June 18, 2024

Chief Judge Patrick Schiltz, Committee Chair
Professor Dan Capra, Reporter
Members of the Advisory Committee on Evidence Rules

Re: Proposed Amendment to Rule 609(a)(1)

Dear Chief Judge Schiltz, Professor Capra, and Members of the Advisory Committee on Evidence Rules:

The National Association of Criminal Defense Lawyers (NACDL) is pleased to submit our comments with respect to the proposed changes to Federal Rule of Evidence 609(a)(1). Our organization has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. Our members have substantial experience with the challenges created by Rule 609 and have submitted amicus briefs before the Oregon Supreme Court and Supreme Court of the State of Washington related to the state counterparts of Rule 609's impact on the people in each jurisdiction. In line with our dedication to advancing the proper, efficient, and just administration of justice, we would like to offer the following comments on the proposed change to Rule 609(a)(1).

NACDL would first like to express support for the proposed amendment to Rule 609(a)(1). This amendment marks an important step toward enhancing the fairness and integrity of our judicial system. By strengthening the threshold governing the admissibility of prior convictions for the purpose of impeaching a defendant-witness's credibility, we are moving closer to ensuring that every defendant receives a fair trial. Though this amendment is a commendable improvement, we would like to address our broader concerns related to the admission of prior convictions against defendants in criminal cases.

The practice of admitting prior convictions against defendant-witnesses undermines several fundamental rights guaranteed by our Constitution. Firstly, it places a significant burden on a defendant's right to testify.[1] Presented with the prospect that their past convictions will be used to discredit them, defendants are dissuaded from taking the stand in their own defense. Indeed, research bears this out. A study of 152 DNA exonerees revealed that nearly 1 in 4

[1] "The right to testify on one's own behalf at a criminal trial . . . is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Rock v. Arkansas*, 483 US 44, 51(1987) (quoting *Faretta v. California*, 422 U.S. 806, 817, n 15. (1975)).

factually innocent defendants elected not to take the stand in their own defense.[2] Of those exonerees, 91% of had prior convictions that could have been used for impeachment.[3] Placing such a powerful disincentive on testifying silences defendants, deprives the jury of critical accounts, and undercuts the fairness of the trial process.

One of the reasons that defendants with prior convictions are afraid of testifying is that they understand that jurors, despite their best intentions, frequently draw propensity inferences from past conduct. As one study found, when provided evidence that a defendant has a prior criminal conviction, jurors are substantially more likely to convict the accused than in a factually identical case in which there is no indication that the accused has a prior conviction.[4] The study also found that "evidence against a defendant with a prior record appears stronger to the jury," and that jurors tend to use prior convictions—particularly convictions that are similar to the charged offense— "to develop propensity judgments and other generally negative evaluations of a defendant."[5] Stated more simply, admitting prior convictions against defendants erodes the presumption of innocence and undermines the burden of proof required to convict.

The practice also compounds racial bias and treats convictions as lasting or even permanent defects in an individual's character. People of color are statistically more likely to have prior convictions due to systemic biases and over-policing in marginalized communities. The well-documented legacy of mass incarceration has meant that the criminal legal system that existed at the time this rule was adopted was nowhere near the size that it is today. One of the most comprehensive studies on the U.S. population's felony convictions estimates that the number of adults with felony convictions increased from fewer than two million people in 1948 to nearly 20 million in 2010.[6] It also estimates that people with felony convictions account for 8% of all adults and an astonishing 33% of African-American adult males. The disproportional conviction rate among African-Americans reflects the implicit biases that persist in the country. A change to Rule 609 is one way to blunt the effect of those implicit biases. The continued use of these convictions only perpetuates the cycle of discrimination and further entrenches systemic racial inequality.

The Committee should also consider how disparities might arise because of prosecutorial discretion. Prosecutors decide whether to bring charges, whether to pursue felony or misdemeanor charges, and whether to offer plea deals. This discretion can lead to significant disparities in how similar conduct is charged and prosecuted. Inconsistent charging decisions

---

[2] John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. Empirical Legal Studies 477, 489 (2008).

[3] *Id*. at 490

[4] *See* Theodore Eisenberg and Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 Cornell L. Rev. 1353 (2009).

[5] Eisenberg and Hans, 94 Cornell L. Rev., at 1361.

[6] Sarah K. S. Shannon et al., *The Growth, Scope, and Spatial Distribution of America's Criminal Class, 1948–2010, 54 Demography* 1795, 1806 (2017).

and disposition of cases can mean that the same or similar behavior is admissible against one defendant as a basis for showing a propensity for dishonesty and not others. Given this variability, the use of convictions as a measure for dishonesty undermines the fairness and integrity of the judicial process. Amending Rule 609 to account for such would ensure that prior convictions used to impeach a witness's character for truthfulness are based on a more reliable assessment of the defendant-witnesses' conduct, rather than on the potentially arbitrary outcomes created by prosecutorial decision-making.

The proposed change to Rule 609(a)(1) is also warranted because the existing rule contributes to the trial penalty. In the federal criminal legal system, defendants who exercise their constitutional right to trial are given sentences three times longer on average than defendants who plead guilty, far exceeding the degree of difference that would result only from denial of credit for "acceptance of responsibility."[7] This is the trial penalty. For some crimes, the average differential is as much as eight times greater.[8] This massive differential has had numerous negative impacts on the legal system, most notably that it has contributed to making trials in criminal cases extremely rare. In 2023, fewer than 3% of federal convictions resulted from trials; the rest were all pleas.[9] The Supreme Court has acknowledged that "criminal justice today is for the most part a system of pleas, not a system of trials."[10] The trial penalty and coercive plea bargaining have been recognized as a major problem in our criminal legal system by a swath of organizations across the political spectrum.[11]

One of the major consequences of the trial penalty is the strong coercive effect it has in inducing defendants to waive their constitutional right to trial and plead guilty to avoid the chance of a much higher sentence if convicted at trial. The trial penalty, or the threat of one, is often so severe that it can even drive innocent people to plead guilty. In the National Registry of Exonerations database of all exonerees—people who were convicted of crimes and later

---

[7] NACDL, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It, at 20 fig. 1 (2018), https://nacdl.org/TrialPenaltyReport.

[8] *Id.* at 17, 20 fig. 1 (showing that for some crimes, such as embezzlement and burglary/breaking and entering, the differential is roughly 8x greater for defendants who went to trial).

[9] U.S. Sent'g Comm'n, 2023 Sourcebook of Federal Sentencing Statistics tbl. 11 (2023) (showing that just 1,824 convictions resulted from trial out of a total of 64,124 convictions in the federal system in 2023).

[10] *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

[11] For example, the national End the Trial Penalty coalition and its member organizations and individuals which include academics, defense lawyers, prosecutors, and a broad variety of advocacy groups and individuals. https://www.endthetrialpenalty.org/who-we-are. *See also* the American Bar Association Criminal Justice Section 2023 Plea Bargain Task Force Report and ABA-adopted resolution, https://www.americanbar.org/groups/criminal_justice/committees/taskforces/plea_bargain_tf/.

exonerated—roughly 24% of cases involved a guilty plea.[12] The fact that innocent people will plead guilty to receive a more lenient sentence is also supported by extensive academic research, both in real-world criminal cases and controlled experiments.[13]

It is clear that existing law contributes to the trial penalty and worsens plea coercion. Melody Brannon, Chief Federal Defender of the District of Kansas, rightly points out that the rule, "has an outsize impact on my clients' constitutional rights, and it's not just the right to testify, but it's really the right to go to trial."[14] She said that clients were coerced to plead guilty rather than going to trial because of the strongly prejudicial effect of a jury hearing about a defendant's prior conviction.[15]

While the proposed amendment to Rule 609(a)(1) is certainly a positive development, it is our hope that this amendment is part of a broader effort to reform our evidentiary rules to better protect defendants' constitutional rights and promote a more equitable justice system. Indeed, we urge the Committee to consider revising Rule 609 to forbid the impeachment of criminal defendants with prior convictions that do not satisfy the ordinary standard of Rule 608(b), governing impeachment of a witness by specific instances of prior conduct that are actually probative of truthfulness (as limited by Rule 403). Absent that step, we urge the Committee at least to consider additional measures that would limit the prejudicial impact of prior convictions, such as providing clearer guidance on the balancing test for admissibility and ensuring that judges receive adequate training on implicit bias.

---

[12] National Registry of Exonerations, Browse Cases, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last accessed June 11, 2024) (filtering for "Guilty Plea" case).

[13] *See* Tina M. Zottoli, Tarika Daftary-Kapur, Georgia M. Winters & Conor Hogan, *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, Psych. Public Pol'y & Law 22(3): 250–59 (2016) (finding in interviews with defendants that 1 in 5 adult defendants pled guilty only because of the substantial sentence reduction they were promised). Controlled experiments also indicate that innocent people are willing to plead guilty to obtain a benefit. *See, e.g.*, Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. Crim. L. & Criminology 1, 34-38 (2013) (finding that in a controlled experiment where half of students taking a test cheated (through use of a confederate), that 89% of guilty students were willing to take a plea, and that 56% of the innocent students were also willing to plead guilty in exchange for the benefit of a far more lenient sentence).

[14] *Quoted in* Cara Salvatore, "Panel Voices Concern Over Prior-Convictions Evidence Rule," Law360 (Apr. 29, 2024), *available at* https://www.law360.com/articles/1827603/panel-voices-concern-over-prior-convictions-evidence-rule.

[15] *Id.*

We commend the Committee for its efforts to improve Rule 609(a)(1) and respectfully suggest that further reforms are necessary to fully safeguard the rights of defendants and uphold the principles of justice and equality.

Thank you for your attention to this important matter. We appreciate your dedication to enhancing the fairness of our legal system and look forward to seeing continued progress in this area.

Very truly yours,

/ The National Association of Criminal Defense Lawyers/

By:

/S/ Peter Goldberger
Peter Goldberger
Chair, Committee on Rules of Procedure
Ardmore, PA

/S/ Cheryl Stein
Cheryl D. Stein
Member, Committee on Rules of Procedure
Washington, DC

/S/ Monica Milton
Monica Milton
Counsel for Public Defense and Special Projects
Washington, DC

/S/ Nate Pysno
Nate Pysno
Director of Economic Crime & Procedural Justice
Washington, DC