

EVIDENCE—PRESERVATION OF ISSUES FOR APPEAL—OBJECTION TO THE ADMISSIBILITY OF PRIOR CONVICTION EVIDENCE IS WAIVED WHEN A DEFENDANT TESTIFIES TO SUCH EVIDENCE ON DIRECT EXAMINATION—*Ohler v. United States*, 120 S. Ct. 1851 (2000).

In 1997, a customs inspector stopped the appellant, Maria Ohler, while she was driving a vehicle from Mexico to California. *Ohler v. United States*, 120 S. Ct. 1851, 1852 (2000). The inspector observed that someone had altered one of the vehicle's interior panels. After a search of the vehicle, customs inspectors seized close to 81 pounds of marijuana. The inspectors arrested Ohler, and she was later charged with importation of marijuana, as well as possession with the intent to distribute.

In 1993, prior to these events, Ohler had been found guilty of possessing methamphetamine. Before trial, the Government filed *in limine* motions with the district court seeking the admission of Ohler's prior felony conviction as character evidence pursuant to Federal Rule of Evidence 404(b) and for impeachment purposes pursuant to Rule 609(a)(1). The district court denied the use of the conviction for character purposes under 404(b), but at trial allowed the Government to use Ohler's prior conviction for impeachment purposes under Rule 609(a)(1). Testifying at trial, Ohler admitted to the 1993 conviction of possession of methamphetamine conviction during direct examination. The jury returned a verdict of guilty on both counts, and the district court sentenced Ohler to thirty months incarceration.

The United States Court of Appeals for the Ninth Circuit affirmed the district court's *in limine* ruling allowing the use of the prior conviction for impeachment purposes. *Id.* at 1853. The court of appeals held that Ohler had waived her objection to the district court's ruling because she testified to her prior conviction during her direct examination. *Id.* (citing *Ohler v. United States*, 169 F.3d 1200 (9th Cir. 1999)).

The United States Supreme Court granted *certiorari* and affirmed, holding that a criminal defendant waives her right to appeal the admission of prior conviction evidence if she testifies to such evidence during direct examination. *Id.* at 1853, 1855. Chief Justice Rehnquist, writing for a five-member majority, began the opinion by reviewing the general rule that a party who introduces evidence at trial cannot thereafter complain to a reviewing court of its erroneous admission. *Id.* at 1853. The Chief Justice found neither Rule 103 nor Rule 609 to be inconsistent with this general

principle. *Id.* Rather, the majority observed that Rule 103 merely governs the timeliness and substance of an objection and does not deal with the waiver of a prior objection, the admission of evidence during direct examination, or the later appeal of such an admission. *Id.*

Continuing, the Court also found that Rule 609(a) merely permits the use of a witness's prior convictions for impeachment purposes, on either direct or cross examination, upon the fulfillment of certain conditions. *Id.* Chief Justice Rehnquist, recognizing that Rule 609(a) allows the admission of impeachment evidence during direct examination, rejected the notion that the rule allows a defendant to testify to prior convictions on direct examination while simultaneously maintaining an objection to the admissibility of such evidence. *Id.*

The Court next addressed Ohler's contention that a defendant may admit prior conviction evidence during direct examination in order to lessen the impact of such evidence on the jury and that a waiver rule would force the loss of that tactical advantage. *Id.* The majority found that such a contention obscures the real issue: Both the Government and the defendant must make tactical choices throughout the course of a trial. *Id.* at 1854. The Chief Justice observed that a defendant must first decide whether or not to testify in his or her own defense and risk possible impeachment by prior convictions during cross-examination. *Id.* The Court remarked that the defendant then must choose whether or not to introduce prior conviction evidence during direct examination in the hope of appearing more credible to a jury. *Id.*

The majority recognized that the Government also has choices to make if the defendant elects to testify. *Id.* Chief Justice Rehnquist observed that the Government must decide whether or not to impeach a defendant using prior conviction evidence after weighing the effectiveness of the prior conviction evidence against the potential risk of reversal on appeal if the trial court erroneously admits the evidence. *Id.* The Court propounded that, though the Government undoubtedly has an advantage over the defendant in that cross-examination follows direct examination, a defendant cannot eliminate this decision-making process and still preserve the admission of a prior conviction as an issue for appeal. *Id.* The majority, relying on the similar case of *Luce v. United States*, found that a defendant suffers no harm per se from a district court's *in limine* ruling. *Id.* at 1854. (citing *Luce v. United States*, 469 U.S. 38, 41 (1984)). The Court declared that it is not unfair to require a defendant to make the choice between providing direct testimony of a prior conviction, thereby waiving right to appeal, or remaining silent about prior convictions and preserving the issue for appeal if the Government does raise the issue on cross examination. *Id.* at 1855.

Finally, the Court rejected the proposition that a waiver rule unconstitutionally burdens a defendant's right to testify. *Id.* at 1855. The majority contended that a waiver rule does not prevent a defendant from testifying to any admissible evidence she so chooses to reveal. *Id.* The Chief Justice maintained that the threat of cross-examination—specifically impeachment by prior convictions—is not an unconstitutional burden on a defendant's right to testify. *Id.* (citing *McGautha v. California*, 402 U.S. 183 (1971)). The Court held that Ohler's introduction of her prior conviction during her direct examination constituted a waiver to the *in limine* ruling admitting such evidence and thus could not be appealed. *Id.*

Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, dissented. *Id.* (Souter, J., dissenting). The dissent argued that the majority's opinion lacked support in both the Federal Rules of Evidence and precedent. *Id.* Justice Souter questioned the Court's reliance on *Luce v. United States* for the derivation of a waiver rule. *Id.* at 1855 (Souter, J., dissenting) (citing *Luce v. United States*, 469 U.S. 38 (1984)). The dissent maintained that *Luce* stands for the proposition that a defendant faced with an *in limine* ruling admitting prior conviction evidence for impeachment purposes must actually testify in order to argue against the admission of such evidence on appeal. *Id.* As such, Justice Souter asserted that *Luce* merely recognized an appellate court's inability to assess an *in limine* ruling if the defendant fails to testify and did not establish a waiver of the right to appeal the ruling. *Id.* at 1855-56 (Souter, J., dissenting).

The dissent distinguished *Luce* from the present case, observing that the district court's *in limine* ruling controlled Ohler's decision to testify to her prior conviction, and that a factual record of the testimony was preserved for appellate review. *Id.* at 1856 (Souter, J., dissenting). Justice Souter proclaimed that the *in limine* ruling certainly controlled Ohler's attorney's decision to testify about the conviction, observing that counselors do not set out to impeach their own clients. *Id.* Consequently, the dissent argued that *Luce* does not control the case at bar because a reviewing court could pinpoint the harm to the defendant and perform a harmless error analysis. *Id.*

The dissent next rejected the majority's reliance on the general rule that a party who introduces evidence at trial cannot thereafter complain to an appellate court of its erroneous admission, contending that it was not based upon precedent, but rather a "commonsense" rule. *Id.* Justice Souter, recognizing the common sense notions behind such a rule in certain situations, argued that the same common sense dictates the opposite result in the instant case. *Id.* The dissent propounded that, when a defendant opposes the admission of the evidence and subsequently introduces the evidence to mitigate its effect on the jury, the case falls outside the scope of

this general rule. *Id.* Justice Souter argued that the law of evidence fails to support the majority's position, and, in fact, points to the opposite conclusion. *Id.* at 1857 (Souter, J., dissenting).

Continuing, the dissent addressed the majority's contention that it is not unfair to force the defendant to choose between testifying to prior conviction evidence or remaining silent to preserve the appeal. *Id.* Justice Souter asserted that the goal of the rules of evidence and the role of the court is the discovery of the truth, and not the preservation of tactical advantages at trial. *Id.* The dissent argued that the majority's approach does not meet this goal. *Id.* The Justice asserted that the purpose of Rule 609 is to provide the jury with information for judging the veracity of the defendant's testimony. *Id.* The dissent stressed that such a purpose is served even if the defendant testifies to prior convictions. *Id.*

Finally, Justice Souter observed that the introduction of prior conviction evidence during cross-examination might in fact cause the jury to believe the defendant was intentionally trying to conceal the evidence. *Id.* Justice Souter remarked that such a situation is antithetical to the purpose behind Rule 609 in that the jury's role in seeking the truth is potentially compromised by their human emotions. *Id.* The Justice concluded by finding no reason to dissuade the defendant from admitting prior conviction evidence during her direct examination by foreclosing an opportunity to appeal the admission. *Id.* at 1857-58 (Souter, J., dissenting).

While the purpose of Federal Rule of Evidence 609(a) is to provide the jury with evidence to be used solely for judging the credibility of the defendant, practical considerations dictate that the evidence might be used for purposes other than impeachment. As a result, the defendant is likely to testify to the prior conviction evidence during direct examination in an attempt to lessen its impact on the jury, preferring an acquittal rather than the preservation of an issue for appeal. If the trial court erroneously admitted the prior conviction evidence, then the defendant was tactically forced to introduce inadmissible evidence and now has no recourse if the jury finds her guilty. Thus, after the Court's decision in *Ohler*, defendants must now reevaluate whether the tactical advantage of introducing prior conviction evidence on direct outweighs the potential harm in waiving the right to appeal the court's *in limine* ruling allowing such evidence.

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