LISA MONET WAYNE
Executive Director

February 15, 2026

Carolyn A. Dubay, Esq., Chief Counsel, Committee on Rules of Practice & Procedure
Members and Reporter, Advisory Committee on Rules of Evidence
Judicial Conference of the United States
Administrative Office of U.S. Courts
One Columbus Circle
Washington, DC 20544

Re: Amendment to Evidence Rule 609 Proposed for Comment, Aug. 2025

To the Committee and Staff:

The National Association of Criminal Defense Lawyers (NACDL) is pleased to submit our comments on the proposed amendment of Federal Rule of Evidence 609(a)(1). Our organization has a nationwide membership of some 10,000 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 litigants in each jurisdiction. In line with our dedication to advancing the twin causes of fairness to the accused and the proper, efficient, and just administration of justice, we offer these comments on the proposed change to Rule 609(a)(1).

NACDL supports the proposed amendments to Rule 609, including the change to subsection (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 move closer to ensuring that every defendant receives a fair trial.

Because prior convictions are not, in fact, uniquely probative with respect to a witness's credibility, NACDL would prefer a revision of Rule 609 that forbids the impeachment of criminal defendants with prior convictions, as such, but rather treats the facts and circumstances underlying any conviction as subject to the ordinary standard of Rule 608(b). That Rule properly

limits attacking the character of a witness for truthfulness with specific instances of prior conduct unless, on cross-examination, they are actually probative of truthfulness (and as further limited by Rule 403). A conviction, as such, is not an instance of conduct, but rather an official record of another judge or jury's determination that the defendant engaged in certain conduct. Whether a conviction resulted from the conduct is, in our view, both immaterial and unduly prejudicial. At most, the conviction might bar the defendant, if the rules of collateral estoppel apply, from denying the conduct or require that the fact be judicially noticed.

Absent that bolder step, however, we fully support the present amendment, subject to one clarification. As proposed, the Rule would be amended to say that evidence of a defendant's prior felony conviction "must be admitted ... if the probative value of the evidence substantially outweighs its prejudicial effect to that defendant" Prop. R. 609(a)(1)(B). In particular, we strongly support the proposed reversal of the ordinary Rule 403 standard, as applied to this troublesome form of evidence. We understand the new wording to mean that evidence of a defendant's prior felony conviction is admissible *only if* the latter standard is met. To ensure that the Rule is not misunderstood as creating a mandatory rule of admissibility if the high standard is met and a permissive one otherwise, NACDL suggests that the proposed rule be modified by the addition of the words "and not otherwise" immediately after "to that defendant."

Admitting prior convictions against defendant-witnesses is rightly subject to a uniquely high standard under the Evidence Rules, because that practice, however traditional, undermines several fundamental rights guaranteed by our Constitution. First, 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 who may have a prior felony record, no matter how non-probative otherwise, are dissuaded from taking the stand in their own defense. Careful research bears this out. A study of 152 DNA exonerees revealed that, despite their innocence, nearly 25% had elected not to take the stand in their own defense.[2] Of those innocent accused who failed to take the stand, nearly all – 91% – had prior convictions that could have been used for impeachment.[3] Placing such a powerful disincentive on testifying silences all 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, a problem that Rule 404 acknowledges. As one controlled experiment found, when

---

[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)).

[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.

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 of allowing impeachment by prior convictions 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 a prior record 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 a little over four million people in 1975 to nearly 20 million in 2010,[6] an increase greatly disproportionate to the increase in our adult population during the same 35 years. It also estimates that people with felony convictions accounted for 8% of all adults as of 2010 but an astonishing 33% of African-American adult males. The disproportional conviction rate among African-Americans reflects the implicit biases that persist in the country. Against this backdrop, the continued use of convictions as if they demonstrated a pertinent trait of character for truthfulness only perpetuates the cycle of discrimination and further entrenches systemic racial inequality. The proposed change to Rule 609 will help to blunt the effect of those implicit and baked-in biases.

The unfair rule that this amendment would ameliorate also perpetuates disparities that arise because of the impact of unchecked prosecutorial discretion. Prosecutors alone decide whether to bring charges at all, whether, if so, to pursue felony or misdemeanor charges, and whether to offer plea deals and on what terms. This discretion can lead to significant unfair disparities in how similar conduct is charged and prosecuted, and how those charges are resolved. Inconsistent charging decisions and disposition of cases can mean that the same or similar behavior results in differing conviction records, which in turn become admissible against one defendant and not another, notwithstanding the same or similar prior conduct, as a basis for showing a propensity for dishonesty. Given this variability, the use of convictions as a measure for dishonesty

---

[4] *See* Theodore Eisenberg & 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] *Id.* 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).

undermines the fairness and integrity of the judicial process. Elevating the standard of admissibility in Rule 609 to account for such will 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 receive sentences, if convicted, that are three times longer on average than defendants who plead guilty, far exceeding the degree of difference that would result only from denial of credit under the federal sentencing guidelines, for example, for "acceptance of responsibility."[7] This is what NACDL and others call 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]

As pertinent here, 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.[12] The trial penalty, or the threat of one,

---

[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 1824 convictions resulted from trial out 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/.

[12] *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.

is often so severe that it can even drive innocent people to plead guilty.[13] In the National Registry of Exonerations database of all exonerees – people who were convicted of crimes and later exonerated – about a quarter of the cases involved a guilty plea.[14] These pleas, of course, result in convictions, even though in many cases, as negotiated, they do not accurately reflect the facts of the defendant's prior behavior. In short, a record of felony conviction may actually be a less reliable indicator of past conduct, and certainly a less reliable indicator of credibility, than the kind of evidence that would otherwise be called for in applying Rule 404, 608(b) or 609(a)(2). Nevertheless, the proposed amendment, by making it more difficult to impeach with a prior felony conviction that is not actually probative of credibility, is a small but important step toward ameliorating this significant flaw in the system and the resulting injustice.

For these reasons, NACDL commends the Committee for its efforts to improve Rule 609(a)(1) and urges adoption of the proposed amendment. At the same time, we recognize that further reforms are necessary to fully safeguard the rights of defendants and uphold the principles of justice and equality.

* * *

NACDL thanks the Committee for its valuable work and for this opportunity to contribute our thoughts. We look forward to continuing our longstanding relationship with the Advisory Committees as a regular submitter of written comments.

Respectfully submitted,

National Association of Criminal Defense Lawyers

By:

Lisa Wayne
Executive Director, NACDL
Washington, DC

Andy Birrell,
President, NACDL
Minneapolis, MN

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. & CRIMIN. 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).

[13] *See, e.g.*, Jed S. Rakoff, "Why Innocent People Plead Guilty," *The New York Review of Books* (Nov. 20, 2014), available at https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/.

[14] National Registry of Exonerations, Browse Cases, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last accessed June 11, 2024) (24%, filtering for "Guilty Plea" case).

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

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

In Memoriam:
William J. Genego
Santa Monica, CA
Late Co-Chair

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

Nate Pysno
Director of Economic Crime & Procedural Justice, NACDL

Please respond to:
Peter Goldberger, Esq.
P.O. Box 645
Ardmore, PA 19003
E: peter.goldberger@verizon.net