Granted

No. 98-9828

IN THE
SUPREME COURT OF THE UNITED STATES

MARIA SUZUKI OHLER
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FEDERAL DEFENDER ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a criminal defendant automatically waives the right to appeal a definitive, pre-trial ruling granting, over her objection, the government's *in limine* motion to impeach her with a prior conviction under Federal Rule of Evidence 609 if she attempts to mitigate the "sting" of such evidence by first testifying about the conviction on direct examination.

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This *amicus curiae* brief is submitted in support of Petitioner, Maria Suzuki Ohler. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.[1]

INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. Among the NACDL's objectives is to ensure that procedures in criminal cases are applied fairly and in accordance with due process.

The Federal Defender Association (the "FDA") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment of the United States Constitution. It is a nationwide, nonprofit, volunteer organization whose membership includes attorneys and support staff of Federal Public Defender Offices. Its primary mission is to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

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[1] As required by Rule 37.6 of this Court, the *amici curiae* submit the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amici curiae*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

The NACDL and the FDA urge this Court to overrule the Ninth Circuit's decision, which establishes a rule of automatic waiver of the appellate right to challenge pretrial rulings under Federal Rule of Evidence 609 in cases where defendants testify in reliance upon those rulings. According to the Ninth Circuit, a defendant who unequivocally objects to the admission of prior convictions forfeits the right to challenge an erroneous decision by the trial court ruling such evidence admissible if he adapts his direct testimony to respond to the trial court's adverse and definitive ruling. The Ninth's Circuit's rule contradicts a long-acceptable litigation tradition of "removing the sting" of impeachment evidence ruled admissible *in limine*, by conferring upon the impeaching party the exclusive right to control how the evidence is presented to the jury as a condition to preserve an appeal. Because neither the text or the history of Rule 609 indicates that Congress intended a departure from traditional practice or the usual rules governing preservation of appellate rights, this Court should not legislate such a policy.

The NACDL and the FDA support reversal of the Ninth Circuit's decision because it is a product of judicial lawmaking and is antithetical to the basic principles that guide both organizations. The automatic waiver rule unfairly presents defendants with a cruel dilemma: either forgo an effective presentation of the defendant's testimony at trial or forgo the right to appeal an erroneous evidentiary ruling. The rule deprives them of the ability to adapt their defense to adverse pretrial rulings and impedes the truthseeking mission of the jury because it forces a defendant to conceal from the jury his willingness to tell his side of the story, so long as the court has ruled that the story may be told. An automatic waiver rule further impairs the ability of trial courts to manage the manner and mode of presenting evidence in order to achieve a speedy, fair and efficient resolution of the case. Moreover, the unfairness created by an automatic waiver rule is unnecessary, when the objectives of the

appellate process and the ability of the government fairly to present its case can be protected without such a rule.

SUMMARY OF ARGUMENT

Nothing in the text of the Federal Rules of Evidence or in the Federal Rules of Criminal Procedure supports the Ninth Circuit's holding that criminal defendants who rely on adverse *in limine* rulings under Federal Rule of Evidence 609 and introduce prior convictions on direct examination automatically waive their right to challenge the *in limine* ruling of the trial court on appeal. It is an established principle that courts should not infer a waiver of rights from the Federal Rules absent a clear indication that waiver is intended. No such clear indication emerges from the historical evolution of the Rules of Evidence, traditional litigation practice, or common law principles of waiver and forfeiture.

Moreover, an automatic waiver rule is unfair to criminal defendants from a policy perspective, creates unintended disparities in the appellate rights of defendants vis-à-vis the government, and impairs the trial court's authority to manage the mode and manner of presentation of the evidence. It is unfair because a defendant is forced, in order to preserve his appellate rights, to appear to the jury as if he is concealing information that he would prefer to disclose in his direct testimony so long as the court has ruled the evidence admissible. The disparity in appellate rights arises from the government's ability to obtain review of *in limine* rulings by virtue of an interlocutory appeal under 18 U.S.C. § 3731, whereas the automatic waiver rule effectively extinguishes the ability of a defendant to obtain review of that same ruling after final decision. The automatic waiver rule impedes the trial court's ability to control the presentation of evidence, because it deprives trial courts of the ability to issue conclusive pretrial rulings so that the parties may conform the evidence to those rulings.

The government's reasons in support of an automatic rule are unpersuasive. The principal authority it relies upon, *United States v. Luce*, 469 U.S. 38 (1984), does not compel, or even suggest, a rule of waiver in circumstances like Ms. Ohler's. The rationale of that case applies only where all pre-conditions placed upon the trial court's *in limine* ruling were not met at trial. The government's protestation that permitting defendants to rely upon *in limine* rulings and remove the sting of impeachment robs it of the decision whether to introduce the evidence does not outweigh the policies supporting the defendant's right to remove the sting of impeachment that is certain to occur. The government has in its control the power to notify the court that it has changed its mind about using the evidence at any time before the defendant elicits it. In any event, an automatic waiver rule is not a necessary response to the government's stated concern. Rather, the trial court may safeguard the government's ability to make the final decision whether the evidence is introduced by forcing the government to make its election before the defendant terminates his direct examination.

ARGUMENT

Rule 609 of the Federal Rules of Evidence, as amended in 1990, openly invites a criminal defendant to introduce evidence of his own prior convictions during his direct testimony if those convictions may be introduced as impeachment evidence by the government. Fed. R. Evid. 609 advisory committee's notes (removing "from the rule the limitation that the conviction may only be elicited during cross-examination"). The drafters of the 1990 amendment to Rule 609 commented that it is "common" for testifying witnesses to seek "to 'remove the sting' of the impeachment." *Id.* The question raised in this case is whether, by exercising the acknowledged privilege to respond on direct examination to evidence unequivocally ruled admissible by a trial court, a defendant necessarily

forfeits the right to challenge the underlying ruling of admissibility, which he has actively opposed.

The lower court answered this question by imposing a rule of automatic waiver in *all* cases where the defendant first mentions the challenged evidence in reliance upon an adverse ruling. The Ninth Circuit's rule applies even if the government has stated an unequivocal intent to introduce the evidence during cross-examination, even if the trial court has issued a definitive ruling and signaled that it will not be open to reconsideration, and even if the defendant renews his pretrial objection during his direct testimony in order to give the Court the opportunity to change its mind and the government the choice to withdraw its stated intent to introduce the evidence itself. As a result, a defendant who diligently raises all available objections to admission of the evidence until further objection is futile cannot avoid renunciation of her right to appellate review of erroneous rulings if she attempts to meet, in advance, points that will inevitably be raised in the government's cross-examination. The rule conditions the right to appeal error on the defendant's willingness to forgo his ability to present his own testimony in the manner that is the most likely to convince the jury of his innocence.

The *amici* agree with the petitioner that nothing in the Federal Rules of Evidence or the common law supports an inflexible forfeiture of appellate rights as a consequence of conforming one's case to a court's definitive *in limine* rulings. The fair and efficient administration of justice requires rejection of such an automatic forfeiture rule.

I.

AUTOMATIC FORFEITURE SHOULD NOT BE READ INTO THE FEDERAL RULES OF EVIDENCE ABSENT A CLEAR INDICATION OF INTENT TO CREATE SUCH A POLICY

A litigant's ability to obtain an appellate ruling on the merits of a particular issue depends first upon whether an appellate court has jurisdiction to entertain the question presented, and second upon whether the appellant properly preserved his right to challenge the trial court's resolution of that issue against him. To determine whether these two prerequisites have been satisfied, a court must interpret statutes conferring appellate jurisdiction and consult procedural rules governing the preservation of error.

Defendants who appeal from a final judgment of conviction and sentence in a criminal case rest jurisdiction on the court of appeals' power to review final decisions of district courts under 28 U.S.C. § 1291. Section 1291, though limited to appeal of "final" decisions, includes within its scope all interlocutory rulings leading up to the final decision to the extent that they have not been rendered moot by subsequent events. *United States v. Hamide*, 914 F.2d 1147, 1152 (9th Cir. 1990) (citing *United States v. Sarkissian*, 841 F.2d 959 (9th Cir. 1988); *Cleveland Hair Clinic, Inc. v. Puig*, 104 F.3d 123, 126 (7th Cir. 1997) ("an appeal at the end of the case brings up all interlocutory orders"). Thus, a pretrial evidentiary ruling excluding evidence, though not a "final decision" under Section 1291 when made, is "merged" into the final judgment, *Koppers Co. Inc. v. Aetna Cas. & Sur. Co.*, 158 F.3d 170, 173 n.2 (3d Cir. 1998), giving the appellate court jurisdiction to review it upon final judgment in the case.

Because there is no jurisdictional obstacle to appellate review of an *in limine* ruling after final judgment in a criminal case, a decision of a court of appeals not to review the merits of an issue must rest upon a forfeiture of the right

to appeal. The general procedure that a defendant must follow to prevent forfeiture of the right to challenge an adverse ruling by the district court is contained in the Federal Rules of Criminal Procedure. Federal Rule of Criminal Procedure 51 provides:

> Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor . . . .

The Federal Rules of Evidence amplify the defendant's obligations to preserve challenges to a trial court's evidentiary rulings. Rule 103 provides that "[e]rror may not be predicated upon a ruling which admits . . . evidence unless . . . a timely objection or motion to strike appears of record." The policy behind a timely objection rule is plain: "An appeal . . . without an objection at trial would bushwhack both the judge and the opponent. Objections alert the judge at critical junctures so that errors may be averted." *Wilson v. Williams*, 182 F.3d 562, 566 (7th Cir. 1999) (*en banc*).

Nothing in Rule 609 defines the meaning of "timely" in the context of objections to the admissibility of impeachment evidence, or suggests that an objection to a pretrial ruling admitting such evidence is "untimely." Nor does anything in that rule suggest or require that a defendant necessarily waives his right to challenge a court's pretrial ruling admitting prior convictions that *the government has stated an intent to introduce*, if he softens the blow of impeachment by introducing the evidence first. A defendant who has stated a clear objection to admission of a prior conviction in a contested pretrial hearing and received a conclusive order

stating the evidence will be admitted has satisfied the purpose of the timely objection rule by placing the judge and opposing counsel on notice of the grounds for the alleged error.

Waiver of rights is not lightly read into the Federal Rules of Evidence, and has been disapproved when the language of the rules is silent on the issue. *Mitchell v. United States*, 119 S. Ct. 1307, 1312-13 (1999) (refusing to read a waiver of the right to decline to testify into Rule 11, which did not explicitly provide that such waiver is a consequence of a guilty plea). Congress knows how to signal to a defendant when his behavior will result in waiver. Some rules do make explicit that certain action or inaction by a defendant results in the inability to raise a claim of error. *See, e.g.*, Fed. R. Crim. P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict."). This Court should resist the invitation of the Ninth Circuit to imply such a bar absent an indication that the legislature intended to make waiver of appellate rights a consequence of a litigation strategy that it expressly acknowledged and condoned when it adopted Rule 609.

II.

FORFEITURE OF APPELLATE RIGHTS IN RULE 609 CASES DOES NOT SERVE THE POLICIES THAT PROMPT WAIVERS IN OTHER CONTEXTS

This Court finds waiver of appellate rights in other contexts based on its perception that the defendant has manipulated the trial process by (1) sandbagging the district court, *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977), or (2) acting inconsistently with the right asserted on appeal, *Taylor v. United States*, 414 U.S. 17 (1973).[2] Neither of

[2] Courts also recognize that a defendant may expressly waive appellate rights as consideration for obtaining some other benefit from the government. *E.g., United States v. Mezzanatto*, 513 U.S. 196 (1995) (permitting defendant to forgo appeal in exchange for benefit of plea bargain). Defendants in Ms. Ohler's position have not expressly agreed to waive rights in exchange for some benefit they did not already possess.

those rationales justifies a waiver of rights in cases such as this one.

A decision to "remove the sting" of impeachment evidence by presenting it first on direct examination in cases such as Ms. Ohler's does not sandbag the district court or the government, so long as the defendant's objection was fully and fairly presented in a pretrial setting. Such cases do not pose the situation where the defendant lulled the district court into committing error by failing to raise a contemporaneous objection and by flagging the error only after it was too late to correct the record. The defendant, *having already objected to the admission of the convictions and lost*, reasonably reacted to the certainty that the evidence would surface by softening the blow.

Nor is the defendant's decision to remove the sting of impeachment by testifying on direct examination at all inconsistent with his position that the evidence should not come in at all. If the evidence is certain to be admitted, the defendant's choice merely reflects adaptation to reality. Arguing that a defendant's response to real world adversity is inconsistent with his position that the evidence should not be admitted is akin to suggesting that a person's actions in handing over his wallet at gunpoint is "inconsistent" with his position that he is entitled to keep it.

The certainty that the evidence will be admitted is not manufactured by the defendant to manipulate the trial process. The certainty is created by the *government*'s representation on an *in limine* motion that it intends to introduce the evidence as impeachment and upon the *court*'s definitive judgment that such impeachment is appropriate

and admissible. Should the development of evidence at trial alter the government's previously expressed intent to introduce the prior convictions as impeachment, it may easily prevent the inadvertent admission of evidence that *no* party wishes to introduce by informing the defendant and court that it will not introduce this evidence on cross-examination before defense counsel elicits it.

A defendant will never introduce his own prior convictions in the absence of real certainty that the evidence will otherwise surface simply "to sow the seeds of error." *United States v. Wilford*, 493 F.2d 730, 736 (3d Cir. 1974). Most battles over the admissibility of prior convictions do not occur as a result of the misapplication of the plain terms of Rule 609 (*i.e.* erroneous admission of convictions not involving dishonesty punishable by less than one year). Rather, they involve disputes over the appropriate balance of the probative value of the prior conviction against the prejudice to the defendant – a judgment on which appellate courts normally defer unless the calculus is unreasonable. Given this deferential standard of review, no defendant will risk the certain and extreme damage to his case that will be caused by introducing one of the most powerful forms of impeachment evidence in order to preserve the highly uncertain prospect of prevailing on appeal.

III.

AN AUTOMATIC FORFEITURE RULE DISREGARDS TRADITIONAL LITIGATION PRACTICE AND IMPOSES UNFAIR COSTS ON DEFENDANTS IN CRIMINAL CASES

The practice of anticipating the admission of harmful evidence by an opponent and softening its blow is an important tool in the trial lawyer's arsenal, which boasts an historic pedigree. 1 McCormick on Evidence § 42 at 166. A trial lawyer who is aware that his opponent will, in reliance on the advance approval of the judge, impeach his witness wisely takes the opportunity to place the damaging evidence

in context before his opponent has the chance to surprise the jury. A remorseful explanation out of the mouth of the offending witness may allow the jury to understand and forgive the reasons for his actions, and to better appreciate the "'real character,' the whole person." *United States v. Bad Cob*, 560 F.2d 877, 883 (8th Cir. 1977); *see also United States v. Medical Therapy Services, Inc.*, 583 F.2d 36, 39 (2d Cir. 1978) ("[T]he law does not limit a party to witnesses of good character, nor does it compel a party to conceal the bad record of his witnesses from the jury, to have it afterwards revealed by the opposing party with telling effect. Such a rule would be unfair alike to the party calling the witness and the jury.") (quoting *People v. Minsky*, 227 N.Y. 94, 98, 124 N.E. 126, 127 (1919)). Allowing litigants to anticipate and address impeachment evidence advances the truthseeking function of a trial. A jury may more easily evaluate a defendant's credibility – one way or the other – when it can listen to the direct testimony of the witness in response to non-leading questions as opposed to through the testimony of government counsel embedded in leading questions on cross-examination.

But the technique of "removing the sting" when used in the context of Rule 609 evidence is more than just a savvy tactical maneuver. Failure to preempt evidence of prior convictions may have a "devastating" effect on a defendant's case because "the jury may infer that the defendant is attempting to hide his prior convictions and will likely focus more on them in assessing his credibility." *United States v. Williams*, 939 F.2d 721, 724 (9th Cir. 1991). As Judge Easterbrook has explained for the Seventh Circuit, sitting *en banc*:

> Sensible adaptations [to trial strategy] could not be accomplished if [the witness] had to wait until [the opposing party] offered the evidence himself, and then raise an objection, acting in the jury's eyes as if he had something to hide. Waiting, objecting and

> only then trying to make something of the subject not only would divest [the testifying party] of the initiative but also would deprive him of an alternative theory of the case.

Wilson, 182 F.3d at 566.

Prosecutors, as well as criminal defendants take advantage of the practice of preempting damaging impeachment to ameliorate its punch. In a parallel set of circumstances to this case, prosecutors may and routinely do deflect impeachment based on its witnesses' records of prior convictions by eliciting that information themselves. In *United States v. Vanco*, 131 F.2d 123, 125 (7th Cir. 1942), the court ruled that the government could introduce the prior convictions of its own witness because "this no doubt would have been done by the appellant, had the government failed to do so. The government therefore was warranted in anticipating such cross-examination and in eliciting such testimony on direct examination." Likewise, the Seventh Circuit in *United States v. Ewings*, 936 F.2d 903, 909 (7th Cir. 1991) approved the government's use of prior conviction evidence in direct examination of its own friendly witness, observing,

> [A] trial is not just combat; it is also truthseeking; and each party is entitled to place its case before the jury at one time in an orderly, measured, and balanced fashion, and thus spare the jury from having to deal with bombshells later on. It is on this theory that defense counsel, in beginning their examination of a defendant, will often ask him about his criminal record, knowing that if they do not ask, the prosecutor will do so on cross-examination. What is sauce for the goose is sauce for the gander.

Id. (quotation and citation omitted).

Prosecutors also elicit other sorts of impeachment evidence that they fought unsuccessfully to suppress in order to mitigate the defense's cross-examination. For instance, the government may first attempt to suppress evidence that its agents threatened its own witness with revocation of immunity or other displays of force if the witness did not confirm the government's theory of events at trial. *See, e.g. United States v. Anderson*, Cr. No. 98-20030 (D. Kan. 1999) (rejecting government's motion *in limine* to exclude prosecutor's profanity and physical threat against a witness during an interview when the witness did not acknowledge the inference the government drew from certain documents). But if its attempt at suppression is fruitless, it will avail itself of the opportunity to explain away those "threats" through the testimony of its own "threatened" witness, blunting the shock that a jury would otherwise experience in learning that the witness who has just delivered the goods for the government may well have done so to save his own skin. *Id.* In still another set of circumstances, the government may wish to deal delicately on direct examination with evidence of a complaining victim's prior sexual history under Federal Rule of Evidence 412, once a trial court announces that such evidence is fair game for a defendant to explore on cross.

The use by the government of this sensible trial strategy comes at no price – it is not forced to relinquish rights of appeal (because it has none following a defendant's acquittal) nor is it required to forego any other rights as a condition of its choice. Without affirmative evidence that Congress intended to place an additional cost on a defendant's exercise of a trial tactic that is available for free to the government, this Court should not manufacture one.

IV.

AN AUTOMATIC FORFEITURE RULE IMPAIRS THE ABILITY OF TRIAL COURTS TO MANAGE THE ORDERLY PRESENTATION OF EVIDENCE AT TRIAL

The NACDL and FDA avidly endorse a system of criminal justice that permits an accused defendant to present all available defenses to charges of criminal misconduct in a manner that emphasizes both the speed with which a defendant may obtain vindication and fairness of procedures. To that end, the *amici* support procedures that give trial judges the ability to resolve contested evidentiary matters in advance of trial outside the hearing of the jury, *see, e.g.*, Fed. R. Evid. 103(c) and 104(c), because such rules streamline the trial (reducing both the cost to defendants and the chance that jurors will blame inefficiency of the system on the defendant) and eliminate the risk of juror speculation that a defendant's legitimate evidentiary objections at trial reflect an attempt to obstruct the truthfinding process.

The Ninth Circuit's automatic waiver rule undermines these goals inasmuch as it rests on the following rationale:

> Even if the district court rules before trial that the prior conviction will be admissible if offered, based on the defendant's expected defense, it is always possible that the court will change its mind on hearing the defendant's actual testimony. The district court should retain discretion to reverse itself when this testimony brings into sharper focus the question of admissibility.

Williams, 939 F.2d at 724. In an apparent effort to maximize the flexibility of trial courts, the rule actually reduces the ability of a trial court to control the efficient presentation of trial evidence by ***requiring*** it to leave a ruling open to change when the court otherwise feels the record has been adequately developed to render a definitive ruling. The

amici do not dispute that a trial court *may* reserve the right to change its mind; they merely dispute that it *must* do so. Without the power to render a definitive ruling at a pretrial stage, courts will be unable to prevent endless debate of settled issues throughout the trial and will encourage litigants to juggle multiple theories of the case before the jury even after the trial court has signaled its intent to foreclose one or more options.

The Ninth Circuit's characterizaton of *in limine* motions as inexorably tentative is in tension with a substantial body of case law recognizing that litigants generally need not reassert objections to the admission or exclusion of evidence, if such objections were adequately presented, considered and definitively overruled on a motion *in limine*. *See, e.g.*, *Richardson v. Missouri Pacific R.R. Co.*, 186 F.3d 1273, 1276 (10th Cir. 1999); *Wilson v. Williams*, 182 F.3d 562, 564 (7th Cir. 1999) (*en banc*); *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446, 454-55 (3d Cir. 1999);*United States v. Williams*, 81 F.3d 1321, 1325 (4th Cir. 1996); *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112, 1118-19 (8th Cir. 1985).

The Ninth Circuit itself has adopted this position in a case not cited by the court below, *Palmerin v. City of Riverside*, 794 F.2d 1409, 1410-13 (9th Cir. 1986) (rejecting argument that plaintiffs waived appellate review of *in limine* ruling admitting evidence of their prior guilty pleas). The court offered a rationale that cannot be squared with the notion that an *in limine* ruling necessarily remains tentative throughout the trial (*id.* at 1413 & n.3):

> [W]here the substance of the objection has been thoroughly explored during the hearing on the motion *in limine*, and the trial court's ruling permitting introduction of evidence was explicit and definitive, no further action is required to preserve for appeal the issue of admissibility of that evidence. In applying

> this approach, we find that the Palmerins have preserved their objection for appeal. The substance of the objection to the admission of the guilty pleas was thoroughly explored during the hearing on the motion *in limine*, and the trial judge's ruling was explicit and definitive. There was no hint that the ruling might be subject to reconsideration. Perhaps most important, there was nothing in the manner or context in which the guilty pleas were introduced at trial that was unforeseen or that cast any doubt on the applicability of the trial court's *in limine* ruling.

A proposed amendment to the Federal Rules of Evidence will amend Rule 103(a) to codify this rule favoring finality of pretrial rulings: "Once the court, at or before trial, makes a definitive ruling on the record admitting or excluding evidence, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." Proposed Amendments to the Federal Rules of Evidence, 181 F.R.D. 133, 134; *see also id.* at 136-37.

Aside from the tension between the automatic waiver rule and the rule dispensing with the need for renewed objections, the Ninth's Circuit's waiver rule creates perverse incentives that *reduce* the chances that contested evidentiary issues will be aired prior to trial, thereby further depriving the Court of opportunities to manage the presentation of evidence. A rule that requires the defendant – and only the defendant – to abandon appellate rights in exchange for removing the sting of impeachment will lead defendants to devise their own methods for leveling the playing field. Defendants will be less likely to raise evidentiary questions on an *in limine* basis if they know that the government may blunt the effect of a ruling in the defendant's favor, but that they will not be afforded reciprocal rights. Given the limited discovery offered the government in criminal cases, reduced use of *in limine* motions for such purposes will increase disruption at trial necessitated by lengthy sidebars and

deprive courts of the opportunity to consider the arguments presented for admission or exclusion of the evidence in an orderly and thoughtful fashion. *See Palmerin*, 794 F.2d at 1413 ("District judges should '[e]ncourage counsel to bring motions in limine on evidentiary questions. This will prevent disruptions at trial which could render the proceedings incoherent to the jurors.'") (quoting Judge's Manual for the Management of Complex Criminal Jury Cases § 2.2 (1982)); MANUAL FOR COMPLEX LITIGATION (THIRD) § 32.23 (1995) ("Addressing these [evidentiary issues] before trial allows the judge and attorneys to give them more deliberate consideration than during trial ... .").

V.

AN AUTOMATIC FORFEITURE RULE DOES NOT FOLLOW FROM *UNITED STATES V. LUCE*

The government's principal argument in favor of an automatic waiver rule rests upon *United States v. Luce*, 469 U.S. 38, 41-42 (1984), but its conclusion is neither compelled by nor a logical outgrowth of the rationale supporting that decision.

In *Luce*, this Court held that a defendant can only preserve his objection to an *in limine* ruling admitting prior conviction evidence if he takes the stand. 469 U.S. at 40-41. The trial court had made its Rule 609(a)(1) decision admitting the evidence was necessarily conditioned on the defendant testifying at trial, but the condition was never satisfied because the defendant chose, for whatever reason, not to testify. In circumstances where the conditions of an *in limine* ruling are not satisfied, the ruling has no effect on the trial. *Wilson*, 182 F.3d at 565. Appellate court review would be impossible because there is no factual basis to determine whether error occurred, and if it did, whether it was harmless:

> A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context. This is particularly true under Rule 609(a)(1), which directs the court to weigh the probative value of a prior conviction against the prejudicial effect to the defendant. To perform this balancing, the court must know the precise nature of the defendant's testimony, *which is unknowable when, as here, the defendant does not testify.*

Luce, 469 U.S. at 41 (emphasis added).

The concerns motivating the decision in *Luce* are completely absent in cases where *all* pre-conditions to the district court's ruling that prior convictions are admissible have been satisfied by the defendant's taking the stand and giving the testimony that, under the *in limine* ruling, renders the prior conviction evidence admissible. In cases such as Ms. Ohler's, the defendant actually does testify, so there is a non-speculative factual basis for performing the balancing of probative value and prejudice required by the rule. Moreover, whereas in *Luce* there could have been many reasons other than the *in limine* ruling for the defendant's choice not to testify, here it is apparent that there was one and only one reason for the defendant's testimony on direct about the prior conviction: the district court's ruling that the conviction would be admissible on cross-examination. Had the court ruled in the defendant's favor on the *in limine* motion, there would be no conceivable reason to introduce the damning information. Finally, a reviewing court will have no trouble determining whether an abuse of discretion in admitting a defendant's prior conviction could be harmless in light of the full record developed at trial.

VI.

AN AUTOMATIC FORFEITURE RULE CREATES UNFAIR DISPARITIES IN THE RELATIVE APPELLATE RIGHTS OF CRIMINAL DEFENDANTS AND THE GOVERNMENT

The petitioner rightly points out that one effect of the Ninth Circuit's decision is to stunt development of case law interpreting Rule 609 because most district court decisions will become effectively unreviewable by virtue of waiver. Most defendants saddled with the baggage of prior convictions ruled admissible will either blunt the blow of impeachment by testifying or forego the opportunity to testify altogether. Under the one-two punch of the Ninth's Circuit's waiver rule and *Luce*, admissibility determinations in any case where a defendant selects one of these options cannot be reviewed on the merits by an appellate court at the behest of the defendant.

Thus, the automatic waiver rule would deprive defendants of effective appellate review. At the same time, however, it would permit appeal by the government on a distinctly incomplete record. The government in criminal cases, due to the one-sided effects of the Double Jeopardy Clause, has a statutory right to appeal some interlocutory rulings that other parties may not appeal before a final decision under § 1291 is rendered. Congress has authorized government appeals from a "decision or order suppressing or excluding evidence . . . not made after the defendant has been put in jeopardy and before the verdict." 18 U.S.C. § 3731. The theory behind the statute is that whereas criminal defendants may obtain effective review after final judgment, the government loses its rights to correct error if the jury acquits. Therefore, if a district court excludes evidence of prior convictions under Rule 609 on a motion *in limine* decided before the onset of trial, the government may seek reversal of the pretrial exclusion order in the Court of

Appeals – at a point when the Court of Appeals has no way to know whether the defendant will, in fact, elect to testify.

Giving the government a second bite at obtaining a favorable outcome under Rule 609 through interlocutory appeal when the district court rules against it while effectively precluding review by criminal defendants when the court rules in the government's favor would introduce a systemic inequity. Absent an explicit indication of intent, it is not reasonable to conclude that Congress intended such a result when it approved the rules.

VII.

AUTOMATIC FORFEITURE IS NOT NECESSARY TO SATISFY THE GOVERNMENT'S ASSERTED NEED TO CONTROL THE DECISION WHETHER TO INTRODUCE PRIOR CONVICTION EVIDENCE

The government has argued that an automatic forfeiture rule is necessary to protect its ability to make – at the last possible moment – the ultimate determination whether to introduce the evidence or to withhold the damaging evidence from the jury to forestall a potentially meritorious appeal. For all of the reasons expressed in this brief, the government's tactical desire to reserve judgment until after the defendant has testified is outweighed by the defendant's need to remove the sting of impeachment and the systemic benefits of allowing him to do so. Any argument that permitting a defendant to anticipate impeachment on direct examination deprives the government altogether of the choice whether the evidence comes in is simply not persuasive.

When the government takes a position on a contested motion *in limine* and announces that it intends to introduce evidence of prior convictions, it has made a choice on which the defendant is entitled to rely until informed to the contrary. If the government's stated intentions change during the course of the trial, the government can inform the defendant and the court of the change prior to the defendant taking the stand.

Even if this Court were to disagree that the government bears this burden, it should not accept the automatic waiver rule as the only acceptable safeguard of the government's asserted interests. Instead, it should adopt procedures in the exercise of its inherent supervisory authority that protect both the government's ability to make its own choices about what evidence to offer and the defendant's ability to testify in response to conclusive adverse rulings without forgoing the right to appeal. To that end, this Court could prospectively require all defendants to renew their objections to the admission of prior convictions at the time they take the stand. Assuming the trial court remains steadfast in its previously conclusive decision that evidence is admissible, it should then be required to exercise its authority under Federal Rule of Evidence 611(a) and require the government to make an election before the defense passes the witness. That Rule provides that a trial court has the authority to

> exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect the witness from harassment or undue embarrassment.

Fed. R. Evid. 611(a).

Requiring the government to make its choice before the witness is passed would promote two of the three goals of Rule 611, and have no adverse impact upon the third. It would make the presentation effective for the ascertainment of truth because it does not disingenuously hide from the jury the defendant's desire to confront this evidence at the outset, and it would offer some protection from the undue embarrassment of responding for the first time about a

criminal history through questions posed by a hostile opposing counsel. And it would not force the government to make an uninformed election, because by this time of trial, the record has already been fully developed. At that point, the government is able to decide for itself the risk of appellate reversal if the prior convictions are introduced.

CONCLUSION

For the foregoing reasons, the automatic waiver rule of the Ninth Circuit should be rejected and the decision below should be overruled.

Respectfully submitted,

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