Evidence:

Impeachment by Evidence of a Criminal Conviction

Colin Miller

Evidence: Impeachment by Evidence of a Criminal Conviction

Colin Miller
The John Marshall Law School

CALI eLangdell Press 2013

About the Author

Professor Miller teaches Evidence, Criminal Procedure, Criminal Law, and Civil Procedure. He is the creator and Blog Editor of EvidenceProf Blog of the Law Professor Blogs Network. He is the Editor of Illinois Criminal Procedure and drafted a 100 page report comparing the Federal Rules of Evidence to Illinois evidentiary principles, which was used in the creation of the first Illinois Rules of Evidence.

Professor Miller received his B.A. degree with distinction from the University of Virginia and his J.D. (Order of the Coif) from the William & Mary Law School.

Notices

This is the first version of the first edition of this chapter, updated June 11, 2012. Visit http://elangdell.cali.org/ for the latest version and for revision history.

About CALI eLangdell Press

The Center for Computer-Assisted Legal Instruction (CALI®) is: a nonprofit organization with over 200 member US law schools, an innovative force pushing legal education toward change for the better. There are benefits to CALI membership for your school, firm, or organization. ELangdell® is our electronic press with a mission to publish more open books for legal education.

How do we define "open?"

- Compatibility with devices like smartphones, tablets, and e-readers; as well as print.
- The right for educators to remix the materials through more lenient copyright policies.
- The ability for educators and students to adopt the materials for free.

Find available and upcoming eLangdell titles at elangdell.cali.org. Show support for CALI by following us on Facebook and Twitter, and by telling your friends and colleagues where you received your free book.

Table of Contents

Impeachment by Evidence of a Criminal Conviction (Rule 609) Chapter

I. An Introduction to Impeachment Evidence

Propensity character evidence is evidence used to prove that a person has a propensity to act a certain way and that he likely acted in conformity with that propensity at the time of a *pre-trial wrong*. For instance, evidence that a defendant charged with battery had a prior conviction for battery would be used to prove his propensity to act violently and his likely conformity with that propensity at the time of the crime charged ("Once a batterer, always a batterer."). Propensity character evidence is generally inadmissible. *See* Federal Rule of Evidence 404. When a party impeaches a witness with evidence of a prior conviction, the party is also asking the jury to engage in a propensity/conformity analysis, but it is a *different* propensity conformity analysis. The goal of the party in impeaching a witness is to use the witness's prior conviction(s) to prove that the witness has a propensity to be deceitful and that the witness is likely acting in conformity with that propensity by lying on the witness stand and/or when making a prior statement admitted at trial to prove the truth of the matter asserted. Impeachment through evidence of prior convictions is covered by Federal Rule of Evidence 609.

II. The Rule

Federal Rule of Evidence 609. Impeachment by Evidence of Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

> (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

III. Historical Origins

In the common law days, the doctrine of disqualification for infamy deemed an individual who had been convicted of a felony or a crime of *crimen falsi* incompetent to testify at trial. At the time, felony convictions were generally defined as convictions for crimes punishable by incarceration for more than one year while *crimen falsi* referred to crimes involving fraud, deceit, or obstruction of justice. This "infamy rule" was part of a patchwork of rules deeming certain categories of individuals incompetent to testify at trial. For instance, spouses were incompetent to testify under the doctrine of coverture and atheists were incompetent to testify on the grounds of irreligion. Eventually, statutory reforms replaced these incompetence rules. One such reform replaced the doctrine of disqualification for infamy with a rule permitting convicted individuals to testify, but allowing for the automatic admission of evidence of their felony and *crimen falsi* convictions for impeachment purposes*, i.e.,* to call into question their credibility as witnesses. Subsequently, most courts relented in the face of scholarly criticism of such automatic admission and shifted toward a more flexible approach under which they balanced a conviction's probative value against its prejudicial effect before admitting it.

IV. Federal Rule of Evidence 609

A. Passage of Rule 609

Congress eventually codified this common law into Federal Rule of Evidence 609, which was "[s]ewn together using disparate parts and contradictory theories." Mark Voigtmann, Note, *The Short History of a Rule of Evidence That Failed (Federal Rule of Evidence 609, Green v. Bock Laundry Machine Co. and the New Amendment)*, 23 IND. L. REV. 927, 929

(1990). Those who wanted convictions deemed *per se* admissible to impeach witnesses were pitted against those who urged that strict limits be placed on conviction-based impeachment, with each and every opinion in between finding voice in one of the panoply of its drafts. Rule 609 sparked more controversy than any other provision of the Federal Rules of Evidence by a significant margin, with the debate so fierce that it eventually "threatened the entire project to create a Federal Rules of Evidence" as the debate exploded from a narrow discussion of impeachment into a broad referendum "on how to balance the rights of an accused against the rights of society to defend itself from criminals." Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2295, 2301 (1994). As finally enacted, Rule 609 was thus a "creature born of legislative compromise," a judicial Scylla of sorts – "incorporating no less than three balancing tests, two references to fairness, one to justice, and several other undefined terms" which "wreak[ed] a sort of judicial vengeance on those unfortunate enough to have to apply it." *See* Colin Miller, *Impeachable Offenses?: Why Civil Parties in Quasi-Criminal Cases Should Be Treated Like Criminal Defendants Under the Felony Impeachment Rule*, 26 PEPP. L. REV. 997, 1039 (2009) [hereinafter *Impeachable Offenses?*].

B. Federal Rule of Evidence 609(c)

> Rule 609(c)
>
> (c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:
>
> > (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or
> >
> > (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

If a party seeks to impeach a witness through a conviction, the **first question** is whether that conviction has been the subject of a procedure that renders it *per se* inadmissible under Rule 609(c). Rule 609(c) enumerates a few procedures that potentially trigger a Rule 609(c) analysis. One enumerated procedure is the pardon, in which the President, governor, or an agency, such as a pardon or parole board, releases an offender from the consequences of his offense. In such a situation, the pardoner delivers the pardon to the pardonee, and the pardon is "not communicated officially to the court." *United States v. Wilson*, 32 U.S. 150, 161 (1833). Conversely, a convict typically receives an annulment from a court by filing a petition of annulment with the sentencing court pursuant to a procedure set forth in a statute. Meanwhile, the "'certificate of rehabilitation' is something similar to an annulment or a pardon, constituting an exceptional determination that the defendant has been fully reintegrated into society." *United States v. Berger*, 50 F.3d. 16 (9th Cir. 1995).

A pardon or annulment can be based on a finding of innocence. For instance, one study found that between 1989 and 2003, there were 42 cases where executive officers issued pardons based upon evidence of defendants' innocence, which often consisted of DNA evidence. *See* Samuel R. Gross, *Exonerations in the United States, 1989 through 2003,* 95 J. CRIM. L. & CRIMINOLOGY, 523, 524 (2005). Because the exonerated individuals in such cases are deemed innocent of the subject crimes, their convictions cannot be used to impeach them under Rule 609(c)(2), even if they are subsequently convicted of other crimes.

Like the certificate of rehabilitation, a pardon or annulment can also be based upon a finding that the convicted person was rehabilitated. As an example, in *Brown v. Frey*, 889 F.2d 159 (8th Cir. 1989), the plaintiff, an inmate at the Missouri Eastern Correctional Center (MECC), brought a lawsuit alleging that various MECC employees deprived him of numerous constitutional rights. At trial, the district court precluded the plaintiff from cross-examining a MECC Investigator regarding a prior perjury conviction. *See id.* at 162. Upon the plaintiff's cross-appeal, the Eighth Circuit found that the district

court properly precluded such cross-examination under Rule 609(c)(1), noting that the Investigator's conviction was pardoned based on a finding of rehabilitation. *See id.* at 171.

If, however, like a certificate of rehabilitation, a pardon, or annulment is based upon a finding of rehabilitation rather than innocence, Rule 609(c)(1) provides that the conviction can still potentially be admissible to impeach the witness if the witness is subsequently convicted of a "crime punishable by death or by imprisonment for more than one year," *i.e.*, a felony conviction. The reasoning behind this exception is that Rule 609(c)(1) prevents impeachment on the ground "that a rehabilitated person should no longer be associated with his conviction." Chandra S. Menon, Comment, *Impeaching Witnesses in Criminal Cases with Evidence of Convictions: Putting Louisiana's Rule in Context*, 79 TUL. L. REV. 701, 709 (2005). When, however, a witness is "subsequently convicted of a felony, he has demonstrated that he is not truly rehabilitated." *Id.* The United States District Court for the District of Columbia used this qualification in *United States v. Morrow*, 2005 WL 1017827 (D.D.C. 2005), when it allowed defense counsel to impeach a witness for the prosecution through a felony weapons conviction which had been set aside due to rehabilitation because the witness was subsequently convicted of felony theft.

By their language, Rules 609(c)(1) & (2) also preclude conviction-based impeachment when a conviction is subjected to an "equivalent procedure," with the dispositive question being whether the procedure was based upon a finding of rehabilitation or innocence of the person convicted. An example where a court found this question answered in the affirmative can be found in *United States v. Pagan*, 721 F.2d 24 (2nd. Cir. 1983), where the Second Circuit determined that the district court committed reversible error by allowing the prosecution to impeach the defendant through his conviction for interstate transportation of a stolen vehicle because that conviction was vacated pursuant to the set-aside provision of an act which required a finding that the offender's rehabilitation had been accomplished.

Conversely, in *U.S. Xpress Enterprises, Inc. v. J.B. Hunt Transport, Inc.*, 320 F.3d 809 (2003), a wrongful death action based upon a traffic accident, a district court denied the motion of a co-defendant to

preclude the plaintiff from impeaching its driver through convictions under Canadian law for possession of stolen property and conspiracy. On appeal, the Eighth Circuit found that the district court's decision was not an abuse of discretion because the driver's convictions were absolved under Canadian law, not based upon a finding of innocence or rehabilitation, but because the driver paid $5,000 and complied with his six-month probation term. *See id.*

Of course, pardons or annulments can also be issued without a finding of innocence or rehabilitation, as is the case with automatic pardons issued to restore the civil rights lost by an incarcerated individual by virtue of his conviction. Moreover, when a conviction is pardoned, annulled, or otherwise expunged based upon a desire to *encourage* rehabilitation, as opposed to a finding of rehabilitation, Rule 609(c)(1) does not preclude impeachment.

Hypothetical 1: Jon Paul Hamilton and Allen Lamar McMurrey are convicted of counterfeiting of U.S. Treasury checks and related crimes. They thereafter appeal, claiming that the district court erred in precluding them from impeaching a witness for the prosecution, Calvin Stout, with evidence of his prior convictions for armed robbery and theft by check. Before trial, the governor of Oklahoma granted Stout "a full and free pardon." The pardon certificate, a pre-printed form, stated that

> since [Stout's] release, it appears [that Stout] ... has conformed to all rules and conditions, and that documentary evidence has been submitted to show that he has not been arrested nor violated the law and that he has conducted himself in a law-abiding and upright manner.

Did the court properly exclude evidence of the conviction? *See United States v. Hamilton*, 48 F.3d 1995 (5th Cir. 1995). What if Stout committed felony assault after he was released?

Hypothetical 2: Michael Burkeen slipped and fell on a liquid substance on the floor of a Wal–Mart store in Hot Springs, causing injuries and memory loss. The liquid apparently came from a broken snow globe that had been part of a Christmas display. Michael and his wife Linda bring a negligence action against Wal-Mart, and both

testify at trial. The trial court precluded Wal-Mart from impeaching Linda through evidence of her prior felony theft conviction that arose out of a check-kiting scheme. Before trial, the Yell County Circuit Court had entered an order expunging her record, finding that she had "satisfactorily complied with the orders of this court, and that the petition to expunge and seal should be granted." Did the trial court properly exclude evidence of the conviction? *See Wal-Mart Stores, Inc. v. Regions Bank Trust Dept.*, 69 S.W.3d 20 (Ark. 2002).

Hypothetical 3: Percy "June" Hutton is convicted of aggravated murder with a gun and related crimes. After he is convicted, Hutton appeals, claiming that the trial court erred by allowing the prosecution to impeach him through the following redirect examination of a witness for the prosecution:

> Q. Now, Mrs. Pollard, isn't it a fact that you know Percy Hutton *took the life of someone?*
>
> MR. HILL: Objection.
>
> THE COURT: Overruled.
>
> A. Answer?
>
> THE COURT: Yes, you may answer.
>
> A. Yes, I heard of it.

This question related to Hutton's prior conviction for involuntary manslaughter in 1978, which was subsequently reversed based upon the finding that Hutton was denied his right to a fair trial. Was this redirect examination proper? *See State v. Hutton*, 1988 WL 39276 (Ohio App. 1988). What if Hutton had subsequently been convicted of felony assault before trial?

C. Federal Rule of Evidence 609(d)

> Rule 609(d)
>
> **(d) Juvenile Adjudications.** Evidence of a juvenile adjudication is admissible under this rule only if:
>
> (1) it is offered in a criminal case;

> (2) the adjudication was of a witness other than the defendant;
>
> (3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and
>
> (4) admitting the evidence is necessary to fairly determine guilt or innocence.

Assuming that a conviction is not *per se* inadmissible under Rule 609(c), the **second question** is whether the conviction is a juvenile adjudication under Rule 609(d). Rule 609(d) places strict limitations on the admission of juvenile adjudications – adjudications that result from proceedings in the juvenile justice system[1] – for impeachment purposes. According to the Advisory Committee's Note, some of the main rationales undergirding this disfavoring of impeachment through juvenile adjudications were "policy considerations much akin to those which dictate exclusion of adult convictions after rehabilitation has been established." Indeed, before the passage of the Federal Rules of Evidence, "[t]he prevailing view ha[d] been that a juvenile adjudication [wa]s not usable for impeachment." *Id.* The drafters of Rule 609(d) decided to take a different route, with this deviation premised on the grounds that "the rehabilitative process may in a given case be a demonstrated failure, or the strategic importance of a given witness may be so great as to require the overriding of general policy in the interests of particular justice." *Id.*

Accordingly, evidence of juvenile adjudications are admissible, but only if **four** circumstances are satisfied. **First**, under Rule 609(d)(1), juvenile adjudications are only potentially admissible in criminal

---

[1] In *State v. Jones*, 2012 WL 2368839 (Minn.App. 2012), however, the Court of Appeals of Minnesota found that an extended-jurisdiction juvenile adjudication by a juvenile court was not a "juvenile adjudication for Rule 6099d) purposes. *See* Colin Miller, *It's So Juvenile: Court Of Appeals Of Minnesota Finds An Extended-Jurisdiction Juvenile Adjudication Not Covered By Rule 609(d)*, EvidenceProf Blog, July 9, 2012; http://lawprofessors.typepad.com/evidenceprof/2012/07/ejj-609d-state-of-minnesota-respondent-v-prince-antonio-jones-appellant-nw2d-2012-wl-2368839minnapp2012.html.

cases, meaning that they are *per se* inadmissible in civil cases. *See Powell v. Levit*, 640 F.2d 239, 241 (9th Cir. 1981) ("The trial court has no discretion to admit such evidence in a civil proceeding."). **Second**, under Rule 609(d)(2), juvenile adjudications are *per se* inadmissible against criminal defendants. *See United States v. Pretlow*, 770 F. Supp. 239, 243 (D.N.J. 1991) ("Federal Rule of Evidence 609(d) simply does not permit the use of such evidence against a [criminal] defendant."). This of course, means that such adjudications are potentially admissible against any other witness in a criminal case: (1) any witness for the prosecution, including the alleged victim; or (2) any witness called by a criminal defendant.

Skipping to the **fourth** circumstance, a juvenile adjudication is only admissible if it "is necessary to fairly determine guilt or innocence" under Rule 609(d)(4). In making this determination, courts consider factors such as whether (1) the "juvenile court adjudication could shed light on the credibility of a key witness," (2) "whether in the particular case the rehabilitative purposes of the juvenile system ha[d] failed," or (3) whether the adjudication is the only evidence that could be used to impeach the witness. *See* John E.B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 PAC. L.J. 801, 932 (1987). Only if the party seeking to impeach a witness through a juvenile adjudication can make a strong showing of necessity can he overcome the "presumption that evidence of juvenile adjudications is generally not admissible." *United States v. Williams*, 963 F.2d 1337 1341 (10th Cir. 1992).

In *Williams*, for example, the Tenth Circuit found that the defendant failed to make such a showing when he tried to impeach a witness for the prosecution with evidence of a juvenile adjudication after he already impeached her with evidence that she was cheating the welfare system. Conversely, in *State v. Van Den Berg*, 791 P.2d 1075 (Ariz. App. 1990), the Court of Appeals of Arizona found that the trial court erred in precluding a defendant charged with aggravated assault from impeaching one of his alleged teenage victims with evidence that he was on probation from a juvenile adjudication. The adjudication was the only evidence available to impeach the victim, a key witness for the prosecution, and the victim's probationary status

gave him an additional motive to lie at trial (the defendant claimed that the alleged assault consisted of warning shots fired after the teenagers trespassed and then became abusive toward him, behavior that would have constituted a probation violation).

Even upon making a showing that a juvenile adjudication "is necessary to fairly determine guilt or innocence," the **third** circumstance under Rule 609(d)(3) requires the party to prove that "an adult's conviction for that [same] offense would be admissible to attack the adult's credibility." This inquiry is the subject of the next several sections.

Hypothetical 4: Edward Powell brings a civil rights suit under 42 U.S.C. § 1983 against several police officers, alleging that they arrested him without probable cause and with excessive force. On cross-examination of Powell by defense counsel, the following exchange took place:

> Question: Okay. Had you ever been injured by police before?
>
> Answer: Sure.
>
> Question: When?
>
> Answer: When I was a kid.

Defense counsel then asked Powell how he was injured by police as a kid. Powell said that he had been handcuffed and taken out of school. Defense counsel asked: "Why were you taken out of high school in handcuffs?" Powell revealed that he had been involved in a juvenile adjudication. Were defense counsel's questions proper? *See Powell v. Levit*, 640 F.2d 239 (9th Cir. 1981). What if the plaintiff's attorney sought to question one of the police officers about a juvenile adjudication?

Hypothetical 5: Richard Lacy is charged with murder after stabbing the victim 23 times after an argument. Lacy had a prior juvenile sex offense. At trial, the following exchange occurred between the prosecutor and a mental health expert

> Q: And in Port Smith, Virginia, what was he treated for?

> [Defense Counsel]: Objection.
>
> The Court: Overruled.
>
> [Defense Counsel]: Your Honor, could we approach?
>
> The Court: Yes.
>
> (A bench discussion was held)
>
> Q: Dr. Hilkey, what was the Defendant being treated for?
>
> A: Do I need to answer that? He had been involved with inappropriate touching of a child and he was referred for treatment for that.

Were the prosecutor's questions proper? *See* State v. Lacy, 711 S.E.2d 207 (N.C. App. 2011); *See* Colin Miller, *Juvenile Record: Court Of Appeals Of North Carolina Finds Error In Allowing Impeaching Of Defendant Through Juvenile Adjudication*, EvidenceProf Blog, May 27, 2012; http://lawprofessors.typepad.com/evidenceprof/2012/05/similar-to-its-federal-counterpartnorth-carolina-rule-of-evidence-609dprovides-that-evidence-of-juvenile-adjudications.html.

Hypothetical 6: During a nighttime raid of a residence, an officer observes a gun being thrown out of a bathroom window. Soon thereafter, officers enter the bathroom and come upon Maseiva Saumani, Dmitri Powell, and Louis Ford. The prosecution develops the theory that Saumani threw the gun out of the window and charges him with being a felon in possession of a handgun. Defense counsel indicates that Powell and Ford, the only two eyewitnesses, will give testimony at trial that will vindicate Saumani. At trial, the prosecution impeaches Powell and Ford with evidence of their juvenile adjudications for second degree robbery and first degree theft, the only impeachment evidence that it had against them. Was this impeachment proper? *See United States v. Saumani*, 189 F.3d 476 (9th Cir. 1999).

Hypothetical 7: Margarita Ciro and Fanny Lida Sloan are charged with conspiracy to distribute cocaine and possession of cocaine with intent to distribute. At trial, three government agents offer strong testimony against Ciro and Sloan. Juan Caicedo, who also participated

in the cocaine conspiracy and turned state's evidence, also testifies against the defendants. On cross-examination, Caicedo admits that he "free based" cocaine four times a week, and that free basing diminished his ability to recall the crimes charged. He also admits that as a result of his cooperation with the government he would not be prosecuted for "60, 70, or 80 other deals" in which he was involved. The district court precludes the defendants from impeaching Caicedo through evidence of his juvenile adjudication for kidnapping and assault with intent to rape. Did the district court act properly? *See* *United States v. Ciro*, 753 F.2d 248 (2nd Cir. 1985).

D. Federal Rule of Evidence 609(a)(2)

> Rule 609(a)(2)
>
> **(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction…
>
> > (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

Assuming that the conviction is an adult conviction or a juvenile adjudication that satisfies Rules 609(d)(1), (2), and (4), the **third question** is whether it can readily be determined that the prosecution had to prove a dishonest act or false statement by the witness to convict him of the prior crime. If this can be readily determined, the conviction is *per se* admissible under Rule 609(a)(2), unless the conviction is more than ten years old, in which case it is covered by Federal Rule of Evidence 609(b). Under Rule 609(a)(2), it is irrelevant whether the prior conviction is a felony or misdemeanor conviction, *i.e.,* it is irrelevant what punishment is prescribed for the crime.

Prior to 2006, Federal Rule of Evidence 609(a)(2) deemed prior convictions that were not more than 10 years old *per se* admissible to

impeach as long as the underlying crime "involved dishonesty or false statement."[2] For instance, assume that a defendant called the victim and asked for his help in fixing a television that was not broken as a ruse so that the defendant could kill the victim when he arrived at his house. Because the defendant's murder of the victim "involved dishonesty or false statement," it would be *per se* admissible to impeach him at a subsequent trial held within the 10 years following the defendant's release.

In 2006, Rule 609(a)(2) was amended to preclude such findings. According to the Advisory Committee,

> The amendment provides that Rule 609(a)(2) mandates the admission of evidence of a conviction only when the conviction required the proof of (or in the case of a guilty plea, the admission of) an act of dishonesty or false statement. Evidence of all other convictions is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of the commission of the crime of conviction. Thus, evidence that a witness was convicted for a crime of violence, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime.

The Advisory Committee noted that this change is consistent with the Conference Committee Report accompanying the original Federal Rule of Evidence 609, which stated:

> That by "dishonesty and false statement" it meant "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other

---

[2] Most states still deem convictions *per se* admissible under their counterparts to the federal rule as long as they are for crimes "involving dishonesty or false statement." *See, e.g.,* Washington Rule of Evidence 609(a)(2).

> offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully."

In other words, Rule 609(a)(2) now only applies to these *crimen falsi* crimes and other crimes such as larceny by trick "in which the ultimate criminal act [i]s itself an act of deceit." Conversely, in the murder example from above, because murder is not an act of deceit, the witness's murder conviction would not be covered by Rule 609(a)(2). This makes sense because the prosecution in that murder case did not have to prove the defendant's lie to convict him of murder; it merely had to prove that the defendant killed the victim (with the requisite *mens rea*).

But what if the witness's conviction is for a crime such as simple larceny, which might or might not involve dishonesty? According to the Advisory Committee,

> Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment—as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly—a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted.

For instance, in *Sanders v. Ritz-Carlton Hotel Co., LLC*, 2008 4155635 (S.D.N.Y. 2008), the defendants sought to impeach the plaintiff through, *inter alia*, his prior conviction for participation in a RICO enterprise. While RICO crimes can involve deceit or force, the court found that the defendant's conviction was admissible under Rule 609(a)(2) because the indictment in that case stated that "the enterprise involved a variety of fraudulent schemes, including…submitting fraudulent accident claims to insurance companies." *See* Colin Miller, *Putting On The Ritz: New York Court*

Makes Seemingly Improper Rule 609(b) Ruling In Slip And Fall Case, EvidenceProf Blog, September 14, 2008;

http://lawprofessors.typepad.com/evidenceprof/2008/09/609-sanders-v-r.html.

As noted, assuming that it can readily be determined that the prosecution had to prove a dishonest act or false statement by the witness to convict him of the prior crime, the conviction is *per se* admissible, unless the conviction is more than ten years old, in which case it is covered by Federal Rule of Evidence 609(b). Assuming that this fact can readily be determined, you can thus bypass the fourth question in the next subsection, subsection E., and move to subsection F. to determine under whether the prior conviction is more than ten years old.

Hypothetical 11: James Toney is charged with mail fraud, and the prosecution seeks to impeach him with his prior conviction for mail fraud. This prior conviction was less than one year old. Toney does not dispute that mail fraud is a crime covered by Rule 609(a)(2). He claims, however, that evidence of his prior conviction couldn't be more prejudicial because the jury will clearly misuse it as propensity character evidence to conclude that he committed the crime charged. Should the court exclude evidence of the prior conviction? *See United States v. Toney*, 615 F.2d 277 (5th Cir. 1980).

Hypothetical 12: Kelly David is charged with conspiracy to defraud the IRS and aiding and assisting in the filing of false tax returns. At trial, the prosecution impeaches him under Rule 609(a)(2) with evidence of his 8 year-old prior conviction for misdemeanor theft, which is a crime when a person "shall feloniously steal, take, carry, lead, or drive away the personal property of another." The prosecution proved that this crime involved a dishonest act or false statement through a police report. The report stated that David, an employee of Neiman Marcus, had a scheme of making false credits on his American Express credit card. These credit card entries did not correspond to any actual purchase of merchandise from Neiman Marcus. Rather, they listed fictitious persons as having returned merchandise to the store, the proceeds from which David would

convert to his own use. Was this impeachment proper under Rule 609(a)(2)? *See United States v. David*, 337 Fed. Appx. 639 (9th Cir. 2009); *See* Colin Miller, *It's In My Report: 9th Circuit Finds Police Report Insufficient To Prove Conviction Fell Under Rule 609(a)(2)*, EvidenceProf Blog, May 26, 2012;

http://lawprofessors.typepad.com/evidenceprof/2012/05/federal-rule-of-evidence-609a2provides-that-the-following-rules-apply-to-attacking-a-witnesss-character-for-truthfuln.html.

E. Federal Rule of Evidence 609(a)(1)

> Rule 609(a)(1)
>
> (a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
>
> > (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
> >
> > > (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
> > >
> > > (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant…

If a conviction is not for a crime for which the prosecution had to prove a dishonest act or false statement by the witness, the **fourth question** is whether the conviction is a felony conviction. As indicated by the language of Rule 609(a)(1), a felony conviction is a conviction for a crime *punishable* by death or imprisonment for more than one year, regardless of the actual punishment imposed. Accordingly, if a defendant commits simple robbery and is sentenced to probation or 6 months' imprisonment, the robbery conviction is still a felony conviction if the maximum punishment for simple

robbery is imprisonment for 4 years. *See Smith v. Tidewater Marine Towing, Inc.*, 927 F.2d 838, 840 (5th Cir. 1991).

Keep in mind, though, that Rule 609(a)(1) requires that the crime be punishable by death or imprisonment *in excess of* one year. Therefore, if a conviction is for a crime that is punishable by a maximum of 12 months/1 year incarceration, it is a misdemeanor conviction*, i.e.,* a conviction for a crime punishable by no incarceration or incarceration for a maximum of 1 year. *See Rahmaan v. Lisath*, 2006 WL 3306430 (S.D. Ohio 2006). And if the conviction is a misdemeanor conviction, the conviction is *per se* inadmissible to impeach the witness under Rule 609(a)(1). *See, e.g., United States v. Lamb*, 99 Fed. Appx. 843 (10th Cir. 2004) ("Because his assault conviction was a misdemeanor, it does not satisfy the requirements of Rule 609(a)(1).").

Assuming that the subject conviction is a felony conviction, there are three separate balancing tests that could apply to the conviction. **First**, regardless of the witness being impeached, if the conviction is more than ten years old under Federal Rule of Evidence 609(b), its admissibility is determined by the balancing test prescribed by Rule 609(b)(1). This analysis is contained in the next subsection, subsection F.

Second, if the conviction is not more than ten years old and the witness being impeached is anyone other than the defendant in a criminal trial, under Rule 609(a)(1)(A) the court determines admissibility by applying the standard Rule 403 balancing test under which the conviction is admissible unless its probative value is *substantially* outweighed by the danger of unfair prejudice. This test thus applies to (1) any witness for the prosecution, including the alleged victim; (2) any witness called by a criminal defendant; (3) a civil plaintiff and any witness called by him; and (4) a civil defendant and any witness called by him.

Third, if the conviction is not more than ten years old and the witness being impeached is the criminal defendant, under Rule 609(a)(1)(B), the prosecution must affirmatively prove that the probative value of the conviction outweighs its prejudicial effect.

According to the Advisory Committee, the reason for this third test is that "the danger that prior convictions will be misused as character evidence is particularly acute when the [criminal] defendant is impeached…."

The way that the modified balancing test provides more protection to criminal defendants than the standard Rule 403 balancing test can be understood by considering the probative value and prejudicial effect that courts balance under Rule 609. The sole probative value of a conviction under Rule 609 is the impeachment value of the conviction *i.e.,* how much bearing the conviction has on the honesty and veracity of the witness. Meanwhile, when the witness is a criminal or civil defendant (or an uncharged co-conspirator or alternate suspect), or, in some cases, a civil plaintiff or alleged victim, the main prejudicial effect of a conviction under Rule 609 is the danger that the jury will misuse the conviction as propensity character evidence. For example, in a battery case involving a claim of self-defense, if the prosecution or civil plaintiff seeks to impeach the defendant, or if the defendant seeks to impeach the alleged victim or civil plaintiff with evidence of a prior battery conviction, the court is concerned that the jury will misuse the conviction to conclude, "Once a batterer, always a batterer," which is precluded by Federal Rule of Evidence 404.

Of course, the use of a conviction for impeachment purposes can cause other prejudicial effects. Impeachment of a witness with evidence of his prior conviction for a crime could cause the witness "unnecessary embarrassment." *See* Advisory Committee's Note to the 1990 amendment to Federal Rule of Evidence 609. Furthermore, impeaching a witness with certain evidence, such as evidence that he is an illegal alien who was convicted of re-entering the United States illegally, "could result in unfair prejudice to the government's interest in a fair trial…." *See id.* When the witness being impeached is not alleged to have engaged in misconduct in the event(s) giving rise to the civil lawsuit or criminal action (*e.g.,* the witness is merely an eyewitness), these other prejudicial effects are the *only* prejudicial effects because there is no concern that the jury will misuse the conviction as propensity character evidence.

In balancing probative value against prejudicial effect, the vast majority of courts apply a five-factor test, first articulated in *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976), which considers:

(1) The impeachment value of the prior crime.

(2) The point in time of the conviction and the witness'[s] subsequent history.

(3) The similarity between the past crime and the charged crime.

(4) The importance of the defendant's testimony.

(5) The centrality of the credibility issue.

First Factor

Under the first factor, courts consider how much bearing the crime underlying the prior conviction has on the issue of the witness's honesty and veracity; "the greater the impeachment value, the higher the probative value." *United States v. D'Agata*, 646 F. Supp. 390, 391 (E.D. Pa. 1986). Courts typically find that crimes of violence have low probative value because such crimes "have little or no direct bearing on honesty" and are instead thought to result "from a short temper, a combative nature, extreme provocation, or other causes." *United States v. Cueto*, 506 F. Supp. 9, 13 (W.D. Okla. 1979). While possession of a controlled substance is thought to have little necessary bearing on veracity, "[p]rior drug-trafficking crimes are generally viewed as having some bearing on veracity." *United States v. Brito*, 427 F.3d 53, 64 (1st Cir. 2005) Meanwhile, courts generally find that property crimes such as "[b]urglary and petit larceny have a definite bearing on honesty which is directly related to credibility." *United States v. Brown*, 603 F.2d 1022, 1029 (1st Cir. 1979).

Second Factor

Under the second factor, "convictions have more probative value as they become more recent;" *United States v. Hayes*, 553 F.2d 824, 828 (2nd Cir. 1977); "the older the conviction, the less probative it is on the credibility issue." *United States v. Cook*, 608 F.2d 1175, 1194 (9th Cir. 1979). The theory behind this sliding scale approach is that the further a witness is removed from a conviction, the more likely it

becomes that he is rehabilitated, meaning that the conviction now tells the court less about his *current* honesty. *See Brewer*, 451 F.Supp. at 53. Under this second factor, courts also consider the witness's subsequent history. When a witness has "continued conflict with the law," as demonstrated by subsequent convictions, his behavior demonstrates that he was not truly rehabilitated, increasing the probative value of his older convictions. *Id.*

Third Factor

Under the third factor, the similarity between the crime underlying the witness's previous conviction and the event(s) giving rise to the civil lawsuit or criminal action is directly related to the conviction's prejudicial effect: the more similar the past crime and the present event(s), the more prejudicial the prior conviction; the less similar, the less prejudicial. *See D'Agata*, 646 F.Supp. at 391. While this relationship may at first appear counterintuitive, it makes sense because, again, a conviction under Rule 609 is solely being used for its bearing on the credibility of the witness's testimony, and cannot be used as propensity character evidence, which is precluded by Federal Rule of Evidence 404. Because the "[a]dmission of evidence of a similar offense often does little to impeach the credibility of a testifying [witness] while undoubtedly prejudicing him...[t]he generally accepted view...is that evidence of similar offenses for impeachment purposes under Rule 609 should be admitted sparingly if at all." *United States v. Beahm*, 664 F.2d 414, 418-19 (4th Cir. 1981).

Of course, this analysis only comes into play when the witness being impeached allegedly engaged in misconduct in the event(s) giving rise to the civil lawsuit or criminal action. Assume, for instance, that a defendant is charged with battery and seeks to impeach an eyewitness for the prosecution with evidence of his prior conviction for battery. If the defendant is merely claiming that the eyewitness misperceived the events giving rise to the battery charges, and not that he was a participant in the battery, the similarity between the past conviction and the present charges would be irrelevant. There would be no danger that the jury would misuse the prior conviction to conclude, "Once a batterer, always a batterer" because there is no allegation that the eyewitness took part in the battery. Therefore, courts

typically refrain from applying the third factor when the witness being impeached was not allegedly engaged in the subject misconduct.

A minority of courts consider only four factors in determining whether prior convictions are admissible for impeachment purposes. *See Impeachable Offenses?*, *supra*, at 1039. These courts analyze this third factor as part of the first factor. *See id.*

Fourth Factor

Under the fourth factor, courts consider the evidentiary need for the defendant's testimony and the extent to which he would be deterred from testifying if the prosecution was entitled to impeach him through prior convictions. *See* *United States v. Causey*, 9 F.3d 1341, 1344-45 (7th Cir. 1993). In most cases, of course, the defendant's testimony will be extremely important, making the fourth factor favor exclusion. But as the defendant's testimony becomes less important, the approved use of his prior conviction(s) for impeachment purposes becomes less prejudicial because the defendant might have reasonable grounds to decide not to testify independent of the fear that the jury will misuse the conviction(s) as propensity character evidence. This would be the case, for example, when the defendant's state of mind or even his actions are not at issue and/or where the defendant's testimony would be substantially the same as that of other witnesses.

For example, in *Causey*, the defendant's sole defense was that weapons and drugs were seized from his house pursuant to a search warrant that mischaracterized the true identity of a confidential informant. Because this defense had nothing to do with the defendant's state of mind or his actions, and because anyone could testify about the information contained in the warrant, the Seventh Circuit found that the defendant's testimony was not especially important, meaning this factor favored admission.

Conversely, when the defendant's *mens rea*, something only he can know, is the sole issue at trial, the defendant's testimony is even more important than usual. In *United States v. Paige*, 464 F. Supp. 99 (E.D. Pa. 1978), the defendant was charged with knowing receipt and

concealment of stolen securities. The defendant was concededly in possession of the stolen securities but claimed that he lacked a knowing *mens rea*. Accordingly, the court found that the defendant's case would "be prejudiced severely if he is deterred from testifying from fear that he will be convicted on the basis of a prior crime."

Although courts differ on the issue, most courts hold that this fourth factor is only relevant for prior convictions of criminal defendants who can choose to exercise their Fifth Amendment privilege against self-incrimination and not testify. Accordingly, most courts do not apply this factor when analyzing the admissibility of convictions for other parties/witnesses. *See, e.g., Alfred v. State*, 200 WL 1356774 (Tex. App.-Texarkana 2000) ("The third and fourth factors do not apply here because they apply only to a defendant who testifies."). Other courts, however, find that this fourth factor applies to all parties/witnesses, and they consider the importance of the testimony of each party/witness. *See, e.g., Robinson v. Clemons*, 1998 WL 151285 (D. Del. 1998).

Fifth Factor

Under the fifth factor, courts consider how central the issue of the witness's credibility is to the resolution of the case. *See Brewer*, 451 F.Supp. at 53. As the credibility issue becomes more central to the resolution of the case, the probative value of the conviction for impeachment purposes increases; the less central the credibility issue, the less probative the conviction. *See id.* at 54. When, as in many trials, the case comes down to the word of one party and his witnesses against the word of the other party and his witnesses, credibility is deemed "extremely important," rendering past convictions extremely probative. *United States v. Rein*, 848 F.2d 777, 783 (7th Cir. 1988). This is especially true in trials "based substantially on witness testimony, not necessarily physical evidence." *Malone v. State*, 829 So. 2d 1253, 1260 (Miss. App. 2002).

In some cases, however, a witness's credibility is not particularly central to the resolution of a case, rendering the conviction less probative. For instance, in *THK America, Inc. v. NSK, Ltd.*, 917 F. Supp. 563, 570-71 (N.D. Ill. 1996), the court found that the

credibility of the defendant was not especially important to a patent case in which the main issues were validity, infringement, and damages.

Fourth & Fifth Factors

Courts often note that these final two factors counterbalance. *See Brewer*, 451 F. Supp. at 53. As the testimony of a witness becomes more important, thus increasing the conviction's prejudicial effect, his credibility typically becomes more central, thus increasing the probative value of the conviction. *See id.* And when the testimony of a witness becomes less important, thus decreasing the conviction's prejudicial effect, his credibility typically becomes less central, thus decreasing the probative value of the conviction.

Unfortunately, some courts have misconstrued the fourth factor and erroneously concluded that a conviction becomes more *probative*, rather than more *prejudicial*, as the witness's testimony becomes more important. *See, e.g., State v. McNeal,* 2012 WL 1658819 (Minn. App. 2012); Colin Miller, *Make Me Whole, Take 8: Court Of Appeals Of Minnesota Yet Again Badly Botches The Felony Impeachment Analysis*, EvidenceProf, May 22, 2012;

http://lawprofessors.typepad.com/evidenceprof/2012/05/mn-609a1-state-v-mcnealnot-reported-in-nw2d-2012-wl-1658819minnapp2012.html. In these jurisdictions, the fourth and fifth factors will almost always favor admission of the conviction. *See id.*

Rule 609(a)(1)(A) & Rule 609(a)(1)(B)

By looking at cases applying the analysis of the above four or five factors, we can see the practical effects of the different balancing tests prescribed by Rule 609(a)(1)(B) (for criminal defendants) and Rule 609(a)(1)(A) (for all other parties/witnesses).

In *Smith v. Specialty Pool Contractors*, 2009 WL 799748 (W.D. Pa. 2009), a civil plaintiff brought an action against his employer, claiming that the employer created a racial and religious hostile work environment. Before trial, the plaintiff filed a motion *in limine* seeking, *inter alia*, to preclude the defendant from impeaching him through evidence of his

conviction for resisting arrest. The first thing to note about *Smith* is that, as is often the case when the witness being impeached is not a criminal defendant, the court did not make specific findings on the record with regard to the above five factors. That said, we can make pretty good assumptions of what the court would have found under each factor.

Under the first factor, the conviction for resisting arrest likely had, at most, moderate bearing on the plaintiff's honesty as a witness, making this factor favor exclusion. Second, the conviction was "approaching the ten-year limitation period provided for in Rule 609(b)," *see id.*, meaning that the second factor also favored exclusion because of the remoteness of the prior conviction. Third, resisting arrest is not at all similar to workplace behavior, so the third factor favored admission because there was little worry that the jury would misuse the prior conviction as propensity character evidence against the plaintiff. Fourth, the plaintiff's testimony concerning events at the workplace and how he perceived them was extremely important, making the fourth factor favor exclusion. Fifth, the plaintiff's credibility was highly central to the resolution of his action because the case boiled down to his word against the word of his former bosses and co-workers.

And while the court did not explicitly make these findings, it did note that the admissibility question was a close one, and that the probative value of the conviction was outweighed by its prejudicial effect. *See id.* The court, however, ultimately deemed the conviction admissible because its probative value was not *substantially* outweighed by its prejudicial effect, meaning that it satisfied the Rule 403 balancing test.

Now, assume that the plaintiff in Smith attacked one of his co-workers and was charged with battery. The prosecution would not have been able to impeach him with evidence of the conviction because its probative value would not have outweighed its prejudicial effect under Rule 609(a)(1)(B). Indeed, even if the prosecution could have proven that the probative value of the conviction *equaled* its prejudicial effect, it would not have been good enough.

For instance, take another case from Pennsylvania involving a Smith. In *United States v. Smith*, 2006 WL 618843 (E.D. Pa. 2006), the defendant was charged with conspiracy to distribute cocaine and related crimes, and the prosecution sought to impeach him with evidence of his prior conviction for simple assault. The Eastern District of Pennsylvania applies the four-factor test under Rule 609. Under the first factor, the court found that assault, a crime of violence, had little bearing on the defendant's honesty as a witness, making this factor favor exclusion. *See id.* Under the second factor, the assault conviction was less than one year old, meaning that the second factor favored admission because of its recency. *See id.* Under the third factor, importance of the defendant's testimony, the court presumed that "there would be no other way for defendant to present…evidence" proving that he was not part of the charged conspiracy except through his own testimony, making the third factor favor exclusion. *See id.* Under the fourth factor, centrality of the credibility issue, the court found that "[w]hether or not defendant's account of events is found credible will be crucial to his case," meaning that the fourth factor favored admission. Therefore, according to the court, "two [factors] weigh[ed] in favor of admission in this case, and two weigh[ed] against," meaning that the conviction had to be excluded because probative value merely *equaled* and did not outweigh prejudicial effect as is required by Rule 609(a)(1)(B).

Indeed, in jurisdictions applying all five factors, it is not surprising to see a court deem a criminal defendant's prior convictions inadmissible under Rule 609(a)(1)(B) even if 3/5 factors favor admission, especially if the first or third factors strongly favor exclusion. For instance, in *United States v. Mahone*, 328 F. Supp.2d 77 (D. Me. 2004), a defendant on trial in 2004 for attempted bank robbery and interstate transport of a stolen vehicle brought a motion *in limine*, which sought, *inter alia*, to preclude the prosecution from impeaching him through evidence of 4 prior convictions: (1) a 2001 conviction for felony second-degree forgery; (2) a 2001 conviction for felony theft by receiving stolen property; (3) a 2001 conviction for felony aggravated assault; and (4) a 2003 conviction for felony possession of a controlled substance.

The court deemed the forgery conviction *per se* admissible under Rule 609(a)(2). With regard to the other three convictions, the court found that the second factor favored admission because each conviction was recent, the third factor favored admission because each prior conviction was sufficiently dissimilar to the crime charged, and the fifth factor favored admission because the defendant's "credibility may be a central issue at trial if he chooses to testify." And the court found that the fourth factor favored exclusion of each of these three convictions because the defendant's testimony was very important.

Ultimately, the court found the conviction for theft by receiving stolen property admissible because it reflected on the defendant's "credibility and veracity," making the first factor and four out of five (4/5) factors overall favor admissibility. Conversely, the court found the convictions for aggravated assault and possession of a controlled substance inadmissible because they had no bearing on the defendant's "credibility or veracity," meaning that they were sorely lacking in probative value under the first factor. In other words, even when the prosecution can establish that three out of five (3/5) factors favor admission, the court can still find that it has failed to fulfill its burden of proving that probative value clearly outweighs prejudicial effect.

There are thus two circumstances in which a conviction is inadmissible against a criminal defendant under Rule 609(a)(1)(B), and yet admissible against any other party or witness under Rule 609(a)(1)(A): (1) when probative value equals or does not clearly outweigh prejudicial effect; or (2) when probative value is outweighed, but not *substantially* outweighed by prejudicial effect. *See United States v. McBride*, 19 F.3d 20 (6th Cir. 1994) ("Under [Rule 609(a)(1)(A)], a district court may admit evidence where the probative value is equal to, or even a bit less than, its prejudicial effect.").

Hypothetical 13: Stacy Howard is convicted of assault and battery of a high and aggravated nature (ABHAN) after a trial in February 2007. Howard unquestionably struck his girlfriend after an argument in his truck, breaking her nose in three places. But, according to Howard, his girlfriend was out of control and he unintentionally hit her while attempting to get a clear view of the road. At trial, the

prosecution impeached Howard with evidence of his three prior felony ABHAN convictions from December 2004, April 2004, and November 1995. Howard was released from incarceration for this earliest conviction after February 1997. Was this impeachment proper? *See State v. Howard*, 720 S.E.2d 511 (S.C. App. 2011). *See* Colin Miller, *Unimpeachable: Supreme Court Of South Carolina Finds Trial Court Conducted Incorrect Felony Impeachment Analysis*, EvidenceProf Blog, May 31, 2012;

http://lawprofessors.typepad.com/evidenceprof/2012/05/similar-to-its-federal-counterpartsouth-carolina-rule-of-evidence-609a1provides-that-for-the-purpose-of-attacking-the-c-1.html.

Hypothetical 14: Tyrone Saunders brings a civil action against the City of Chicago, the Chicago Police Department, and his arresting officers, seeking damages for excessive force in arrest, assault, and battery. Saunders' trial will be held in 2004. Before trial, Saunders brings a motion *in limine* seeking to preclude the defendants from impeaching him through evidence of his 1999 felony conviction for violation of an order of protection, his 1999 felony conviction for domestic battery, and his 1994 felony conviction for possession of a controlled substance. Saunders was released from incarceration for this earliest conviction after 1994. Should the court grant the motion? *See Saunders v. City of Chicago*, 320 F. Supp. 2d 735 (N.D. Ill. 2004).

F. Federal Rule of Evidence 609(b)

> Rule 609(b)
>
> (b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:
>
> > (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
> >
> > (2) the proponent gives an adverse party reasonable written notice of the intent to

> use it so that the party has a fair opportunity to contest its use.

Assuming that a conviction preliminarily covered by Rule 609(a)(1) or Rule 609(a)(2) is more than ten years old, the **fifth question** is whether the party seeking to use the conviction can satisfy Rule 609(b). Of course, before answering this question, we have to determine whether the conviction is indeed more than ten years old.

As Rule 609(b) makes clear, the ten-year clock begins with the date of the prior conviction or the date of release, whichever is *later*. So, if a witness was convicted of a crime more than 10 years before Rule 609(b)'s end date, but was not released from confinement for that crime until 10 years or less before the end date, the date of release would be the "determinative date." *See United States v. Brewer*, 451 F. Supp. 50 52 (E.D. Tenn. 1978). Therefore, if a defendant were convicted on January 6, 1968, sentenced on March 22, 1968, and released from incarceration on March 22, 1969, the ten-year clock would start on March 22, 1969 because the date of release would be later than the date of conviction. *See id.*

On the other hand, if a witness is subjected to pre-trial incarceration on March 10, 2012, made bail on May 10, 2012, and then convicted after trial on June 10, 2012 and sentenced to time served, the date of conviction would be the determinative date because the date of conviction would be later than the date of release. And, of course, if a defendant is convicted and, say, only given a fine and not subjected to confinement, the date of conviction would be the determinative date because there would be no release from confinement. *See United States v. Lopez*, 979 F.2d 1024, 1033 (5th Cir. 1992).

This leaves the question of what besides incarceration constitutes "confinement" under Rule 609(b). The biggest dispute among courts involves the issue of whether a period of parole or probation constitutes "confinement." *See* Colin Miller, *Reelin' In The Years: 11th Circuit Badly Botches Rule 609(b) Analysis, Bypassing "Confinement" Issue*, EvidenceProf Blog, April 23, 2012;

http://lawprofessors.typepad.com/evidenceprof/2012/04/federal-rule-of-evidence-609bprovides-that-this-subdivision-b-applies-if-

more-than-10-years-have-passed-since-the-witnes.html. In *United States v. Gaines*, 105 Fed. Appx. 682 (6th Cir. 2004), the Sixth Circuit found that the question under Rule 609(b) is whether "less than ten years had passed since the witness was released from confinement or the period of his parole or probation had expired." Most courts, however, have found that a period of parole or probation does not constitute "confinement," including the Seventh Circuit in *United States v. Rogers*, 542 F.3d 197 (7th Cir. 2008); *See* Colin Miller, *Exchange For His Parole?: Seventh Circuit Find Probation/Parole Periods Don't Count In Rule 609(b)'s Clock*, September 6, 2008;

http://lawprofessors.typepad.com/evidenceprof/2008/09/probation-doesn.html.

All courts seem to be in agreement that if a defendant is convicted, paroled before he serves his entire sentence, and then recommitted to serve the rest of his sentence after a parole violation, the determinative date is the date when he finishes serving the remainder of his initial sentence. *See Brewer*, 451 F. Supp. at 53. In *Brewer*, the defendant was convicted of kidnapping on October 20, 1960, placed on parole on June 27, 1967, committed a parole violation, sent back to prison, and eventually released from confinement for the kidnapping conviction on February 9, 1976, making February 9, 1976, the date that the Rule 609(b) clock started.

But when does the clock stop, *i.e.,* what is the end date under Rule 609(b)? In its opinion in *Clay v. State*, 2012 WL 933080 (Ga. 2012), the Supreme Court of Georgia noted that

> At least four different end points have been identified by various jurisdictions. *See United States v. Cohen*, 544 F.2d 781, 784 (5th Cir.1977) (identifying the date trial commenced as the end date); *United States v. Coleman*, 11 F. Supp. 2d 689, 692 (W.D. Va.1998) (identifying the date the witness testified as the end date); *Minnesota v. Ihnot*, 575 N.W.2d 581, 585 (Minn.1998) (identifying the date of the new charged offense as the end date); *United States v. Maichle*, 861 F.2d 178, 181 (8th Cir.1988) (identifying the date of the defendant's indictment as the end date); *See*

> Colin Miller, *10 Years Have Got Behind You: Supreme Court Of Georgia Discusses Different Tests For Remote Conviction Impeachment*, EvidenceProf Blog, March 26, 2012;
>
> http://lawprofessors.typepad.com/evidenceprof/2012/03/similar-to-itsfederal-counterpartocga-249841bprovides-that-evidence-of-a-conviction-under-subsection-a-of-t.html.

Assume that a defendant is convicted of robbery on March 1, 2000 and released from confinement for that conviction on March 1, 2002. Also assume that the defendant allegedly committed larceny on January 1, 2012, the defendant was indicted for the larceny on February 1, 2012, his trial commenced on April 1, 2012, and he testified on May 1, 2012. Depending upon the jurisdiction, his prior robbery conviction could be (1) 10 years, 2 months old (date the defendant testified); (2) 10 years, 1 month old (date trial commenced); (3) 9 years, 11 months old (date of the indictment); or (4) 9 years, 10 months old (date of the new charged offense) In examples (1) & (2) the larceny conviction would be covered by Rule 609(b); in examples (3) & (4), it would not.

There are three consequences to a conviction being more than 10 years old under Rule 609(b). **First**, when a party plans to use a conviction or juvenile adjudication to impeach a witness at trial, it is typically under no affirmative obligation to provide notice of this plan before engaging in the impeachment as long as the conviction/adjudication is not more than 10 years old. *See United States v. Stewart*, 2010 WL 3730122 (W.D.N.Y. 2010). When, however, the conviction/adjudication is more than 10 years old, Rule 609(b)(2) dictates that the party must "give an adverse party reasonable written

notice of the intent to use it so that the party has a fair opportunity to contest its use."[3]

Second, when a conviction/adjudication is more than 10 years old, Rule 609(b)(1) flips the typical balancing test that Federal Rule of Evidence 403 prescribes for most other evidence. As noted in the previous subsection, Rule 403 deems most evidence admissible unless its probative value is *substantially* outweighed by the danger of unfair prejudice. Conversely, Rule 609(b)(1) provides that evidence of a conviction/adjudication that is more than 10 years old is only admissible to impeach a witness if "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect…"

Under Rule 609(b)(1), courts typically apply the same four or five factors that they apply for convictions under Rule 609(a)(1). By looking at a case applying these factors, we can see the practical effect of the inverted Rule 403 balancing test contained in Rule 609(b)(1). In *Robinson v. Clemons*, 1998 WL 151285 (D. Del. 1998), the plaintiff brought a civil action, claiming, *inter alia*, that the defendants arrested him *without* probable cause and *with* excessive force. In response, the defendant brought a motion *in limine* to impeach the plaintiff through, *inter alia*, a 15 year-old conviction for falsely reporting an incident. The court found that the first factor favored admission because the prior crime had a strong bearing on the plaintiff's honesty, the third factor favored admission because the prior crime was not at all similar to the present civil action, and the fifth factor favored admission because the plaintiff's credibility was central to resolution of the case. Conversely, the court concluded that the second factor militated against admission because the conviction was

---

[3] Some state counterparts do not contain this notice requirement. *See* Colin Miller, *Going Unnoticed: Texas Appeal Illustrates Difference Between Texas And Federal Rule Of Evidence 609(b)*, EvidenceProf Blog, June 23, 2009; http://lawprofessors.typepad.com/evidenceprof/2009/06/609-txkeelan-gore-appellant-v-the-state-of-texas-appellee----sw3d------2009-wl-1688196texapp-hous-1-dist2009.html.

15 years old and that the fourth factor cut against admission because the plaintiff's testimony was very important.

So, three factors favored admission while two factors favored exclusion, meaning that probative value outweighed prejudicial effect. Under the typical Rule 403 balancing test, the prior conviction thus would have been admissible. So, if the plaintiff's conviction were nine years old, it would have been admissible under Rule 609(a)(1)(A). Indeed, if the prior conviction were nine years old, it would have been admissible even it its probative value *equaled* its prejudicial effect or if its prejudicial effect outweighed, but did not *substantially* outweigh, its probative value.

But "a fifteen year-old conviction is not subjected to the normal Rule 403 balancing test." *Id.* Instead, it triggered "the stringent reverse Rule 403 balancing test implemented by Rule 609(b)," pursuant to which a conviction/adjudication that is more than 10 years old is only admissible if its probative value *substantially* outweighs its prejudicial effect. *Id.* And because the probative value of the plaintiff's conviction in *Clemons* outweighed, but did not *substantially* outweigh its prejudicial effect, the court deemed it inadmissible.

As *Clemons* makes clear, it is quite difficult for a party to impeach a witness with evidence of a conviction or adjudication that is more than 10 years old. This is consistent with the Advisory Committee's Note to Rule 609, which states that "It is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances." This intent is reflected in the **third** consequence of a conviction or adjudication being more than 10 years old. As is made clear by the language of Rule 609(b)(1) and the Advisory Committee's Note, the decision to admit evidence under the Rule must

> be supported by specific facts and circumstances thus requiring the court to make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact.

So, in *Simpson v. Thomas*, 528 F.3d 685, 690 (9th Cir. 2008), the Ninth Circuit found that the district court erred when it curtly concluded that the plaintiff's 10+ year old convictions were admissible because they would not "be so prejudicial as to outweigh the probative value" for two reasons: (1) it misstated the Rule 609(b)(1) balancing test; and (2) it did not make specific findings on the record.

Hypothetical 15: Jonathan Denton is charged with possession of cocaine. Denton files a motion *in limine* to preclude the prosecution from impeaching him with evidence of three prior convictions that were more than 10 years old. The trial court rules that

> The defendant's motion *in limine* as to the possession of stolen goods and the common law robbery and robbery with a dangerous weapon at this time is denied. But I'll have to conduct a weighing of that when we reach that point in the trial.

At trial, at the close of the State's evidence, Denton renews his motion, and the court concludes that

> [S]ubject to further consideration as to balancing called for by the context in which the questions arise, I'm denying the motion *in limine* as to the possession of stolen goods, common law robbery and robbery with a dangerous weapon.

On cross-examination, the prosecutor impeaches Denton with evidence of his three prior convictions without objection from defense counsel or anything else said or written by the court. After he is convicted, Denton appeals. Did the trial court act properly? *See* State v. Denton, 699 S.E.2d 478 (N.C. App. 2010); Colin Miller, *State Your Reasoning: Court Of Appeals Of North Carolina Finds Trial Court Failed To Conduct Proper Rule 609(b) Analysis*, September 24, 2010; http://lawprofessors.typepad.com/evidenceprof/2010/09/609b-state-v-dentonslip-copy-2010-wl-3633457-tablencapp2010.html.

Hypothetical 16: Michael Sweat is charged with aggravated robbery, and his trial takes place in 2005. Sweat was convicted of burglary in 1984 and escape from prison in 1988, with Sweat being released from

prison for both convictions on July 28, 1996. At trial, the prosecution seeks to impeach Sweat through evidence of his prior convictions, leading to the following exchange between the judge and defense counsel:

> [DEFENSE COUNSEL]: As I understand that rule in reading it, it appears to me that some of the case law says that you have to look at whether or not the conduct complained of is relevant to the truthfulness in this case.
>
> THE COURT: Yes.
>
> [DEFENSE COUNSEL]: That's what the rule contemplates. That's my understanding.
>
> THE COURT: It may be a bit stale, but-all right.

The judge then deems the convictions admissible under Rule 609(b) without making specific findings regarding probative value and prejudicial effect. Did the court act properly? *See State v. Sweat*, 2010 WL 153038 (Tenn. Crim. App. 2010); Colin Miller, *Ten Years Have Got Behind You: Court Of Criminal Appeals Of Tennessee Affirms Felony Conviction Impeachment Ruling BECAUSE Of Timing Calculation Error*, EvidenceProf Blog, January 25, 2010;

http://lawprofessors.typepad.com/evidenceprof/2010/01/609state-v-sweatslip-copy-2010-wl-153038tenncrimapp2010.html.

Hypothetical 17: Terry Byington is charged with DUI after failing three field sobriety tests and refusing to take a breathalyzer test in December 2001. Specifically, the arresting officer claimed that Byington's speech was slurred while Byington claimed that his partial dentures caused him to "whistle a lot," which could have been misperceived as slurring. The officer claimed that Byington failed a one-legged stand test while Byington claimed that he couldn't stand on one leg because he had three blown discs and a severed nerve. The officer claimed that Byington failed the backwards alphabet test while Byington claimed that he can't say the alphabet without starting at the beginning. Only Byington and the officer testified at trial. The prosecution seeks to impeach Byington through evidence of his

perjury conviction. Byington was released from confinement for that conviction in January 1991. Is evidence of the prior conviction admissible? *See State v. Byington*, 2010 WL 2812664 (Tenn. Crim. App. 2010); Colin Miller, *Ten Years Have Got Behind You: Tennessee Case Is Rare Case In Which Defendant's Remote Conviction Is Admissible Under Rule 609(b)*, EvidenceProf Blog, July 2, 2010;

http://lawprofessors.typepad.com/evidenceprof/2010/07/609b--state-v-byingtonslip-copy-2010-wl-2812664tenncrimapp2010.html.

Hypothetical 18: Honeywell sells seat belts to the van conversion industry through two distributors. One of those distributors brings an antitrust action against Honeywell, claiming that Honeywell charged it higher prices for the same parts than it charged the other distributor. Honeywell gives pretrial notice that it plans to impeach the distributor's President through evidence of his conviction for possession with intent to distribute cocaine. Trial will be held in 2001, and the President was released from prison for his prior crime on July 14, 1985. The President's testimony concerning the meetings leading up to one of its agreements with Honeywell will be essential to the distributor's case. Should the court deem evidence of the conviction admissible? *See Moecker v. Honeywell Intern., Inc.*, 2001 WL 34098650 (M.D. Fla. 2001).

G. Rule 609 Flowchart

While there are many ways to address Rule 609 issues, the following flowchart is the best way that I have found to address the admissibility of any conviction for impeachment purposes:

Rule 609(c)

(1) Has the conviction been the subject of a pardon, annulment, or equivalent procedure based on a finding of **innocence** [Rule 609(c)(2)]?

(2) If yes, the conviction is inadmissible.

(3) If no, has the conviction been the subject of a pardon, annulment, certificate of rehabilitation, or equivalent procedure based on a finding of **rehabilitation** [Rule 609(c)(1)]?

(4) If no, proceed to **(8)**

(5) If yes, has the witness subsequently been convicted of a felony [Rule 609(c)(1)]?

(6) If no, the conviction is inadmissible.

(7) If yes, proceed to **(8)**

Rule 609(d)

(8) Is the conviction a juvenile adjudication [Rule 609(d)]?

(9) If no, proceed to **(17)**

(10) If yes, is the conviction offered in a criminal case [Rule 609(d)(1)]?

(11) If no, the conviction is inadmissible.

(12) If yes, is the conviction offered against a witness other than the defendant [Rule 609(d)(2)]?

(13) If no, the conviction is inadmissible.

(14) If yes, is the conviction necessary to fairly determine guilt or innocence [Rule 609(d)(4)]?

(15) If no, the conviction is inadmissible.

(16) If yes, would an adult's conviction for the same offense be admissible to attack the adult's credibility [Rule 609(d)(3)]? Proceed to **(17)** for the answer.

Rule 609(a)(2)

(17) Can it readily be determined that the prosecution had to prove that the witness committed a dishonest act or false statement to convict him of the prior crime charged [Rule 609(a)(2)]?

(18) If no, proceed to **(22)**

(19) If yes, have more than 10 years passed since the witness' conviction or date of release, whichever is **later** [Rule 609(b)]?

(20) If no, the conviction is *per se* admissible.

(21) If yes, proceed to **(34)**

Rule 609(a)(1)

(22) Is the conviction for a felony, a crime **punishable** by death or imprisonment in excess of 1 year [Rule 609(a)(1)]?

(28) If no, the conviction is inadmissible.

(29) If yes, have more than 10 years passed since the witness' conviction or date of release, whichever is **later** [Rule 609(b)]?

(30) If yes, proceed to **(34)**

(31) If no, is the witness a criminal defendant?

(32) If no, the conviction is admissible unless its probative value is **substantially** outweighed by the danger of unfair prejudice under Rule 403 [Rule 609(a)(1)(A)].

(33) If yes, the conviction is admissible if its probative value outweighs its prejudicial effect [Rule 609(a)(1)(B)].

Rule 609(b)

(34) Does the conviction's probative value, supported by specific facts & circumstances **substantially** outweigh its prejudicial effect [Rule 609(b)(1)]?

(35) If no, or if this balancing didn't take place on the record, the conviction is inadmissible.

(36) If yes, did the proponent give reasonable written notice of his intent to use the conviction at trial [Rule 609(b)(2)]?

(37) If no, the conviction is inadmissible.

(38) If yes, the conviction is admissible.

Hypothetical 15: Miquel Morrow is charged with conspiracy to commit bank robbery, armed bank robbery, and possession of a semi-assault weapon during a crime of violence. The main witness for the prosecution will be Morrow's alleged co-conspirator Nourredine Chtaini, who has turned state's evidence. The trial is expected to take place in June 2005. Chtaini has

(1) a juvenile adjudication for felony theft from 1991, with Chtaini being released before 1995;

(2) a May 24, 1995 juvenile adjudication for weapons possession, which is punishable by up to two years incarceration. Chtaini was given probation on May 24th, with that probation ending on October 2, 1995. This adjudication was expunged under the Youth Rehabilitation Act, 28 C.F.R. 2.106, based upon a finding that Chtaini would derive "no further benefit" from the probation; and

(3) an adult felony theft conviction from November 1995.

Defense counsel has no facts regarding how Chtaini's two thefts were committed. Morrow files a motion *in limine* seeking a ruling that he can impeach Chtaini with evidence of these convictions/adjudications. How should the court rule? *See United States v. Morrow*, 2005 WL 1017827 (D.D.C. 2005).

H. Other Aspects of Rule 609 & Constitutional Considerations

It should be noted that while prior convictions are technically hearsay, they are admissible under the hearsay exception contained in Federal Rule of Evidence 803(22) for judgments of prior convictions. There are five final aspects of Rule 609 that should also be mentioned.

First, Federal Rule of Evidence 609(e) provides that

> A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Therefore, in *In re Slodov*, 849 F.2d 610 (6th Cir. 1988), the Sixth Circuit found no problem with the admission of a trustee's prior embezzlement conviction even though the trustee was currently appealing that conviction. According to the Advisory Committee, "[t]he presumption of correctness which ought to attend judicial proceedings supports the position that pendency of an appeal does not preclude use of a conviction for impeachment."

Second, in *Luce v. United States*, 469 U.S. 38 (1984), the Supreme Court addressed the following question: Can a criminal defendant

appeal a trial court ruling that his prior conviction(s) will be admissible in the event that he testifies if the defendant eventually decides to exercise his Fifth Amendment privilege and not testify. The Supreme Court concluded that such a defendant could not appeal because, if the defendant did testify, the court could alter its ruling deeming the conviction(s) admissible, or the prosecution could choose not to use the conviction(s), rendering any harm "wholly speculative." *Id.* at 41-42.[4] A minority of state courts, however, have found that a criminal defendant *can* appeal such a ruling, regardless of whether he testifies at trial. *See, e.g., Commonwealth v. Crouse*, 855 N.E.2d 391, 397 (Mass. 2006) ("It has been our established practice to consider challenges to unfavorable rulings allowing the use of prior convictions, irrespective of whether the defendant actually testified at trial.").

Third, several courts have held that there is no Constitutional problem with a trial court deferring the question of whether a criminal defendant's prior conviction(s) will be admissible to impeach him until *after* the defendant testifies. In other words, in a jurisdiction applying this reasoning and *Luce* a defendant must make the choice to testify, knowing that his failure to testify means that he cannot appeal, but *not* knowing whether he can be impeached. In *United States v. Masters*, 840 F.2d 587, 590 (8th Cir. 1988), for instance, the Eighth Circuit found that the defendant's choice about whether to testify under such circumstances is simply a matter of trial tactics and not "an issue of constitutional significance." Some state courts adhere to the Eighth Circuit's position on deferral but do not apply *Luce*. These courts do not require the defendant to testify to preserve

---

[4] Most federal circuit courts have held that the rationale of *Luce* extends to any ruling allowing for any type of impeachment or refusing to limit the scope of cross-examination. *See* Colin Miller, *Self Preservation Instinct: 3rd Circuit Finds Defendant's Failure To Testify Precludes Review Of Cross-X Ruling*, EvidenceProf Blog, August 14, 2011;

http://lawprofessors.typepad.com/evidenceprof/2011/08/611-luce-us-v-ferrerslip-copy-2011-wl-3468319ca3-pa2011.html.

the issue for appellate review. *See, e.g., Dallas v. State*, 993 A.2d 655 (Md. 2010); Colin Miller, *Impeachable Opinion?: Court Of Appeals Of Maryland Finds Trial Court Properly Deferred Impeachment Ruling Until After Defendant Testified*, EvidenceProf Blog, April 30, 2010;

http://lawprofessors.typepad.com/evidenceprof/2010/04/609a-defer--dallas-v-state----a2d------2010-wl-1643252md2010.html.

Fourth, in *Ohler v. United States*, 529 U.S. 753 (2000), the Supreme Court addressed the question of whether a criminal defendant can appeal a trial court ruling that the prosecution can use his prior conviction(s) to impeach him during cross-examination in the event that he testifies if the defendant preempts such cross-examination and testifies about the conviction(s) on direct examination. During typical impeachment, the prosecution can discredit the testimony that the criminal defendant gave on direct examination by revealing his prior conviction(s) to the jury and rigorously questioning him about his prior indiscretion(s) on cross-examination. To circumvent this, a defense attorney may attempt to mitigate the "sting" of such impeachment by gently having the defendant admit to the prior conviction(s) during direct examination and assure the jury that he has since reformed. In *Ohler*, a majority of the Supreme Court found that the consequence of such a practice is that the defendant waives the issue for appellate review because, again, the prosecution could still have chosen not to impeach the defendant, making any harm speculative. *See id.* "The majority of state appellate courts to consider the issue, after *Ohler*, rejected the reasoning of the *Ohler* Majority." *Cure v. State*, 26 A.3d 899, 908 (Md. 2011).

Fifth, at least 16 jurisdictions hold that if a conviction is inadmissible under one of the aforementioned three balancing tests, a party might still be able to impeach a witness through evidence that he has an unspecified prior conviction. *See* Colin Miller, *Unspecified Error, Tale 2: Supreme Court Of Minnesota Reverses Prior Precedent, Allows For Impeachment Through Unspecified Prior Convictions*, EvidenceProf, August 31, 2011;

http://lawprofessors.typepad.com/evidenceprof/2011/08/609-unspecified-state-v-hill-nw2d-2011-wl-3687535minn2011.html

[hereinafter *Unspecified*]. For instance, in *State v. Hill*, 801 N.W.2d 646 (Minn. 2011), the court found that the defendant's prior felony robbery conviction was too similar to the armed robbery charge against him to be fully admissible. The court did, however, allow the prosecution to ask the defendant one question, "Now in September of 2008, you were convicted of a felony, correct?" The Supreme Court of Minnesota found that this single question and the defendant's answer of "yes" were proper because they precluded the jury from assuming, "Once a robber, always a robber."

Indeed, at least four states have a rule that the single question asked in Hill is the *only* question that the party impeaching a witness can ask and that the crime or any of its details cannot be mentioned. *See Unspecified*, *supra*. Conversely, at least six jurisdictions preclude a party from impeaching a witness through evidence of an unspecified prior conviction once the court has found that the conviction fails one of the aforementioned three balancing tests. *See id.*

Hypothetical 16: Detective Dummett pulled over a car driven by Ronald Weaver and eventually recovered 65 rocks of crack cocaine and $600 in cash from James Blakeney, a passenger. Blakeney asked Dummett "if there was anything that [Dummett] could do to just forget about the drugs that [he] had found." Dummett asked Blakeney what he meant by that. Blakeney responded "that his friend, Ronald Weaver was coming into four hundred thousand dollars from a military type of settlement and he would give [Dummett] some money, just for free, to drop the charges." Blakeney then turned to Weaver and asked, "How much money are you willing to give him to make this go away?" Weaver replied, "It doesn't matter to me, whatever it takes." Blakeney asked Dummett, "Don't you need a vacation or something?" Dummett responded that he was not interested in a bribe. Blakeney claimed that he was not offering a bribe, but instead it was "just a gift from one black man to another black man." He urged, "Come on brother, help me out." Blakeney again mentioned money, turned to Weaver, and said, "We can do that, can't we?" Weaver responded, "Whatever he wants, we can do it." Weaver is convicted of bribery of a public official after the prosecution impeaches him at trial with evidence of a prior

conviction for possession of drug paraphernalia. After he's convicted, Weaver appeals, claiming that the trial court erred in allowing this impeachment because he was appealing the prior conviction at the time of trial. Is he correct? *See State v. Weaver*, 584 S.E.2d 345 (N.C. App. 2003).

Hypothetical 17: Devian Charles Burks is charged with assault. Before trial and again after the State rested, the trial court ruled that the prosecution could impeach Burks with evidence of his five prior felony convictions in the event that he testified. Burks chooses not to testify and later appeals his conviction, claiming that the trial court's rulings were erroneous. How should the court rule? *See* *Burks v. State*, 2008 WL 5341296 (Tex. App.-Houston [14 Dist.] 2008); Colin Miller, *To Take The Stand Or Not?: Texas Appeal Reveals That Criminal Defendants Must Testify To Appeal Conviction Impeachment Rulings*, EvidenceProf Blog, January 12, 2009;

http://lawprofessors.typepad.com/evidenceprof/2009/01/to-take-the-sta.html.

Hypothetical 18: Malik El-Alamin is charged with possession with intent to distribute cocaine base and being a felon in possession of a firearm. Before trial, El-Alamin files a motion *in limine* seeking to preclude any reference to his 1998 aggravated robbery conviction and 1997 drug conviction. The district court denies the motion, and at trial, rather than allowing the prosecutor to impeach El-Alamin on cross-examination through these convictions, defense counsel had El-Alamin testify about the convictions during his own direct examination. After he is convicted, El-Alamin appeals, claiming that the district court erred in denying his motion *in limine*. How should the court rule? *See United States v. El-Alamin*, 574 F.3d 915 (8th Cir. 2009); Colin Miller, *Preemptive Strike: Eighth Circuit Finds Defendant's Testimony On Prior Convictions Waives Ability To Appeal*, EvidenceProf Blog, August 5, 2009;

http://lawprofessors.typepad.com/evidenceprof/2009/08/609a1us-v-el-alamin----f3d------2009-wl-2366384ca8-minn2009.html.

V. Conviction Impeachment Motions

Some concise examples of motions connected to evidence sought to be admitted or excluded under Rule 609 can be found at:

- *Del Webb Communities, Inc. Charles Leslie Partington*, 2010 WL 1861217 (D. Nev. 2010) (Opposition to Plaintiff's Motion *in Limine* No 3) [Rule 609(a)(2); Rule 609(b); Rule 609(c)];
- *Veanus v. Northampton County Prison*, 2006 WL 736894 (E.D. Penn. 2006) (Brief of Primecare Medical, Inc. in Opposition to Plaintiff's Motion *in Limine*) [Rule 609(a)(1); [Rule 609(a)(2)];
- *L.C. v. Pennsylvania Youth Ballet*, 2010 WL 1723563 (M.D. Penn. 2010) (Brief of Defendant in Support of Motion to Strike) [Rule 609(d)].