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Rule 609: Impeachment by Evidence of Conviction of Crime

RULE 609: IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

Federal Rule of Evidence 609 states:

(a) General rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of 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 juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.[1]

Federal Rule 609 provides that a witness' credibility may be impeached with evidence of his or her prior criminal convictions: "There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose."[2]

Although the rule was designed for the limited purpose of impeaching the credibility of a witness' present testimony, there is a danger that evidence of a prior conviction will be misused by the fact finder.[3] The fact finder may be inclined to draw an inference from the criminal defendant's propensity to commit crimes to the probability that the defendant committed the present crime charged.[4] Consequently, Federal Rule 609 imposes detailed restrictions concerning the admissibility of prior convictions to impeach the credibility of a criminal defendant who has taken the stand.[5]

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1. FED. R. EVID. 609.

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

3. GLEN WEISSENBERGER, WEISSENBERGER'S FEDERAL EVIDENCE § 609.1, at 279 (2d ed. 1995) ("Rule 609(a) creates a special exercise of discretion which must be undertaken before certain types of convictions may be utilized by the prosecution in criminal cases.").

4. *Id.*

5. *See* FED. R. EVID. 609(c), (d), (e).

In criminal cases,[6] Federal Rule 609 distinguishes between a defendant witness and other non-defendant witnesses. A defendant witness' prior conviction will automatically be admissible for purposes of impeachment if the past crime involved dishonesty or a false statement, regardless of the prejudicial effect to the defendant.[7] However, where the prior conviction was for a felony punishable by death or imprisonment for more than one year, the court may, within its discretion, allow the evidence to be admitted under subsection 609(a)(1), but only if the "probative value of admitting this evidence outweighs

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6. Rule 609 has generally been held to apply to civil actions as well. *See*, United States v. Sanders, 759 F.2d 1284, 1290 (7th Cir. 1985):

> Several courts . . . have assumed without deciding that the balancing test of Rule 609(a)(1) applies in civil cases to protect any witness from unfair impeachment. At least one court has decided that Rule 609(a)(1) governs the admissibility of prior felony convictions in civil cases and that a district judge has no discretion under that rule to exclude prior felony convictions when offered to impeach a plaintiff.

(citations omitted). *See also* Diggs v. Lyons, 741 F.2d 577, 582 (3rd Cir. 1984) ("We . . . hold that . . . Rule 609(a) compelled the admission of evidence of [defendant's] prior conviction and that Rule 403 did not give discretionary authority to exclude them as prejudicial to the witness."), *cert. denied*, 471 U.S. 1078 (1985).

7. FED. R. EVID. 609(a)(2). *See, e.g.*, United States v. Klein, 438 F. Supp. 485, 487 (S.D.N.Y. 1977) (holding that evidence of the defendant's prior misdemeanor conviction for willfully failing to file federal income tax withholding returns was admissible, since the crime involved an element of dishonesty); *see also* FED. R. EVID. 609 Conference Report. The Conference Report stated:

> By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

Id. See also MCCORMICK ON EVIDENCE § 42, at 56 (John William Strong ed., 4th ed. 1992) ("[F]ederal courts and most state courts are unwilling to conclude that offenses such as petty larceny, shoplifting, robbery, possession of a weapon, and narcotic violations are per se crimes of 'dishonesty or false statement.'").

its prejudicial effect to the accused."[8] The prosecution bears the burden of convincing the court that the other felony meets this test.

If the witness is someone other than the criminal defendant, a prior conviction will automatically be admissible to impeach his credibility if the crime involved an element of dishonesty or a false statement.[9] However, if another felony conviction is introduced, the court must first balance any prejudicial effect to the defendant against the probative value of the evidence, pursuant to Federal Rule 403.[10] The evidence will only be admissible if the court determines that the probative value is substantially outweighed by any unfair prejudicial effect.[11] This approach indicates that the drafters of the rule intended to offer a non defendant witness less protection than a defendant witness against impeachment of prior convictions.[12]

To prevent any prejudice to a criminal defendant, district courts may provide advance rulings on the admissibility of a defendant's prior convictions before the defendant testifies.[13]

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8. FED. R. EVID. 609(a)(1). *See* United States v. Hayes, 553 F.2d 824, 828 (2d Cir. 1977) (allowing evidence of the defendant's prior conviction for the importation of cocaine to be admitted to impeach the defendant's testimony because the probative value outweighed the prejudicial effect. "[T]he conviction was a very recent one . . . and we have held that convictions have more probative value as they become more recent.")

9. FED. R. EVID. 609(a)(2).

10. FED. R. EVID. 403. Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

11. *Id.*

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

13. United States v. Luce, 713 F.2d 1236, 1239 (1983) (stating that "[a] motion in limine is a request for guidance by the court regarding an evidentiary question [and] [t]he trial court may, within its discretion, provide such guidance by making a preliminary ruling with respect to admissibility.") See New Jersey v. Portash, 440 U.S. 450, 462 n.1 (Powell, J. concurring); United States v. Johnston, 543 F.2d 55, 59 (8th Cir. 1976), Houston v. Lane, 501 F.Supp. 5 (E.D. Tenn. 1978), aff'd, 636 F.2d 1217 (6th Cir. 1980), cert denied, 450 U.S. 1003 (1981).

This would prevent the jury from hearing such damaging testimony that would later be deemed inadmissible. Prior to 1984, trial judges often refused to decide whether a defendant's prior convictions were admissible until a defendant testified, since a defendant was able to claim reversible error on appeal. The United States Supreme Court has held, however, that a trial court's ruling on the admissibility of evidence of a prior conviction will not be available for review on appeal if a defendant chooses not to testify.[14] The Court explained that

> [a]ny possible harm flowing from a district court's *in limine* ruling permitting impeachment by a prior conviction is wholly speculative . . . When the defendant does not testify, the reviewing court . . . has no way of knowing whether the Government would have sought to impeach with the prior conviction . . . [A] reviewing court cannot assume that the adverse ruling motivated a defendant's decision not to testify.[15]

In contrast to the discretionary right to seek a pretrial ruling in federal court, criminal defendants in New York also have the right to obtain a preliminary determination as to which crimes the prosecution intends to use during cross-examination. The New York State courts have adopted a procedure, known as a *Sandoval*[16] hearing, in which the trial court determines whether

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14. Luce v. United States, 469 U.S. 38, 43 (1984). During his trial for conspiracy and possession of cocaine with intent to distribute, defendant sought to preclude the government's use of an earlier conviction for possession of a controlled substance. *Id.* at 39. The defendant did not testify and was subsequently found guilty. *Id.* at 40. "It is clear . . . that had petitioner testified and been impeached by evidence of a prior conviction, the District Court's decision to admit the impeachment evidence would have been reviewable on appeal along with any other claims of error." *Id.* at 41.

15. *Id.* at 41-42. BLACK'S LAW DICTIONARY 787 (6th ed. 1990). A motion *in limine* is defined as "[a]ny motion, whether used before or during trial, by which exclusion is sought of anticipated prejudicial evidence." *Id.*

16. People v. Sandoval, 34 N.Y.2d 371, 374, 314 N.E.2d 413, 416, 357 N.Y.S.2d 849, 853 (1974) (holding that "in exercise of . . . discretion a Trial Judge may . . . make an advance ruling as to the use by the prosecutor of prior convictions or proof of the prior commission of specific criminal, vicious or immoral acts for the purpose of impeaching a defendant's credibility. . . .").

the defendant's prior convictions may be used by the prosecution if the defendant testifies. However, only a defendant-witness is entitled to a *Sandoval* hearing.[17] The interests to be protected are much greater for a defendant-witness than for a non defendant witness in that the focus of impeachment of a defendant-witness is to establish guilt, whereas the focus of impeachment of a non defendant witness is on the witness' credibility.[18]

In criminal proceedings,[19] New York Criminal Procedure Law section 60.40(1) governs the admissibility of prior convictions.[20]

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17. People v. Ocasio, 47 N.Y.2d 59, 60, 389 N.E.2d 1101, 1103, 416 N.Y.S.2d 581, 583 (1979)

> It must be at once clear that these factors, motivating the establishment of Sandoval's procedural prescription, have particular and peculiar reference to the defendant witness . . . Indeed, it hardly needs saying that for a non-defendant witness, however discomforted by impeaching revelations, neither conviction nor vindication, imprisonment or freedom, hangs in the balance . . . [W]e take the opportunity presented by this case to make explicit that [Sandoval] is inapplicable to witnesses who are not defendants."

Id.

18. *Id.*

19. New York Civil Practice Law and Rules (hereinafter C.P.L.R.) 4513 governs when a witness in a civil action may be impeached with prior convictions of past crimes. N.Y. CIV. PRAC. L. & R. 4513 (McKinney 1992). C.P.L.R. § 4513 provides:

> A person who has been convicted of a crime is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he shall be required to answer any relevant question, or by the record. The party cross-examining is not concluded by such person's answer.

Id. By definition, traffic violations, local ordinances and juvenile adjudications are not admissible in civil cases because they are not crimes. *See* JEROME PRINCE, RICHARDSON ON EVIDENCE § 506, at 494 (10th ed. 1973).

20. N.Y. CRIM. PROC. LAW § 60.40(1) (McKinney 1992). Subsection (1) provides:

> If in the course of a criminal proceeding, any witness, including a defendant, is properly asked whether he was previously convicted of a specified offense and answers in the negative or in an equivocal manner, the party adverse to the one who called him may independently prove such conviction. If in response to proper inquiry whether he has ever been convicted of any offense the witness answers in the negative or in

Section 60.40(1) uses the term "offense," which is broader than the term "crime," since convictions of violations as well as crimes may be used to impeach.[21]

In *People v. Walker*,[22] the lower court permitted inquiry about defendant's prior convictions, but, because the jury may have been particularly prejudiced by the similarity between prior and present criminal acts, the court prohibited reference to the underlying criminal acts.[23] The Court of Appeals held that *Sandoval* was properly considered by the trial court.[24] "Our law does not require 'the application of any particular balancing process' in *Sandoval* determinations and there are no per se rules

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an equivocal manner, the adverse party may independently prove any previous conviction of the witness.

Id.

21. *See* N.Y. PENAL LAW § 10.00(1) (McKinney 1992). Subsection (1) provides:

"Offense" means conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state, or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same.

Id.

22. 83 N.Y.2d 455, 633 N.E.2d 472, 611 N.Y.S.2d 118 (1994).

23. *Id.* at 457-58, 633 N.E.2d at 473, 611 N.Y.S.2d at 119. In *Walker*, the defendant was charged with the criminal sale and possession of a controlled substance. The trial court permitted the prosecution to introduce certain evidence as to the defendant's prior two felony convictions and seventeen prior misdemeanor convictions. *Id.* at 457, 633 N.E.2d at 473, 611 N.Y.S.2d at 119. *See also* People v. Mattiace, 77 N.Y.2d 269, 275, 568 N.E.2d 1189, 1192, 567 N.Y.S.2d 384, 387 (1990) (holding that the trial court did not abuse its *Sandoval* discretion by allowing the prosecution to impeach the credibility of defendant with evidence of prior convictions for environmental crimes).

24. *Walker*, 83 N.Y.2d at 459, 633 N.E.2d at 474, 611 N.Y.S.2d at 120. ("The court's decision which permitted inquiry about each of defendant's prior convictions but forbade reference to the underlying criminal acts, reflects sensitivity to the particular prejudice that may result when a jury is made aware of the fact that the defendant has previously committed crimes that are similar to the charged crime.")

requiring preclusion because of the age, nature and number of a defendant's prior crimes."[25]

Furthermore, in *People v. Mackey*,[26] the New York Court of Appeals held that the trial court's admission into evidence of the defendant's prior convictions for disorderly conduct and petit larceny, committed approximately fifteen years earlier, was not reversible error.[27] The court explained that "the exclusion of prior convictions is largely, if not completely, a matter of discretion which rests with the trial courts and fact-reviewing intermediate appellate courts."[28] Thus, the New York Court of Appeals upheld as admissible, a conviction over ten years old.[29]

In conclusion, there are certain differences between Federal Rule 609 and New York's rule on impeachment of prior convictions of past crimes. For instance, Federal Rule 609 permits impeachment of a witness with a prior conviction only when that crime is a felony or one which involved dishonesty or a false statement, whereas New York has no firm rule regarding the type of crime that may be introduced.[30] In addition, Federal Rule 609 provides that evidence of a past conviction is inadmissible "if a period of more than ten years has elapsed since the date of the conviction . . . ."[31] New York, on the other hand, does not have such a time constraint.[32]

More importantly, there is a significant similarity between the two approaches that is worthy of reflection. Both the Federal Rule, and the *Sandoval* approach require the substantially same inquiry by the trial court when it is deciding whether to allow evidence of a defendant's other felonies. The Federal Rule

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25. *Id.*

26. 49 N.Y.2d 274, 401 N.E.2d 398, 425 N.Y.S.2d 288 (1980).

27. *Id.* at 277, 401 N.E.2d at 400, 425 N.Y.S.2d at 289.

28. *Id.* at 281, 401 N.E.2d at 402, 425 N.Y.S.2d at 292 (quoting People v. Shields, 46 N.Y.2d 764, 765, 386 N.E.2d 257, 258, 413 N.Y.S.2d 649, 650 (1978)).

29. *Id.* at 277, 401 N.E.2d at 400, 425 N.Y.S.2d at 289.

30. *Compare* FED. R. EVID. 609(a) *with* People v. Walker, 83 N.Y.2d 455, 633 N.E.2d 472, 611 N.Y.S.2d 118 (1994).

31. *See* FED. R. EVID. 609(b).

32. *See* People v. Walker, 83 N.Y.2d 455, 633 N.E.2d 472, 611 N.Y.S.2d 118 (1994).

requires that the trial judge determine that the probative value of the evidence outweighs the prejudicial effect that will be suffered by the defendant. *Sandoval* requires the same determination:

> The rules governing the admissibility of evidence of other crimes represent a balance between the probative value of such proof and the danger of prejudice which it presents to the accused. When evidence of other crimes has no purpose other than to show that a defendant is of a criminal bent or character and thus likely to have committed the crime charged, it should be excluded.[33]

However, there are two big differences between Rule 609 and the New York rule. First, FRE 609 contains several categories of prior convictions; some are automatically admissible, some are automatically inadmissible and some will be admitted into evidence only after the judge decides that the probative value of the evidence outweighs any prejudicial effect. The New York rule, on the other hand, is ad hoc discretionary.

The second major difference between Rule 609 and the New York rule is that Sandoval creates a procedural right afforded to criminal defendants in New York. Conversely, in federal court, the trial judge has the discretion as to whether to make a pre-trial ruling regarding the evidence of other felonies or not.

33. People v. Sandoval, 34 N.Y.2d 371, 374, 314 N.E.2d 413, 416, 357 N.Y.S.2d 849, 853 (1974).