No. 98-9828

In the Supreme Court of the United States

MARIA SUZUKI OHLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a federal criminal defendant waives an objection to the admission of a prior conviction as impeachment evidence under Rule 609(a)(1) of the Federal Rules of Evidence when the defendant introduces the conviction on direct examination to "remove the sting" of its anticipated prejudicial effect.

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OPINION BELOW

The opinion of the court of appeals (J.A. 146-155) is reported at 169 F.3d 1200.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1999. The petition for a writ of certiorari was filed on June 7, 1999, and granted on October 18, 1999. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Rule 609(a) of the Federal Rules of Evidence provides:

> **General rule.** For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of importing marijuana, in violation of 21 U.S.C. 952 and 960, and one count of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). The district court sentenced petitioner to 30 months' imprisonment to be followed by three years' supervised release. J.A. 140-141. The court of appeals affirmed. J.A. 147.

1. On July 29, 1997, petitioner attempted to enter the United States from Mexico through the port of entry at San Ysidro, California. Petitioner was the driver and sole occupant of a 1984 GMC van, which was later found to be registered in her name. A customs inspector noticed that someone had tampered with one of the van's interior panels. A search of the van uncovered more than 80 pounds of marijuana. Petitioner was arrested and subsequently indicted for importation of marijuana and possession of marijuana with intent to distribute it. J.A. 147; 1/29/98 Tr. 79.

The government filed motions in limine asking the district court to admit petitioner's 1993 felony conviction for possession of methamphetamine as impeachment evidence under Federal Rule of Evidence 609(a)(1) and as substantive evidence under Federal Rule of Evidence 404(b). J.A. 13-21.[1] At a pretrial hearing on January 26, 1998, the court denied the motion to admit the conviction under Rule 404(b). J.A. 56. The court reserved ruling on the motion to admit the conviction under Rule 609(a)(1). J.A. 67-68. A short time later during the hearing, in ruling on another motion in limine, the court advised counsel of the tentative nature of its in limine rulings, instructing that "[y]ou can always revisit the issue." J.A. 72. The court added that "[n]o ruling I make is with prejudice; I always keep an open mind." *Ibid.*

On the morning of January 28, 1998, before the jury was selected, the district court heard further arguments on the Rule 609 issue, J.A. 90-97, and then ruled in limine that, if petitioner testified at trial, the government could use her prior conviction to impeach her, J.A. 97-98. The court concluded that the probative value of the conviction outweighed any prejudice to petitioner from its admission. *Ibid.*

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[1] Rule 609(a)(1) provides, in relevant part, that "evidence that an accused has been convicted of * * * a crime [punishable by death or imprisonment in excess of one year] 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). Rule 404(b) provides, in relevant part, that "[e]vidence of other crimes," although "not admissible to prove the character of a person in order to show action in conformity therewith," may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b).

On January 29, 1998, the government presented its case-in-chief, which consisted of the testimony of four witnesses. 1/29/98 Tr. 8-136. After presenting one witness, petitioner testified in her own defense.

On direct examination, after answering a few background questions elicited by defense counsel, petitioner testified that she had been convicted of possession of methamphetamine in 1993. J.A. 104-105. She then testified about the events charged in the indictment in this case. She denied any knowledge of the marijuana discovered in the van. J.A. 123. She claimed that the van had been taken to Mexico without her permission and that she had gone to Mexico simply to retrieve the van. J.A. 114-120. She raised no objection, either before or during her testimony, to the admission of her prior conviction.

On cross-examination, the prosecutor asked petitioner whether her prior conviction was for a felony, and petitioner responded that it was. J.A. 135. On redirect examination, petitioner explained that the conviction was for possession of "a personal use quantity" of methamphetamine rather than "a distribution quantity." J.A. 136.

On February 1, 1998, the jury found petitioner guilty on both counts of the indictment. The district court entered a judgment of conviction in accordance with the jury's verdict. J.A. 140-145.

2. The court of appeals affirmed petitioner's conviction. J.A. 146-155. Petitioner argued on appeal that the district court abused its discretion in granting the government's in limine motion to admit evidence of her prior felony conviction under Rule 609(a)(1). The court of appeals declined to reach that argument. Relying on circuit precedent, the court held that "when a criminal defendant introduces evidence of his prior conviction

during his direct examination, the criminal defendant waives the right to appeal the district court's in limine ruling that the prior conviction was admissible under Rule 609(a)(1)." J.A. 148-149 (citing, *inter alia*, *United States* v. *Williams*, 939 F.2d 721, 725 (9th Cir. 1991)).

The court of appeals rejected petitioner's argument that its waiver rule was undermined by a 1990 amendment to Rule 609(a)(1), which clarified that a criminal defendant's prior convictions may be elicited on direct examination as well as on cross-examination. (The rule had previously referred only to cross-examination.) The court explained that criminal defendants in the Ninth Circuit, as in most other circuits, were permitted to testify about prior convictions on direct examination even before the 1990 amendment. The court perceived nothing inconsistent between allowing a defendant to introduce his prior convictions on direct examination to attempt to "remove the sting" and precluding a defendant who does so from appealing an in limine ruling on the admissibility of the convictions as impeachment evidence. J.A. 152-153.

SUMMARY OF ARGUMENT

In *Luce* v. *United States*, 469 U.S. 38 (1984), this Court held that a criminal defendant cannot challenge on appeal an in limine ruling on the admissibility of a prior conviction as impeachment evidence under Federal Rule of Evidence 609(a)(1) if the defendant does not testify at trial. The Court reasoned that an in limine ruling under Rule 609(a)(1) is necessarily tentative because, in order to perform the requisite balancing of the probative value of the conviction against its prejudicial effect, a court "must know the precise nature of the defendant's testimony" at trial. 469 U.S. at 41. Accordingly, because a court's in limine ruling

under Rule 609(a)(1) "is subject to change when the case unfolds" and because a prosecutor might elect at trial "not to use an arguably inadmissible prior conviction," the Court concluded that "[a]ny possible harm flowing from a district court's in limine ruling permitting impeachment by a prior conviction is wholly speculative." *Id.* at 42-41.

Here, in contrast to *Luce*, petitioner chose to testify at trial. But petitioner's tactical decision to introduce her prior conviction on direct examination had the same preemptive effect on the district court's and the government's prerogatives and thereby rendered any possible harm flowing from the in limine ruling "wholly speculative." The district court was denied the opportunity to revisit its in limine ruling on the admissibility of petitioner's conviction in light of the evidence at trial. And the government was denied the opportunity to elect not to impeach petitioner with the conviction in order to avoid an issue for appeal. Petitioner should therefore be foreclosed, as was the defendant in *Luce*, from challenging the in limine ruling on appeal.

Nothing in the text, legislative history, or purposes of the Federal Rules of Evidence is inconsistent with a holding that a criminal defendant waives an objection to the admission of a prior conviction by testifying to the conviction on direct examination. The Federal Rules of Evidence are silent on the applicability of waiver principles in the circumstances presented here. This Court has recognized that waiver, including waiver of evidentiary objections, is presumptively available absent an express prohibition. See *United States* v. *Mezzanatto*, 513 U.S. 196, 200-203 (1995). The waiver rule applied in this case serves Congress's intent that the Rules of Evidence be construed to

promote fairness and judicial economy. It prevents a defendant from planting irremediable errors in his trial during direct examination. It also affords the district court and the government the opportunity, in the context of trial, to avoid the introduction of arguably inadmissible evidence, thereby protecting against unnecessary appeals, reversals, and retrials.

Nor does the waiver rule impose an unconstitutional burden, as defined by this Court, on a criminal defendant's right to testify in his own defense. The waiver rule serves "legitimate interests" of finality and judicial economy and is not "arbitrary" or "disproportionate" to those interests. *Rock* v. *Arkansas*, 483 U.S. 44, 55-56 (1987). Indeed, the waiver rule does not meaningfully restrict a defendant's right to testify in any way. At most, the waiver rule may complicate a defendant's choice about when to testify about a single peripheral issue—a choice that "is indistinguishable from any of a number of difficult choices that criminal defendants face every day." *Mezzanatto*, 513 U.S. at 209.

ARGUMENT

A CRIMINAL DEFENDANT CANNOT APPEAL AN IN LIMINE RULING ON THE ADMISSIBILITY OF A PRIOR CONVICTION AS IMPEACHMENT EVIDENCE UNDER FEDERAL RULE OF EVIDENCE 609(a)(1) IF THE DEFENDANT INTRODUCES THE PRIOR CONVICTION DURING HIS DIRECT EXAMINATION

A. A Defendant Waives An Objection To An In Limine Ruling Under Rule 609(a)(1) By Testifying To His Prior Conviction On Direct Examination

Federal Rule of Evidence 609(a)(1) provides that evidence of an accused's prior felony convictions "shall be admitted" for the purpose of attacking his credibility

if the district court determines that "the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Fed. R. Evid. 609(a)(1). Rule 609 was enacted against the backdrop of the common law, which originally held that persons with felony convictions were not competent to testify. *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 511 (1989). The common law evolved into an evidentiary rule allowing such persons to testify but admitting all felony convictions for impeachment purposes "without exercise of judicial discretion." *Id.* at 511-512, 521. In enacting Rule 609(a)(1), Congress explicitly "circumscrib[ed] the common-law rule" by requiring district courts to admit evidence of a prior felony conviction only if its probative value outweighs its prejudicial effect. *Id.* at 522.[2]

This case, like *Luce* v. *United States*, 469 U.S. 38 (1984), concerns whether a criminal defendant may challenge on appeal a district court's in limine ruling on the admissibility of a prior conviction under Rule 609(a)(1). Although not explicitly authorized by the Federal Rules of Evidence, the practice of entertaining motions in limine "developed pursuant to the district court's inherent authority to manage the course of trials." *Id.* at 41 n.4.[3] The in limine procedure serves to

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[2] No such balancing is called for if the prior conviction was for a crime that "involved dishonesty or false statement, regardless of the punishment." Fed. R. Evid. 609(a)(2).

[3] In limine means "[o]n or at the threshold; at the very beginning; preliminarily." *Black's Law Dictionary* 708 (5th ed. 1979). An in limine motion refers to any motion, "whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce*, 469 U.S. at 40 n.2. Motions in limine were not recognized at common law and "encountered opposition in the courts" when first introduced. *Gendron* v. *Paw-*

give the parties a preliminary indication of how the court will decide an evidentiary question should the evidence actually be offered at trial. A defendant has no right to such an advance ruling; a court may opt instead to make a decision only after the facts have developed at trial.[4] When a court issues an in limine ruling, the parties may take it into account as one factor in planning their trial strategy. But an in limine ruling may remain "subject to change as the case unfolds," *id.* at 41, especially where the issue requires a balancing of probative value against prejudicial effect. The issue also may become moot if the evidence is not introduced despite an in limine ruling in favor of its admissibility.

1. In *Luce*, this Court considered whether, after a district court ruled in limine that the government could impeach the defendant with a prior conviction if he testified at trial, the defendant could refrain from testifying, and thus avoid impeachment with the conviction, but still could challenge the in limine ruling on appeal. The Court held that, in order to preserve for review a challenge to an in limine ruling allowing the use of a prior conviction for impeachment purposes under Rule 609(a)(1), a defendant must testify at trial. 469 U.S. at 43.

The Court's holding rested largely on its conclusion that in limine rulings under Rule 609(a)(1) are not

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tucket Mut. Ins. Co., 409 A.2d 656, 659 (Me. 1979) (approving use of motion in limine).

[4] See, *e.g.*, *United States* v. *Martinez*, 76 F.3d 1145, 1152 (10th Cir. 1996); *United States* v. *Witschner*, 624 F.2d 840, 844 (8th Cir.), cert. denied, 449 U.S. 994 (1980); *United States* v. *Evanchik*, 413 F.2d 950, 953 (2d Cir. 1969); see generally *Huddleston* v. *United States*, 485 U.S. 681, 690 (1988) ("The trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial.").

definitive rulings on admissibility. The Court explained that the district court "must know the precise nature of the defendant's testimony" in order to balance the probative value of a prior conviction as impeachment evidence against its prejudicial effect. *Luce*, 469 U.S. at 41. And that cannot be known until the defendant actually testifies. A defendant's proffer of his proposed testimony cannot suffice because "his trial testimony could, for any number of reasons, differ from the proffer." *Id.* at 41 n.5. A district court's in limine ruling on the admissibility of a prior conviction under Rule 609(a)(1) consequently "is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer." *Id.* at 41. "Indeed," the Court said, "even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling." *Id.* at 41-42.

The Court thus concluded that "[a]ny possible harm flowing from a district court's in limine ruling permitting impeachment by a prior conviction is wholly speculative," *Luce*, 469 U.S. at 41, because the court always could, and in some instances should, reconsider the ruling based on the evidence presented at trial. The Court also identified another reason why the impact of an in limine ruling permitting the government to impeach a defendant with a prior conviction is speculative: Even if the district court did not alter its in limine ruling in light of the evidence at trial, the government still might choose not to introduce the conviction in order to avoid a close question on appeal. *Id.* at 42. "If, for example, the Government's case is strong, and the defendant is subject to impeachment by other means,"

the Court explained, "a prosecutor might elect not to use an arguably inadmissible prior conviction." *Ibid.*[5]

2. As the Court's decision in *Luce* teaches, an in limine ruling on the admissibility of a prior conviction under Rule 609(a)(1) is necessarily tentative, because the district court cannot definitively balance the probative value of the conviction as impeachment evidence against its prejudicial effect on the defendant in advance of trial.[6] That is because the balancing required by Rule 609(a)(1) turns on factors that become concrete only during the course of trial. Those factors include the strength of the government's case-in-chief, the similarity between the past crime and the charged crime, the defendant's actual testimony on direct examination, the extent to which the case turns on the

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[5] The Court also noted that, "[e]ven if these difficulties could be surmounted," the defendant's failure to testify would preclude harmless error analysis, while a requirement that the defendant testify would enable a reviewing court to determine the impact of any error in admitting impeachment evidence and would discourage motions simply to "plant" claims of reversible error in the record. *Luce*, 469 U.S. at 42.

[6] Notwithstanding petitioner's assertion to the contrary, the in limine ruling in this case was less than definitive. Before trial, while discussing another in limine ruling, the district court specifically instructed counsel that none of its rulings was made with prejudice and that the court always kept an "open mind." 1/26/98 Tr. 35. See *Walden* v. *Georgia-Pacific Corp.*, 126 F.3d 506, 520 (3d Cir. 1997) (district court's in limine ruling was non- definitive where, "[a]lthough the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative"), cert. denied, 523 U.S. 1074 (1998).

defendant's credibility, and the other impeachment evidence available to the government.[7]

Thus, "to perform th[e] balancing [required by Rule 609(a)(1)], the court must know the precise nature of the defendant's testimony," *Luce*, 469 U.S. at 41, as well as the other evidence at trial that preceded that testimony. See *United States* v. *Williams*, 939 F.2d 721, 724-725 (9th Cir. 1991) ("the admissibility of a prior conviction for impeachment depends to a great extent on the nature of the defendant's testimony," because "it is often difficult to determine in advance of this testimony whether the use of such a powerful form of impeachment is justified"); see also *United States* v. *Mejia-Alarcon*, 995 F.2d 982, 987 n.2 (10th Cir.) (recognizing that a definitive balancing of the probative value of a conviction against its prejudicial effect can "only properly be performed after an assessment of the evidence that had come in up to the point of its admission"), cert. denied, 510 U.S. 927 (1993); *United States* v. *Cook*, 608 F.2d 1175, 1190 (9th Cir. 1979) (Kennedy, J., concurring in part and dissenting in part) ("after the defendant has testified on direct * * * is the time at which the probative value of the conviction

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[7] See, *e.g.*, *United States* v. *Browne*, 829 F.2d 760, 762-763 (9th Cir. 1987) (the factors that a court should consider in determining the admissibility of a prior conviction under Rule 609(a)(1) include "(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and, (5) the centrality of the defendant's credibility"), cert. denied, 485 U.S. 991 (1988); accord, *e.g.*, *United States* v. *Pritchard*, 973 F.2d 905, 908-909 (11th Cir. 1992); *United States* v. *Sloman*, 909 F.2d 176, 181 (6th Cir. 1990); *Gordon*, v. *United States*, 383 F.2d 936, 940 (D.C. Cir. 1967) (Burger, J.), cert. denied, 390 U.S. 1029 (1968).

can be balanced against its prejudicial effect with the most care and precision"), cert. denied, 444 U.S. 1034 (1980).[8]

The inherently tentative nature of in limine rulings is reflected in the general rule that, to preserve for appeal a challenge to the introduction of evidence that was ruled admissible before trial, a party must make a contemporaneous objection at trial. See *Clausen* v. *Sea-3, Inc.*, 21 F.3d 1181, 1190 (1st Cir. 1994) (observing that the contemporaneous-objection rule rests on the understanding that in limine rulings are "frequently made in the abstract") (quoting *Collins* v. *Wayne Corp.*, 621 F.2d 777, 784 (5th Cir. 1980)); see also, *e.g.*, *United States* v. *Birbal*, 62 F.3d 456, 465 (2d Cir. 1995), cert. denied, 522 U.S. 976 (1997); *McEwen* v. *City of Norman*, 926 F.2d 1539, 1544 (10th Cir. 1991); 1 Jack B. Weinstein, *Weinstein's Federal Evidence* § 103.11[2][b], at 103-16 (1997 ed.) ("If a party has raised an objection before trial by means of a motion in limine that the court has denied, most courts hold that the objection must be renewed at trial for the objection to be preserved for appeal.").[9] Even those courts that have

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[8] See also, *e.g.*, *United States* v. *Cobb*, 588 F.2d 607, 612 (8th Cir. 1978) ("any final ruling on the admissibility [under Rule 609(b)] of a more than ten-year-old conviction should rest upon 'specific facts and circumstances' developed in the course of trial which bear on the probative value or prejudicial effect of the conviction"), cert. denied, 440 U.S. 947 (1979); see generally *Walden*, 126 F.3d at 518 n.10 ("[W]hen the evidence is challenged as irrelevant or prejudicial[,] the considerations weighed by the court will likely change as the trial progresses."); *Rosenfeld* v. *Basquiat*, 78 F.3d 84, 90 (2d Cir. 1996) ("Claims that relevant evidence is unduly prejudicial * * * must be resolved in the developed context of the trial.") (citing, *inter alia*, *Luce*, 469 U.S. at 43).

[9] See also, *e.g.*, *Hendrix* v. *Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1504 (11th Cir. 1985); *Hale* v. *Firestone Tire & Rubber*

allowed a party to appeal an adverse in limine ruling without renewing the objection at trial have done so only where the in limine ruling was "definitive" as opposed to preliminary or tentative. See, *e.g.*, *Wilson* v. *Williams*, 182 F.3d 562, 565-566 (7th Cir. 1999) (en banc); *Scott* v. *Ross*, 140 F.3d 1275, 1285 (9th Cir. 1998), cert. denied, 119 S. Ct. 1285 (1999); *Walden* v. *Georgia-Pacific Corp.*, 126 F.3d 506, 517 (3d Cir. 1997), cert. denied, 523 U.S. 1074 (1998).[10] A pretrial ruling on the admissibility of a prior conviction under Rule 609(a)(1) cannot be definitive for the reasons explained in *Luce*.

3. Whether or not an in limine ruling allowing a defendant's impeachment with a prior conviction could ever be challenged on appeal absent a contemporaneous objection at trial, a defendant forecloses the right to appellate review by introducing the conviction on direct examination. A majority of the courts of appeals that have considered the issue since *Luce* have held that a party waives any challenge to the in limine ruling in such circumstances. See *United States* v. *Gaitan-Acevedo*, 148 F.3d 577, 592 (6th Cir.), cert. denied, 119 S. Ct. 256 (1998); *Gill* v. *Thomas*, 83 F.3d 537, 540-541 (1st Cir. 1996); *United States* v. *Smiley*, 997 F.2d 475,

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Co., 756 F.2d 1322, 1333 (8th Cir. 1985); 1 Michael H. Graham, *Handbook of Federal Evidence* § 103.8, at 50 (4th ed. 1996) ("To preserve error for appeal, counsel most often will be required to and thus to be safe should either renew the objection or make an offer of proof at trial.").

[10] A proposed amendment to Federal Rule of Evidence 103 would eliminate the contemporaneous objection requirement with respect to "definitive" in limine rulings. Pet. Br. App. A5. The proposed amendment has been approved by the Judicial Conference and is pending before this Court. 21 Charles A. Wright et al., *Federal Practice and Procedure* § 5031 (Supp. 2000) (available on Westlaw).

480 (8th Cir. 1993); *Williams*, 939 F.2d at 724-725; cf. *United States* v. *Martinez*, 76 F.3d 1145, 1151 (10th Cir. 1996) (holding that the defendant waived his right to object to the admission of his prior convictions under Rule 609(a)(1), where the district court declined to rule on their admissibility until after the defendant testified, and the defendant acknowledged the convictions on direct examination to "draw the sting").[11]

Those courts have reasoned that a defendant's tactical decision to introduce his prior conviction on direct examination has the same consequences as the defendant's tactical decision in *Luce* to refrain from testifying. In both circumstances, the defendant deprives the district court of the opportunity to rule definitively on the admissibility of the prior conviction in light of the evidence at trial, including the defendant's own testimony on direct examination, and thereby to avoid a potential error that could jeopardize any verdict of guilt obtained in the case. And, in both circumstances, the defendant deprives the government of the opportunity to decide, in light of the evidence at trial, to refrain from introducing the conviction and thereby to avoid an appeal on the Rule 609(a)(1) issue and potentially a second trial. As the Ninth Circuit has explained:

> By bringing out the fact of the prior conviction during her direct examination of [the defendant],

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[11] But see *Wilson*, 182 F.3d at 566-567 (a party does not waive an objection to the admission of a prior conviction under Rule 609(a)(1) by introducing the conviction on direct examination); *United States* v. *Fisher*, 106 F.3d 622, 629-630 (5th Cir. 1997) (same). Cf. *Judd* v. *Rodman*, 105 F.3d 1339, 1342 (11th Cir. 1997) (holding that the plaintiff did not waive her objection to the trial court's in limine ruling admitting evidence of prior sexual history by introducing the evidence at trial to "attempt to soften [its] blow").

> [defense counsel] deprived the court and the government of a last chance to reverse their pre-stated positions. Were we to sanction such a strategy, we would in effect be licensing defendants to plant irremediable errors in their trials during direct examination.

Williams, 939 F.2d at 725; accord *Gill*, 83 F.3d at 541.

The general rule that a defendant cannot both preserve an objection to a ruling admitting evidence and introduce the evidence himself to gain a tactical advantage—in essence, that he cannot eat his cake and have it, too—has been recognized in a variety of contexts both before and after the enactment of the Federal Rules of Evidence. See, *e.g.*, *United States* v. *Rosenthal*, 793 F.2d 1214, 1245 (11th Cir. 1986) ("[It] would circumvent our entire judicial system to allow one to elicit testimony at trial and later allow that person to complain of its admissibility on appeal."), cert. denied, 480 U.S. 919 (1987); *United States* v. *Mariani*, 539 F.2d 915, 921 (2d Cir. 1976) ("[W]here one who objects to a pretrial ruling himself introduces the evidence in order to present it in its most favorable light, and that evidence forms no significant part of his opponent's case, he cannot later be heard to complain that its admission constituted reversible error."); *United States* v. *Truitt*, 440 F.2d 1070, 1071 (5th Cir.) ("It is settled law that one waives his right to object to the admission of evidence if he later introduces evidence of the same or similar import himself."), cert. denied, 404 U.S. 847 (1971); *Weinstein's Federal Evidence*, *supra*, § 103.14, at 103-30 ("An attorney can waive a client's right to raise an error on appeal by deliberately eliciting inadmissible evidence."); cf. *United States* v. *Mezzanatto*, 513 U.S. 196, 203 (1995) (a

criminal defendant is "not entitled 'to evade the consequences of an unsuccessful tactical decision' made in welcoming admission of otherwise inadmissible evidence") (quoting *United States* v. *Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991), cert. denied, 503 U.S. 941 (1992)).

The waiver rule applied by the court of appeals in this case serves important societal interests in the fair and efficient administration of criminal justice. It assures that a district court and the government are afforded an opportunity, after exposure to the defendant's testimony and the other evidence at trial, to avoid a potential error that could jeopardize any conviction obtained in the case. It eliminates an incentive for defendants to "plant irremediable errors," *Williams*, 939 F.2d at 725, in their trials that could provide a basis for reversal. It spares the courts of appeals from having to review evidentiary rulings that were necessarily tentative because they were made before the district court heard any of the testimony offered at trial.

A contrary rule could deter district courts from making in limine rulings, and thus from providing the parties with valuable guidance about the probable resolution of evidentiary issues that may arise at trial, in order to preserve their own and the government's prerogative to change their minds in the context of trial. Such a result would operate to the disadvantage of criminal defendants, such as petitioner here, who would have to decide whether to testify without any indication of how evidentiary issues might be resolved. It could also cause significant inefficiency in the conduct of the trial. When an evidentiary issue, such as the admissibility of a conviction under Rule 609(a)(1), has been briefed and argued before trial on a motion in

limine, the court and the parties often need not tarry long over the issue when it arises during trial. Any further argument can typically be focused on why the actual evidence bearing on that issue is, or is not, consistent with the evidence anticipated before trial. In contrast, when the district court is confronted with the Rule 609(a)(1) issue for the first time at trial, a more extensive proceeding may be required. The jury may have to be excused for a prolonged period while the issue is debated and decided.

Although the waiver rule results in a defendant's having to choose between preserving a Rule 609(a)(1) objection for appeal and introducing the conviction on direct examination to "reduce the sting," defendants have to make similar tactical decisions throughout the course of a trial, including the more significant decision presented by *Luce* of whether to testify at all. See Part C, *infra* (explaining why putting a defendant to the choice presented here does not unconstitutionally burden his right to testify).[12]

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[12] At a minimum, a defendant should be required to offer the prior conviction only at the end of his direct examination after renewing his Rule 609 objection—a requirement that was not satisfied here because petitioner introduced her prior conviction at the beginning of her direct testimony without renewing her Rule 609 objection. Such a procedure would at least give the district court an opportunity to perform the Rule 609(a)(1) balancing in light of the defendant's direct testimony and would give the government an opportunity to decide at that time whether to seek to introduce the conviction. See 1 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* 37 (7th ed. 1998) (proposing such an approach). Even that rule, while preferable to allowing a defendant to rely on a pretrial ruling alone, nevertheless deprives the court and the government of the opportunity to act only after hearing the defendant's testimony on cross-examination.

B. Nothing In The Text, History, Or Purposes Of The Federal Rules Of Evidence Precludes The Application Of Waiver Principles When A Defendant Introduces A Prior Conviction On Direct Examination

Petitioner contends (Br. 14-40) that the waiver rule applied by the court of appeals in this case is contrary to the language, legislative history, and purposes of the Federal Rules of Evidence. She is mistaken.

1. Rule 103 Is Consistent With The Rule That A Defendant Waives An Objection To An In Limine Ruling On The Admissibility Of A Prior Conviction By Introducing The Conviction On Direct Examination

Petitioner asserts (Br. 18-21) that, because Federal Rule of Evidence 103 does not expressly authorize waiver of objections to the admissibility of evidence, Rule 103 prohibits such waiver. That is incorrect. Rule 103 is silent on whether, or in what circumstances, a party may waive an objection to the admission of evidence. This Court has held that evidentiary objections are presumptively waivable absent an express prohibition. *Mezzanatto*, 513 U.S. at 200-203; see generally *New York* v. *Hill*, No. 98-1299 (Jan. 11, 2000), slip op. 4 (noting that the Court has, "'in the context of a broad array of constitutional and statutory provisions,' articulated a general rule that presumes the availability of waiver") (quoting *Mezzanatto*, 513 U.S. at 200-201). Petitioner cites no authority to the contrary.[13]

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[13] Petitioner's position is further undermined by the Advisory Committee's Note to the proposed amendment to Rule 103 that would, among other things, eliminate the requirement that a party object at trial to the introduction of evidence that the court held to be admissible in a "definitive ruling * * * either at or before

Petitioner next argues (Br. 21) that a waiver rule would render Rule 103 "internally inconsistent," because a defendant who simply does not object at trial to the government's introduction of a prior conviction as impeachment evidence is entitled to plain error review, whereas a defendant who introduce the conviction himself is entitled to no review at all. But the two categories of defendants are not entitled to the same treatment. The defendant who testifies to a prior conviction on direct examination, in contrast to the defendant who merely fails to object when the government offers a prior conviction on cross-examination, "deprive[s] the court and the government of a last chance to reverse their pre-stated positions," and thereby to avoid any error in the admission of the conviction. *Williams*, 939 F.2d at 725; accord *Gill*, 83 F.3d at 541. It is thus appropriate to find a waiver of any claim of error in the admission of the conviction when the defendant himself introduces the conviction.

Petitioner further contends (Br. 25) that a waiver rule is contrary to the "prevailing common-law view" in 1975 when the Federal Rules of Evidence were enacted.[14] There was no generally accepted view in

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trial." Pet. Br. App. A5. The advisory committee's note explains 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." *Id.* at A11. The statement indicates that the advisory committee does not perceive that the existing Rule 103 precludes waiver in such circumstances.

[14] Petitioner asserts (Br. 28) that the advisory committee's notes to Rule 103 "state that Rule 103(a) was meant to codify 'the law as generally accepted today.'" The statement on which petitioner relies, however, refers only to the proposition that "[r]ulings

1975 as to whether a defendant preserved an objection to the admission of a prior conviction where, after the trial court ruled in limine that the conviction could be used as impeachment evidence, the defendant introduced the conviction himself on direct examination. The question had been addressed by very few courts as of that time.[15] Petitioner cites only two decisions that held that a defendant had not waived an objection by introducing a prior conviction himself—both of which decisions date from shortly before the enactment of the Federal Rules of Evidence. Pet. Br. 26-27 (citing *United States* v. *Maynard*, 476 F.2d 1170, 1175 (D.C. Cir. 1973), and *United States* v. *Puco*, 453 F.2d 539, 541 n.6 (2d Cir. 1971), cert. denied, 414 U.S. 844 (1973)). It takes more than two decisions to demonstrate a "prevailing common-law view." Neither decision purported to be applying any settled rule of common law.[16] And other contemporaneous appellate decisions *did* find

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on evidence cannot be assigned as error unless (1) a substantial right is affected, and (2) the nature of the error was called to the attention of the judge." Fed. R. Evid. 103 advisory committee's note (subdiv. a). It does not refer to the entire body of law relating to appellate review of evidentiary rulings.

[15] That is understandable given both that the common law allowed the admission of all convictions, without any balancing of their probative value against their prejudicial effect, and that motions in limine were not known to the common law. See pp. 7-8, & n.3, *supra*; *Green*, 490 U.S. at 511-512.

[16] Even the law in the Second Circuit does not appear to have been settled. Just a few years after *Puco*, the Second Circuit precluded a defendant from challenging an adverse Rule 609(a)(1) ruling on appeal where the defendant had testified about the prior conviction on direct examination, stating that "even if the original ruling by the trial court was erroneous, * * * defense counsel's own use of the evidence in its direct examination as a matter of trial strategy cured any error." *Mariani*, 539 F.2d at 921.

waiver in such circumstances. See *United States* v. *Kiraly*, 445 F.2d 291, 292 (6th Cir.) (per curiam), cert. denied, 404 U.S. 915 (1971); *Shorter* v. *United States*, 412 F.2d 428, 431 (9th Cir.), cert. denied, 396 U.S. 970 (1969); cf. *United States* v. *Tocki*, 469 F.2d 655, 657 (9th Cir. 1972) (holding that the defendant's motion to exclude his prior felony convictions was properly denied, "particularly when the defendant offered evidence of his prior convictions before he was cross-examined") (citing *Shorter*).[17]

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[17] Contrary to petitioner's assertion (Br. 27 n.8), *Shorter* is squarely on point. In *Shorter*, the defendant moved in limine to exclude his prior convictions under *Luck* v. *United States*, 348 F.2d 763 (D.C. Cir. 1965), which allowed a court to exercise its discretion to exclude prior convictions as unduly prejudicial. The district court "declined [the defendant's] invitation to consider applying the [*Luck*] rule," observing that "the rule in th[e] circuit favored the admissibility of the convictions"; the defendant then testified to his convictions on direct examination. *Shorter*, 412 F.2d at 429. On appeal, the defendant argued that the convictions should have been excluded either under *Luck* because they were unduly prejudicial or under *Burgett* v. *Texas*, 389 U.S. 109 (1967), because they were obtained in violation of his right to counsel.

As to the first point, the court of appeals rejected the defendant's reliance on *Luck* on the ground that "the trial court never actually ruled on this point because testimony regarding the convictions had not as yet been solicited at the time the question of admissibility was raised." *Shorter*, 412 F.2d at 430. The court's additional comment that the circuit had not adopted the *Luck* rule was only an alternative ground for its decision.

As to the second point, the court of appeals ruled that the defendant had waived any challenge under *Burgett* by testifying to the convictions on direct examination. The court did not, as petitioner asserts (Br. 28 n.8), indicate that its refusal to entertain the defendant's *Burgett* claim was "rooted in the fact that he did not specifically raise it before the district court." Rather, the court

As noted above (at 14-15 & n.11), since the enactment of the Federal Rules of Evidence, the federal courts have continued to diverge on this issue. The state courts also have taken varying approaches.[18] The sparse case law before the enactment of the Federal Rules of Evidence, and the contrary approaches taken by the federal and state courts both before and after that time, belie the existence of a uniform common-law approach to waiver that was intended to be codified in Rule 103.

2. Rule 609 Is Consistent With The Rule That A Defendant Waives An Objection To An In Limine Ruling On The Admissibility Of A Prior Conviction By Introducing The Conviction On Direct Examination

There is likewise nothing in the text or history of Rule 609 that suggests that a defendant cannot waive an objection to an in limine ruling on the admissibility of a prior conviction by preemptively testifying about

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rested its decision on the defendant's preemptive trial strategy:

> [The defendant] did not wait to see if the priors would in fact be offered and then object to them; rather, he offered the evidence himself as a matter of trial strategy, probably to soften the anticipated blow in the eyes of the jury. Having adopted this strategy, which appeared to be in his best interest, he cannot now be heard to complain that his own act of offering such evidence violated his constitutional rights.

Shorter, 412 F.2d at 431.

[18] Compare, *e.g.*, *State* v. *Idlebird*, 896 S.W.2d 656, 663 (Mo. Ct. App. 1995) (a defendant waives an objection to the admissibility of a prior conviction by testifying to it on direct examination), and *State* v. *Azure*, 591 P.2d 1125, 1131 (Mont. 1979) (same), with *State* v. *Eugene*, 340 N.W.2d 18, 29 (N.D. 1983) (a defendant does not waive a challenge to the admissibility of a prior conviction in such circumstances), and *State* v. *Williams*, 326 N.W.2d 678, 680 (Neb. 1982) (same).

the prior conviction on direct examination. Petitioner observes (Br. 22-23, 29-31) that Rule 609(a) was amended in 1990 to clarify that a defendant may testify on direct examination about a prior conviction in order to "remove the sting." See Fed. R. Evid. 609(a) & advisory committee's note (1990 amendment).[19] Contrary to petitioner's contention, however, no special appellate rights are protected by the amended rule.

As originally phrased, Rule 609(a) expressly allowed evidence of a witness's prior conviction to be admitted "during cross-examination." Although Rule 609(a) could thus have been read as allowing such evidence to be offered *only* during cross-examination, "virtually every circuit" concluded that Rule 609(a) was not to be given such a restrictive reading. Fed. R. Evid. 609 advisory committee's note (1990 amendment).[20] The

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[19] Before the 1990 amendment, Rule 609(a) provided:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonestly or false statement, regardless of the punishment.

The amended Rule 609(a), which reflects the elimination of the reference to cross-examination, is reproduced at pages 1-2, *supra*.

[20] Courts reasoned that the reference to cross-examination was designed simply "to make clear that evidence of a prior conviction is not admissible if a person does not testify," and not to prohibit a party from eliciting evidence of a conviction from his own witness. See *United States* v. *Dixon*, 547 F.2d 1079, 1082 n.2 (9th Cir. 1976); see generally *Green*, 490 U.S. at 513-524 (discussing history of Rule 609).

1990 amendment removed the reference to cross-examination from Rule 609(a), thereby eliminating any possible ambiguity as to whether a witness may testify about a prior conviction on direct examination. The amendment did not, however, address the appellate consequences of such a trial strategy. No court has changed its position as to those consequences based on the 1990 amendment to Rule 609(a).[21]

3. The Policies Underlying The Federal Rules Of Evidence Support A Rule That A Defendant Waives An Objection To An In Limine Ruling On The Admissibility Of A Prior Conviction By Introducing The Conviction On Direct Examination

Petitioner contends (Br. 31-40) that allowing defendants to preserve an objection to an in limine ruling on the admissibility of a prior conviction even when they introduce the conviction on direct examination is supported by Congress's intent that the Federal Rules of Evidence "be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence." Fed. R. Evid. 102. In fact, those interests are better served by the contrary rule that prevents a defendant, such as petitioner here, from preempting the district court's and the government's decision whether a prior conviction is to be introduced.

First, with respect to "secur[ing] fairness in administration," the fairer rule is one that affords the govern-

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[21] Compare *United States* v. *Bad Cob*, 560 F.2d 877, 883 (8th Cir. 1977) (holding under the original Rule 609 that a defendant may testify about a prior conviction on direct examination, but that the defendant thereby waives any objection to the admission of the conviction), with *Smiley*, 997 F.2d at 480 (same under the amended Rule 609).

ment, as the party whose verdict would be jeopardized by the erroneous admission of a prior conviction, an opportunity to decide at trial to forgo using the conviction. The fairer rule is likewise one that affords the district court, which could be required to conduct a second trial if the conviction is admitted in error, an opportunity to revisit its admissibility in light of the evidence at trial.

There is nothing inherently unfair about requiring a defendant to choose between introducing the conviction on direct examination, in order to gain a perceived tactical advantage, and preserving an objection to the government's introducing the conviction on cross-examination.[22] The same requirement applies to a defendant in any case in which the court declines to rule

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[22] The waiver rule does not, as petitioner's amici contend (Br. 20), produce "a systemic inequity" because, under 18 U.S.C. 3731, only the government may take an interlocutory appeal of a "decision or order of a district court suppressing or excluding evidence * * * not made after the defendant has been put in jeopardy." In the first place, Section 3731 does not permit the government to appeal a district court's analogous in limine ruling on the admissibility of a prior conviction to impeach a prosecution witness. Moreover, Section 3731, where applicable, serves to mitigate, not to exacerbate, an asymmetry in the treatment of the government and criminal defendants. Absent Section 3731, the government could never appeal a district court's ruling "suppressing or excluding evidence." The ruling would not be appealable before trial under 28 U.S.C. 1291, which is limited to "final decisions," and would not be appealable after an acquittal because of the Double Jeopardy Clause. A criminal defendant, in contrast, may challenge a district court's evidentiary rulings on appeal from a final judgent (to the extent that he has not waived an objection to those rulings). See generally *United States* v. *Sisson*, 399 U.S. 267, 293-298 (1970) (discussing background of Section 3731).

in limine on the admissibility of a prior conviction.[23] Petitioner does not dispute that the latter defendant could not introduce a conviction on direct examination and then challenge the admission of the conviction on appeal.

Petitioner nonetheless contends (Br. 32) that a waiver rule is unfair because it may cause many defendants to refrain from disclosing their convictions on direct examination,[24] which, in turn, may cause juries to infer that those defendants sought to conceal their convictions and thus are generally not credible. There is a simple solution to such concerns that does not impose the same significant costs on the judicial system as does the solution that petitioner advocates: In conjunction with the standard instruction that the jury may consider the conviction only on the question of the defendant's credibility, see 1 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 15.08 (4th ed. 1992), the district court can instruct the jury not to infer anything from the fact that the government, rather than the defendant, introduced the conviction. If a jury can be presumed to follow an instruction to ignore even prejudicial evidence, a jury surely can be presumed to follow the instruction suggested here. See, *e.g.*, *Greer* v. *Miller*, 483 U.S. 756, 766 n.8 (1987) ("We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the

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[23] As noted above (at 9 & n.4), a party has no right to an in limine ruling.

[24] Contrary to petitioner's suggestion, however, the Ninth Circuit's well-established waiver rule did not deter her from disclosing her prior conviction on direct examination.

court's instructions and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant.") (quoting *Richardson* v. *Marsh*, 481 U.S. 200, 208 (1987), and *Bruton* v. *United States*, 391 U.S. 123, 136 (1968)).

It is debatable whether jurors actually perceive a defendant to be more credible if he introduces a conviction himself rather than awaiting its introduction by the government.[25] And, even if such a strategy does enhance a defendant's credibility in the minds of some jurors, the reason why the strategy has that effect is uncertain. Petitioner claims that the strategy prevents jurors from inferring that a defendant intended to conceal the conviction. It is equally plausible, however, that the strategy causes jurors to credit a defendant unduly for his candor when, unbeknownst to them, he disclosed the conviction only after failing to persuade the court to exclude it. This Court should be hesitant to draw conclusions about the fairness of encouraging or discouraging a particular strategy when the inferences, if any, that jurors draw from the strategy are speculative.

Second, with respect to the "elimination of unjustifiable expense and delay," the more efficient rule is one

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[25] See Robert H. Klonoff & Paul L. Colby, *Sponsorship Strategy: Evidentiary Tactics For Winning Jury Trials* 183 (1990) (former federal prosecutors observe that "[w]e can recall no trial * * * in which a direct examiner was (or would have been) better off eliciting prior convictions or prior inconsistent statements himself instead of letting his opponent do so," notwithstanding the conventional wisdom to the contrary); but see Kipling D. Williams et al., *The Effects of Stealing Thunder in Criminal and Civil Trials*, 17 Law & Human Behavior 597 (1993) (reporting study that suggested a boon to a defendant's credibility from volunteering a prior conviction).

that affords the district court and the government an opportunity at trial to avoid the introduction of arguably inadmissible evidence, and thereby to protect against unnecessary appeals, reversals, and retrials. As explained above (at 17-18), moreover, a contrary rule could deter courts from making in limine rulings and, as a consequence, could result in more extended litigation of evidentiary issues during trial, thereby interrupting the presentation of the case to the jury.

Indeed, petitioner agrees (Br. 33) that "[t]he goal, then, is to have one trial, not multiple ones"—a goal that would seem to support a waiver rule. But petitioner then suggests (*ibid.*) that a waiver rule is somehow inconsistent with that goal because it does not "encourage[] the defendant to put on her best case." The Federal Rules of Evidence were not designed, however, to maximize a defendant's tactical advantages at trial.

Third, with respect to the "promotion of growth and development of the law of evidence," the law is most effectively advanced by evidentiary rulings made in the concrete factual context of trial and by appellate review of such rulings. It is not significantly advanced by necessarily tentative rulings in limine based on the district court's and the parties' suppositions about what evidence might be offered at trial. Nor is the law significantly advanced by appellate consideration of the somewhat hypothetical question whether the district court committed harmful error in ruling before trial that government could impeach the defendant with a prior conviction if he testified at trial. Cf. *Cook*, 608 F.2d at 1190 (Kennedy, J., concurring in part and dissenting in part) ("[T]o mandate the trial court's decision on th[e] troublesome question [whether a conviction is properly admitted as impeachment evidence

under Rule 609(a)(1)] prior to the defendant's testimony means that both the trial court's ruling and our review will be done in the dark much of the time.").[26]

All waiver rules, by their nature, foreclose appellate review. But that consequence has not been considered sufficiently compelling to preclude the widespread application of waiver rules. Cf. *New York* v. *Hill*, slip op. 4 (noting the presumptive availability of waiver with respect to "a broad array of constitutional and statutory provisions"). A waiver rule, such as that applied here, serves to filter out weak objections from the appellate process, a result that promotes judicial efficiency without impairing the development of the law.

C. A Defendant's Right To Testify Is Not Unconstitutionally Burdened By Requiring Him To Choose Between Introducing A Prior Conviction On Direct Examination And Preserving An Objection To An In Limine Ruling On The Admissibility Of The Conviction

Petitioner contends (Br. 40-46) that a criminal defendant's right to testify in his own defense is unconstitutionally burdened if he is put to the choice of testifying about a prior conviction on direct examination or preserving an objection to its admission. Although this Court has recognized that a criminal defendant has a

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[26] Petitioner contends (Br. 37-38) that the courts of appeals can make their own determinations about whether a prosecutor would, in fact, have sought to introduce a prior conviction after hearing the defendant's testimony and the other evidence at trial. It is not the province of the courts of appeals to decide what tactical decisions counsel would have made if given the opportunity to do so. Cf. *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984) (courts should not second-guess counsel's tactical decisions because of the "difficulties inherent" in doing so).

constitutional right to testify in his own defense, that right "is not without limitation" and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Rock* v. *Arkansas*, 483 U.S. 44, 55 (1987). Restrictions on the defendant's right to testify are thus permissible if they serve "legitimate interests" and are not "arbitrary or disproportionate to the purposes they are designed to serve." *Id.* at 55-56; accord *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998).

The waiver rule applied by the court of appeals in this case does not meaningfully restrict a defendant's right to testify. At most, the waiver rule may affect a defendant's choice about *when* to testify about a prior conviction. If the defendant wishes to preserve an objection to the admission of the conviction, he cannot introduce the conviction on direct examination, but instead must wait until the government does so on cross-examination. The defendant then may testify fully about the conviction on redirect examination (provided, of course, that the conviction has actually been offered by the government and admitted by the court).

In any event, even if viewed as a limitation on a defendant's right to testify, the waiver rule serves the same legitimate purposes that were served in *Luce*. The waiver rule preserves the ability of the district court and the government to prevent the introduction of potentially reversible error into the trial. It thereby serves important societal interests in finality and judicial economy. Because those interests would be jeopardized in every case if a defendant could preemptively introduce a prior conviction and still challenge its admission on appeal, there is nothing "arbi-

trary" or "disproportionate" about applying a per se waiver rule in this context.[27]

A rule that puts a defendant to the choice of either testifying about a conviction on direct examination and waiving an objection to its introduction, or deferring his testimony to cross- and redirect examination and preserving an objection to its introduction, is not remotely as burdensome as the rules that this Count has found to violate a defendant's right to testify or to present a defense. See *Scheffer*, 523 U.S. at 308 (rules burdening a criminal defendant's right to present a defense have been struck down only where they "infringed upon a weighty interest of the accused"). For example, in *Rock*, the Court invalidated a state rule barring hypnotically refreshed testimony that prevented the defendant, the only eyewitness to the shooting with which she was charged, from testifying that the shooting was accidental. See 483 U.S. at 61 (explaining that the rule would "disable [the] defendant from presenting her version of the events for which she is on trial"). In *Brooks* v. *Tennessee*, 406 U.S. 605 (1972), the other case on which petitioner relies, the Court struck down a state law that barred a defendant from testifying at all unless he agreed to be the first defense witness.

The rules invalidated in *Rock* and *Brooks* thus operated to preclude key defense testimony. The waiver rule at issue here, in contrast, operates merely

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[27] Petitioner states (Br. 44-45 n.14 (citations omitted)) that in determining whether a restriction on a defendant's right to testify is "disproportionate," "[o]ne could argue that because the right to testify is a *fundamental* constitutional right, a strict-scrutiny test should apply." But this Court made clear in *Rock* that the interests justifying the restriction need be only "legitimate," not "compelling," as strict scrutiny would require. 483 U.S. at 55; accord *Scheffer*, 523 U.S. at 308.

to complicate a defendant's choice about when to testify on a collateral issue—a choice that "is indistinguishable from any of a number of difficult choices that criminal defendants face every day." *Mezzanatto*, 513 U.S. at 209. This Court has repeatedly upheld evidentiary rules that may complicate criminal defendants' tactical decisions about how, or even whether, to testify. See, *e.g.*, *Jenkins* v. *Anderson*, 447 U.S. 231, 238 (1980) (holding that a criminal defendant is subject to impeachment with his pre-arrest silence notwithstanding that, as "a choice of litigation tactics," he then "may decide not to take the witness stand because of the risk of [such] cross-examination"); *McGautha* v. *California*, 402 U.S. 183, 215 (1971) (recognizing that a criminal defendant who chooses to testify on his own behalf is subject to "cross-examination on matters reasonably related to the subject matter of his direct examination" and to "impeach[ment] by proof of prior convictions or the like"); *Harris* v. *New York*, 401 U.S. 222, 225-226 (1971) (holding that a criminal defendant who chooses to testify may be impeached with prior inconsistent statements taken in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966)). As this Court has observed:

> The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. * * * Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.

McGautha, 402 U.S. at 213 (quoting *McMann* v. *Richardson*, 397 U.S. 759, 769 (1970)). Surely, if the Constitution does not forbid a defendant from being put

to the choice whether to testify or to be subject to impeachment with prior convictions, the Constitution does not forbid a defendant from being put to the lesser choice presented here.

D. The Court Should Not Remand The Case For A Determination Whether Petitioner's Waiver Of An Objection To The Admission Of Her Prior Conviction Was Knowing And Intentional

Petitioner finally contends (Br. 46-47) that, even if a criminal defendant's introduction of a prior conviction on direct examination could constitute a waiver of an objection to its admission, the Court should remand for a determination whether the waiver in this case was knowing and intentional. There is no need for the Court to do so.

At the time of petitioner's trial, the law was well-settled in the Ninth Circuit that a criminal defendant who "introduce[s] the fact of his prior conviction on direct examination, * * * waive[s] his right to appeal the district court's in limine ruling that the evidence was admissible under Rule 609(a)(1)." *Williams*, 939 F.2d at 725; see *United States* v. *Garcia*, 988 F.2d 965, 967-968 (9th Cir. 1993) ("In *Williams* we held that a defendant waives the right to challenge on appeal the trial court's pretrial ruling that a prior conviction can be used by the prosecution for impeachment purposes when the defendant himself brought out the fact of the prior conviction on direct examination."). Petitioner's counsel is properly charged with knowledge of the waiver rule. Accordingly, when petitioner responded to her counsel's question on direct examination about her prior conviction, petitioner waived any objection to its admission.

Contrary to petitioner's suggestion (Br. 47 n.15), a criminal defendant need not personally consent to such a waiver. This Court has not required a "showing of conscious surrender of a known right * * * with respect to strategic and tactical decisions, even those with constitutional implications, by a counseled accused." *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3 (1976). As this Court has recently explained:

> Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. * * * Thus, decisions by counsel are generally given effect as to what arguments to pursue, *what evidentiary objections to raise*, and what agreements to conclude regarding the admission of evidence.

New York v. *Hill*, slip op. 4-5 (emphasis added; internal quotation marks and citations omitted); accord, *e.g.*, *United States* v. *Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (defense counsel may waive certain rights on behalf of a criminal defendant, including "strategic and tactical matters such as selective introduction of evidence, stipulations, objections, and pre-trial motions").

Defense counsel's decision to elicit petitioner's prior conviction on direct examination, rather than to wait for the government to do so on cross-examination and thereby preserve the issue for appeal, is precisely the sort of "strategic" or "tactical" decision that is binding on a criminal defendant. See, *e.g.*, *Henry* v. *Mississippi*, 379 U.S. 443, 451-452 (1965) (recognizing that defense counsel's "deliberate bypassing * * * of the contemporaneous-objection rule as a part of trial strategy" could constitute a waiver binding on his

client).[28] To conclude otherwise would open the door to requiring a criminal defendant's express consent to a wide array of strategic decisions made by counsel, thereby causing criminal trials to "bog down in endless warnings to the accused, followed by private consultation and choices on the record." *United States* v. *Boyd*, 86 F.3d 719, 724 (7th Cir. 1996), cert. denied, 420 U.S. 1231 (1997).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[28] The decision at issue here is not of the same character as those "fundamental decisions" that "the accused has the ultimate authority to make," such as "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). The decision is more closely analogous to the decision about which issues to raise on appeal, a decision that the *Barnes* Court recognized is not a "fundamental" one. See *id.* at 750-754; see also *New York* v. *Hill*, slip op. 5.