



U.S. Department of Justice

950 Pennsylvania Ave, N.W.
Washington, D.C. 20530

April 12, 2024

The Honorable Patrick Schiltz
United States District Judge
United States Courthouse
300 South Fourth Street, Room 14E
Minneapolis, MN 55415

Re: Federal Rule of Evidence 609(a)(1)

Dear Judge Schiltz:

We write in order to articulate the views of the Department of Justice on the current proposal to amend Federal Rule of Evidence (“FRE”) 609 by abrogating subsection 609(a)(1), among other suggestions. For the reasons that follow, we oppose the amendment.

To begin, a jury is entitled to hear relevant evidence, *see* FRE 401, including impeachment evidence. The agenda memorandum (“Memo”) agrees that prior convictions involving dishonesty are relevant in assessing the credibility of a witness testifying under oath at trial. But as the current rule recognizes, there can also be probative value in prior felony convictions even where the elements of those offenses do not expressly involve a dishonest act or false statement—and the rule sensibly requires the district court to find that such probative value outweighs any prejudicial impact to a criminal defendant prior to admission.

Many offenses that do not require proof of a dishonest act or false statement to establish an element of the offense may in fact involve such a dishonest act or false statement. Imagine, for example, two defendants, each of whom lied to the owner of property in order to gain access to that property. The two defendants then took the property away without the owner’s consent, with the intent to deprive the owner of the property. One defendant is charged with larceny, which does not require proof of a false statement, while the other is charged with fraud, which does require proof of a false statement. Without Rule 609(a)(1), the fraud defendant could be impeached with his prior conviction, but the theft defendant could not, even though they engaged in identical conduct.¹ Much like the oft-maligned categorical approach that defines “crimes of violence” only by the elements of the offense as opposed to the actual conduct of the defendant, a bright line rule

¹ Similarly, obstruction of justice does not require deceit or dishonesty as an element of the offense. Yet obstruction of justice often entails dishonest conduct, such as lying to authorities. Without Rule 609(a)(1), a defendant could be impeached with a conviction for making a materially false statement to an agent or officer, but not if the same conduct was prosecuted as obstruction of justice.

that allows impeachment by prior convictions only by reference to the elements of the offense, and not the conduct of the defendant, makes little sense.

To be sure, if unchecked by judicial oversight, there is risk that impeachment by prior conviction could create unfair prejudice. But the drafters of Rule 609 addressed that concern by carefully crafting the rule to provide additional protections to criminal defendants. For most witnesses, a relevant prior conviction is admissible subject to Rule 403; to be excluded, the probative value must be substantially outweighed by unfair prejudice. But prior convictions of defendants face a much stricter admissibility standard. Those convictions are admissible only if the probative value outweighs any unfair prejudice. The current rule thus strikes the right balance. It allows judges to determine on a case-by-case basis whether a prior conviction is relevant to establishing the witness's character for truthfulness. It protects criminal defendants by excluding any conviction where the probative value is outweighed by—or even in equipoise with—the danger of unfair prejudice. And it places the decision-making in the appropriate place, with the judge trying the case and considering the specific witness's particular prior conviction.

District courts, moreover, do not take lightly the task of determining whether probative value outweighs the prejudice for determining whether to admit a defendant's prior conviction. Often there are multi-factor tests that the court applies. In the Second Circuit, for example, courts look to five distinct factors: (1) the impeachment value of the prior crime; (2) the date of the conviction and the witness's subsequent history (the more recent, the more probative); (3) the similarity between the past crime and the charged crime (the more similar, the greater likelihood of prejudice); (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *United States v. White*, 312 F. Supp. 3d 355, 359 (E.D.N.Y. 2018) (citing cases). The Third Circuit uses a similar, four-factor test, known as the “Bedford factors.” See *Gov't of Virgin Islands v. Bedford*, 671 F.2d 758, 761 (3d Cir. 1982); *United States v. Gillard*, 2024 WL 247054 (E.D. Pa.) (Jan. 23, 2024) (denying motion *in limine* to admit prior convictions); see also *United States v. Wilkins*, 538 F. Supp. 3d 49, 84 (D.D.C. 2021) (denying admission of prior conviction applying multifactor test).

To the extent that the Memo argues that some district courts are improperly applying the balancing test required by FRE 609(a)(1)(B) to admit prior convictions that should be excluded, abrogation of the rule itself would be a blunt and heavy-handed solution. At most, concern for how district courts conduct the required balancing would support judicial education on the balancing test, not elimination of the rule. As the cases reflect, however, courts come out on both sides of the balancing test depending on the facts of the individual case. That makes sense, as district courts are in the best position to assess the particular facts of the cases and apply the established legal framework.

We also disagree that the compromise position that Congress reached in Rule 609 is muddled or illogical. On the contrary, it is quite reasonable to conclude that prior convictions involving dishonesty and false statements are extremely probative of credibility for a testifying witness and should always be admitted, but that other felonies, while probative, may be less so and more likely to prejudice a defendant, such that a defendant-friendly balancing test should be applied. The D.C. Circuit, in *United States v. Lipscomb*, 702 F.2d 1049, 1058 (D.C. Cir. 1983), included a long discussion of the legislative history of the Rule, which is based on the rationale

that all felonies are probative of credibility to a greater or lesser degree. The Second Circuit in *Estrada* agreed:

It is implausible that Congress believed that crimes falling on one side of the Rule 609(a) line are so probative of credibility that they should be admitted regardless of prejudice but that crimes falling just on the other side of the line may in some cases not be probative at all. We find equally persuasive the point that more likely, Congress anticipated that crimes of stealth (*e.g.*, smuggling, burglary), while not quite crimes of dishonesty or false statement, do reflect lack of credibility and should be admitted unless significantly prejudicial. We thus find the gradations among Rule 609(a)(1) crimes, in terms of their bearing on truthfulness, to lie at the heart of the Rule 403 analysis that district courts must undertake when determining whether to admit for impeachment purposes evidence of a witness's convictions, including their statutory names, under Rule 609(a)(1).

United States v. Estrada, 430 F.3d 606, 618–19 (2d Cir. 2005) (cleaned up).

The more nuanced position adopted by Congress is compelling: crimes demonstrating a lack of integrity, requiring more preparation or planning, or indicating a greater disregard for the law are more probative of credibility than those committed on impulse or in the heat of emotion. Abrogating 609(a)(1) would draw an unwarranted bright line rule instead of a fact- and context-specific determination, depriving juries of important and relevant information with which to assess the credibility of testifying witnesses. As the D.C. Circuit wrote in *United States v. Lewis*, when the defendant's testimony conflicts with that of government witnesses, "it is of prime importance that the jury be given as much help in determining credibility as the Rules of Evidence permit." 626 F.2d 940, 950 (D.C. Cir. 1980). Thus, when prior convictions are probative of a defendant's character for truthfulness and willingness to lie under oath, juries should not be denied such information where a determination is made that the probative value outweighs its prejudicial effect.

The Memo expresses appropriate concern about overruling the nuanced, compromise position that Congress reached in Rule 609—but comes to terms with that concern on the basis of two adjustment amendments added to the rule in the 50 years since its promulgation. To state the obvious, there is an enormous difference between adjusting a rule to address particular anomalous applications and throwing that rule out altogether. The former may be necessary to ensure the rule's proper application, but the latter represents a fundamental override of the rule's very purpose—an action that should be taken, in our view, with trepidation and based only on a clear and indisputable empirical and judicial record. Indeed, as recently as 2018, the Advisory Committee rejected a similar proposal to abrogate 609(a)(1) because it ran counter to the hard-fought compromise in Congress that resulted in the passage of Rule 609(a). The Committee at that time also rejected an amendment to account for the self-impeaching nature of a defendant's testimony, and a separate proposed amendment that would have limited felony impeachment to theft-related offenses. *See* https://www.uscourts.gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf.

The Memo also expresses concern that prior convictions similar to the charged offense may be unfairly introduced. That is, of course, an important factor that courts must consider in weighing the probative value against the prejudicial effect. But in certain circumstances, admission of such convictions may be appropriate. Some courts have admitted evidence of prior convictions involving conduct similar to that charged because it was specifically relevant to the defendant's testimony. In *Lewis*, for example, the defendant testified that he was ignorant of street drug transactions, did not recognize drug dealing when he saw it, and did not recognize the illegal drugs at issue. The court admitted the fact of his prior conviction for drug distribution, finding that it was strongly probative of his credibility as to whether he was unfamiliar with the enterprise of drug dealing.

Further, we are unpersuaded by the rationales underlying the proposal for abrogation. First, the Memo expresses concern that juries are unable to understand a court's instruction that prior convictions offered for impeachment purposes are not being introduced to establish a propensity for criminal behavior. But there are countless other such instructions under the Rules that we presume juries to understand. Pursuant to Rule 404(b), for example, juries are instructed to consider prior bad acts only for purposes permitted under the rule, but not to establish a defendant's propensity to commit a criminal act. Juries are instructed to ignore testimony that they have already heard if an objection to such testimony has been sustained. They are also instructed that criminal defendants are presumed innocent, and that no inference may be drawn from defendants invoking their constitutional right not to testify. Juries are instructed on the law that applies to their findings of fact, instructions that can be lengthy and complex. We cannot assume that juries are incapable of following these instructions, as our system of justice depends on the contrary expectation. And in our experience, jurors conscientiously seek to follow the law and are capable of careful and nuanced analysis in their verdicts.

Second, the Memo expresses concern that admission of prior convictions has a disproportionate effect on criminal defendants because it discourages their testimony. Certainly, for defendants with a prior criminal history, the fear of impeachment by prior conviction can be one factor weighing against a defendant's decision of whether to testify.² But there are many reasons that defendants choose not to testify, including the reluctance to be cross-examined, and the fact that defendants have no burden of proof. In criminal tax cases, for example, most defendants have no prior convictions, and most defendants do not testify. The Memo also assumes that justice would be better served if more defendants did testify. That does not seem to us an obvious conclusion. Defendants have a constitutional right not to testify, precisely because it is *not* always better for defendants to testify. If the policy goal of the proposed amendment is to encourage more defendants to testify, there is scant evidence to believe that excluding evidence of

² The survey of public defender offices confirms this truism. The survey does not resolve, however, the degree to which the fear of cross-examination, or simply advice of counsel based on the relative burdens of proof, for example, similarly impacts the decision of whether to testify or plead.

prior convictions will accomplish that objective.³ It may also be a policy leap beyond what is appropriate for the rules of evidence.

Third, we question the wisdom of abrogating 609(a)(1) based on the assumption that defendants who testify are already impeached by having an incentive to avoid conviction. As an initial matter, that assumption turns on its head the presumption of innocence. A jury may be skeptical of a testifying defendant but may also be *more* inclined to believe a defendant who is presumed innocent and has no burden of proof but who nevertheless takes the stand to tell her story, subjecting herself to cross-examination. Indeed, the Memo cites studies suggesting that juries impermissibly penalize defendants who *don't* take the stand, yet they also assume that defendants who *do* take the stand are already so impeached that prior convictions are unjustly cumulative. In addition, under this theory, all testifying defendants are self-impeached. But not all defendants are equally credible. Surely some testifying defendants – *i.e.*, those defendants who have a relevant and admissible prior conviction under 609(a)(1) – are even less credible. The jury is entitled to that information in assessing the defendant's testimony.

Fourth, we are not persuaded by the studies on which the Memo relies to establish that defendants are primarily dissuaded from testifying by fear of being impeached with prior convictions.⁴ These studies do not factor in: (1) whether the convictions at issue would be admissible under Rule 404(b); (2) whether the prior convictions were falsity-based; and (3) the fact that there are many other powerful reasons for a defendant not to testify. In addition, many of the studies are dated and/or were conducted in other countries, with different systems of justice, and involved mock trials. We question whether mock jurors behave as real jurors do when exposed to an actual criminal trial, with the attendant solemnity of a courtroom setting and the gravity of a real person facing a potential loss of liberty. It is also not conclusive that in some studies, mock jurors appeared more likely to convict after learning of a prior conviction. That result may be because the prior conviction bore on the defendant's credibility and the jurors appropriately discounted the testimony. It does not necessarily indicate a problem with the rule.

Finally, because we oppose abrogation of Rule 609(a)(1), we do not address all the permutations in the Memo that might flow from such an action. We do oppose, however, any effort to adopt language stating that “[a] crime containing an element of theft may not be treated as requiring proof or admission of a dishonest act or false statement under this rule.” As discussed above, some theft offenses may contain an implied scienter element that involves dishonesty (or a dishonest act) during the commission of the offense. *See, e.g. United States v. Turley*, 352 U.S. 407, 77 (1957) (discussing the terms used in the National Motor Vehicle Theft Act to denote “embezzlement” and noting “that where a federal criminal statute uses a common

³ If, as Prof. Bellin argues, a defendant is impeached as soon as she takes the stand “many orders of magnitude greater” than impeachment with a prior conviction, one can expect the abrogation of 609(a)(1) to have little or no impact on a defendant's choice of whether to testify.

⁴ The Memo discusses seven states that, in various forms, disallow the use of non-falsity based prior convictions to impeach a witness—but includes no empirical evidence that in those states defendants are more likely to testify than in the remaining 43 states and the District of Columbia where conviction impeachment is permissible.

law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning”).

We look forward to discussing these issues further in our upcoming meeting.

Sincerely yours,



Marshall L. Miller
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