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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 FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL AMENDMENTS

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

FEDERAL RULES

STATE STATUTES

MISCELLANEOUS

CITATION OF OPINION BELOW

The district court's oral ruling was not reported and is contained in the Joint Appendix ("JA"). The United States Court of Appeals for the Ninth Circuit published its decision at *United States v. Ohler*, 169 F.3d 1200 (9th Cir. 1999).

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment on March 9, 1999. Petitioner timely filed her petition for a writ of *certiorari* on June 7, 1999, within the ninety-day period allowed under Rule 13.1 of the Rules of the Supreme Court of the United States. The Court therefore has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. U.S. Const. Amend. V.
2. U.S. Const. Amend. VI.
3. Fed. R. Evid. 102.
4. Fed. R. Evid. 103.
5. Fed. R. Evid. 609.[1]

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[1] These provisions and the Advisory Committee's proposed amendment with corresponding notes to Fed. R. Evid. 103 are included in the Appendix ("App.").

STATEMENT OF THE CASE

On July 29, 1997, petitioner drove a van from Mexico to the San Ysidro, California Port of Entry. JA at . Customs inspectors searched the van and found approximately eighty-one pounds of marijuana hidden behind one of the interior panels. JA at . Petitioner was arrested, and, on August 6, 1997, a federal grand jury in the Southern District of California returned a two-count indictment charging her with: (1) importation of marijuana, in violation of 21 U.S.C. §§ 952 and 960; and (2) possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). JA at . On November 10, 1997, the district court set a trial date of January 27, 1998 and determined that all motions *in limine* would be decided the day before trial, January 26, 1998. JA at .

On January 13, 1998, the government filed its motions *in limine*, which included a motion to admit petitioner's 1993 conviction for possession of methamphetamine under Rules 404(b) and 609(a)(1) of the Federal Rules of Evidence. JA at . With respect to admission under Rule 609, the motion *in limine* stated:

> The Government hereby notifies Defendant of its intention to offer the following conviction at

> trial under Federal Rule of Evidence 609(a)(1): Defendant was convicted of the felony offense of Possession of a Controlled Substance, in violation of California Health and Safety Code Section 11377(A), on June 29, 1993, and sentenced to 90 days jail and three years probation. Therefore, if Defendant testifies, the Government intends to use this conviction to impeach her.

JA at .[2] One week later, on January 20, 1998, petitioner filed a written submission in which she objected to the government's motion *in limine* to admit her prior conviction under Rules 404(b) and 609. JA at . With respect to admissibility under Rule 609, petitioner argued that because it was unclear whether her prior conviction was a felony or misdemeanor, Rule 609(a)(1)'s threshold requirement that the prior conviction be a felony had not been satisfied. JA at .

As scheduled, the district court held a hearing to resolve the various motions *in limine* on January 26, 1998. JA at . At the hearing, the district court denied the government's motion to admit petitioner's prior conviction under Rule 404(b). JA at . The parties then argued whether the conviction was admissible under Rule 609(a)(1). JA at .

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[2] Rule 609 provides in relevant part: "For the purpose of attacking the credibility of a witness . . . evidence that an accused has been convicted of [a felony] shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused . . . ." Fed. R. Evid. 609(a)(1).

Petitioner conceded that her prior conviction was a felony and therefore withdrew her previous argument that the threshold requirement of Rule 609(a)(1) had not been satisfied. JA at . Petitioner, however, continued to "object to the use of this prior conviction under [Rule] 609[,]" arguing that the probative value of her prior conviction for impeachment purposes did not outweigh its prejudicial effect. JA at .

In response, the government strenuously argued for the conviction's admission under Rule 609(a)(1). JA at . At no time, in either its written motion *in limine* or in its oral argument to the district court, did the government indicate that it might ultimately decide not to introduce the conviction. To the contrary, the government emphasized that use of the prior conviction to impeach petitioner was "something that's important and critical to the Government's case . . . ." JA at .

The district court deferred ruling on the conviction's admissibility under Rule 609 so that the parties could submit supplemental briefing. JA at . The district court also rescheduled the trial for January 28, 1998. JA at . On January 27, 1998, petitioner filed a supplemental brief

in which she cited further case law in support of her objection and "request[ed] that the government be prohibited from introducing the conviction pursuant to Fed. R. Evid. 609(a)(1)." JA at . The government also filed a supplemental brief. JA at . Once again, the government argued to admit the conviction and never mentioned any indecision regarding its intent to impeach petitioner with the prior conviction. JA at .

Trial began the next day, January 28, 1998. JA at . At the beginning of the proceedings, the district court entertained further argument on the Rule 609 issue, during which petitioner again objected to the admission of her prior conviction under Rule 609. JA at . The government continued to argue strenuously for its admission and, again, never indicated that it might decline to use the prior conviction for impeachment purposes. JA at .

After two sets of briefing and two rounds of oral argument, the district court decided that it was time to rule as it informed the parties: "All right. I think I've heard the arguments at this point. . . . I do think we do need to get this issue resolved." JA at . The district court then definitively ruled that petitioner's prior

conviction was admissible under Rule 609(a)(1) and explained:

> Well, I will say at the threshold that this is a very close call. You may not see it as such, but it is a close call. Looking at the factors under *U.S. v. Brown*[e, 829 F.2d 760 (9th Cir. 1987), *cert. denied*, 485 U.S. 991 (1988)] I will deny the motion in limine to preclude evidence of the defendant's prior conviction for methamphetamine use. There is some impeachment value to that. Drug offenses, this circuit has indicated, do have some impeachment value. Perhaps one day we will get a refinement of [*United States v.*]*Alexander*[, 48 F.3d 1477 (9th Cir.), *cert. denied*, 516 U.S. 878 (1995)] and perhaps a distinction, if a distinction is to be made, between personal use convictions and other types of drug convictions. There is some impeachment value.
>
> The point in time of the conviction and the witness's conduct under question in this case is not so remote so as to create undue prejudice. We're clearly well within the ten-year rule, and we have a conviction within five years. There is some similarity between the prior conviction and the charged crime in this case, but once again, the prior conviction is for mere use whereas this charge is a smuggling charge.
>
> Mr. Neal [defense counsel], I think you can certainly make the distinction that you've attempted to make in argument to the Court. There is obviously some importance to the defendant's testimony in this case. But I think the centrality of the defendant's credibility in this case is obviously very significant, and so that if the defendant does take the stand, she should be capable of being impeached. And I think that the factors set forth in *Brown*[e] weigh slightly in favor of the allowability of that prior conviction for impeachment purposes and, as I say, weigh

> slightly -- realizing that there is a substantial prima facie case that the prosecution has to make.
>
> I think that looking at probative value versus prejudice that the probative value is outweighed by the prejudice in light of the argument that you can make, Mr. Neal, related to time and also the dissimilarity between the convictions.
>
> * * * *
>
> It's been brought to my attention I may have in the statement of my ruling relating to the use of the prior conviction for impeachment purposes indicated that the probative value of the prior corroboration [sic] was outweighed by possible prejudice, and if that was what I in fact said, I meant the converse to be true, that the prejudice -- any prejudice would be outweighed by the probative value of the use of the prior conviction. I want to make that record clear.

JA at .[3] With this crucial evidentiary issue definitively resolved, the parties selected a jury, and the trial commenced. JA at .

The next day, before the continuation of the trial, the district court again warned defense counsel: "I don't know if your client is going to testify in this case, Mr. Neal, but if she does, *obviously* the prior conviction can be used

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[3] Although the government was actually the party who filed the motion *in limine* to admit the prior conviction under Rule 609(a)(1), the district court ultimately characterized the motion as one by petitioner to exclude the evidence. In addition, the final paragraph quoted in the text, in which the district court corrected its ruling, did not occur immediately after the ruling but did occur a short time later during voir dire.

for impeachment purposes." JA at (emphasis added). Neither at this point, nor at any other point in the trial, did the government indicate that it might reverse its intention to admit the prior conviction under Rule 609.

The government rested its case-in-chief early on the second day of trial, and, later that day, petitioner testified in her own defense. JA at . On direct examination, petitioner attempted to mitigate the "sting" of the Rule 609 evidence by testifying about the existence and nature of her prior conviction and sentence. JA at .[4] Regarding the charges, petitioner testified that she had no knowledge of the marijuana hidden in the van and explained that another individual had taken her van to Mexico without her permission and that she was returning to the United States after having retrieved the van. JA at . On cross-examination, the prosecutor's last question asked petitioner if her prior conviction was a felony for possession of methamphetamine, and she answered affirmatively. JA at . On redirect examination, petitioner clarified that her

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[4] Throughout the brief, petitioner will use the phrase "attempt to mitigate the 'sting'" as shorthand for testifying about the prior conviction on direct examination in order to soften the prejudicial impact of the conviction if it is introduced for the first time by questioning on cross-examination.

conviction was merely for personal use, not distribution. JA at .

Ultimately, the jury returned guilty verdicts on both counts of the indictment, and the district court imposed a custodial sentence of thirty months to be followed by three years of supervised release. JA at . Petitioner appealed her convictions to the Ninth Circuit, contending that the district court erred in admitting her prior conviction under Rule 609(a)(1). JA at . Petitioner acknowledged that in *United States v. Williams*, 939 F.2d 721 (9th Cir. 1991), the Ninth Circuit had held that a defendant automatically waives the right to appeal an adverse Rule 609 ruling if she attempts to mitigate the "sting;" however, petitioner urged the Ninth Circuit to reconsider its precedent. JA at . The Ninth Circuit declined and instead adhered to *Williams*, concluding that petitioner "waived her right to appeal the district court's in limine ruling that her prior conviction was admissible under Rule 609(a)(1)." JA at . As a result, the Ninth Circuit did not entertain the merits of her Rule 609 argument. JA at .

Petitioner subsequently filed a petition for a writ of *certiorari*, noting that the Ninth Circuit's waiver rule had

been rejected by several other circuits. On October 18, 1999, after the Solicitor General filed a brief opposing the petition and petitioner filed a reply brief, the Court granted the petition for a writ of *certiorari*. *See Ohler v. United States*, 120 S. Ct. 370 (1999).

SUMMARY OF ARGUMENT

The federal courts of appeals have taken differing approaches in answering the question presented for review. Like the Ninth Circuit, the Eighth Circuit also has held that a defendant automatically waives her right to appeal a definitive, adverse Rule 609 ruling if she attempts to mitigate the "sting." *See, e.g., United States v. Smiley*, 997 F.2d 475, 479-80 (8th Cir. 1993). Additionally, the Sixth Circuit has approved of such an approach in *dicta*. *See United States v. Gaitan-Acevedo*, 148 F.3d 577, 592 (6th Cir.), *cert. denied*, 119 S. Ct. 256 (1998). The Fifth Circuit, on the other hand, has held that a defendant does not waive appeal of a district court's Rule 609 ruling under such circumstances. *See United States v. Fisher*, 106 F.3d 622, 629-30 (5th Cir. 1997). The courts of appeals are similarly divided when considering whether attempts to mitigate the "sting" of adverse evidentiary rulings

constitute waivers of appeal in related contexts. *Compare Wilson v. Williams*, 182 F.3d 562, 565-68 (7th Cir. 1999) *(en banc)* (no waiver with respect to Rule 609 ruling in civil context), *and Judd v. Rodman*, 105 F.3d 1339, 1342 (11th Cir. 1997) (no waiver with respect to Rule 412 ruling in civil context), *with Gill v. Thomas*, 83 F.3d 537 (1st Cir. 1996) (automatic waiver with respect to Rule 609 ruling in civil context). *See also United States v. Mejia-Alarcon*, 995 F.2d 982, 985-88 (10th Cir.) (no waiver in Rule 609(a)(2) context but suggesting different rule may apply in Rule 609(a)(1) context), *cert. denied*, 510 U.S. 927 (1993).

The abandonment or relinquishment of a right is a threshold requirement for a waiver. Thus, to resolve the confusion among the courts of appeals, the Court must first determine whether the Federal Rules of Evidence (sometimes referred to as "the Rules") provide that a defendant relinquishes or abandons her right to appeal an adverse ruling admitting her prior conviction under Rule 609 if she attempts to mitigate the "sting." Although this issue would appear primarily to involve a question concerning how the Rules should be interpreted, many of the above decisions have neglected to employ the interpretive method established

by the Court for resolving such questions. This method, which is akin to normal statutory construction, looks at the plain language of the rules involved, their legislative history, and relevant policy considerations. When employing this interpretive method, it becomes clear that a defendant does not abandon the right to appeal an adverse Rule 609 ruling by attempting to mitigate the "sting." Accordingly, there is no waiver.

The plain language of Rules 103 and 609 (the two rules at issue) reveals that a defendant does not abandon her right to appeal under the circumstances. Rule 103(a) sets forth the prerequisites for preserving an objection to the admission of evidence for appeal and requires a party to make a timely objection to a district court's ruling; however, the rule in no way indicates that a party relinquishes the right to appeal an adverse ruling by attempting to mitigate the "sting." Indeed, such an approach would render Rule 103 as a whole inconsistent, as Rule 103(d) allows at least plain-error review even when a party fails to object before the district court. It would be quite odd for the rule to provide that the right to appeal the admission of evidence is not abandoned when a

party fails to object but that the right is relinquished when a specific objection is made. Moreover, the plain language of Rule 609 specifically was amended in 1990 to clarify that litigants can mitigate the "sting" of prior-conviction evidence by first introducing it during direct examination. Again, it would be quite odd for the Rules to sanction attempts to mitigate the "sting" of Rule 609 evidence on the one hand but to penalize attempts to do so by requiring the relinquishment of the right to appeal rulings admitting such evidence on the other.

The legislative history of Rules 103 and 609 supports the same conclusion. The prevailing common-law approach was that a party did not abandon the right to appeal under the instant circumstances. The legislative history of Rule 103 reveals that Congress did not in any way intend to change this prevailing common-law view. Additionally, the legislative history of Rule 609 reveals that Congress was deeply concerned with the prejudicial effect that prior-conviction evidence can have on criminal defendants. A no-abandonment interpretation, at least in the specific context of Rule 609 evidence being used to impeach a criminal defendant, furthers such a concern, as it allows a criminal

defendant complete freedom to mitigate the "sting" of such highly prejudicial evidence.

Policy considerations, the final prong of the Court's interpretive method, also support a no-abandonment approach. Rule 102 sets forth three relevant policy considerations: (1) fairness; (2) elimination of expense and delay; and (3) the development of the law of evidence. With respect to the first consideration, an interpretation that requires a defendant to remain silent about her prior conviction on direct examination if she does not wish to abandon her right to appeal is unfair because a jury may wrongly perceive such silence as an attempt to hide the truth. As to the second consideration, a no-abandonment interpretation encourages a defendant to present her best case at trial, while an abandonment interpretation entails the distinct possibility that a defendant will not present her best case in order to preserve a potentially meritorious appellate issue. The no-abandonment interpretation, which encourages a defendant to present her best case at trial, eliminates expense and delay as it may result in acquittals which will obviate the need for further litigation. With respect to the third consideration, an abandonment approach seriously stunts the

development of Rule 609 case law in the criminal context because appellate courts would rarely reach the merits of contested issues under such a rule. Thus, policy considerations, like the plain language and legislative history of the Rules, reveal that a defendant does not abandon the right to appeal under the instant circumstances.

Even if the Rules incorporate an abandonment approach, such a rule cannot apply to a criminal defendant because it unconstitutionally interferes with the right to testify. Although a rule requiring abandonment of the right to appeal does not constitute an outright deprivation of the right to testify, it does interfere with the free exercise of that right by exacting a price on a defendant if she testifies about her prior conviction on direct examination. The *per se* nature of such a rule renders it unconstitutional as it arbitrarily interferes with the right to testify in situations where it is entirely unjustified. Furthermore, any interest that an abandonment rule is designed to serve does not outweigh the rule's interference with the right to testify. As a result, even if an abandonment rule is not void for arbitrariness, it still cannot withstand constitutional scrutiny.

Finally, even if the Rules can be interpreted to require the abandonment of the right to appeal under these circumstances, and even if such an interpretation can withstand constitutional scrutiny, an *automatic* waiver rule is still flawed. An abandonment of a right does not automatically constitute a waiver. Instead, an abandonment of a right must be knowing and intentional in order to ripen into a waiver. In applying an *automatic* waiver rule, the Ninth Circuit erroneously failed to make a determination as to whether the right to appeal was knowingly and intentionally abandoned.

ARGUMENT

I.

THE PLAIN LANGUAGE, LEGISLATIVE HISTORY, AND POLICY REASONS UNDERLYING RULES 103 AND 609 DICTATE THAT A DEFENDANT DOES NOT ABANDON THE RIGHT TO APPEAL A RULING ADMITTING PRIOR-CONVICTION EVIDENCE BY ATTEMPTING TO MITIGATE THE "STING."

A. Introduction

A "waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Thus, the threshold requirement for a waiver is that a right must be relinquished or abandoned. The initial question for the Court, then, is whether, under

the Federal Rules of Evidence, a defendant relinquishes or abandons the right to appeal an adverse Rule 609 ruling if she attempts to mitigate the "sting." The following analysis demonstrates that, when employing the Court's methodology for interpreting the Rules, a defendant does not relinquish or abandon the right to appeal under these circumstances. Obviously, because there is no "relinquishment" or "abandonment" under the Rules, there is no waiver.

B. The Court Has Established A Methodology For Interpreting The Meaning Of The Rules.

The Court has now had an opportunity to develop a substantial body of case law governing the interpretation of the Federal Rules of Evidence. This body of case law has established a well-defined interpretive methodology by which to resolve questions concerning their meaning. While the Court now has the benefit of this precedent to guide its interpretation of the Rules, this settled framework was not in place fifteen years ago when it decided *Luce v. United States*, 469 U.S. 38 (1984), one of its first attempts at interpreting the Rules. Thus, while the Court's decision in *Luce* addresses issues related to those presented in the

instant case,[5] much of the analysis that follows, which is based on the interpretive method now established by the Court, does not appear in that decision.

In the years since *Luce*, the Court has emphasized that its task in interpreting the Rules "is not to fashion the rule [it] deem[s] desirable but to identify the rule that Congress fashioned." *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 508 (1989); *see also United States v. Salerno*, 505 U.S. 317, 322 (1992) ("This Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases."). In general, the Court "interpret[s] the legislatively enacted Federal Rules of Evidence as [it] would any statute." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993). Therefore, it "turn[s] to the 'traditional tools of statutory construction,' in order to construe their provisions."

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[5] In *Luce*, 469 U.S. at 41-43, the Court held that a defendant who failed to testify could not appeal a district court's tentative finding that evidence of his prior conviction was admissible under Rule 609. In explaining its decision, the Court's leading rationale was that an appellate court is "handicapped" in reviewing such an evidentiary claim without the factual context of the defendant's testimony, particularly because it cannot determine whether any evidentiary error that may have been committed in admitting the prior conviction was harmless. *Id.* at 41-42. In addition, the Court emphasized that appellate review was barred under the particular circumstances because the district court's ruling was only tentative: "*[o]n a record such as here*, it would be a matter of conjecture whether the District Court would have allowed the Government to attack [Luce's] credibility at trial by means of the prior conviction." *Id.* at 42 (emphasis added).

Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988) (citation omitted).

In accordance with such traditional principles, the Court "begin[s] with the language of the Rule itself." *Id.* In analyzing the plain language of the rule, the Court examines the "natural reading" of its words, *United States v. Owens*, 484 U.S. 554, 561 (1988), and also "the principle behind the Rule, so far as it is discernible from the text . . . ." *Williamson v. United States*, 512 U.S. 594, 599 (1994). In addition, the Court does not simply look at the plain language of the rule in isolation but rather in conjunction with the plain language of other relevant rules. *See Old Chief v. United States*, 519 U.S. 172, 184 (1997) (analyzing language in one rule in conjunction with language in another rule); *Owens*, 484 U.S. at 562 (same); *Bourjaily v. United States*, 483 U.S. 171, 187 (1987) (Blackmun, J., dissenting) ("[I]n the case of a Federal Rule of Evidence, the rule's complex interrelations with other rules must be understood before one can resolve a particular interpretive problem.").

If the text of a rule does not answer the question presented, the Court then "seek[s] guidance from the

legislative history and from the Rules' overall structure." *Green*, 490 U.S. at 509. This default method of interpretation sometimes requires an analysis of whether a common-law approach existed at the time Congress adopted the rule in question and whether Congress sought to deviate from that common-law approach. *Compare Tome v. United States*, 513 U.S. 150, 159-60 (1995) (finding that Congress intended to carry over the common-law approach), *and United States v. Abel*, 469 U.S. 45, 50 (1984) (same), *with Daubert*, 509 U.S. at 587-89 (finding that Congress intended to supersede common-law approach). In determining such legislative intent, the Court sometimes relies on the Advisory Committee's Notes to the Rules. *See Beech Aircraft Corp.*, 488 U.S. at 165 n.9 ("As Congress did not amend the Advisory Committee's draft in any way that touches on the question before us, the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted."); *but see Tome*, 513 U.S. at 167-68 (Scalia, J., concurring) (Advisory Committee's Notes are persuasive scholarly commentary but do not possess any authoritative force in determining the meaning of a rule).

Finally, if a rule's meaning cannot be determined from

its plain language or legislative history, the Court evaluates policy considerations. *See generally Daubert*, 509 U.S. at 595-97 (addressing various policy concerns in explaining Court's interpretation of rule). For example, the Court interprets a particular rule in a way that makes sense from a practical perspective and is consistent with the "general approach" of the Rules as a whole. *Beech Aircraft Corp.*, 488 U.S. at 168-69; *see also Kumho Tire Company, Ltd. v. Carmichael*, 119 S. Ct. 1167, 1174 (1999) (rejecting interpretation of rule that "would prove difficult, if not impossible, for judges to administer").

When analyzing the question presented under this three-pronged interpretive method, it becomes clear that, under Rules 103 and 609, a defendant does not abandon the right to appeal an adverse Rule 609 ruling by attempting to mitigate the "sting." The plain language and legislative history of the two rules, as well as policy concerns, dictate such a result. Moreover, interpreting Rules 103 and 609 in this manner is not at all inconsistent with the Court's decision in *Luce*.

C. Under This Interpretive Method, A Defendant Does Not Abandon The Right To Appeal An Adverse Rule 609 Ruling By Attempting To Mitigate The "Sting."

1. Plain Language

Rule 103 sets forth the requirements for pursuing an evidentiary claim on appeal and provides in relevant part:

> **(a) Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> > **(1) Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . . .
>
> * * * *
>
> **(c) Hearing of the jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.
>
> **(d) Plain error.** Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Fed. R. Evid. 103. Rule 103 has not changed since its original enactment.[6]

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[6] The Advisory Committee has proposed an amendment to Rule 103 for prescription by the Court and transmission to Congress pursuant to 28 U.S.C. §§ 2072-74. *See* App. at . The proposed amendment adds the

Nothing in the plain language of Rule 103 suggests that petitioner abandoned the right to appeal the district court's adverse Rule 609 ruling by attempting to mitigate

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following sentence to Rule 103(a): "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." *Id.* This amendment addresses the legal concept of forfeiture, a related yet distinct concept from waiver, the legal concept at issue in this case. *See Olano*, 507 U.S. at 733 ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'") (citation omitted).

To avoid confusion, petitioner wishes to clarify that this is a waiver case, not a forfeiture case, as the Ninth Circuit held that petitioner *waived* any claim of error on appeal with respect to the district court's Rule 609 ruling because she first introduced her prior conviction on direct examination. *See Ohler*, 169 F.3d at 1202-04. As a result of the alleged waiver, petitioner could not, and did not, receive any appellate review of the claim whatsoever. *Id.* Had the Ninth Circuit only found that petitioner did not properly preserve her objection to the Rule 609 ruling by failing to renew it during trial, and thereby merely *forfeited* her claim, she would have at least been entitled to plain-error review on appeal. *See* Fed. R. Evid. 103(d). Ironically, although the Ninth Circuit held that petitioner waived her Rule 609 claim, its precedent clearly indicates that she did not forfeit her claim because she had already made a detailed objection to the Rule 609 evidence at the *in limine* stage and the district court definitively overruled her objection. *See, e.g., United States v. Wood*, 943 F.2d 1048, 1054-55 (9th Cir. 1991).

The Ninth Circuit's forfeiture rule (as opposed to the waiver rule at issue here) is obviously in accord with the plain language of the proposed amendment to Rule 103. Moreover, the Ninth Circuit's forfeiture rule should be viewed as the correct interpretation of the current version of Rule 103. *See Wilson*, 182 F.3d at 565 (noting the proposed amendment to Rule 103 and determining that Rule 103, as it now exists, does not require a repeated objection at trial when a definitive pretrial ruling has been made); *see also* Fed. R. Crim. P. 51 (eliminating the need for exceptions to rulings). Because the Ninth Circuit's forfeiture rule is correct, and because petitioner has not forfeited her Rule 609 claim under that rule, she would be entitled to normal appellate review, as opposed to plain-error review, when presenting the merits of her claim to the Ninth Circuit should she prevail before the Court on the waiver issue.

the "sting." Rather, in order to preserve a claim of error on appeal with respect to the admission of evidence, the plain language of Rule 103 clearly states that a party merely needs to make "a timely objection or motion to strike . . . ." Fed. R. Evid. 103(a). This is exactly what petitioner did.

Despite the rather clear prerequisites set forth in Rule 103(a) for preserving an appeal of a ruling admitting evidence, one could contend that because the rule is silent as to whether an attempt to mitigate the "sting" constitutes an abandonment, the rule's plain language is not so clear. The Court, however, has rejected past attempts to transform clear language into ambiguity through speculation about what a rule does not provide. *See Bourjaily*, 483 U.S. at 179 n.2 ("Silence is at best ambiguous, and we decline the invitation to rely on speculation to import ambiguity into what is otherwise a clear rule."). Accordingly, any attempt to read an abandonment theory into Rule 103(a), a theory which is absent from the rule's plain language, should be dismissed.

Moreover, such a reading of Rule 103(a) defies basic principles of statutory construction, as it would render the

plain language of the rule as a whole internally inconsistent. *See, e.g., United States v. Powell*, 6 F.3d 611, 614 (9th Cir. 1993) ("It is a basic rule of statutory construction 'that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless.'") (citation omitted). The plain language of Rule 103(d) allows appellate review, albeit under the plain-error standard, of errors that "were not brought to the attention of the court." Fed. R. Evid. 103(d). "It would be very odd" if Rule 103 allowed appellate review of a ruling to which a party never objected but, at the same time, required abandonment of the right to appeal when a proper objection was made, "and the Rules of Evidence are not so odd." *Old Chief*, 519 U.S. at 183-84.

The premise underlying an abandonment theory appears to be that although a party may have objected at an earlier time, she cannot predicate error on the objectionable evidence if she offered it first. Rule 103, however, specifically contemplates that a ruling on the admission of evidence may not occur at the same time it is offered at trial; in other words, the rule contemplates rulings at *in*

limine hearings or otherwise outside the presence of the jury. *See* Fed. R. Evid. 103(c). In such instances, Rule 103(a) indicates that the predicate for claiming error on appeal is the district court's ruling, not the offering of the evidence. Indeed, the plain language of Rule 103(a) states that error on appeal "may not be predicated upon a *ruling* which admits . . . evidence unless a substantial right of the party is affected" and a proper objection is made. Fed. R. Evid. 103(a) (emphasis added). Obviously, the focal point is the district court's "ruling" admitting the evidence, not the party "offering" the evidence.

While the plain language of Rule 103 should generally be interpreted as allowing a party to appeal a ruling admitting evidence that she first introduced solely to cope with the district court's adverse decision, it certainly should be interpreted in that manner in the specific context of Rule 609 evidence. When Rule 609 was originally enacted, it provided that a prior conviction being used to attack the credibility of a witness was to be "elicited from him or established by public record *during cross-examination* . . . ." Fed R. Evid. 609 (1975) (emphasis added). In 1990, Congress amended Rule 609 by deleting this language.

See Fed. R. Evid. 609(a) (1990). The obvious import of this change in the plain language of Rule 609 was to clarify that a party being impeached with a prior conviction is allowed to introduce the conviction on direct examination in order to attempt to mitigate the "sting."

"[T]he principle behind" the 1990 amendment to Rule 609 is "discernible from the text," *Williamson*, 512 U.S. at 599, as the clarification was meant to encourage attempts to mitigate the "sting" of highly-prejudicial Rule 609 impeachment evidence. Thus, when reading Rules 103 and 609 together, a party whose objection to the admission of Rule 609 evidence is overruled should still be able to preserve that objection for appeal while simultaneously coping with the district court's adverse ruling. Again, "[i]t would be very odd for the law of evidence to" allow a litigant to mitigate the "sting" of Rule 609 evidence but, at the same time, forbid the litigant from appealing an adverse Rule 609 ruling if she employs this statutorily-sanctioned strategy, "and the Rules of Evidence are not so odd." *Old Chief*, 519 U.S. at 183-84.

Finally, petitioner emphasizes that this analysis of the plain language in Rules 103 and 609 is by no means

inconsistent with the Court's decision in *Luce*. Other than a brief, tangential reference, *Luce* does not mention Rule 103. *See Luce*, 469 U.S. at 41 n.4. Moreover, the Court's 1984 decision in *Luce* obviously predated the 1990 amendment to Rule 609; in any event, as the defendant in *Luce* did not testify, the instant situation, in which a testifying defendant attempts to mitigate the "sting," was never contemplated.

Perhaps most importantly, *Luce* is implicitly a Rule 103 holding, as the reasons for the Court's decision dovetail with the rule's requirements for raising error on appeal. The Court's decision that the defendant's failure to testify barred appellate review because it made harmless-error analysis impossible, *Luce*, 469 U.S. at 42, corresponds with Rule 103's requirement that error can only be predicated when "a substantial right of the party is *affected* . . . ." Fed. R. Evid. 103(a) (emphasis added). In other words, without a defendant's testimony, there is no way for an appellate court to ascertain the effect of any Rule 609 error. Likewise, the Court's explanation that the district court merely made a tentative finding with respect to the admissibility of Luce's prior conviction corresponds with

Rule 103's requirement that error can only be predicated on a definitive "ruling." *Id.*[7]

In instances like this case, however, in which the district court makes a definitive "ruling" and the defendant testifies, the prerequisites for appellate review under the plain language of Rule 103 and *Luce* are satisfied. *See* Fed. R. Evid. 103; *Luce*, 469 U.S. at 43 ("We hold that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify."). Accordingly, an appeal should lie.

2. Legislative History

Although petitioner contends that the plain language of Rules 103 and 609 supports a no-abandonment interpretation, and thus there is no need for further analysis, the legislative history of the two rules also dictates the same conclusion. As indicated earlier, in assessing the

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[7] The above analysis in the text is only meant to demonstrate that *Luce* does not undercut petitioner's interpretation of the plain language of Rules 103 and 609. By harmonizing *Luce* with Rule 103, petitioner does not mean to suggest that the decision should be reaffirmed. Over the years, *Luce* has received its share of criticism even though none of the eight justices deciding the case (Justice Stevens did not take part in the decision) dissented from the holding. Several state courts have rejected *Luce*, *see, e.g.*, *State v. Whitehead*, 517 A.2d 373, 374-77 (N.J. 1986), and many commentators have questioned its soundness, particularly in light of subsequent developments in the Court's precedent. *See, e.g.*, James Joseph Duane, *Appellate Review of In Limine Rulings*, 182 F.R.D. 666 (1999). In any event, this case is distinct from *Luce* and its resolution therefore requires neither the overturning or reaffirmation of that decision.

legislative history of Rules 103 and 609, one should begin by determining whether a common-law approach existed at the time Congress adopted the two rules and whether Congress sought to deviate from that approach. *See Tome*, 513 at 159-60; *Daubert*, 509 U.S. at 587-89; *Abel*, 469 U.S. at 50. Furthermore, in making this determination, the Court has explained that "[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green*, 490 U.S. at 521.

Under the prevailing common-law view, a defendant did not abandon her right to appeal under the instant circumstances. Wigmore specifically emphasized that "a party who has made an unsuccessful motion in limine to exclude evidence that he expects the proponent to offer may be able to first offer that same evidence without waiving his claim of error." 1 Wigmore, Evidence § 18, at 836 (Tillers rev. 1983). The common-law approach articulated by Wigmore corresponded with the prevailing common-law approach of the federal courts of appeals at the time the Rules were enacted.

Indeed, two years before the Rules' enactment, Chief

Judge Bazelon, writing for the D.C. Circuit, clearly articulated the no-abandonment approach:

> We close by taking note of a problem of procedure. We are holding that Maynard is entitled to a reversal on the ground of the error of the trial judge in ruling that his witness, Mrs. Kemper, was subject to impeachment by a showing of her arrest and indictment, even though that fact was elicited by Maynard himself. Maynard's counsel did what he could to dilute, but he could not remove the prejudicial impact of the ruling. His offer of the evidence was in submission to the ruling of the District Court. Defense Counsel objected to the prosecution's proposal, fully argued the matter to the trial judge, was bound by the ruling. As counsel he was under a restraint against rearguing a point that had been fully argued. We think he was fairly entitled to treat the ruling as definite and complete, and to do what he fairly could to limit the prejudicial impact of the ruling.

United States v. Maynard, 476 F.2d 1170, 1175 (D.C. Cir. 1973).

Two years before *Maynard*, the Second Circuit articulated an identical rule in *United States v. Puco*, 453 F.2d 539, 541 n.6 (2d Cir. 1971), when it rejected the government's contention that the defendant had waived appeal of the district court's pre-trial decision to admit his prior conviction by referring to it during direct examination. The Second Circuit explained that "the trial judge ruled in advance of trial that, if Puco took the

stand, the government could impeach him with his prior conviction. In view of this advance ruling, Puco was entitled to attempt to offset the prejudicial effect of admission of his prior conviction by referring to it before the government did and by using it to support his defense." *Id.* Given this prevailing common-law approach,[8] the

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[8] Petitioner recognizes that the Ninth Circuit's waiver rule, as articulated in *Ohler* and *Williams*, had its genesis in a common-law case, *Shorter v. United States*, 412 F.2d 428 (9th Cir.), *cert. denied*, 396 U.S. 970 (1969). The Ninth Circuit's decision in *Shorter*, however, does not conflict with the prevailing common-law view, as articulated in *Maynard* and *Puco*. Indeed, the Ninth Circuit's subsequent reliance on *Shorter* to articulate a waiver rule results from an imprecise reading of the decision.

In *Shorter*, the defendant made a motion *in limine* asking the district court to exercise its discretion and exclude his prior convictions for impeachment purposes. *Id.* at 429. The district court, however, "indicated that it believed the rule in [the Ninth C]ircuit favored the admissibility of the convictions . . . ." *Id.* The defendant then testified about the prior convictions on direct examination. *Id.* On appeal, the defendant raised two arguments with respect to the admission of his prior convictions: (1) he claimed that the district court wrongly exercised its discretion in admitting them; and (2) he raised a constitutional argument based on *Burgett v. Texas*, 389 U.S. 109 (1967), a case decided after his trial, that he did not specifically raise before the district court. *Id.* at 430-31. As to the first claim, the Ninth Circuit noted that "the trial court never actually ruled on this point" but nonetheless entertained and rejected its merits. *Id.* at 430. The Ninth Circuit did not entertain the merits of the defendant's new, constitutional argument reasoning that "he offered the evidence himself . . . . [and] he cannot now be heard to complain that his own act of offering such evidence violated his constitutional rights." *Id.* at 431.

Despite its subsequent interpretation, *Shorter* does not articulate a conflicting common-law approach. First, even though the district court only responded to the defendant's motion with equivocal language, *id.* at 430("the trial court never actually ruled" on the motion); *see also United States v. Cook*, 608 F.2d 1175, 1185 (9th Cir. 1971) (*en banc*) ("In . . . *Shorter* . . . the trial court never actually ruled on the admissibility of the convictions."), *cert. denied*, 444 U.S. 1034 (1980), the Ninth Circuit nonetheless entertained the merits of the

question becomes whether Congress sought to supersede it. Nothing in the legislative history of Rules 103 or 609, however, indicates that Congress sought to change the common-law approach; if anything, as set forth below, the legislative history demonstrates that Congress sought to maintain it.

With respect to Rule 103, Congress only made a technical change to the Advisory Committee's proposed rule and otherwise adopted it without comment. As stated earlier, in such situations, it is appropriate to look to the Advisory Committee's Notes to determine legislative intent. *See Beech Aircraft Corp.*, 488 U.S. at 165 n.9; *but see Tome*, 513 U.S. at 167-68 (Scalia, J., concurring). The Advisory Committee's Notes specifically state that Rule 103(a) was meant to codify "the law as generally accepted today." Fed. R. Evid. 103 Advisory Committee's Note. Accordingly, the legislative history of Rule 103, as viewed through the Advisory Committee's Notes, reveals that the

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claim presented to the district court. Second, the Ninth Circuit's refusal to entertain the defendant's constitutional argument is rooted in the fact that he did not specifically raise it before the district court. Had the defendant specifically raised the constitutional claim before the district court, the decision in *Shorter* may have been different. Finally, even if the Ninth Circuit's treatment of the constitutional claim can be viewed as a conflicting, common-law approach, it did not command approval of the entire panel. *Id.* at 434 (Foley, J., dissenting).

rule sought to maintain the prevailing common-law view, which allowed an appeal under the instant circumstances.[9]

With respect to Rule 609, the legislative history also supports a no-abandonment interpretation. Congress adopted the 1990 amendment to Rule 609 proposed by the Advisory Committee without comment. Thus, again, it is appropriate to look to the Advisory Committee's Notes to determine legislative intent. *See Beech Aircraft Corp.*, 488 U.S. at 165 n.9; *but see Tome*, 513 U.S. at 167-68 (Scalia, J., concurring). The Notes explain that the amendment "removes

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[9] The Advisory Committee has included notes to its proposed amendment to Rule 103. Those notes, however, specifically state that the proposed "amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to 'remove the sting' of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling." App. at . Thus, the Advisory Committee's proposed amendment and its notes do not alter the above analysis.

In addition, the Advisory Committee originally contemplated including a sentence in the proposed amendment which would have codified *Luce*. After receiving critical responses, *see, e.g.*, Duane, *supra* note 7, the Advisory Committee ultimately decided not to include such a sentence in the proposed amendment and instead placed the following language in its notes: "Nothing in the amendment is intended to affect the rule set forth in *Luce* and its progeny. The amendment provides that an objection or offer of proof need not be renewed to preserve a claim of error with respect to a definitive pretrial ruling. *Luce* answers affirmatively a separate question: whether a criminal defendant must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment." App. at (citation omitted). The Advisory Committee's conscious choice not to propose a codification of *Luce* could be interpreted as a determination that the ramifications of the decision should be open to future consideration. Again, such consideration, if appropriate, can await another day as this case is distinct from *Luce*.

from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit has found to be inapplicable. It is common for witnesses to reveal on direct examination their convictions to 'remove the sting' of the impeachment." Fed. R. Evid. 609 Advisory Committee's Note.[10] This commentary confirms what has already been argued; the principle behind Rule 609 is to allow parties to feel free to attempt to mitigate the "sting" of Rule 609 evidence. Such freedom, of course, does not exist if an attempt to mitigate the "sting" comes at the high price of abandoning the right to appeal an adverse Rule 609 ruling.

The Advisory Committee's Notes that correspond to the 1990 amendment also emphasize that Rule 609 evidence is particularly prejudicial to criminal defendants, and therefore the rule provides for a "special" test to

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[10] In originally including the cross-examination limitation, Congress did not intend to alter the common law by prohibiting attempts to mitigate the "sting." Rather, the legislative history reveals that the purpose of the language was "to make clear that evidence of a prior conviction is not admissible if a person does not testify." *United States v. Dixon*, 547 F.2d 1079, 1082 n.2 (9th Cir. 1976) (reviewing the legislative history of the original enactment of Rule 609). In other words, "[i]t seems clear from the legislative history that on direct examination, a party [could] elicit the evidence of prior conviction from his own witness[,]" *id.*, even under the old version of Rule 609. Thus, the 1990 amendment did not change the law in this regard but rather merely clarified that Rule 609 authorizes attempts to mitigate the "sting."

determine whether they can be impeached with a prior conviction. *Id.*[11] Because the notes specifically recognize the inherent dangers of the use of Rule 609 evidence to impeach testifying criminal defendants, it follows that criminal defendants should not be penalized for attempting to mitigate the "sting" of such concededly harmful evidence.

In sum, under the prevailing common-law approach, a party did not abandon the right to appeal by attempting to mitigate the "sting" of an adverse ruling. Given that the legislative history demonstrates that Congress sought to maintain this common-law rule and that this rule furthers all relevant legislative concerns, the burden of showing otherwise cannot be met. *See Green*, 490 U.S. at 521.

3. *Policy Considerations*

Although, given the above analysis, the Court need not resort to policy considerations, such considerations also support a no-abandonment interpretation. The Rules specifically state that they "shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development

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[11] The extensive legislative history of the original enactment of Rule 609 also reflects this concern. *See Green*, 490 U.S. at 512-24 (providing a detailed account of the legislative history of the original enactment of Rule 609).

of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102. When considering the "general approach" of the Rules, *see Beech Aircraft Corp.*, 488 U.S. at 168-69, as set forth in Rule 102, almost all relevant policy considerations weigh in favor of a no-abandonment interpretation.

Rule 102's first consideration is that the Rules "be construed to secure fairness in administration." When considering the concept of "fairness" under the Rules (albeit in the context of Rule 403, not Rule 102), the Court has specifically recognized that, when it comes to presenting evidence to a jury, a "party seemingly responsible for cloaking something has reason for apprehension . . . ." *Old Chief*, 519 U.S. at 189. An abandonment interpretation certainly makes a defendant seem responsible for cloaking something, as it unfairly requires the defendant not to mention her prior conviction during her testimony in order to preserve an appeal, and such silence "may be viewed by the jury as concealment of relevant facts." 1 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual*, at 37 (7th ed. 1998). If a defendant chooses not to introduce evidence of the prior conviction

during her direct examination, such a perceived "hide-the-ball" strategy may undermine the integrity of both the defendant and her counsel before the jury. *Id.*

The magnitude of this problem is compounded by the fact that Rule 609 evidence is designed to show that a defendant is untruthful. Thus, under an abandonment interpretation, not only does a defendant have to suffer an attack on her credibility by the Rule 609 evidence itself, but, in order to maintain an appeal, she must also suffer the appearance that she attempted to hide the very evidence that shows she should not be believed. This is exactly the type of unfairness that should not be tolerated. In short, Rule 102's first consideration, fairness, supports a no-abandonment interpretation.

Rule 102's second consideration is the avoidance of "unjustifiable expense and delay." The goal, then, is to have one trial, not multiple ones, in which the parties, the judge, and the jury all give their best efforts to reach a true and just result. The Court has certainly agreed with this principle, as it has emphasized that a "trial on the merits [is] the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be [a]

determinative" hearing. *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). In other words, the goal is for the parties "to put their best foot forward" to attempt to win at trial, as opposed to focusing on potential victory at some later stage in litigation after more expense and delay has resulted.

Given this basic, universal principle, the merits of a no-abandonment interpretation certainly are superior to an abandonment approach. Simply put, a no-abandonment interpretation encourages a defendant to try to win at trial. It encourages the defendant to put on her best case, by mitigating the "sting" of impeachment evidence, with the hope that a jury will believe her and vote to acquit. Under this approach, the defendant does not have to worry that, by presenting her best defense, she will be relinquishing a potentially meritorious issue on appeal. If the defendant who feels free to put on her best case wins at trial, "that will be the end of the case . . . ." *Sykes*, 433 U.S. at 89. The truth will have been ascertained; there will be no appeal and therefore no more expense and delay.

An abandonment approach, on the other hand, discourages a defendant from "putting her best foot forward," as it forces her to choose between putting on her best case by

mitigating the "sting" of impeachment evidence or presenting a lesser case to retain her right to appeal a potentially erroneous ruling if convicted. Such a rule simply generates wasted expense and delay. For example, the defendant who chooses not to put on her best case by declining to mitigate the "sting" may be convicted and therefore will file an appeal, whereas she may have been acquitted, thereby eliminating an appeal, if she had chosen otherwise. Similarly, a jury that would have acquitted a defendant who "put her best foot forward" may be unable to reach a verdict because the defendant chose otherwise; of course, such a result would require a retrial. In essence, one of the very real alternatives of an abandonment approach is that a defendant will choose not to put on her best case, a strategy explicitly discouraged by Rule 102 and the Court.

Rule 102's third and final consideration is the "growth and development of the law of evidence." Because the admission of a defendant's prior conviction under Rule 609 is one of the most potent weapons in a prosecutor's arsenal, the development of a firm body of appellate case law to guide lower courts in applying the rule is particularly important. Adoption of an abandonment approach, however,

will seriously stunt the growth and development of Rule 609 case law, particularly in the criminal context. There are already numerous hurdles that must be overcome in order to obtain a definitive appellate ruling on a Rule 609 issue. Under *Luce*, defendants must testify; they must also properly object under Rule 103, or be subject to a plain-error standard of review. Moreover, even if an objection is preserved, an appellate court may avoid reaching the merits of a Rule 609 issue by proceeding directly to a harmless-error analysis. Adding the significant hurdle that a defendant not attempt to mitigate the prior conviction's "sting" will further curtail the development of Rule 609 case law in the criminal context.

Such a regime entails unfortunate consequences. *See* 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 609.04[2][e], at 609-35 (2d ed. 1999) (noting negative ramifications if Rule 609 issues are rarely subjected to review). Indeed, this case provides an excellent example of how an abandonment interpretation limits the "growth and development" of Rule 609 case law. In this instance, the district court obviously was troubled by the Rule 609 issue and was uncertain as to the

admissibility of petitioner's prior conviction. The district court's comments at the time of its ruling even seemed to ask for more concrete guidance from the Ninth Circuit. As a result of an abandonment interpretation, however, the district court has yet to receive any such guidance.

While all three of the policy considerations set forth in Rule 102 weigh in favor of a no-abandonment approach, one final policy consideration should be examined. In support of its holding in *Luce*, the Court reasoned that "*[w]hen a defendant does not testify*, the reviewing court also has no way of knowing whether the Government would have sought to impeach with the prior conviction. If, for example, the Government's case is strong, and the defendant is subject to impeachment by other means, a prosecutor might elect not to use an arguably inadmissible prior conviction." *Luce*, 469 U.S. at 42 (emphasis added). This policy consideration, however, is inapplicable when a defendant testifies and attempts to mitigate the "sting" of the prior-conviction evidence.[12]

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[12] As a statement of the Court, *Luce*'s hypothetical example of a prosecutor declining to introduce Rule 609 evidence in order to eliminate an appellate issue should not be lightly disregarded, and therefore the text proceeds as if the hypothetical is valid.

While a reviewing court may have "no way of knowing" whether a prosecutor would have used Rule 609 evidence "when a defendant does not testify," it certainly has a way of knowing when a defendant does testify because it can examine the defendant's testimony to determine whether "the Government's case [was] strong." *Luce*, 469 U.S. at 42. If a defendant's testimony established a plausible defense, thereby diminishing the strength of the government's case, a

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Petitioner, however, contends that the hypothetical is merely *dicta*, not the holding of the opinion, and therefore can and should be questioned. *See, e.g., United States v. Gaudin*, 515 U.S. 506, 522 (1995) ("Whatever support it gave to the validity of those decisions was obiter dicta, and may properly be disregarded.").

Indeed, the Court's hypothetical suffers from a fundamental flaw in logic. If the hypothetical prosecutor believes that his case is so strong that he does not need to use the Rule 609 evidence, he should also realize that any error in admitting such evidence will not result in a reversal because it will be deemed harmless on appeal. *See* Fed. R. Crim. P. 52(a); Fed. R. Evid. 103. Therefore, the hypothetical prosecutor has no logical reason not to use the conviction. Perhaps because of this logical flaw, the Court's hypothetical appears to be just that, a hypothetical that does not correspond to the realities of criminal trial practice, as a prosecutor's focus is to put on his strongest case in an effort to win the "main event."

Of course, petitioner has referred to the "main event" language in *Sykes* because the Court's hypothetical also conflicts with the principle established in that opinion. The Court should not treat prosecutors differently from other parties; rather, treating prosecutors like other parties by encouraging them to present their best case at trial will ultimately result in less expense and delay. A prosecutor who decides not to present his best case by foregoing Rule 609 evidence may, as parties sometimes do, overestimate the strength of his case. As a result, a jury could be unable to reach a verdict, which would then require a retrial. Had the prosecutor presented his best case and introduced the prior-conviction evidence, he may have obtained a guilty verdict. The Court should not encourage risking hung juries, or otherwise unsound jury verdicts, to avoid one appellate issue.

reviewing court can reasonably determine that the prosecutor would have used the prior conviction for impeachment purposes. Of course, a reviewing court may not be absolutely certain as to what a prosecutor would have done if a defendant did not attempt to mitigate the "sting," but reviewing courts regularly make similar determinations. For example, when a reviewing court conducts harmless-error analysis, it does not know with certainty what a jury would have done if it did not consider a piece of improperly-admitted evidence. Yet, on a daily basis, reviewing courts examine the record as a whole and make such educated findings. A reviewing court can make the same educated finding as to what a prosecutor would have done based on a full and complete record which includes the defendant's testimony.

Indeed, making such a finding is much easier than conducting a harmless-error analysis. Usually, in conducting harmless-error analysis, a reviewing court knows very little about what a jury was thinking other than its one-word verdict -- "guilty." In the case of a prosecutor, however, there usually is much more evidence of his thought processes, such as his written filings and oral arguments to

the district court. This case is an excellent example. Here, the government affirmatively moved to admit petitioner's prior conviction under Rule 609. A reviewing court could reasonably determine that a prosecutor would not file such a motion unless it was his clear intent to use the prior conviction. Moreover, a reviewing court could certainly make such a determination when, as here, the prosecutor files such a motion, states that the prior-conviction evidence is "important and critical" to his case, and never once mentions that he may opt not to use the conviction if his motion is granted.

Finally, even if the Court somehow determines that *Luce*'s policy concern is equally applicable in this context, it still should not take the drastic step of adopting an abandonment interpretation, as this one concern certainly does not outweigh all of the other policy considerations. Furthermore, this one concern can easily be allayed without the drastic solution of adopting an abandonment approach. If, for example, a prosecutor is uncertain as to whether he is going to introduce a Rule 609 conviction, he can easily alleviate this concern by articulating his uncertainty. In such a case, a district court can then give the prosecutor

until the conclusion of the defendant's direct examination, if he needs that much time, to make a decision.[13] At that point, if a prosecutor decides that he is going to use the conviction, the defendant should be allowed to attempt to mitigate the "sting;" if the prosecutor decides otherwise, the conviction need not be mentioned. *See* Saltzburg, *supra*, at 37 (specifically articulating this practical alternative).

D. Conclusion

The above analysis demonstrates that the plain language and legislative history of Rules 103 and 609, as well as relevant policy considerations, support a no-abandonment interpretation. Because a defendant does not abandon the right to appeal under the circumstances, there can be no waiver. As a result, the Court should reverse with instructions to entertain the merits of petitioner's Rule 609 claim.

Furthermore, it is a cardinal principle of statutory

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[13] Petitioner suggests that it will be the rare case in which a prosecutor is uncertain about his intent to use Rule 609 evidence. Of course, while a prosecutor could always express doubts about his intentions in order to disorganize the defendant's testimony, he certainly should be candid with the district court. Moreover, it is probably to a prosecutor's advantage to make his decision early on, as a district court may be less inclined to admit the prior conviction if the prosecutor is hesitant about its overall value.

construction, "repeatedly affirmed, that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter.'" *Jones v. United States*, 119 S. Ct. 1215, 1222 (1999) (citation omitted). As argued below, an interpretation of Rules 103 and 609 which requires a defendant to remain silent about a prior conviction on direct examination in order to appeal the propriety of its admission unconstitutionally interferes with the right to testify. Accordingly, the Court's duty is to adopt a no-abandonment interpretation so as to avoid the grave constitutional problems articulated below.

II.

AN ABANDONMENT INTERPRETATION IS UNCONSTITUTIONAL WHEN APPLIED TO A CRIMINAL DEFENDANT BECAUSE IT IMPERMISSIBLY INTERFERES WITH THE EXERCISE OF THE RIGHT TO TESTIFY.

A. The Right To Testify Is A Fundamental Constitutional Right.

Although the Court has long noted the importance of a criminal defendant's testimony in the truth-seeking process, *see, e.g., Ferguson v. Georgia*, 365 U.S. 570, 581 (1961), a right to testify was not firmly established as one of constitutional dimension when the Court rendered its 1984

decision in *Luce*. As a result, although the decision briefly mentions two cases involving a defendant's constitutional right to remain silent, *see Luce*, 469 U.S. at 42-43 (citing *Brooks v. Tennessee*, 406 U.S. 605 (1972) and *New Jersey v. Portash*, 440 U.S. 450 (1979)), it did not engage in any analysis of the constitutional right to testify.

Three years after *Luce*, however, the Court firmly established that the right of a criminally accused to testify is one of constitutional dimension. *See Rock v. Arkansas*, 483 U.S. 44 (1987). In *Rock*, the defendant challenged an Arkansas rule that *per se* excluded all hypnotically-refreshed testimony. The Court held that the Arkansas rule unconstitutionally interfered with the defendant's right to testify. *Id.* at 60. In doing so, the Court firmly established that the right to testify is rooted in three separate provisions of the Bill of Rights.

First, the Court found that the right of a criminal defendant to testify on her own behalf is "one of the rights that 'are essential to due process of law in a fair adversary system.'" *Id.* at 51 (citation omitted). Second, the Court stated that the right of a criminally accused to

testify is grounded in the Compulsory Process Clause of the Sixth Amendment. *Id.* at 52. Third, the Court reasoned that the right of a criminal defendant to testify is a necessary corollary to the Fifth Amendment guarantee against compelled testimony. *Id.* at 52-53.

After determining that the right to testify is one of constitutional dimension, the Court concluded by emphasizing that "the right to testify on one's own behalf in defense to a criminal charge is a *fundamental* constitutional right." *Id.* at 53 n.10 (emphasis added); *see, e.g., United States v. Teague*, 953 F.2d 1525, 1531-32 (11th Cir.) (*en banc*) (emphasizing that right to testify is a *fundamental* constitutional right), *cert. denied*, 506 U.S. 842 (1992).

B. An Abandonment Rule Unconstitutionally Interferes With The Right To Testify.

Although the evidentiary rule at issue in *Rock* did not completely deprive the defendant of the right to take the witness stand, the Court nonetheless held that the rule's exclusion of hypnotically-refreshed evidence, on a *per se* basis, unconstitutionally interfered with her right to testify. Similarly, in this case, petitioner acknowledges that an abandonment rule does not completely deny a criminal defendant of the opportunity to present full and complete

testimony. Such a rule, however, "does interfere[] with the ability of a defendant to offer [such] testimony[,]" *Rock*, 483 U.S. at 53, as it allows a defendant to give complete testimony on direct examination only if she is willing to abandon her right to appeal the admission of one of the most damaging pieces of evidence at trial. The exaction of this price constitutes an interference of constitutional dimension. *See Brooks*, 406 U.S. at 610-11 (finding state statute that required defendant to testify first to be unconstitutional because it "exact[ed] a price for" the exercise of a constitutional right and "cast a heavy burden on a defendant's otherwise unconditional right"); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) ("There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price."). An abandonment "rule, in other words, 'cuts down on the [right to testify] by making its assertion costly.'" *Brooks*, 406 U.S. at 611 (citation omitted).

Of course, the fact that an abandonment rule interferes with a defendant's right to testify does not necessarily mean that it is unconstitutional. As *Rock* made clear, the right to testify "is not without limitation. The right to

testify in one's own defense 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" *Rock*, 483 U.S. at 55 (citation omitted). In order to determine whether an evidentiary rule, like an abandonment rule, unconstitutionally interferes with the right to testify, the Court considers a two-pronged test: (1) whether the rule is arbitrary; *or* (2) whether the interference with the right to testify is disproportionate to the purposes it is designed to serve. *Rock*, 483 U.S. at 55-56; *see Williams v. Lord*, 996 F.2d 1481, 1484 (2d Cir. 1993) (Cardamone, J., concurring) (characterizing the test as a disjunctive one), *cert. denied*, 510 U.S. 1120 (1994). An abandonment rule cannot withstand scrutiny under either prong of the test and therefore is unconstitutional.

1. Arbitrariness

In *Rock*, the Court found that an evidentiary rule which placed a *per se* ban on the admission of hypnotically-refreshed testimony was arbitrary and therefore unconstitutional. *Id.* at 61. Like the rule in *Rock*, an abandonment rule operates in a *per se* manner, as it applies irrespective of whether the justification supporting such a rule exists in a given case. For example, an abandonment

rule requires a defendant to relinquish her right to appeal an adverse Rule 609 ruling if she attempts to mitigate the "sting" of her prior conviction even when the prosecutor clearly intended to use the prior-conviction evidence. In such a situation, there would appear to be no justification supporting abandonment of the right to appeal. Put simply, the *per se* nature of the rule, like the *per se* evidentiary rule in *Rock*, renders it unconstitutional because it arbitrarily interferes with the fundamental constitutional right to testify.

2. Disproportionality

The second prong of the *Rock* test asks whether the evidentiary rule is "disproportionate to the purpose[it is] designed to serve." *Id.* at 56. Because the Court struck down the rule in *Rock* for arbitrariness, it did not fully explain how the balancing test set forth in the second prong should be applied. The Court did, however, indicate that "[i]n applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right

to testify." *Id.* at 56.[14]

The only possible interest served by an abandonment rule is the one articulated in *Luce* -- that is, allowing the government to withhold its decision as to whether to introduce the conviction until the last possible moment in order to avoid an appellate issue. *See Luce*, 469 U.S. at 42. This interest certainly does not compare to the weighty interests involved in other evidentiary rules that have withstood constitutional attack. *See, e.g., Stephens*, 13 F.3d at 1001-02 (noting "valid legislative determination that victims of rape . . . deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy" in rejecting attack on state rape shield statute).

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[14] The precise balancing test is not entirely clear. *See Stephens v. Miller*, 13 F.3d 998, 1004 (7th Cir.) (*en banc*) (Flaum, J., concurring) ("[W]hen one examines the relevant Supreme Court authority mandating a balancing test, one must conclude that the Court has yet to formulate a clear standard for determining when a governmental interest is sufficiently important to outweigh the accused's interest in presenting relevant testimony."), *cert. denied*, 513 U.S. 808 (1994). In *United States v. Scheffer*, 118 S. Ct. 1261 (1998), Justice Thomas's lead opinion does state that a statute will be found to be unconstitutionally "disproportionate only where it is has infringed upon a weighty interest of the accused." *Id.* at 1264. It is not clear, however, whether this portion of the opinion commanded a majority of the Court. One could argue that because the right to testify is a *fundamental* constitutional right, *see, e.g., Rock*, 483 U.S. at 53 n.10; *Teague*, 953 F.2d at 1531-32, a strict-scrutiny test should apply. *See, e.g., Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988). In other words, the evidentiary rule must "advance a compelling state interest by the least restrictive means available." *Bernal v. Fainter*, 467 U.S. 216, 219 (1984). Applying this standard, an abandonment rule certainly would not pass constitutional muster.

On the other hand, under an abandonment rule, a defendant will suffer one of two serious consequences; she will either (1) appear as if she is hiding something from the jury, or (2) be unable to pursue her objection to the admission of critical evidence on appeal. These two serious consequences certainly outweigh the minimal interest in allowing a prosecutor to choose whether to introduce Rule 609 evidence at the last possible moment. As a result, an abandonment rule is also unconstitutional under the second prong of the *Rock* test.

C. Conclusion

Even if the Rules incorporate an abandonment rule, such a rule is unconstitutional when applied to a criminal defendant. As a result, the Court should reverse and remand with instructions to entertain the merits of petitioner's Rule 609 claim.

III.

EVEN UNDER AN ABANDONMENT RULE, WAIVER CANNOT APPLY IN THIS CASE BECAUSE THERE HAS BEEN NO FINDING THAT THE ABANDONMENT OF THE RIGHT TO APPEAL WAS KNOWING AND INTENTIONAL.

Even if the Court finds that the Rules constitutionally provide that a criminal defendant abandons the right to appeal an adverse Rule 609 ruling by attempting to mitigate

the "sting," that does not mean that a waiver automatically occurs every time a defendant does so. A "waiver is the '*intentional* relinquishment or abandonment of a *known* right.'" *Olano*, 507 U.S. at 733 (emphases added) (citation omitted). Thus, only an intentional and knowing abandonment ripens into a waiver.

Furthermore, "[w]hether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Olano*, 507 U.S. at 733. The Ninth Circuit did not analyze any of these factors; instead, it applied an automatic waiver rule. In other words, it never made any determination as to whether the abandonment of the right to appeal was knowing and intentional and thereby ripened into a valid waiver. As a result, if the Court adopts an abandonment interpretation of the Rules, it should at least remand to the Ninth Circuit for consideration of the factors outlined in *Olano* and a determination as to whether the abandonment of the right to appeal was knowing and

intentional.[15]

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court reverse the decision of the Ninth Circuit and remand with instructions to entertain the merits of her Rule 609 claim. In the alternative, petitioner respectfully requests that the Court reverse the decision of the Ninth Circuit and remand with instructions to make a finding as to whether there was a knowing and intentional abandonment of the right to appeal the Rule 609 ruling.

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[15] The Court has stated that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, *testify in his or her own behalf, or take an appeal.*" *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (emphasis added). Thus, under *Olano*, the Ninth Circuit may have to determine whether petitioner had to participate personally in the waiver and whether certain procedures should have been employed to ensure that an informed choice was made. The practical problems inherent in making such determinations, and their potential for micro-managing district court proceedings, are simply another policy reason in support of a no-abandonment interpretation of the Rules. *Cf. Kumho Tire Company, Ltd.*, 119 S. Ct. at 1174 (rejecting interpretation of rule that "would prove difficult, if not impossible, for judges to administer").