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THE CONFUSING RELATIONSHIP BETWEEN RULES 608(b) AND 609 OF THE FEDERAL RULES OF EVIDENCE

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INTRODUCTION

In American courts virtually any person with relevant evidence is considered competent to testify. A witness' testimony, however, need not be taken at face value. In addition, the opposing party may attack the credibility of the witness in many different ways. Two of the most important ways are to show that the witness has been convicted of a crime or has committed prior bad acts. These two methods of impeachment are actually very similar because in both cases it is the prior acts of misconduct that bear on credibility. In both instances, the opponent wants the jury to infer that a person who would engage in serious wrongdoing is not an honest, believable witness. The fact that a witness was convicted of the prior wrongdoing is not in itself significant. What matters is that the witness did the underlying acts.

Despite the similarity of these two methods of impeachment, in federal court they are governed by different rules with different standards. Impeachment by bad acts is governed by Rule 608(b),[1] and impeachment by convictions is governed by Rule 609.[2] My thesis is that those charged with amending the rules, or the courts, or both, should take steps to harmonize the standards for impeachment by bad acts and convictions. Some differences must remain for sound policy reasons, but other differences are illogical and lead to mischief and injustice.

I will proceed as follows. First, I will very briefly review historical practice. Traditionally, American courts treated these two methods of impeachment almost the same way. Many state courts - like New York, for example - still barely distinguish between them. I will illustrate the traditional practice by discussing a wonderful old case from New Mex-

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1. FED. R. EVID. 608(b).
2. FED. R. EVID. 609.

ico before it became a state - *Territory v. Chavez*,[3] decided in 1896. Next, I will explain how modern federal practice has moved away from the traditional approach under Federal Rules 608(b) and 609. Finally, I will suggest several ways the Rules might be changed to minimize the inconsistencies.

I. Traditional Practice

Bad act impeachment developed first because persons convicted of a crime were incompetent as witnesses and not allowed to testify. In early times, a cross-examiner could ask about virtually any prior misconduct. As Wigmore states, "exploiting the witness' life and associations, however discreditable, was freely allowed. The orthodox rule came to be that 'any question tending to discredit' might be asked; and only rarely was there any interference from the court."[4] During the nineteenth century, most American jurisdictions abrogated the rule making persons convicted of crime incompetent to testify and instead allowed use of convictions to impeach credibility. In addition, with both methods of impeachment, courts began to disagree about what sort of prior misconduct had a bearing on witness credibility. Some courts continued to admit virtually any kind of witness misconduct to impeach, while others excluded bad acts that merely showed a witness was a bad person and thus did not bear on credibility directly. Despite these differences of opinion, however, individual judges did not generally distinguish between bad acts that resulted in a criminal conviction and those that did not. A judge favoring wide-open impeachment allowed wide-open impeachment with both bad acts and convictions; a judge who restricted impeachment imposed similar restrictions on admission of bad acts and convictions.

This traditional practice is illustrated by *Territory v. Chavez*. The defendant was charged with the murder of Gabriel Sandoval. The only witnesses whose testimony directly connected the defendant with the crime were Guadalupe Cabellero and Julian Trujillo. By their own testimony, they were accomplices and coconspirators in the assassination of Sandoval. A third witness, Manuel Gonzales y Baca, testifed about admissions made by the defendant concerning his flight from Las Vegas after the discovery of Sandoval's body. All three of the witnesses

3. Territory v. Chavez, 45 P. 1107 (N.M. Terr. 1896).

4. 3A John A. Wigmore, Evidence in Trials at Common Law § 986 at 857 (James H. Chadbourn, ed., rev. ed. 1970).

against the defendant were themselves notorious outlaws. They had numerous serious criminal convictions and had committed various acts, criminal in nature, for which they had not been convicted. Caballero, for example, had been convicted of larceny and sent to the penitentiary. He also was indicted for the murder of another man, Patricio Maes, and for the murder of Sandoval, and he had pled guilty to second degree murder in both cases. Trujillo also had been convicted of the murder of Sandoval and sent to the penitentiary. But both men had been pardoned, apparently in exchange for testifying against Chavez. Gonzales y Baca had been indicted for robbery, cow-stealing and for the murder of Patricio Maes, but he had never been prosecuted for these offenses.

The trial court forbade cross-examination of the witnesses as to any of these matters, and Chavez was convicted of murder and sentenced to death. The Supreme Court of the Territory reversed. The Court drew a distinction between cross-examination as to trivial matters intended to embarrass a witness, which might properly be denied, and cross-examination as to more serious wrong-doing, which should be allowed:

> Assaults upon a witness by cross-examination into collateral matters cannot be allowed to gratify the caprice or the displeasure of those against whom he testifies; and intrusions into private affairs, which are calculated merely to wound the feelings, humiliate, or embarrass the witness, will not be permitted . . . But a clear distinction is to be taken between those matters . . . and . . . matters, on the other hand, which are calculated, in an important and material respect, to influence the credit to be given to his testimony. As to the latter class, the witness cannot be shielded from disclosing his own character on cross-examination, and for this purpose he may be interrogated upon specific acts and transactions of his past life; and if they are not too remote in time, and clearly related to the credit of the witness, in any important and material respect, it would be error to exclude them.[5]

The Court did not distinguish between serious witness misconduct that resulted in a conviction and that which did not, holding both admissible.

5. *Chavez*, 45 P. at 1108.

II. FEDERAL RULES 608(B) AND 609

The Federal Rules governing impeachment by bad acts and convictions do not follow the traditional approach; instead, the Rules set different standards for these two methods of impeachment. The differences were made greater when Rule 609 was amended in 1990 but Rule 608 was left unchanged.

Rule 608(b), in somewhat awkward phrasing, allows "[s]pecific instances of the conduct of a witness, for the purpose of attacking . . . the witness' credibility . . . in the discretion of the court, if probative of . . . untruthfulness [to be] inquired into on cross-examination of the witness (1) concerning the witness' character for . . . untruthfulness."[6] The Rule does not specify what "instances of conduct" are probative of untruthfulness, which leaves individual federal judges with enormous discretion in defining the scope of permissible cross-examination under the Rule. Nor does the Rule require that the bad acts reflect serious wrongdoing. The acts need not even be criminal in nature. In addition, the Rule does not distinguish between a criminal defendant and other witnesses, despite the fact that an accused faces a greater danger of unfair prejudice than other parties or witnesses in criminal or civil cases from introduction of prior acts of misconduct.[7] The Advisory Committee Note to 608(b) does state that the Rule is subject to "the overriding protection" of Rules 403 and 611.[8] Under Rule 403, however, the burden is on the party opposing impeachment to establish that the danger of unfair prejudice substantially outweighs the probative value on the issue of the witness' credibility.[9] This is a heavy burden to sustain. Rule 611(a) states that the court "shall exercise reasonable control over the mode . . . of interrogating witnesses so as to . . . (3) protect witnesses from harassment or undue embarrassment."[10] This Rule is quite vague and also does not differentiate between an accused and other witnesses.

Rule 609, by contrast, makes it more difficult to impeach an accused than to impeach other witnesses with a conviction. Evidence

6. FED. R. EVID. 608(b).

7. The danger to an accused is essentially two-fold: (1) the jury may convict the defendant for being a bad person without carefully scrutinizing the evidence in the present case; and (2) the jury may wish to convict in the present case to punish the defendant for his past wrongdoing.

8. *See* FED. R. EVID. 608(b) advisory committee's note.

9. FED. R. EVID. 403.

10. FED. R. EVID. 611(a).

that an accused has a conviction can be admitted "if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused."[11] Thus, the burden is on the prosecutor to demonstrate that probity outweighs prejudice. Evidence that a witness other than an accused has been convicted of a crime "shall be admitted, subject to Rule 403."[12] This language places the burden on the party opposing impeachment to demonstrate that the danger of unfair prejudice substantially outweighs probative value on the issue of the witness' credibility. As with Rule 608(b), Rule 609 provides no guidance in determining what sorts of convictions are probative of credibility, thus leaving trial courts with enormous discretion in defining the permissible scope of cross-examination. Unlike Rule 608(b), however, impeachment with a conviction under 609(a)(1) is limited to felony convictions, thus excluding evidence of less serious wrongdoing. Finally, Rule 609(a)(2) allows impeachment with any crime involving dishonesty or false statement. Under this provision, any witness, including an accused, can be impeached. The cross-examiner can ask about any conviction, felony or misdemeanor, and the courts have held that the party opposing impeachment cannot request exclusion under Rule 403.[13] The reason for such easy admissibility is that crimes such as perjury, fraud, and embezzlement are thought to be particularly probative of credibility.

III. Harmonizing the Rules

The different standards for impeachment with bad acts and convictions have caused inconsistency, mischief, and injustice. Thus, it makes sense to harmonize the Rules as far as possible to lessen these problems. I have several suggestions. First, the same misconduct should be admissible - or inadmissible - under both Rules to impeach a witness' credibility. Second, the burdens of proof and substantive standards of 609(a)(1) should be read into Rule 608(b). Third, convictions automatically admissible under 609(a)(2) should be strictly limited to crimes that go directly to false statement and dishonesty. Fourth (and this is a related point), the standard of proof mandated by

11. Fed. R. Evid. 609.

12. *Id.*

13. *See* United States v. Tracey, 36 F.3d 187, 192 (1st Cir. 1994); United States v. Morrow, 977 F.2d 222, 228 (6th Cir. 1992); United States v. Kuecker, 740 F.2d 496, 501-02 (7th Cir. 1984) (all holding convictions involving dishonesty or false statement admissible without recourse to Rule 403 balancing).

Huddleston v. United States[14] for admission of prior bad acts under FRE 404(b) should also be applied to admission of bad acts for impeachment under Rule 608(b).

The case for making the same prior misconduct admissible under both rules whether it resulted in a conviction or not is straightforward. What bears on a witness' credibility is the bad deed, not the fact of the conviction for the deed. A conviction (whether by trial or guilty plea) may make us more confident that the witness actually did the bad deed, but it adds nothing to the deed's probity on credibility. Consequently, the same misconduct should be admissible under both rules.[15]

Consistency can of course be achieved in two ways. One might make 608(b) more like 609 or make 609 more like 608(b). The former makes more sense given the 1990 amendment to Rule 609. The amendment clarified an ambiguity in the Rule as to the relationship of Rules 609 and 403 with respect to impeachment of witnesses other than the accused and affirmed the special protection afforded to defendants in criminal cases. Indeed, the Advisory Committee's Note specifically discussed the "unique risk of prejudice" faced by an accused.[16] Since the risk is the same with impeachment by bad acts, particularly if the misconduct was criminal in nature, failure similarly to amend Rule 608(b) seems an odd oversight.

The different standards under 608(b) and 609 have resulted in some mischief. One example is the so-called "back door" practice by which a prosecutor barred from impeaching an accused with a conviction under Rule 609 can ask about the facts underlying the conviction under Rule 608(b). Imagine a case where a defendant is on trial for robbery and he has a conviction for robbery. Assume that the trial judge believes that a robbery conviction demonstrates a blatant disregard of the law and thus is very probative of the defendant's credibility. But the conviction is for exactly the same crime as the current charge, and the judge also believes that the danger of unfair prejudice to the accused is high. Reluctantly, the judge concludes that the prosecutor

14. Huddleston v. United States, 485 U.S. 681 (1988).

15. This suggestion does not address what conduct should be considered probative of untruthfulness. Lawyers and judges have disagreed on this question for hundreds of years. The disagreement kept Congress from deciding the question when it enacted the Federal Rules of Evidence. I suggest only that whether a judge holds a broad or narrow view of what conduct is probative of untruthfulness, she apply that view consistently to both bad act and conviction impeachment.

16. FED. R. EVID. 609 advisory committee's note.

has not met his burden under 609(a)(1) of demonstrating that the probative value on the issue of credibility outweighs prejudice to the accused.

The prosecutor then proposes to ask not about the conviction, but rather about the acts underlying the conviction. He wants to ask, "Isn't it true that on the evening of October 10, 2001, at the corner of Broadway and Worth, you stole $150 from John Jones by threatening him with a loaded 38 caliber pistol?" The prosecutor argues that under Rule 608(b) the burden is now on the accused under Rule 403 to demonstrate that the danger of unfair prejudice substantially outweighs probative value. Because the judge found probity and prejudice quite evenly balanced under Rule 609, the defendant is unable to sustain his high burden under Rule 608(b). As it happens, many trial judges accept this sort of argument.

There are also many additional advantages to the prosecutor in proceeding by the back door. First, Rule 609(b) bars convictions more than 10 years old unless a special showing is made, but 608(b) contains no such limitation. The phrase "in the discretion of the court"[17] in 608(b) was inserted in the rule by Congress to give courts discretion to exclude prior bad acts that are remote in time, but without a specific year limit, courts obviously can admit bad acts more than 10 years old. Second, questions about convictions are usually limited to asking about the conviction itself - "Isn't it true that you were convicted of armed robbery?" - and questions about the underlying acts are not allowed. Under Rule 608(b), the questioner can ask about the underlying acts, which gives the questioner a real advantage if the acts are particularly vicious or disgusting. Third, Rule 609(a)(1) limits impeachment to felony convictions. Rule 608(b) contains no such limitation, so the questioner can ask about the specific acts underlying a misdemeanor conviction as long as she doesn't mention the conviction.

My third suggestion is that courts construe Rule 609(a)(2) narrowly so that only crimes directly involving dishonesty and false statement may be admitted. While Rule 609(a)(2) and Rule 608(b) would still be inconsistent, strict construction of 609(a)(2) would make the two rules more consistent in practice. The inconsistency in the rules comes from the fact that convictions involving dishonesty or false statement are automatically admissible without any Rule 403 balancing, while the same misconduct not resulting in a conviction can be ex-

17. FED. R. EVID. 608(b).

cluded under Rule 403. If courts construe Rule 609(a)(2) narrowly so that only those crimes that are most relevant to credibility are admitted, it seems unlikely that courts would often bar cross-examination about the same bad acts that did not happen to result in a conviction. The party opposing impeachment would be hard pressed to convince a court that if a witness has committed perjury or embezzled funds he should not be asked about it because the danger of unfair prejudice substantially outweighs probity.

My final suggestion is to impose the standard of proof from *Huddleston v. United States* to Rule 608(b). In *Huddleston*, the Supreme Court held that to admit a bad act for a permissible 404(b) purpose (such as to show intent, knowledge, plan, preparation, etc.), the proponent had to present evidence sufficient to make a prima facie case that the bad act actually happened.[18] A prima facie case is enough evidence from which a reasonable juror might conclude by a preponderance of the evidence that the act happened. The Court reasoned that if no reasonable juror could conclude by a preponderance that the act occurred, then the act was not relevant and should be excluded. The current standard for asking about bad acts for impeachment purposes under Rule 608(b) is a "good faith" standard.[19] This standard is obviously vague and invites abuse. What is a good faith basis for an inquiry about a bad act? Hearsay? Triple hearsay? Gutter rumor? Talk around the station house? No one knows. Use of the *Huddleston* standard would help insure that there is a basis in fact for bad acts admitted for impeachment purposes.

CONCLUSION

Rules 608(b) and 609 of the Federal Rules of Evidence contain very different standards for impeachment by bad acts and convictions. The Rules should be harmonized to insure consistent, fair impeachment.

18. 485 U.S. at 689.
19. FED. R. EVID. 608(b).