OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MARIA SUZUKI OHLER, Petitioner v. UNITED STATES

CASE NO: 98-9828

PLACE: Washington, D.C.

DATE: Monday, March 20, 2000 (c.2)

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IN THE SUPREME COURT OF THE UNITED STATES

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MARIA SUZUKI OHLER, :

Petitioner :

v. : No. 98-9828

UNITED STATES :

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Washington, D.C.

Monday, March 20, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

BENJAMIN L. COLEMAN, ESQ., San Diego, California; on behalf of the Petitioner.

BARBARA B. McDOWELL, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 98-9828, Maria Suzuki Ohler v. the United States.

Mr. Coleman.

ORAL ARGUMENT OF BENJAMIN L. COLEMAN

ON BEHALF OF THE PETITIONER

MR. COLEMAN: Mr. Chief Justice, and may it please the Court:

The Ninth Circuit has adopted a per se waiver rule. Under all circumstances, a defendant waives her right to seek any appellate review of her objection to a district court's ruling admitting her prior conviction for impeachment purposes if she attempts to mitigate the sting of that evidence. The Ninth Circuit --

QUESTION: You mean, when you say mitigate the sting, when she gets on the stand and testifies herself about it.

MR. COLEMAN: Correct. The Ninth Circuit has articulated this rule, although it has relied on no specific language in the Federal Rules of Evidence or the Federal Rules of Criminal Procedure. Indeed, the Solicitor General appears to concede that there is no such specific language supporting such a rule.

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QUESTION: Well, what specific language do you rely on to support your position?

MR. COLEMAN: We rely on the 1990 amendment to Rule 609, which specifically removed the cross-examination limitation with respect to when evidence could be admitted under Rule 609.

QUESTION: But that simply allowed the testimony to come in on direct as -- as well as cross. How does that support your position?

MR. COLEMAN: We believe it supports our position because we do not think that Congress would have intended to lay a trap for the unwary to on the one hand specifically authorize attempts to mitigate the sting, but on the other hand silently provide for the fact that such attempts, which are authorized, constitute waivers of the right to appeal without making any such indication in the rules of evidence.

In addition, we also rely on Rule 103.

QUESTION: I don't know, I mean, you really -- are most rules of waiver reflected in the Federal rules? I mean, what you have here is a criminal defendant who introduces this matter in the trial herself. How can she complain of its introduction?

MR. COLEMAN: With respect to the first part of the question, I believe that usually the waiver rules are

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incorporated in the Federal rules. For example, Federal Rule of Criminal Procedure 12 has a specific provision which indicates when a party specifically waives any objections.

With respect to, how can a defendant actually introduce the evidence and yet seek to appeal it, she is only introducing the evidence after she has articulated an objection, that objection has been overruled, and the only possible reason why she would be admitting that evidence is because the objection is overruled.

No criminal defendant in their right mind would seek to put in evidence of a prior conviction. That's extremely damaging evidence, and nobody would ever seek to do that. In addition --

QUESTION: Well, we've held, haven't we, that most rights generally are waivable? In other words, it doesn't take a specific provision allowing waiver in the granting of the right for it to be waivable. There's a presumption in favor of waiver.

MR. COLEMAN: I believe there's a presumption in favor of the availability of waiver. That does not mean that there's a presumption in favor of waiver. In fact, I think the presumption --

QUESTION: Well, what's the difference between a presumption in favor of waiver and a presumption as to the

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availability of waiver?

MR. COLEMAN: The difference is that with respect to a presumption of the availability of waiver, that means that unless there is a specific provision saying that you cannot waive this, no ifs, ands, or buts, waiver is available. However, if the presumption against waiver in general means that if the rules are silent, for example, you should presume that there will be no --

QUESTION: But there isn't any presumption against waiver in general. There's a presumption in favor of waiver, our cases say.

MR. COLEMAN: I believe Barker v. Wingo says that the presumption is against waiver.

QUESTION: Well, Barker v. Wingo was decided a long time before the more recent cases.

MR. COLEMAN: That is true. Barker v. Wingo was a 1972 case. However, I'm not aware of any cases overruling that proposition. Admittedly, Mezzanatto says that waiver is presumptively available, but I don't believe that Mezzanatto took the additional step to overrule Barker v. Wingo and to indicate that not only is waiver presumptively available, but we also are going to presume waiver.

QUESTION: Oh, I don't -- I don't think it's a matter of presuming waiver when it's your client herself

that put the evidence in. How can she possibly complain about the Government's introducing the evidence when she herself took the initiative in introducing it? I -- that's not a hard question as far as the issue of waiver is concerned.

MR. COLEMAN: Again, if she had not objected beforehand to the introduction of this evidence and received a ruling beforehand, then I agree, she would have waived, but in this instance the only reason why she is putting in the evidence is because she has articulated an objection, that objection has been overruled.

QUESTION: The Government might have decided that its case was strong enough that it wouldn't take a chance on the ruling and wouldn't introduce the evidence. She took that option away from the Government by leaping ahead.

MR. COLEMAN: I believe on the record that we have here there was absolutely no question that the Government was going to use this conviction. The Government affirmatively moved to admit the conviction, as opposed to a motion to exclude the conviction.

QUESTION: Before it knew how the trial had gone. It might have concluded, after seeing how strong its case looked and how well its witnesses did, not to take a chance on this, that we didn't need it anyway. Why

should it be precluded from deciding not to introduce it by her jumping the gun?

MR. COLEMAN: I think that Your Honor is articulating a policy concern that was articulated in Luce v. United States. I believe that Luce indicates that when a defendant does not testify, an appellate court cannot determine for sure whether a prosecutor would have used the prior conviction.

However, when the defendant does testify, an appellate court can review the full and complete record, which includes the defendant's testimony, and make a determination as to whether the Government's case was so strong that it never would have used the conviction.

QUESTION: Mr. Coleman, could not the defense have, to be sure about this, said to the judge, out of the hearing of the jury, just before the defendant testified, judge, I don't want to bring out this conviction if I can avoid it, but if your ruling is going to stick, let me know now? Couldn't he have confirmed the in limine ruling by asking just before the testimony, Government, are you going to bring this up, and then there would have been no doubt about the definitiveness of the ruling, or the Government's expectation of bringing it out on cross?

MR. COLEMAN: He could have done that. However, I don't think that such a sidebar or such a colloquy is

required, especially given the circumstances of this case, given the Government's motion to admit the evidence, and their claim that such evidence was critical and -- it was important and critical evidence and, in addition, the district court was clear that it was going to rule that the prior conviction was admissible.

In fact, on the day that the defendant testified, the district court specifically warned defense counsel that obviously the prior conviction was admissible, so in these particular circumstances, I do not think that such a scenario was required. However --

QUESTION: Well, of course, even if that's true, it wouldn't quite answer the problem that Justice Scalia raised. I want to go back to that for just a moment. In your colloquy you said, well, there's no question but that the Government would have used this in its case. Is the rule you're proposing one in which there -- if there is some question whether the Government would introduce the evidence, there should be some sort of different result?

MR. COLEMAN: I believe if the Government articulates a question as to whether they are going to admit the evidence beforehand, then that would be a different result, yes.

QUESTION: Isn't that what the Government will do all the time, if you win this case?

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MR. COLEMAN: I don't believe so, for essentially three reasons. Number 1, of course the Government has to be honest with the court. They can't just say something that's dishonest.

QUESTION: Well, it's not that they have to be dishonest about it. They simply can take the position that, given the nonwaiver rule, it's simply in their interest to have the decision made, in effect, at the last possible moment when, in fact, the judge knows as much as the judge can possibly know in weighing the relative probity versus prejudice, and it's in the Government's interest in effect to avoid appeal risks.

So I don't think the Government necessarily would have to act in bad faith simply to say, we're not going to make the final decision and we're not going to make a representation. I can see that as being something the Government might choose to do in good faith.

MR. COLEMAN: Well, I think there are two reasons why the Government won't always do that. Number 1, if the Government expresses any hesitation as to whether it's going to use the conviction, certainly it couldn't take an interlocutory appeal under section 3731 of the district court's ruling excluding the evidence. They would have had to make it --

QUESTION: Yes, but that's -- is that a real-

world scenario? I mean, that's conceivable, but that's really not going to happen very often, is it?

QUESTION: It seems to me the real-world scenario is, if the Government has such a strong case it doesn't need to use it, at the end of its case it simply advises the judge, I've decided not to use this impeaching evidence.

MR. COLEMAN: Exactly.

QUESTION: And then they would avoid this risk.

MR. COLEMAN: Exactly, and we do believe it's the Government's burden.

QUESTION: Mr. Coleman, you sort of assume throughout all of this that the defendant doesn't have to pay a price for removing the sting. You assume some absolute right to remove the sting, and you should not lose anything by removing the sting. I don't know why there's that principle in our law.

Let's assume the defendant knows that the Government's going to introduce, you know, a bloody shirt, so in order to remove the sting, the defendant himself introduces the bloody shirt. Now, you really think that we would entertain an argument, well, after all, the defendant only introduced it because he knew the Government was going to introduce it, and therefore you shouldn't be deemed to have waived any objection to it.

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That doesn't seem to me like a sensible principle. If you want to remove the sting, remove it, but don't come to the court and then say, we have an objection to what we ourselves have put in.

MR. COLEMAN: Well, for -- specifically with respect to Rule 609 evidence, again, I think it does come back to the 1990 amendment to Rule 609. If Congress intended that a defendant should have to give something up in order to remove the sting, one would think that Congress would have said so, rather than just specifically authorizing such attempts to mitigate the sting.

QUESTION: Why? That's the normal rule. You have no basis for objecting to stuff that you've put in yourself. I mean, I don't know why you would have to spell that out in order for that rule to be applied.

MR. COLEMAN: We don't believe that that was the normal rule, that in fact the Second Circuit and the D.C. Circuits before the Federal Rules of Evidence were enacted had specifically indicated that there was no waiver under the circumstances.

QUESTION: Is it relevant here or not -- I've been thinking, not about Rule 609 but 103. My thought was simply that there's a definitive ruling by the judge. The judge says, I rule, Government, you can admit this evidence, and you wish under 103 to appeal that ruling.

You can appeal the ruling if, and only if, it affects a substantial right of the defendant, that it substantially hurt the defendant, the ruling. If the Government didn't introduce it, it didn't hurt the defendant.

Ah, but wait a minute. The defendant, because of the threat, introduced it herself, so of course that ruling affected a substantial right. If we're uncertain about what the Government would or wouldn't do, I guess maybe it didn't affect a substantial right, but where we're certain, it did. I think the exact word is, a substantial right of the party affected.

Now, that's how I've been thinking about it, but don't let me think that way if I'm wrong on the basic concept.

MR. COLEMAN: I agree with the basic concept that if there's a case where the evidence is so overwhelming that an appellate court would take a look at this and say, well, maybe the prosecutor would not have used the conviction, in any event that error is going to be harmless anyhow. It's not going to affect a substantial right. I do agree that the Rule 103 substantially affecting language overlaps.

QUESTION: Well, I was thinking that that's what the case is about. Ordinarily, you would get your appeal, because there's a ruling that affected a substantial right

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of the defendant, and the reason it did is because the defendant was put to bringing out the evidence herself.

MR. COLEMAN: I certainly agree with --

QUESTION: Is that right?

MR. COLEMAN: Yes.

QUESTION: Don't let me think this way if I'm making some error in the basic --

MR. COLEMAN: No, I agree with that.

QUESTION: When you assume that the defendant is put to, into the position of bringing it out herself, you're assuming something which I guess most of us assume, and that is that she's really going to reap a significant advantage by doing so.

There was at least one study cited, I guess, in the Government's brief that calls that into question. I didn't read the study. I take it you probably have. What's your response to that?

MR. COLEMAN: In response in our reply brief we cited a study that conducted empirical studies which contradicted the one article cited by the Solicitor General. In addition, I believe that Your Honor's opinion in Old Chief talks about the devastating effect that a litigant can have if the jury perceives that litigant as hiding something from them, so I think that the Court has embodied the mitigating the sting principle in its

jurisprudence.

QUESTION: Well, my thought was maybe we shouldn't have. But you think we got it right.

MR. COLEMAN: I do think you got it right, and I think that Congress has indicated that you got it right, because they specifically authorized such attempts to mitigate the sting, and --

QUESTION: Well --

QUESTION: And defense attorneys respond that way. Defense attorneys, if they know that a prior conviction is in the wind, will try to diffuse it. I think that's standard operating procedure.

MR. COLEMAN: That's correct, and it's standard operating procedure for Government trial attorneys when they use an informant or a cooperating witness. They often attempt to mitigate the sting, and we cited some cases in our briefs, and that's standard operating procedure for both parties, and it's something that you learn as a trial lawyer, or one of the first things.

QUESTION: Would the Government have a similar right to appeal if the trial court made an adverse ruling on its informant's testimony?

MR. COLEMAN: No.

QUESTION: Why not?

MR. COLEMAN: Once jeopardy has attached, they

couldn't appeal under --

QUESTION: Well, how about an interlocutory appeal of the type you described that might be taken under section 3731?

MR. COLEMAN: The problem is that under 3731 it says that the Government can appeal a ruling that either excludes or suppresses evidence. If a district court admits a prior conviction of a Government witness, then I don't believe they could appeal under 3731.

QUESTION: But you could.

MR. COLEMAN: We certainly couldn't take an interlocutory appeal, but we would be able to appeal after the final judgment.

QUESTION: If you win this case.

MR. COLEMAN: Correct.

QUESTION: You agree, seem to agree with the Government that waiver is the right concept, but it seems to me that the rule the Government is urging is really forfeiture. You're not saying, here it is and I voluntarily give it up. You don't want to give it up, but the Government is contending that the consequences of your bringing it up on direct is that you forfeit the right to appeal. Am I correct in understanding that?

MR. COLEMAN: I don't believe so, because again the distinction between the forfeiture and the waiver

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would be that under forfeiture we at least would have been able to obtain plain error review on appeal, but what the Government is arguing and what the Ninth Circuit held was that we're not entitled to any review whatsoever, and that's why it's waiver, and so I don't think that the Government is simply arguing forfeiture. They're actually endorsing the Ninth Circuit's rule that we don't get any appellate review at all, which is a waiver.

QUESTION: Under your view, would it be an abuse of discretion for a trial judge to say at the beginning of every criminal trial, it's a matter of policy in this court that I will not make advance rulings on prior convictions? If and when the Government brings up the prior conviction, then I'll make my ruling, not before. Abuse of discretion if your rule prevails, and if you win?

MR. COLEMAN: It would be difficult for me to say whether it would be abuse of discretion. I do think that the district court, making that per se blanket statement that it will never, ever consider a ruling, could be violating Rule 12(e). Rule 12(e) says that a district court can only defer a ruling for a good cause.

Now, there may be an almost -- in a wide variety of Rule 609 cases that the district court will, in fact, have good cause, but to simply make the blanket statement --

QUESTION: Well, the district court says, I'm going to -- my good cause is, I might get reversed if I make a mistake.

(Laughter.)

QUESTION: Defer it from when? I mean, may only defer it for a good cause, to be sure, defer it from the point at which he should have made the ruling, but really the normal procedure is to make the ruling when the matter comes up, and it's really a novel -- in the history of civil procedure, a novel arrangement to have all of these things presented before the trial, just a matter of efficiency.

But the normal, and the final ruling on whether to exclude or omit evidence is when it's introduced, and Rule 12 applies to the judge saying, you know, when it's introduced, well, I don't know whether it's properly let in or not. Bring it in now and I'll think about it later, and I'll instruct the jury that it should have been admitted. That's deferring the ruling.

But here, he made the ruling --

MR. COLEMAN: We do believe he did make a ruling for purposes of Rule 103 and in order to obtain appellate review --

QUESTION: But he didn't --

MR. COLEMAN: I'm sorry.

QUESTION: No, it's your question. I was going to say, he didn't have to make the ruling. I mean, your argument I thought was assuming that he has an obligation to make that ruling in limine, and to my knowledge he has no obligation to make the rule -- the rules allow him to do so, but he has no obligation to do that.

MR. COLEMAN: No, I hope I didn't misspeak. We agree, he does not have an obligation to render the ruling at the in limine stage.

QUESTION: Okay. Then isn't -- why would it be an abuse -- going back to Justice Kennedy's question, why would it be an abuse of discretion if he --

MR. COLEMAN: The only way I could ever foresee that being abuse of discretion is, the way he posed the hypothetical, a district court judge says, I am never, ever going to consider this, consider a Rule 609 issue at the in limine stage, and the only point I was trying to make is that such a blanket statement could potentially violate Rule 12(e), because Rule 12(e) says that motions that are made before trial should be entertained before trial unless the court for good cause feels it needs to determine --

QUESTION: Well, why wouldn't it be good cause for a district judge to say, I will just -- I will never know at the in limine stage as much as I do about the

state of the record at the time it's being offered, and so I'm just -- that's my good cause.

MR. COLEMAN: I agree, that generally will be -- that will be enough. That will be good cause, and in almost all cases, if the district court wants to defer, it certainly has the power to defer.

QUESTION: Well, isn't that what it is likely to do if you win your case, or perhaps let me give you a second alternative, or maybe a variant on Justice Kennedy's.

Either the judge is going to say, look, I'm going to -- I'm going to wait until the evidence is offered before I make a ruling, or the judge is going to say, I will entertain an in limine ruling, and I will make one before trial, but it is subject to reconsideration when we get closer to the point of introduction, and I will not make a final ruling until the moment comes that the Government offers it, because only then can I make the most intelligent judgment about the relative prejudice and probative force.

That would certainly I take it the latter position would not be an abuse of discretion, and so isn't a cautious judge going to take that position?

MR. COLEMAN: A judge could take that position. However, I don't think that judges will always do that as

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a result of this decision. There are many reasons why a judge will want to render a definitive Rule 609 ruling or other in limine ruling before trial.

QUESTION: Well, tell me why -- as against the risk of reversal that is the assumption of Justice Kennedy's question and mine, why is the judge going to want to go out on the limb?

MR. COLEMAN: Number 1, the judge --

QUESTION: If you win.

MR. COLEMAN: The judge may believe that a definitive ruling at the in limine stage will help the parties settle the case, so he doesn't even have to go through a whole trial and then an appeal. A judge may think that in fairness the parties should have such a ruling so that if the Government wants to take an interlocutory appeal they can, or if the defendant wants to be able to figure out his trial strategy throughout the trial he can do that. A judge --

QUESTION: There's another reason too, Mr. Coleman. I don't think all our district judges are nearly as timid as my colleagues seem to suggest.

(Laughter.)

MR. COLEMAN: I agree, and I can attest to that. They --

QUESTION: At least they weren't when I was

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trying cases.

MR. COLEMAN: And it hasn't changed. They have no problem making definitive rulings and letting you know --

QUESTION: Along that line, can you tell me, and this relates to an observation Justice Scalia made. In the civil area, with pre-trial orders, in limine rulings shaped the whole course of the civil case. Are there many in limine rulings in criminal cases? Is there always a conference in chambers, and there are four or five in limine rulings made? Just -- can you give me some practical sense of how often this happens --

MR. COLEMAN: Of course, I can give you --

QUESTION: -- in areas other than prior convictions, as well as prior convictions.

MR. COLEMAN: Of course, I can give you a flavor of what occurs in the Southern District of California. I'm not quite certain as to other districts, but there are many in limine rulings that are brought. In fact, if you notice in this case, the district court specifically said an in limine hearing, because that is the normal course in criminal cases in the Southern District of California.

In limine motions are brought with respect to expert testimony. The Government these days uses expert testimony in all sorts of cases. As you indicated, 404(b)

and 609 issues are usually dealt with at the in limine stage. You know, again, after Old Chief there may be certain Rule 403 issues that are going to be dealt with at the in limine stage.

So there are a variety of issues that are dealt with at the in limine stage, and --

QUESTION: Does this matter that much? I mean, doesn't the same problem exactly arise if you have your witness on the stand, the defendant's testifying, you're well into the thing, and then you go to the judge, say judge, excuse me, now, I have a final question I want to ask my client. I'm going to elicit the information that she has a prior conviction, and I'm going to do that, but I'm not going to do it -- you know, I don't want to do it, but I'll do it if you let them cross-examine and bring it out on cross.

Now, the judge is going to have to say yes or no. What's the difference if he does it at that point, frankly, or if he did it 15 minutes earlier, or if he did it 15 hours earlier?

MR. COLEMAN: I agree, I don't think there is too much --

QUESTION: Would he have to say yes or no? I would say, you know, it's up to you. You want to introduce evidence, introduce it.

QUESTION: He's not a trial judge.

QUESTION: Evidence that you introduce, you can't complain about.

I am still unable to understand what seems to me the premise of your whole case, and that is that you have a right to eliminate the sting without paying a penalty for it. It seems to me the normal rule is, you introduce evidence, you have no right to complain about the introduction of that evidence, and your response to that is, oh, well, I'm only doing it to -- quote, to eliminate the sting.

I don't care why you did it. You put it in. Why do you have a special right to eliminate the sting? It seems to me you take your chance. If you want to eliminate the sting, you don't complain about the admission on the Government's part. If you're confident that it shouldn't have been let in, then you cannot eliminate the sting. What is so evil about make -- putting you to that choice?

MR. COLEMAN: The reason why I believe that we do have a right is because, again, in 1990 Congress specifically amended Rule 609 to say you have a right to do that, so that's why I believe we do have a right.

And in addition, again it's our position that there wasn't a general rule before the Federal Rules of

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Evidence were enacted if you look at the common law, that if you brought in the conviction first, you waived your right to appeal and, in fact, the second Circuit and the D.C. Circuit held to the contrary, and a revised version of Wigmore --

QUESTION: The common law, they never had in limine motions, did they?

MR. COLEMAN: At the -- if you take the common law taking it all the way back, in limine motions were rare. However, as you get closer --

QUESTION: Not only rare, but nonexistent, weren't they?

MR. COLEMAN: At one time they were nonexistent, but as you take that closer to the adoption of the Federal Rules of Evidence, in limine motions did become a habit within trial courts, you know, in the United States.

QUESTION: When? Because you know, I practiced for 16 years. It was just unknown in my time.

MR. COLEMAN: Well, we look at the cases, for example, United States v. Maynard and United States v. Puco, where this specific type of issue with respect to prior conviction evidence was addressed at the in limine stage, and the district court made rulings thereon.

QUESTION: Mr. Coleman, in this particular case, if I remember right, the judge was genuinely in doubt at

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the outset. He asked for briefing, he had an oral argument on the issue, and then he made a ruling that he considered definitive, but he said it's a close call.

Is there -- relevant in this picture at all that maybe district judges would like to know what the law is, so that's a reason for saying, if the judge has made a definitive ruling that he called a close call, there should be appellate review?

MR. COLEMAN: We certainly agree, and that hits home with our point with respect to Rule 102, that one of the purposes in construing the rules that Rule 102 indicates is that we should further the progress and development of the law of evidence.

And this is a classic case, where the district court had real trouble determining whether a prior conviction for simple possession of drugs is probative of veracity, and this is exactly the type of reason why we do not want to have blanket waivers of the right to appeal. There will be no development of the Rule 609 case law under those circumstances, so we certainly do agree with that.

Your Honors, if there are no more questions, I'd like to save the remaining time for rebuttal.

QUESTION: Very well, Mr. Coleman.

Ms. McDowell, we'll hear from you.

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ORAL ARGUMENT OF BARBARA B. McDOWELL

ON BEHALF OF THE UNITED STATES

MS. McDOWELL: Mr. Chief Justice, and may it please the Court:

A criminal defendant who chooses to reveal his prior conviction on direct examination waives any claim of error with respect to its admission. That's the undisputed rule where the district court has not ruled in limine on the admissibility of the conviction, for it's well-settled that a party cannot introduce adverse evidence as its own for its own tactical purposes and then challenge the admission of the evidence on appeal. There's no reason to depart from that sensible rule where, as here, the district court did issue an in limine ruling on the admissibility of a conviction.

QUESTION: What happens in some of the other in limine ruling areas that we were discussing? Suppose the defense said now, Your Honor -- at a pretrial hearing -- I want the Government instructed right now they're not to introduce hair sample evidence. The hair was found too far from the scene, and so on, and the judge said, I'm going to admit it.

Can the defendant then, in the defendant's own case, introduce the hair sample and -- evidence and an expert who said it's not the defendant's, or would that be

a waiver under your principle?

MS. McDOWELL: We would take the position that that's a waiver. I don't recall any cases specifically presenting --

QUESTION: So you don't know any case in which the in limine ruling entitles the defendant to anticipate?

MS. McDOWELL: Only under the rulings of those circuits who have allowed the contrary of the rule applied by the Ninth Circuit in this --

QUESTION: You wait, you just wait for the rebuttal stage of the -- the defendant should wait for the rebuttal stage of the case.

QUESTION: But that case couldn't arise, could it, because the evidence of guilt has to be put in by the prosecution first, and the defendant doesn't have a chance to put in --

QUESTION: Well, the defendant might do it on cross.

QUESTION: -- isn't that right? Isn't that why those cases don't arise?

MS. McDOWELL: Well, there are other instances in which there's evidence that a district court has allowed in only as rebuttal evidence other sorts of impeachment evidence in addition to Rule 609 --

QUESTION: In an impeachment context, sure, I

understand that. But as to the main case you just don't have that problem.

MS. McDOWELL: Typically not, Your Honor --

QUESTION: Yes.

MS. McDOWELL: -- that's correct.

QUESTION: Ms. McDowell, does your position depend on taking the view that the judge's ruling was necessarily tentative?

MS. McDOWELL: It doesn't depend on that, Justice O'Connor, although that's one of the reasons why we think the rule is particularly justified in those 609(a)(1) cases.

QUESTION: I'm very curious because, as you know, there is a proposed amendment to Rule -- is it 103?

MS. McDOWELL: That's correct.

QUESTION: That then will speak in terms of definitive rulings and preservation of objections and so forth, so I wondered to what extent your argument depends on the notion that it's not a definitive ruling.

MS. McDOWELL: Well, we would take the position that even with respect to those evidentiary issues that the authors of the rule and those courts that have adopted the definitive-nondefinitive distinction would classify as definitive, for example, rulings under 609(a)(2) with respect to whether a conviction involves dishonesty or

false statement. Those can be resolved definitively before trial for purposes of not having to make a contemporaneous objection --

QUESTION: Well, can't this be resolved definitively by the judge?

MS. McDOWELL: No, it can't.

QUESTION: No?

MS. McDOWELL: No, it cannot.

QUESTION: The judge can't say, look, if the Government wants to introduce it, it can. That's not definitive? What's tentative about that?

MS. McDOWELL: In order to be definitive, a ruling has to possess two characteristics. One, it has to be the kind of issue that can be resolved definitively before trial, and the courts have said that if it requires a balancing of --

QUESTION: The question --

MS. McDOWELL: -- prejudicial and probative --

QUESTION: The question presented to the judge is, by the prosecution, judge, I intend to offer evidence at trial of the prior conviction of this defendant. May I do so? Yes or no. Judge says yes. I've looked at it, you may do so. That's not definitive, hmm?

MS. McDOWELL: It's definitive in some sense, but it's the sort of ruling that requires the court to

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keep an open mind in the course of trial as to whether it's actually going to come in, because --

QUESTION: He can always change his mind later, even if he -- I know I said it was definitive --

MS. McDOWELL: Yes.

QUESTION: -- but I hadn't seen all the evidence, and I've -- you know, I've reconsidered it. Until it's put in, it's not really final, is it, until he does allow the evidence in?

MS. McDOWELL: That's correct. That's what this Court appeared to recognize in Luce.

QUESTION: Yes, but a lawyer isn't going to get very far if he badgers a judge after the judge says, I have made up my mind and that's it. You can't come back every day and say look, change your mind. You're not going to do much for your case that way.

MS. McDOWELL: No, but it's not offensive to a judge to simply renew an objection and to point out --

QUESTION: Well, but isn't that the thrust of rule -- the proposed Rule 103, which is at A-5 of the blue brief? Proposed Rule 103, and I know that it's not applicable in this case, but it indicates what perhaps is the better view.

MS. McDOWELL: Yes, but --

QUESTION: It says, once the court makes a

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definitive ruling, it assumes there is such an animal as a definitive ruling.

MS. McDOWELL: Yes, but those courts that have adopted that distinction have said that Rule 609(a)(1) rulings are not definitive because they require a balancing of probative value of prejudicial effects.

QUESTION: So in other words there's now going to be a whole classification of rulings that by their nature cannot be definitive?

MS. McDOWELL: That's correct, and the advisory committee cited two cases holding that, or stating that in its notes, so what we suggest is --

QUESTION: I've read the notes, but I'm concerned with the text of the ruling. It does seem to me to contradict your position if you don't look at the advisory notes. Would you --

MS. McDOWELL: The text raises the question of what is definitive.

QUESTION: -- agree that it's more helpful to the petitioner than it is to you, absent the advisory comments?

MS. McDOWELL: The meaning of the word definitive is something that is not clear on its face. The courts that, as I said, have adopted that distinction, require both a ruling of the sort that can be made before

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trial without a balancing of --

QUESTION: But in the civil area all the time this happens. I say in a condemnation case, Your Honor -- the pretrial -- I don't think we should have valuation testimony about property on the far side of the river, and the judges says, you're wrong about that. We're going to have it.

I take it that I don't waive my objection if I'm the first one to introduce comparable sales in my part of the case, and you seem to be arguing for a somewhat different theory. Is it because of the nature of the ruling? Is that what we're talking about?

MS. McDOWELL: Generally under the rule applied in most circuits today, you would have to make a contemporaneous objection at trial to evidence that you wanted to exclude and that you wanted to --

QUESTION: How about evidence that you want to introduce?

MS. McDOWELL: If it's evidence that you want to introduce, there's no reason, presumably, why you would want to preserve an objection to its admission.

QUESTION: Wait, suppose -- let's leave out the definitive part, as follows. Imagine your client's on the stand. The defendant is on the stand. The defendant has now testified.

The defendant's lawyer says to the judge, judge, you know perfectly well that the prosecution now is going to introduce her prior drug conviction. Now, if you're going to let that in, I'm going to ask her one final question which will be, Mrs. So-and-so, do you have a final drug conviction, an earlier one, and she will say, yes. So judge, I would like to know before asking that final question, just one question left to go, I would like to know how you're going to rule when the prosecution -- you intend to offer that, right? Yes.

All right. When the prosecution offers that conviction, now, that's my case. What's your view on that one? Can't -- the judge says, I'm going to let the prosecution offer that conviction. The lawyer says, Mrs. So-and-so, do you have a prior conviction? Answer, yes. The lawyer now wants to appeal the judge's ruling, all right.

What's your view of that? That gets all the preliminary, finality, definitive parts out of it. It's right in the trial. I want to know, what's your view of that case?

MS. McDOWELL: As we indicated, I believe in footnote 12 of our brief, that approach would be much less problematic.

QUESTION: Oh, no. I want to know whether or

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not, in that case, the lawyer can appeal or the lawyer cannot appeal.

MS. McDOWELL: We would say that it's still a waiver because the defendant is still trying to introduce adverse evidence as his own, for his own practical purposes.

QUESTION: So finality has nothing to do with it in my case. You're still not going to let him, so my question, then --

MS. McDOWELL: Well, there's a second reason as well.

QUESTION: Fine. All right. My -- that would be my question. My question would be, an appeal is permitted where a substantial right is affected as a result of the ruling. The lawyer says, of course a substantial right was affected as a result of this ruling. You ruled that that came in, and that certainly affected my client. And your response is?

MS. McDOWELL: That's it's still a waiver.

QUESTION: I know that, but I mean, I want to know why?

(Laughter.)

MS. McDOWELL: Well, in the first place because it's contrary to generally accepted evidentiary law that if you introduce evidence yourself you can't complain

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about it later.

QUESTION: The ruling -- I think your answer is that the ruling didn't affect -- didn't affect the client at all. What affected the client was the evidence that the client, client's lawyer himself --

MS. McDOWELL: The client's decision to testify.

QUESTION: -- introduced.

QUESTION: I would say that would have to be your answer.

QUESTION: It is ultimately the client who put in the evidence, and that's what hurt the client, not the ruling.

QUESTION: Fine. I agree that would have to be your answer, and then I guess you'd have one further question, which is, that sounds very metaphysical to me. Anyone who doesn't think that my client wasn't affected by your ruling hasn't been in this trial. And you respond to that?

MS. McDOWELL: Well, it's not --

(Laughter.)

MS. McDOWELL: There are many ways in which a criminal defendant can seek to draw the sting, so to speak, of a prior conviction. Defendant doesn't have to do it by introducing the conviction first. For example, the defendant can explain the conviction on redirect

examination.

The defendant can bring out, as, in fact, petitioner's counsel did here on closing argument, that Maria really wanted to tell you her story of the case, and she knew that the conviction was going to be brought in by the Government, but she wanted to tell you the story anyway.

QUESTION: But Ms. McDowell, if -- isn't it a factor that the defendant is going to look like she had something to hide if she keeps her mouth shut on direct, then the prosecutor brings it out?

Think of what happened in this case. She diffused it to the extent that the prosecutor just had one simple little question. He couldn't make a big deal out of it.

MS. McDOWELL: Yes, but she can diffuse it in other ways as well, as I was saying, by her explanation of the conviction on redirect, by the way she answers the question put to her by the prosecutor on cross-examination, by seeking instructions saying that the jury is not to draw any inference from who introduces the conviction. There are many other ways in which to take the sting --

QUESTION: I suppose his lawyer could ask her, you're not an angel, are you? She says, no, I'm not an

angel. You don't pretend to be an angel, do you? No, I don't pretend to be an angel. But just not actually introduce the conviction. I mean, there are a lot of ways to do it.

QUESTION: Would that constitute a waiver under your view, if the defense lawyer asked her --

(Laughter.)

QUESTION: -- if -- have you had -- have you ever been in trouble with the law before, but not asking any specific -- would that constitute a waiver?

MS. McDOWELL: It might be well -- might well be viewed as opening the door to the subject matter.

QUESTION: So it would be a waiver. If you said, have you ever been --

MS. McDOWELL: It might well, yes.

QUESTION: No, but that's not a waiver --

QUESTION: Maybe we have the same kind of problem here as whether the trial judge's ruling is definitive or not. We get the same gray area as to when the waiver takes place.

MS. McDOWELL: That's correct, and there's another principle to remember here, and that's when we're dealing with these threshold evidentiary procedural questions, it's often beneficial to have a bright line rule, even if there are some cases where the rationale for

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the rule is not as --

QUESTION: So there would be benefit -- excuse me. Go on.

QUESTION: If she answered the question that -- suggested by Justice Stevens, have you ever been in trouble with the law before, if she answered no, certainly there would be no doubt that the Government could introduce that by way of impeachment --

MS. McDOWELL: That's correct.

QUESTION: -- without regard to the introducibility of prior convictions.

MS. McDOWELL: Yes. The question would --

QUESTION: Yes, but our question is not the correctness of the introduction. Our question is whether there is a right to claim that it is not correct, and I take it that the response to Justice Stevens would be, that doesn't waive anything. It may make it more likely that the admission ruling is correct, but certainly the defendant has the right to raise the issue in the appellate court. Isn't that so?

MS. McDOWELL: Not if the defendant has introduced the issue sufficiently herself. If she has been the one who has presented it to the jury, who has precluded the district court and the Government from a last clear chance to decide not to introduce the

conviction, no, it's a waiver.

QUESTION: In the hypothetical Justice Breyer put, where just at the close of the direct examination of the defendant by the defendant's own attorney he says, there's one more question, and the judge turns in a -- what do they call these now? -- sidebar to the prosecution and says, now, do you propose to introduce the prior conviction, and the prosecutor says, well, I'm going to wait and see. Can the prosecutor do that?

MS. McDOWELL: Yes, because in many circumstances, or at least some circumstances, the prosecutor may want to know how the rest of the cross-examination goes. It may turn out that the prior conviction is not necessary if the impeachment goes well on other matters, or if for some other reason during cross-examination the introduction of the prior conviction seems particularly problematic, and a prosecutor should be able to preserve the option to decide later in cross-examination whether --

QUESTION: But the forthright prosecutor who knows that the prosecutor is going to introduce the statement should say, well, yes, judge, I'm going to do it no matter.

MS. McDOWELL: Yes, if that's his true intent, but it would still be a waiver, we would submit, even in

that circumstance.

However, as we point out, that's not what happened in this case. There was no opportunity given whatsoever to the Government or to the district court to reconsider the in limine ruling right before petitioner introduced it at trial.

QUESTION: When you say the judge, the judge said before the examination of the defendant, obviously the prior conviction can be used for impeachment purposes. He made his ruling. He spent an extra day. He had briefs. He had argument. He decided it. It seemed to me that it was as definitive as a ruling could be, and then he backed it up later on by -- said, obviously it can be admitted.

MS. McDOWELL: Of course, all of those statements were made before trial, and an in limine motion of this kind is made with the implicit assumption that a district court can reconsider it. The district court in this case also specifically said --

QUESTION: Yes, but it's really made with the implicit understanding that this is the rule for this trial. We don't have in limine motions and say, well, we'll see what happens later on. I mean, you run a trial with some firmness on how the thing is going to go.

Most trial judges don't say, I'm going to rule

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this way, but maybe I'll change my mind tomorrow. That's not the way we want our trial judges to conduct trials, certainly.

MS. McDOWELL: Well, they may not explicitly say that, Your Honor, but certainly if they see an error arising --

QUESTION: And this is not the most complex issue in the world, either. This is a very simple evidentiary issue that he can affect both sides on, the kind of thing you ought to get a firm ruling out of the trial judge that the parties can rely on. It certainly doesn't advance trial process to say, everything's tentative.

QUESTION: Ms. McDowell, what was our ruling -- what was our holding in Luce?

MS. McDOWELL: The Court held that a defendant could be required to choose whether to take the stand, be impeached with a prior conviction, and preserve the objection for appeal, or alternatively choose not to testify and abandon the issue, and the Court said that was permissible.

QUESTION: Of course, one of the problems with Luce was that if the Court had ruled the other way, every defendant would have announced that but for the ruling he would have taken the stand. He would be given a, sort of

a free appeal.

Here, you know the defendant's taking the stand, so at least that uncertainty is eliminated.

MS. McDOWELL: That's correct.

QUESTION: And that makes this a harder case than Luce, it seems to me.

MS. McDOWELL: It may be, but there's still the question of not knowing whether the district court actually would have admitted the conviction or whether the Government would have tried to introduce it.

QUESTION: Well, do you know for sure that the defendant is going to take the stand in this case?

MS. McDOWELL: Not until she takes the stand, no. She's not obligated to make a commitment to do that.

QUESTION: And if she doesn't, Luce applies.

MS. McDOWELL: That's correct.

QUESTION: What does happen -- I don't know this. With all -- leaving -- with all sorts of other evidence in a criminal trial, I mean, suppose it's just a relevance point, you know, and one of the lawyers, either side, says judge, are you going to let in all that Chicago stuff, and he says yeah.

And then he says, well, okay then, what I'm going to do is, I'm going to try to introduce it first. There's a definitive ruling, you know, the Chicago stuff

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will come in, and so the lawyer whom that disfavors introduces the Chicago stuff himself. Is that a waiver?

MS. McDOWELL: Yes, it is.

QUESTION: Yes, and the case that I -- I just look that up in a regular treatise. Is that just obvious?

MS. McDOWELL: The issue has generally arisen after motions in limine have been decided on the matter, specifically with respect to prior convictions. I'm not aware of a lot of case law that deals with matters other than that.

QUESTION: I mean, you could think it would come up in all kinds of conduct -- contexts. I mean, it doesn't have to be prior convictions.

All sorts of trials are managed because -- yeah, because you know, there's whole vast realms of complicated evidence. The judge makes preliminary ruling, makes in limine rulings, makes definitive rulings, how I'm going to run this trial, so I'd think that there would be stuff on the -- in reaction to that, you introduce it yourself, whether you lose the right that you'd otherwise have under the rules to object to a definitive ruling by the judge that hurt your client.

MS. McDOWELL: Well, typically the issue arises only with respect to impeachment evidence. In the other circumstance it would --

QUESTION: Never rose in other circumstances that you know of?

MS. McDOWELL: Not that I'm aware of. It may have. The general principle has, of course, arisen that has been articulated quite frequently and in cases dating back before the rules of evidence that if a party introduces adverse evidence for his own tactical purposes, he is bound by that decision and cannot challenge it on appeal.

QUESTION: It's rather -- is it your proposal that is hypothetical, or is it the other one that was hypothetical? I think the objection being made here by the defendant is that if he had known that this evidence would not be introduced, he would not have introduced it, and therefore his introduction of it should be forgiven and should not be a waiver. Is that not the defendant's argument here?

MS. McDOWELL: I believe it is.

QUESTION: I didn't think it was. I thought the argument was, there is a definitive ruling by the judge that the rules give me a right to appeal to if it hurt me, and it did hurt me. Am I saying something different than Justice Scalia said?

QUESTION: No, it --

MS. McDOWELL: I think it's the same.

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(Laughter.)

MS. McDOWELL: We ask that the judgment of the court of appeals be affirmed. Thank you.

QUESTION: Very well, Ms. McDowell.

Mr. Coleman, you have 3 minutes remaining.

MR. COLEMAN: Your Honor, unless there are any questions, I have no further rebuttal.

CHIEF JUSTICE REHNQUIST: Very well. The case is submitted.

(Whereupon, at 10:50 a.m., the case in the above-entitled matter was submitted.)

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