witness is not properly qualified as an expert, but admissible under Rule 611(a)).

When courts decide whether to admit summary evidence under Rule 1006, they recognize that summaries might be used to gloss over serious gaps in the evidence. So, “[t]o be admissible under [the rule], a summary must summarize the underlying materials ‘accurately, correctly, and in a non-misleading manner.’ ” 6 Joseph M. McLaughlin, Weinstein’s Federal Evidence § 1006.04[2], at 1006–9 (2d ed. 2001) (quoting *United States v. Bray*, 139 F.3d 1104, 1110, 1112 (6th Cir. 1998)). If the chart or summary is misleading, incorrect or inaccurate, it is not admissible.

Similarly, where testimony like Stoothoff’s is misleading and inaccurate, or if it encompasses evidence that is not otherwise admissible, it should not be admitted. The problem is that since the overview comes at the beginning of trial, there is no way to know in advance whether it will meet these standards. As seen last month in *Koubriti*, it often does not.

With these dangers in mind in the *Casas* case, Chief Judge Boudin insightfully observed that overview testimony “raises the very real specter that the jury verdict could be influenced by statements of fact or credibility assessments in the overview but not in evidence. There is also the possibility that later testimony might be different than what the overview witness assumed; objections could be sustained or the witness could change his or her story.” *United States v. Casas*, 356 F.3d at 119 (citations omitted). There simply is no proper way for the witness to talk about would-be evidence that the prosecution cannot promise to the jury.

For the trial to be fair, and the outcome to be correct, the jury must be in a position to evaluate the disputed underlying bases of the testimony. A prosecution witness cannot be permitted simply to manufacture an accused’s guilt by vague opinion and innuendo. The whole format of overview testimony presents a danger of abuse that is more trouble than it’s worth.

Going a step beyond the analysis set forth by the Fifth Circuit in *Griffin*, the *Casas* panel recognized that “[o]verview testimony by government agents is especially problematic because juries may place greater weight on evidence perceived to have the imprimatur of the government” *Id.*, at 120 (citing *United States v. Perez-Ruiz*, 353 F.3d 1, 12 (1st Cir. 2003) (“It follows inexorably” from the prohibition on vouching “that the prosecution cannot prop up a dubious witness by having a government agent place the stature of his office behind the

witness.”); see *Some Prosecutors Just Don't Get It: Improper Cross and Vouching: RICO Report*, *The Champion* (Nov. 2004).

Expressing disappointment that some prosecutors still need to learn these basic lessons, the court said, “The fact that we and the Fifth Circuit have now had to address the government’s use of such preliminary overview government agent witnesses is a troubling development. The government should not knowingly introduce inadmissible evidence; it risks losing convictions obtained by doing so.” *Id.*, at 120. Thus, by now it should be clear that a prosecutor cannot properly admit “overview testimony.”

Even in *Casas*, however, where the court so clearly articulated the dangers of the testimony and the prosecution actually failed to produce evidence fully supporting the overview, the harmless error doctrine still stood as an obstacle to the kind of relief that reins prosecutors in; namely, reversals. The panel concluded that the evidence against *Casas* and *Segui-Rodriguez* was sufficient to render the error harmless, while the fourth defendant ostensibly did not avail himself of this argument. *United States v. Casas*, 356 F.3d at 121–23.

Only *Cunningham* obtained relief as a result of the panel’s analysis. Finding that the central issue of his case was “whether [the] Rasta [of the conspiracy was] *Cunningham* or [wa]s someone else,” the court refused to say that *Stoothoff*’s testimony did not influence the verdict. *Id.*, at 123. The other evidence against *Cunningham* was weak. *Carlos Perez-Delgado* identified *Cunningham* as Rasta, but he testified at the trial of the 56 other defendants that “Rasta” was *Bryan Francis*. *Thomas Martinez* also identified *Cunningham* as “Rasta,” but he had only briefly met Rasta seven years earlier. To exacerbate the problem, Rasta was known to be black, and *Cunningham* was the only black defendant in the courtroom when *Martinez* made the identification. *Martinez* “may have, under the circumstances, mistakenly identified *Cunningham*, the only black defendant in the courtroom, as Rasta.” *Id.*, at 123. *Bryan Francis* also identified *Cunningham* as Rasta, but he had signed an affidavit before cooperating with the prosecution stating that *Cunningham* was not involved. *Id.*

Under these circumstances, the likelihood remained that *Stoothoff*’s testimony involved using the agent’s credibility to vouch for a case that would not otherwise withstand scrutiny. *Id.*, at 124. Since the error was not harmless, the panel reversed *Cunningham*’s conviction.

Feast Or Famine

Whatever hope might have existed that the First Circuit would temper the application of the harmless error doctrine in cases of overview testimony dissipated in the wake of *United States v. Garcia-Morales*, *supra*, 382 F.3d 12. If *Casas* stands partly for the proposition that overview evidence is harmful when an accused faces slight or no other evidence of guilt, *Garcia-Morales* illustrates that if significant other evidence of guilt exists, even especially egregious overview testimony will not lead to a reversal.

In *Garcia-Morales*, a shipping captain signed on as a confidential informer, telling the government about a drug shipment entering Puerto Rico. The shipment involved the defendant, *Roberto Francisco Garcia-Morales*. When the informer was invited to a face-to-face meeting with *Garcia*, he brought undercover Customs Service Agent *Luis Carmona*. At the meeting, *Garcia* incriminated himself by talking about his preparations for the receipt and distribution of the drugs and by giving *Carmona* the keys to a delivery van. *Garcia* was the subject of a controlled delivery the next day, and shortly thereafter he was arrested. *Id.*, at 15–16.

Worse than *Griffin* and like the circumstances leading to a reversal in *Casas*, overview testimony in *Garcia-Morales* included so-called evidence that was otherwise inadmissible, as well as conclusory opinions from a respected law enforcement officer that were bound to prejudice the jury.

The first witness at trial was the lead Customs Service Agent on the case, *Yariel Ramos*. *Ramos* offered a broad overview of the investigation and the prosecution’s case. His testimony was not limited by his personal knowledge. It included information he gleaned from the informer. For example, *Ramos* offered hearsay testimony about a conversation between the informer and the

head of the drug ring “in which the inform[er] agreed to transport the drugs to Puerto Rico.” *Id.*, at 16. Besides the obvious problems that Ramos lacked personal knowledge of the conversation and testified as to facts not yet in evidence, neither the informer nor the ring’s head were ever called to testify. Ramos was the sole presenter of this information to the jury. Ramos also offered conclusory evidence that Garcia was a member of the conspiracy, *id.*, at 17, and that the investigation concluded “Garcia was ‘the recipient of the narcotics, the distributor,’” *id.*, at 16.

The error was obvious, but not reversible, according to a panel consisting of Judges Jeffrey R. Howard, Bruce M. Seyla and Juan R. Torruella. Finding the error harmless, Judge Howard, who concurred in the *Casas* opinion, said undercover agent Carmona provided “damning testimony” concerning the details of his first meeting with Garcia and the informer, as well as the controlled delivery. *Id.*, at 17. The panel also called the evidence of Garcia’s role as a distributor of the conspiracy “overwhelming” and “uncontroverted.” *Id.*, at 18. By comparison, Garcia’s defense was “weak,” in that it consisted solely of attacks upon the credibility of the prosecution’s witnesses, the defense most often relied upon in drug cases. *Id.* In such a case, and despite Ramos’s egregious overreaching in his testimony, the panel found that it was highly probable that the erroneous overview testimony did not influence the verdict. See *id.*, at 17, 18.

This is a troubling result. It signals that the more prosecutors think there is sufficient evidence of guilt, the less they need to worry about a reversal if they introduce an “overview witness” to conjure “facts” out of thin air and to introduce prejudicial accusations against the defendants. It suggests that if the ends seem right, the means don’t matter. This is just the sort of wrong-headed signal from the courts that encourages misconduct leading to improper outcomes.

Overview Experts

The dangers of overview testimony are all the more acute when a law enforcement officer testifies not only as an overview witness, but also as an expert about the kind of criminal activity at issue in the case. The witness not only muddies the waters between fact and legal conclusion and runs the risk of usurping the jury’s role in finding the facts and assessing witness credibility, but also blurs the line between factual averments and expert opinion testimony.

This troubling problem is becoming increasingly prevalent in complex cases. For example, fact-opinion overview testimony was presented both in the *Garcia-Morales* drug conspiracy case and in the Detroit “ Sleeper Cell” terrorism case, *United States v. Koubriti* (U.S. Dist. Ct. E.D. Mich. Case No. 01-CR-80778).

In *Koubriti*, FBI Special Agent Paul George testified not only as the lead investigator and overview witness, but also as an expert in terrorism and clandestine tradecraft. Similarly, in the *Garcia-Morales* drug prosecution, Customs Agent Ramos testified not only about specific events related to the case, but also as to “the structure and operation of a typical drug distribution conspiracy” and the purported relation between the typical structure and the facts of the case. *United States v. Garcia-Morales*, 382 F.3d at 18.

The courts’ initial response to this compound problem is not reassuring. The *Koubriti* court ostensibly did not even recognize the problem and simply admitted the evidence without objection. Unfortunately, although the *Garcia-Morales* panel addressed the basic arguments counseling against the admission of fact-opinion overview testimony, it rejected them.

The *Garcia-Morales* court’s sparse and cursory treatment of this compound issue is worth a review, if only to demonstrate why courts must recognize the issue in context. In presenting his claims to the panel, Garcia first argued that Agent Ramos’s soft-expert testimony simply should not be admissible under Federal Rule of Evidence 702. The First Circuit gave this argument short shrift. Courts generally find that law enforcement testimony about the structures of criminal conspiracies and the common aspects of other crimes is both relevant and helpful. “In particular, ‘expert testimony regarding the description of a typical drug network [is] relevant to provide context to the jury evaluating the offenses charged.’” *Id.*, at 19 (quoting *United States v. Clarke*, 24 F.3d 257, 269 (D.C. Cir. 1994); citing *United States v. Campino*, 890 F.2d 588, 593 (2d Cir. 1989)).

This might be true in some cases, but it is crucial to separate out expert opinion from statements of fact and to distinguish summaries of admitted evidence from averments that, at best, might later be supported by evidence. Descriptions of the typical drug network that are conjoined and confused with comments about the accused's activities and purported role in a drug network are not helpful to provide context for other facts; they are a muddled, prejudicial hodgepodge asserting the accused's guilt as a matter of fact at the outset of the case. *See generally Expert Witnesses and Prosecutorial Vouching: New Frontiers in 'Soft Expert' Testimony: RICO Report, The Champion* (Sept./Oct. 1997), at 52 (discussing prosecution's use of "organized crime expert" in a RICO trial of John Gotti to insert interpretations of "facts," which directly contradicted the evidence).

In the typical soft-expert case, many courts are cognizant that this mixed fact-opinion testimony can easily go astray. Cautioning district courts that admit soft-expert testimony, the Second Circuit warned in *United States v. Cruz*, 363 F.3d 187 (2d Cir. 2004), that "district courts, in their role as gatekeepers, must be ever vigilant against expert testimony that could stray from the scope of a witness' expertise." *Id.*, at 194 (citing *United States v. Dukagjini*, 326 F.3d 45, 54-55 (2d Cir. 2003)).

For example, in *Cruz* the trial court allowed an agent to testify that drug transactions usually use a "lookout" to watch for the police. This much was not unusual. The trial court also allowed testimony that when Cruz said to an agent that he was employed to "watch someone's back" he meant not just that he was guarding the person, but that he was doing so specifically in a drug deal. This latter testimony about the meaning of common words strayed outside the agent's so-called specialized law enforcement knowledge. *United States v. Cruz*, 363 F.3d at 191, 195-96. In such a case, "an expert is no longer applying his extensive experience and a reliable methodology," and the opinion "should be excluded." *United States v. Dukagjini*, 326 F.3d at 54, quoted in *United States v. Cruz*, 363 F.3d at 194. Accordingly, the *Cruz* panel reversed. *Id.*, at 200.

If courts in ordinary soft-expert cases see the danger of allowing meandering, wayward testimony, one would think they would be especially sensitive to the compound problems arising out of overview testimony. Unfortunately, the *Garcia-Morales* panel ostensibly did not even acknowledge the danger.

Soft expert fact-opinion testimony also often creates a danger of unfair prejudice that substantially outweighs its probative value. The Second Circuit in *Cruz*, for example, recognized that law enforcement soft experts present special dangers because of the jury's likely deference to them. They have an "aura [of reliability that] poses a particular risk of prejudice because the jury may infer that the agent's opinion is based on knowledge of the defendant beyond the evidence at trial." *United States v. Cruz*, 363 F.3d at 194 (quoting *United States v. Brown*, 776 F.2d 397, 401 n.6 (2d Cir. 1985); *United States v. Young*, 745 F.2d 733, 766 (2d Cir. 1984) (internal quotation marks omitted). So the danger of unfair prejudice already weighs heavily on the balance.

Although the defendant Garcia argued this point in *Garcia-Morales*, the First Circuit simply rejected the argument, finding that agent Ramos's testimony was probably very helpful to a jury unfamiliar with the drug trade. *United States v. Garcia-Morales*, 382 F.3d at 19. This does not bode well for the development of future precedent.

What courts must recognize is that a soft expert overview witness presents an especially compelling version of the prosecution's theory of the case. The witness takes the stand before others who testify to the underlying facts. So there is nothing in the record with which the expert can be inconsistent. There is no fact that might allow the jury to question whether the expert is getting the theory right on the facts. There is also no practical way for the jury to keep track of the testimony so as to assess it against the later facts, especially in a case involving complex testimony and voluminous documentary evidence. Finally, courts must take into account the presumption of credibility enjoyed by law enforcement officers. When they are permitted to mix fact with opinion and legal conclusion, it should be deemed harmful and prejudicial *per se*. When an expert's position is used to underwrite the already problematic "overview testimony," trial courts should find the danger of unfair prejudice substantially outweighs the probative value.

Similarly, when an appellate court considers whether overview testimony is harmless, the fact that a witness has testified as an expert should be enough to show prejudice even if the court would otherwise find the error harmless.

Unfortunately, judicial attention to this complex, compound problem has not adequately focused on the prejudicial picture faced by the accused. In these circumstances, wrongful convictions like those in the terrorism case of *Koubriti* are bound to occur. n

National Association of Criminal Defense Lawyers (NACDL)

1150 18th St., NW, Suite 950, Washington, DC 20036

(202) 872-8600 • Fax (202) 872-8690 • assist@nacdl.org