

1 CUAUHTEMOC ORTEGA (Bar No. 257443)  
Federal Public Defender  
2 JELANI J. LINDSEY (Bar No. 280092)  
(E-Mail: jelani\_lindsey@fd.org)  
3 Deputy Federal Public Defender  
321 East 2nd Street  
4 Los Angeles, California 90012-4202  
Telephone: (213) 894-1456  
5 Facsimile: (213) 894-0081

6 Attorneys for Defendant  
BRETT WAYNE PARKINS  
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9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**  
11 **WESTERN DIVISION**

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 BRETT WAYNE PARKINS,

16 Defendant.

Case No. CR 21-175-FLA

**BRETT WAYNE PARKINS’  
MOTION *IN LIMINE* NO. 1 TO  
EXCLUDE PRIOR CONVICTION  
EVIDENCE**

17  
18 Defendant Brett Wayne Parkins, by and through his counsel of record, Deputy  
19 Federal Public Defender Jelani J. Lindsey, hereby moves this Honorable Court for an  
20 order excluding his prior convictions as impeachment evidence under Rules 609(a)(1)  
21 and (a)(2), should he testify.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On March 3 and 4, 2022, the parties met and conferred regarding the  
4 admissibility of Mr. Parkins’ prior convictions for impeachment purposes in the event  
5 he testifies at trial. The government indicated that it may attempt to impeach Mr.  
6 Parkins with his prior convictions if he chose to testify. The government did not  
7 indicate which of Mr. Parkins’ convictions it may attempt to use if he testifies, but the  
8 defense anticipates that the government may try to impeach him with one or more than  
9 one of the following convictions:

10 (1) two May 2013 misdemeanor convictions for DUI Alcohol/Drugs, DUI  
11 Alcohol/0.08 Percent in violation of California Vehicle Code sections 23152(a)  
12 and 23152(b) in the Orange County Superior Court (Case Number  
13 13WM02799);

14 (2) three June 2013 misdemeanor convictions for DUI Alcohol/Drugs, DUI  
15 Alcohol/0.08 Percent, and Hit-and-Run Resulting in Property Damage in  
16 violation of California Vehicle Code sections 23152(a), 23152(b), and 20002(a)  
17 in the Orange County Superior Court (Case Number 13WM04208); and

18 (3) a 2014 felony conviction for Receiving Stolen Property in violation of  
19 California Penal Code section 496(a) in the Orange County Superior Court (Case  
20 Number 14WF0192).

21 The defense submits that Mr. Parkins’ prior convictions do not constitute proper  
22 impeachment evidence under Rule 609.<sup>1</sup> For the reasons outlined below, Mr. Parkins  
23 requests that Court exclude evidence of his prior criminal convictions.

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25  
26 <sup>1</sup> Mr. Parkins has convictions where more than 10 years have past since his  
27 conviction and/or his release from confinement. The government has not given the  
28 defense written notice under Federal Rule of Evidence 609(b)(2) that it plans to use any  
of Mr. Parkins’ convictions where more than 10 years have past since his conviction  
and/or his release from confinement. Therefore, Mr. Parkins asks the Court for an order  
barring the government from using any such convictions to impeach him should he  
choose to testify.

1 **II. ARGUMENT**

2 **A. Legal Standards for the Admissibility of Prior Convictions**

3 **1. The Standard for Admitting Prior-Felony-Conviction Evidence to**  
4 **Impeach Is Higher for Testifying Criminal Defendants Than It Is**  
5 **for Any Other Witness.**

6 A defendant’s prior felony convictions are admissible for impeachment “if the  
7 probative value outweighs the prejudicial effect to that defendant.” Fed. R.  
8 609(a)(1)(B). Impeachment is properly relied upon only to the extent that it reflects  
9 upon the credibility of the witness. In light of this purpose, “prior felony convictions  
10 which do not in themselves involve the veracity of a witness may have little impact on  
11 credibility” and, therefore, should ordinarily not be admitted. *United States v. Bagley*,  
12 772 F.2d 482, 487 (9th Cir. 1985).

13 Rule 609 (a)(1) was designed to offer more protection to testifying defendants  
14 than to other witnesses. The rule places the burden on the government to prove that the  
15 probative value of introducing evidence of prior convictions outweighs its prejudicial  
16 effects. *See e.g.*, Jeffrey Bellin, *Circumventing Congress: How the Federal Courts*  
17 *Opened the Door to Impeaching Criminal Defendants With Prior Convictions*, 42 U.C.  
18 DAVIS L. REV. 289, 311-312 (Dec. 2008) (explaining that Congress enacted Rule 609  
19 to strictly limit prior conviction impeachment of criminal defendants). The explicit  
20 language of Rule 609 favors the defense. *See id.* at 312. The presumption against  
21 admissibility regarding prior convictions is in contrast to the presumption of  
22 admissibility regarding the prior convictions of other witnesses. *See e.g.*, *United States*  
23 *v. Portillo*, 633 F.2d 1313, 1323 (9th Cir. 1980); *United States v. Tse*, 375 F.3d 148,  
24 164 (1st Cir. 2004); *United States v. Sims*, 588 F.2d 1145, 1149 (6th Cir. 1978).

25 In addition to the favorable distinction in burden allocation for defendants under  
26 Rule 609(a)(1), the plain language of the rule favors defendants by providing more  
27 protection regarding the consideration of prejudice. Indeed, courts must exclude an  
28 accused’s prior felony conviction if the prejudicial effect merely outweighs its

1 probative value, while they may exclude the prior conviction of other witnesses only if  
2 the danger of “unfair” prejudice “substantially outweighs” its probative value. *Compare*  
3 Rule 609(a)(1)(A) with Rule 403; *see also Tse*, 375 F.3d at 163 (explaining distinction).  
4 Furthermore, “Rule 403 protects government witnesses only against the danger of  
5 ‘unfair prejudice,’ while Rule 609 protects the accused against any ‘prejudicial effect.’”  
6 *Tse*, 375 F.3d at 163 (citation omitted). What is more, the higher standard  
7 acknowledges,

8 “that the potential prejudice to the defendant from the  
9 admission of prior convictions is simply not the same as the  
10 potential prejudice to a government witness. In particular, there  
11 is a heightened risk that a jury will use evidence of a prior  
conviction of the accused to draw an impermissible  
inference[.]”

12 *Id.* at 163. As the Court conducts the Rule 609(a)(1) analysis, it must bear in mind the  
13 special consideration for the rights of the accused and the presumption against  
14 admission in Rule 609.

15 **2. Only a Very Narrow Category of Convictions Qualify as Crimes**  
16 **Involving Dishonesty or a False Statements Under Rule 609(a)(2).**

17 Federal Rule of Evidence 609(a)(2) provides that evidence of the commission of  
18 any crime (i.e., misdemeanor or felony) “must be admitted if the court can readily  
19 determine that the establishing elements of the crime required proving – or the witness  
20 admitting – a dishonest act or false statement.” Fed. R. Evid. 609(a)(2). The legislative  
21 intent behind the enactment of Rule 609 was to “[to limit] the ‘dishonesty and false  
22 statement’ language to those crimes that involve some element of misrepresentation or  
23 other indicium of a propensity to lie and [to exclude] those crimes which, bad though  
24 they are, do not carry with them a tinge of falsification[.]” *United States v. Foster*, 227  
25 F.3d 1096, 1100 (9th Cir. 2000) (citing *United States v. Ortega*, 561 2d. 803, 806 (9th  
26 Cir. 1977)) (first and second alterations in the original). Indeed, as the Ninth Circuit has  
27 explained, “[a]n absence of respect for the property of others is an undesirable character  
28 trait, but it is not an indicium of a propensity toward testimonial dishonesty.” *Id.*

1 Offenses that can be committed without “any misrepresentation or deceit” do not fall  
2 within the very narrow category of cases Rule 609(a)(2) allows to be used to impeach a  
3 testifying defendant.

4 **B. The Government Cannot Establish That the Probative Value of**  
5 **Admitting Mr. Parkins’ 2014 Felony Conviction for Impeachment**  
6 **Would Outweigh Its Prejudicial Effect.**

7 In determining whether the government has met its burden under Rule  
8 609(a)(1)(B), the Ninth Circuit has identified five factors a court must consider: (1) the  
9 impeachment value of the prior crime; (2) the temporal relationship between the  
10 conviction and the subsequent history of the defendant; (3) the similarity between the  
11 prior offense and the offense charged; (4) the importance of the defendant’s testimony;  
12 and (5) the centrality of the credibility issue. *United States v. Bagley*, 772 F.2d 482, 487  
13 (9th Cir. 1985) (internal citation omitted). Meaningful consideration of these factors  
14 compel the conclusion that Mr. Parkins’ 2014 conviction should be excluded.

15 **a. Mr. Parkins’ Prior Conviction Does Not Have Impeachment**  
16 **Value.**

17 If Mr. Parkins testifies, he does not intend to misrepresent his character.  
18 Therefore, the impeachment value of his prior convictions is low. When the Ninth  
19 Circuit has upheld the district court’s admission of the defendant’s prior convictions for  
20 impeachment purposes, there was reason to believe that the defendant would  
21 mispresent his character to the jury. *United States v. Cook*, 608 F.2d 1175, 1187 (9th  
22 Cir. 1979) (en banc). However, where there is no such reason to believe that the  
23 defendant would mispresent his character, such impeachment evidence was precluded.  
24 *See Bagley*, 772 F. 2d at 488. Similar to *Bagley*, there is no evidence to show that Mr.  
25 Parkins intends to mispresent his character to the jury and, as such, the impeachment  
26 evidence should be excluded.

27 Furthermore, his 2014 conviction does not involve dishonesty, fraud, or false  
28 statements, limiting their relevance to the question of Mr. Parkin’s credibility. *See*

1 *United States v. Glenn*, 667 F.2d 1269, 1273 (explaining the applicability of Rule 609)  
 2 (citations omitted). Although the offense of Receiving Stolen Property may exhibit “a  
 3 lack of respect for the [law] or property of others[,]” it does not “bear directly on the  
 4 likelihood that the defendant will testify truthfully.” *Id.* at 1273.

5 **b. There Is a Distant Temporal Relationship between the**  
 6 **Conviction and the Subsequent History of Mr. Parkins.**

7 The conviction that the government may seek to introduce as impeachment  
 8 evidence occurred in 2014, more than seven years from the instant offense. The defense  
 9 acknowledges that the length of time between Mr. Parkins’ prior conviction and the  
 10 instant offense may weigh in favor of inclusion. *See* Rule 609(b) (specifying ten years  
 11 from the date of the conviction or release from confinement as the reference point).  
 12 However, when balanced with the other factors, the weight overwhelmingly militates in  
 13 favor of exclusion.

14 **c. Mr. Parkins’ Testimony at Trial Is Important.**

15 The Court must consider the importance of Mr. Parkins’ testimony at trial. As a  
 16 result of the “harsh relation of Rule 609, many defendants [remain] silent thus  
 17 depriving the jury of the most critical piece of testimony available to them.” Robert D.  
 18 Dodson, *What Went Wrong With Federal Rule of Evidence 609: A Look at How Jurors*  
 19 *Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 19 (1999). The  
 20 exclusion of such important testimony is dangerous because data shows “that  
 21 approximately half of Americans believe that a defendant who does not testify in his or  
 22 her own defense is guilty.” John H. Blume, *The Dilemma of the Criminal Defendant*  
 23 *With a Prior Record-Lessons From the Wrongfully Convicted*, 5 JOURNAL OF  
 24 EMPIRICAL LEGAL STUDIES 477, 478 n. 1 (Issue 3, Sept. 2008) (citations omitted). *See*  
 25 *also id.* (“If the defendant does not testify, then the jury is likely to draw the inference  
 26 that he or she has something to hide or, more specifically, that the defendant is guilty”).  
 27 The conclusion, while wholly improper, accords with their experience—experience that  
 28 they are expressly encouraged to use as they deliberate a defendant’s fate. *Cf. Mitchell*



1 *v. United States*, 526 U.S. 314, 333 (1999) (“If I ask my son whether he saw a movie  
2 that I had forbidden him to watch, and he remains silent, the import of his silence is  
3 clear”) (Scalia, J., dissenting).

4 Mr. Parkins’ testimony is vitally important to this case because he is the only  
5 witness who can counter the narrative offered by the government. *See generally* Jeffery  
6 Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules That*  
7 *Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 852-54 (Spring 2008)  
8 (increase in non-testifying defendants results from “elaborate jurisprudence permitting  
9 numerous burdens to be placed on the right to testify[,]” but carries “decided  
10 disadvantage for both the criminal justice system and society in general when the right  
11 to remain silent is invoked”). “This deprivation increases the danger of a verdict based  
12 on a ‘partial ...presentation of the facts’ and at the same time impairs the related  
13 ‘public interest in a full and truthful disclosure of critical facts.’” *Id.* (citations omitted).

14 When Mr. Parkins is the sole witness who can provide a counter-narrative to the  
15 government’s case, both Mr. Parkins’ interests and the interests of the criminal justice  
16 system as a whole benefit from Mr. Parkins testifying on his own behalf. This factor  
17 strongly favors excluding his 2014 conviction.

18 **d. Credibility Is a Central Issue in This Matter.**

19 Mr. Parkins credibility is paramount in this case, and this fact weighs in favor of  
20 excluding his prior conviction. Social Science studies have shown even if jurors are not  
21 informed of a defendant’s prior convictions, there is no risk that a jury will be more  
22 likely to take give credibility to the defendant’s testimony. Dodson at 20. On the  
23 contrary, studies have shown that juries do not effectively limit their consideration of  
24 prior conviction evidence. *See* Bellin at 885-86 n.118 (citing studies and articles  
25 regarding jurors’ misuse of impeachment evidence and noting the inefficacy of limiting  
26 instructions). Indeed, excluding the evidence of prior convictions does not confer any  
27 advantage upon the defendant. Instead, it simply produces a more level playing field.  
28



1           **e. There Is No Similarity Between The Charged Offense and**  
2           **the 2014 Conviction. The 2014 Conviction Should Be**  
3           **Excluded.**

4           There is no similarity between the instant offense (i.e., pointing a laser at a  
5 helicopter) and receiving stolen property. They do not have the same elements, they do  
6 not share a common *modus operandi*, and the 2014 conviction does not evince anything  
7 probative about Mr. Parkins' ability to commit the instant offense. After careful  
8 consideration of the factors outlined in *Bagley*, this Court should exclude Mr. Parkins'  
9 2014 conviction because the prejudicial effect of admission outweighs any probative  
10 value.

11       **C. Mr. Parkins' 2013 and 2014 Convictions Do Not Fall into the Very**  
12       **Narrow Category of Convictions That Qualify as Crimes Involving**  
13       **Dishonesty or False Statements and, Therefore, Cannot Be Used to**  
14       **Impeach Him.**

15           None of Mr. Parkins' prior convictions qualify as crimes involving dishonesty or  
16 false statements. Mr. Parkins' DUI convictions did not involve misrepresentation or  
17 deceit, and the elements of his DUI convictions did not require proof that Mr. Parkins  
18 acted dishonestly or made a false statement. *See* Cal. Jury Instr.--Crim. 16.831 (Jury  
19 Instruction for California Vehicle Code section 23152(a)) and Cal. Jury Instr.--Crim.  
20 16.830.1 (Jury Instruction for California Vehicle Code section 23152(a)). Likewise,  
21 Mr. Parkins' conviction for misdemeanor hit-and-run did not involve misrepresentation  
22 or deceit, and the elements of the offense did not require proof that he acted dishonestly  
23 or made a false statement. Cal. Jury Instr.--Crim. 16.650 (Jury Instruction for California  
24 Vehicle Code section 20002(a)). Mr. Parkins' 2014 conviction for receiving stolen  
25 property did not involve misrepresentation or deceit, and the elements of the offense do  
26 not require that he acted dishonestly or made a false statement. *See* Cal. Jury Instr.--  
27 Crim. 1465 (Jury Instruction for California Penal Code section 496(a)). Additionally, a  
28 conviction for receiving stolen property under California law does not categorically

1 qualify as crime involving dishonesty or misrepresentation under Rule 609(a)(2).  
2 *Foster*, 227 F.3d at 1099-1100.

3 **III. CONCLUSION**

4 Based on the foregoing, Mr. Parkins respectfully moves this Honorable Court for  
5 an order precluding the government from introducing evidence of Mr. Parkins' prior  
6 convictions to impeach him if he chooses to testify.

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8 Respectfully submitted,  
9 CUAUHTEMOC ORTEGA  
10 Federal Public Defender

11 DATED: March 8, 2022

12 By */s/ Jelani J. Lindsey*  
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JELANI J. LINDSEY  
14 Deputy Federal Public Defender  
15 Attorney for Brett Wayne Parkins  
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