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Ohler v. United States: Defendants Waive Appellate Review by Reducing the Sting of Prior Conviction Impeachment Evidence

Misty Dawn Garrett

CASENOTE

Ohler v. United States: Defendants Waive Appellate Review By Reducing the Sting of Prior Conviction Impeachment Evidence

In *Ohler v. United States*,[1] the United States Supreme Court adopted a per se waiver rule holding that a defendant waives the right to appeal an in limine ruling permitting the government to impeach the defendant with evidence of a prior conviction when the defendant introduced the evidence on direct examination in an effort to reduce the sting of the evidence.[2]

I. FACTUAL BACKGROUND

In July 1997, Maria Suzuki Ohler attempted to enter the United States from Mexico through San Ysidro, California. A customs inspector searched Ohler's van and noticed that someone tampered with an interior panel. The inspector found approximately eighty-one pounds of marijuana in the panel.[3] Ohler was arrested and subsequently indicted on August 6, 1997, for importation of marijuana in violation of 21 U.S.C.

1. 120 S. Ct. 1851 (2000).
2. *Id.* at 1855.
3. *Id.* at 1852.

§§ 952 and 960 and for possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1).[4]

Before trial the government filed a motion in limine seeking to admit Ohler's 1993 felony conviction for possession of methamphetamine under Federal Rule of Evidence 404(b) ("Rule 404(b)")[5] and Federal Rule of Evidence 609(a)(1) ("Rule 609(a)(1)").[6] The district court denied the government's motion to admit Ohler's conviction under Rule 404(b), but reserved ruling on the motion to admit Ohler's conviction under Rule 609(a)(1). On the first day of Ohler's trial, the district court ruled that her conviction was admissible for impeachment purposes under Rule 609(a)(1) if she testified on her own behalf.[7]

Ohler testified at trial and denied knowledge of the hidden marijuana. She also attempted to take the sting out of the impeachment evidence by admitting that she had previously been convicted of possession of methamphetamine. On cross-examination, Ohler answered in the affirmative when the prosecutor asked her whether her prior conviction was a felony conviction. On redirect examination, Ohler explained that her conviction was merely for possession of a personal-use quantity, not a distribution quantity. The jury found Ohler guilty of both counts, and the court sentenced her to thirty months' imprisonment and three years of supervised release; it also assessed a $200 penalty.[8]

Ohler appealed, arguing that the district court erred by admitting evidence of her drug possession conviction under Rule 609(a)(1). Ohler

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4. United States v. Ohler, 169 F.3d 1200, 1201 (9th Cir. 1999).

5. FED. R. EVID. 404(b). This rule provides:

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

6. FED. R. EVID. 609(a). This rule provides:

(a) **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.

7. *Ohler*, 169 F.3d at 1201.

8. *Id.* at 1201-02.

contended that before the 1990 amendment to Rule 609(a)(1), the literal language of the rule suggested that prior conviction impeachment evidence was only admissible during cross-examination.[9] Therefore, because the 1990 amendment to Rule 609(a)(1) removed the language suggesting the restriction, the amended rule specifically sanctioned the strategy of allowing a defendant to remove the sting of impeachment evidence on direct examination.[10] Ohler argued that her use of this strategy should not act as a bar to appellate review of the trial court's decision to admit the evidence. The Ninth Circuit Court of Appeals rejected Ohler's argument.[11] The court explained that, even before the amendment, some courts held that the cross-examination limitation of Rule 609(a)(1) was inapplicable and permitted defendants to reduce the sting by introducing impeachment evidence on direct examination.[12] Furthermore, the court found that the rule amendment did not address the issue of whether the defendant waived appeal of the trial court's ruling admitting the prior conviction.[13] The court of appeals concluded that Ohler waived her objection to the admissibility of the prior conviction by introducing evidence of the conviction during her direct examination.[14]

The United States Supreme Court granted certiorari to determine whether appellate review of an in limine ruling permitting prior conviction impeachment evidence is available when a defendant introduces the conviction during direct examination.[15] The Court

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9. Before the 1990 amendment, Rule 609 of the Federal Rules of Evidence provided:

> For the purpose of attacking the credibility of a witness, evidence that he 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 he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Id. at 1202 (quoting FED. R. EVID. 609 (amended 1990)) (emphasis added).

10. *Id.* The 1990 amendment to Rule 609 of the Federal Rules of Evidence removed the reference to the cross-examination limitation on impeachment evidence of prior conviction. The Advisory Committee noted that the apparent limitation had been found inapplicable by "virtually every circuit." FED. R. EVID. 609 1990 Amendment.

11. 169 F.3d at 1203.

12. *Id.* (citing FED. R. EVID. 609 advisory committee's note). *See* United States v. Bad Cob, 560 F.2d 877, 883 (8th Cir. 1977) ("The introduction by a witness himself, on his direct, of a prior conviction is a common trial tactic, recommended by textwriters on trial practice.") (footnote omitted); United States v. Dixon, 547 F.2d 1079, 1082 n.2 (9th Cir. 1976).

13. 169 F.3d at 1203.

14. *Id.* at 1204.

15. 120 S. Ct. at 1853.

affirmed the court of appeals decision holding that a defendant who introduces evidence of a prior conviction during direct examination in an attempt to reduce the sting of impeachment evidence waives appellate review of the alleged erroneous admission of the evidence.[16]

II. LEGAL BACKGROUND

It has long been a general trial strategy for a defendant to mitigate the damaging effect of prior conviction impeachment evidence by introducing the conviction during direct examination.[17] This tactic serves two purposes: It "takes the sting out of [the evidence] by preventing the prosecutor from bringing it out [first]," and it gives the defense attorney "the opportunity to excuse or explain [the conviction] in the most satisfactory way."[18] If a defendant does not explain or reveal his prior conviction on direct examination, a jury may think the defendant is being dishonest and trying to hide the conviction.[19] Therefore, a defendant who loses a motion in limine ruling allowing the admissibility of prior conviction evidence is motivated to introduce the harmful evidence before the prosecutor in order to reduce the prejudicial effect on the jury.[20]

While a defendant's attempt to reduce the sting of this evidence was a commonly used trial strategy before the adoption of the Federal Rules of Evidence, there was no uniform approach to determine whether a defendant waived his right to appeal a motion in limine ruling allowing the admission of prior conviction impeachment evidence when a defendant introduced this evidence on direct examination. For example, the Second Circuit in *United States v. Puco*[21] held that the defendant can appeal the trial judge's decision allowing the admission of evidence of the defendant's conviction for violating federal narcotics laws even when the strategy was employed.[22] The court explained that a defendant is "entitled to attempt to offset the prejudicial effect of admission of his prior conviction by referring to it before the government [does] and by using it to support his defense."[23] Likewise, the District of Columbia

16. *Id.* at 1855.

17. *See* IRVING GOLDSTEIN, TRIAL TECHNIQUE § 328 (1935); IRVING MENDELSON, DEFENDING CRIMINAL CASES. ADDITIONAL MATERIALS BY ISIDORE SILVER 91-93 (Rev. ed. 1967); F. LEE BAILEY & HENRY B. ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS § 253 (1971).

18. BAILEY & ROTHBLATT, *supra* note 17, § 253, at 222.

19. *Id.* at 222-23.

20. *Id.*

21. 453 F.2d 539 (2d Cir. 1971).

22. *Id.* at 541-42.

23. *Id.* at 541 n.6.

Circuit in *United States v. Maynard*[24] permitted the defendant to appeal the trial judge's ruling admitting impeachment evidence of the defense's key witness's prior arrest when the defendant made the "tactical decision" to introduce this evidence on direct examination.[25] The court explained that the defendant was "fairly entitled" to "do what he fairly could to limit the prejudicial impact of the ruling."[26]

However, in *Shorter v. United States*,[27] the Ninth Circuit Court of Appeals held that a defendant who offers prior conviction impeachment evidence after the court has ruled the evidence admissible over the defendant's objection cannot then complain that the introduction of the evidence violated his constitutional rights.[28] There, defendant offered this evidence as a "matter of trial strategy, probably to soften the anticipated blow in the eyes of the jury."[29] But the court opined, "[T]he better practice is to make an objection" when the evidence is about to be presented by the government in cross-examination.[30] The Seventh Circuit Court of Appeals, in *United States v. Hauff*,[31] also held that, when the defendant introduces prior conviction impeachment evidence, the defendant waives the right to object to its admission even if the defendant's prior conviction is on appeal and subject to reversal.[32]

After Congress adopted the Federal Rules of Evidence in 1975, defendants continued to introduce prior conviction evidence on direct examination in order to reduce the sting of the evidence as part of trial strategy.[33] Rule 103 of the Federal Rules of Evidence sets forth the requirements for appealing evidentiary claims,[34] but it does not address

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24. 476 F.2d 1170 (D.C. Cir. 1973).

25. *Id.* at 1174.

26. *Id.* at 1175.

27. 412 F.2d 428 (9th Cir. 1969).

28. *Id.* at 431. *See* United States v. Tocki, 469 F.2d 655, 657 (9th Cir. 1972) (holding that there is no abuse of discretion by trial judge admitting prior conviction impeachment evidence when defendant offers the evidence on direct examination).

29. 412 F.2d at 431.

30. *Id.* at 431 n.4.

31. 395 F.2d 555 (7th Cir. 1968).

32. *Id.* at 557.

33. *See Bad Cob*, 560 F.2d at 883 (holding "[t]he introduction by a witness himself, on his direct, of a prior conviction is a common trial tactic, recommended by textwriters on trial practice"); *see also* FED. R. EVID. 609 1990 Amendment (noting "[i]t is common for witnesses to reveal on direct examination their convictions to 'remove the sting' of the impeachment").

34. FED. R. EVID. 103. This rule provides in pertinent 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

waiver of objection when a defendant introduces evidence on direct examination after losing an in limine ruling allowing the opponent to admit evidence.[35] Likewise, Rule 609 does not address the issue.[36] In the absence of specific direction in the Federal Rules of Evidence on the issue of whether the defendant waives appellate review of a motion in limine ruling allowing the introduction of prior conviction impeachment evidence when the defendant introduces this evidence,[37] the circuit courts continued to split on the issue—some holding the defendant waived appellate review and some holding the defendant did not waive appellate review.[38]

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(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 . . . .

An amendment to Rule 103(a), effective December 1, 2000, adds: "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." FED. R. EVID. 103 (amended 2000).

35. *Id.* The Advisory Committee's Note on the 2000 Amendment to Rule 103 of the Federal Rules of Evidence provides in pertinent part: "The 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."

36. FED. R. EVID. 609. This rule provides in pertinent part:

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

(1) evidence that a witness other than the 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 . . . .

37. *Id.*

38. *See* FED. R. EVID. 103 Advisory Committee's Note (amended 2000). The note addresses the split in the circuits:

See, e.g., United States v. Fisher, 106 F.3d 622 (5th Cir. 1997) (where the trial judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct examination); Judd v. Rodman, 105 F.3d 1339 (11th Cir. 1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); Gill v. Thomas, 83 F.3d 537, 540 (1st Cir. 1996) ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal"); United States v. Williams, 939 F.2d 721 (9th Cir. 1991) (objection to impeachment evidence was waived when the defendant was impeached on direct examination).

The Supreme Court addressed a related issue in *Luce v. United States*.[39] In *Luce* defendant made an in limine motion seeking to preclude the government from using a prior conviction for impeachment. The district court denied the motion, and Luce, therefore, did not testify. On appeal, Luce contended that the district judge erred in ruling that the evidence would be admissible.[40] The Court concluded that Luce did not preserve a claim of error based on the trial court's in limine ruling because he failed to testify and the evidence was never introduced.[41] The Court reasoned that when a defendant does not testify, the reviewing court is prevented from "determin[ing] the impact any erroneous impeachment may have had in light of the record as a whole" because the court does not know the "nature of the defendant's testimony" and does not know whether in fact the ruling kept the defendant from testifying.[42] Thus, the Court held that in order for a defendant to preserve appellate review of an error in admitting prior conviction impeachment evidence, the defendant must testify at trial.[43]

Luce put an end to the confusion regarding whether a defendant waived review of the admissibility of prior conviction impeachment evidence when the defendant does not testify, but the Court left open the issue of waiver when a defendant does testify and brings out the evidence on direct examination.[44] The circuit courts, applying *Luce* to situations in which a defendant testifies, have not taken a uniform approach. For example, the Fifth Circuit Court of Appeals, in *United States v. Fisher*,[45] held that a defendant does not waive his right to object to the introduction of prior conviction impeachment evidence when he introduces the evidence in an attempt to reduce the damage from the

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39. 469 U.S. 38 (1984).

40. *Id.* at 39-40.

41. *Id.* at 43.

42. *Id.* at 41-42.

43. *Id.* at 43.

44. *Id.* at 41. However, as Justice Souter pointed out in his dissent in *Ohler v. United States*, the Court in *Luce* implied that the defendant does not waive appellate review when impeachment evidence is introduced when the Court stated that:

> It is clear, of course, that had petitioner testified and been impeached by evidence of a prior conviction, the District Court's decision to admit the impeachment evidence would have been reviewable on appeal along with any other claims of error. The Court of Appeals would then have had a complete record detailing the nature of petitioner's testimony, the scope of the cross-examination, and the possible impact of impeachment on the jury's verdict.

120 S. Ct. at 1856 n.1 (Souter, J., dissenting).

45. 106 F.3d 622 (5th Cir. 1997).

evidence.[46] The court explained that when the government receives a favorable ruling allowing the introduction of evidence that, when introduced during cross-examination, may harm the defendant, a defendant "is faced with a difficult dilemma: to refrain from testifying in his own defense, or risk impeachment by the opposite side."[47] The court reasoned that a waiver rule preventing defendant from raising the issue on appeal "goes against basic notions of fairness."[48] Therefore, the court concluded that a defendant is not precluded from reducing the "highly prejudicial effect of that evidence" and is not deemed to have waived appellate review of the pretrial ruling.[49]

The Eleventh Circuit Court of Appeals, in *Judd v. Rodman*,[50] applied the same principle to a motion in limine ruling on another type of evidence.[51] In an action for wrongful transmission of a sexually transmitted disease, Judd moved in limine to exclude evidence of her prior sexual history under Rule 412 of the Federal Rules of Evidence.[52] When the court overruled Judd's motion, she presented this evidence on direct examination.[53] The court held that Judd's introduction of the evidence was "valid trial strategy," and therefore, she did not waive her objection to the pretrial ruling.[54]

The Seventh Circuit Court of Appeals in *Wilson v. Williams*[55] also refused to adopt a per se waiver rule when a party admits prior conviction impeachment evidence on direct examination after the trial judge has ruled the evidence admissible.[56] The court recognized that some courts have held "that a litigant who loses an evidentiary ruling and then offers the evidence himself has waived any opportunity to

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46. *Id.* at 629. *See* Reyes v. Missouri Pac. R.R., 589 F.2d 791, 793 n.2 (5th Cir. 1979) (holding that a motion in limine is sufficient to preserve for appeal objection to the introduction of prior conviction evidence when a party brings the evidence out on direct examination in an effort to reduce the damaging effects of the evidence).

47. 106 F.3d at 629.

48. *Id.*

49. *Id.*

50. 105 F.3d 1339 (11th Cir. 1997).

51. *Id.* at 1342.

52. *Id.* at 1342-43. Rule 412(a) of the Federal Rules of Evidence provides in pertinent part: "(a) **Evidence generally inadmissible**. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct . . . (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior; (2) Evidence offered to prove any alleged victim's sexual predisposition."

53. 105 F.3d at 1342.

54. *Id.*

55. 182 F.3d 562 (7th Cir. 1999).

56. *Id.* at 566-67.

complain about the decision *in limine*."[57] However, the court refused to follow this holding because it "gives up one of the principal benefits of the pretrial-ruling procedure," which is "to avoid the delay and occasional prejudice caused by objections and offers of proof at trial."[58] The court distinguished this situation, in which a defendant preemptively introduced the evidence after the trial court made a definitive ruling, from the situation in which a defendant preemptively introduces the evidence before the trial court makes a definitive ruling.[59] The court concluded that the defendant waives his objection if the trial judge's ruling is "conditional or tentative" but not if the ruling is definitive.[60]

However, the Ninth Circuit Court of Appeals, in *United States v. Williams*,[61] held that defendant waived his right to appeal the district court's in limine ruling admitting prior conviction impeachment evidence under Rule 609(a) when defendant introduced the evidence during direct examination.[62] The court reasoned that defendant "made a strategic decision to introduce the evidence preemptively, to soften its anticipated effect on the jury,"[63] and "'cannot now be heard to complain that his own act of offering such evidence'" was error.[64] The court noted that if a defendant is allowed to introduce this evidence on direct examination, the trial court is precluded from reversing its ruling on the admissibility of the evidence, and the government is precluded from deciding not to introduce the evidence on cross-examination; therefore, there is the risk of possible reversal on appeal.[65] The court concluded that the defense attorney should not be permitted to "deprive[] the court and the government of a last chance to reverse their pre-stated positions" on the admissibility of the impeachment evidence and thus, adopted a per se waiver rule.[66]

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57. *Id.* at 566. *See* United States v. Williams, 939 F.2d 721, 723 (9th Cir. 1991); Gill v. Thomas, 83 F.3d 537, 540 (1st Cir. 1996).

58. 182 F.3d at 566.

59. *Id.* at 566-67.

60. *Id. See* United States v. DePriest, 6 F.3d 1201, 1209 (7th Cir. 1993) (holding that a defendant waives the right to appellate review by introducing prior conviction evidence before the trial judge makes a definitive ruling).

61. 939 F.2d 721 (9th Cir. 1991).

62. *Id.* at 725.

63. *Id.* at 724.

64. *Id.* at 723 (quoting Shorter v. United States, 412 F.2d 428, 431 (9th Cir. 1969)). *See* United States v. Bryan, 534 F.2d 205, 206 (9th Cir. 1976) (holding no error when defendant first introduced prior conviction into evidence); United States v. Hauff, 395 F.2d 555, 557 (7th Cir. 1968) (holding defendant waived appeal of prior conviction evidence when defendant's attorney introduced the evidence when defendant testified).

65. 939 F.2d at 724-25.

66. *Id.*

Similarly, the Eighth Circuit Court of Appeals, in *United States v. Smiley*,[67] adopted a per se waiver rule when defendant introduced the prior conviction evidence during his direct examination.[68] Likewise, in *Gill v. Thomas*,[69] the First Circuit Court of Appeals held that, by offering the evidence himself, defendant "waived his opportunity to object."[70] The court noted that defendant made a tactical decision and "'opened the door'" to cross-examination on prior conviction evidence and, therefore, "cannot now be heard to complain that his own offer of such evidence was reversible error."[71]

Until the Supreme Court's decision in *Ohler*, neither common law nor case law following the enactment of the Federal Rules of Evidence definitively and uniformly answered the question of whether a defendant waives appellate review of a ruling allowing the admissibility of prior conviction impeachment evidence when the defendant introduces the evidence on direct examination. The Supreme Court addressed this issue specifically in *Ohler* to resolve the disagreements among the lower courts.[72]

III. RATIONALE OF THE COURT

Writing for a five-to-four majority, Chief Justice Rehnquist delivered the opinion of the Court in *Ohler*.[73] The Court affirmed the circuit court and held that a defendant waives objection to an in limine ruling permitting the admission of impeachment evidence of the defendant's prior conviction when the defendant introduces the evidence during direct examination.[74] Chief Justice Rehnquist began his analysis by setting forth the general evidentiary principle that "a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted."[75] Ohler, by invoking Rules 103 and 609(a), sought to "avoid the consequences of this well-established commonsense principle."[76] The Court examined the plain language of Rules 103 and 609(a) and

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67. 997 F.2d 475 (8th Cir. 1993).

68. *Id.* at 480. *See* United States v. Brown, 956 F.2d 782 (8th Cir. 1992); United States v. Vega, 776 F.2d 791 (8th Cir. 1985); United States v. Johnson, 720 F.2d 519 (8th Cir. 1983).

69. 83 F.3d 537 (1st Cir. 1996).

70. *Id.* at 541.

71. *Id.*

72. 120 S. Ct. at 1852-53.

73. *Id.* at 1852.

74. *Id.* at 1852-53.

75. *Id.* at 1853 (citing 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 103.14, 103-30 (2d ed. 2000)).

76. *Id.*

concluded that these rules simply do not address whether or not evidence introduced by a defendant on direct examination is appealable as erroneously admitted.[77] Rule 103 only provides "that a party must make a timely objection to a ruling admitting evidence and that a party cannot challenge an evidentiary ruling unless it affects a substantial right."[78] Rule 609(a) "merely identifies the situations in which a witness' prior conviction may be admitted for impeachment purposes."[79] Therefore, the Court held that there is no statutory basis to support Ohler's allegation that she did not waive appellate review.[80]

The Court then analyzed whether applying a waiver rule of this sort unfairly "compels a defendant to forgo the tactical advantage of preemptively introducing the conviction in order to appeal the *in limine* ruling."[81] Ohler argued that in order for a defendant to retain the option of appealing the admissibility of the prior conviction impeachment evidence pursuant to the waiver rule, the defendant is forced to give up the right of introducing the evidence on direct examination, thus risking the jury's doubting defendant's credibility once the evidence is introduced on cross-examination.[82] The Court explained that, pursuant to the adversarial trial process, both the defendant and the government must make strategic choices throughout the trial that are a part of normal criminal trial rules.[83] The Court recognized that the defendant has certain choices to make: (1) whether to testify in her own behalf, which automatically subjects her to cross-examination that may include damaging impeachment by any prior convictions; (2) if she does testify, whether to introduce evidence of prior convictions on direct examination to reduce the sting of such adverse evidence; and (3) whether to wait for the possibility that this evidence will be introduced on cross-examination, which could be more harmful to the defendant.[84]

In addition, the Court noted that the Government also has to make certain choices during the trial: (1) whether to impeach the defendant with evidence of a prior conviction after the defendant testifies and (2) whether to refuse to impeach the defendant with prior conviction evidence because the decision to impeach may be reversed on appeal.[85] The Court then explained that Ohler wants to take the decision of

77. *Id.*
78. *Id.* *See supra* note 34 and accompanying text.
79. *Id.* *See supra* note 6 and accompanying text.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 1854.
84. *Id.*
85. *Id.*

whether or not to impeach a defendant away from the Government by offering the conviction herself on direct examination and "still preserve its admission as a claim of error on appeal."[86] However, pursuant to the Court's decision in *Luce*,[87] a defendant can claim a denial of a substantial right on appeal if the district court's in limine ruling proved to be erroneous only when the Government exercised its option to elicit the testimony on cross-examination.[88]

Finally, the Court addressed defendant's third contention that applying a waiver rule "unconstitutionally burdens her right to testify."[89] The Court explained that although the waiver rule "may deter a defendant from taking the stand" because a defendant will be subject to cross-examination and impeachment by prior conviction evidence, the rule does not prevent a defendant from taking the stand.[90] The Court concluded that "'it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify.'"[91] Accordingly, the Court found that a defendant who introduces impeachment evidence on direct examination may not appeal the admissibility of that evidence.[92]

Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, dissented, contending that the majority's waiver rule contains no precedential, evidentiary, or trial practice support.[93] Justice Souter first disagreed with the majority's reliance on *Luce* in which the Court held that a defendant who does not testify in his own defense cannot appeal a motion in limine ruling permitting the admissibility of prior conviction impeachment evidence.[94] The Court in *Luce* reasoned that because the defendant did not testify and the impeachment never occurred, appellate review would be impossible without a record from which to determine whether or not the defendant was harmed by the in limine ruling.[95] According to Justice Souter, *Luce* "merely acknowledged the incapacity of an appellate court to assess the significance of the ruling for a defendant who remains silent" and, therefore, did not

86. *Id.*
87. *See supra* text accompanying notes 46-54.
88. 120 S. Ct. at 1854-55. *See* FED. R. EVID. 103.
89. 120 S. Ct. at 1855.
90. *Id.*
91. *Id.* (quoting McGautha v. California, 402 U.S. 183, 215 (1971)).
92. *Id.*
93. *Id.* (Souter, J., dissenting).
94. *Id.*
95. *Id.* at 1856.

control the instant case.[96] Justice Souter also disagreed with the majority's reliance on the "'commonsense'" rule that "'a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted.'"[97] This principle simply does not reach the situation in which a defendant opposes the admissibility of evidence and then introduces it only to "mitigate its effect in the hands of her adversary" and is, therefore, treated by evidentiary scholarship as an exception to the general principle.[98]

Justice Souter then analyzed the rationale and policy concerns underlying the practical application of the Federal Rules of Evidence. He noted that under Rule 102, the rules "'shall be construed to secure fairness in administration . . . to the end that the truth may be ascertained and proceedings justly determined.'"[99] Justice Souter explained that when a defendant admits to a prior conviction on direct examination, the factfinder is more inclined to scrutinize carefully all the further testimony of the defendant in order to come to a just result.[100] But when a defendant chooses to conceal prior convictions that are later elicited on cross-examination, the factfinder is less inclined to believe the defendant and may discount her testimony, which will impede the factfinder's duty of ascertaining the truth.[101] Justice Souter concluded that the majority's waiver rule discourages the defendant from introducing any evidence of prior conviction and, thus, is "antithetical to dispassionate factfinding in support of a sound conclusion."[102] However, the majority of the Court concluded that the waiver rule is sound, fair, and unburdensome to defendants.[103]

IV. IMPLICATIONS

The holding in *Ohler* establishes that under the Federal Rules of Evidence, once the trial judge has made a definitive ruling that evidence

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96. *Id.*

97. *Id.*

98. *Id.* (citing 1 JOHN H. WIGMORE, EVIDENCE § 18, at 836 (P. Tillers rev. 1983) ("[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."); MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 103.4, at 17 (1981) ("However, the party may . . . himself bring out evidence ruled admissible over his objection to minimize its effect without it constituting a waiver of his objection.") (footnotes omitted)).

99. *Id.* at 1857 (quoting FED. R. EVID. 102).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1855.

of a defendant's prior conviction is admissible, a defense attorney whose client decides to testify is faced with a Hobson's choice: The attorney can reveal the evidence on direct examination, thus losing the right to appeal the possible erroneous ruling but retaining the opportunity to reduce the sting of the evidence, or the attorney can wait until the prosecutor reveals the evidence on cross-examination, thus preserving the right to appeal but foregoing the opportunity to demonstrate that the defendant has been forthcoming. Indeed, *Ohler* places the defendant in the precarious situation of deciding between putting the best defense forward at trial, by mitigating the sting of the conviction evidence, and retaining the right to appeal the potentially erroneous ruling. How should the practitioner resolve the dilemma?

Conventional trial strategy leans toward a presumption of "inoculating" the jury with bad facts on direct examination.[104] This inoculation theory is based on the premise that a jury perceives the defendant as more credible when he introduces evidence of damaging prior convictions because the defendant has been forthcoming in admitting character and behavior flaws.[105] However, a countervailing view known as the sponsorship theory presumes that jurors actually do not perceive a defendant to be more credible if he introduces a conviction himself rather than awaiting its introduction by the Government.[106] This theory suggests that rather than highlighting weaknesses in one's own case, the defendant should force the other side to elicit the potentially damaging facts and to assume the burden of convincing the jury that these facts are material.[107] Indeed, the central premise of the sponsorship strategy is that "'the jury does not expect an advocate to go out of his way to present evidence harmful to his case . . . [and] will not view him as unfair if he fails to do so.'"[108] Thus, while the inoculation theory advises a defendant to introduce all bad evidence to the jury up front, the sponsorship theory advises a defendant not to solicit and highlight bad evidence to the jury.[109]

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104. Robert H. Klonoff & Paul L. Colby, *Responding to a May 2000 Legal Article: The Flawed Empirical Testing of Sponsorship Strategy*, 63 TEX. B.J. 754, 754 (2000).

105. *Id.* at 754 n.2.

106. ROBERT H. KLONOFF & PAUL L. COLBY, SPONSORSHIP STRATEGY: EVIDENTIARY TACTICS FOR WINNING JURY TRIALS (1990). *See generally* Paul L. Colby & Robert H. Klonoff, *Sponsorship Strategy: A Reply to Floyd Abrams and Professor Saks*, 52 MD. L. REV. 458 (1993).

107. Colby & Klonoff, *supra* note 106, at 459.

108. *Id.* at 461 (quoting KLONOFF & COLBY, SPONSORSHIP STRATEGY, *supra* note 106, at 101. *See* Respondent's Brief, Ohler v. United States, 120 S. Ct. 1851 (2000) (No. 98-9828) (citing sponsorship theory text).

109. *See supra* text accompanying notes 103-07.

Therefore, in consideration of the result of *Ohler* and of these competing theories, a defense attorney is required to make a more exacting analysis of the likelihood of a successful appeal of the trial court's ruling on the motion in limine versus the perceived advantages of disclosing the damaging evidence on direct examination. Because evidentiary questions are subject to an abuse of discretion standard of review, the more relevant the prior conviction is to credibility, the less likely the trial judge's ruling will be reversed on appeal. Therefore, the defense attorney may want to bring out crimes that are considered closer to a defendant's credibility in greater detail on direct examination to avail the defendant of the full opportunity to explain the prior conviction. In addition, the defense attorney should consider more carefully how the failure to reveal each item of evidence could be assessed by the jury. Indeed, the perceived value of early disclosure of this evidence is that the jury will find the defendant more credible because the defendant was honest and did not conceal damaging evidence in a self-preserving manner.

In addition, a defense attorney may consider a number of factors relating to the prior conviction in making the decision whether to elicit it on direct examination. These factors, which the trial judge considers in making the ruling to allow admissibility of the prior conviction, include the nature of the prior crime, the similarity of the prior crime to the present crime, the nearness or remoteness of the prior crime to the present crime, and the extent to which the prior crime affects the credibility of the defendant.[110] If the crime the defendant was previously convicted of is similar, close in time, or relevant to the defendant's credibility, the defense attorney may lean toward not bringing it out on direct examination in the hopes that the prosecutor will not risk reversal by bringing it out on cross-examination.

An alternative approach to the *Ohler* dilemma attempts to accommodate both inoculation and sponsorship considerations.[111] This technique would have the defense attorney ask the client on direct examination, "Do you understand that, because you have chosen to testify, the prosecutor will be allowed to ask you things about your past that were not part of their original case? Are you willing to answer her questions?" The defense attorney, after asking this question, would then not elaborate in any further detail about the evidence. This technique accommodates both of the opposing tactical theories while preserving appellate possibilities: Objections made to the prior convictions will not

110. 1 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 609.3 (4th ed. 1996).

111. Interview with Deryl Dantzler, Professor of Trial Advocacy, Mercer Law School; Dean of National Criminal Defense College (Feb. 2, 2001).

be waived, but the defendant demonstrates forthrightness without conceding to the jury any relevance to the evidence.[112]

Essentially, the Supreme Court's holding in *Ohler* that a defendant waives appellate review of a ruling allowing the government to impeach the defendant with prior conviction evidence when this evidence is first elicited by the defense puts an enormous burden on the defense attorney to make very carefully the election whether to reveal or to conceal evidence of a defendant's prior conviction on direct examination.

MISTY DAWN GARRETT

112. *Id.*