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

RE: Amendments to Rule 609(a)(1)

Dear Chief Judge Shiltz, Professor Capra, and Committee Members:

I currently serve as the Litigation Director with the Federal Public Defender for the District of Nevada. In that role, I supervise litigation across our trial and habeas units (capital and non-capital) in federal and state court, while also maintaining my own trial caseload of death-eligible and complex criminal matters. I have been a public defender, in federal and state court, for a total of 15 years. I have tried more than 30 cases before a jury, including four homicides to verdict, and have litigated countless preliminary hearings, bench trials, and evidentiary hearings of nearly every variety.

Fear of being impeached by a prior felony conviction has unequivocally prevented my clients from testifying in their own defense. Even more troubling, fear of impeachment at trial has not only kept my clients off the stand, it has prevented them from going to trial.

The reason is simple. A felony conviction is widely perceived by lawyers and the criminally accused alike as ruinous to an accused's credibility and disqualifying for those seeking a fair chance at a merits-based evaluation by a jury. Consequently, in cases involving the risk of Rule 609(a)(1)(B) impeachment, clients who may have received an acquittal at trial instead plead guilty.

A survey of my own litigation experience underscores the dissuasive influence of Rule 609(a)(1)(B) on an accused's decision to testify. Trial attorneys can differ sharply in their opinions about whether a client should ever testify. The decision is often case- and client-specific, but I generally encourage it when strategically warranted, and have called many clients to the stand in high stakes cases. But there is a pattern in my own experience. Not one client I have represented with a prior felony conviction testified at his or her own trial. Only those with no exposure to prior felony impeachment have chosen to speak up in their own defense. Notably, several of the cases in which my client chose to take the stand resulted in an acquittal.

This pattern is not limited to my own practice. Rather, it is a widespread reality in the criminal legal system. Prosecutors understand the power of Rule 609(1)(a)(B) impeachment just as a counseled criminal defendant does. It is no coincidence that representing criminal defendants with prior felony convictions is common, but seeing them take the stand in their own defense despite their felony record is exceedingly rare.

Rule 609(1)(a)(B) chills criminal defendants throughout every stage of the process. If the prospect of impeachment by prior conviction does not encourage early resolution of a case at the plea bargaining phase, it ultimately enables a trial process in which the jury is deprived of hearing testimony from the accused. When the testimony of the accused is the only potentially compelling evidence available to compete with the prosecution's narrative of guilt, the jury's verdict necessarily rests on an incomplete presentation of the facts.

Rule 609(1)(a)(B) as drafted frustrates what should be the common interest of the accused and the community in safeguarding the integrity of case outcomes and enhancing the truth-seeking function of a jury trial, as well as the historical preference of having criminal cases decided on their full merits.

Please do not hesitate to contact me if I can share additional thoughts or further inform the Committee on any matter referenced in this letter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Chris Frey', written over a large, light-colored circular scribble.

CHRISTOPHER P. FREY

Litigation Director

Federal Public Defender, District of Nevada