

Pricking Boils, Preserving Error: On the Horns of a Dilemma After *Ohler v. United States*

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INTRODUCTION

Steal the other side's thunder.¹ Inoculate the jury.² Draw the sting.³ Prick the boil.⁴ Regardless of whether the metaphor is climatological, pharmacological, or medical, the meaning is the same. Conventional wisdom advises trial advocates to disclose the weaknesses in their cases at trial before the other side has the opportunity to exaggerate their significance in the case.⁵ This advice is ubiquitous⁶ for at least three

¹ See Kipling D. Williams, Martin J. Bourgeois, and Robert T. Croyle, *The Effects of Stealing Thunder in Criminal and Civil Trials*, 17 LAW. & HUM. BEHAV. 597, 597 (1993) [hereinafter Williams, et al.] (describing tactic of disclosing negative information about one's client before opponent can do so as "stealing thunder").

² See Quentin Brogdon, *Admissibility of Criminal Convictions in Civil Cases*, 61 TEX. B. J. 1112, 1118 (1998) (stating "[Y]ou can preemptively inoculate the jury against [the] impact [of a witness's criminal conviction] by mentioning it to the jury before the other party introduces the evidence."); Douglas S. Rice & Ellen L. Leggett, *Empirical Study Results Contradict Sponsorship Theory*, INSIDE LITIG., Aug. 1993, at 20 (referring to preemptive introduction of "case facts detrimental to [a party's] own side" as "inoculation").

³ See James A. Protin, *What Is a "Crime Relevant to Credibility"?* 54 MD. L. REV. 1125, 1130 (1995) (describing process of eliciting convictions on direct examination as permitting advocate to "draw the sting"); see also Floyd Abrams, *Trial Tactics: Sponsorship Costs of the Adversary System*, 101 YALE L. J. 1159, 1163 (1992) (noting that preemptive disclosure of weaknesses is believed to "take the sting out of the weakness by voluntarily disclosing it before the cross-examiner can effectively use it"); Michael J. Saks, *Flying Blind in the Courtroom: Trying Cases Without Knowing What Works or Why*, 101 YALE L. J. 1177, 1180 (1992) (stating "Conventional tactical wisdom holds that we should try to present the information to the jury before our adversary gets the chance to, so as to 'take the sting out' of the evidence or increase the perception of our credibility or fairness.").

⁴ See H. Mitchell Caldwell, et al., *Primacy, Recency, Ethos and Pathos: Integrating Modern Communication Principles Into the Direct Examination*, 76 NOTRE DAME L. REV. 423, 499 (2001) (noting that disclosure should diffuse impact of cross-examination).

⁵ 1 HERBERT J. STERN, TRYING CASES TO WIN 177 (1991) (advising lawyers that "[i]t is of the highest importance that the jury hear your explanation before your adversary's accusation").

⁶ The trial advocacy texts used in American law schools uniformly recommend preemptive disclosure of weaknesses. See, e.g., LAWRENCE A. DUBIN AND THOMAS F. GUERNSEY, TRIAL PRACTICE 63-64 (1991) (stating "The direct examination should expose a significant weakness known by the other side, because it will come out sooner or later."); ROGER HAYDOCK & JOHN SONSTENG, EXAMINING WITNESSES: DIRECT, CROSS, AND EXPERT EXAMINATION §1.54, at 71-72 (1994) (suggesting that advocates may need to present "[w]eaknesses in the witness' background or testimony . . . to minimize impact and to enhance the credibility of the witness and the attorney"); STEVEN LUBET, MODERN TRIAL ADVOCACY 31-32 (1993) (stating "From time to time it may be advisable to bring out potentially harmful or embarrassing facts on direct in order to blunt their impact on cross examination."); THOMAS MAUET, TRIAL TECHNIQUES 50-51 (4th ed.1996); ALBERT J. MOORE, ET AL., TRIAL ADVOCACY: INFERENCES ARGUMENTS AND TECHNIQUES 155-56 (1996) (stating "The conventional wisdom is to 'take the sting out' of cross by [disclosing weaknesses on direct]."); J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 357-58 (1983) (concluding that advocates should disclose "harmful evidence [that] is genuinely relevant to [their] case[s]" because such evidence "can have a serious impact on the

reasons: (1) the trier of fact is more likely to trust and respect an advocate or a witness who "volunteers" harmful information; (2) the disclosure avoids the risk that the trier of fact will believe that the party or witness concealed the damaging material; and (3) the advocate retains a measure of control over the disclosure of the perceived weaknesses and can couch the disclosure as sympathetically as possible.⁷

Despite its common sense appeal, preemptive disclosure does not come cheaply. In *Ohler v. United States*,⁸ the U.S. Supreme Court held, by a five to four majority, that a criminal defendant's disclosure of a prior criminal conviction during her direct examination waived that defendant's right to appeal the trial court's *in limine* ruling admitting the prior conviction.⁹ The majority found that a party cannot complain about evidence that it introduced.¹⁰ The Court's ruling in *Ohler* squarely pits good advocacy (preemptive disclosure of weaknesses) against good procedural practice (preserving errors for appeal), putting lawyers on the horns of a dilemma.¹¹ After *Ohler*, lawyers trying cases in federal court must pick their poison. They can either make the preemptive disclosure and waive their right to complain about any error on appeal, or they can allow the other side to disclose the harmful information, preserving the error and hoping for success on appeal.

The premise of this Article is that the result reached by the Supreme Court in *Ohler* was both unnecessary and unfortunate, though perhaps not particularly surprising.¹² The Court failed to recognize the

perceived credibility of the witness").

⁷ See, e.g., PETER MURRAY, BASIC TRIAL ADVOCACY 115 (1995) (noting that lawyer should present matters unfavorable to his witness on direct examination to defuse their otherwise unfavorable impact); WELCOME D. PIERSON, THE DEFENSE ATTORNEY AND BASIC DEFENSE TACTICS 224 (1956) (stating that "it is frequently advisable for the attorney to bring out the bad part as soon as possible after the witness is called to the stand"); THOMAS SANNITO & PETER J. MCGOVERN, COURTROOM PSYCHOLOGY FOR TRIAL LAWYERS 178 (1985) (advising trial lawyers to "make admissions of the weaknesses of your case, to demonstrate . . . objectivity and steal the thunder from your opponent's case" because then "jurors will be inclined to trust you and your evidence . . .").

⁸ *Ohler v. United States*, 529 U.S. 753 (2000).

⁹ *Id.* at 759.

¹⁰ *Id.*

¹¹ See 3 THE OXFORD ENGLISH DICTIONARY 362 (1933) (defining term "dilemma" as "[a] choice between two . . . alternatives, which are or appear equally unfavourable [sic]; a position of doubt or perplexity, a 'fix'"). *The Oxford English Dictionary* notes that "[t]he alternatives are commonly spoken of as the 'horns' of the dilemma." *Id.*

¹² See *United States v. Mezzanatto*, 513 U.S. 196, 203, 209 (1995) (holding that agreement to waive exclusionary provisions of Rule 410 of Federal Rules of Evidence regarding plea-statements is valid and comparing such waiver to frequent strategic decisions that parties make during trial to waive evidentiary objections; stating that

excruciatingly difficult decision faced by criminal defendants who have prior criminal convictions. Their ability to testify in their own defense is burdened by the specter of any prior criminal convictions. If defendants preemptively disclose their convictions, *Ohler* teaches that appeal on that point is foreclosed.¹³ If defendants instead fail to disclose their prior conviction during direct testimony, and allow juries to first learn of their convictions during cross-examination, juries will consider the defendants both felons *and* liars.¹⁴ The *Ohler* Court failed to account for the circumstances surrounding a typical disclosure. The disclosure is not "voluntary" in the manner normally required to bring about waiver.¹⁵ No party would "voluntarily" impeach himself. Instead, preemptive disclosures are compelled by trial court rulings that admit evidence in the first place. *Ohler* effectively penalizes lawyers who choose to make preemptive disclosures, or alternatively, creates a false impression with the jury when the lawyer chooses not to make the disclosure for the purpose of preserving error (suggesting that the party was attempting to hide something from the jury).

This Article examines the *Ohler* opinion and the larger question of waiver by preemptive disclosure. The Article begins, in Part I,¹⁶ with an analysis of the practice of disclosing witnesses. Part II¹⁷ discusses the legal backdrop to *Ohler*, including the common law approach to preemptive disclosures, the split of authority among the circuits regarding the proper approach under the Federal Rules of Evidence, and the important 1984 Supreme Court decision of *Luce v. United States*.¹⁸

"incredible dilemma" defendants face when forced to accept waiver in order to enter plea discussions is "indistinguishable from any of a number of difficult choices that criminal defendants face everyday").

¹³ *Ohler*, 529 U.S. at 759.

¹⁴ HAYDOCK & SONSTENG, *supra* note 6, at 71 (advising trial lawyers to volunteer weaknesses on direct examination to minimize impact and enhance credibility and stating that "[w]eaknesses revealed on direct examination demonstrate that neither the examiner nor the witness has anything to hide, reducing the adverse affect of the weakness."); LUBET, *supra* note 6, at 63 (stating that it is "advisable to bring out potentially harmful . . . facts on direct," and that "[t]he theory of such 'defensive' direct examination is that the bad information will have less sting if the witness offers it herself and, conversely, that it will be all the more damning if the witness is seen as having tried to hide the bad facts.").

¹⁵ BLACK'S LAW DICTIONARY 1580 (6th ed. 1990) (defining "waiver" as "[t]he intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right Essential to waiver is the voluntary consent of the individual.").

¹⁶ See *infra* notes 21-77 and accompanying text.

¹⁷ See *infra* notes 78-161 and accompanying text.

¹⁸ *Luce v. United States*, 469 U.S. 38 (1984); see *infra* notes 94-106 and accompanying text (discussing *Luce v. United States*).

Part III¹⁹ examines the *Ohler* decision itself. Finally, in Part IV, the implications of *Ohler* are considered.²⁰ The Article concludes that the Court erred in finding waiver in *Ohler* and did so in disregard of the interests of truth, justice, and effective trial advocacy.

I. PREEMPTIVE DISCLOSURE OF WEAKNESSES

To fully appreciate the Court's decision in *Ohler v. United States*, one must understand the perceptions of lawyers about preemptive disclosures – why they disclose weaknesses, how they make the disclosures, and their perceptions about the impact of the disclosures on the jury. In addition, one must understand the "science" behind preemptive disclosures, including recent studies attempting to measure the persuasive value of such efforts. This Part explores both the practical and theoretical dimensions of the disclosure of weaknesses.

A. Disclosing Weaknesses in an Adversary System

Effective persuasion at trial requires that advocates build a sacred bond with jurors based on mutual respect and trust.²¹ That respect and trust must be earned during the course of the trial by the advocate's demonstration, in thousands of ways both large and small, that he or she is in fact worthy of the jury's trust. Building trust and respect is immeasurably more difficult because of the skepticism about the motivations of lawyers with which most jurors begin a trial. They perceive the lawyers as motivated by money and partisanship and largely unconcerned with truth or justice.²² An effective advocate must combat these all-too-real perceptions from the very beginning of the trial, refusing to give jurors any opportunity to confirm their stereotypes.

One means of refuting juror skepticism is for the lawyer to display a measure of objectivity and a strong sense of fairness.²³ Commentator and trial lawyer Herbert J. Stern has observed that effective advocacy

¹⁹ See *infra* notes 162-232 and accompanying text.

²⁰ See *infra* notes 233-350 and accompanying text.

²¹ ROGER HAYDOCK & JOHN SONSTENG, TRIAL: THEORIES, TACTICS, TECHNIQUES § 6.7, at 266 (stating that "[t]he greater the rapport jurors feel toward the lawyer, the more persuasive an advocate that lawyer will be.").

²² ROBERT H. KLONOFF & PAUL L. COLBY, SPONSORSHIP STRATEGY 19 (1990) (stating "[T]he jury views each attorney . . . as a hired gun with one task to perform: to win the case for his client."); STERN, *supra* note 5, at 14 (stating that "[j]urors know that [lawyers are] advocate[s] for profit. That means they know [lawyers] are in it for the money.").

²³ STERN, *supra* note 5, at 30 (advising lawyers that they should "[n]ever give the jury the impression that [their] objectivity has been lost").

requires that an advocate avoid being too partisan or appearing too zealous.²⁴ Instead of arguing every contention no matter how weak it is, an advocate should argue only the strongest claims.²⁵ Instead of refusing to concede anything to the other side, the advocate should give away those points she cannot prove anyway, and which are not important to the outcome of the case.²⁶ Instead of burying her head in the sand and ignoring the sometimes glaring weaknesses in the case, an advocate should disclose the weaknesses early in the case, before the opponent is able to exploit them.²⁷ Jurors view these modest steps as important evidence that a lawyer can be trusted and deserves a measure of respect.²⁸

In this way, the preemptive disclosure of weakness flows naturally out of the need for juror trust. Confession is not simply good for the soul,²⁹ it is also indispensable for ultimate success at trial. The premise of preemptive disclosure is that people who confess their own shortcomings and flaws enhance the believability of their message.³⁰ The drafters of the Federal Rules of Evidence recognized the reliability of statements made against the declarant's interest and codified a hearsay exception for such statements in Rule 804(b)(3).³¹ The principle is not a

²⁴ *Id.* at 29-30.

²⁵ *Id.* (stating "You must never advance a weak argument, unless you cannot win without it.").

²⁶ *Id.* (stating "Weak arguments should not merely be avoided; they should be voluntarily handed over to the jury.").

²⁷ *Id.*

²⁸ *See id.* at 29-31.

²⁹ WILLIAM GEORGE SMITH, *THE OXFORD DICTIONARY OF ENGLISH PROVERBS* 478 (2d ed. 1952) (stating "Open confession is good for the soul."); BURTON STEVENSON, *THE HOME BOOK OF QUOTATIONS* 295: 13 (2d ed. 1934) (attributing phrase "open confession is good for the soul" to George Herbert, *Jacula Prudentum*).

³⁰ HAYDOCK & SONSTENG, *supra* note 6, § 1.54, at 71-72 (suggesting that advocates may need to present "[w]eaknesses in the witness's background or testimony . . . to enhance the credibility of the witness and the attorney").

³¹ *See* FED. R. EVID. 804(b)(3). The rule provides, in pertinent part:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * *

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

new one. The ancient Roman poet, Marcus Valerius Martialis, wrote in the first century: "Conceal a flaw and the world will imagine the worst."³² Conversely, the jury, when faced with a preemptive disclosure, believes the best about the disclosing party: "If the lawyer (and/or witness) is willing to disclose harmful information (facts that make the case (or the witness) less persuasive), he must be interested more in the truth than in winning." The apparent fairness reflected by preemptive disclosures forces the jury to modify favorably its impression of the advocate and his or her motivations.

From the lawyer's perspective, preemptive disclosure is beneficial not only for the trust it builds, but also because of the control it gives the lawyer.³³ If credibility is essential to success at trial, then control, or at least the perception of being in control, is essential to a lawyer's sanity during trial. By disclosing harmful information early in the trial – during *voir dire*,³⁴ the opening statement,³⁵ and on direct examination³⁶ – the advocate maintains some control over how the weakness is portrayed and how much information is revealed. The "head in the sand" approach, which simply ignores all damaging information, essentially cedes control of the weakness of the opponent. This is an untenable approach for any advocate.

B. The Conventional Wisdom About Disclosure

The practice of disclosing weaknesses enjoys a substantial history. Long before social scientists turned their attention to the trial process, commentators recognized the need for lawyers to preemptively disclose weaknesses.³⁷ The author's experiences, however, reveal that lawyers only inconsistently followed that advice. The reticence on the part of lawyers is understandable. After all, a core principle of the adversary system is that when both parties present their "best" case to the jury the

Id.

³² See generally JAMES MICHIE, *THE EPIGRAMS OF MARTIAL* (1973).

³³ See JAMES W. MCELHANEY, *TRIAL NOTEBOOK* 518 (3d ed. 1994) (advising trial lawyers to "take the other side's attack on your case and bring it out in your own way before the other side gets a chance to use it themselves").

³⁴ *Id.* at 520.

³⁵ JULIUS B. LEVINE, *WINNING TRIAL ADVOCACY: HOW TO AVOID MISTAKES MADE BY MASTER TRIAL LAWYERS* 28 (1989).

³⁶ MCELHANEY, *supra* note 33, at 519.

³⁷ See, e.g., JOHN C. REED, *CONDUCT OF LAWSUITS OUT OF AND IN COURT* 250 (1885) (noting that "if there [was] something adverse apparent on the surface, the examiner in chief had better [draw] it out himself").

truth will prevail.³⁸ The disclosure of "weaknesses" is, by definition, the revelation of information that the party would prefer to conceal. Accordingly, it is not the party's "best" case, but rather seems more analogous to a soldier's self-inflicted wounds in the midst of combat. Moreover, as the various names given the act of making preemptive disclosures suggest, the disclosure itself is painful. Lawyers and commentators describe it as drawing the sting,³⁹ or, worse yet, pricking the boil.⁴⁰ No one enjoys the procedure at the time, but it is essential for one's long term health. In the same way, no one approaches preemptive disclosure with pleasure, but rather endures the pain of disclosure for the improved chance of success with the jury in the long run.

Not all lawyers agree with the wisdom of preemptive disclosure. Some believe that the pain of making the disclosure is simply too great to bear.⁴¹ Others simply disagree with the notion that preemptive disclosures enhance the party's credibility in the jury's eyes.⁴² Two former prosecutors, Robert Klonoff and Paul Colby, subscribe to the latter position, and in the early 1990s they wrote a book entitled *Sponsorship Strategy* about their views.⁴³ The authors developed a "sponsorship theory" of trial advocacy, arguing that advocates should pay careful attention to the evidence they choose to introduce (or "sponsor") at trial because of the jury's purported assumption that parties will introduce only the best evidence they have.⁴⁴ Klonoff and Colby theorized that jurors are inherently skeptical of lawyers; jurors assume lawyers are partisans who strive to win at all costs.⁴⁵ Thus, the jury

³⁸ See *Herring v. New York*, 422 U.S. 853, 862 (1975) (stating "The very premise of our adversary system is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."); Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 IND. L.J. 301, 316-17 (1989) (noting that in adversary systems, when both sides present their best case, decision-maker has all information it needs to reach just result).

³⁹ See *supra* note 3 and accompanying text.

⁴⁰ See *supra* note 4 and accompanying text.

⁴¹ See, e.g., Michael H. Leonard, *How to Win Jury Trials: Building Credibility with Judges and Jurors*, FEDERAL LAWYER, Nov./Dec. 1998, 54, 55 (book review) (agreeing with Klonoff and Colby that disclosing weaknesses magnifies importance of evidence and concedes its materiality and that advocates are better off ignoring their weaknesses and presenting only their best evidence).

⁴² See KLONOFF & COLBY, *supra* note 22, at 1.

⁴³ See *id.*

⁴⁴ *Id.* at 7 (noting that central thesis of their theory is "that the impact of an item of evidence on the jury's verdict will often be decisively influenced by the identity of the party who introduces that item into evidence").

⁴⁵ *Id.* at 19.

exaggerates the importance of damaging material introduced by the damaged party, giving such admissions full value without attributing to the party any enhanced credibility.⁴⁶ According to Klonoff and Colby, the jury discounts all of the positive evidence introduced at trial, but fully credits all of the negative evidence introduced.⁴⁷

Though their theory has provoked substantial response from practitioners and academics alike,⁴⁸ it has not been widely embraced. Klonoff and Colby developed their sponsorship theory based on their collective experience in the courtroom as trial lawyers,⁴⁹ not based on any empirical studies of the effect of sponsorship.⁵⁰ Most of the literature, however, regardless of the position or perspective of the author, continues to espouse preemptive disclosure.⁵¹

The failure of sponsorship theory to gain a foothold is important for purposes of this article because it demonstrates the extent to which disclosure of weaknesses is an accepted part of trial advocacy. Empirical data collected since the publication of *Sponsorship Strategy* further bolsters the argument of those who favor the preemptive disclosure of weaknesses.⁵² The next section describes that data.

C. Empirical Data Supporting Disclosure

Three separate studies conducted after the introduction of sponsorship theory all concluded that preemptive disclosures enhance lawyer and witness credibility.⁵³ The largest of the studies, involving more than 250 college students, presented a criminal case in which the defendant twice had been convicted of the charged crime.⁵⁴ When the

⁴⁶ *Id.*

⁴⁷ *Id.* at 22 (stating "The jury will accept nothing at face value that either advocate says with one critical exception: any concession made by the advocate will be fully credited and held strictly against him.")

⁴⁸ Abrams, *supra* note 3, at 1159-60.

⁴⁹ KLONOFF & COLBY, *supra* note 22, at 9-10 (noting that book's conclusions were based on logic, longstanding evidentiary principles, and authors' trial experiences).

⁵⁰ Saks, *supra* note 3, at 1178.

⁵¹ E.g., Quentin Brogdon, *Inoculating Against Bad Facts: Brilliant Trial Strategy or Misguided Dogma?*, 63 TEX. B. J. 443, 447 (May 2000) (stating "The empirical research confirming the triumph of inoculation over sponsorship squares with common wisdom and intuition. [I]n cases involving material, harmful evidence, inoculation offers a tested effective approach to dealing with that evidence."); Rice & Leggett, *supra* note 2, at 20.

⁵² See *infra* notes 53-63 and accompanying text.

⁵³ Williams, et al., *supra* note 1, at 597; Rice and Leggett, *supra* note 2, at 20.

⁵⁴ Williams, et al., *supra* note 1, at 601. The study included 257 college students enrolled in introductory psychology classes. The transcript of the trial was 18 pages,

defendant preemptively disclosed the prior convictions, the participants were less likely to convict than when the prosecution disclosed the information first.⁵⁵ Moreover, disclosure resulted in greater credibility for the defendant and the defense lawyer than did non-disclosure.⁵⁶ Similar findings were obtained in the other two studies, both of which involved civil fact patterns.⁵⁷ The group of jurors who heard the

single-spaced, and lasted 35 minutes when acted out. The case involved an assault and battery in which the defendant was accused of beating the victim after an argument. *See id.* The participants read the transcript or saw the trial reenacted in groups of up to six. Some participants observed the "no thunder" condition, in which no evidence of the prior criminal convictions of the defendant was introduced at trial. Some participants were given the "thunder" condition, in which the prosecution elicited the prior convictions during its cross-examination of the defendant. A third group of participants observed the "stolen thunder" condition, in which the defense attorney revealed the prior convictions and "downplayed the importance of [them] by noting that [they are] not to be considered evidence of culpability." *Id.* Each version of the trial included multiple eyewitnesses who placed the defendant at the scene, although the evidence for guilt had been pretested to be ambiguous. *Id.* After the trial, the participants were given a questionnaire, which asked them to render a verdict and to evaluate the credibility of the defense attorney, prosecutor, and defendant. *Id.*

⁵⁵ *See id.* at 601-02 (stating "stolen thunder" probability of guilt scores ($M=5.83$) were significantly lower than those in the "thunder" condition, $t(166) = 1.96$, $p < .05$ "). In order, the likelihood of guilt was greatest when the prosecution disclosed the prior convictions (the "thunder" condition), next greatest when the defendant disclosed the conviction preemptively (the "stolen thunder" condition), and least likely when the prior convictions were not admitted at all. *See id.* Thus the study may reveal not only the power of preemptive disclosure, but also the high probative value that juries attach to prior convictions, particularly when the convictions are similar to the charged offense. *See infra* notes 240-42 and accompanying text (discussing impact of prior convictions on juries).

⁵⁶ *See id.* at 602. On a 9 point scale, with 0.0 being not credible and 9.0 being totally credible, the participants rated the defendant's convincingness as follows:

No Thunder	5.06
Thunder (no disclosure)	4.24
Stolen Thunder (disclosure)	4.61

See id. Similarly, defense attorney honesty increased with disclosure and the difference was statistically significant. *See id.* at 601-02.

⁵⁷ *See id.* at 603-07; Rice & Leggett, *supra* note 2, at 21. In a second study by Williams and his colleagues, about 150 college students read or watched testimony from an actual civil case involving a suit by a man's estate against a shipyard claiming that the decedent's lung cancer had been caused by his exposure to asbestos at the shipyard. *See Williams, supra* note 1, at 604. The variable piece of evidence was the credibility of plaintiff's expert medical witness. The expert had testified in a different case the previous week that it was not scientifically valid to determine causation merely from past medical records. That testimony was inconsistent with his approach to the causation question in the present case, in which he had opined about the cause of the decedent's death based solely on reviewing medical records. *See id.* The inconsistency presented an impeaching opportunity to the defendant. As with the earlier study, one group of participants did not learn of this inconsistency (the "no thunder" condition); in a second group the inconsistency was elicited on cross-examination by the defendant (the "thunder" condition); and in the third group

preemptive disclosure found the plaintiff's position more persuasive than did the no disclosure group and found the plaintiff's lawyer more honest and persuasive. For example, on a scale of 1 to 9, with 9 being completely persuasive, the jurors in the disclosure group rated the plaintiff's lawyer 6.53 on honesty compared to 6.13 in the non-disclosure group, and 7.39 on clarity compared to 6.52.⁵⁸ In one of those studies the researchers concluded that there were three rewards of preemptive disclosure, including: (1) a reduction in the persuasiveness of the opponent's claims; (2) an enhancement of the jurors' views of the disclosing lawyer with a concomitant decrease in their opinion of the character and effectiveness of the opposing lawyer; and (3) an increase in the strength of the jurors' commitment to the position espoused by the disclosing lawyer.⁵⁹

These studies are helpful in that they provide some additional evidence in support of the practice of preemptively disclosing weaknesses. However, several methodological weaknesses in the

the expert disclosed the inconsistency on direct and explained that as an expert he could testify for both sides of such a controversial issue. *See id.*

As with the first study, preemptive disclosure by the plaintiff's expert significantly enhanced the likelihood of a verdict for the plaintiff and led to higher ratings of the expert's preparedness, convincingness, and trustworthiness when compared to the non-disclosure scenario. *See id.* at 605-06. For example, the participants in the stolen thunder situation perceived the expert as being substantially more prepared than in the thunder situation, 7.4 to 5.8 on a 9 point scale; in the stolen thunder situation the participants rated the expert at 6.5 in terms of his convincingness, compared to 4.6 in the thunder condition; and in the stolen thunder condition the participants rated the expert 6.4 for trustworthiness compared to 4.7 in the thunder condition. *See id.* Remarkably, plaintiff's disclosure resulted in more plaintiff's verdicts than even the condition in which the expert's past testimony was altogether ignored. *See id.* The breakdown was as follows:

No Thunder:	58% (for plaintiff)
Thunder:	43% (for plaintiff)
Stolen Thunder:	65% (for plaintiff)

See id. The researchers concluded that "the present studies indicate that stealing thunder can be an effective presentation strategy and that it appears to work by enhancing the presenter's credibility."

In a smaller study, but one conducted using jury-eligible adults, the results were similar. *See Rice & Leggett, supra* note 2, at 21. In this study two groups of seventy-five viewed video tapes of plaintiff and defense opening statements. One group heard a plaintiff's opening statement that "scrupulously avoided any mention of the . . . fact [that plaintiff had been drinking]." *See id.* The other group heard the plaintiff's disclosure of the allegation of drinking and plaintiff's explanation that the plaintiff's blood alcohol was below the legal limit and that plaintiff did not have a reputation as a drinker. Both groups heard the same defense opening statement, which made full use of plaintiff's alleged drinking. *See id.*

⁵⁸ Rice and Leggett, *supra* note 2, at 21.

⁵⁹ *Id.*

studies ensure that they will not be the last word on the effectiveness of making preemptive disclosures at trial. In two of the studies the researchers used college students and relied on simulations.⁶⁰ The third study relied on a relatively small number of adult participants and provided them with each side's opening statements only.⁶¹ Drawing broad, irrefutable conclusions from these studies is not appropriate.⁶² Nevertheless, the larger and more significant point is that practitioners and commentators alike continue to hold firmly to the practice of preemptive disclosure.⁶³ The fact that it is so widely endorsed means that courts must be prepared to respond to the implications of disclosure and must respond in a way that takes into account the realities of the courtroom.

D. Practical Considerations When Disclosing Weaknesses

Preemptive disclosure can take many forms. The most common disclosure that finds its way into appellate opinions is a criminal defendant's disclosure of a prior conviction.⁶⁴ But that is far from the only kind of weaknesses disclosed by litigants. The list of possible disclosures extends to any kind of impeaching point, including a witness's alleged bias, interest, or prior inconsistent statement.⁶⁵ It might also include preemptive explanations of aspects of the witness's testimony that might seem farfetched or unbelievable or past nonconviction misconduct of the witness.

In all cases, an advocate's decision to make the disclosure is a matter of last resort, reached only after the advocate has exhausted all available means of excluding the evidence outright and the court has rejected all such efforts. Typically, the party's first step when confronted with damaging evidence is to attempt to exclude the evidence by means of a

⁶⁰ Williams, et al., *supra* note 1, at 597.

⁶¹ Rice and Leggett, *supra* note 2, at 20.

⁶² James W. McElhane, *Persuasive Organization*, LITIG., Spring 2000, 51, 66 (observing that "[m]ost lawyers agree" it is "a serious mistake" to ignore weaknesses in your own case).

⁶³ MCELHANEY, *supra* note 33, at 350 (stating "The current bias is in favor of bringing out harmful information [on direct examination] rather than leaving it to the other side.").

⁶⁴ *Id.* at 519 (stating that "[o]ne of the best times to take the other side's attack is when you represent the criminal defendant with a record of prior convictions who decides to take the witness stand.").

⁶⁵ *Id.* at 517-20 (discussing variety of situations in which it is wise to "steal your opponent's thunder," including when witness in a criminal case has past record, civil trials, and settlement negotiations).

pre-trial motion in limine.⁶⁶ The purpose of the motion in limine, of course, is to prevent the opponent from being able to mention or discuss the weakness in front of the venire during *voir dire* or before the jury during opening statement.⁶⁷ An additional benefit of the motion in limine is that it allows the advocates to brief the question and the court to fully consider the issue. This is often impossible with evidentiary issues that arise in the middle of trial.⁶⁸ The frustration with motions in limine, on the other hand, is that judges are wary of giving definitive rulings,⁶⁹ thus limiting the extent to which the movant can plan his or her trial strategy. Yet, regardless of the outcome, judges often give some indication of how they are leaning on the motion or the nature of their concerns about the evidence, providing trial counsel with useful information for trial planning purposes.

If the judge denies the motion in limine,⁷⁰ the advocate must then decide whether to disclose the weakness or to wait and see whether and how the opponent uses the evidence. The prevailing view, of course, is that the party should draw the sting of the evidence by preemptively disclosing the harmful material and should do so as early as possible.⁷¹ At the same time, conventional wisdom recognizes that whether or not to disclose is often a difficult decision. The decision turns on a number of considerations, including the extent to which the evidence will be prejudicial to the party or witness, the existence of an explanation for the weakness, and whether or not the other party knows about the weakness and is likely to use it.⁷²

⁶⁶ STERN, *supra* note 5, at 162-63 (stating "Your rule of thumb should be to make a number of motions in limine-whenver you have a strong argument against admissibility.").

⁶⁷ See HAYDOCK & SONSTENG, *supra* note 6, § 5.5, at 169 (noting that "[m]otions in limine are commonly brought prior to jury trials to avoid the prejudicial impact of inadmissible evidence on the jurors . . ."); MURRAY, *supra* note 7, at 236 (stating that purpose of motion in limine is "to argue the evidence point in advance so that the potentially inadmissible material will not slip out before objection"); STERN, *supra* note 5, at 163 (advising trial lawyers to "[u]se the motion in limine before opening and even before trial").

⁶⁸ HAYDOCK & SONSTENG, *supra* note 6, § 4.8, at 128 (stating "Seeking an advance ruling of an in limine motion promotes trial efficiency and permits the judge more time for reflection.").

⁶⁹ See STERN, *supra* note 5, at 163 (stating that "as a general rule, judges hate making decisions if they can avoid them," and, therefore, "the judge would like to postpone the decision if he can.").

⁷⁰ See *id.*

⁷¹ See Williams, et al., *supra* note 1.

⁷² See Caldwell, et al., *supra* note 4, at 499.

The advocate's decision about whether or not to make the disclosure must be made at the very beginning of the case, before *voir dire* or the opening statement, when the jury begins to form lasting impressions.⁷³ Of course, even after the advocate decides to make the disclosure, the strategic decision-making required on the issue does not end. In fact, the *manner* in which the disclosure is made may be as important as the fact of disclosure itself. Most commentators advise that the timing and method of disclosure should avoid emphasizing the harmful material.⁷⁴ That is, the disclosure should not look like a "disclosure." It should be seamlessly woven into the story, not conspicuously exposed as if it was some toxic poison that required a warning.⁷⁵ Thus, the disclosure should be made at a logical point in the presentation and not as part of an abrupt transition to a new topic.⁷⁶ And, the principles of primacy and recency dictate that weaknesses should not be disclosed at the beginning or ending of the opening or direct. Instead, they should be buried in the middle so as not to draw undue attention to them.⁷⁷

The broad acceptance among practitioners of the practice of preemptive disclosure, the existence of empirical data that seems to confirm disclosure's presumed effectiveness, and the developing body of literature regarding the optimum methods of making the disclosure, emphasize the degree to which preemptive disclosure is a part of the art of modern trial advocacy. The prominent role of disclosure makes unavoidable the question of the legal impact of the "voluntary" disclosure of harmful material. Is preemptive disclosure simply a tactical device, a gimmick, used by practitioners to gain an advantage at trial? Or, is it a legitimate effort by trial lawyers to avoid creating the impression that the party was attempting to hide certain unfavorable information? A court's answer to these questions — its perspective on the very nature of preemptive disclosure — may well dictate its

⁷³ See MCELHANEY, *supra* note 33, at 353 (advising trial lawyers who choose to make pre-emptive disclosure, to do so earlier because "[b]etween two equally plausible versions of an event, the one that is heard first is more likely to be accepted as true").

⁷⁴ See *infra* notes 75-77 and accompanying text.

⁷⁵ MAUET, *supra* note 6, at 87 (advising that when weakness is volunteered on direct examination it is best to "make it part of the story").

⁷⁶ TANFORD, *supra* note 6, at 358 (noting that damaging evidence must fit logically into sequence of direct examination because "a sudden break to insert damaging evidence will only emphasize it").

⁷⁷ LUBET, *supra* note 6, at 64 (stating that "[b]y definition, bad facts cannot possibly be the strong points of your case, so you will always want to bury them in the middle of the direct examination."); MAUET, *supra* note 6, at 87 (advising that "[w]hen you do decide to volunteer a weakness, it is usually best to bury it in the middle of the direct examination . . .").

determination of the procedural impact of disclosure. Part II describes the contrasting answers given by courts to those questions and the difference those answers have made in each court's analysis.

II. PRELUDE TO *OHLEK*: THE HISTORICAL DEVELOPMENT OF THE WAIVER DISPUTE

The unusual context of preemptive disclosures presents several difficult evidentiary questions. In the typical trial scenario, evidence is offered by the party benefitted by the evidence and the party harmed by the evidence registers an objection. In the preemptive disclosure context, however, the identity of the proponent of the evidence and the timing of the objection both change. The party producing the evidence is the party harmed by the evidence. Thus, the party disclosing the evidence does not register a contemporaneous objection, but rather relies on prior court rulings admitting the damaging evidence. Each of these changed conditions has significant evidentiary implications. The submission of the evidence by the harmed party presents the specter of waiver, and the absence of a contemporary objection creates concerns about the preservation of error. This Part addresses both of those issues, beginning with preservation of error.

A. *Preservation of Error and Motions in Limine*

In an adversary system the fundamental requirement for the preservation of error is a specific objection timely lodged by the opponent of the evidence.⁷⁸ Rule 103 of the Federal Rules of Evidence leaves no doubt about the necessity of an objection: "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless . . . a timely objection or motion to strike appears of record, stating the specific ground of objection. . . ."⁷⁹ The rule could not be more adamant: no objection, no preservation of error.⁸⁰ The objection must be both timely and specific.⁸¹ But what does timely mean? Does a pre-trial motion in limine satisfy the timeliness requirement? Traditionally, courts have held that pre-trial rulings on motions in limine are not final rulings and,

⁷⁸ FED. R. EVID. 103(a).

⁷⁹ *Id.*

⁸⁰ Rule 103(d) does except "plain error" from the objection requirement. FED. R. EVID. 103(d). Plain error is limited to trial error that is not only clear, but also causes a miscarriage of justice. *Wilson v. Williams*, 182 F.3d 562, 568 (7th Cir. 1999) (en banc).

⁸¹ *See id.* (requiring objections to be timely and specific).

thus, do not preserve any error for appeal.⁸² Instead, the party who loses the motion in limine must raise the objection again when the evidence is offered.⁸³

A review of modern decisions by federal courts reveals a disturbing diversity of opinions about the effect of a trial court ruling on a motion in limine.⁸⁴ The approaches taken by circuit courts include: rulings on motions in limine are never appealable;⁸⁵ in limine rulings are appealable if the ruling involved an issue capable of pretrial determination;⁸⁶ in limine rulings are appealable if the matter was thoroughly briefed so that the district court was fully informed;⁸⁷ in limine rulings are appealable only if there was a good reason for not objecting at trial;⁸⁸ and in limine rulings are appealable if the court's ruling was definitive and not conditional or tentative.⁸⁹

⁸² 1 FRED LANE, GOLDSTEIN TRIAL TECHNIQUE § 7.09 (3d ed. 1999) (stating "The court's ruling on a motion in limine is only a preliminary ruling which may be modified during the course of a trial as the evidence in the trial fully develops."); TANFORD, *supra* note 6, at 313 (stating "A ruling on a motion in limine usually is not final.").

⁸³ MCCORMICK ON EVIDENCE 85 (John W. Strong ed., 5th ed. 1999) (stating "If she loses the motion, the prevailing view requires the opponent to renew the objection at trial in order to preserve the issue for appeal.").

⁸⁴ See generally James Joseph Duane, *Appellate Review of In Limine Rulings*, 182 F.R.D. 666, 668 (1999) (noting variety of positions adopted by circuit courts on effect of rulings on motions in limine and concluding that "the worst feature of current law is that many circuits have, in very different ways, adopted nebulous standards that leave even the most sophisticated attorneys guessing whether their own court of appeals will deem their appellate claims to have been preserved").

⁸⁵ See, e.g., *United States v. Sides*, 944 F.2d 1554, 1560 (10th Cir. 1991) (quoting *Wilson v. Waggener*, 837 F.2d 220, 222 (5th Cir. 1987)) (stating "[A] party whose motion in limine is overruled must renew his objection when the evidence is about to be introduced at trial."); *McEwen v. City of Norman*, 926 F.2d 1539, 1544 (10th Cir. 1991) (stating "A party whose motion in limine has been overruled must nevertheless object when the error he sought to prevent by his motion occurs at trial.").

⁸⁶ See, e.g., *United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993) (reciting three-part test for when motion in limine need not be renewed, including that issue "can be finally decided in a pretrial hearing").

⁸⁷ See, e.g., *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112, 1118-19 (8th Cir. 1985) (holding that because issue was "fully briefed and argued" ruling on motion in limine was appealable).

⁸⁸ See, e.g., *Rojas v. Richardson*, 703 F.2d 186, 189 (5th Cir. 1983) (stating that "Objection must be made in the trial court unless a good reason exists not to do so.").

⁸⁹ See, e.g., *Greger v. Int'l Jensen, Inc.*, 820 F.2d 937, 941 (8th Cir. 1987) (noting that trial court's "definitive" pretrial ruling obviated need for party to continue objecting); *Am. Home Assurance Co. v. Sunshine Supermarket, Inc.* 753 F.2d 321, 324-25 (3d Cir. 1985) (concluding that when issue is fully addressed and definitive ruling is made before trial, party need not object again to preserve error). A definitive ruling is one that completely and finally decides an issue such that an objection is unnecessary to preserve the error. *Wilson v. Williams*, 182 F.3d 562, 566 (7th Cir. 1999) (en banc). A conditional ruling is one

The limited circumstances in which in limine rulings preserve error works the greatest mischief on criminal defendants whose prior convictions have been ruled admissible. In those situations, defendants must choose between two unattractive options. On the one hand, they can testify at trial and suffer impeachment (thus enhancing the likelihood of conviction). Or, on the other hand, they can give up the right to testify in their own defense simply to avoid revealing the prior conviction, and surrender the right to appeal the court's in limine ruling on the conviction. In an effort to avoid that conundrum altogether, some defendants, prior to the Supreme Court's opinion in *Luce v. United States*,⁹⁰ argued that in limine rulings on the admissibility of their prior convictions should preserve error when the defendants provided the court with a pretrial proffer of their proposed testimony. The circuit courts split over the use of this tactic. Some courts permitted defendants to substitute a proffer about the expected nature of their trial testimony for their actual testimony.⁹¹ This provided the trial court with a basis for ruling on the admission of the defendant's conviction, without requiring the defendant to actually take the stand in the event the conviction was admitted.⁹² Other courts insisted that the defendant actually testify to preserve the point for appeal.⁹³

In *Luce*, the Court resolved the circuit split on the use of proffers. The *Luce* defendant was tried on charges of conspiracy and possession of cocaine with intent to distribute.⁹⁴ The defendant moved for exclusion of a prior conviction for possession of a controlled substance, but without a proffer of his anticipated testimony or a commitment to testify if the

that requires the satisfaction of a condition before the court can render a definitive ruling, such as the requirement that the defendant must take the stand to testify before the evidence will be excluded or limited. *Id.* at 565. A tentative ruling is, by definition, not final because the court needs more information or the admissibility questions turns on later developments. *Id.*

⁹⁰ *Luce v. United States*, 469 U.S. 38 (1984).

⁹¹ *See, e.g., United States v. Cook*, 608 F.2d 1175, 1183-84 (9th Cir. 1979) (holding that defendant could challenge trial court ruling under Rule 609 of Federal Rules of Evidence if defendant established on record that he would testify if his prior convictions were excluded).

⁹² *Id.* (noting that defendant must "outline the nature of his testimony so that the trial court, and the reviewing court, can do the necessary balancing contemplated in Rule 609."); *see also New Jersey v. Portash*, 440 U.S. 450 (1979) (upholding appellate review of trial court's admission of defendant's grand jury testimony despite defendant's failure to testify at trial); *Brooks v. Tennessee*, 406 U.S. 605 (1972).

⁹³ *See, e.g., United States v. Hasting*, 461 U.S. 499 (1983).

⁹⁴ *Luce*, 469 U.S. at 39.

motion was granted.⁹⁵ The trial court made a conditional ruling on the motion, finding that the conviction would be admissible for impeachment purposes if the defendant testified and denied any prior drug use or involvement.⁹⁶ However, if the defendant limited his testimony to explaining his effort to avoid the police, the conviction would not be admissible for any purpose.⁹⁷ The defendant chose not to testify and was convicted.⁹⁸ He subsequently sought reversal of the conviction based on the trial court's denial of his motion in limine. The Supreme Court held that criminal defendants must testify before a trial court can properly balance the probative value of the conviction with the potential for unfair prejudice and definitively rule on the admissibility of the prior conviction. The Court's ruling unequivocally foreclosed the proffer approach.⁹⁹ Similarly, the Court took a dim view of the argument that rulings on motions in limine should preserve error.¹⁰⁰ It noted:

Any possible harm flowing from a district court's in limine ruling permitting impeachment by a prior conviction is wholly speculative. The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed 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.¹⁰¹

The Court also rested its ruling on the fact-specific inquiry required under Federal Rule of Evidence 609(a)(1)¹⁰² and the court's resultant need to know "the precise nature of the defendant's testimony."¹⁰³ For most convictions, Rule 609(a)(1) requires the trial judge to balance the probative value of the prior conviction against its unfair prejudice.¹⁰⁴

⁹⁵ The only indication in the record regarding the precise offense for which the defendant had been convicted was the government's representation in its opposition to the motion. *See id.*

⁹⁶ *Id.* at 40.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *See id.* at 43.

¹⁰⁰ *See id.* at 43-44 (Brennan, J., concurring) (stating that court was not "deciding broader questions of appealability *vel non* of in limine rulings that do not involve Rule 609(a)").

¹⁰¹ *See id.* at 41-42.

¹⁰² *See* FED. R. EVID. 609(a)(1); note 169 (text of Rule 609(a)(1)).

¹⁰³ *See Luce*, 469 U.S. at 41.

¹⁰⁴ *See* FED. R. EVID. 609(a)(1). The precise balancing required under the rule depends on the identity of the witness. The standard provided by Rule 403 (probative value is substantially outweighed by unfair prejudice) governs the admission of felony convictions of all witnesses other than criminal defendants, while a modified balancing test (probative

That task necessarily requires some sense of a witness's testimony and the nature of the prior conviction.¹⁰⁵ Finally, the Court noted that a trial court is limited when ruling on future contingencies. Specifically, without the defendant's testimony, the court "has no way of knowing whether the Government would have sought to impeach with the prior conviction."¹⁰⁶

The Supreme Court's decision in *Luce* paved the way for the issue presented in *Ohler*. The *Luce* requirement that criminal defendants must testify to preserve for appeal the issue of the trial court's admission of prior convictions put defendants in a quandary: testify and preserve error or do not testify and waive error. And, of course, in the aftermath of *Luce*, conventional wisdom for those defendants who chose to testify in their own defense dictated that they preemptively disclose their prior convictions. This opened another Pandora's box of waiver risks. Yet, *Luce* provided no direct guidance on the value of motion in limine rulings in the context of preemptive disclosures. Moreover, the confused state of the circuits on the question left advocates guessing whether a pretrial ruling effectively preserved error. Undoubtedly, the safest course of action then and now is to renew the objection when the evidence is offered during the trial. That is easier said than done in the *Ohler* situation, however, because the proponent of the evidence is also the one who should lodge an objection.

B. Waiver of Error

It is a fundamental premise of evidence law that parties cannot complain about evidence that they introduce.¹⁰⁷ That principle is nothing more than a straightforward application of waiver. A party waives any error created by the admission of evidence which that party chooses to introduce into evidence.¹⁰⁸ For example, when a defendant charged with being a felon in possession of a firearm testifies about the details of a prior felony conviction in an effort to explain the circumstances of the conviction, despite being entitled to have such evidence excluded, that defendant cannot later complain about the government's introduction of

outweighs prejudicial effect) governs the admission of felony convictions of the accused. *Id.*

¹⁰⁵ See *Luce*, 469 U.S. at 41.

¹⁰⁶ See *id.* at 42.

¹⁰⁷ MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 103.4 (5th ed. 2001) (stating that party introducing evidence cannot later complain about admission of that evidence).

¹⁰⁸ See *id.*

evidence on the same point.¹⁰⁹ Of course, the commonsense application of waiver in that situation is not nearly as straightforward in the context of a party who makes preemptive disclosures. At least two reasons explain the difference. First, and perhaps most importantly, preemptive disclosure is not entirely "voluntary," but rather is arguably "coerced" by the trial judge's adverse ruling on the party's previous motion in limine.¹¹⁰ Second, the disclosure is made not to advance the party's case on the merits, but to avoid giving the jury the impression that the disclosing party was trying to hide the harmful material.¹¹¹ Thus, the notion that one cannot complain about the evidence that he or she introduces is simply inadequate to answer the questions presented by preemptive disclosures. Does a party, by means of the strategic choice to disclose to the jury adverse information, give up all rights to appeal the court's rulings on the disputed evidence?

At the time the Court decided *Luce*, federal circuit courts were split over the effect of a party's preemptive disclosure of prior convictions.¹¹² The disagreement centered on whether a defendant who moved in limine to exclude a prior conviction, but lost that motion, and then testified at trial and disclosed the conviction during direct examination, lost the right to appeal the court's in limine ruling. *Luce* did not specifically address that question,¹¹³ though it did enhance the likelihood that the question would arise much more frequently.

The substantial majority of courts of appeals that addressed the issue held that preemptive disclosure by the defendant waived any right to

¹⁰⁹ See *United States v. Joost*, 133 F.3d 125, 128 (1st Cir. 1998). In *Joost*, the defendant, appearing pro se, made a number of procedural errors. Despite being entitled to a stipulation regarding the existence of the prior conviction without the introduction of any evidence of the nature or details of the conviction as a result of the Supreme Court's opinion in *Old Chief v. United States*, 519 U.S. 172, 187-192 (1997), the defendant failed to object to the prosecution's evidence of the conviction and proceeded to offer his own testimony about the conviction.

¹¹⁰ See BLACK'S LAW DICTIONARY 1580 (6th ed. 1990) (defining "waiver" as "[t]he intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right Essential to waiver is the voluntary consent of the individual.").

¹¹¹ LUBET, *supra* note 6, at 31-32 (stating that although "bad facts cannot possibly be the strong points of your case . . ." they must sometimes be brought out defensively on direct examination rather than waiting until cross because they will be "all the more damning if the witness is seen as having tried to hide the bad facts").

¹¹² *Luce v. United States*, 469 U.S. 38, 40 (1984); see, e.g., *Reyes v. Missouri Pac. RR*, 589 F.2d 791, 793 n.2 (5th Cir. 1979) (concluding that preemptive disclosure on direct examination does not constitute waiver); *Sharter v. United States* 412 F.2d 428, 434 (9th Cir. 1969) (finding that preemptive disclosure constitutes waiver).

¹¹³ See *Luce*, 469 U.S. at 40-41.

appeal the error.¹¹⁴ For example, six years before the federal rules of evidence were codified, the Ninth Circuit, in *Shorter v. United States*,¹¹⁵ held that a defendant who offered prior convictions during his own testimony at trial waived the right to complain about the admission of the convictions.¹¹⁶ The court explained that the defendant could not complain about his own act of offering the evidence, noting that the defendant voluntarily offered the convictions as a matter of trial strategy.¹¹⁷ In the following years, the Ninth Circuit repeatedly turned to the "trial strategy" theme,¹¹⁸ noting that the preemptive strike was "strategic" rather than the result of "compulsion."¹¹⁹

More than twenty years later, the Ninth Circuit, in *Williams v. United States*,¹²⁰ further explained its rationale for finding waiver when a party makes preemptive disclosures. The defendant faced trial on two counts of cocaine possession with intent to distribute and the prosecution sought to introduce evidence that the defendant had been convicted previously for possession of marijuana for sale.¹²¹ The court ruled in limine that the prior conviction was admissible to impeach the defendant under Rule 609(a)(1).¹²² The defendant took the witness stand and disclosed the prior conviction on direct examination. However, the prosecution never asked about the conviction or mentioned it during the trial.¹²³ The defendant was convicted on both counts and appealed, claiming that the court's ruling on the prior conviction was reversible error.¹²⁴

The Ninth Circuit refused to address the admissibility question, finding that the error was waived by the defendant's preemptive act of

¹¹⁴ See *infra* notes 115-133 (discussing courts of appeals which have adopted waiver approach to preemptive disclosure).

¹¹⁵ *Shorter v. United States*, 412 F.2d 428 (9th Cir. 1969).

¹¹⁶ See *id.* at 434.

¹¹⁷ See *id.*

¹¹⁸ See, e.g., *United States v. Cook*, 608 F.2d 1175, 1184-85 (9th Cir. 1979) (en banc); *United States v. Lasky*, 548 F.2d 835, 837 (9th Cir. 1977) (per curiam); *United States v. Murray*, 492 F.2d 178, 197 (9th Cir. 1973); *Tucker v. United States*, 431 F.2d 1292, 1293 (9th Cir. 1970); *Plies v. United States*, 431 F.2d 727, 729 (9th Cir. 1970); *Jordan v. United States*, 428 F.2d 7, 9 (9th Cir. 1970).

¹¹⁹ See *Lasky*, 548 F.2d at 837.

¹²⁰ *United States v. Williams*, 939 F.2d 721 (9th Cir. 1991).

¹²¹ See *id.* at 723.

¹²² See *id.*

¹²³ See *id.* In *Ohler*, by contrast, the prosecution asked the defendant one question concerning the prior conviction during its cross-examination of her. See *infra* note 186 and accompanying text (discussing prosecution's cross-examination of Ohler).

¹²⁴ See *Williams*, 939 F.2d at 722.

disclosure.¹²⁵ The court relied on the tentative nature of in limine rulings, the impossibility of deciding after the fact whether the prosecution would have actually used the prior conviction if it had not been disclosed by the defendant, and the fact that defendant had voluntarily elicited the conviction himself.¹²⁶ The court expressed concern about the defendant's strategic choice, concluding that approving such a choice "would in effect be licensing defendants to plant irremediable errors in their trials during direct examination."¹²⁷ The court, while recognizing that the defendant's choice "between preempting the prosecution and preserving the Rule 609 objection for appeal may be perilous," found comfort in the fact that the choice is not unlike many other decisions defense counsel has to make at trial.¹²⁸

The Ninth Circuit was far from alone in adopting the hardline waiver position. The First,¹²⁹ Sixth,¹³⁰ Seventh,¹³¹ Eighth,¹³² and Tenth¹³³ Circuits adopted the waiver position for largely identical reasons: the uncertainty of in limine rulings, the preemptive nature of the disclosure (precluding the prosecution from deciding whether to use the conviction), and the "voluntary" nature of the disclosure.

The relatively brief opinions of these courts are not particularly clear about which particular principle undergirds their rationale. Is the problem that defendants who make preemptive disclosures in reliance on in limine rulings have *failed to preserve* error because such rulings are merely advisory and tentative? Or, is the problem that the defendant elicited the evidence himself, thus *waiving* any trial court error? Or, perhaps both failure to preserve error and waiver support the court decisions.

¹²⁵ See *id.* at 723.

¹²⁶ See *id.*

¹²⁷ See *id.* at 725.

¹²⁸ See *id.*

¹²⁹ See, e.g., *United States v. Cignac*, 119 F.3d 67 (1st Cir. 1997); *Gill v. Thomas*, 83 F.3d 537 (1st Cir. 1996); *United States v. Levesque*, 681 F.2d 75 (1st Cir. 1982).

¹³⁰ See, e.g., *United States v. Gaitan-Acevedo*, 148 F.3d 577 (6th Cir. 1998).

¹³¹ See, e.g., *United States v. DePriest*, 6 F.3d 1201 (7th Cir. 1993); *United States v. Berry*, 661 F.2d 618 (7th Cir. 1981); *United States v. Hauff*, 395 F.2d 555 (7th Cir. 1968).

¹³² See, e.g., *United States v. Einfeldt*, 138 F.3d 373 (8th Cir. 1998); *United States v. Warren*, 16 F.3d 247 (8th Cir. 1994); *United States v. Smiley*, 997 F.2d 475 (8th Cir. 1993); *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. Cobb*, 588 F.2d 607 (8th Cir. 1978).

¹³³ See, e.g., *United States v. Martinez*, 76 F.3d 1145 (10th Cir. 1996); *United States v. Mejia-Alarcon*, 995 F.2d 982 (10th Cir. 1993); *United States v. Sides*, 944 F.2d 1554 (10th Cir. 1991); *McEwen v. City of Norman*, 926 F.2d 1539 (10th Cir. 1991).

A recent series of decisions from the Seventh Circuit helps to illustrate the confusion over the waiver rationale. In *United States v. DePriest*,¹³⁴ the Seventh Circuit ruled that the defendant's "decision to testify before he obtained a ruling on his motion effectively waived any objection that he had regarding the [disputed evidence]."¹³⁵ The court seemed to take pains to emphasize its waiver rationale, noting that even if the defendant had sought and obtained a ruling from the court before testifying it would not have effected the outcome. "[A] defendant waives his right to appeal a trial court's pretrial ruling that a prior conviction can be used by the prosecution for purposes of impeachment when the defendant himself brought out the fact of the prior conviction in his direct testimony."¹³⁶

In *Wilson v. Williams*,¹³⁷ decided four years after *DePriest*, the appeals court upheld the trial court's in limine admission of the plaintiff's prior conviction based upon the plaintiff's failure to object to its admission during trial. The court said that an in limine ruling is "essentially an advisory opinion by the trial court" which the court may change or reconsider at any point.¹³⁸ The plaintiff's failure to obtain "leave to enter a 'continuing objection' specific enough to cover the evidence in dispute" was fatal to the plaintiff's appeal.¹³⁹ The court did not mention waiver despite the fact that the plaintiff disclosed the prior conviction during his direct examination testimony.¹⁴⁰

The Seventh Circuit subsequently reviewed *Wilson v. Williams*, *en banc*,¹⁴¹ and reversed its course on the effect of preemptive disclosures. The court concluded that the plaintiff "did not surrender his objection by making the best he could of his situation after the judge's adverse ruling."¹⁴² Surprisingly, however, the court decreed that its ruling was

¹³⁴ *DePriest*, 6 F.3d at 1201.

¹³⁵ *See id.* at 1209.

¹³⁶ *See id.*

¹³⁷ *Wilson v. Williams*, 161 F.3d 1078 (7th Cir. 1998).

¹³⁸ *Id.* at 1085.

¹³⁹ *Id.* at 1087.

¹⁴⁰ *Id.* at 1078.

¹⁴¹ *Wilson v. Williams*, 182 F.3d 562 (7th Cir. 1999) (*en banc*).

¹⁴² *See id.* at 566. The court held that definitive rulings do not require further objection, while conditional and tentative rulings are not final rulings for purposes of appeal. *See id.* at 565-66. In *Wilson*, the trial court's pretrial ruling, which allowed the defendant-police officer to mention that the plaintiff had been convicted for killing a law enforcement official, was definitive, and therefore, no further objection was necessary at least as to the specific evidence the court had ruled admissible. *See id.* at 566. The *en banc* court ultimately concluded that the plaintiff had waived the point anyway because he failed to object to the defendant's "cop killer" references and other evidence and arguments that

"compatible" with *DePriest* because the trial judge in that case had not rendered a definitive ruling before the disclosure was made.¹⁴³ The Seventh Circuit found waiver when the party's preemptive disclosure was in response to a tentative ruling from the court and suggested that there would be no waiver for such disclosures based on definitive pretrial rulings.¹⁴⁴ The court's careful distinction shows the close interplay between preservation of error and waiver.

The Seventh Circuit, in rejecting the waiver argument, joined several other circuits who have found that preemptive disclosure was an appropriate tactical choice for litigants.¹⁴⁵ The seminal case is the Fifth Circuit's decision in *Reyes v. Missouri Pacific Railroad Co.*¹⁴⁶ In *Reyes*, the plaintiff brought a diversity action against the railroad for injuries suffered when Reyes was run over by a train as he was lying across the tracks.¹⁴⁷ He claimed that the railroad acted negligently in failing to discover him and stop the train before it ran over him.¹⁴⁸ The railroad sought to introduce four prior misdemeanor convictions of Reyes for public intoxication as proof that he was intoxicated on the night he was injured.¹⁴⁹ Reyes moved in limine to exclude the convictions, but the trial

were outside the scope of the court's pretrial ruling. *See id.* at 567-68.

The Seventh Circuit noted that its recognition that definitive rulings on motions in limine preserve error without further objection would save time, avoid unnecessarily alerting the jury to the inadmissible evidence, remove a trap for "unwary counselors," and "permit the parties to adjust their trial strategy in light of the court's decisions." *See id.* at 566. The court observed:

[The plaintiff] wanted to keep the occupation of his victim out of the case, but if this could not be accomplished he wanted to introduce the evidence himself, if only to draw its sting. Sensible adaptations could not be accomplished if Wilson had to wait until Williams offered the evidence, and then raise an objection, acting in the jury's eyes as if he had something to hide. *Id.*

¹⁴³ *See id.* at 566-67 (stating "Our conclusion that preemptive use of evidence does not waive an established objection is compatible with *United States v. DePriest*, . . . which held that a defendant gives up his objection by making use of the evidence before the district judge renders a definitive ruling.").

¹⁴⁴ *See id.* at 567.

¹⁴⁵ *See, e.g.,* *Richardson v. Missouri Pac. R.R. Co.*, 186 F.3d 1273 (10th Cir. 1999); *Palmerin v. City of Riverside*, 794 F.2d 1409 (9th Cir. 1986); *Am. Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321 (3d Cir. 1985); *Reyes v. Missouri Pac. R.R.*, 589 F.2d 791 (5th Cir. 1979).

¹⁴⁶ *Reyes*, 589 F.2d at 791.

¹⁴⁷ *Id.* at 792.

¹⁴⁸ *Id.* *Reyes* claimed that he was knocked unconscious by an unidentified third person and left on the railroad tracks. *Id.* at 793.

¹⁴⁹ *Id.* The railroad alleged contributory negligence based on Reyes' intoxication and the fact that he was wearing dark clothing such that he could not be seen by the railroad

judge denied the motion.¹⁵⁰ Reyes then attempted to draw the sting of the convictions by testifying about them during his direct.¹⁵¹ On appeal, the *Reyes* court rejected the railroad's argument that the plaintiff had waived error by bringing out on direct examination his prior convictions for public intoxication.¹⁵² In fact, the language used by the court stood in stark contrast to the language used by the Ninth Circuit in *Shorter* and its progeny. The court in *Reyes* concluded: "[a]fter the trial court refused to grant Reyes' motion in limine to exclude the evidence, he had no choice but to elicit this information on direct examination in an effort to ameliorate its prejudicial effect."¹⁵³ Instead of finding that the plaintiff's strategic choice came with a price, waiver, the court found that the disclosure was anything but voluntary. The plaintiff "had no choice," thus the disclosure could not constitute a waiver, which, by definition, is a voluntary relinquishment of a known right.¹⁵⁴

Subsequent decisions in the Fifth and Eleventh Circuits also follow the "no waiver" position.¹⁵⁵ Those courts have focused on the difficult choice faced by litigants after a trial court refuses to exclude harmful evidence. For example, in *United States v. Fisher*,¹⁵⁶ the Fifth Circuit held that a "party who attempts to anticipate . . . negative evidence" does not waive any rights by introducing the evidence himself. The court observed that "[w]hen the government obtains a ruling in advance allowing it to introduce prior conviction evidence, the defendant is faced with a difficult dilemma: to refrain from testifying in his own defense or risk impeachment by the opposite side."¹⁵⁷ The court concluded that a

employees who were on the train. *Id.*

¹⁵⁰ *Id.* The trial judge agreed with the railroad that the convictions were admissible to prove that Reyes was intoxicated on the night of the accident. *Id.* The Fifth Circuit reversed on this point as well, holding that the convictions were improper propensity evidence. *Id.* at 795.

¹⁵¹ *Id.* at 793.

¹⁵² *See id.* at 795.

¹⁵³ *See id.* at 793 n.2.

¹⁵⁴ *See supra* note 15, and accompanying text.

¹⁵⁵ *See, e.g.,* *United States v. Fisher*, 106 F.3d 622, 629 (5th Cir. 1997); *Judd v. Rodman*, 105 F.3d 1339, 1342 (11th Cir. 1997); *Petty v. Ideco*, 761 F.2d 1146, 1152 n.3 (5th Cir. 1985); *Rojas v. Richardson*, 703 F.2d 186, 189 (5th Cir. 1983); *Coursey v. Broadhurst*, 888 F.2d 338, 341 n.3 (5th Cir. 1989). A number of state courts have adopted the no waiver position as well. *See, e.g.,* *People v. Turner*, 789 P.2d 887, 890 n.18 (Cal. 1990) (stating that "Given the apparent futility of an effort to exclude the prior convictions, however, prudent counsel would be well advised to minimize their 'sting' by eliciting them himself [or herself]. Such defensive acts do not waive an objection on appeal."); *Harley-Davidson Motor Co. v. Daniel*, 260 S.E.2d 20, 22 (Ga. 1979).

¹⁵⁶ *Fisher*, 106 F.3d at 622.

¹⁵⁷ *See id.* at 629.

finding of waiver under such circumstances would violate "basic notions of fairness."¹⁵⁸ In addition, the Fifth and Eleventh Circuits have recognized the awkwardness of requiring a party to object to evidence that the party is introducing. In *Rojas v. Richardson*,¹⁵⁹ the Fifth Circuit recognized the general rule that an objection must be made to preserve error, but with an exception for situations in which "a good reason" exists to not object, such as a strategic attempt "to soften the blow of damaging information."¹⁶⁰ The court concluded: "*An objection to one's own testimony is an absurdity. It is impossible.*"¹⁶¹

The split between the circuits that existed before *Ohler* created an unsettling reality. Federal litigants in Texas or Florida could confidently disclose harmful material to the jury, knowing that they would be able to raise the issue of the correctness of the court's pretrial ruling on appeal. At the same time, however, federal litigants in California or Illinois faced the impossible task of choosing whether to give up appellate rights (by making disclosure) or to refrain from disclosing damaging material (and preserve the right to appeal the issue). In the case of *Ohler v. United States* the Supreme Court seized the opportunity to resolve the circuit split once and for all by determining the impact of a criminal defendant's preemptive disclosure of damaging material.

III. *OHLER V. UNITED STATES*

At approximately 7:15 a.m. on July 29, 1997, United States customs inspectors stopped Maria Suzuki Ohler as she attempted to enter the United States from Mexico.¹⁶² While checking Ohler's van, a customs

¹⁵⁸ *See id.*

¹⁵⁹ *Rojas*, 703 F.2d at 186.

¹⁶⁰ *Id.* at 189.

¹⁶¹ *See id.* at 189; *see also* *Judd v. Rodman*, 105 F.3d 1339, 1342 (11th Cir. 1997) (quoting *Rojas* with approval and holding that plaintiff's preemptive disclosure of her prior sexual history "constituted valid trial strategy"). As stated in note 155, *supra*, the highest court of at least one state, California, has adopted a "defensive acts rule," under which criminal defendants do not waive appellate rights by eliciting testimony during direct examination about their prior convictions. *People v. Turner*, 789 P.2d 887, 907. The California Supreme Court, in *People v. Turner*, held that it was perfectly reasonable for defendants to attempt to "minimize the sting" of the prior convictions by disclosing them during the direct examination, and that such a disclosure, done defensively, did not constitute waiver. *Id.*

¹⁶² *United States v. Ohler*, 169 F.3d 1200, 1201 (9th Cir. 1999). Ohler claimed in her trial testimony that an acquaintance by the name of Francisco Gomez had taken her van without her permission and that she was later told by her niece that the van had been left in Mexico. Ohler's niece then drove Ohler to the United States/Mexico border and Ohler walked the rest of the way to Tijuana. She found the van in a parking lot in Tijuana and returned to the United States by means of the San Ysidro Port of Entry. Joint Appendix at 115-20,

inspector noticed that someone had apparently tampered with one of the rear interior panels.¹⁶³ Further inspection uncovered a total of 81.9 pounds of marijuana behind the inside panels of Ohler's van.¹⁶⁴ The customs inspectors immediately arrested Ohler, who was subsequently indicted for importation of marijuana and possession of marijuana with the intent to distribute.¹⁶⁵

Approximately four and one-half years before the trial for importing marijuana, Ohler was convicted of possession of methamphetamines and sentenced to 90 days in jail and three years probation.¹⁶⁶ Prior to trial, the government filed a motion in limine seeking, *inter alia*, the admission of Ohler's prior felony conviction¹⁶⁷ as permissible character evidence under Federal Rule of Evidence 404(b)¹⁶⁸ and as impeachment evidence under

United States v. Ohler, 169 F.3d 1200, 1201 (9th Cir. 1999) (No. 98-9828) (presenting direct examination testimony of Maria Suzuki Ohler) [hereinafter Joint Appendix]. Ohler denied giving Gomez permission to take the van as well as knowledge of where he drove it, thus forming the basis of her defense. *Id.* at 117 (discussing Ohler's trial testimony that Gomez did not ask if he could take her van).

¹⁶³ See *Ohler*, 169 F.3d at 1201. Ohler consented to the search of the back of her van. She testified at trial that before the search the customs inspector "asked me if he - he can take a look in the back of my van, and I told him go ahead" Joint Appendix, *supra* note 162, at 122 (stating Ohler's direct examination testimony).

¹⁶⁴ See *Ohler*, 169 F.3d at 1201. At trial Ohler testified that she did not know that there was marijuana in her van and that she was not trying to bring marijuana across the border. Joint Appendix, *supra* note 162, at 123 (referring to Ohler's direct examination testimony).

¹⁶⁵ See *Ohler*, 169 F.3d at 1201.

¹⁶⁶ Ohler's conviction was for possession of a controlled substance, a felony, in violation of CAL. HEALTH & SAFETY CODE § 11377(A). Joint Appendix, *supra* note 162, at 13 (presenting government's motion in limine). Ohler testified at trial that the illegal substance was methamphetamines. See *id.* at 105.

¹⁶⁷ Although the most common use of motions in limine is as a pretrial tool to seek exclusion of evidence, it is not limited to that purpose. The term "in limine" means simply "at the threshold" and applies to any motions made in advance of the submission of the evidence. BLACK'S LAW DICTIONARY 787 (6th ed. 1990). The fact that the government initially sought admission of the prior conviction should not effect the analysis of *Ohler* in that the defendant opposed the government's motion and made a clear and comprehensive record of her opposition to the admission of the prior conviction. Brief for Petitioner, at 3-4, United States v. Ohler, 169 F.3d 1200, 1201 (9th Cir. 1999) (No. 98-9828) [hereinafter Brief for Petitioner].

¹⁶⁸ Federal Rule of Evidence 404(b) provides as follows:

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 on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 609(a)(1).¹⁶⁹ The government also claimed that Ohler had failed at least two drug tests since her arrest and had lied about her drug use to the pretrial services officer.¹⁷⁰ The government argued that the court should admit the recent drug usage under Rule 404(b) to show Ohler's motive for smuggling marijuana "to obtain money to support her drug habit" and Ohler's lies to the pretrial services officer under Rule 608(b).¹⁷¹ The government argued that the prior conviction was admissible under 404(b) as evidence "that [defendant] had knowledge of the marijuana concealed in her van."¹⁷² At the same time and in the same motion, the government sought admission of the prior conviction as impeachment evidence under Rule 609(a)(1), arguing that it was highly probative evidence of the defendant's lack of credibility.¹⁷³

FED. R. EVID. 404(b).

¹⁶⁹ See Joint Appendix, *supra* note 162, at 6, 13-21 (presenting government's Motions in Limine). Federal Rule of Evidence 609(a)(1) provides as follows:

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, any 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.

FED. R. EVID. 609(a)(1).

¹⁷⁰ See Joint Appendix, *supra* note 162, at 14-15. The government, in its motion in limine, reported that Ohler had told her pretrial services officer that she had not used any drugs since 1995. Yet, she subsequently tested positive for methamphetamines on two separate occasions and admitted to the magistrate that she had so tested. *Id.* at 15.

¹⁷¹ Federal Rule of Evidence 608(b) provides in pertinent part:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

FED. R. EVID. 608(b).

¹⁷² See Joint Appendix, *supra* note 162, at 16. The government's argument about the admission of the conviction was just as conclusory and tautological as its argument about the drugs. The government cited to Ninth Circuit cases espousing the general proposition that possession or sale of narcotics can be relevant under Rule 404(b) to the issues of intent, knowledge, motive, etc. *Id.* at 18.

¹⁷³ See *id.* at 13. The government argued that Ohler's defense—"that she was simply an unwitting driver"—placed her credibility squarely at issue, thus justifying admission of the prior conviction to demonstrate her "lack of trustworthiness." *Id.* at 14.

Ohler opposed the government's motion and argued that her prior conviction was not admissible. Ohler made two arguments in response to the government's arguments under Rule 404(b). First, Ohler argued that her past drug usage did not establish a "rational nexus" to Ohler's motive to smuggle marijuana.¹⁷⁴ Second, Ohler asserted that the government's use of her prior drug conviction required "a large leap of rational inferences" to prove that her prior methamphetamine use made it more likely that she knew that her van contained marijuana on July 29, 1997.¹⁷⁵ Ohler argued that the slight probative value of the evidence was outweighed by its unfair prejudice.¹⁷⁶

Ohler also claimed that the conviction was not admissible under Rule 609(a)(1) for impeachment purposes because it was not particularly probative of Ohler's trustworthiness. The conviction evidence carried a high risk of unfair prejudice, thus not satisfying the balancing test under the rule.¹⁷⁷ According to Ohler, the offense revealed little about her credibility, but was sufficiently similar to the charged offense to create a heightened risk that the jury would improperly use the prior conviction as propensity character evidence.¹⁷⁸

On January 26, 1998, the trial court heard oral argument on the motion in limine. The judge denied the government's motion to admit Ohler's prior conviction as character evidence under Rule 404(b) and reserved ruling on whether the prior conviction was admissible for impeachment purposes under Rule 609(a)(1).¹⁷⁹ The court excluded the prior conviction under Rule 404(b) because the government's effort to link the conviction for possession to Ohler's knowledge of what was hidden in her van "was a stretch" and the probative value of that evidence was

¹⁷⁴ See Joint Appendix, *supra* note 162, at 37 (containing defendant's response and opposition to motions in limine filed by the Government). Ohler argued that the government's evidence failed to establish that Ohler had a "drug habit" and thus had not provided any motive for her alleged drug smuggling. *See id.* (containing Ohler's points and authorities in response to the Government's motion in limine).

¹⁷⁵ *See id.* at 38.

¹⁷⁶ *See id.*

¹⁷⁷ Ohler claimed that drug possession convictions are "not probative of dishonesty or veracity." *See id.* at 67-68 (containing oral argument on government's motion in limine). She further claimed that the slight probative value of the conviction was outweighed by its prejudicial effect. *See id.* at 79 (consisting of defendant's supplemental motions in limine briefing).

¹⁷⁸ Rule 401(a) and (b) of the Federal Rules of Evidence preclude the admission of evidence of a person's character or a person's past conduct to prove that the person acted "in conformity therewith" in committing the charged offense. *See Fed. R. Evid.* 401(a), (b).

¹⁷⁹ *United States v. Ohler*, 169 F.3d, 1200, 1201 (9th Cir. 1999).

outweighed by its unfair prejudice.¹⁸⁰ However, the court found that the government's motion to admit the prior conviction for impeachment purposes presented a much closer, and more difficult question. The court explicitly referred to it at one point as "a very close call."¹⁸¹ Ultimately, after receiving supplemental briefing from both parties and additional oral argument, the court ruled that the prior conviction was admissible for impeachment purposes.¹⁸²

At trial, Ohler testified in her own defense and chose to preemptively disclose her prior conviction.¹⁸³ Relatively early in the direct examination,¹⁸⁴ before addressing the merits of the charges, defense counsel broached the topic of the prior conviction. Ohler testified that she had been convicted for being under the influence of methamphetamines about five years before the trial.¹⁸⁵ At the close of its

¹⁸⁰ See Joint Appendix, *supra* note 162, at 56. The trial judge concluded that "attempting to use a five year-old conviction for personal use as constructive knowledge that on a particular occasion the defendant knowingly transported drugs or contraband of a different type entirely . . . is a stretch. It's obviously prejudicial. . . . I will grant the motion in limine with respect to that prior conviction." *Id.*

¹⁸¹ See *id.* at 97 (presenting supplemental oral argument on January 28, 1998). The court's complete comment was as follows: "[T]his is a very close call. You [the prosecutor] may not see it as such, but it is a close call." *Id.* The ruling admitting the evidence was based on the court's reading of *United States v. Alexander*, 48 F.3d 1477 (9th Cir. 1995), a case relied upon by the government in its supplemental brief, for the proposition that drug convictions have "some impeachment value." *Id.* In *Alexander*, the Ninth Circuit commented: "We have previously stated that prior convictions for robbery are probative of veracity. The same is true of prior convictions for drug offenses." *Alexander*, 48 F.3d at 1488 (citations omitted). The court found that "the centrality of the defendant's credibility in this case is obviously very significant," tipping the balancing test under Rule 609(a)(1) "slightly" in favor of admission. Joint Appendix, *supra* note 162, at 97-98.

¹⁸² Joint Appendix, *supra* note 162, at 97.

¹⁸³ Brief for Petitioner, *supra* note 167, at 8 n.4 (noting that Ohler's brief, filed with U. S. Supreme Court, referred to her preemptive disclosure as an "attempt to mitigate the sting"). See generally MCCORMICK, EVIDENCE § 42 at 64-65 (5th ed. 1999). McCormick describes the process of drawing the sting as follows:

It is a common tactic for the party who calls a witness with a provable criminal record to bring out the prior conviction on direct examination. This practice was never viewed as true impeachment of a party's own witness but rather as anticipatory disclosure designed to reduce the prejudicial effect of the evidence if revealed for the first time on cross-examination.

Id.; see *Ohler*, 169 F.3d at 1201.

¹⁸⁴ The question about the prior conviction was the 25th question of the direct examination and is found on only the third page of the official transcript of her testimony. Joint Appendix, *supra* note 162, at 102-04 (indicating that Ohler's testimony began on page 155 of trial transcript and that questioning about prior conviction came on page 157).

¹⁸⁵ *Id.* at 104-05. The exact exchange between Ohler and her lawyer is set forth below:

Q – Have you ever been convicted of a crime?

cross-examination, the government asked only one question about the conviction. That question elicited that the prior conviction was a felony conviction for possession of methamphetamine.¹⁸⁶ On re-direct examination, defense counsel clarified that Ohler's prior conviction involved a small quantity of methamphetamines for personal use rather than a large quantity for distribution.¹⁸⁷ Ohler was convicted by the jury on both counts and sentenced to thirty months imprisonment and three years of supervised release.¹⁸⁸ She appealed to the United States Court of Appeals for the Ninth Circuit on the grounds that the trial court improperly admitted evidence of her prior conviction.¹⁸⁹

The Ninth Circuit never reached the propriety of the trial court's admission of the conviction, however, concluding that Ohler had waived her right to appeal the admission of the prior conviction by testifying to it on direct examination.¹⁹⁰ On appeal, Ohler argued that the 1990

A – Yes, I have.

Q – How many times?

A – Once.

Q – When did this happen?

A – Five years ago.

Q – What was the charge you were convicted of?

A – I was under the influence of methamphetamine.

Q – Did you go to jail on that case?

A – For the weekend.

Q – What was the sentence you received?

A – Probation, I believe, and a rehabilitation completion that I needed to do, which I did.

Q – Did you plead guilty in that case or did you have a trial?

A – I pleaded guilty.

Q – Do you have any other criminal convictions?

A – No besides this one.

Id.

Defense counsel asked about the prior conviction without doing anything to prepare the jury for the questions. *See id.* at 102-104. Instead, Ohler's counsel made an abrupt transition from Ohler's phone service to the prior convictions. *Id.* Most commentators advise against making such an abrupt transition to disclosures of harmful information, fearing that the effect will be to emphasize the disclosure instead of de-emphasizing it. *See supra* notes 74-77 and accompanying text.

¹⁸⁶ Joint Appendix, *supra* note 162, at 135.

¹⁸⁷ *Id.* at 136.

¹⁸⁸ *Ohler*, 169 F.3d at 1202.

¹⁸⁹ *Id.* at 1201-02.

¹⁹⁰ *Id.* at 1202.

amendments to rule 609(a)(1)¹⁹¹ effectively overruled the Ninth Circuit's holding in *United States v. Williams*, as evidenced by the Fifth Circuit decision in *United States v. Fisher*.¹⁹² The 1990 amendment to 609(a)(1) specifically authorized the introduction of prior convictions during direct examination.¹⁹³ The Ninth Circuit rejected this argument. Prior to the amendment the circuit courts had found the rule's terms, which appeared to limit disclosure of prior convictions to cross-examination, to allow the introduction of convictions during direct.¹⁹⁴ Specifically, the Court pointed to its 1976 decision in *Dixon v. United States*¹⁹⁵ in which the Ninth Circuit allowed the introduction of a defendant's prior convictions during direct examination despite recognition of the cross-examination limitation contained in the rule.¹⁹⁶ The court reasoned that the amendment to rule 609 did not modify the Court's decision in *Williams* "because the 'remove the sting' strategy has long been sanctioned by this Court and the 1990 amendments to Rule 609 only codify the law as it existed when *Williams* was decided."¹⁹⁷ The court also noted that "no circuit court had found it necessary to reexamine the waiver issue in light of the 1990 amendments of Rule 609."¹⁹⁸ The court thus rejected Ohler's argument that the Fifth Circuit's decision in *Fisher*¹⁹⁹ was based on the fundamental change in law resulting from the amendments to Rule 609. Instead, it concluded that the court's decision simply followed

¹⁹¹ *Id.* In 1990, Rule 609(a) was amended by removal of the limitation that a witness's prior conviction could be introduced "during cross-examination" for the purpose of impeaching the witness's testimony. See FED. R. EVID. 609 & advisory committee's note.

¹⁹² *Ohler*, 169 F.3d at 1202-04. In *United States v. Williams*, 939 F.2d 721, 724-25 (9th Cir. 1991), the Ninth Circuit had applied the waiver rule noting that "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." *Williams*, 939 F.2d at 724-25.

¹⁹³ See FED. R. EVID. 609 advisory committee's note. The 1990 amendment deleted from the rule the requirement that prior convictions could be elicited "during cross-examination." *Id.* The advisory committee noted that "virtually every circuit" had found the limitation to be inapplicable and that the amendment would conform to the common practice of witnesses to "remove the sting" by revealing the conviction during direct examination. *Id.*

¹⁹⁴ *Ohler*, 169 F.3d at 1202.

¹⁹⁵ *United States v. Dixon*, 547 F.2d 1079, 1083 (9th Cir. 1976) (declaring that "[i]t seems clear from the legislative history that on direct examination, a party may elicit the evidence of a prior conviction from his own witness . . .").

¹⁹⁶ *Ohler*, 169 F.3d at 1203.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *United States v. Fisher*, 106 F.3d 622, 629 (5th Cir. 1997) (holding that party does not waive right to appeal in limine ruling that prior conviction is admissible when defendant introduces evidence of his prior conviction during his direct examination.).

Fifth Circuit precedent which had developed prior to the amendments.²⁰⁰

Ohler appealed the appellate court's decision to the Supreme Court. She argued that she had not waived the right to appeal by her counsel's attempt to "mitigate the sting."²⁰¹ The United States Supreme Court granted the petition for writ of certiorari.

The United States Supreme Court affirmed the decision of the Ninth Circuit and held that Ohler had waived her right to appeal the admission of her prior conviction by introducing it during her direct examination.²⁰² Chief Justice Rehnquist, writing for the Court, addressed and rejected Ohler's arguments in a relatively short opinion that was conspicuously bereft of authority,²⁰³ and was remarkably straightforward and uncompromising.²⁰⁴ The Court simply applied the traditional waiver rule with little explanation or elaboration.²⁰⁵

The majority relied initially on the well-established general rule that a party who introduces evidence cannot complain on appeal that the evidence was erroneously admitted. The court concluded that Ohler could not avoid the application of that rule by invoking Rules 103 and 609.²⁰⁶ The Court observed that neither rule says anything about the effect of a party introducing evidence on direct examination and later assigning its admission as error on appeal.²⁰⁷ Thus, the rules do not overrule or modify the common law practice *sub silentio*.²⁰⁸

In response to Ohler's argument that application of the waiver rule under such circumstances was unfair, the Court observed that in a criminal trial both sides must make strategic decisions which have certain consequences. The fact that cross-examination follows direct examination, thus giving the government the last word with the defendant, is one inherent trial advantage for the government.²⁰⁹ This

²⁰⁰ *Ohler*, 169 F.3d at 1204.

²⁰¹ Brief for Petitioner, *supra* note 167, at 8-10.

²⁰² *Ohler v. United States*, 529 U.S. 753, 754-55 (2000).

²⁰³ *Id.* at 754-60. The entire majority opinion cites only five court decisions, two circuit opinions that demonstrate the lower court split on the waiver issue, two Supreme Court opinions regarding the criminal defendant's constitutional right to testify in his own defense, and the *Luce* opinion. *See id.* at 755, 758, 759. Other than *Luce*, the Court cited two evidence treatises as its only authority for the waiver position. *See id.* at 755.

²⁰⁴ *Id.* at 755-60.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 755-56.

²⁰⁷ *Id.* at 756.

²⁰⁸ *Id.*; *see also* BLACK'S LAW DICTIONARY 1428 (6th ed. 1990) (defining "*sub silentio*" as "[u]nder silence; without any notice being taken; passing a thing *sub silentio* may be evidence of consent").

²⁰⁹ *Ohler*, 529 U.S. at 758.

particular advantage allows the government to assess its case in light of the defendant's testimony and to determine whether it is necessary to introduce impeaching material, such as a prior conviction, and risk the possibility that the admission of the conviction may be deemed reversible error on appeal.²¹⁰ The defendant's preemptive strike effectively denies the government its right to decide whether to introduce the prior conviction during cross examination.²¹¹ At the same time, the defendant's preemptive strike presumably gives the defendant a tactical advantage as well, by stealing the government's thunder.

Furthermore, the Court pointed to its decision in *Luce v. United States*²¹² as an example of the speculative nature of in limine rulings on the admissibility of prior convictions. The Court affirmed the teachings of *Luce*, stating: "Only when the government exercises its option to elicit the testimony is an appellate court confronted with a case where, under the normal rules of trial, the defendant can claim the denial of a substantial right if in fact the district court's in limine ruling proved to be erroneous."²¹³ Thus, the Court concluded that "there is nothing 'unfair' . . . about putting petitioner to her choice in accordance with the normal rules of trial."²¹⁴

In addressing Ohler's final argument, the Court concluded that the waiver rule did not unconstitutionally burden Ohler's right to testify because it did not prevent a defendant from taking the stand and presenting any admissible testimony she chooses.²¹⁵ The Court found that it is not "overly harsh" to require a defendant to make the strategic decision whether to testify. After all, that decision is present in every criminal trial.²¹⁶ The Court concluded that a defendant's preemptive disclosure of a prior conviction on direct examination waives any claim on appeal that the admission of the evidence was in error.²¹⁷

Justice Souter, in his dissent, noted the court's apparent lack of support for its holding. At the same time, he distinguished *Luce*, observing that it was the only case "the majority claims as even tangential support for its waiver rule."²¹⁸ From Justice Souter's perspective, the rule announced in

²¹⁰ *Id.*

²¹¹ *Id.* at 757-58.

²¹² *Luce v. United States*, 469 U.S. 38 (1984).

²¹³ *Ohler*, 529 U.S. at 759.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 759-60.

²¹⁷ *Id.* at 760.

²¹⁸ *Id.* (Souter, J., dissenting).

Luce derived from the "incapacity of an appellate court to assess the significance of the ruling for a defendant who remains silent."²¹⁹ This "practical difficult[y]" differs from *Ohler* in a number of critical respects.²²⁰ First, unlike the defendant in *Luce*, *Ohler* testified. Second, the trial court's in limine ruling in *Ohler* controlled the decision of *Ohler*'s counsel to ask about the prior conviction during the direct examination of the defendant. Third, the in limine ruling in *Ohler* was final and definitive, not conditional as in *Luce*.²²¹ Thus, the need for a "wholly speculative harmless-error analysis," about which the Court in *Luce* was concerned, did not exist in *Ohler*.²²² Instead, there was a factual record sufficient for complete review of the evidentiary issue.²²³

Justice Souter next criticized the majority for its reliance on the "'commonsense' rule that a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted."²²⁴ He noted that the "commonsense" rule has no application when a party opposes the admission of evidence and introduces it solely to mitigate the damage.²²⁵ Souter cited to four leading evidence treatises,²²⁶ all of which recognized that the general waiver rule did not apply to preemptive disclosures.²²⁷

Finally, the dissent attacked the majority's conclusion that the waiver rule was not "unfair."²²⁸ In fact, the waiver rule creates unfairness by requiring defendants to either waive errors by making disclosures or to participate in a deception on the jury. The majority's holding means that

²¹⁹ *Id.* at 761.

²²⁰ *Id.*

²²¹ *Id.* at 761 n.1.

²²² *Id.* at 760-61.

²²³ *Id.* at 761 n.1. With regard to the nature of the in limine ruling in *Ohler*, Justice Souter noted that in future cases there would be "practical issues" the court would have to confront, including whether the in limine ruling was "final and definitive." *Id.* at 761 n.1. However, those practical considerations were unnecessary in *Ohler* because the district court ruling was "plainly final." *Id.*

²²⁴ *Id.* at 761-62.

²²⁵ *Id.* at 762.

²²⁶ *Id.* (citing to M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE §103.4, 17 (1981); D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 11, 65 (1977); 1 J. STRONG, MCCORMICK ON EVIDENCE § 55, 246 (5th ed. 1999); 1 J. WIGMORE, EVIDENCE § 18, 836 (P. Tillers rev. 1983)).

²²⁷ *Ohler*, 529 U.S. at 762 (Souter, J., dissenting).

²²⁸ *Id.* at 763-64. Justice Souter argues that the majority's conclusion that "there is nothing unfair . . . about putting [Ohler] to her choice in accordance with the normal rules of trial" is an exercise in question begging. *Id.* at 763. The Court should be asking whether the "normal rules of trial" apply beyond the normal circumstances for which they were devised." *Id.* at 763 n.3. That is, "[a]ny claim of a new rule's fairness under normal trial conditions will have to stand or fall on how well the rule would serve the objects that trials in general, and the Rules of Evidence in particular, are designed to achieve." *Id.* at 763.

"[t]he jury may feel that in testifying without saying anything about the convictions the defendant has meant to conceal them."²²⁹ Of course, any such impression may well be false and at odds with the purposes behind Rule 609 and the Federal Rules of Evidence in general.²³⁰ Facilitation of preemptive disclosures furthers the search for the truth "without depriving the Government of anything to which it is entitled."²³¹ The majority, Justice Souter concludes, unnecessarily "discourage[s] the defendant from introducing the conviction herself," and imposes a rule that is "antithetical to dispassionate fact-finding."²³²

IV. ANALYSIS OF THE *OHLER* DECISION

The *Ohler* Court embraced waiver as the clear consequence of a party's efforts to disclose weaknesses and accordingly ignored whether *Ohler* had preserved error by obtaining a clear and definitive pre-trial ruling on the admissibility of her conviction. However, *Ohler* does not necessarily impose waiver for every disclosure of a weakness, including disclosures made during the *voir dire* or the opening statement or in rebuttal of the opponent's evidence. This Part evaluates the Court's opinion, first analyzing its rationale for imposing waiver on those who make disclosures and the consequences of the Court's approach and then examining its failure to give weight to defendant's efforts to preserve error.

A. *The Court's Waiver Analysis*

The Court's opinion in *Ohler* leaves little room for compromise on the impact of a party's preemptive disclosure of harmful information. The Court appears to express a hard-and-fast rule subject to no exceptions. When a party attempts to draw the sting during direct examination, the party waives the right to complain about the error.²³³ The Court's reliance on the vagaries of trial²³⁴ and the basic principles of waiver²³⁵

²²⁹ *Id.* at 764.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 759.

²³⁴ *See id.* at 758-59 (concluding that trial structure which gives prosecution right to, in effect, go last by cross-examining defendant and preserves its right to choose whether to impeach, and dictates that imposing waiver upon defendants who choose to preemptively disclose prior convictions was not unfair).

²³⁵ *See id.* at 759 (relying on basic principle that party cannot complain on appeal about

appear to foreclose efforts to limit the reach of *Ohler*. The Supreme Court would presumably find waiver any time a party, whether a criminal defendant or a civil litigant, complained on appeal about evidence that the appealing party had introduced at trial. Thus, it would not have mattered if *Ohler* had sought a side bar conference and had renewed her motion in limine just prior to introducing her prior conviction to remove any doubt that she was disclosing the conviction only because of the court's ruling.²³⁶ It would not have changed the outcome if she had waited until the end of her direct examination before introducing the prior conviction, so that the trial court would have had all of her testimony before it ruled.²³⁷ And, it would not have changed the result in *Ohler* even if the prosecution had stipulated on the record that it unequivocally intended to inquire about the prior conviction during the cross-examination of *Ohler*.²³⁸ The *Ohler* decision appears to boil down to a simple mathematical equation: preemptive disclosure equals waiver.

Ohler applies most directly, of course, to efforts by criminal defendants to disclose prior convictions. And arguably, *Ohler* also works its greatest harm in that context. In combination with *Luce*, *Ohler* forms quite an imposing obstruction for defendants who want to testify in their own defense, but are burdened by a prior conviction that has been ruled admissible. When *Ohler* forces the defendant to withhold disclosure of the conviction for the purpose of preserving error, it creates a false impression with the jurors – that the defendant purposefully concealed the prior conviction for the purpose of deceiving them.²³⁹

1. Criminal Defendants and Prior Convictions

Perhaps the significance of *Ohler*'s impact on criminal defendants with prior convictions can be fully appreciated only when such evidence is put in context. The simple truth is that the admission at trial of a criminal defendant's prior convictions often spells doom for a criminal defendant.²⁴⁰ Jurors tend to place great weight on prior convictions,

evidence introduced at trial by party to support holding of waiver).

²³⁶ See *id.*

²³⁷ See *id.*

²³⁸ See *id.*

²³⁹ See *Ohler*, 529 U.S. at 764 (Souter, J. dissenting) (noting deception on jury perpetuated by court's decision).

²⁴⁰ See Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL L. REV. 1, 9 (1997) (stating "[A] testifying defendant with prior convictions runs the risk that a jury will misuse the convictions in determining not just the credibility of the defendant qua witness, but also his or her guilt.").

regardless of the fact that the conviction was admitted solely as impeachment evidence and despite the judge's carefully worded limiting instruction.²⁴¹ The available empirical data demonstrate that the admission of a prior conviction has an explosive impact on the jury, substantially increasing the likelihood that the jury will convict the defendant of the charged crime.²⁴²

The judge's decision to admit or exclude convictions under Rule 609(a)(1) rests on the court's balancing of the probative value of the conviction as to the defendant's veracity against the prejudicial effect of the conviction.²⁴³ The prosecution has the burden of establishing that the probative value of the conviction outweighs its prejudicial effect.²⁴⁴ The court's task is complicated by the laundry list of factors courts should consider in making the decision.²⁴⁵ For example, the potential unfair prejudice from the prior conviction may turn, in part, on the similarity or dissimilarity of the prior conviction to the charged crime.²⁴⁶ When the prior conviction closely resembles the charged crime, it is excruciatingly

²⁴¹ Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions When Jurors Use Prior Conviction Evidence to Decide Guilt*, 9 LAW & HUM. BEHAV. 37, 47 (1985).

²⁴² See, e.g., Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 LAW & HUM. BEHAV. 67, 70-77 (1995) (describing study involving 105 prospective jurors concluding that "mock jurors who learned that the defendant had been previously convicted were significantly more likely to convict him of a subsequent offense than were jurors without this information") (emphasis in original); Wissler & Saks, *supra* note 241, at 39-47 (describing study involving 160 adult men and women finding that "it appears that mock jurors used the prior conviction evidence to help them judge the likelihood that the defendant committed the crime charged . . . even though they had been instructed not to use the information for that purpose"); see also HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 146-48 (1966) (finding that conviction rates were twenty seven percent higher when jurors knew of prior conviction evidence).

²⁴³ See FED. R. EVID. 609(a)(1).

²⁴⁴ See Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2322 (1994) (observing that Rule 609(a)(1) as applied to criminal defendants "implicitly imposes on the prosecution the burden of showing that the balance should be struck in favor of admitting the evidence. . . . [I]f the prosecution fails to meet this burden, the evidence must be excluded.").

²⁴⁵ See, e.g., *United States v. Lipscomb*, 702 F.2d 1049, 1062-71 (D.C. Cir. 1983). Included among the various factors courts consider are: (1) the nature of the prior crime, (2) the recency or remoteness of the prior conviction, (3) the prior crime's similarity to the charged crime, (4) the extent and nature of the defendant's record before and after the prior conviction, (5) the importance of the defendant's testimony in the trial, and (6) the importance of credibility issues in the trial. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* 624-28 (1995).

²⁴⁶ See *Gordon v. United States*, 383 F.2d 936, 940-41 (D.C. Cir. 1967) (noting that prior convictions for same crime "should be admitted sparingly"); ROGER C. PARK, DAVID P. LEONARD & STEVEN H. GOLDBERG, *EVIDENCE LAW* § 9.09, at 453 (1998) (stating "[W]hen the only basis for receiving [a prior conviction] is to impeach credibility, similarity between the two crimes is a factor disfavoring admissibility.").

difficult for the jury to avoid improperly considering the crime on the issue of the defendant's guilt instead of limiting its consideration to the issue of the defendant's credibility.²⁴⁷

The facts in *Ohler* demonstrate the inherent difficulty of the jury's evaluative task. *Ohler's* prior conviction was for possession of methamphetamine and the charged crime was importation of marijuana and possession with intent to distribute. The judge admitted the conviction under Rule 609(a)(1) for the sole purpose of helping the jury evaluate *Ohler's* credibility, and not for the purpose of deciding whether *Ohler* imported or possessed the marijuana found in her van.²⁴⁸ Yet, under the facts in *Ohler*, that purported limitation asks the jury to compartmentalize the evidence in a way that approaches the impossible. The jury would be less than human if it ignored *Ohler's* status as a convicted drug felon when deciding whether she illegally imported and/or possessed drugs on the occasion in question. The tragic irony for Ms. *Ohler* is that the prior drug conviction has little probative value to prove *Ohler's* propensity to lie, but arguably much greater value to a lay fact-finder in portraying her as a person who is involved with illegal drugs.²⁴⁹

Under Rule 609(a)(1) a conviction's probative value depends on the extent to which the conviction impairs the defendant's credibility.²⁵⁰ Although all felony convictions are treated under Rule 609 as having some tendency to discredit the witness,²⁵¹ the relative probative value of any particular conviction depends on the nature of the conviction, its recency, and its connection to the character trait of truthfulness.²⁵² Thus, convictions for forgery, perjury, or fraud are considered highly probative of the witness's credibility, whereas convictions for murder or prostitution hold little probative value on the issue of credibility.²⁵³ In

²⁴⁷ See *Gordon*, 383 F.2d at 940 (observing that similar prior conviction is particularly likely to be misused by jury on issue of guilt rather than limited to considerations of credibility).

²⁴⁸ See *Ohler v. United States*, 529 U.S. 753, 757 (2000).

²⁴⁹ Cf. *Hornstein*, *supra* note 240, at 14-15 (noting that prior convictions "bearing less directly on veracity . . . may add less probative value on the question of credibility than on the question of guilt or innocence.").

²⁵⁰ See FED. R. EVID. 609(a)(1) advisory committee's note (stating that "Although the rule does not forbid all use of convictions to impeach a defendant, it requires that the government show that the probative value of convictions as impeachment evidence outweighs their prejudicial effect.").

²⁵¹ See *United States v. Lipscomb*, 702 F.2d 1049, 1059 (D.C. Cir. 1983) (stating "[A]ll felony convictions are probative of credibility to some degree.").

²⁵² See *MUELLER & KIRKPATRICK*, *supra* note 245, at 624-25.

²⁵³ See *id.*

the same way, drug convictions for mere possession of illegal substances are only slightly probative of credibility.²⁵⁴ Both honest and dishonest people possess illegal drugs, but it is often not an offense of stealth or deception and it does not involve any other victims. Drug offenses show little more than a disregard for the law, which arguably says something about the offender's trustworthiness, but not as much as when the offender is a lawbreaker by some deceitful means.

In *Ohler*, the defendant's prior drug conviction was for possession of methamphetamine several years earlier.²⁵⁵ The methamphetamine, both sides agreed, was for personal use by Ohler and not for commercial distribution.²⁵⁶ Thus, on its face, the probative value of the prior conviction was inadequate to outweigh the unfairly prejudicial effect of admitting the conviction. Yet, courts regularly consider another factor under Rule 609 in drug cases: whether the defendant claims that she did not know of the presence of the drug or was not familiar with the drug trade in general.²⁵⁷ Courts contend that such a claim of ignorance enhances the probative value of the prior drug conviction because the conviction directly impeaches the defendant's professed lack of knowledge or familiarity.²⁵⁸ In *United States v. Cordoba*,²⁵⁹ the Ninth Circuit, with very little analysis or explanation, admitted the defendant's

²⁵⁴ See *id.* (noting that "many drug crimes" are low on probative value scale under Rule 609(a)(1)). Most commentators and many courts have noted the low probative value of felony convictions for mere possession of illegal drugs as opposed to the much greater probative worth of convictions for drug smuggling or importation, which connote the use of deceitful means. See, e.g., *United States v. Begay*, 144 F.3d 1336, 1338 (10th Cir. 1998) (stating "A conviction for drug possession is not necessarily relevant to credibility and is potentially prejudicial in arousing sentiment against a witness."); *Wilson v. Union Pac. R.R. Co.*, 56 F.3d 1226, 1231 (10th Cir. 1995) (concluding that evidence of drug conviction alone is not highly relevant to issue of veracity); *Miller v. Hoffman*, No. CIV.A.97-7987, 1999 WL 415402, at *3 (E.D. Pa. June 22, 1999) (stating "Evidence of a prior drug conviction is only minimally probative of a witness's character for truthfulness, if at all.") (quoting *Dover-Hymon v. Southland Corp.*, No. CIV.A.91-1246, 1993 WL 419705, at *6 (E.D. Pa. Sept. 27, 1993)). Cf. *Gust v. Jones*, 162 F.3d 587, 595-96 (10th Cir. 1998) (concluding that plaintiff's prior conviction for smuggling contraband into prison was not admissible under Rule 609(a)(1) because conviction's probative value was outweighed by its prejudicial effect). See generally MUELLER & KIRKPATRICK, *supra* note 245, at 624-25 (explaining that crimes involving smuggling and importation may fall at high end of probative value scale, while other drug offenses are at low end of scale).

²⁵⁵ *Ohler v. United States*, 529 U.S. 753, 755 (2000).

²⁵⁶ See Joint Appendix, *supra* note 162, at 136 (presenting redirect examination of defendant).

²⁵⁷ See, e.g., *United States v. Cordoba*, 104 F.3d 225, 228-29 (9th Cir. 1996).

²⁵⁸ See *United States v. Harris*, 959 F.2d 242, (9th Cir. 1992) (admitting prior cocaine conviction to impeach defendant's claim that she "did not distribute any cocaine.").

²⁵⁹ *Cordoba*, 104 F.3d at 228-229.

prior conviction for possession of cocaine with intent to distribute because the defendant's veracity was in issue in that he had denied knowing that 300 kilograms of cocaine were in the van he was driving.²⁶⁰ The mere fact that drug offenses have some probative value on the issue of veracity does not end the inquiry.²⁶¹ The court must then decide whether that value of the evidence is sufficient to outweigh its prejudicial effect.²⁶² The court in *Cordoba* never asks that question or examines the potential prejudice of the conviction, similar to the limited analysis of the trial court in *Ohler*.²⁶³

Although there are some differences between *Cordoba* and *Ohler* (e.g., in *Cordoba* the prior drug charge was for possession with intent to distribute, an offense with greater probative value on the defendant's credibility than *Ohler*'s conviction for mere possession²⁶⁴), the fact remains that the Ninth Circuit failed in *Cordoba*, just as the trial judge failed in *Ohler*, to properly balance probative value versus prejudicial effect. The Ninth Circuit in *Cordoba* emphasized the fact that "drug offenses are probative of veracity, which was at issue"²⁶⁵ and the trial judge in *Ohler* noted that the prior conviction for methamphetamine had "some impeachment value."²⁶⁶

²⁶⁰ See *id.* The court's analysis consisted of little more than a restatement of the rule. The court noted that "[p]rior convictions for drug offenses are probative of veracity," citing a prior Ninth Circuit opinion, *United States v. Alexander*, 48 F.3d 1477, 1488 (9th Cir. 1995), but failed to explicitly apply the balancing test mandated by Rule 609(a)(1). See *id.* at 229. Of course, the *Alexander* case was heavily relied upon by the prosecution in arguing their motion in limine in *Ohler*. See Joint Appendix, *supra* note 162, at 82-83 (presenting government's Supplemental Brief Regarding Use of Defendant's Prior Drug Conviction for Impeachment Under Rule 609 of the Federal Rules of Evidence and citing *Alexander* for proposition that drug offenses are "probative of veracity"); *id.* at 93 (presenting oral argument on admissibility of defendant's prior drug conviction and noting prosecution argument that "Alexander states . . . unequivocally [that] prior drug offenses [are probative of veracity]").

²⁶¹ See *United States v. Mehrmanesh*, 689 F.2d 822, 833-34 (9th Cir. 1982) (noting that Rule 609(a)(1) requires more than determination that conviction "may have some bearing on credibility;" court must "strike a considered balance" of "probative value and unfair prejudice").

²⁶² See FED R. EVID. 609(a)(1).

²⁶³ Compare *Cordoba*, 104 F.3d at 229 (noting trial court's oral announcement of ruling on admissibility of defendant's prior drug conviction), with Joint Appendix, *supra* note 162, at 97-98 (reflecting court's truncated analysis, turning largely on fact that conviction had "some impeachment value," was less than ten years old, and was not identical to charged offense).

²⁶⁴ See *Cordoba*, 104 F.3d at 229.

²⁶⁵ See *id.*

²⁶⁶ See Joint Appendix, *supra* note 162, at 97.

Both courts placed inflated importance on the probative value of the prior felony drug convictions as to veracity, but failed to recognize the substantial unfair prejudice of the admission of the conviction under the specific facts of the cases. Moreover, both courts failed to recognize that although all felony convictions have some general probative value on the issue of veracity, as among the potential universe of felony convictions, drug convictions for possession are near the bottom of the scale.²⁶⁷ The prior convictions admitted in *Ohler* and *Cordoba* had such high risks of unfair prejudice that it is next-to-impossible for the probative value of the drug convictions to have outweighed the unfair prejudice.²⁶⁸ Thus, both courts arguably reached the wrong result under Rule 609(a)(1).²⁶⁹

Perhaps this is the worst news of all for criminal defendants after *Ohler*. They have been stripped of their ability to prick the boil of their prior convictions unless they forgo the right to appeal the admissibility of the prior conviction. Worse yet, if they choose to preserve the error and pursue the admission of the prior conviction on appeal, they may well be met with a narrow, half-hearted application of Rule 609(a)(1) and a near certain affirmance, particularly in drug cases.

2. Other Litigants and Other Disclosures

Of course, the Supreme Court's broad holding in *Ohler* is not limited to criminal defendants or to the preemptive disclosure of prior convictions admitted for purposes of impeachment. Instead, the Court's waiver rule appears to extend to every litigant and to every harmful piece of impeaching evidence ruled admissible by the trial court. Thus, for example, a civil plaintiff's preemptive disclosure that he was fired for embezzling from his employer, and a witness's disclosure that he had previously lied on his resume, would both fall under the holding of *Ohler* and would result in waiver.²⁷⁰ The court in *Ohler* based its ruling not on

²⁶⁷ See MUELLER & KIRKPATRICK, *supra* note 245, at 624-25.

²⁶⁸ The high risk of prejudice in both cases flows from the similarity of the prior crimes to the charged crimes creating a substantial risk that the jury would use the prior convictions when determining the guilt of the defendants and not limited to the defendants' credibility. In *Ohler* the prior crime was possession of methamphetamine and the charged crimes were importation of marijuana and possession with intent to distribute, *Ohler v. United States*, 529 U.S. 753, 755, while in *Cordoba*, the prior conviction was for possession of cocaine with intent to distribute and the charged crime was possession of cocaine with intent to distribute, the very same crime. *Cordoba*, 104 F.3d at 226, 229.

²⁶⁹ Arguably, the trial judge in *Ohler* was simply following *Cardoba* and *Alexander* and likely would have been affirmed if the appellate court had chosen to review the issue on the merits.

²⁷⁰ A review of the lower court opinions addressing trial counsel's preemptive

the particularities of the criminal defendant or the application of Rule 609. Instead, the court relied on the general rule that a party cannot complain about the admission of evidence it introduces at trial²⁷¹ and the built-in advantage of the cross-examiner in choosing whether to use evidence ruled admissible by the judge.²⁷²

However, there remains after *Ohler* a question about the applicability of the waiver rule to non-impeachment contexts. For example, if *Ohler*'s prior conviction had been admitted under Rule 404(b) for purposes of proving her motive or intent,²⁷³ the dynamic of the preemptive disclosure would change. The admission of the conviction for substantive purposes would mean that the prosecution would presumably be able to present the evidence first, in its case-in-chief, as opposed to only during the cross-examination of *Ohler*.²⁷⁴ Thus, by the time *Ohler* took the stand, the jury would already know about the prior conviction and typically there would be no question about the prosecution's desire to use the evidence. Accordingly, the majority's concern in *Ohler* that the no waiver position precluded the prosecution from being able to decide to use the evidence would often not be an issue.

With non-impeachment evidence the only issue would be whether the mere fact that a defendant "voluntarily" addressed a prior conviction or other harmful fact on direct examination would constitute waiver. Three reasons suggest that the court would not, or at least should not, find waiver in this situation. First, the mention of the prior conviction is in rebuttal of the prosecution's introduction of the evidence. Presumably, even in the *Ohler* situation, the defendant could discuss the prior conviction on redirect examination, after the prosecution's cross-examination without waiving error. Parties are typically allowed to rebut the other side's evidence without giving up their right to complain about the court's admission of the evidence in the first place.²⁷⁵ Second,

disclosure reveals the wide variety of types of evidence involved. The evidence ranges from plaintiff's status as an illegal alien, see *Rojas v. Richardson*, 703 F.2d 186 (5th Cir. 1983), to plaintiff's prior work as a nude dancer and her breast augmentation surgery, see *Judd v. Rodman*, 105 F.3d 1339 (11th Cir. 1997), to defendant manufacturer's recall letter, see *Harley-Davidson Motor Co. v. Daniel*, 260 S.E.2d 20 (Ga. 1979).

²⁷¹ See *Ohler*, 529 U.S. at 755.

²⁷² See *id.* at 758.

²⁷³ See *supra* note 168 for text of Rule 404(b).

²⁷⁴ See MUELLER & KIRKPATRICK, *supra* note 245, at 265-66 (noting that courts allow evidence admitted under Rule 404(b) to be admitted during prosecution's case-in-chief).

²⁷⁵ See *id.* at 13 (stating "The . . . effect of introducing evidence is to pave the way for other parties to introduce evidence, question witnesses, and offer argument on the subject in attempts to rebut or confine the initial evidence. . . . [T]he party who offers evidence on a point is said to have "opened the door," meaning that doing so legitimates countermoves

the prosecution's introduction of the evidence removes any doubt about the prosecution's desire to introduce the evidence. Third, the rebuttal use of the evidence removes concerns about ensuring that the judge has an adequate record on which to rule on the matter before allowing the matter to be taken up on appeal.²⁷⁶ Once the prosecution offers the evidence first, presumably after the defendant's objection has been lodged and argued, a full record exists. The rebuttal use of the evidence during defendant's case should not foreclose appeal. In one sense, this result is obvious because when the disputed evidence is offered by a party to rebut the other side's use of the evidence, the party is no longer acting preemptively and is no longer obtaining any so-called tactical advantage from the disclosure.

The third category of evidence, which *Ohler* does not explicitly address, concerns the admission of evidence for substantive purposes when the opposing party puts into issue the element of the charge or claim that is proven by the disputed evidence. For example, the trial court might admit evidence of defendants past drug dealing to prove intent under Federal Rule of Evidence 404(b), but only if the defendant raises issues regarding intent in the party's case-in-chief.²⁷⁷ In that scenario, should the party who attempted to exclude the evidence be able to make the preemptive disclosure in hopes of gaining a tactical advantage and avoiding the impression that the party had concealed the past conduct or events without waiving error? *Ohler's* concern with preserving the inherent advantage given at trial to the party who gets to go last suggests that disclosure in this situation would fall under *Ohler* and would result in waiver.²⁷⁸ Moreover, the disclosing party is, under *Ohler's* analysis, "voluntarily" disclosing the evidence such that the party cannot later complain about its admission.

3. Disclosures During *Voir Dire* or Opening Statement

In the non-impeachment context, the issue of preemptive disclosure is more likely to arise when a party makes a disclosure during jury *voir dire* or opening statement. The same principle that counsels lawyers to have

seeking to answer or rebut the initial evidence and that litigants may 'fight fire with fire' . . .").

²⁷⁶ See *Ohler*, 529 U.S. at 759 (citing *Luce v. United States*, 469 U.S. 38 (1984) for concern that harm from court's ruling on motion in limine is speculative).

²⁷⁷ See MUELLER & KIRKPATRICK, *supra* note 245, at 263-64 (noting that courts may require prosecution to delay introduction of 404(b) evidence until its rebuttal case if "the defendant is not denying intent but rather claiming that he was not the perpetrator").

²⁷⁸ See *Ohler*, 529 U.S. at 757-58.

the witness admit to past misconduct on direct before they are asked about it on cross-examination dictates that lawyers should disclose any harmful material to the jury at the earliest opportunity.²⁷⁹ The disclosure of weaknesses during *voir dire* or opening statements can effectively minimize the weakness and avoid any suggestion that the party was trying to conceal the evidence.²⁸⁰

Disclosure made prior to the introduction of any testimony or exhibits should not waive error under either *Ohler* or general common law principles of evidence. In the first place, nothing said during *voir dire* or the opening constitutes evidence.²⁸¹ Thus, good faith references to harmful evidence that the party believes will be introduced during the trial does not commit the party to introducing the evidence themselves, nor does it foreclose the opposing party from choosing to introduce the evidence. Accordingly, neither of *Ohler's* concerns – that a party has voluntarily introduced harmful evidence and that the disclosure preempts the other party's control of the evidence²⁸² – are implicated. In the second place, any representations made by a party during *voir dire* or the opening statement that are not borne out by the evidence carry their own consequences. The jury may discount the party's entire case because of the broken promise, or may place greater value on the weaknesses based on the party's failure to disprove or otherwise minimize the evidence.²⁸³ Those checks on advocates, combined with the reticence of lawyers to reveal negative information about their case, provide adequate safeguards on preemptive disclosures made at the beginning of the case without the need to impose waiver as well.

²⁷⁹ See STERN, *supra* note 5, at 170-82 (advising that lawyers should disclose weaknesses during opening statement and concluding that "to ignore the unpleasant truth [in the opening statement] is suicidal"); HAYDOCK & SONSTENG, *supra* note 6, at 323 (stating "Weaknesses in a case that have not been explained and that most likely will be mentioned during the opposition's opening statement or later in the case should be addressed during the opening statement.").

²⁸⁰ TANFORD, *supra* note 6, at 281 (stating "Trial practitioners and psychologists unanimously agree that weaknesses in your case should be disclosed in the opening statement. By bringing them out yourself in as positive a manner as possible you take some of the sting out of them, appear honest, and lessen the negative impact when your opponent points them out.").

²⁸¹ See RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE 83 (2d ed. 1995) (noting that lawyers often tell jury that opening statement is not evidence).

²⁸² See *Ohler*, 529 U.S. at 757-58.

²⁸³ See HAYDOCK & SONSTENG, *supra* note 6, at 321 (advising lawyers to avoid making promises during opening statement that lawyer cannot keep or exaggerating evidence because jury "will lose confidence in the lawyer").

In *United States v. Garcia*,²⁸⁴ the Ninth Circuit held that the defendant's disclosure of his prior convictions during *voir dire* did not waive the party's right to challenge on appeal the trial court's admission of the evidence.²⁸⁵ The court's ruling is significant because the Ninth Circuit, at the time of *Garcia*, had followed the waiver approach for at least twenty-four years.²⁸⁶ The court in *Garcia* relied on the timing of the disclosure, noting that defendant's counsel had "merely" referred to the prior conviction during *voir dire* rather than actually offering it into evidence.²⁸⁷ The court also pointed out that the prior conviction was admitted as circumstantial evidence of the alleged crime and that the defense had not disclosed the "nature of the evidence" during *voir dire*.²⁸⁸

Garcia supports the argument that *Ohler* waiver is not inexorably required every time a party preemptively discloses a weakness. Rather, the tactical advantages of "drawing the sting" may still be freely available to litigants during *voir dire* and opening statements.²⁸⁹ The concerns expressed by the Court in *Ohler* do not apply.

B. The Court's Preservation of Error Analysis

One consequence of the Supreme Court's exclusive reliance on waiver is that the Court largely ignored the preservation of error issues in the case. Yet, the disclosure of weaknesses raises a number of important issues regarding preservation of error, including the effect of rulings on motions in limine. Significantly, a recent amendment to Rule 103 modifies the traditional treatment of such rulings. This section explores the preservation of error issues that the *Ohler* Court ignored, and analyzes the appropriate outcome in *Ohler* based on the defendant's efforts to preserve the error of the trial courts in limine ruling.

²⁸⁴ *United States v. Garcia*, 988 F.2d 965 (9th Cir. 1993).

²⁸⁵ *See id.* at 967-68.

²⁸⁶ *See supra* notes 115-28 and accompanying text (discussing historical background of Ninth Circuit cases addressing preemptive disclosure).

²⁸⁷ *See Garcia*, 988 F.2d at 968.

²⁸⁸ *Id.*

²⁸⁹ *See, e.g., Petty v. Ideco*, 761 F.2d 1146, 1152 n.3 (5th Cir. 1985) (holding that party's disclosure of harmful evidence during opening statement did not waive party's right to complain about admission of that evidence on appeal).

1. Definitive In Limine Rulings

In *Ohler*, the Court's only allusion to preservation of error issues is its brief discussion of *United States v. Luce*.²⁹⁰ However, even in that part of the opinion the Court did not address the question of whether the defendant could rely on the trial court's pre-trial ruling admitting the prior conviction.²⁹¹ The omission is not an oversight; the court's analysis makes the preservation of error arguments superfluous. Without regard to whether the error was preserved, *Ohler* waived the point by introducing the conviction during her direct.²⁹² Thus, even if *Ohler* had raised the issue at side bar and sought reconsideration of the court's in limine ruling immediately before disclosing it during the direct or had waited until the end of the direct before revisiting the issue with the judge and only then disclosed it, the Court's ruling presumably would have been the same.

The Court's disregard of the preservation issues undervalues the differences between *Ohler* and *Luce*. In *Ohler*, the defendant actually took the stand and testified, fulfilling the condition imposed by *Luce* for appealing the trial court's admission of the defendant's prior conviction.²⁹³ That distinction is significant. As Justice Souter noted, in *Ohler* the Court had a complete record before it including the defendant's testimony, thus allowing it a full opportunity to decide whether the conviction should be admitted into evidence under Rule 609(a)(1).²⁹⁴ Unlike *Luce*, no conditions in the court's in limine ruling were left unfulfilled; no proffers were offered in the place of the defendant's actual testimony.²⁹⁵ In *Ohler* the defendant objected to the government's stated intent to introduce the prior conviction, lost on the objection, and then fulfilled *Luce* by taking the stand and testifying.²⁹⁶

²⁹⁰ See *supra* notes 94-106 and accompanying text (discussing *Luce v. United States*, 468 U.S. 38 (1984)).

²⁹¹ See *Ohler v. United States*, 529 U.S. 753, 758.

²⁹² *Id.*

²⁹³ *Id.* see *Luce*, 469 U.S. at 45.

²⁹⁴ See *Ohler*, 529 U.S. at 761 (Souter, J., dissenting).

²⁹⁵ See *id.*; see also Joint Appendix, *supra* note 162, at 97-98, 102-39 (presenting trial court's oral ruling on government's motion in limine and transcript of defendant *Ohler*'s testimony at trial). The trial court's oral ruling did not indicate that there were any remaining issues to be decided on the admission of defendant's prior conviction. To the contrary, the court evaluated the probative value of the evidence against the potential unfair prejudice and pronounced it admissible. See *id.* at 97-98. The only condition to its admission was that the defendant testify, see *Luce*, 469 U.S. at 42, which she did. Joint Appendix, *supra* note 162, at 102.

²⁹⁶ See *id.* at 35-36 (presenting Defendant's Response and Opposition to Motions In

One possible remaining objection to Ohler's effort to exclude the prior conviction is that she should have waited until the end of the direct examination and then have re-urged the exclusion of the conviction outside the presence of the jury before disclosing it to the jury.²⁹⁷ However, that approach puts defendants in the position of objecting to their own testimony in advance of disclosing weaknesses. As the Fifth Circuit has noted more than once, requiring the defendant to re-urge the matter before disclosing it constitutes a foolish absurdity.²⁹⁸

Nevertheless, the delay would have allowed the court and prosecution to hear the bulk of the defendant's testimony before having to rule on the admission of the prior conviction. Of course, that assumes that the court needed more information to make its ruling. When Ohler took the stand the court knew the nature of the prior conviction (possession of methamphetamine), knew the nature of the defendant's defense (lack of knowledge), knew that the defendant's credibility would be an issue in the case (the defendant was testifying as the lone witness to the lack of knowledge), and knew that the prosecution was the party insisting on the admission of the prior conviction (the government's pre-trial motion sought admission of the conviction).²⁹⁹ Remarkably, the court knew all of that even before the trial began. The trial court's in limine ruling on the admission of the prior conviction came after the court received additional briefing on the issue, heard oral arguments from counsel on two separate occasions, and carefully considered the matter over a period of days.³⁰⁰ The court's ruling was unambiguous,³⁰¹ leaving only

Limine Filed by the Government); *id.* at 74-79 (presenting Defendant's Supplemental In Limine Briefing); *id.* at 97-98 (noting trial court's oral ruling that defendant's prior conviction was admissible for impeachment purposes); *id.* at 102-39 (consisting of transcript of defendant's trial testimony).

²⁹⁷ See Brief of United States at 18 n.12, *United States v. Ohler*, 529 U.S. 753 (2000) (No. 98-9828) [hereinafter Brief of United States] (arguing that, "[a]t 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."). The government's argument relied on two factors: (1) the court would have an opportunity to "perform the Rule 609(a)(1) balancing in light of the defendant's direct testimony"; and (2) the government would have additional time and information to decide whether it would introduce the conviction during the cross-examination. *Id.*

²⁹⁸ See *supra* notes 155-161 and accompanying text (discussing Fifth Circuit approach to preemptive disclosure).

²⁹⁹ See Joint Appendix, *supra* note 162, at 97-98 (presenting trial court's oral ruling on admission of prior drug conviction).

³⁰⁰ See *supra* notes 167-82 and accompanying text (discussion of procedural history of case).

³⁰¹ See Joint Appendix, *supra* note 162, at 97-98 (presenting trial court's oral announcement of its ruling, stating "I will deny the motion in limine to preclude evidence

the implied condition imposed by *Luce* that the defendant take the stand and testify.³⁰² By the time the defendant satisfied that condition and testified, there was nothing left for the court to consider, no additional arguments to be made. Thus, the trial court's in limine ruling presumably was "definitive" under any definition.³⁰³ That definitiveness, coupled with Ohler's testimony at trial, should have preserved the propriety of the trial court's admission of the conviction for appeal. Yet, the Supreme Court's opinion entirely omits any discussion of preservation of error issues and fails to address Ohler's reliance on the trial court's pre-trial ruling as the basis for her point of error.³⁰⁴

2. Amendment to Federal Rule of Evidence 103

The Court's disregard of the preservation of error issues in *Ohler* in no way lessens their importance, particularly in light of recent amendments to Federal Rule of Evidence 103. Effective December 1, 2000, the following sentence was added to the end of Rule 103(a):

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.³⁰⁵

The rule attempts to resolve the existing circuit split about the effect of rulings on motions in limine.³⁰⁶ The new rule provides that such rulings are effective to preserve error if they are definitive and on the record.³⁰⁷ The advisory committee's note to the amendment observes that renewed objections to definitive rulings are unnecessary formalisms, just as the former practice of excepting to adverse rulings from the bench was disregarded as unnecessary many years ago.³⁰⁸ The advisory committee does not attempt to define "definitive." It does point out that changed

of the defendant's prior conviction for methamphetamine use."). In case there was any doubt about the courts' ruling, on the first day of trial the trial judge made reference to the in limine ruling, telling defense counsel that "if [the defendant] testifies, obviously the prior conviction can be used for impeachment purposes." *Id.* at 100.

³⁰² See *Luce v. United States*, 469 U.S. 38, 42 (1984).

³⁰³ See *supra* note 89 and accompanying text (discussing meaning of "definitive" pre-trial ruling).

³⁰⁴ See *Ohler v. United States*, 529 U.S. 753, 755-60 (2000).

³⁰⁵ See FED R. EVID. 103(a).

³⁰⁶ See *supra* notes 843-89 and accompanying text; see also FED. R. EVID. 103 advisory committee's note (2000 amendment).

³⁰⁷ FED R. EVID. 103(a).

³⁰⁸ FED R. EVID. 103(a) advisory committee's note.

circumstances between the time of the court's ruling and the time that the evidence is offered, or a party's failure to fulfill conditions imposed by the trial court, limits the party's ability to rely on appeal on the court's ruling.³⁰⁹ The rule does not purport to impact the Supreme Court's decision in *Luce* in any way,³¹⁰ nor does the amendment purport to address the impact of a party's preemptive disclosure of weaknesses.³¹¹

However, the amendment makes an important change in the rules of evidence and raises an important question about the *Ohler* decision. The amendment creates a uniform approach to the perplexing question of whether a litigant must renew objections after obtaining a ruling on a motion in limine. The answer is: "It depends." If the ruling is definitive, then the objection or offer of proof need not be renewed at the time the evidence is offered.³¹² The error is preserved without any further action by the party. Of course, critical questions remain. How can a party know that the court's ruling was definitive? The advisory committee's note advises that it is counsel's obligation to ensure that an in limine ruling by the court is definitive if there is any doubt.³¹³ The meaning of definitive defies precise or comprehensive definition. If the ruling is unambiguous, unconditional, and final, it may well be "definitive."³¹⁴ If it is tentative, conditional, and ambiguous, it almost certainly is not "definitive."³¹⁵ If in doubt, the advocate should seek clarification from the judge. If still in doubt, the advocate should object when the evidence is offered.

The amendment also raises questions about why the Court in *Ohler* failed to address or even recognize the preservation of error issues presented by the case. *Ohler* involved the very factual scenario that the *Luce* opinion foreordained: A defendant who testified in her own defense despite the specter of a prior conviction, and then tried to minimize the impact of the conviction by disclosing the conviction during her direct examination.³¹⁶ Yet, instead of treating *Ohler* as *Luce*'s offspring, the

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² FED. R. EVID. 103(a).

³¹³ *Id.*, advisory committee's note.

³¹⁴ See *Wilson v. Williams*, 182 F.3d 562, 566 (7th Cir. 1999) (en banc). The amendment to Rule 103 does not attempt to define the term "definitive," and neither does the advisory committee's note. See FED. R. EVID. 103(a) & advisory committee's note. The Seventh Circuit's opinion in *Wilson* distinguishes definitive pre-trial rulings from conditional or tentative ones. See *Wilson*, 182 F.3d at 565-66.

³¹⁵ See *Wilson*, 182 F.3d. at 566.

³¹⁶ See *Ohler v. United States*, 529 U.S. 753, 755 (2000).

Court based its ruling solely on waiver. The *Ohler* Court did not recognize that the "waiver" was necessitated by *Luce* and was not the result of some cynical effort by criminal defendants to get some unfair tactical advantage.³¹⁷ *Ohler* followed *Luce* as naturally as night follows day, and yet the Court seems to treat *Ohler* as a dangerous and manipulative tactic that must be reigned in. Instead of applying the established rules and treating *Ohler* as a case involving questions of preservation of error, consistent with *Luce*, the court misapplied waiver principles and severely hampered the ability of litigants to address the weaknesses of their case in a forthright and candid way.³¹⁸

C. Truth, Justice and the Rules of the Game

Beyond legalistic notions of waiver or technical requirements of preserving error, the rules of evidence and practice should be designed to further the search for truth, to advance justice, and to facilitate effective trial advocacy. When the text of the rules of evidence do not provide a clear answer to an evidentiary question,³¹⁹ a guiding principle in their interpretation should be the extent to which a particular construction enhances the fact-finder's ability to reach the correct verdict without unnecessarily interfering with the trial lawyer's strategic decision-making.

Preemptive disclosure of weaknesses furthers the search for the truth in at least two ways: (1) it brings to the jury's attention important information about the witness, and (2) it avoids the impression that the witness or party is trying to hide information from the jury.³²⁰ Disclosure advances the cause of justice by allowing the parties control over their cases.³²¹ The disclosing party decides whether to make disclosure and the opposing party decides whether to use the information on cross-examination or otherwise.

³¹⁷ See *id.* at 759.

³¹⁸ See *id.* at 761-63 (Souter, J., dissenting).

³¹⁹ See, e.g., *Bourjaily v. United States*, 483 U.S. 171, 171-72 (1987) (construing rules 104(a) and 801(d)(2)(E) in accordance with their "plain meaning"); Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, The Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 866 (1992) (noting Supreme Court's affinity for "plain meaning" approach to rules of evidence).

³²⁰ See *Ohler*, 529 U.S. at 763-64 (Souter, J., dissenting); *supra* notes 1-7 and accompanying text.

³²¹ See *supra* notes 33-36 and accompanying text.

As Justice Souter noted in his dissent in *Ohler*,³²² Federal Rule of Evidence 102 mandates that the rules of evidence must be "construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."³²³ Thus, Rules 103 and 609, neither of which specifically address the effect of preemptive disclosures,³²⁴ should be read in a way that is consistent with the weighty matters of truth and justice. Preemptive disclosure is entirely consistent with the terms and purposes of both rules. Rule 609 allows impeachment of witnesses, including the accused, who have prior felony convictions or convictions involving dishonesty or false statement.³²⁵ The preemptive disclosure of the conviction on direct examination in no way limits the ability of the opposing party to impeach. The conviction can still be elicited by the impeaching party during the cross. In the same way, Rule 103 requires timely and specific objections to preserve error.³²⁶ Yet, the purposes of the Rule – to apprise the judge of the grounds of the objection and to give the opposing party an opportunity to correct the problem³²⁷ – are in no way jeopardized by preemptive disclosures and, in fact, are furthered by definitive rulings on motions in limine.

The majority's concern in *Ohler* appeared not to be so much with matters of justice or fairness as with purported fairness to the prosecution. The *Ohler* Court was concerned with preserving the

³²² See *Ohler*, 529 U.S. at 763 (Souter, J., dissenting).

³²³ FED. R. EVID. 102.

³²⁴ See FED. R. EVID. 103 & 609. The amendment to Rule 103 specifically disclaims any intent to resolve the uncertainty over the impact of preemptive disclosures. The advisory committee's note states: "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." FED. R. EVID. 103 advisory committee's note (2000 amendment). Rule 609 was amended in 1990 to delete language in the rule which intimated that the disclosure of the prior conviction would be made during the cross-examination. See Brief for Petitioner, *supra* note 167, at 22-23. The Supreme Court rejected *Ohler*'s argument that the amendment was pertinent to preemptive disclosures, finding that the amendment allowed the strategy choice of preemptive disclosure, but did not address the issue of the waiver effect of the disclosure. See *Ohler*, 529 U.S. at 755.

³²⁵ See FED. R. EVID. 609(a).

³²⁶ See FED. R. EVID. 103; *supra* notes 78-80 and accompanying text.

³²⁷ MUELLER & KIRKPATRICK, *supra* note 245, at 6. Rule 103 requires objections for three reasons: (1) "[To] help the trial court avoid error by reconsidering its ruling and taking corrective measures if necessary"; (2) "[To] give the proponent a chance to avoid problems in proof"; and (3) "[To] serve the broader interest of providing a fair but not endless chance to litigate." *Id.*

prosecution's right to decide whether to use the harmful evidence and with the lack of any *unfairness* to the defendant. In *Ohler* those concerns are particularly misplaced because it was the *prosecution* that filed the motion in limine seeking to admit *Ohler's* prior conviction.³²⁸ The prosecution never indicated any doubt about its intent to use the prior conviction, despite many opportunities to do so,³²⁹ and the prosecution actually asked *Ohler* about the conviction on cross-examination.³³⁰ The reality is that there are numerous ways to accommodate the prosecution's autonomy concerns short of imposing waiver on the defendant. The prosecution could be given the chance to disclaim its intent to use the conviction when the defendant seeks to make disclosure, or the defendant could be required on appeal to demonstrate that the evidence would have been used by the opposing party regardless of the preemptive disclosure.

Although the Supreme Court could not identify any way in which preemptive disclosure might infringe on the concepts of truth or justice,³³¹ some courts have expressed concern that in the absence of the waiver rule defendants might make preemptive disclosures at trial as a means of planting error in the record.³³² Such an argument rests on the notion that allowing preemptive disclosures without any procedural consequence would allow defendants to create error, and thus obtain an undeserved second trial.

This argument sweeps too broadly and assumes too much. First, relief on appeal turns on a showing that the trial court erred in admitting the evidence and that the error affected a substantial right of the party.³³³ Thus, not every disclosure will automatically result in a new trial. In fact, the remote possibility of success on appeal³³⁴ means that defendants

³²⁸ See Joint Appendix, *supra* note 162, at 13-15 (presenting government's Motion In Limine Regarding Impeachment Evidence).

³²⁹ See *id.* at 42-73 (presenting original oral argument regarding government's motions in limine); *id.* at 87-98 (consisting of supplemental oral argument regarding government's motion in limine to admit defendant's prior drug conviction); *id.* at 102 (noting beginning of defendant's testimony).

³³⁰ See *id.* at 104; *supra* note 186 and accompanying text.

³³¹ See *Ohler v. United States*, 529 U.S. 753, 755-60 (2000).

³³² See, e.g., *Williams v. United States*, 939 F.2d 721, 725 (9th Cir. 1991) (concluding that if court sanctioned preemptive disclosure strategy, it "would in effect be licensing defendants to plant irremediable errors in their trials during direct examination").

³³³ See FED. R. EVID. 103(a).

³³⁴ See CAROLE C. BERRY, *EFFECTIVE APPELLATE ADVOCACY* 2-3 (1998) (noting that appellate reversal rates "are notoriously low" and that between 1987 and 1996, reversal rate of federal circuit courts declined from just more than thirteen percent to less than 9.5 percent).

have every incentive to win at trial and a substantial need to make the preemptive disclosure for the purpose of maximizing those chances. Trial lawyers know that to pursue a trial strategy in hopes of prevailing on appeal is sheer folly.³³⁵

Second, the argument assumes that the only choices are between two absolutes: waiver or no waiver. In fact, the legitimate concerns about planting error could be resolved by requiring the disclosing party to wait until near the end of the direct before making the disclosure and allowing the opposing party to disavow its intent to use the impeaching material during the cross-examination. Such an opportunity would substantially reduce the risk of parties intentionally planting error in the trial record. If the party indicated that it intended to ask about the matter on cross, then the preemptive disclosure would not constitute waiver. If the party indicated that it did not intend to inquire on cross, there would be no need for disclosure. Such an approach would preclude a party from creating error in the record, while balancing the interests of both parties.

Beyond the primary interest courts should have in advancing truth and justice, they should also pay heed to the strategic interests of trial lawyers to the extent such interests are not inconsistent with truth, justice, or efficiency. Preemptive disclosure is one of those strategic decisions that advances the truth-seeking function of the trial and furthers the interests of justice. The disclosure gives the jury more information about the case and witness, not less, and it in no way gives an *unfair* tactical advantage to the disclosing party.³³⁶ In truth, it does just the opposite. The absence of disclosure suggests to the jury that the party and witness made an effort to conceal important information from them. The disclosure remedies that incorrect impression. The fact that the disclosure is made only because the court ordered that the evidence was admissible does not turn the disclosure into some gimmick whereby the lawyer is manipulating the jury.³³⁷ In this instance, good strategy

³³⁵ See TANFORD, *supra* note 6, at 294 (stating "Your principal trial objective is to win the case and make your opponent worry about whether he or she has preserved claims of error properly.").

³³⁶ See *Ohler*, 529 U.S. at 763-64 (Souter, J., dissenting).

³³⁷ The government suggested in its brief filed with the Supreme Court in *Ohler* that a party's preemptive disclosure "cause[d] jurors to credit a defendant for candor unduly when, unbeknownst to them, he disclosed the conviction only after failing to persuade the court to exclude it." Brief for United States, *supra* note 297, at 28. The government concluded that the court "should be hesitant to encourage or discourage "a particular strategy." *Id.* This argument, which the Court ultimately adopted as its own, see *Ohler*, 529 U.S. at 757-59, rests on a premise that because the defendant makes a strategic choice to

should be supported by the rules.

Nevertheless, the Court rejected an interpretation of the rules that was supportive of preemptive disclosure, and conspicuously noted in its opinion the government's much more limited view of the efficacy of preemptive disclosures.³³⁸ The government, in its brief to the Supreme Court, cited Klonoff and Colby's theory of sponsorship to question the underlying premise of preemptive disclosures.³³⁹ The Court characterized the government as arguing that "it is debatable whether jurors actually perceive a defendant to be more credible if she introduces a conviction herself."³⁴⁰ Although the Court does not appear to take sides in the debate explicitly, its opinion undervalues the effect of disclosure and underestimates the extent to which making preemptive disclosures is accepted trial strategy. It is left to Justice Souter, in dissent, to point out the important role of disclosure in mitigating the potentially explosive impact of the prior conviction and ensuring that the jury has a full and accurate understanding of the disputed evidence.³⁴¹

D. Strategies for Dealing with the Dilemma Created by Ohler

In the aftermath of *Ohler*, lawyers trying cases in federal court face the difficult choice between disclosure of harmful evidence and preserving the alleged error of the trial court's decision admitting the evidence. It is really a choice between two unattractive alternatives, particularly for criminal defendants. As a general matter, the chances of success on

preemptively disclose the conviction he should not get any other "benefit" from the disclosure. The concern seems misplaced. The question should be whether the defendant's disclosure can be fairly called "voluntary" and whether it is inconsistent with the rules of evidence. Courts should not be in the business of discouraging legitimate strategic choices by parties.

³³⁸ See *Ohler*, 529 U.S. at 757.

³³⁹ Brief of the United States, *supra* note 297, at 28 & n.25 (citing KLONOFF & COLBY, SPONSORSHIP STRATEGY 183 (1990) (stating "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."). The government suggested in its brief that even if preemptive disclosure enhances credibility that the enhancement may be unjustified because the defendant made the disclosure only after the court ruled the evidence admissible. *Id.* How that circumstance makes the juries' assessment of credibility unjustified is unclear at best. The fact remains that the disclosing party made the decision to admit to the weakness instead of ignoring it. The fact of disclosure reveals something about the witness and party regardless of the fact that the disclosure presumably would not be made in the absence of the court's adverse ruling.

³⁴⁰ *Ohler*, 529 U.S. at 757.

³⁴¹ *Id.* at 763-64 (Souter, J., dissenting).

appeal are small,³⁴² and yet the chances of acquittal at trial if the jury learns for the first time from the prosecution that the defendant has a prior conviction are equally small.³⁴³ Despite the Supreme Court's opinion, however, all is not lost. For instance, the opinion should not limit counsel's ability to make disclosures during *voir dire* and opening statement.³⁴⁴ Without waiving any claim of error, counsel should be able to reveal any harmful facts early in the case, before testimony is received, as a means of showing the party's trustworthiness and its interest in more than just winning. Moreover, *Ohler* should not limit the disclosure on direct examination of non-impeaching material.³⁴⁵ *Ohler* addresses the disclosure of a prior conviction under Rule 609 and is particularly concerned with the prosecution's right to decide for itself whether to use the conviction during cross-examination.³⁴⁶ Those concerns do not exist with evidence that relates to the merits of the dispute, at least with regard to evidence introduced by the prosecution during its case-in-chief, and, thus, should not be controlled by *Ohler*. Finally, *Ohler* does not limit a party's ability to address the problem evidence after it has been disclosed on cross-examination by the impeaching party. On redirect, the party can allow the witness to explain the evidence and attempt to mitigate its impact.

The critical question after *Ohler*, of course, is when should a party proceed with the preemptive disclosure, knowing that doing so forecloses appeal on that point. The starting point is that lawyers should make every effort to win at trial, not on appeal. Thus, even after *Ohler*, lawyers should begin from the premise that disclosure is the best approach. The lawyer's credibility with the jury, once lost, is nearly impossible to restore³⁴⁷ and ignoring important facts that the other side then "reveals" is a dangerous tactic indeed. Consequently, the questions

³⁴² See *supra* note 334-35 and accompanying text.

³⁴³ See Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 36 (1999) (stating "[K]nowledge of a previous conviction biases a case against a defendant. The likelihood that a jury will convict the defendant is significantly higher if the defendant's record is made known to the jury. The fact that the defendant has a record permeates the entire discussion of the case.").

³⁴⁴ See *supra* notes 281-289 and accompanying text.

³⁴⁵ See *supra* notes 273-278 and accompanying text.

³⁴⁶ See *Ohler*, 529 U.S. at 758.

³⁴⁷ See STERN, *supra* note 5, at 28, 171 (noting critical importance of disclosing weaknesses to jury so that advocate's credibility will not be undermined and concluding that "in the final analysis, the juror will usually vote for the case of the lawyer they believe in").

after *Ohler* are the same as before: Does the opposing party know about the weakness?³⁴⁸ How prejudicial is the evidence?³⁴⁹ What effect will preemptive disclosure have on the jury's assessment of the witness's testimony?³⁵⁰ Does the witness have an explanation for the shortcoming? And, perhaps the *Ohler* opinion suggests an additional question: What is the likelihood that the court's decision admitting the evidence will result in a reversal on appeal in the event you lose at trial? If the answer to the last question is that the likelihood is high, the lawyer might be justified in not making disclosure. Yet, assessing one's chances on appeal is more art than science. Even in the face of a strong argument on appeal, if the lawyer has a reasonable chance of success at trial and the preemptive disclosure will enhance those chances, the lawyer should make the disclosure. The reasonable chance of success at trial always trumps the inherent uncertainty of success on appeal.

CONCLUSION

Ohler places lawyers on the horns of a dilemma. A lawyer can preemptively disclose a weakness and thus waive any error, or he or she can withhold disclosure of the weakness and preserve the error. Neither option is attractive in that neither gives the party everything that it wants and needs. The former choice forecloses appeal in the event of conviction, the latter increases the likelihood of conviction.

Procedural rules at trial should, of course, facilitate an orderly and efficient determination of the facts in dispute. But they should also do more than that. They should ensure a full and fair presentation of the evidence. They should promote a determination of the issues by the fact-finder that is consistent with the basic principles of truth and justice. They should give the parties a legitimate opportunity to apprise the jury of their evidence and the perspectives of their witnesses. Instead, the *Ohler* Court gave primacy to efficiency and gave short shrift to the other precepts.³⁵¹ The decision imposes on lawyers a high cost for making the imminently reasonable and common sense decision to prick the boils in their cases. Perhaps trial lawyers can find some solace in the fact that

³⁴⁸ See TANFORD, *supra* note 6, at 357 (observing that if opponent does not know about weakness, "it may make sense to avoid bringing it up in direct examination").

³⁴⁹ See *id.* (noting that if evidence is "unconnected to the main issues" or will not have a "serious impact on the perceived credibility of the witness" the lawyer may not need to disclose it).

³⁵⁰ See *id.*

³⁵¹ See *Ohler*, 529 U.S. at 758-59.

Ohler applies only to federal trials and that not all state courts follow the approach adopted by the Supreme Court.³⁵² Yet, for those trial lawyers who find themselves trying cases in federal courtrooms across the United States, there will be little solace. Instead, there will be continuing frustration as they try to practice effective trial advocacy while navigating the thicket of procedural barriers designed to make it difficult for them to do so.

³⁵² See, e.g., *People v. Turner*, 789 P. 2d 887, 900 n.18 (Cal. 1990) (stating "[P]rudent counsel would be well advised to minimize the[] sting [of prior convictions] by eliciting them himself. Such defensive acts do not waive an objection on appeal."); *Harley-Davidson Motor Co. v. Daniel*, 260 S.E.2d 20, 22 (Ga. 1979) (concluding that party's preemptive disclosure of recall letter did not waive objection).